



# After 20 Years, Mediation is Mainstream at the EEOC

What began as a case-management tool is now an essential option

*By E. Patrick McDermott, Stephen Ichniowski, Katherine S. Perez, and Jennifer Ortiz Prather*

When the United States Congress passed the Civil Rights Act of 1964, it sought to recognize the legislative efforts of the recently assassinated President John F. Kennedy and bring to a culmination long-standing efforts by civil-rights advocates to outlaw racial and other discrimination. The Civil Rights Act, an omnibus bill that aimed to address discrimination in voting, public accommodation, education, and employment, established the United States Equal Employment Opportunity Commission (EEOC), an organization that in the past 50 years has become so well established that today many people know it only by its initials.

The EEOC's website offers a straightforward but ambitious mission statement: Prevent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace. In practice, this means that the EEOC is responsible for enforcing all federal laws that make it illegal to discriminate

against a job applicant or an employee because of race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (after age 40), disability, or genetic information. Federal laws also prohibit discrimination against someone out of retaliation — because he or she complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. The EEOC's range is wide, covering most employers that have at least 15 employees (or, in the case of age discrimination, 20 employees). Most labor unions and employment agencies come under its umbrella.

Back in 1964, Congress expected that the EEOC could investigate and resolve all the meritorious cases brought before it. But as soon as 1965, when the commission really got started, its case inventory was 3,000; by the early 1990s, its backlog included more than 130,000 charges, the term used for complaints

or cases within the EEOC's enabling legislation. As new statutes added new cases, EEOC managers introduced various investigative tools to reduce the backlog, but everyone knew something much more comprehensive was needed.

In late 1994, EEOC Chairman Gilbert F. Casellas established several internal task forces to study the case-handling challenges. One recommended dividing charges into triage-type categories:

- "A" charges: those the EEOC staff considered likely to result in a finding of "reasonable cause" of a violation of the law;
- "B" charges: those with possible merit, with the final finding contingent on the results of the investigation; and
- "C" charges: those without merit on their face that should be dismissed outright.

Traditional investigation would assist in resolving the A charges, the task force suggested, but for the larger pool of B charges, a new mechanism would be needed. Following this suggestion, another task force explored the idea of expanding the use of dispute resolution, which had been piloted in four EEOC offices in the early 1990s, and in 1995 it concluded that mediation was indeed a viable alternative process for resolving charges. Shortly thereafter, the commission voted to commit the agency to mediation as a voluntary alternative. The EEOC's mediation program was officially up and running.

### **The EEOC's mediation policy principles**

The EEOC-adopted dispute resolution policy states that its program is governed by several core principles, all of which will be familiar to those in the dispute resolution field: voluntariness (participation at all stages is voluntary), neutrality (third-party neutrals assist in resolution at no cost to parties), confidentiality (within each individual session and inside the agency, through a "firewall" separating mediation activity from investigation and litigation), and enforceability (agreements can be enforceable through a model settlement agreement in which the EEOC is a party).

By the end of 1997, each of the EEOC's 24 district offices and the Washington Field Office had a sustainable mediation program, a phenomenon that

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caught the attention of lawmakers. In a bipartisan effort, Congress voted to increase the EEOC's 1999 budget by \$37 million, with \$13 million specifically allocated for the institutionalization of its mediation program.<sup>1</sup> This allowed the EEOC to fully implement its dispute resolution/mediation program by April 1999, integrating this process along with its revised A/B/C charge-processing procedures, all of which evolved into the commission's current model of charge resolution.

The EEOC's roster of neutrals is comprised of mediators who have expertise in both equal employment opportunity matters and the EEOC's process. Given that the mediation option is offered pre-investigation, the program has a facilitative, not evaluative, approach. The EEOC currently employs more than 80 full-time staff mediators, many of whom mediate three to four days a week in locations within commuting distance of their offices. In more remote areas and underserved regions, the commission relies on contractors or individuals who have agreed to provide the service on a *pro bono* basis. Contractors receive a flat fee of \$800 per charge mediated, with all costs and expenses included in that fee. Funding for the contract program varies from year to year depending upon the agency's budget level. (While the contract roster is currently closed, a request for proposals is anticipated in early fiscal year 2019; for more information, [www.FedBizOpps.gov](http://www.FedBizOpps.gov).)

### **A look at the numbers**

From 1999 through mid-2018, the agency conducted more than 214,000 mediations, resulting in more than 155,000 resolutions (a resolution rate of about 72%) and helped parties get more than \$2.5 billion in monetary benefits.<sup>2</sup>

Each year the program averages 11,300 mediations, helps resolve about 8,150 charges, and obtains more than \$130 million in monetary benefits (often accounting for more than 50% of the total benefits obtained through the administrative — i.e., non-litigation — process annually). Cases are completed in an average of 94 days, less than one-third of the current investigative processing time. These statistics do not include “mini-wins,” cases in which the EEOC mediation sets the stage for later resolution, sometimes days or weeks later.

