The Use of Mediation in Employment Discrimination Cases

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I. INTRODUCTION

Over the last thirty years, the number of individuals protected in some fashion or another from discrimination has expanded to cover a large segment of the working population. When an employee is terminated, the reaction of some protected individuals is to file a lawsuit claiming discrimination. Because of the large number of employment discrimination cases filed, the Equal Employment Opportunity Commission ("EEOC"), the government agency entrusted with enforcing the various anti-discrimination statutes, has turned to alternative forms of dispute resolution to reduce its own backlog and the backlog of the court system generally. One method the EEOC has utilized recently to reduce its backlog is mediation. Mediation itself is not a bad alternative to resolving disputes; however, in the employment discrimination setting, mediation poses both real and theoretical problems.

This Article will address the issues noted above. Part II discusses the realities for employers and employees created by the increased filing of employment discrimination claims. Part III encapsulates the procedural movement of a claim

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2. After all, no one wants to admit that his termination was justified, so not only do anti-discrimination laws provide relief to those discriminated against, but such laws also allow individuals to blame someone else for their termination. Just as there are employers that escape liability for discriminatory conduct, so too are there employees who receive unjust compensation due to the nuisance value of a discrimination charge.
4. These alternative forms of dispute resolution can include conciliation, arbitration, summary jury trials, negotiation and, the topic of this Article, mediation.
through the EEOC. Part IV summarizes the mediation process and notes why mediation is one of the methods used to deal with these claims. Part V highlights the pros and cons associated with the mediation of employment discrimination claims. Part VI discusses the inherent tensions between the goals of mediation and the goals of the anti-discrimination laws, as well as the inherent tensions that naturally flow from added government regulation on our capitalist economic structure. Part VII sets out alternative solutions other than mediation to deal with employment discrimination cases. Finally, Part VIII concludes this Article by stating that although mediation should not be used for employment discrimination cases, the fact that it is, and will continue to be used, should be accepted by parties and practices and should be adjusted accordingly.

II. THE DRASTIC INCREASE IN THE FILING OF EMPLOYMENT DISCRIMINATION CASES

In many ways, the anti-discrimination laws\textsuperscript{6} are like Pandora's Box\textsuperscript{7}—once Congress opened the lid of employment discrimination, there was essentially no going back to the universal employment at-will doctrine. By creating causes of action for real and perceived wrongful employment acts, Congress allowed employees to flock in droves to the courts for vindication or for dejection, depending on how you view the proliferation of discrimination cases. This occurrence was certain to happen and is vividly demonstrated by the sheer volume of employment discrimination cases filed over the last thirty years.\textsuperscript{8}

The number of causes of action available to a terminated employee can include the following litany of claims: (1) an unemployment insurance claim, (2) a grievance claim, (3) an arbitration claim, (4-5) federal and state age discrimination claims, (6-7) federal and state sex discrimination claims, (8-9) federal and state race discrimination claims, (10-11) federal and state national origin discrimination claims, (12-13) federal and state disabilities discrimination claims, (14) a union activity discrimination claim, (15) a federal section 1981 claim, (16) an ERISA section 510 claim, (17-18) federal or state whistleblower claims, (19) a common law public policy claim, (20) a libel claim, (21) a slander claim, (22) an intentional infliction of

\textsuperscript{6} For the entirety of this article, the phrase "anti-discrimination laws" encompasses the laws established by the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Civil Rights Act of 1991, the Equal Pay Act of 1963, the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990.

\textsuperscript{7} The myth of Pandora's Box involves the epic struggle between good and evil. According to the myth, Zeus, the king of the gods, created Pandora for Epimetheus as a gift. Zeus also gave Pandora a gift, the legendary box. When Zeus gave Pandora the box, he instructed her not to open the box because it contained "hope." In time, Pandora's curiosity got the best of her and she opened the box, releasing all the evils upon mankind. For opening the box, Pandora is led by Hades, god of the underworld, throughout the world to see all the harm the evils had caused man. At the point when all hope seems lost, "hope" itself escapes from the box and forces all the evils back into the box. See 1 ROBERT GRAVES, THE GREEK MYTHS 142 (The Folio Society 5th ed. 1998).

\textsuperscript{8} See infra notes 10-14 and accompanying text.
emotional distress claim, (23) a negligent infliction of emotional distress claim, (24) a tort claim and (25) a retaliation claim. 9

In terms of cases filed, the federal courts have seen more than a 2,000 percent increase in the number of employment discrimination cases, 10 as compared to only a 125 percent increase in the general federal civil caseload. 11 The EEOC reports that it receives an average of 80,000 charges of discrimination per year. 12 This large number of yearly filed claims creates a backlog at the EEOC of roughly 52,000 claims as of 1999. 13 Congress has allocated additional resources in order to meet these new claims. 14 Two important questions emerge: where do these claims come from, and why has the number skyrocketed over the last thirty years?

