

**An Evaluation of the Equal Employment Opportunity
Commission's Pilot Mediation Program**

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Executive Summary

In the fall of 1992 the Equal Employment Opportunity Commission (EEOC) contracted with the Center for Dispute Settlement (CDS) in Washington, D.C. to implement a pilot voluntary mediation program in four of its regional locations -- Houston, New Orleans, Philadelphia, and Washington. Charging parties who initiated claims of discrimination involving discharge, terms and conditions of employment or discipline were to be offered the opportunity to participate in mediation at intake by the EEOC. If charging parties agreed to mediation, then responding parties would also be given the chance to participate. Mediation was provided by private mediators, either acting as volunteers, paid by the program, or paid by the responding party. The first charges were referred to mediation in April, 1993. The project was extended from its projected conclusion date of September 30, 1993 until March 31, 1994. The pilot was to include an evaluation component. This report presents that evaluation.

The evaluation was designed as an experiment with eligible charges assigned randomly either to a control group (normal processing) or to a mediation group (invited to participate in mediation). Unfortunately, the short duration of the research precludes any comparisons between control and mediation groups because few control group cases are concluded at this time. Those comparisons can be made at a later date. Data were gathered largely from intake questionnaires and affidavits submitted by charging parties, checklists completed by mediators, exit surveys of parties after mediation, mailed follow-up surveys to charging parties who had participated in mediation, and telephone interviews of parties choosing not to participate in mediation.

About 80% of the charges entering the pilot project proved to be discharge cases. Almost half of the charges were based on race. Fifty-nine percent of charging parties were black, 26% were white, and the remaining 15% Hispanic or other ethnic groups. The charging parties included in the pilot were evenly divided between men and women.

In the course of the pilot project 920 charging parties were offered mediation and 87% of them chose to try it. Rates of acceptance increased over time, apparently as a result of improved knowledge and acceptance of mediation by EEOC staff doing intake work. No characteristics of charging parties (such as race, gender or type of charge) predicted whether or not they would participate in mediation.

Forty-three percent of the responding parties who were asked

to participate agreed to mediation. Those responding parties who were asked to pay \$300 for mediation were half as likely to accept mediation as those offered mediation at no cost. Responding parties were more reluctant to enter mediation in cases involving discharge, when the employee was under 30, and when the employee had sought the assistance of a union or legal counsel. The largest (over 501 employees) and smallest employers (under 101 employees) were the least likely to enter mediation. Public agencies were less likely to enter mediation than private employers.

Ultimately, 267 mediations were completed (29% of the eligible cases). The average time to completion of mediation from time of filing charges was 67 days. This compares to an average time to completion of 294 days for regular EEOC charge processing (in fiscal, 1993).

The mediation sessions averaged 3.6 hours in length and required several additional hours of preparation time for mediators. In addition, a mediation coordinator had to devote considerable time to locating and contacting responding parties and to arranging the mediation sessions. All told, each mediation required an estimated 8 hours of person time on the part of mediation staff.

Fifty-two percent of the mediated cases concluded with settlements. Over half of these mediated agreements provided for financial payments to the charging party, ranging from \$25 to over \$80,000. In addition, 17% of agreements involved changing the employee's work situation, and 22% contained provisions to alter workplace practices or rules.

Both charging and responding parties indicated in exit surveys considerable satisfaction with mediated outcomes -- 66% of charging parties were satisfied as were 72% of responding parties. Ninety-one percent of charging parties and 93% of responding parties believed that the mediation process had been fair. Ninety-five percent or more of the parties trusted the mediator and believed that they had been treated with respect in the mediation process. About a quarter to one-third of parties thought that mediation had taken too much of their time, however, and 37% of charging parties and 24% of responding parties felt that not all important issues had been discussed at mediation. Eighty-four percent of charging parties and 83% of responding parties indicated that they would try mediation again if they had a similar problem.

A follow-up survey mailed to 125 charging parties who had been through mediation (with a response rate of 35%) suggested that several months later, they generally assessed mediation as positively as they had in the exit surveys.

The design of the pilot program answered some questions about the implications of how mediation is delivered and to whom. The use of face-to-face mediation appears to have been preferable, especially to employers, but telephone mediation seems to be an effective device in exceptional circumstances. Mediators in the pilot program were as effective and devoted as many hours to the process when they were volunteers as when they were paid. Yet, the ability of the EEOC to sustain a program with volunteer mediators over time appears to be in doubt. A mediation program that requires employers to pay for the service would have some participants (about 20% of responding parties offered mediation), but only half as many as when mediation is offered at no cost. Concentration of mediation on discharge cases limits both the percentage of cases entering mediation and the likelihood of settlement.

The report's general conclusions are limited by the short time-frame of the research that has precluded following to conclusion in the regular EEOC process the control group charges and the mediation eligible charges that did not enter or settle in mediation. The conclusions are also limited by the absence of evidence about the number of staff hours required to process cases in the regular EEOC investigative process.

The report concludes that the mediation pilot was generally effective and timely in resolving charges and providing tangible benefits to charging parties without denying charging parties access to EEOC's enforcement process and without unduly pressuring employers to settle in cases where charges had no basis. Mediation also appears to have been viewed as a fair process by participants and one worthy of using again under similar circumstances. Some of the "inefficiencies" of the pilot program are identified, and suggestions for changes in delivery of mediation are offered.

How "cost-effective" mediation is remains to be determined, as does its impact on the operation of the regional offices in resolving cases in a timely fashion and its impact on the percentage of cases settled with "merit resolutions." However, data gathered through the evaluation will provide the basis for addressing these issues when additional evidence becomes available.

Chapter 1. Introduction

In initiating a pilot mediation project in 1993, the Equal Employment Opportunity Commission identified two general objectives: improved ability to encourage amicable resolutions and enlarged capacity to manage a burgeoning caseload. The primary goal was to improve its ability to resolve amicably those disputes that reflected "poor management-employee communication and/or relations" which in turn contributed to "and frequently intensified, the charging parties' belief regarding disparate treatment due to unlawful conduct."¹ Such complaints come to the EEOC because adequate institutional mechanisms often are not available to resolve them. Employee distrust of employer dispute resolution systems (or their inapplicability to cases in which the employee is discharged) and employers' reluctance to attempt settlement on their own for fear of "admitting guilt" diminish the potential for private dispute resolution. Nor does the conventional EEOC investigatory process directly address such complaints about unfair management practices because of its statutory focus on identifying discriminatory behavior. As a consequence, such charges are likely to be dismissed -- often, after long delay. These dismissals leave charging parties unhappy with the failure to address their problems and burden employers with the paperwork and cost of a formal EEOC

¹ Equal Employment Opportunity Commission, RFP 92-14, page 4.

investigation that is unlikely to assist them in identifying their own management problems.

In this context, according to the Request for Proposals for this project, "[t]he opportunity for both parties to "air" their positions in a non-adversarial setting, that was controlled but not recorded, would, in the view of many charge resolution professionals, [lead] to a higher degree of amicable resolutions in a shorter time period."

A second clear goal of the EEOC pilot mediation program was to assist an understaffed agency in dealing with the burden of a burgeoning caseload. According to the General Accounting Office's report on "EEOC's Expanding Caseload,"² average processing time for charges has begun to grow substantially and is expected to increase to over 600 days by fiscal year 1996 from roughly 300 days in fiscal 1993. These increases in processing time reflect the sharp growth in charges from fiscal 1989 to 1993 (57%) and the expectation of continued growth in the future during a period when the staffing level at the EEOC has remained virtually unchanged. In the view of the GAO, these growing delays "are incompatible with the mission of the Commission..."³ Among their recommendations for dealing with the growing problems of backlog and delay is the one that the EEOC had already chosen

² General Accounting Office, "EEOC's Expanding Caseload," Report to United States Senate Special Committee on Aging, February 8, 1994.

³ General Accounting Office, "EEOC's Expanding Caseload," Report to United States Senate Special Committee on Aging, February 8, 1994, p. 14.

to explore in its pilot mediation program: the use of alternative dispute resolution.

The use of mediation in the EEOC process remains controversial, however. The agency's central role is "to ensure equality of opportunity by vigorously enforcing federal legislation prohibiting discrimination in employment...." In the eyes of some, this mission appears incompatible with the use of mediation, a process that encourages settlement and that could be viewed as undermining the Government's role as an advocate and enforcement agent when discrimination occurs. Further, some worry that mediation may encourage individual parties to settle for less than they might be entitled to under law. These concerns about the appropriateness of mediation in employment discrimination cases will be a central issue in any future discussion of its role in the EEOC process.

This is the context in which the EEOC's pilot mediation program has been undertaken, and it is the context in which it must be evaluated. This report, although constrained by limited time and resources, attempts to present evidence that will permit policy-makers to begin to address the following kinds of questions. How effective is mediation in encouraging amicable settlement in a timely fashion? How might mediation be delivered most efficiently? How does the use of resources for mediation compare to the use of resources for investigation of charges? What is the impact of undertaking mediation on the EEOC's role as an enforcement agency?

Chapter 2. The Pilot Program and Its Implementation

The mediation pilot program was undertaken by contract with the Center for Dispute Settlement (CDS, a private, non-profit firm in Washington, D.C.) at four EEOC field offices -- those in Houston, New Orleans, Philadelphia, and Washington, D.C. -- between April, 1993 and February 21, 1994.⁴ The mediation process was entirely voluntary, requiring agreement of both the charging party and the responding party. Mediation itself is a consensual process with one or both parties free to terminate mediation or to decide against any settlement proposal. If mediation did not lead to an agreement parties were free to have their charges returned to the EEOC for its regular investigatory process.

Cases eligible for mediation were confined to those with charges arising under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act of 1967 and including one of the following issues: discharge, terms and conditions of employment, or

⁴ The project began on October 1, 1992, but the first six months were spent organizing the project: for example, establishing procedures for mediation, selecting and training mediators, coordinating with the EEOC field offices. The referral of charges to mediation did not begin until April 1, 1993. The project was originally supposed to be concluded by September 30, 1993, but was extended until March 30, 1994 to permit more cases to enter mediation. In order to permit some time for data analysis and evaluation report preparation, mediation ceased on February 21, 1994.

discipline. Class action cases, equal pay and sexual harassment charges along with many others were not included in the pilot.

Discharge cases constitute roughly half of the caseload of the EEOC. It was felt by EEOC staff that such cases also posed the most difficult test for mediation because they do not involve a continuing relationship between employer and employee. As a consequence, in discharge cases there is less likely to be an incentive either to enter mediation or to settle once in mediation. Discipline and terms and conditions cases, on the other hand, involve a continuing employment relationship where those incentives presumably are more likely. Much of the remainder of the EEOC caseload (not included in the pilot) -- for example, charges involving promotion or failure to accommodate employees with disabilities -- fall into the latter category of continuing relationship cases.

Mediation was offered by the EEOC staff to charging parties at the time that they filed their charges with the EEOC. When a charging party agreed to mediation, the case was referred to the mediation coordinator in the region, who in turn would contact the responding party and invite participation. If the responding party also accepted, mediation would be scheduled with private mediator (not an EEOC employee). In this mediation process, the mediator's role was to assist the parties in reaching a voluntary, negotiated settlement of some or all of the issues in dispute. The mediator had no power to decide the outcome of the charges, and would not report to the EEOC about the content of

the mediation. If a complete agreement was not reached, the charging party was free to continue in the EEOC process (and almost always did so). If an agreement was reached, it would be committed to writing and submitted for review to the EEOC to insure that it did not compromise the statutory rights of the charging party.

In order to test several different options for delivering mediation, the pilot project included two variations. Roughly one-quarter of responding parties were to be asked to pay a \$300 fee for the mediation. Roughly another quarter were to go to mediation conducted by mediators paid by the EEOC through contract with CDS. Finally, the remaining half of mediations were to be conducted by mediators working on a volunteer basis. In addition, it was hoped that some mediations at each site would be carried out by telephone rather than in person. Not part of the original design was a comparison between co-mediation (mediation by pairs of mediators) and solo mediation. However, due to the policies of one of the "subcontracting" mediation providers a substantial number of co-mediations were undertaken as well, providing an additional program variation to evaluate.

The pilot design randomly assigned eligible cases to mediation if the charge number was even and to a "control group" if the charge number was odd. Control group cases entered the regular EEOC process. The creation of a control group was thought essential to answering some of the most significant questions about the impact of mediation on cases. For example,

it would permit comparisons between the rates at which cases were settled, dismissed, and litigated in the mediation eligible group and in the control group. Unfortunately, the short time period for this evaluation report precludes use of the control group for such comparisons. Very few of the cases starting in or returning to the regular EEOC process have been completed at this time. Full comparisons of the control group with the mediation-eligible group of cases will have to be undertaken over the next eighteen months.

The pilot mediation program was initially received with varying degrees of skepticism in the four field offices of the EEOC. Although there generally was reported to be excellent cooperation by the EEOC staff in carrying out the pilot, there were also consistent concerns and challenges. The first line of information and education about mediation came from EEOC investigators who talked with charging parties initially. It is clear that the level of the EEOC staff's knowledge about and enthusiasm for mediation affected the willingness of charging parties to undertake mediation. The pilot project provided only a one-day orientation session for these staff at the start of the program. Some sites (see below) had additional training later in the pilot, and that training seemed to make a difference in both the response of employees to the project and the willingness of charging parties to undertake mediation. Variations from region to region and over time in charging party acceptance of mediation probably reflect changing staff views and further training.