The benefits of the program stretch far and wide, well beyond the commission itself and the parties it serves: the program reduces state and federal caseloads because disputes are often multi-faceted, involving state courts and administrative agencies such as workers’ compensation boards, the Federal Labor Relations Authority (FLRA), the Department of Labor (DOL), and the National Labor Relations Board (NLRB).

### The scope of EEOC mediations

Most EEOC cases involve questions of racial, disability, gender, or age discrimination in an employment setting, well within the limits of the commission’s mandate. Sometimes, however, disputants’ concerns fall outside the scope of laws that the EEOC enforces, including claims at the state level and other related workplace issues. While the EEOC cannot be a party to the settlement of such ancillary matters, the dispute resolution process does permit parties to enter separate bilateral agreements that may be referenced but not incorporated into the EEOC settlement.

When mediation first started being used widely at the EEOC, some observers initially expressed concerns that certain charges (such as sexual harassment and mental disability claims) would not be appropriate for mediation and should be routed only through the

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investigative process. Commission officials and academic studies reviewing the program, however, have concluded that when a carefully trained experienced mediator selects an appropriate location, determines exactly who should be present, and clearly outlines a tailor-made protocol for meetings, parties can have productive, professional, and safe discussions that can help people move toward resolution. For all disputes, wise counsel may use the EEOC mediation program for an early, free opportunity to resolve a dispute.

### What participants say

In 2000, an independent university research team (led by E. Patrick McDermott, one of the coauthors of this article) evaluated the EEOC’s mediation program. Among the findings:

- An overwhelming majority of the participants (91% of charging parties and 96% of respondents) indicated that they would be willing to participate in the mediation program again if they were a party to an EEOC charge. Participants, regardless of their satisfaction with the outcome of mediation, overwhelmingly indicated their willingness to return to mediation.
- The participants expressed strong satisfaction with the information they received about mediation from the EEOC before the mediation session. They also felt very strongly that they understood the process after the mediator’s introduction.
- The vast majority of participants agreed that their mediation was scheduled promptly and that they had a full opportunity to present their views during the mediation.
- Participants were especially satisfied with the role and conduct of the mediators. They felt strongly that the mediators understood their needs, helped clarify those needs, and assisted them in developing options for resolving the charge. They felt even more strongly that the procedures used by the mediators were fair. The questions regarding the neutrality of the mediators elicited some of the strongest responses from the participants, who felt that the mediators were neutral throughout the process. As one might expect from those looking back on a

process that doesn't always give people exactly what they want, participants generally expressed stronger satisfaction with the process than with the case outcome.

- Participant satisfaction with the EEOC mediation program remained high even when the participant responses differed as to the nature of the charges (such as the statute involved or the substance of the dispute) and the characteristics of the mediation session (such as whether lawyers were involved or the differing mediator's style, training, and methodology).

Overall, participant feedback regarding the EEOC mediation program indicated that the program is, by any measure, acceptable to those who participated in it.<sup>3</sup>

### How the program helps lawyers and their clients

Like most mediations, the EEOC's dispute resolution process gives parties a chance to share information that may lead to the resolution of a dispute — one that can range from a misunderstanding to a serious violation of the law requiring significant damages.

EEOC mediation is also an effective opportunity for the savvy lawyer to assess the other party's strength as a witness, understand the key issues of the dispute, and find out whether the lawyer's client has accurately communicated the crux of the dispute and the potential exposure to the organization. This is not free discovery but rather free case assessment, with an opportunity to reduce exposure early.

Mediation can change a lawyer's perspective, presenting new facts and surprising information. One coauthor of this article, E. Patrick McDermott, represented management for more than two decades before litigating plaintiffs' cases for more than 20 years. He has seen cases litigated and settled at trial where payment of hundreds of thousands of dollars could have been settled at the EEOC for significantly less — with full party satisfaction. He also seen cases in which a pending EEOC claim was not resolved and subsequent litigation became a fertile ground for discovery of numerous other lawsuits.

Even for plaintiffs' lawyers who believe in the merits of their clients' cases, the reality is that most cases

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will settle at some point, rendering mediation an obvious choice to expedite this activity. While some cases may be fully litigated and ultimately disposed of at the summary judgment stage, an employer can expend significant resources just to get to that stage, and a negotiated resolution early in the case may be quicker, less expensive, and less burdensome for all concerned. Mediation may also help in instances where the client has an unrealistic view of the damages that could be awarded in the case. A skilled neutral can provide valuable assistance by making sure parties consider the real-life consequences of their decisions and actions.

Mediation is especially beneficial for *pro se* parties and respondents unfamiliar with the specialized advocacy and negotiation that employment litigation may require. A skilled, experienced mediator can ensure that parties inexperienced in EEO matters are provided a balanced and corresponding voice in the process.

Mediation often enables parties — and their lawyers — to diagnose the relative strengths and weaknesses of their underlying claims. While the program has officially adopted the facilitative approach in conducting its sessions, the EEOC soon recognized that discussions concerning the merits of the charge almost invariably occur, and it now permits its mediators to guide the conversation and the parties through reality checks and probative questions, affording participants the platform to control the process and, more important, preserving their right to self-determination. Program designers recognize this delicate balance of controlling the process so that the mediator maintains neutrality through inquiries and guidance that support the parties' self-evaluation. They also know that this requires a carefully measured, practiced finesse.