The main reason, and the simplest reason, that accounts for the increase in discrimination claims is due to the expanded coverage of protected individuals beginning with the Civil Rights Act of 1964. 15 At both the federal and state level, legislatures have granted a variety of individuals protection from discrimination. 16 As a result, "over seventy percent of the total labor force is protected both by federal employment discrimination law and by EEOC enforcement." 17 In addition, the United States Supreme Court has expanded the number of individuals protected by anti-discrimination laws by interpreting Title VII to include sexual harassment, reverse discrimination and disparate impact discrimination. 18

Other reasons attributable for the increase in employment discrimination claims filed have nothing to do with Congressional policy or judicial expansion of statutory rights, but rather, have everything to do with pure numbers. First, there are more law schools in 1997 than in 1964. 19 Because there are more law schools, there are more lawyers practicing law. 20 With so many lawyers saturating the market, it should be

13. See Steven A. Holmes, EEOC gets back on road to respect, DENV. POST, May 4, 1999, at 20A.
14. See id.
15. See Belt, supra note 1, at 155.
16. See id. at 155-56.
17. Id. at 156.
19. Currently, there are 182 American Bar Association accredited law schools in America. See American Bar Association, Alphabetical List of ABA Approved Law Schools (visited Jan. 16, 2000) <http://www.abanet.org/legaled/alpha.html>. A large number of these law schools came into existence after the Civil Rights Movement of the 1960s. For example, Ohio has nine law schools, five of which pre-date 1960 and four of which post-date 1960.
20. There are roughly 40,000 new attorneys graduating from law school every year. Ohio, which only represents four percent of the United States population, is served by nine law schools and graduates roughly 1,800 new attorneys per year. See Government Information Sharing Project, General Profile
no surprise to see an increase in employment discrimination claims,\textsuperscript{21} which the United States has indeed seen.\textsuperscript{22} One lawyer noted that employment discrimination law is "one of the most lucrative for many and an attraction for scores of entrepreneurial lawyers. As many law school graduates cannot find work because of diminishing job opportunities, a flood of new attorneys has entered into the field."\textsuperscript{23} These new attorneys are most likely plaintiff's attorneys\textsuperscript{24} because, while it is easy to find a "wronged" employee to represent, it is difficult to find an employer willing to employ a novice attorney without the experience and proven reputation to defend an employment discrimination case. According to Fitzpatrick, these plaintiff's attorneys are the individuals filing "shotgun complaints that plead every imaginable claim that might somehow arise under a termination of employment."\textsuperscript{25}

Second, one commentator observed that a large number of employment discrimination claims filed "are at best unprovable . . . and, not infrequently, lack merit."\textsuperscript{26} These unprovable or meritless cases undermine the legitimate claims because the employer, its attorney and the EEOC representative become tired of hearing claimants "cry wolf."\textsuperscript{27} The problem is that many plaintiff's attorneys file baseless claims because they know the system and recognize the value of nuisance as compared to the cost of employer vindication.\textsuperscript{28} After all, an innocent employer could incur upwards of $100,000 in attorney's fees and lots of bad publicity just to be vindicated in a Motion for Summary Judgment; whereas, the employer could have settled the case for $5,000 before incurring even $1,000 in attorney's fees or any bad publicity. Hence, a smart plaintiff's attorney will file as many lawsuits as possible, knowing full well that an adequate nuisance settlement will be reached in most of

\textsuperscript{21}Compare with John J. Donohue III & Peter Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 STAN. L. REV. 983, 984-85 (1991) (postulating that as minorities and women enter the workforce in greater numbers, discrimination litigation likely will increase).

\textsuperscript{22}See Brigid McMenamin, Un-natural justice, FORBES, May 5, 1997, at 122, 126.


\textsuperscript{24}See McMenamin, supra note 22, at 128; supra note 20.

\textsuperscript{25}Fitzpatrick, supra note 23, at 15.

\textsuperscript{26}Marjorie A. Silver, The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement, 55 GEO. WASH. L. REV. 482, 532 (1987).

\textsuperscript{27}This concept undermines the court system's role in employment discrimination cases. The civil rights movement felt that the courts offered the only real protection for discriminated minorities. Now, partially due to the crying wolf effect, the courts and the EEOC have become less protective of discrimination claims. This degeneration is evidenced by the high number of claims dismissed by the EEOC and by the increased number of employers prevailing in a motion for summary judgment.

\textsuperscript{28}An illustration of this practice occurs when a plaintiff's attorney files a lawsuit and then settles the case before the answer is even filed or discovery commenced. Although the settlement might be for $5,000 or less, the plaintiff's attorney did little, if any, work and still collected his third of the settlement.
those cases to sustain a nice livelihood. This reality, saddled with the procedural hurdles set-up by the EEOC, render anti-discrimination laws coercive to employers. 29

Finally, the Civil Rights Act of 1991 includes a provision that allows for claims for punitive damages under Title VII, which encourages employees, whether wronged or not, and plaintiff’s attorneys to file suit every time a termination occurs.

III. THE PROCEDURAL FLOW OF A CLAIM THROUGH THE EEOC ADMINISTRATIVE PROCESS

Procedurally, a claim of discrimination filed with the EEOC goes through certain steps. First, the claim is filed by filling out a form and submitting a statement describing the alleged discriminatory conduct. 30 If a Charging Party has documentation to support the allegation of discrimination, those documents are submitted as well. 31 An Intake Investigator then evaluates the claim and makes a determination as to the likelihood of actual discrimination. 32 If the Intake Investigator believes that it is more likely than not that discrimination occurred, then the claim is assigned “A” status; if the Intake Investigator believes that further information is required before a determination can be made, then the claim is assigned “B” status; if the Intake Investigator believes that it is more likely than not that no discrimination occurred, then the claim is assigned “C” status. 33 Because the status assignment is based solely on a Charging Party’s statement, which depends largely on whether or not the Charging Party is able to articulate the alleged discrimination, or say the magic words, in a manner that persuades the Intake Investigator to assign an “A” or “B” status, this method of evaluation is problematic, and certainly not in keeping with our justice system’s reliance on the adversarial process.