In addition, the formal reward structure for EEOC investigators works against devoting much time to assisting parties in examining the mediation alternative. Investigators have their performance measured by the numbers of cases they process during the course of a year. Cases going to mediation were not counted among those, so that time devoted to those cases was "time lost" in terms of their own performance evaluations.

It was hoped that 75 cases would be mediated in each of the four locations by the completion of the pilot. However, fewer cases entered mediation than had been hoped. In addition, the experimental design cut by half the number of cases that could be offered mediation. As the completion of the project approached (extended to March 31, 1994 in the fall, 1993), it became clear that more cases had to be offered mediation. This was accomplished by closing off the control groups after a minimum of 75 cases had entered them in each site, and offering mediation in all cases where the type of charge made it appropriate to do so.

In the initial model for the pilot, the mediators were expected to contact parties within five days of the filing of the charge. This expectation immediately proved impractical. Often it took the EEOC considerably longer to send the paperwork over to the mediators. Early transmission of the charges turned out to be just as ineffective in any event. In one location when the mediation group received charges by fax within a day of their filing, they found themselves contacting the responding party before the employer had received official notice of the charges.

The most time consuming and unpredictable task for the mediation coordinator proved to be the location of the appropriate contact person at an employer. Because each employer deals with discrimination charges in a different way, locating the responsible employer representative with knowledge of the case and settlement authority proved to be a very time-consuming task.

A further challenge noted by mediation coordinators and mediators was the absence generally of good information, for charging parties in particular, about the nature, duration, and likely outcomes of the EEOC investigation process. Unrealistic expectations about speedy investigation and about the kinds of settlements that might be reasonable to expect made charging parties less interested in engaging in mediation or in accepting settlement offers than they might otherwise have been.

Implementation of the Pilot Program in the Four Field Offices

The general design of the mediation pilot project was implemented in somewhat different ways in each of the four sites. These differences in location and implementation appear to have been consequential in a number of ways for the likelihood that parties would enter mediation and for the likelihood of settlement, issues to be examined later in this report. The following sections, therefore, present brief descriptions of implementation at each field office.

Houston

In Houston, almost all of the mediators were attorneys with considerable experience in private or court-connected mediation, and they did almost all of their mediations in the offices of the EEOC. Several months into the project, the EEOC office began to utilize several student interns to make initial contacts with the responding parties. After locating the person responsible for handling discrimination complaints at the employing organization, the interns also made an initial "sales pitch" to the responding party about the potential cost savings of mediation to them and its potential capacity to resolve cases finally and rapidly. This work at the EEOC office reduced dramatically the time required by the mediation coordinator in locating responding parties. In the last few months of the pilot, these initial phone calls were made on the day that the charges were filed while the charge was faxed to the responding party.

The mediation coordinator in Houston did most of the case scheduling, asking responding parties in the initial contact for three firm dates when they were available. The coordinator then proceeded to contact the charging party and to assign the case to an available mediator.

About half way through the project, the mediators met with EEOC staff to discuss mediation and the pilot process. They were concerned particularly about the question of representation for unrepresented charging parties who often seemed uncertain about their options and who were characterized as frequently having

unrealistic expectations for their cases. At this point, the EEOC office promised to have staff people available to answer the questions of either charging or responding parties during the course of the mediation. In addition, the mediation coordinator compiled a list of volunteer labor lawyers who would be available to consult with unrepresented charging parties should they want the advice of counsel in instances where mediation sessions were adjourned. In the last several months of the pilot in Houston, an EEOC staff person also made herself available to parties by phone prior to mediation in order to talk with them about what they might realistically expect in their cases.

The mediation coordinator in Houston was also willing -- with the approval of the charging parties -- to talk in general terms with the responding party at the initial contact about the nature of the allegations as revealed in the affidavit. This was done as part of an effort to provide information that would permit responding parties to come to the table in good faith to seek settlement. Without sufficient information about the substance of the complaint, it was felt, responding parties were often uncertain about whether or not to undertake mediation.

Finally, the Houston mediation coordinator developed with the cooperation of the EEOC office a letter informing the responding party about the mediation process, that a charge had been filed, that the charging party had accepted mediation, and that the mediation coordinator would call to explore with them the possibility of entering mediation. This official notice of

mediation by the EEOC diminished the likelihood that employers would learn about mediation first (or perceive that they had learned first) from the mediation coordinator rather than from the EEOC itself. In addition, both the coordinator and an EEOC representative made many presentations to business and employer's organizations to make the mediation process known.

New Orleans

The New Orleans program was the only one to use newly trained mediators without much experience in other kinds of mediation. The mediators were mostly lawyers or law professors. The mediations in New Orleans were done mostly at Tulane University, not at the EEOC office.

Early in the New Orleans program, new charges were faxed from the EEOC office to the mediation coordinator whose efforts then to contact the responding parties often preceded their receipt of the notice of charges. This also placed the burden of informing the employer about the mediation options on the mediation coordinator rather than on the EEOC.

Once an employer agreed to participate in mediation, the task of contacting parties and scheduling mediations was turned over to the mediator. This meant that in New Orleans mediators spent considerably more time making phone calls to parties than in other sites where the scheduling was initiated by the coordinator.

Mediation training of the EEOC staff in the New Orleans office mid-way through the project appears to have improved

acceptance of the mediation program and smoothed the intake process.

Philadelphia

Almost all of the mediators were non-attorneys, and most had substantial experience in interpersonal mediation in community programs. Most of the mediations were carried out in the downtown offices of a private, non-profit agency right across the street from the overcrowded space of the EEOC.

Because of the policy of the program administering the mediation program, almost all of the mediations were conducted by pairs of mediators. The mediation coordinator attempted to match skills in mediator pairs by placing together a person with strong experience in interpersonal mediation and someone with more experience in working with institutional parties. When the mediators were paid either by the program or by the responding party, they would split the \$300 fee so that there was no added cost to co-mediation.

The mediation coordinator made the initial contacts with responding parties, and also faced the difficulty in locating the responsible person within the employing organization. The major tasks of scheduling were carried out by the mediation coordinator. The number of such contacts prior to mediation ranged from 6 to 56 for responding parties and 6 to 13 for charging parties.

Washington, D.C.

The initial pool of mediators in Washington was almost

evenly divided between lawyers and nonlawyers. As the program progressed, however, the assignment of mediations increasingly was concentrated among mediators (both lawyers and nonlawyers) who had most experience with institutional parties rather than only with individual parties in interpersonal disputes. The latter mediators appeared to be less successful in dealing with the circumstances of EEOC claims. Mediations were generally conducted at the EEOC or at CDS.

Charges were received in bunches from the EEOC office and the mediation coordinator tried to locate the appropriate official at the employer to seek agreement to enter mediation. This task proved difficult but was eased somewhat by use of "employer contact sheets" (lists of contact persons responsible for discrimination complaints at local employers) compiled by the EEOC office. Often responding parties were unaware of the mediation pilot until they were contacted by the mediation coordinator. At that time, some had already begun the process of responding to the complaint. As a result of the lack of official and early notice of mediation from the EEOC, responding parties often were reluctant to participate. At the request of the mediation coordinator, the EEOC office in Washington added to the Notice of Charge of Discrimination sent to the responding party a statement that the charging party had accepted mediation and that CDS would contact the responding party to inquire about their interest in mediation. The statement also made clear that the responding party did not have to complete the formal response to

the charge while mediation was pending. This notice appears to have increased the receptivity to mediation among responding parties.

The mediation coordinator at CDS had copies of each mediator's schedule and asked responding parties to agree to two or three possible mediation times. With this information in hand, central scheduling of mediation by CDS proved relatively easy.

Summary and Conclusion

The pilot program was designed to make voluntary mediation available in four regional locations of the EEOC for charges involving discharge from employment, terms and conditions of employment, or employee discipline. The pilot built in variations in the ways that mediators would be compensated and asked a randomly selected subset of employers to pay for mediation. Although face-to-face mediation was presumed to be the process of choice, telephone mediations were also encouraged. Further variation in program design occurred because the policy of the private provider of mediation in Philadelphia was to use co-mediation rather than the mediation by single mediators generally used at other sites.

In practice, the organization of delivery of mediation at the four sites involved some common challenges in locating responsible officials in the employer organizations and in integrating the mediation referral process into the work of the

EEOC staff. The organization and delivery of mediation also varied across the four sites in terms of the background and experience of mediators, the procedures for notifying responding parties of mediation, the methods of scheduling mediation, the locations of mediation, and the information available to charging parties before and during mediation. These variations in delivery may help account for some of the differences across the four locations in the willingness of parties to undertake mediation and its outcomes.

Chapter 3. Evaluation of the Pilot Project: Design and Methods

One important component of the EEOC pilot program was an evaluation that would examine the character and particular problems of implementing a voluntary mediation program as well as its impact on party satisfaction and perceptions of fair treatment, case settlement and timing, and case outcomes. In addition, the evaluation was to address in some fashion the question of cost and efficiency of mediation as a way of addressing EEOC charges.

The initial design of the pilot project permitted random assignment of eligible charges either to a mediation group (mediation offered to charging party) or to a control group that would be processed without any offer of mediation. However, the initial hope to compare the aggregate patterns of disposition and the perceptions of parties in the mediation eligible group with those in the control group proved impossible to implement in the short time-frame for the research. Cases entering the control group, as well as those reentering the regular EEOC process after mediation was declined or was unsuccessful, simply did not have time to be investigated by the EEOC and resolved prior to the completion of the evaluation. This random assignment will permit follow-up research over the eighteen months, however, to make these comparisons.

Data from EEOC intake questionnaires and affidavits were collected for each case in both the mediation and control groups. In addition, tracking forms from the mediation coordinators at each site provided information on the response of parties to the offer of mediation and the timing and outcome of mediation if undertaken. Each mediator was asked to complete a check-list after the mediation, indicating the time invested in the case, the outcome, who participated, and their own evaluations of the degree to which complex issues of law, evidence of discrimination, and evidence of other workplace issues not involving discrimination were apparent in the mediation. All parties participating in the mediation were asked to complete a two page exit survey and to enclose it in a sealed envelope for transmission to the evaluator. The data from EEOC records and from the mediators and parties constitute the core of the evidence reported in the evaluation.⁵

As part of the evaluation, several other sorts of data were collected and are reported briefly here. First, a one day debriefing session was held in Washington, D.C. on March 1, 1994 with mediation coordinators from each site participating. This session provided the descriptive material on program management

⁵ The transmission of charge records and completion of mediator check-lists was imperfect, particularly under the time pressures at the close of the pilot. This evaluation report is based on records of 1270 of the 1282 charges (99%) entering the pilot; of checklists for 240 of the 267 mediations (90%); exit surveys from charging parties in 204 of the 267 mediations (76%) and from responding parties in 216 of the mediations (81%).

and operation at each location that is summarized in Chapter 2. Second, samples of responding parties (48) and of charging parties (12) who had declined to participate in mediation were contacted by letter and then interviewed briefly by phone about the reasons for their decision not to participate in mediation.

Third, two waves of mailed questionnaires were sent with stamped, self-addressed return envelopes to 285 charging parties who had filed charges in a three month period in mid-1992 in order to try to learn the perceptions of the EEOC process among a group of charging parties comparable to those receiving mediation a year later. These mailings were undertaken to provide a "control group" where the cases had been completed and parties were ready to comment on their experience with EEOC investigation and findings. Low response rates (24%) -- compounded by significant numbers of questionnaires returned as undeliverable (14%) -- and the fact that many of the parties had still not had their cases resolved when they received the questionnaire diminished the utility of this questionnaire. Its results will not be reported extensively here.

Finally, a mailed survey similar to the one just described was sent in January, 1994 to 125 charging parties who had completed their cases weeks or months before. Forty-four of these were returned (35%). The results of this survey will be described briefly.

Although the evaluation agenda was ambitious, the funding

for this research was modest and the time constraints were limiting. The need to have the evaluation completed within 40 days of the completion of the last mediation and one year from the receipt of the first charge referred to mediation effectively limits its capacity to answer confidently several key questions. In particular, one of the lingering questions that is not immediately answerable is the impact of mediation on the total volume of settlements reached and on the total number of resolutions in which the charging party receives some relief (either monetary or other relief). Although some educated guesses will be made about the answers to these questions in Chapter 7 and at the conclusion of this report, final evidence will not be available until at least mid-1995 when almost all of the charges that entered either mediation or the control groups will have been finally resolved.

The data that are available from the various sources described above, however, provide significant insights about the operation and effects of the mediation pilot and should help to address the questions raised by policy-makers about its impact, effectiveness, and appropriateness.

Chapter 4. Characteristics of the Cases in the Pilot: An Overview

Of the nearly 1300 charges entering the pilot project either for assignment to mediation or to the "control group," about 79% were discharge cases (see Table 4.1).⁶ The remaining 21% consisted of discipline and terms and conditions charges. The most common charge alleged discrimination based on race (48% of charges). In 21% of the cases gender discrimination was alleged and in 17% age discrimination. Allegations of discrimination based on disability were made in 14% of the cases. Fifty-one percent of the charging parties were men and 49% women. The average age of charging parties was 38. Fifty-nine percent of the charging parties identified themselves as black or African American, 26% as white, 5% as Hispanic, and the remaining 10% in other ethnic or racial groups.