Finally, the EEOC experience and related evaluation data show that mediation can help counsel shift from positional conduct based on their perception of the existing law to the root cause of the dispute. This assists counsel in fashioning creative agreements — many of them free from damage limitations and case law, with payment schedules and characterizations of damages that maximize parties' positions under tax rules and other laws.

### Lessons for dispute resolution designers

The EEOC evaluation data and participants' experiences underscore the importance of procedural variables, including the beliefs that the mediator was neutral, that the party had a full opportunity to present his or her story, that the mediation was held in a timely matter, and that the process was explained and understood. An acceptable, neutral way for parties to work out a dispute is central to the EEOC program's success. Parties know they cannot compete to "win" at mediation; they also know that they can find satisfaction in a respectful process with a fair outcome.

While high settlement rates are important, they are not the *sine qua non* of a successful mediation or program. Success in mediation can be defined in many ways and may come long after the actual mediation sessions (See the article by Ava J. Abramowitz in this issue for an extensive discussion of "success" in mediation). Sometimes a mediation simply builds the foundation for a future resolution, as parties exchange new information and attempt to fashion solutions that may form a basis for settlement. If party satisfaction with the process is the best measure, the EEOC's score is remarkable: as the 2000 university evaluation noted, 91% of the charging parties and 96% of the respondents said they would use this process again.

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The EEOC has shown that it is possible to design and implement a large-scale ADR process within an administrative process operating under well-established statutory constructs. In short, mediation can be embedded into an existing agency culture. The key is understanding the pre-existing culture of the agency or organization and its stakeholders, and this kind of understanding can come only from inside — and only with the long-term, strong support from organizational leaders. At the EEOC, support has come internally directly from the chair's office and executive directors and externally from employer and employee groups with a stake in durable, workable solutions.

For observers such as legal practitioners, professional neutrals, scholars, and dispute design professionals, the EEOC program is proof that disputants like mediation, often want to mediate, and are usually satisfied with it. While experts may identify certain instances in which a claim should not have been mediated or a case ended in impasse because not all the appropriate decision-makers were involved, incidents that program administrators recognize and address, such critiques should not swallow the whole. Mediation works where there is careful program design and enduring commitment to that program's success.

The EEOC's program, which began with volunteer mediators and continues today with careful funding, is also proof that a successful program can be developed with minimal resources. It is also a reminder that controlling a process that happens behind closed doors is a challenge; while the program's process is facilitative, some evaluation may occur and may be necessary. Program designers who look at the EEOC experience will also see that as in other realms, even with targeted promotion, getting parties — and their lawyers — to the table early in their dispute is far from easy.

### Future issues and challenges

The EEOC mediation program continues to wrestle with four challenges, many of them shared by other programs. First, how should mediator performance be evaluated? A valuable mediation can occur with or without immediate resolution. With this in mind, how can we quantify the performance of a particular mediator in a particular case? From a practical and research methodology perspective, effective

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evaluation is a difficult and expensive process fraught with ethical concerns related to the underlying confidential nature of the mediation process. Second, the fact that mediation saves public and private resources doesn't always translate to support by policy-makers, and program advocates need to do a better job of identifying and marketing the business justification for mediation. Education and public awareness are constant challenges for the EEOC, as they are for so many in this field. In mediation, as in dance, it takes two to tango, and the EEOC will not mediate if both parties do not agree to participate in the process. This surely results in many missed cases, and program personnel must focus on communicating the value of mediation to parties and counsel in ways that make them want to consider early settlement opportunities. Our final challenge involves recognizing and embracing change. Studying many systems, including the EEOC model, and understanding how they maintain their vitality, adopt new technologies, and continue to evolve are crucial.

From a holistic vantage point, any successful program must be self-aware, adapting and changing as times and parties require. If the EEOC's mediation program is to remain vital and useful, managers must study what works, what doesn't help, and what people want and need, including the use of new technology — and then put that learning into practice. ■

*Note: The views expressed by the EEOC employees in this article are the employees' own and do not necessarily represent the views of the EEOC.*

### Endnotes

1 A key factor in obtaining funding support from Congress was a joint letter to committee chairpersons from employer and worker advocacy groups, including the Equal Employment Advisory Council (EEAC), the Labor Association, the Women's Defense Legal Fund, the National Employment Lawyers Association, the Employment Litigation Project of the Lawyers Committee for Civil Rights and Urban Affairs, and the Lawyers' Committee for Civil Rights Under Law.

2 This figure does not account for other settlement caused by EEOC mediation but resolved later outside the EEOC's aegis.

3 E. Patrick McDermott et. al., *An Evaluation of the Equal Employment Opportunity Commission Mediation Program*, Executive Summary, <https://www.eeoc.gov/eeoc/mediation/report/> (last accessed April 27, 2018).



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