After a claim is assigned a status, several events occur. If the claim was given a “C” status, it is dismissed by the EEOC and a Right to Sue Letter is issued to the Charging Party indicating that the Charging Party may sue in Federal court. 34 If the claim was given an “A” status or a “B” status, the mediation option is offered to the

29. For example, when current Supreme Court Justice Clarence Thomas first became Chairman of the EEOC, he noted that “the EEOC’s enforcement methods have gone too far. . . . The process itself becomes a punishment for employers. We’ll drag you through endless discovery and bankrupt you if you don’t do what we want. I can’t go for that kind of blackmail. Even the most discriminatory employer has rights.” See Prentice-Hall Interview with EEOC Chairman Clarence Thomas: New EEOC Chairman Sees Agency Management Reforms as Way to Improve Basic Civil Rights Enforcement, COMPLIANCE REP. MANUAL BULL. NO. 5 (EEOC, Washington, D.C.), 1982.

30. See Telephone Interview with Loretta Feller, ADR Coordinator for the EEOC (Apr. 23,1997) (on file with author) [hereinafter Interview].

31. See id.

32. See id.

33. See id.

34. See id.

35. See id.

36. Rarely will an employee obtain documents substantiating alleged discrimination.

37. See Interview, supra note 30. The Right to Sue Letter allows the claimant to file a lawsuit in the courts without running into jurisdictional problems.
Charging Party. If mediation is selected by the Charging Party and the Employer-Respondent agrees to mediate, then the EEOC sends the claim to an independent mediator. Again, at this point in the process, the only information on record is the statement by the Charging Party and any other information submitted by the Charging Party. If mediation is rejected by the Charging Party, then the EEOC begins its investigation of the claim.

If settlement is reached in mediation and the settlement does not appear to violate EEOC policy, then the claim is dismissed. If settlement is not reached in mediation, the claim is returned to the EEOC for investigation. After the EEOC concludes its investigation, it either finds no reasonable cause for discrimination and issues a Right to Sue Letter to the Charging Party or it sets the claim for conciliation, which is a more intense form of mediation. If settlement is not reached at conciliation, the EEOC finds reasonable cause for discrimination and either issues a Right to Sue Letter to the Charging Party, thereby allowing the Charging Party to file a lawsuit, or the EEOC files a lawsuit on behalf of the Charging Party.

IV. WHY IS MEDIATION UTILIZED TO REDUCE THE NUMBER OF EMPLOYMENT DISCRIMINATION CLAIMS?

Mediation is an informal process of facilitation "through which two or more disputing parties negotiate a voluntary settlement of their differences with the help of a . . . mediator." The process of mediation involves several stages which include "introduction of the process by the mediator[,]" "presentation of viewpoints by each of the parties[,]" focusing of issues, "emotional expression by the parties[,]" "caucusing to discuss confidential information[,]" "exploration of alternative solutions" and entering into a settlement agreement.

During the mediation, mediators will "work 'to establish their integrity, competence and concern for the parties' and their positions." Mediators will try to bring out the facts and issues "through the use of 'active' listening and open-

39. See Interview, supra note 30.
40. See id. Because it is outside the scope of this Article, the investigation process will not be discussed.
41. See id. The EEOC will review any settlement to insure "consistency" with the relevant statute. However, no one is sure what "consistent" means.
42. See id.
43. See id.
44. Conciliation, unlike mediation, occurs much later in the claim process. Hence, by the time conciliation is ordered, the employer-respondent should have had plenty of time to conduct its own investigation and make an internal determination as to the legitimacy of the discrimination claim.
45. See Interview, supra note 30.
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ended questions . . . ." There This process helps the one disputant understand the position and feelings of the other disputant. Although all mediators are different, most mediators use caucuses to "discover additional information that the party did not want to share in the joint session . . . [and to] challenge the party's position and attempt to persuade him or her to hear and understand the other side's viewpoint." "Through a series of these joint and separate sessions, the mediator structures the parties' negotiations, encourages cooperative bargaining, and helps them reach a resolution that is satisfactory for all concerned." It is this author's position that mediation is utilized by the EEOC to reduce the number of employment discrimination claims for three reasons: (1) each party to mediation usually gets something out of it, (2) it pre-empts formal discovery and (3) it is viewed as a win-win-win-win mechanism by employees, employers, the EEOC and the judicial system. Pursuant to Section 118 of the Civil Rights Act of 1991, the EEOC is authorized to use alternative dispute resolution, including mediation.

A. Something Is Better than Nothing

Whereas litigation is a "winner-take-all" endeavor, mediation provides each party an opportunity "to achieve some benefit." The benefit to employers is found in lower settlements where discrimination would be found were the case to go beyond mediation; the benefit to employees is found in higher settlements where discrimination would not be found were the case to go beyond mediation. Both parties benefit in the early resolution of these disputes. In a juxtaposed position, the burden on the employer is found in higher settlements where discrimination would not be found were the case to go beyond mediation; the burden on the employee is found in lower settlements where discrimination would be found were the case to go beyond mediation.

The settlement rate for employment discrimination claims that are sent to mediation is greater than fifty percent. However, of all claims filed with the EEOC where a finding is made, ninety-five percent are dismissed without a finding of reasonable cause. Hence, the number of claims (reasonable cause claims) where employees settle claims for less than what those claims are actually worth is small.

49. Id.
50. Id.
51. Id. at 32.
when compared to the large number of claims (the ninety-five percent no reasonable cause claims) where employers settle those claims for more than what that claim is actually worth. 57

Mediation also gives mediating parties a high level of satisfaction. In one post-mediation study, ninety-two percent of participants were satisfied with mediation and "eighty percent said they would try mediation again." 58 These numbers, while impressive, do not really say all that much because no one knows what results would have transpired in a particular case had the case been litigated or settled later. 59 Thus, without any type of baseline comparison, we do not know if the participants who said they were satisfied would have been equally, more or less satisfied with litigation. Presumably, satisfaction levels would be tied to the amount of money awarded. One wonders if the high satisfaction rates are due to the juxtaposition noted above--employees receiving more money than they should; employers paying less money than they should.