The four regions differed in the characteristics of the cases referred to the pilot (see Table 4.1). Just over 90% of the Philadelphia cases involved discharge, compared to 86% in Houston, 76% in New Orleans, and 69% in Washington. Current cause of alleged discrimination varied also from place to place, with discrimination based on national origin more common in

⁶ Because we infrequently received for coding and analysis information about how EEOC had officially categorized the charge, our coders had to do the categorization. Although our coding is not likely to be entirely consistent with the official charges, it should be fairly close.

Houston and Washington, and discrimination based on age much more common in Philadelphia. Gender as the basis of discrimination was most commonly alleged in Washington. In addition, charging parties in Philadelphia were far more likely to report having consulted counsel on their intake questionnaires (25%) than those in the other sites. Similarly, they were somewhat more likely to report having assistance from their unions. These differences by region may help explain the modest variations among them in the willingness of parties to enter mediation and to reach agreement in the mediation process.

TABLE 4.1: Characteristics of Charges and Charging Parties
for Cases Entering EEOC Pilot Project by Region

	Houston (n=296)	New Orleans (n=363)	Philadelphia (n=261)	Washington (n=340)	Total (n=1260)
% Discharge Charges	86%	76%	90%	69%	79%
Current Cause of Discrimination					
% Race	51%	54%	46%	41%	48%
% Gender	16%	22%	19%	25%	21%
% Age	17%	13%	28%	13%	17%
% Disability	17%	13%	14%	17%	14%
% National Origin	17%	4%	6%	16%	11%
% Retaliation	5%	11%	10%	15%	11%
CP Mean Age	39 yrs	36 yrs	41 yrs	37 yrs	38 yrs
% Female CPs	44%	50%	42%	57%	49%
Race Ethnicity of CPs					
% Black	52%	65%	54%	61%	59%
% White	24%	33%	29%	21%	26%
% Hispanic	12%	3%	3%	4%	5%
% CPs Reporting Assistance					
From Attorney	10%	15%	25%	4%	13%
From Union	5%	1%	9%	3%	4%
RP Size					
% Less than 101 Employees	35%	34%	35%	35%	35%
% Over 500 Employees	40%	42%	42%	40%	41%

Chapter 5. Entering Mediation: Patterns of Acceptance and Rejection of Mediation by Charging and Responding Parties

By definition, a voluntary mediation program gives parties the choice of whether or not to participate. In the EEOC pilot, charging parties were asked during the intake process whether they would be willing to try to discuss the charges with the employer in mediation. If they agreed to try mediation, the responding party was contacted and asked about participation. Most charging parties agreed to participate in mediation and about two-fifths of the responding parties did so. In some instances, after mediation was scheduled, one or both parties changed their minds or did not appear. Ultimately, 29% of the 920 eligible cases were mediated. This chapter examines the factors that appear to have influenced charging and responding parties to decide whether or not to undertake mediation.

Acceptance of Mediation by Charging Parties

Overall, 87% of those charging parties offered mediation accepted the offer (see Table 5.1). The rate of charging party acceptance of mediation ranged from 80% in Washington, to 86% and 87% in New Orleans and Philadelphia to 97% in Houston.⁷ In the final four months of the project, the charging party acceptance

⁷ These differences across region are statistically significant using a chi square test and the conventional .05 level of significance as the standard. Throughout this report the results of contingency table analysis are summarized in the text. All relationships are tested using chi square tests and are significant at the .05 level or better unless otherwise noted.

rate climbed from about 81% to 92% overall. This increase in charging party acceptance was most marked in Washington, where acceptance rates climbed from 66% in the early months of the project to 92% in its closing months. Similar, but less substantial, increases occurred over time in New Orleans and Philadelphia. Only Houston showed consistently high charging party acceptance rates from the beginning. Thus, in the closing months of the project charging party acceptance rates varied from 82% in New Orleans to 92%, 96%, and 98% in Washington, Philadelphia, and Houston respectively.

This variation by region and over time suggests that the orientation of the EEOC staff to mediation and their familiarity with and enthusiasm for the process can have marked effects on the willingness of charging parties to choose mediation. The assignment of several specially designated "intake specialists" in Washington to explain mediation to charging parties appears, for example, to have had a substantial effect on the acceptance rate there. In general, as the EEOC staff became more familiar with mediation and began to see that it produced results, their descriptions of the process and its potential value may have changed subtly. These shifts over time also suggest that mediation may have been "under utilized" in three of the sites early in the project.

The rates of acceptance of mediation did not vary significantly by characteristics of charging parties themselves (e.g. gender, race, age), by the nature of their allegations

about discrimination (e.g. sex or race discrimination), by the nature of their current employment relationship (discharged or still in employment), characteristics of the (former) employer (size, business/government agency), or by the nature of reported consultation with third parties (such as unions, government, or attorneys).⁸ The lack of such associations suggests that the choice to enter mediation had most to do with variations in the individual circumstances and attitudes of charging parties and with the character of the introduction to mediation provided by the EEOC staff.

Some of these individual variations were made clear in brief telephone conversations with a small sample (12) of charging parties who had declined mediation early in the pilot. These conversations also underlined that charging parties often did not understand mediation and had unrealistic expectations about the character of the EEOC investigation process. Mediation coordinators reported similar impressions in their lengthy conversations with charging parties who had agreed to mediation but who several days later were uncertain about what mediation was or forgot their agreement to participate. For example, one woman described her intake experience and her decision not to try mediation as follows:

I just went to the lady, and she told me there was

⁸ Charging parties claiming age or gender discrimination were slightly more likely to select mediation than parties alleging gender or race discrimination (90% versus 84%). The chi square values for these relationships were significant only at the .10 level.

something, I can't remember what it was called, that would be quicker and if it didn't work, they would put the charge back in the EEOC. I just wanted to get things over with and didn't want [the delay] of starting over.

Another charging party remembered some description about a "person in the middle" but confessed that she did not understand the mediation process and, therefore, chose not to participate.

Several other charging parties anticipated that their employer or former employer would refuse to participate in mediation (or to participate meaningfully) and, thus, decided against it.

I know my employer won't go for it. They are trying to fight my getting unemployment benefits.

The case has to do with communications. I have already tried to talk with them, but they won't talk with me. The company has an attitude of non-participation in dialogue.

These decisions not to participate in mediation may have been based on misimpressions about its capacity to deal with communications problems or to encourage good faith participation once parties agree to enter the process.

None of the charging parties we talked with had any realistic idea about how long it might take to pursue the charge through the formal EEOC investigation process. Several asked the interviewer how long it took, and one charging party indicated that she expected to hear within sixty days. It is certainly possible that these individuals would have decided differently about mediation if they had understood the potential wait they faced in having their charge formally investigated. Clearly, charging parties have no reason to know or to understand how the

EEOC process works or the place of mediation within it. The need to educate parties carefully about both would appear to be great.

Acceptance of Mediation by Responding Parties

Once charging parties had agreed to mediation, responding parties were sought out and asked whether or not they would participate. Overall, about 43% of those responding parties given an opportunity to select mediation did so. Acceptance rates varied across the four regions from 34% in Philadelphia, to 42% in Houston and 44% in New Orleans, and 51% in Washington (see Table 5.1). Acceptance rates for responding parties remained constant through the life of the project, although each of the regions experienced some "ups" and "downs" over that period.

Responding parties were twice as likely to enter mediation when it was offered to them without cost as when they were asked to pay \$300 for the mediation. Overall, 50% of those responding parties offered no-cost mediation accepted it, while 25% of those who were asked to pay accepted mediation. Unaccountably, in Washington, D.C. 44% of those asked to pay agreed to undertake mediation compared to 52% who were not asked to pay. In the other regions, acceptance of mediation by those asked to pay ranged from 16% in Philadelphia to 28% in Houston. Clearly, the total number of cases entering mediation was affected substantially by the payment variable.

Several characteristics of employers appear to be related to their decisions to enter mediation. Public employers were more reluctant to enter mediation than private employers. While small

and large businesses and professional organizations chose mediation in 43% of the cases, local government agencies, schools, and municipal services (such as transit authorities) selected mediation in only 28% of the cases. Hospitals were intermediate, opting for mediation in 33% of the cases.

Size of employer also was related to the willingness to enter mediation. The smallest (under 101 employees) and largest (501 or more employees) employers were the least willing to enter mediation (40% and 36% respectively) while intermediate size employers were the most willing (49%).

The nature of the current employment relationship also influenced the employer's choice. Employers agreed to enter mediation in 48% of those cases where the employee was still working for them while they selected mediation in only 39% of those cases where the employee had been discharged. In the 10 cases where the employee had resigned, employers chose mediation 70% of the time.

Employers also seemed more reluctant to enter mediation in those cases where the employee had already invoked assistance from a union, an attorney, or the "government." In only 33% of the cases where charging parties had reported such assistance on their intake questionnaires, employers chose mediation, while they did so in 43% of cases where the charging party reported no such assistance. This association suggests underlying differences in charges or employer-employee relationships and interactions that would make employers reluctant to enter

mediation. It may be that in such cases particularly, employers are concerned that participation in mediation will appear to constitute a confession of wrongdoing on their part.

Finally, employers were less likely to enter mediation with younger employees (under 30) than with older employees. Mediation was chosen in 31% of the cases where the (former) employee was younger than 30 and in 44% of the cases where the employee was older. Employers also appeared to be more reluctant to undertake mediation where claims of gender discrimination had been made (34%) than when other kinds of discrimination were alleged (43%).⁹ Other characteristics of the charging party (gender, race) and of the charge (alleged cause of discrimination) were not related to the choices of responding parties to enter mediation.

The patterns described above echoed through the explanations that employers gave for rejecting mediation. In brief telephone interviews with 48 responding parties who had turned down the chance to participate in mediation, we heard these themes as well as other concerns about the suitability of cases for mediation and about its timing. The most common reason for rejecting mediation was the belief that it was unsuitable in the particular case in question. Typically, in the view of the employer, there was nothing to negotiate.

I didn't feel there was any point. I am happy with mediation when there is room for discussion, but from my

⁹ The chi square value for this relationship is significant only at the .08 level, slightly above the conventional .05 level.

perspective, we were comfortable with the action against Mr. X.

In this situation we were clear that we were going to prevail, that our actions were not discriminatory....It was clear that mediation would not be very helpful in this case.

I assigned the case to one of my attorneys. There was no point in doing mediation. Our legal position was that there was no wrongdoing on the part of our agency. If there is wrongdoing, we do not go to the EEOC; we take care of it in house.

The case was unfounded -- there is no case. In the business we're in, it's common for one to file for whatever reason -- age, race. We get lots of these. He was a temporary employee. There was nothing to mediate. Once we told the EEOC, the case was dropped.

Some respondents also believed that they had already exhausted the possibilities for negotiation, often through their personnel departments.

Mediation is really done through our personnel office here.

We tried to settle it long before it got that far. She had gone to her lawyer -- you know lawyers. We were trying to avoid that before it became an issue. We tried to settle on our own.

Thus, employers generally tried to filter out of mediation those claims that they believed to be impossible to settle or to be completely unjustified and thus very likely to be dismissed or found to be without cause by the EEOC.

Some of the reasons given for not participating in mediation were idiosyncratic ones, relating to the particular problems posed by the charging party.

Not in this case. In this case, the man tried to sue me and complained and threatened me.... I don't need the hassle of negotiation [with him]. Maybe with somebody else it would make sense to mediate.

For the safety of his co-workers. No way would I subject his co-workers to his return to work. This guy turned into a monster, verbally outrageous. He was thrown out of hotels, the neighbors got into it....Once we had to get the police.

Other responding parties expressed distaste for any future interaction with the particular charging party in question.

Several employers expressed concerns about engaging in mediation with represented charging parties, particularly those where a union and union procedures were involved. However, lawyers and lawsuits were also mentioned.

There was an arbitration pending. The person was a union member. I discussed the case with the contact [mediation coordinator], and we both agreed that it was not profitable to enter negotiations. The case was then settled.

There is no room for movement when negotiating with the union, especially in termination cases. If we change the rules for one, we have to change them for everyone.

For a variety of reasons, therefore, responding parties appeared somewhat more reluctant to undertake mediation when the charging party was represented by a union or an attorney.

Several employers also noted the problems of timing and information in making the decision about mediation. For some the offer of mediation came too early and for others too late, suggesting a fairly narrow "window" for seeking participation of responding parties. On occasion, the offer of mediation came prior to receipt of the charges from the EEOC and always it came without there being a very full description of the charges.

We needed a copy of the charges, and it took a long time. We received nothing from the EEOC. We did not receive the full text of the charge nor the complaint, and we decided to be conservative about it. We felt we needed more

information before we felt we could enter into mediation....In fact, this case could have been mediated.

Essentially, they ask too early before you know anything about what the issues are. They don't want to tell you anything...Unless the charges are reasonable, there's no point.

As noted earlier, the Houston office attempted to deal with this problem by summarizing (with the charging party's permission) information about the charges from the affidavit. However, it is perhaps important to note that responding parties were not markedly more willing to participate in mediation in Houston than in other sites.

A late offer of mediation could be as problematic as an early chance to undertake it.

By the time we found out about mediation, I had spent half a day filling out forms for the case [for the EEOC]. It was too late. It would have saved a lot of time if I had known I could mediate. I would have done it.

One of the major incentives for employers to participate in mediation is its potential to preclude completion of the paperwork required to respond to an EEOC investigation. If that paperwork is already underway, the employer may have less interest in participating in mediation.

As suggested by the quantitative analysis, employers on occasion also distinguished between cases involving employees in continuing relationships and those cases where employees had been discharged. The incentive to mediate was thought to be considerably higher for the former cases, although the statistical evidence suggests that the probability of choosing mediation is about one-quarter greater for such cases.

Mediation makes sense on issues we want to resolve. Discharge cases are hard to work with unless there is a mistake, particularly if it is a result of reduction in force.

Mediation is most valuable when the employee is still employed-- a promotional situation with a charge--to promote better understanding on both parts.

Employers were also attentive to the fee asked of roughly one-fourth of those responding parties offered mediation. In some instances, for example, the companies or agencies in question simply did not have budgets for that kind of expense or simply were unwilling to consider the costs.

We didn't want to pay \$300 on a bogus charge.

One and a half months ago someone contacted me about mediation. She said we will be charged \$200. We decided not to go any further.

Concern about the costs of the mediation were especially pronounced when the employer believed the charges against them to be unjustified. Some employers also noted that the regular EEOC process was carried through without charge to them.

Almost all employers acknowledged the potential utility of mediation for some cases, even though rejecting it for the case at hand. They characterized the appropriate cases as ones "where the issues are less clear cut, where it is not clear what happened or what the problem is." In addition, they noted the potential value of mediation in identifying "poor management practices" that should be corrected. It was the exceptional employer that had rejected mediation for all cases because of cost and inconvenience.

We have decided against using mediation in any case. The

number one reason is time. If we did not agree [in mediation], we would just have to go through the EEO process. The number two reason is the travel factor. We handle all EEO matters out of our corporate headquarters in [a distant western state].

It should be noted that the mediators themselves reported instances at each site where officials of employers flew in from substantial distance to participate in mediation. This blanket rejection of mediation for inconvenience was thus the exception rather than the rule.

Summary and Conclusion

The quantitative and qualitative data suggest that the choices of charging and responding parties to engage in mediation differ substantially. For charging parties decision-making was often not well-informed, either about the realities of the EEOC process or about the nature of mediation. It probably was influenced in important ways by the particular approach to explanation taken by EEOC personnel. That approach appears to have varied over time and from office to office, as well as among individuals.

The choices of responding parties appeared to be much better informed and substantially related to the nature of the charges and the relationship to the employee, as well as to the conditions of payment under which mediation was offered. Given the fact that only about one-fifth of charges filed with the EEOC end in "merit resolutions" in which there is a settlement or a finding of reasonable cause, responding parties want to be free

to choose not to undertake mediation in cases that are, in their view, clearly non-meritorious. The reports of responding parties suggest that they were centrally concerned with doing just that. Reports from mediation coordinators indicate that employers were also concerned that entering mediation would be construed as an admission of liability. Responding parties were particularly sensitive to the request to pay for mediation, and were half as likely to agree to it when asked to pay than when mediation was offered at no cost.

The decisions of responding parties and of charging parties highlight the need for EEOC to provide adequate information about its processes to both parties so that they can make informed decisions. For employers particularly the timing of the offer of mediation appears to be important and problematic because it may come either too early or too late. Further, employers would like to know more about the charges against them before agreeing to or entering mediation, but this need on their part may be difficult to meet without compromising the nature of the formal complaint process.

TABLE 5.1: Mediation Eligible Cases, Rates of Mediation Acceptances and of Mediated and Settled Cases by Region*

	HOUSTON	NEW ORLEANS	PHILADELPHIA	WASHINGTON	TOTAL
Total charges entering mediation	229	238	198	255	920
% CPs accepting mediation	97% (223/229)	86% (204/238)	87% (172/198)	80% (197/255)	87% (796/920)
% RPs accepting mediation	42% (95/225)	44% (87/197)	34% (56/164)	51% (93/184)	40% (331/771)
Mediations completed % of cases in which RP accepted	90% (85/95)	75% (65/87)	88% (49/56)	73% (68/93)	81% (267/331)
Settlements % of cases mediated	61% (52/85)	55% (36/65)	45% (22/49)	44% (30/68)	52% (140/267)
Mediations completed % of all eligible cases	37% (85/229)	27% (65/238)	25% (49/198)	27% (68/255)	29% (267/920)
Settlements % of all eligible cases	23% (52/229)	15% (36/238)	11% (22/198)	12% (30/255)	15% (140/920)

*The parentheses in the body of the table contain the ratios from which the percentages were computed. For example, 95 of the 225 responding parties actually offered mediation in Houston accepted -- 42%.

Chapter 6. Mediation, Mediated Cases and Settlement

Of the cases in which both the responding and charging party had consented to mediation initially, 81% made it to mediation (see Table 5.1). Settlements prior to mediation (17 occurred), changed minds on the part of one party or another, and failures to appear produced modest attrition of cases between agreement to enter and completion of mediation. As a result of the voluntary choices of parties and this final attrition, 267 cases were finally mediated, representing 29% of the 920 cases eligible for mediation. This chapter examines the characteristics of these mediated cases, the amount of time it took to get to mediation, the duration of mediation sessions and person-hours of time in preparing for and carrying out mediation, the rate of settlement in mediation and its correlates. The next chapter will examine the substance of the settlements achieved.

To balance and flesh out this largely quantitative portrait of mediation, Appendix 1 presents a set of descriptions of mediations prepared by mediation coordinators and mediators. These descriptions cannot be taken as entirely representative. They focus on mediations that led to agreements and sometimes report the mediator's "most interesting case," but provide an excellent general sense of the nature of the cases in mediation and, to a lesser extent, of the mediation processes and outcomes.

The Characteristics of Mediated Cases

The selection process which filtered eligible cases and produced the final 267 mediated cases was not a random one. Nonetheless, the characteristics of mediated cases in Table 6.1 resemble quite closely the characteristics of all cases (mediation eligible and control cases) described in Table 4.1. Mediated cases, for example, were largely discharge cases (76%), most often identified race as the current cause of discrimination (46%), and involved blacks (61%) and males (52%) most commonly as the charging parties. There was some tendency, however, for mediated cases (as compared to pilot cases as a whole) to include a larger proportion of the biggest employers as responding parties, to have fewer charges in which the current cause is alleged to be gender discrimination, and for mediation cases to involve somewhat older employees on average.

The checklists completed by mediators after each session also tell something about the characteristics of the charges entering mediation. Although the mediation process was not designed to gather evidence about any discriminatory practices of the employer, it provided a reasonable opportunity for mediators to make informed (but necessarily limited) judgments about the extent of that evidence. On the check-list, mediators were asked to rate on scale from 0 to 6 the degree to which the mediation revealed evidence showing employment discrimination. In only 11% of the mediated cases did mediators report substantial evidence of discrimination (score 5 or 6) while in 48% they reported

little or no such evidence (score 0 or 1). In 41% of the mediated cases, the mediator perceived moderate evidence of discrimination.

The Timing and Duration of Mediation

On average, it took 67 days from the date of filing the complaint to completion of mediation, with some variations across regions (56 days in Washington, 63 days in New Orleans, 73 days in Philadelphia, and 75 days in Houston). Delays in receiving case materials from the EEOC office and difficulties in locating and contacting responding parties account for a significant proportion of the time from filing to mediation. Half of the mediations were completed within 63 days of filing charges and 80% were completed within 90 days of filing.

Mediation sessions lasted an average of 3.6 hours in the four locations, although the averages ranged from 3.0 hours in Philadelphia to 4.2 hours in Houston, with New Orleans at 3.2 hours and Washington at 3.5 hours. Mediation sessions averaged about 30 minutes longer in cases that did not settle as compared to those that did settle.

Time Expended in Preparing for and Mediating Cases

Mediators reported on average that they spent 5.1 hours per case in preparation time and completion of the mediation sessions. These times were slightly higher in Houston (5.7 hours) and New Orleans (5.1 hours) than in Philadelphia (5.0

hours) and Washington (4.7 hours). In Philadelphia, where co-mediation was used, the average aggregate mediator time per case was in fact closer to 8 hours (mediation plus preparation time for one mediator plus mediation time for second mediator).

Added to this mediator time per case is time of the mediation coordinators and staff who devoted substantial effort to locating parties and scheduling mediations. A rough estimate of the coordination time per case is three to four hours. The extent of time depended substantially on the difficulty of locating responding parties and the willingness of the coordinator to spend long periods on the phone listening to the charging parties describe their complaints.

Thus, it appears that mediation cases absorbed about eight to nine hours of staff time (and in Philadelphia, 11 to 12 hours) including that of the mediator(s) and the mediation coordinator. In addition, as much as an hour per case may have been expended on those charges that did not enter mediation because of the refusal of the responding party. This time was spent in trying to locate the official responsible for the EEOC matters at each employer. These estimates are rough and do not include general administrative time for program operation.

Settlement in Mediation and Its Correlates

Overall, 52% of the 267 cases entering mediation during the pilot settled. Settlement rates differed somewhat across the four sites ranging from 42% and 47% in Washington and

Philadelphia respectively to 55% in New Orleans and Houston. These differences across sites appear to be explainable largely in terms of the differences in kinds of cases that entered mediation in the four locations (see Table 6.2). We will return to that issue below. It is also notable that the settlement rate in the last three months of the pilot jumped from 44% to 67% overall, despite some variation from location to location. That jump remains unexplained although it may be a product of more experience among the mediators and more realistic expectations among charging parties about both the mediation and regular EEOC processes as a result of adjustments in EEOC intake procedures.

The likelihood of settlement did not vary in any statistically significant way in relation to the nature of the "current cause" of discrimination or the gender or race of the charging party.¹⁰ For example, 51% of male charging parties settled and 50% of female charging parties did so. However, the youngest (under 30) charging parties (68%) were significantly more likely to settle than older parties (47% settlement).

One of the most striking correlates of settlement was the nature of the representation of parties in mediation (see Table 6.3). Cases in which neither party was represented by an

¹⁰ The most frequent current cause was race; these settled precisely as often as other current causes. Claims of gender discrimination were more likely to settle (62%) than all other current causes (48%). However, women and men were equally likely to settle as charging parties. Both age (43%) and retaliation (41%) current cause charges were less likely to settle than other current cause charges (52%). None of these relationships was statistically significant at anything less than the .10 level.

advocate in mediation were over twice as likely to settle (68%) as were those cases in which both parties were represented by counsel (or, for charging parties, by another advocate) -- 31%. In between were cases in which the charging party only was represented (39% settlement) and those where only the responding party was represented (53% settlement). It is probable that representation of parties reflects something about the nature of the charges themselves¹¹ as well as the orientation of parties toward the charge, one another, and settlement.¹² Presumably, the dynamics of the relationship and the mediation also varied depending on the character of the parties' representation. Both parties were represented in 22% of the cases while neither was represented in 45%.

The size of the employer (estimated number of employees) was inversely related to the likelihood of settlement. Settlement was reached in 60% of the cases in which the responding party had between 15 and 100 employees and declined to 38% in cases where

¹¹ Cases with representation also differed from those without representation in the mediator's assessment of the complexity of legal issues and the degree to which there was a substantive showing by the charging party of discrimination in cases. Asked to rate the strength of the evidence of discrimination on a 0 to 6 scale, mediators gave an average score of 2.6 when both parties were represented, 2.4 when only the complaining party was represented, 2.3 when only the responding party was represented and 2.1 when neither was represented.

¹² This interpretation is suggested by the fact that charging parties who reported on their intake questionnaire that they had sought assistance from the government, union, or a lawyer were considerably less likely to settle in mediation than those who had not. In aggregate, those few (only 16% of charging parties) who had sought assistance settled in 31% of the mediations compared to over 52% settlement for those who had not sought assistance.

the responding party had 501 or more employees (see Table 6.4). This relationship between size and likelihood of settlement may be accounted for in part by the fact that size is modestly related to the likelihood of legal representation, with the smallest employers (15-100 employees) represented by counsel about one-quarter of time and larger employers represented about 40% of the time. Size by itself, however, also appears to be related to settlement, perhaps because the people who came to mediation in cases involving smaller employers often knew the employees personally, whereas that was unlikely in cases involving a bigger employer. In addition, larger companies may have more professionally organized affirmative action offices that deal with discrimination claims internally. They may be better at resolving valid claims internally and have more confidence that the charges reaching EEOC are without foundation.

The type of responding party was also related to the likelihood of settlement, but the relationship was not statistically significant. Businesses and professional organizations settled in 52% of the cases while agencies of local government, schools, and municipal services such as transit authorities reached settlement with charging parties in only 33% of the cases (n=18). Hospitals settled in 48% (n=25) of the cases.

Discharge cases settled less often than those cases where the charging party was still employed. Of the discharge cases, 47% settled compared to 61% of the cases where the employer-employee

relationship continued. Settlements were also reached in three of the five cases in which the employee had resigned. These findings are consistent with the presumption that continuing relationship cases are somewhat more amenable to mediation but suggest that considerable potential for settlement exists in those many cases where discharge has occurred.