B. The Pre-emption of Discovery by Early Mediation

The mediation of employment discrimination cases under the EEOC will occur prior to any meaningful discovery by either side. EEOC guidelines require mediation within sixty days of the filing of the charge. 60 This early mediation requirement will effectively prevent participants from accurately gauging the merits of the claim because little or no formal discovery will have taken place within two months of the EEOC claim. The only real information participants will have at the mediation stage is the discrimination form filled-out by the Charging Party, as well as the Charging Party's statement describing the discriminatory conduct and any documentation submitted by the Charging Party. 61 As a result, the danger always

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57. One could argue that this scenario only plays out if defense attorneys fail to gauge accurately the merits of various claims. However, because mediation occurs so early in the dispute process, defense attorneys are unable to conduct a proper investigation to ascertain the merits of a given claim. See The U.S. Equal Employment Opportunity Commission, Questions and Answers About Mediation (last modified Feb. 11, 1999) <http://www.eeoc.gov/mediate/qanda.html>. This problem exists independent of the circumvention of the formal discovery process due to early mediation intervention. Without both a proper investigation and formal discovery, uninformed settlement decisions will be made more often than not.


59. This problem underlies the ability to measure the true satisfaction of mediation. Because neither party really knows what would have happened had the case been litigated, mediation cannot validly measure party satisfaction. This author submits that if a plaintiff was told at the conclusion of mediation that a substantially similar claim was litigated with a much larger monetary award, then the plaintiff would not be satisfied with mediation as parties seem to be now. This result is obvious. Thus, when proponents of mediation wrap themselves around high satisfaction rates, they are really wrapping themselves around a vacuum.


61. See Interview, supra note 30.
exists that one party will use mediation in bad faith as a "means to do quick, inexpensive discovery."  

This pre-emption of discovery hurts only the search for truth because (1) during mediation, neither party has a duty to disclose any damaging information that would otherwise be discoverable during formal discovery and (2) early mediation inhibits realistic measurement of each party's side because, unlike formal discovery, mediation does not permit "attorneys . . . [to] acquire a significant amount of inadmissible information. . . . Therefore, their negotiations may not be governed by a better sense of what actually happened . . . ." Pre-empting formal discovery facilitates the settlement of claims based on little or no information and substitutes the search for truth with the search for settlement.

Pre-empting discovery, however, does allow parties to "avoid the disclosure of additional evidence that might impede settlement." As discussed below in Part VI, mediation does not search for truth, rather mediation searches for satisfaction. Our refined, centuries old legal system is being displaced by a form of dispute resolution where hiding information is viewed as proper conduct aimed at promoting settlement, regardless of the truth.

This abandonment of the search for truth and justice was noted by Owen M. Fiss, who stated that

[s]ettlement is for me the civil analogue of plea bargaining: consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.

A similar thought was echoed by Chief Judge Harry T. Edwards who asked readers to "[i]magine, for example, the impoverished nature of civil rights law that would have resulted had all race discrimination cases in the sixties and seventies been mediated rather than adjudicated."

In our rush for the quick resolution of employment discrimination cases and for the reduction of backlogged court dockets, we are forgetting two of the principles of our legal system--the overriding importance of the search for truth, and the ascertainment of justice. As so eloquently noted by Chief Judge Edwards, "[i]f . . . reform benefits only judges, then it isn't worth pursuing. If it holds out

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64. Evans & Sloan, supra note 10, at 767.
65. See infra notes 109-24 and accompanying text.
progress only for the legal profession, then it isn't worth pursuing. It is worth pursuing only if it helps to redeem the promise of America. 68

C. If Everyone Wins, Does Anyone Lose?

When claims are handled via mediation and settlement is reached, the assumption is that all parties come out winners. The employee wins because he receives something—reinstatement, money or a good reference; the employer wins because it presumably saves large amounts of money in litigation costs and attorney's fees; the EEOC wins because it has one less case to investigate; and the courts win because now one less case clogs the docket. 69 Because both sides' attorneys have invested little time or resources at such an early stage, both attorneys walk away with a nice day's work worth of pay and room for yet another employment discrimination case.

Of course, the loser in the big picture is the American legal system. The reasons for this loss are discussed in full in Part V.B.

V. THE PROS AND CONS OF MEDIATING EMPLOYMENT DISCRIMINATION CASES

A. The Pros of Mediating Employment Discrimination Claims

Proponents of mediating employment discrimination cases invariably cite several benefits derived from such activity. These benefits include EEOC and court cost savings, 70 quicker resolution of disputes, 71 amicable dealings, 72 preservation of relationships, 73 reduction of backlogged dockets, 74 greater control leading to higher self-esteem and self-confidence, 75 and nullifying entrenchment of positions before it happens. 76 Other benefits include the "value of a compromise . . . [and] the value of nonconfrontation." 77

Several of these benefits, however, have yet to undergo intense scrutiny or intellectual debate in order to determine if such claimed benefits are derived from mediating employment discrimination claims. Those benefits that have undergone intense scrutiny or intellectual debate are revealed to be less beneficial than the claims of mediation proponents.

68. Id. at 684.
69. See Silberman, supra note 60, at 1008.
71. See id.
72. See id. at 33.
73. See Silver, supra note 26, at 587.
74. See Ettingoff & Powell, supra note 54, at 1141.
75. See Silberman et al., supra note 58, at 1537.
76. See Hodges, supra note 53, at 1069.
77. Silver, supra note 26, at 528.
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In fact, an intense empirical study was conducted that measured the impact that alternative dispute resolution schemes had on caseloads, costs and delays. The conclusion of that study was that "ADR does not have any measurable impact on caseloads and delays . . . [and that] claims concerning ADR's potential to reduce costs and delays are greatly exaggerated." In comparing districts that used ADR schemes to those districts that did not use ADR schemes, the study revealed that ADR districts "are neither more efficient nor more effective in handling their caseloads or inducing settlements." The author reviewing that study posited that "the time has long since come, not for expanded use of ADR as a court management tool, but to question more seriously the premises underlying the ADR movement. . . . [T]he time has come for more exacting scrutiny of ADR in the federal courts to determine whether ADR is the salvation of federal civil litigation--or if the emperor has no clothes."

As for the preservation of relationships, commentators have noted that employment discrimination claims have shifted from failure to hire claims to wrongful termination claims. In 1966, failure to hire claims outnumbered wrongful termination claims by fifty percent, but by 1985, wrongful termination claims outnumbered failure to hire claims by 300%. This dramatic shift is attributed to the success of the anti-discrimination laws. Because wrongful termination claims are easier to detect and to prove than failure to hire claims, "the probability of being sued for [a wrongful termination] violation is roughly six times as great[,]" which intuitively means that there should be (as there has been) an increase in wrongful termination litigation. Thus, the alleged benefit of preserving relationships via mediation are either overstated or are increasingly not relevant because an employer that terminates an employee has no use for the preservation of a relationship with the terminated employee; rather, the employer's position will focus more on monetary or good will settlements, not reinstatement.

Finally, a downside to the early use of mediation to prevent entrenchment is that attorneys will not have had time to evaluate properly their cases in order to gauge the strengths and weaknesses of their client's position. Not only does this decrease the attorneys' abilities to engage in settlement discussions, but it also pushes the attorneys dangerously close to committing malpractice under the Model Rules of Professional Conduct. It is one thing to enter into settlement and perform poorly for one's client; it is quite another thing to enter into settlement when one does not even know most of the facts pertaining to a particular matter. This ignorance is especially true in the employment setting where decisions are highly fact-based.

79. Id. at 915-16.
80. Id. at 921.
81. Id. at 957.
82. See Donohue & Siegelman, supra note 21, at 1015.
83. See Belt, supra note 1, at 158 n.66.
84. See Donohue & Siegelman, supra note 21, at 1014-15.
85. Id. at 1017 n.107.
86. See Hodges, supra note 53, at 1069.
87. See id.
88. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.1, 1.3 (1999).
Hence, a good advocate should at a minimum conduct an internal investigation, interview relevant witnesses, obtain affidavits from supporting witnesses, review the hiring and termination practices of the employer, ascertain what the make-up is of the employer’s employees who fall under the relevant protected status and review all employee records.

B. The Cons of Mediating Employment Discrimination Claims

The opponents of mediating employment discrimination claims submit that the benefits derived from mediation are more than offset by the burdens imposed by mediation. The burdens of mediation, generally, include the deprivation of due process, the denial of the affirmation of public rights, the unequal bargaining powers between employers and employees, the pre-wired biases of the mediators (i.e., won’t settle if the claim is strong), the danger of physical and psychological harm due to the volatile nature of the dispute, the undermining of the guarantee to one’s day in court (justice), the undermining of the discovery process and prevention of public stigmatization of discriminating employers (i.e., the privacy of mediation, unlike litigation, precludes the society from expressing its moral outrage).

The American legal system has undergone many refinements over its two-hundred-plus year history. Those refinements include the adoption of rules of procedure and evidence. Such rules promote a legal system dedicated to the search for truth and the attainment of justice. "The great procedural reforms of this century, civil discovery and long-arm jurisdiction, were likewise intended to equalize power and opportunity among litigants." Mediation contains no such safeguards and undermines the rules of procedure and evidence by discarding the discovery process, a process vital to ascertaining the strengths and weaknesses of one’s case, and by circumventing the evidence rules. As noted by one commentator, there are mediation programs where “mediators will not encourage a settlement if an unrepresented charging party has a strong case.” This blatant bias towards one party indicates the procedural pitfalls of mediation—pitfalls not tolerated in our legal system. In mediation, the search for satisfaction replaces the search for truth, so anything becomes relevant, including a disgruntled employee’s emotions, psychological and physical failings, historical baggage and whatever else that

89. See Riskin, supra note 70, at 34-35 (discussing the cons of mediation, generally).
90. See Edwards, supra note 67, at 676.
91. See Silver, supra note 26, at 553.
92. See Baar & Zody, supra note 62, at 40.
94. See Silver, supra note 26, at 544.
97. Id. at 1401.
98. See id. at 1374.
employee feels is important. The trouble caused by this total "air-out" is illustrated when an innocent employer is hauled into mediation (or court) due to an employee's hurt feelings after the employee is terminated.

Removing employment discrimination claims from the court system prevents the articulation of rules of law (norms) that society uses to ensure proper behavior. Without which discrimination can be kept private ensuring that discriminating employers will continue to conduct their business in immoral and divisive ways without public censure or reproach. Courts are also becoming leery of plaintiffs, given the increase in filing of nuisance-value cases. For many years, the wronged plaintiff proclaimed: "I'll get my day in court!" This psychological vindication provided Americans with the reassurance that we were all equal before the law. As Chief Judge Edwards noted above, what would America look like today if the seminal cases in our jurisprudence had been mediated?