A substantial showing of discrimination in the mediation seemed to make the case less likely to settle. Of the 26 cases where the mediator scored a 5 or 6 on evidence of discrimination (on a 0 to 6 scale), 27% settled compared to 55% of the remaining cases where the evidence of discrimination was thought to be moderate to none. This pattern suggests that charging parties who had the most substantial discrimination claims generally felt free to press those charges in the regular EEOC process although a few chose to settle them in mediation.

Variations in Settlement Rates across Regions

Settlement rates varied across the four regional offices in ways that are difficult to account for with confidence. As Table 6.2 makes clear, mediators in each of the regions faced somewhat different mixes of charges and parties. For example, Philadelphia, which had one of the two lowest rates of settlement, had the highest proportion of discharge cases in mediation. It also was substantially more likely in Philadelphia that both parties were represented in mediation (32%) than was the case in other regions (19%). It seems likely that a

combination of such factors as these -- along with possible differences in the dispute resolution climates of the various regions -- accounts for the differences in settlement rates across regions.

Summary and Conclusion

Mediation sessions were arranged and completed within a little over two months of the filing of a discrimination charge with the EEOC. These sessions typically lasted about three to four hours, and just over half of them concluded in settlements. These settlements were less likely when both parties were represented in the mediation and when the evidence of discrimination was substantial. Larger employers were less likely to settle than smaller employers. The likelihood of settlement was generally the same regardless of the gender and race of the charging party and the current cause of the alleged discrimination.

The pilot mediation program, thus, provided a rapid resolution of EEOC charges for 52% of those parties who entered mediation. This settlement rate might be somewhat higher were there a different mix of cases, in particular a smaller proportion of discharge cases. Looked at another way, 15% of those cases originally eligible for mediation concluded in settlement. This percentage in the pilot was probably diminished as well by the experimentation with having responding parties pay and by the relatively low referral rates to mediation earlier in

the project. Thus, this number underestimates the proportion of settlements likely in an on-going program in which mediation is offered at no cost to parties.

The settlement rates of EEOC mediation compare favorably with the rates of settlement in mandatory court programs such as settlement weeks and more formal civil case mediation where between 30% and 45% of cases are resolved. The general comparability of settlement rates across kinds of charges and kinds of parties suggests no patterns of disparate experience of charging parties in the mediation process. The lesser likelihood of settlements in cases where stronger evidence of discrimination appears to exist may be a reassurance that the EEOC's enforcement role is not substantially undercut by the mediation process. Instead, it appears that disputes that involve other workplace problems than discrimination are those that are most likely to reach resolution in mediation.

At the same time, it is clear that mediation (as structured in the pilot) was a labor intensive undertaking. One might estimate very roughly that sixteen hours were expended to achieve one settled case (eight hours per mediation; two mediations for one settlement). This estimate does not take account of the time expended in contacting parties who chose not to enter mediation. Greater efficiency in arranging mediation sessions would diminish substantially the time invested per case, however. Unfortunately, there is no evidence available about the average number of hours it takes to process cases through the regular

EEOC process. These issues of efficiency will be examined more extensively in the final chapter.

TABLE 6.1: Characteristics of Charges and Charging Parties for Cases Mediated by Region (n=253)

	Houston (n=76)	New Orleans (n=65)	Philadelphia (n=48)	Washington (n=62)	Total (n=251)
% Discharge Charges	87%	68%	94%	64%	76%
Current Cause of Discrimination					
% Race	40%	54%	58%	37%	46%
% Gender	14%	15%	10%	23%	16%
% Age	26%	18%	29%	13%	22%
% Disability	17%	15%	6%	18%	15%
% National Origin	18%	3%	4%	16%	11%
% Retaliation	7%	6%	4%	10%	7%
CP Mean Age	45 yrs	39 yrs	46 yrs	37 yrs	42 yrs
% Female CPs	45%	51%	40%	56%	48%
Race/Ethnicity of CPs					
% Black	45%	70%	70%	65%	61%
% White	32%	25%	28%	25%	28%
% Hispanic	17%	2%	2%	2%	6%
% CPs Reporting Assistance					
From Attorney	9%	14%	25%	2%	12%
From Union	7%	0%	2%	3%	3%
RP Size					
% Less Than 101 Employees	24%	35%	31%	52%	35%
% Over 500 Employees	38%	40%	31%	23%	34%

TABLE 6.2: Mediation Settlement by Nature of Charging (CP) and Responding (RP) Party Representation (n=235)

	Both parties rep.	CP rep. only	RP rep. only	Neither party rep.
Settled	30.8%	38.5%	52.6%	67.9%
Not Settled	69.2%	61.5%	47.4%	32.1%
	22.1% (n=52)	16.6% (n=39)	16.2% (n=38)	45.1% (n=106)

TABLE 6.3: Settlement in Mediation by Size of Employer (n=242)

	Under 101 employees	101 to 200 employees	201 to 500 employees	501 and up employees
Settled	60.0%	56.8%	48.7%	38.3%
Not Settled	40.0%	43.2%	51.3%	61.7%
	35.1% (n=85)	15.3% (n=37)	16.1% (n=39)	33.5% (n=81)

Chapter 7. The Nature of Settlements in Mediation

A total of 140 cases settled in mediation. From mediator checklists completed by mediators, we have brief descriptions of the content of 110 of these settlements. Of these, just over half (51%) involved monetary payments, and 17% included either reinstatement or change in employment status. For some charging parties, the chance to get a job back or to change jobs was far more important than monetary payment, although in a few instances settlements included provisions for both. Taken together then, 64% of the mediation settlements involved changes in status or monetary benefits for the charging party. The monetary benefits ranged from \$25 "for efforts in apprehending a shoplifter" to \$22,000 in cash as a "severance package." Other settlements included apologies (5%), references for a new employer (37%), and assistance in searching for a new job (4%).

According to the EEOC's calculations a little more than half-way through the pilot, the average dollar benefits for those receiving them through mediation was about \$5,000 compared to \$14,300 for those receiving benefits through the regular EEOC process. Two cautions are necessary in making such comparisons, however. First, it is important to note that dollar benefits are frequently calculated in terms of weekly or monthly pay that has been lost. The early settlement of mediation cases (within 67 days of filing on average) means that lost wages or benefits are substantially smaller than they might be when cases are resolved

after a much longer time.

Second, the groups are not comparable.¹³ Most of the mediation eligible cases are continuing through the EEOC process. These include a significant proportion of the cases where there appears to be a more substantial potential for a showing of discrimination (as perceived by the mediator) and a significant proportion of cases where the charging party is represented. Presumably, some of these cases will result in relief to charging parties and because they are resolved later and may be more serious cases, they may yield higher dollar benefits.

The important comparison cannot now be made: a comparison between the aggregate (and average) benefits in the mediation eligible group (once all cases have been resolved) and the aggregate benefits either in the control group or in a comparable group of cases (with a similar distribution of charges) in the EEOC generally.

The EEOC reports that in the first quarter of fiscal year 1994, a total of 17.4% of charges filed led to merit resolutions, that is resolutions in which the charging party received some sort of relief.¹⁴ The percentage of cases in which there was financial relief or change in job situation in mediation was much

¹³ It appears that the EEOC average was computed for all charges, not for charges comparable to those in the mediation eligible cases.

¹⁴ These data apply to all types of charges. Since the mediation eligible cases were confined to terms and conditions, discipline and discharge cases, it is not at all clear how closely these data describe the resolutions for cases comparable to those in the pilot.

larger -- 64%. A more appropriate analysis, however, is to calculate the proportion of mediation eligible cases that end in "relief." By applying the percentages of mediation cases resulting in "relief" for which we have data (110) to the entire group of 140 settlements, we can estimate that roughly 73 settlements resulted in monetary relief and 17 more in change in job conditions. Taken together, these projections produce an estimate that of the 920 mediation eligible cases in the pilot, 90 concluded through mediation with either monetary relief or change in job situation.¹⁵ These constitute about 10% of the mediation eligible cases.

Given the fact that about 760 of the original charges¹⁶ in the mediation eligible group continue to be investigated by the EEOC, it is likely that a substantial number of additional cases will conclude with "merit resolutions." It seems highly probable, therefore, that the total number of "merit resolutions" will be significantly higher in the mediation eligible group than in comparable groups of cases proceeding through the regular EEOC process. In sum, it appears very likely that the use of

¹⁵ In addition, 17 cases eligible for mediation settled prior to mediation. We know nothing about the content of these settlements.

¹⁶ Of the original 920 mediation eligible cases, 267 were actually mediated. All but 17 of the non-mediated cases -- 636 charges -- continued in the regular EEOC charge process. These 17 cases settled on their own prior to mediation, but we have no data about the nature of those settlements. In addition to the 636 cases continuing in the charge process, 127 mediated cases that did not settle returned to the regular charge process -- a total of 763 cases.

mediation has enlarged significantly the numbers of charges resulting in "merit resolutions."

In addition, to the resolutions that resulted in financial benefits to charging parties or changes in job status, 21% of the agreements reached in mediation included promised changes in disciplinary practices or other management practices and procedures. These results are important to emphasize because they represent significant concerns both of charging parties and of responding parties. In particular, in interviews with charging parties, they made it clear that one of the strongest reasons for pursuing the charges was to "get justice" and to insure that other employees did not have the experience that they had. Similarly, it is reasonable to suppose that a major reason that managers participated in mediation was to learn about how they might improve working conditions and company policies and practices.

Summary and Conclusion

Over half of the settlements reached through mediation involved financial payments to charging parties. A significant proportion of settlements also included changes in job status, including reemployment (17%), or changes in employer policies and practices (21%), both of considerable importance to charging parties. Although the aggregate effects on the mediation eligible population of the level and kind of settlement in mediation remain uncertain, it is very likely that mediation has

served to enlarge substantially the percentage of EEOC charges that conclude with meaningful benefits for the charging parties. In addition, it appears clear that the substantial number of settlements that include changed management practices benefit employers intent on improving their organizations.

Chapter 8. Party Evaluations of Mediation

In exit surveys completed confidentially immediately after completion of mediation or within several days after, charging parties, responding parties, and their representatives expressed consistently positive perceptions of the fairness of the mediation process and general satisfaction with its outcomes. Overall, 92% of the parties participating in mediation described the process as very or somewhat fair (75% very fair, 17% somewhat fair). Sixty-nine percent of the parties were very or somewhat satisfied with the outcome of mediation.

The overwhelmingly positive general assessment of the mediation process was supported by positive views of specific aspects of mediation. Ninety-six percent of respondents indicated that they agreed strongly or somewhat that the mediator explained the process clearly; 96% agreed strongly or somewhat that they were treated with respect in mediation; 85% disagreed strongly or somewhat that they did not have a chance to tell their side of the story; and 95% agreed strongly or somewhat that they trusted the mediator. As a consequence, 84% agreed strongly or somewhat that they would try mediation again if they had a similar problem in the future.

Although both complaining parties and responding parties were overwhelmingly positive in their assessments of the mediation experience, responding parties were slightly more

positive (see Table 8.1). For example, they were a bit more likely than charging parties to believe that all issues in the mediation had been discussed and that they had had a chance to tell their side of the story. Overall, however, the responses of charging parties and responding parties to mediation are strikingly similar.

For responding parties, assessments of the mediation process were generally not related to the outcome of mediation -- that is, whether or not an agreement had been reached. Thus, employers were precisely as likely to view mediation as very fair (70%) in cases that did not reach agreement as in those that did. Assessments of the chance to tell their story, to discuss important issues, perceptions of being treated with respect in mediation, and trust of mediator were all unrelated to the outcome of mediation for responding parties.

However, responding parties were more likely to agree strongly or somewhat that mediation took too much of their time in cases where no settlement was reached (38%) than in those cases where an agreement was achieved (26%). In addition, agreement that they would undertake future mediation in a similar case was somewhat more likely when a settlement occurred (88%) than when no settlement took place (77%).

Charging parties' views of mediation were more clearly colored by its outcome. For example, in those cases that settled, charging parties judged mediation as a somewhat or very fair process 97% of the time, but in those cases which did not

settle, they did so 82% of the time. Similar differences occurred for perceptions of how well mediation was explained and whether the charging party had a chance to tell his or her side of the story. Charging parties, like responding parties, were more likely to agree that mediation took too much time and less likely to be willing to undertake mediation again in those cases where no settlement was reached.

In general, no characteristics either of cases or of parties were related to charging parties' perceptions of the overall fairness of the mediation process. For example, charging parties' assessments of the fairness of mediation were almost identical for claims of discrimination based on gender, age, race, disability, and retaliation. Mediations in which neither party was represented were judged as fair as those where one or both parties had representation. Mediations in which the responding party was a large employer were judged as fair as those where the employer was small. Finally, neither age nor race of charging party was related to perceived fairness.

However, women who were charging parties were somewhat more likely to perceive the mediation process as unfair than were men. Fifteen percent of women viewed mediation as somewhat or very unfair compared to 4% of men.

Employers, like charging parties, tended to view the mediation process as fair in ways that were unrelated to the characteristics of the charges, the charging parties, and the nature of party representation.

Both charging and responding parties separated their overwhelmingly positive reaction to the mediation process from their reactions to its outcome. Thirty-one percent of parties were very satisfied with the outcome, 38% somewhat satisfied, 16% somewhat dissatisfied, and 15% very dissatisfied. These reactions to outcome were, not surprisingly, strongly related to the achievement of an agreement in mediation. Ninety percent of charging parties were very or somewhat satisfied with outcomes when an agreement was reached while only 34% were satisfied when no agreement was achieved. Similarly, 95% of responding parties were very or somewhat satisfied when an agreement resulted from mediation, while only 47% were satisfied when no agreement was reached.