Lastly, mediation fails to balance the inequalities inherent in the employment setting and, due to the personal and offensive nature of employment discrimination, places parties in dangerous circumstances. Because mediation focuses more on the satisfaction of parties and not on the rights of the parties, power imbalances are preserved that make negotiating more favorable to the stronger party. Several commentators have argued, based on social science studies, that "when confronting opponents of higher status or power, minorities would be well advised to opt for formal adjudication and should not be forced by the courts [or the EEOC] into informal proceedings." The main argument made on behalf of this position is that

[a]n imbalance of power can distort the settlement process in a number of ways: (1) the poorer party will be less able than the wealthier party to predict the outcome of litigation and thus will be in an inferior bargaining position; (2) the poorer party may be in great need of damages and thus willing to settle for a smaller sum rather than wait for a larger recovery through litigation; and (3) the poorer party may be forced to settle simply because she cannot afford to hire counsel or finance litigation, regardless of the merit of her claim.

This power imbalance also causes problems when issues are highly volatile and divisive. Under most circumstances, opposing parties in litigation have little, if any, actual contact with each other, and when the parties do see each other, it is in a courtroom under very formal settings. This separation reduces the potential for

100. See Riskin, supra note 70, at 34.
101. See Silver, supra note 26, at 525.
102. Edwards, supra note 67, at 676.
103. See Donohue, supra note 95, at 1605.
104. See Brown v. Board of Educ., 347 U.S. 483 (1954) (holding that the segregation of black and white students can never achieve equality).
106. See Irvine, supra note 48, at 36.
107. Delgado et al., supra note 96, at 1359.
108. Id. at 1398.
violence. In mediation, no such separation exists, increasing the likelihood of violence, especially when one party feels overwhelmed or slighted.

VI. THE INHERENT TENSIONS CREATED BY USING MEDIATION IN EMPLOYMENT DISCRIMINATION CASES

A. The Goals of Mediation Versus the Goals of the Anti-Discrimination Laws

The primary goal of the anti-discrimination laws is the elimination of discrimination through EEOC and court action. On the other hand, the primary goal of mediation is the satisfaction of the parties. The inherent tension created as these two goals “battle” for primacy is vividly illustrated by the mediated settlement of a claim in which the employer gets away with discrimination, but the good reference letter gained by the employee satisfies him completely. Although satisfaction is reached by the parties, discrimination has not been eliminated, rather, it has been affirmed.

The opposite is true where the parties litigate a claim and the result is that the employer is found “guilty” of discrimination, but the employee is highly unsatisfied with the outcome because the discrimination was not found by the jury to be egregious enough to award a large amount of money. Here, although satisfaction is not reached by either party, discriminatory conduct has been found and the employer will adjust its future conduct accordingly.

Mediation is a process “in which ‘the emphasis is not on who is right or wrong . . . but rather upon establishing a workable solution that meets the participant’s unique needs.’” This alternative focus wreaks havoc in the employment setting because innocent employers settle nuisance claims where no discrimination occurred and “guilty” employers escape liability where discrimination did occur. As noted above, suave plaintiffs’ attorneys will manipulate the system by filing EEOC charges and mediating without filing an actual lawsuit. Conversely, wealthy employers may abuse mediation in order to avoid costly litigation and maintain an unspoken policy of discrimination.

To the contrary, litigation facilitates the attainment of the anti-discrimination laws’ goal to eliminate discrimination from the employment setting. This facilitation occurs because, unlike mediation, litigation does “set precedents, contribute[s] to the development of clear, consistent legal standards to govern future conduct, [and] reach[es] beyond the particular dispute to identify or eradicate class-based discrimination.” Likewise, the existence of litigation activates the attorney

109. See Silver, supra note 26, at 487.
110. See id. at 541.
111. Nelle, supra note 105, at 291.
112. Silberman et al., supra note 58, at 1557.
reprimand measures, which reduce the likelihood of an overzealous plaintiffs’
attorney filing a baseless or frivolous lawsuit.\footnote{113} Underlying the above tension is the inherent tension between the mediating
individual’s ability to control his own case and the goal of the anti-discrimination
laws to root out pattern and practice discrimination. The informality of mediation
and its focus on a particular transaction reduces the EEOC’s ability to “uncover
larger patterns of discrimination”\footnote{114} and, thereby, undermines the goal of
discrimination elimination.\footnote{115} This assertion is supported by a study that found that
the EEOC failed to find pattern and practice discrimination where it existed because
mediation poorly served “the larger goals of civil rights programs by focusing
narrowly on the resolution of individual disputes.”\footnote{116} However, this country does
have an individualist bent that supports the idea that the individual should control his
own case, regardless of the goals of the anti-discrimination laws.

Related to this tension is the inherent tension between the goals of mediation
and the goals of the anti-discrimination laws, specifically in regard to the voluntary
settlement aspect of mediation versus the compliance with the law aspect of the anti-
discrimination laws. In theory, parties mediate voluntarily\footnote{117} and can draft
settlements without any adherence to the statutory purposes of the anti-
discrimination laws.\footnote{118} Unlike court actions, these settlement agreements offer “no assurance[s] that the legislative or agency-mandated standards have been
followed.”\footnote{119}

In addition, “the dispute-resolution story trivializes the remedial dimensions of
lawsuits and mistakenly assumes judgment to be the end of the process.”\footnote{112} The fact
is that in many circumstances, the court supervises the employer’s conduct to ensure
total compliance. Mediation simply does not have this protection because the
settlement reached is self-regulating. Only if one party fails to meet a requirement
of the settlement does the court potentially intervene--to clean up the mess after it
has been created when the legitimacy for court involvement is at its lowest.\footnote{121
\footnotesize\textsuperscript{113.} The reprimand measures include a Rule 11 motion, a Rule 37 motion, a 28 U.S.C. § 1927 motion
and a 42 U.S.C. § 2000e-5(k) motion. These measures are not available unless a complaint has been
filed. Hence, the only reprimand measure available is the Model Rules of Professional Conduct
grievance, which most attorneys refrain from using due to the tendency to regulate via the elimination
of, what this author calls, good faith conduct in future interactions. This phrase refers to the practice of
attorneys to treat opposing attorneys fairly and amicably due to the reality that both attorneys will likely
face each other again in the future. An attorney who fails to behave accordingly will find himself
opposite an attorney he mistreated in a previous encounter who will not be very cooperative should the
misbehaving attorney request an extension, a continuance or other measures where opposing party
cooperation is useful.