Despite these differences by outcome and the lower satisfaction with outcome than with process, the general response of both charging parties and responding parties to mediation was strongly positive. Thus, even after those mediations where no agreement was reached, 80% of the parties still indicated that they would want to try mediation if they had a similar problem in the future.

Another and more vivid picture of the parties' responses to mediation comes from the comments they added to roughly half of the exit surveys completed. Generally, these comments involved brief positive comments about the mediation experience. Over 90% of the comments were positive. For example, from charging parties, we hear:

I thank the mediators for their mediation. Words can't express how at peace I feel with this being resolved.

I think it was handled very well.

For me, there was a much clearer understanding! I feel every effort was put forth, and I'm made to feel whole again. Thanks.

I think the mediator was very helpful in helping me decide what was in my best interest.

From responding parties, we hear:

I feel that any process that can resolve conflicts short of any formal hearing is beneficial.

I feel this process is a fair and equitable and low cost way of agreement.

Even though this took 4-5 hours of my time, it is worth it in the long run because it would take a lot more time in court or if we had to go further with this matter.

This is a great forum [for dispute resolution]. I'm disappointed we couldn't come to an understanding and settlement, but we would do it again.

The written comments of participants thus generally echoed and amplified the positive responses that they had circled on the questionnaire.

At the same time, there were occasional critical comments and suggestions that should be noted. From both charging and responding parties came the concern about unanticipated representatives showing up on the other side, leading some to question the good faith of the other side or to feel outnumbered. Both charging parties and responding parties (but particularly the latter) also expressed concern that party expectations -- especially those of charging parties -- were unrealistic and wondered about ways to provide counsel or advice that would

assist in focussing arguments and in making realistic judgments about plausible outcomes.

For employers particularly, repeated concern was expressed with non-meritorious claims. In most instances, this simply meant that mediation did not produce an agreement.

[Mediation] seems like a good idea. In our case, I just believe we had a charging party who was looking for big \$ and without a real case.

On the other hand, two responding parties expressed concern that they had been "blackmailed" into a settlement.

As glad as we are to have this behind us, we did not come away from the process feeling justice had been served. Our former employee feels she was discriminated against and we know she wasn't.

This process assumes that the employer is wrong, and that we should pay to keep this from going on. There is no discrimination. Someone should be able to make that decision here.

This distinctly minority view of responding parties seemed to be connected to a perception of the EEOC and the EEOC process as biased against employers.

Comparisons from Follow-Up Survey of Charging Parties Whose Cases Had Been Mediated

Those charging parties who returned questionnaires in a follow-up survey in January, 1994 generally continued to view mediation as they had seen it earlier. Eighty-eight percent of those who had reached agreements viewed the mediation process as having been fair; 75% thought the outcome fair; 93% would try mediation again. Those who had not reached an agreement in mediation were less happy about the process. Sixty-one percent

thought the process fair in retrospect. Only 21% thought the outcome (non-settlement) fair; and 54% agreed they would try mediation again for a similar problem. These results from a self-selected sample of charging parties who had been through mediation thus tend to confirm the short-term judgments made in the exit surveys. However, there were two charging parties who expressed concern that their employer had not lived up to the terms of the agreement.

Comparisons from a Sample of Charging Parties Not in Mediation

In passing, it is worth noting the responses of a sample of charging parties who initiated in March to June of 1992 discrimination charges that were comparable to those eligible for mediation a year later. They were surveyed in two waves in July and November of 1993. These charging parties were surveyed in order to learn their evaluations of the procedural fairness and outcomes they experienced in the normal EEOC investigatory and decision-making process.¹⁷ Presumably they could provide a rough "control group" for the charging parties experiencing mediation.¹⁸

¹⁷ As noted earlier, the research design provided a control group for the mediation group but because the research had to be completed before the cases in the control group had been investigated by the EEOC, it was fruitless to survey people in that group to ask about their experiences with and perceptions of the EEOC.

¹⁸ Once again, to assess the aggregate effects of mediation on party perceptions of fairness, one should survey the whole mediation eligible group (many of whom did not experience mediation) to see whether their perceptions of the EEOC are more or less positive than those of either this 1992 sample or the 1993

Eighteen percent of the 66 respondents indicated that no decision had yet been reached in their case. Only 13% of the respondents indicated that they were satisfied with the way their case had been handled. Of those who had a decision in their case, only 8% indicated satisfaction with it. Clearly, this non-representative group (25% of the random sample) suggests the high level of charging party frustration with the EEOC process that the mediation pilot was designed in part to address. The response of charging parties to mediation stands in sharp contrast to the response of those to the regular process.

Summary and Conclusions

In general, both charging and responding parties assessed their experiences in mediation very positively. They trusted the mediators, felt the process allowed them to tell their stories, believed that they were treated with respect, and evaluated the process as fair.

The assessments of fairness were almost uniform across kinds of charges, characteristics of parties, and the nature of representation in mediation. The most significant exception was a slight tendency for charging parties who were women to find the process less fair than charging parties who were men. For charging parties, judgments of fairness were related to whether or not an agreement had been achieved while that was not the case

control group established in the research design. Such comparisons are impossible in this short time period, however, because few of the mediation eligible cases have been investigated by the EEOC at this point in time.

for responding parties. The written comments of parties generally echoed the rating scales. The assessments of mediation by charging parties did not change much in the weeks after mediation. In addition, charging parties who experienced mediation assessed it much more positively than a group of charging parties not in mediation assessed the EEOC investigative process.

A substantial research literature concludes that perceptions of procedural justice are an important component of the experience of justice in our society. Parties in conflict are not only concerned with outcomes.¹⁹ They are also deeply interested in having an opportunity to voice their problems and tell their stories to an impartial third party in a dignified setting. Thus, the generally positive perceptions of mediation can be seen as significantly enhancing the experience of justice for the participating parties, regardless of outcomes.

However, about 66% of charging parties were satisfied with the outcome of mediation, and 72% of responding parties were satisfied. These levels of satisfaction compare with 8% satisfaction among a not entirely comparable group of charging parties who had completed the regular EEOC investigatory process. Over 80% of both charging and responding parties who had been through mediation reported that they would try the process again if they had another similar problem in the future.

¹⁹ See, for example, E. Allen Lind and Tom R. Tyler, The Social Psychology of Procedural Justice. New York: Plenum, 1988.

TABLE 8.1: Party Evaluations of Mediation Process in Exit Surveys*

	Charging Parties (n=204)	Responding Parties (n=216)
Mediation process was very fair or somewhat fair	91%	93%
Very or somewhat satisfied with outcome of mediation	66%	72%
Mediator explained mediation well (agree or strongly agree)	95%	98%
Mediation took too much of my time (agree or strongly agree)	26%	32%
I was treated with respect in mediation (agree or strongly agree)	96%	97%
I did <u>not</u> have a chance to tell my side of story (agree or strongly agree)	18%	11%
<u>Not</u> all important issues discussed in mediation (agree or strongly agree)	37%	24%
I trusted mediator (agree or strongly agree)	95%	95%
If had a similar problem would try mediation again (agree or strongly agree)	84%	83%

*Because more than two parties often participated in mediation, a total of 505 charging or responding parties returned exit surveys to us. In this table we report only one charging and one responding party response per case. The percentage distribution for all 505 responses is virtually identical to that reported here, varying once by as much as 4%.

**Chapter 9. Variations in Delivery of Mediation:
Payment of Mediators, Telephone/Face-to-Face Mediation,
and Solo or Co-Mediation**

In the design and in the implementation of the pilot mediation program several variations were introduced in the delivery of mediation services. Some mediators served as volunteers while others were paid. Some mediators were paid by the project while others were paid by the responding parties. A very few mediations were carried out by telephone while most were completed by telephone. Finally, mediation was provided by single mediators in three sites and by pairs of mediators in one location. This chapter reviews the evidence about the implications of these variations for duration of process, cost, settlement and party response.

Payment of Mediators

Mediators were recruited to do mediation in randomly assigned categories: some were paid by the responding party, some by the EEOC, and some were unpaid volunteers. This variation in payment had no statistically significant relationship to the average time devoted to the case, to the length of mediation, to settlement rates,²⁰ or to the

²⁰ It is interesting to note that those cases in which the responding party paid for mediation were somewhat more likely to settle (58%) than those cases where the mediator was paid by the program or was a volunteer (47%). This difference is intriguing but not statistically significant.

perceptions of the parties about the mediation experience. For example, the total mediator time per case across the three payment categories ranged from 4.7 hours to 5.4 hours with the volunteer mediators devoting an intermediate amount of time on average -- 5.1 hours on average. There is no evidence that the method of payment influenced in any way the quality of the mediation process or the amount of effort devoted to it by mediators.

The request that the responding party pay a \$300 fee for mediation clearly discouraged participation in mediation and created some mild resentment among employers who noted that the EEOC process was otherwise "free." In fact, 50% of those responding parties offered no-cost mediation accepted it, while 25% of those who were asked to pay accepted mediation. The resentment about paying for mediation was highlighted for some respondents who believed that the EEOC process already gives "charging parties a free ride." For these responding parties costs assessed on both parties would be more equitable.

Clearly, the total number of cases entering mediation was affected substantially by the payment variable. Although a mediation program in which responding parties paid for mediation appears to be feasible, but would have half the impact on EEOC caseload that a program paid for by EEOC would have.

Telephone or Face-to-Face Mediation

The few mediations carried out by telephone (10 in our data

set) in fact lasted longer than in-person mediations, averaging 5 hours per mediation compared to 3.5 hours for face-to-face sessions. In addition, telephone mediations required substantially more preparation time, typically involving telephone contacts with each party to set up the mediation session. As a consequence, telephone mediations demanded an average of 7.1 hours of the mediator's time compared to 5.0 hours for the face-to-face mediation sessions.

On the other hand, agreements were reached in 70% of the telephone mediations, compared to 51% of face-to-face mediation sessions, a striking difference but one that is not statistically significant because of the low number of cases mediated by phone. There were few discernible differences in the satisfaction of the parties with the telephone mediation process as compared to face-to-face mediation. However, responding parties were less likely to view telephone mediation as fair. Thirty percent thought it very fair compared to 72% of face-to-face mediation. Other evaluations of the mediation process were generally similar for telephone and face-to-face mediation.

It should also be noted that some responding parties, in particular, were reluctant to engage in telephone mediation because of its impersonality. Two noted in our telephone interviews with those declining mediation that it would be too burdensome to attend in person because of distance, and that the option of telephone mediation was unacceptable to them.

Co-mediation or Solo Mediation

All but one of the cases completed in Philadelphia used co-mediation, as did seven others in New Orleans. The average time for preparation and participation in mediation for each individual mediator in co-mediation appeared to be only slightly lower than the average time committed by solo mediators, so that the total mediator time devoted to co-mediation was essentially twice that for solo mediation -- approximately 10.3 hours per case. The mediation sessions themselves averaged 3.0 hours when co-mediated compared to 3.7 hours when done by solo mediators. In the pilot program, co-mediation did not cost any more money because, when co-mediators were paid, they split the standard fee.

There is no evidence that settlement rates were enhanced by co-mediation. The rates of agreement were essentially identical at 53% (solo mediation) and 47% (co-mediation). Measures of party perception of fairness of process and satisfaction with outcomes of mediation were also nearly identical for co-mediation and solo mediation.

Summary and Conclusions

The mediation pilot program provided an opportunity to test mediation delivered in somewhat different ways and through different payment mechanisms. Co-mediation clearly demands more mediator time than solo mediation and could be more costly if each mediator had to be compensated at a standard rate. There is no evidence from any of our measures of any significant advantage

to co-mediation that would balance against its greater use of human resources.²¹

Mediation by telephone appears to be feasible, although an unattractive alternative to face-to-face mediation. It absorbs more mediator time, so is more expensive to administer, but may save one or both parties to mediation some time and expense. It would appear to be a useful option, but not the preferred one for providing mediation.

Not surprisingly, responding parties were much more willing to participate in "free" mediation than in mediation that cost them \$300. By asking them to pay for mediation, the number of responding parties entering the mediation process was cut markedly. Nonetheless, and perhaps surprisingly, a modest number of responding parties were willing to pay for the opportunity to mediate discrimination charges against them. To maximize participation in mediation, however, the offer of mediation at no-cost is clearly advantageous.

²¹ Co-mediation may, however, give mediators greater confidence and permits the assignment of mediators with differing kinds of skills and experiences to a each mediation.

Chapter 10. Conclusions

The pilot mediation program was intended to test whether mediation could promote resolution of significant numbers of employer-employee disputes where discrimination charges filed with the EEOC were mixed with other workplace issues. At the same time, to be effective the mediation program would have to be efficient and could not undermine the central enforcement role of the EEOC. Evidence has been presented in the preceding chapters that can address each of these issues. In this concluding chapter, some of that evidence is summarized as it relates to these major policy issues. Obviously, the conclusions and suggestions reflect the views of the evaluator. Others may read the same evidence and interpret it differently.