\footnotesize\textsuperscript{114.} See Silver, supra note 26, at 524.
\footnotesize\textsuperscript{115.} See Mark D. Klimek, Discrimination Claims Under Title VII: Where Mandatory Arbitration
\footnotesize\textsuperscript{116.} Eric K. Yamamoto, ADR: Where Have the Critics Gone?, 36 SANTA CLARA L. REV. 1055, 1060
(1996).
\footnotesize\textsuperscript{117.} See Silberman, supra note 60, at 1008.
\footnotesize\textsuperscript{118.} See Interview, supra note 30.
\footnotesize\textsuperscript{119.} Edwards, supra note 67, at 678.
\footnotesize\textsuperscript{120.} Fiss, supra note 66, at 1082.
\footnotesize\textsuperscript{121.} See id.
A final tension, intrinsically related to all three of those discussed above, is the tension between mediation's search for satisfaction and anti-discrimination laws' search for justice. Proponents of mediation invariably cite to the high satisfaction rates elicited from participants in mediation and to the reduction in backlogged dockets because of mediation—as if participant satisfaction rates and happy judges are the indices with which we measure the health of our legal system. Such minimalist thought obscures the point of the anti-discrimination laws—seeking justice for the oppressed and disenfranchised.

As Owen Fiss noted, the job of the courts is not to maximize the ends of private parties, nor simply to secure peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes. . . . To be against settlement is only to suggest that when parties settle, society gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone. The settlement of a school suit might secure the peace, but not racial equality. Although the parties are prepared to live under the terms they bargained for, and although such peaceful coexistence may be a necessary precondition of justice, and itself a state of affairs to be valued, it is not justice itself. To settle for something means to accept less than some ideal.

It is this notion of justice that underscores the societal importance of our anti-discrimination laws, not participant satisfaction or judicial economy. Indeed, the notion of justice guides us to implement our anti-discrimination laws through litigation in order to achieve justice as the desired end. Mediation as a means fails in this regard, which does not make it a bad tool for other areas of law, just a bad tool for employment discrimination claims; the traditional court system, however slow and purposeful it might be, seeks and secures justice as an end in itself.

B. The Inherent Tension Between Government Regulation and a Capitalist Economic System

An implicit theme of the anti-discrimination laws is the equalization of all Americans in their private rights. Such a theme, albeit noble, conflicts with the realities of a capitalist economic system. To ensure compliance, Congress has created a body of anti-discrimination laws, and the EEOC has promulgated mountains of regulations. A study by Arthur Andersen and Company revealed the associated costs to private industry because of the various regulations. These associated costs included $6.5 billion in compliance cost, $1 billion in

122. See Hodges, supra note 53, at 1057.
123. See Fiss, supra note 66, at 1086.
124. Id. at 1085-86.
125. See Donohue, supra note 95, at 1600.
126. See id.
administrative and litigation costs, and $80 billion in productivity loss cost. This assessment does not include the associated costs to private industry because of state laws and regulations. A recent study indicated that state laws and regulations increased labor costs by ten percent. One free market commentator noted that such laws are “a new form of imperialism that threatens the political liberty and intellectual freedom of us all.”

One of the key critiques by the free market thinkers posits that some discrimination is rational and, as such, should not be illegal. This criticism falls mainly on the passage of the Age Discrimination in Employment Act, which consumes “considerable resources for the purpose of defining and complying with antidiscrimination laws that lack a compelling theoretical justification.” Such laws only serve to “disrupt useful business practices, generating transfers of wealth of uncertain magnitude.” Mediation helps to minimize this disruption and further acts of rational discrimination by allowing employers to settle employment discrimination claims, which the employer felt made strong economic and productive sense, before EEOC or court action. Such a result seems to subvert the aims of the anti-discrimination laws. Without mediation, employers, at a minimum, must deal with the investigative strong-arm of the EEOC pending agency resolution and then typically face a court action and the added costs of litigation.

A similar tension is the confusion of public rights as compared to private rights. The founding fathers, entirely cognizant of the mental and physical differences among individuals, created our republican form of government in order to allow for the maximization of private freedom, while insuring the security of political equality. In the eyes of the free market, those with traits favored by a capitalist system should

127. See id. at 1601.
128. See id. at 1602.
129. See id.
131. See Donohue, supra note 95, at 1585.
132. Id. at 1586.
133. Id. at 1585.
134. A similar subversion of the anti-discrimination laws is found by the fact that an employer must factor into any hiring decision the expected costs associated with hiring a protected individual because a solid probability exists that if the individual is later fired, that individual will file a discrimination claim with the EEOC. See Donohue & Siegelman, supra note 21, at 1024. Hence, employers will adjust their behavior in order to avoid such future liability.
135. An example of this strong-arm is illustrated by the Hooters Restaurant claim filed by a group of men. In December of 1994, the men filed a Title VII sex discrimination claim because Hooters, a chain of restaurants with scantily-clad female servers as its trademark, refused to hire these men as servers. The EEOC stepped in and tried to coerce Hooters into altering its practices. Hooters stood its ground and launched a publicity offensive against the EEOC. See generally The U.S. Equal Employment Opportunity Commission, EEOC Comments on Hooters’ Press Offensive (Nov. 21, 1995) <http://www.eeoc.gov/press/11-21-95.html>. A similar incident occurred at the University of Chicago Hospitals when a male systems analyst was terminated because he had a practice of luring women into his office to view “raunchy Web sites.” McMenamin, supra note 22, at 128. The terminated employee filed a claim of disability discrimination under the Americans with Disabilities Act because he had multiple sclerosis. Id. Even though the EEOC conceded that the employer probably did not know about the terminated employee’s disability, it still “suggested” the hospital settle with the terminated employee for $8,000. Id.
be allowed to exercise their freedoms and prosper; conversely, in the eyes of the
government, traits are meaningless and all individuals should be treated equally.