Effectiveness in Resolving Disputes

The EEOC pilot mediation program appears to have resolved a significant proportion and number of discrimination charges and to have done so in ways that the parties believed to be fair. Roughly 52% of mediated cases in the pilot ultimately reached resolution (roughly 15% of all cases originally eligible for mediation). Even in those cases that did not reach settlement, the vast majority of charging and responding parties believed that they had experienced a fair process, had been treated with respect, and had their stories and viewpoints heard. Thus, in the 29% of eligible pilot cases that were mediated, most parties

came away with a sense of "procedural justice" that may be valuable in itself.²² Of particular significance to the parties, these settlements were achieved in an average of 67 days, considerably faster than the normal EEOC process which currently takes an average of roughly 300 days. Almost two-thirds of settlements in mediation involved either financial payment to the charging party or a change in job situation (including rehiring).

The mediation process and the settlements that were reached in mediation appear to acknowledge a range of issues other than discrimination, as was anticipated in the design of the project. Mediators indicated that most cases that they heard did not have strong evidence of discrimination and that those cases that did, in fact, were the least likely to settle. Other workplace issues played a central part in many of the discussions in mediation. As a result, nearly a quarter of mediation settlements involved some commitment to alter workplace rules or practices. This opportunity to improve workplace conditions was one of the incentives for participating in mediation on the part of employers. They also viewed it as a more efficient and effective forum for dealing with charges of discrimination.

It appears to be very likely that the use of mediation has enlarged the proportion of charges in which "merit resolutions" are achieved. As noted in Chapter 7, "merit resolutions" were

²² As noted below, the numbers and proportions of cases mediated and settled was constrained in the mediation pilot by particular design decisions.

achieved in 90 (estimated) of the 140 cases settled in mediation. Since another 17 cases settled on their own before mediation and 763 of the original 920 mediation eligible charges continue in the regular EEOC charge process, it is very likely that a substantial additional number of merit resolutions will result. Through mediation, merit resolutions have already occurred in 10% of the mediation eligible group. The EEOC itself reports that in the first quarter of 1994, 17.4% of all charges resulted in merit resolutions. Given the large number of mediation eligible charges still awaiting resolution, it is probable that, by the time they are concluded in the regular EEOC process, the percentage of merit resolutions in that group will exceed 17.4%.²³ Thus, it appears likely that the introduction of mediation will have enlarged, perhaps substantially, the total percentage of charges filed that conclude with a settlement providing meaningful benefits to the charging party.

Cost, Efficiency and Mediation Delivery Options

This pilot was designed to provide a difficult test for mediation by applying it largely to discharge cases and by asking a significant proportion of responding parties to pay the costs of mediation themselves. In addition, the pilot mediation

²³ The percentage of mediation eligible cases settling with monetary benefits should ideally be compared with the percentage of control group cases settling with monetary benefits. The comparison with overall EEOC settlement with benefits rates presupposes that settlements with benefits occur as frequently for the peculiar mix of cases in mediation (largely discharge cases) as for the general range of EEOC charges.

program, of necessity, was set "on top of" existing EEOC procedures, rather than fully integrated into them, placing an extra burden on overworked EEOC staff who were not fully acquainted with mediation. Each of these factors appears to have influenced either or both the willingness of parties to enter mediation or to settle within it. Responding parties were more reluctant to use mediation in discharge cases, and such cases were less likely to settle. When faced with paying the cost of mediation, responding parties were half as likely to accept it as when it was offered at no cost to them. Acceptance of mediation by charging parties increased over time as EEOC staff became more familiar with the process.

As a consequence, the results of the pilot program almost certainly significantly underestimate the potential impact of mediation on the EEOC caseload. If all charges were referred to mediation rather than mostly discharge cases, if responding parties were not expected to pay for mediation, and if EEOC staff were well-trained about mediation and provided with ample educational materials (such as videotapes) about the EEOC and mediation processes, one would expect larger proportions of cases to enter mediation, and larger proportions of cases to be resolved in mediation.

The mediation pilot clearly demonstrated that mediation could be provided within a relatively short period after filing of charges. The 67 day average for completion of mediation compares very favorably with the case processing time for other

EEOC cases which may on average be approaching 300 days. Although this average mediation processing time is somewhat longer than hoped for and might be reduced by some administrative changes, it would be unrealistic to expect significant reductions in time. The need for responding parties to be notified and to understand the charges and the complexity of scheduling multiple parties all make a 60 day period appear to be a reasonable one in which to accomplish mediation.

As yet unknown is whether the use of mediation improved the speed of overall charge processing in the four offices in the pilot and thus enhanced their capacities to deal with their caseloads in a timely fashion. Internal EEOC study is needed to address that question. In addition, the EEOC should examine whether the disposition of cases assigned to mediation and then returning to the normal investigatory process was delayed in any fashion by the diversion to mediation.

Some concerned with efficiency might wonder whether acceptance rates and settlement rates were too low in this pilot. After all, only 29% of eligible cases entered mediation. Although the settlement rate in mediation was 52%, only 15% of the charges originally eligible for mediation settled. As noted earlier, both rates were probably considerably lower than they would have been if a different design were used for implementing mediation. Thus, widening the range of charges eligible for mediation and not requiring some responding parties to pay for mediation would be likely to increase both acceptance of

mediation and settlement in mediation.

There are limits, however, on the percentage of cases that will and should either enter mediation or settle within mediation. Many charges filed with the EEOC are, in fact, without merit. The charges most amenable to mediation are those in which there are significant workplace issues which are tied to the charges of discrimination. In the absence of time-consuming screening and later referral to mediation (a possibility to be considered), employers must act as screeners themselves.²⁴ They may not always be successful in such screening and thus should, of course, be free to refuse to settle in mediation. Similarly, charging parties who believe the employer is not responsive or who have significant evidence of discrimination that they want to pursue should be free not to enter mediation or to resist settling within the process. Significant rates of refusal to enter mediation and of non-settled cases after mediation, thus, can be viewed not as shortcomings but as reassuring signs of the voluntariness of the processes.

By acknowledging the virtues of non-entry and non-settlement, thus, it is possible to recognize the fine balancing

²⁴ In its report on "EEOC's Expanding Workload," the General Accounting Office notes on pages 21 and 22 that a fact-finding conference used by the EEOC as part of a rapid charge-processing system in the period 1979-1983 "overemphasized negotiating charges that had little merit." As a consequence, "charging parties, as well as employers, too often agreed to settle when it was not in their best interest." These are the sorts of problems that effective voluntary choice to enter mediation and to consent to settlements within the process should help avoid. By and large, they appear to have been minimized in the mediation pilot.

that must be done in trying to encourage parties to enter mediation initially. For example, in the pilot some mediation coordinators became concerned about high refusal rates among responding parties and became more aggressive in encouraging them to participate in mediation, particularly in the face of their denials of discrimination and of any interest in reaching an accommodation with the charging party. Such aggressive recruitment of responding parties also responded to their general lack of understanding of mediation and how it works. As necessary as such active marketing may be, it should be balanced against the potential for bringing to mediation many cases that are, in fact, non-meritorious. Both charging parties and responding parties need information about mediation and encouragement to attempt it. However, both can serve as screening agents as well, keeping out either cases where the charging party has strong legal claims that need to be pressed through EEOC enforcement action or non-meritorious claims that are unlikely to produce a settlement.

The ultimate "cost-effectiveness" of mediation will depend on how a mediation program is ultimately designed and integrated into the EEOC process. One measure of cost would require a comparison of the person hours (and per hour cost) per settlement in mediation versus the person hours (and per hour cost) of formal investigation and resolution.

The analysis reported here suggests that under the arrangements in place in the pilot roughly 16 person hours may

have been required per settlement achieved. This estimate includes the time of mediators and mediator coordinators and the time expended in mediations that did not reach agreement as well in those that did. Procedural changes that increased the efficiency in contacting responding parties, higher rates of responding party participation, and higher settlement rates would all contribute substantially to reducing this rough per settlement average. Such efficiencies appear to be possible and such changes in participation and settlement likely.

How much can this mediator/coordinator time per settlement be reduced? How does the estimated time per settlement compare to the average time spent in formal investigation? How do the costs per hour of the time of mediators and of EEOC staff compare? These are the sorts of question that need to be answered to judge better the "cost effectiveness" of mediation. The evidence to answer these questions is not now available.

The evidence also suggests some conclusions about the several options examined for providing mediation. First, as noted above, when responding parties were expected to pay, they were only half as likely to participate in mediation. The cost savings of party payment may not be sufficient to outweigh the significant narrowing of the pool of eligible cases for mediation. Second, the use of volunteer and paid mediators had no discernible implications for the nature of mediation or its outcomes. Clearly, the use of volunteer mediators diminishes costs considerably. The practical question, of course, is

whether a sufficient number of highly qualified volunteer mediators could be recruited and maintained over time to provide high quality mediation to the EEOC. It seems likely that the EEOC will have to consider paying independent mediators if it is to pursue mediation in the future.

Another option -- to train EEOC staff to do mediation "in house" may be considered. There was some evidence, however, from the responses of parties that they appreciated the apparent neutrality of independent mediators. It seems likely that employers, particularly, would be even more concerned about the implications of participating in mediation for "admitting wrongdoing" if EEOC staff were doing the mediating. There also seems to be an inherent conflict between EEOC's perceived role as an enforcement agent and the provision by its staff of mediation prior to investigation of charges.

The use of mediation by telephone appears plausible, but takes more time both for preparation and for mediation itself. Responding parties were also substantially less satisfied with the process, far less likely to view it as very fair than face-to-face mediation. In addition, there was evidence that some responding parties would prefer not to mediate at all rather than to carry out the process impersonally, by phone. The considerable willingness of employers to send representatives even from distant offices to participate in face-to-face mediation indicates that telephone mediation may be less necessary than originally thought. It would seem to be

potentially useful in exceptional cases, but probably not the procedure of choice.

The use of co-mediation appears to add time and possible expense to the delivery of mediation without any clear payback in terms of enhanced party sense of fairness or satisfaction or increased rates of settlement.

The challenges of implementing mediation suggest the need to address the following sorts of program design and management issues in any future mediation programs:

1. Development of appropriate informational materials about the EEOC process and about mediation that would permit charging parties to make informed decisions about how to proceed with their charges and to have more realistic expectations when they do so. Such materials might include both written materials and a short videotape that would describe both the normal investigation process and mediation.
2. Improved and more efficient procedures for identifying responsible officials at responding parties and assisting them in making decisions about entering mediation. For example, a mediation notice (with descriptive information about mediation) might be sent with the notice of charges. It could include a request that the responsible official at an employer contact a mediation coordinator at the EEOC by a specified date in order to discuss the possibility of mediation. This procedure would place the initiative with the employer (with risks of delay) but reduce the burden on staff people to locate that responsible official by

telephone.

3. Examination of appropriate procedures to communicate with responding parties enough information about the character of the charges so that they can make informed decisions about mediation and enter mediation prepared to mediate in good faith.

4. Train EEOC staff about mediation so that they can better assist charging parties in their decisions. Incorporate mediation cases appropriately into the "caseloads" of field staff members so that they are rewarded for spending time dealing with these cases.

5. Identify procedures that might constrain the unexpected appearance of additional participants at mediation sessions. Both charging parties and responding parties at times brought as many as six or seven others to the mediation sessions, often to the surprise of the mediator and the other party. At the same time, parties should be encouraged to have legal or other advocates if they choose to have them there to assist in reviewing possible settlement options and in "reality testing."

6. Review the appropriateness of having EEOC staff serve as resources for "reality testing" to unrepresented charging or responding parties during the course of a mediation.

7. Insure that party perceptions of the fairness of mediation are monitored. Any future mediation programs should replicate the example of the pilot program where the experience of fairness by parties in mediation did not diverge significantly on the basis of race, gender or other characteristics.

The Relation Between Mediation and the EEOC's Enforcement Role

The risks of the EEOC mediation process appear to be balanced between drawing in non-meritorious charges that should not be mediated at all and promoting settlement of claims where substantial discrimination has occurred and the EEOC has an obligation to pursue enforcement most vigorously. The pilot program appears to have steered successfully between these two extremes.

By providing employers considerable room to reject mediation, many non-meritorious charges were presumably screened out of mediation. So also, perhaps, were some charges with substantial merit (employers were less likely to mediate charges where unions and lawyers had already been contacted by charging parties). In mediation, those charges where evidence of discrimination was perceived by mediators to be strongest were least likely to settle. Thus, there is reason to believe that many of the charges which reached settlement were ones where the evidence of discrimination was not clear or extensive and where there were other workplace issues that gave credence to the charging parties' grievances. These appear to have been the kinds of problems targeted by EEOC in designing the mediation pilot. Because a substantial proportion of the relatively rare cases with strong evidence of discrimination continue in the EEOC process, the EEOC can maintain its strong enforcement role in these cases.

Further, the settlements reached in mediation seem quite

substantial in comparison to those reached in the regular EEOC process, especially when recognizing the "costs" of delay. At the same time, as noted before, the aggregate effect of mediation is almost certainly going to be an enlargement of the percentage of charging parties receiving some form of relief. Whether or not it does have this effect, in fact, awaits future study.

In summary, the mediation pilot generally appears to have achieved its objectives of providing expeditious opportunities for parties to discrimination charges to talk and to examine settlement possibilities. The project appears to have done so without undermining the EEOC's work as an enforcement agency and without apparent sacrifice in the rights of charging or responding parties. The substantial merits of the settlements achieved in mediation and of the positive response to the mediation process by parties must ultimately be weighed against the costs of providing mediation. The information is too limited for this report to examine those costs. However, there clearly are ways to make any future mediation program both more efficient and more effective than the pilot.