As James Madison noted in *The Federalist No. 10*, "Theoretic politicians, who
have patronized this species of Government (democracies, not republics), have
erroneously supposed, that by reducing mankind to a perfect equality in their
political rights, they would, at the same time, be perfectly equalized and assimilated
in their possessions, their opinions, and their passions." Under this rubric, private
discrimination should not be made unlawful; rather, the law should "exclude all
instances of mere offense born of moral outrage or bruised sensibilities from the
class of actionable harms, however deeply felt the hurt."

The basic premise in this line of thought is that employers who choose to
discriminate in the free market should be able to do so because either their decision
will be an economically sound decision (not hiring an older worker to perform
extreme physical labor) and that employer will prosper, or it will be an economically
unsound decision (not hiring blacks for purely prejudicial reasons even though a
large part of that employer's market is black) and that employer will not prosper.

It seems that Congress, by enacting the anti-discrimination laws, chose to ignore the
dichotomy between public rights and private rights. The EEOC's utilization of
mediation appears to reverse Congress' intent by allowing employers to discriminate
at a low cost as compared to the costs and outcome of an EEOC investigation or
court action. Hence, discrimination becomes rational again and all individuals are
not treated equally in their private rights.

VII. ALTERNATIVE SOLUTIONS TO THE USE OF MEDIATION
IN EMPLOYMENT DISCRIMINATION CASES

The three main reasons cited for using mediation in resolving disputes are (1)
the speed of mediation," (2) the cheapness of mediation" and (3) the reduction in
backlogged cases." With these three goals in mind, I offer two alternatives to the
use of mediation in employment discrimination claims.

The first alternative is to create a universal just cause standard in employment
terminations and repeal the anti-discrimination laws. This alternative is not practical
for three reasons: (1) instead of reducing litigation, the point of focus will just
switch from discriminatory conduct to unjust firing, (2) most terminations are not
considered discriminatory, so we would be fixing a hole in the wall by building a

136. THE FEDERALIST NO. 10 (James Madison).
137. See Donohue, supra note 95, at 1589.
138. EPSTEIN, supra note 130, at 415.
139. This proposition, of course, assumes that plaintiff attorneys prefer settling more claims for less
money at an early stage before significant attorney's fees are incurred, than they do settling fewer claims
for more money much later after significant attorney's fees are incurred and the prospect of prevailing
decreases.
140. See Riskin, supra note 70, at 34.
141. See id.
142. See Ettingoff & Powell, supra note 54, at 1141.
new house and (3) a just cause standard is inefficient as a market solution because of the concept noted in (2).  

The second alternative is to cut back on the anti-discrimination laws and create greater sanctions for plaintiff's attorneys who bring baseless or frivolous claims. This alternative works because it would allow for some types of rational discrimination, it would free the market from some government regulation and it would caution plaintiffs' attorneys from using the system for unethical practices. In addition, this alternative would decrease the dockets of the EEOC and the court system, which would in turn speed up the resolution of legitimate claims. One commentator noted that "[i]t is not the least of the ironies of the study of Title VII that it has brought in its wake more discrimination (and for less good purpose) than would exist in any unregulated system."  

Under this second alternative, anti-discrimination laws could be amended to accurately reflect the types of discrimination that are abhorrent in modern society, rather than discrimination that is rational or that is called discrimination because one lobbying group exerted enough political pressure. Under current law, many people feel that discrimination based on age should not be unlawful because there are certain realities that accompany age and to legislatively deny those realities is the equivalent of handcuffing employers in an intended free market system.

By amending anti-discrimination laws, we would reduce the amount of government regulation, which would presumably free-up capital in the economy to increase employment opportunities. The only apparent loser would be attorneys, but as Chief Judge Edwards commented: "If it [reform] holds out progress only for the legal profession, then it isn't worth pursuing."  

Lastly, creating greater sanctions for plaintiff's attorneys who bring baseless or frivolous claims would decrease the number of claims being brought under the anti-discrimination laws. Obviously, such sanctions should be carefully crafted so as not to discourage legitimate claims from being filed; however, as noted in Part II, the saturation of the legal profession inevitably means that attorneys will file nuisance claims simply because doing so sustains a "practice" and a livelihood. It is at this conduct that we should aim attorney sanctions.

VIII. CONCLUSION

The bottom line, in theory, is that mediation, based on the aforementioned information, should not be used for the resolution of employment discrimination claims. The American legal system is the only resolution mechanism that protects both parties and ensures equality of position and equality of treatment.

144. EPSTEIN, supra note 130, at 497.
145. Edwards, supra note 67, at 684.
146. See supra notes 6-29 and accompanying text.
The bottom line, in practice, is that with so many employment discrimination claims being filed and with Congress’ current lack of political will, mediation will be used to resolve employment discrimination claims. Because mediation will be used for resolving employment discrimination claims, parties should take advantage of mediation to achieve their respective goals.