Appendix 1. Mediation Case Summaries

Case Summary 1

This case was brought by a disabled person who had been hired as a receptionist for an organization which was ostensibly involved in the advancement of disabled persons. The charging party (CP) did not want her disability to dictate her job description. The responding party (RP), because it was an organization (non-profit) promoting disabled persons' interests, could not afford to be perceived as discriminatory.

Although this case could have been framed as an ADA case, the workplace problem really resulted from a lack of appropriate resource management as well as a subtle resentment of the perception that the charging party had been hired for a position for which another person might have been better qualified.

Resolution of this dispute addressed these two issues with an agreement which required both changes in management of resources as well as education of those who worked in the environment affected by the CP's work. In addition, the agreement incorporated training for the CP to minimize future problems.

Case Summary 2

CP had been employed by a national chain of service organizations. The chain was under a court order for a previous violation of civil rights laws and had hired a Human Resources Director to ensure that they were in compliance.

CP filed a charge of discrimination based on race. He said that one day his supervisor was unable to locate him when a prospective customer came for a tour of the club. That afternoon the supervisor called CP into his office and yelled at him. CP defended himself and said how much he needed this job. CP said the supervisor then said, "That's right, beg for your job; that is what niggers do." When CP left the office, a prospective member stopped him and said he had overheard the remark and was very disturbed about it. CP got his name and number. CP made a complaint about the remark. Shortly after that he was fired.

CP came to the mediation with two pro bono attorneys. He was now homeless, living in a city shelter. The attorneys were aware of the court order. They believed their client had a very strong case and were asking for \$125,000 and his job back. RP was represented only by the Human Resources Director. During the joint session, CP told his version of the event. RP said that her investigation convinced her that the alleged remark had not

been made and that no discrimination occurred. It was CP's word against the supervisor's. The attorneys produced a signed affidavit from the prospective member saying that he overheard the conversation and repeated verbatim the offending remark.

This mediation continued for weeks and included multiple phone conversations between the mediator and the RP and the CP's attorneys. RP agreed that the company's complaint process had not been followed after CP complained about the supervisor's remark. She remained adamant that there had been no discrimination. CP was clear that his real interest was in getting his job back. He did not want to go through the EEOC process or court if it could be settled now. His attorneys agreed that the job was the big consideration.

This mediation ended with a written agreement. The terms were: RP will pay CP \$500 and hire him for the same position he held previously at the same location and for the same salary and hours; CP will not discuss the situation or what was discussed in the mediation; RP will give CP a copy of the Civil Rights Handbook and explain the company's policies and procedures in regard to employment discrimination and its procedures for addressing employees' claims of employment discrimination; RP will removed from CP's personnel file the Corrective Action Report and the Voluntary Resignation Form signed by CP.

Case Summary 3

CP was an African-American woman who had worked for the RP for several years, when she resigned for medical reasons. She was re-hired to fill a receptionist position in October of 1993. She stated that, upon her reinstatement, she was told she would be given a "better" position if/when one became available.

After working for approximately two months, she was "promoted" to a new position, processor, without a salary increase. About one and a half months later, CP was told she was being terminated because of poor attendance. According to the RP, she "begged" to be allowed to stay and was reinstated as receptionist. At that time, the Caucasian receptionist was promoted to processor, the position the CP vacated and was given a salary increase. The RP maintained that the raise was the Caucasian employee's yearly increase; however, the CP was convinced the Caucasian employee was given a raise, better equipment, and better training. CP concluded that she had been discriminated against.

To further complicate matters, after the CP filed the EEOC claim, she was discharged by the RP because they learned through a security check of a previous criminal problem. RP maintained that federal law prohibited them from continuing to employ the CP

and that it was only coincidence that the FBI check was finalized and the results known after the filing of the EEOC charge.

During the mediation it became clear that the CP had a great deal of respect for her former supervisor who was also present at the session. Both supervisors present at the mediation also spoke highly of the CP and expressed regret that she could no longer work as a result of the FBI check. CP wanted to get on with her life but was convinced that the RP (especially the new supervisor) had discriminated against her, although she recognized that other African-Americans had been promoted within the company and by the same supervisor.

The company was fairly small, and the RP voiced a concern that the CP would discuss the results of the mediation with her friends at the company or continue to speak poorly of the supervisors.

They agreed to a financial settlement, with most of the monies to be paid immediately, and the final \$1,000 to be paid in one year provided the CP did not disclose the information to other employees.

Case Summary 4

A black male CP claimed race discrimination when fired by the small business where he worked. The manager of the business, who had done the actual firing, was also a black male. At the mediation session, the CP described (indeed, dwelt at length on) his feelings at being let go without any chance to talk directly to the owner. The owner described the intensity of his own feelings when he'd received the Notice of Charge of Discrimination in the mail: this owner was Jewish and had devoted much of his life to working against discrimination. The manager described his own experiences with discrimination and how he had felt being caught between the other two men. Tears appeared in the eyes of both the CP and the RP. Mediation enabled them to work everything out, including rehiring the CP. At the end of the session they all embraced each other and left together.

Case Summary 5

A 60-year-old male CP claimed age discrimination when fired by an institution upon returning to work following a leave of absence. The reason for termination was that he had failed to follow the correct procedures for returning to work in those circumstances in an institution that doesn't easily tolerate deviation from prescribed policies. In mediation the RP came to understand how devastating its action had been for the CP and rehired him on a part-time basis, with the possibility of full-

time employment when a suitable position became available.

Case Summary 6

A 54-year-old female CP claimed age discrimination when she was peremptorily fired for insubordination by a service agency's owner whom she had only met once or twice in all the time she had worked at the agency. The mediation was attended by the human resources manager at the agency, the agency's attorney, and the CP and her attorney. The informal nature of the mediation allowed the agency's representatives to indicate that they knew the owner to be an unreasonable and difficult person, and although they vigorously denied any legal wrongdoing and claimed they just wanted to settle in order to get rid of this nuisance case, it was obvious they believed something unfair had probably happened to the CP at the hands of the owner. They settled for \$11,000 and a mutually satisfactory letter of reference prepared by the CP's former supervisor.

Case Summary 7

A black male CP in his early 50's claimed race discrimination when terminated by a technical/scientific firm where he had been employed for some years. The RP was "delighted to be offered the mediation option so they could work things out with the CP personally whom they had always liked and respected." This was actually credible in view of the employer's local reputation as a desirable place to work because of its enlightened views and policies concerning personnel. Like many other employers, however, they had been forced by current economic realities to downsize and this man had been one of many casualties. They had tried to spare him the axe because, as they candidly admitted, there is a chronic shortage of qualified minority personnel in their scientific field. Unfortunately, this man's expertise was confined to one small area and their belt-tightening program made it necessary for them to retain employees with more versatile competencies. They awarded him \$10,780. In addition, they gave him \$2,500 to obtain a particular technical certification which would enhance his marketability (including to themselves in case of economic upturn) as well as a glowing job reference.

Case Summary 8

A 55-year-old white male charged age discrimination when terminated by an engineering firm, and arrived at the mediation with his attorney, a stack of documents purportedly supporting his contention that the firm preferred younger talent, and a demand for \$300,000 in damages. In the mediation, the owner was able to bring up gently and tactfully the CP's drinking problem

and how it had undermined his staff's perception of his competence to manage them. This was news to the CP's attorney (and doubtless to the CP himself, if everything they say about denial is true) and the CP was happy to settle for \$15,000 in the end.

Case Summary 9

The CP in this discharge case was employed by the RP, a local hospital, from September of 1991 to November of 1993.

The RP stated that the CP was discharged because he tested positive on a drug test. However, the CP believed he was discriminated against on the basis of his race, African-American. This was a case where the evidence for the RP's decision to discharge the CP was documented and was part of their policy, yet the RP chose to mediate. In many such cases, the RP was not as likely to elect mediation because he/she could not negotiate rehiring the CP.

Upon receiving the "Notice of Charge of Discrimination" from EEOC, the RP sought outside counsel. The RP's attorney immediately agreed to mediation. The CP did not retain an attorney.

The case was mediated and an agreement was reached. The agreement included the following provisions:

- (1) RP agreed to pay CP 36 hours of Paid Days Off under their benefit plan, less withholdings.
- (2) CP was given the opportunity to enroll in its substance abuse program through the Human Resources Department.
- (3) RP agreed to provide a neutral reference.

Case Summary 10

The CP had been hired by a corporation in February of 1993 as an administrative assistant and was discharged in May of 1993. The employer stated as reason for discharge the CP's change in attitude and, consequentially, her potential inability to train the new Contract Secretary. The CP charged that she was terminated because of her age (54).

The CP felt that her supervisors and the vice president of the corporation, all Caucasian males younger than herself, had been disproportionately terminating older employees. The RP in this case was a personnel services company (temporary agency). This company had been her original employer before she became a permanent employee at the employing company. Thus, the representative for the RP was the Director of Human Resources for the personnel services company.

The CP came to the mediation represented by counsel, and the

RP was not represented. Difficulties arose during the six hour mediation when the employment practices of the employing corporation were criticized or demands were made by the CP that could not be answered by the representatives for the RP. Although the Human Resources Director from the temporary agency was able to negotiate a settlement and had authority to sign a written agreement, she was not able to represent the interests of the employing corporation.

The settlement included an agreement that the personnel services company would pay \$740, and in return, the CP would provide detailed accounting of the use of that money and would acknowledge that she was offered the opportunity to apply with an affiliated personnel service.

Case Summary 11

The CP felt he was being treated unfairly and was given additional work without additional pay because of his race, African-American. The CP also felt, as a result of bringing up this charge, that he would be fired. The RP explained the company down-sized and many employees of all races changed jobs without additional pay.

The CP related specific incidents where he felt discriminated against or where derogatory statements were made to him regarding his race. The RP claimed that he did not know about those statements and does not condone that kind of behavior from any of his employees. The RP would like the CP to report those situations directly to him when they happen, and he assured the CP that he would immediately address the person making the derogatory statements.

The RP, in fact, felt the CP was a good worker and was not in jeopardy of being fired. It appeared the CP had a good relationship with the RP, but seemed to have been hesitant about informing him when a racial incident occurred. Communicating the CP's concerns to the RP was most effective in this mediation. The RP appeared to be genuinely concerned about making himself available to the CP if any racial issues were evident.

Toward the end of the mediation, the CP began to feel the RP's concern was genuine and the two parties came up with a settlement. The settlement stated: the CP would immediately report to the RP any derogatory statements made to him by an employee. The RP agreed to address the concern at the time of the report. The RP also added if it were a day when he was not in the office, the CP could call him at home. Both parties appeared to have left the mediation feeling positive about the mediation process.

Case Summary 12

My most successful mediation was also the hardest to settle. The CP was a newly promoted Black supervisor for a large company who felt that he had been discriminated against in the manner in which he had been trained for this new position. The CP based this belief on his observations as to how previous white supervisors had been trained. While not expressed, it was clear that the CP believed that he had suffered from discrimination throughout his career with the RP company.

The RP, who was represented by a Human Resources person with no individual stake in the earlier actions of the RP, seemed honestly amazed that the CP felt that he had been discriminated against. The RP expressed the fact that the company valued the CP highly.

Unfortunately, even in light of the RP's affirming posture, the CP, who was a very bright, articulate individual, took the position that he no longer trusted the RP's promises. After almost seven hours of mediation, a series of steps necessary for full training of the CP were worked out between the parties. However, the CP was not willing to settle until the first step which involved a meeting to assess the additional training required, was completed. A two week time frame was agreed upon. At the end of that time, I held additional telephone sessions with both parties. While the CP was now agreeable to settle based on the RP's promise that the other steps would be accomplished in a timely fashion, there was some dispute as to the final wording of the settlement agreement. That took another week to resolve via phone calls and faxes. Finally the settlement agreement was signed.

What made this mediation so satisfying was that after the process was completed, the CP had regained at least some confidence in the good intentions of the RP, and the RP had become much more sensitized to the ways in which minorities perceive the existence of systemic discrimination.

This mediation served to open lines of communication between employer and employee in a way that should benefit not only the CP but other employees at many different sites under the RP's control.

Case Summary 13

CP filed under Title VII on the basis of sexual discrimination. She was employed as a computer operator. She had been changed to the night shift. She alleged that a less

senior, less experienced male employee had been given her shift.

The mediation gave CP the opportunity to air her concerns, which, as soon became apparent, extended far beyond the shift change. She described a hostile work environment where sexual harassment was a recurrent problem. In addition, she raised safety concerns and expressed doubts that the employer was following OSHA guidelines. From her point of view, lifting heavy objects was not only a problem for female employees but also for male employees; all needed proper safety equipment to do that part of the job. Thus, the allegation that unequal demands were placed on the sexes at her worksite was intertwined with concerns as to workplace safety.

RP's headquarters were out-of-state. The person charged with overseeing personnel matters seemed genuinely interested in discovering the problems existing at the other locations. Mediation afforded him this opportunity.

In the Settlement Agreement, RP agreed to specific provisions setting out meeting dates and times for teleconferences to improve communication. RP promised to address the safety concerns. As RP observed, it was extremely beneficial for the employer to learn of these critical problems now while there was time to address them rather than at the end of a long, drawn-out investigation.