

MEDIATION OF EMPLOYMENT DISPUTES

John T. Dunlop and Arnold M. Zack

Resolution of workplace disputes in the United States has had a long and troubled history since the early days of the conspiracy theories of unionization and the reticence of the federal government to legislate workplace protections. Since then it has evolved under collective bargaining strong dispute resolution procedures outside the judiciary system. Most other industrialized countries and now even many developing nations, have established labor courts, workers councils and comprehensive mandatory systems to assure workers due process and fairness in resolving their workplace disputes. Our patchwork system of private and public, union and non-union and federal and state forums to address these issues have left us in a lagging position compared to the labor courts and tribunals in other countries. At the same time our present hodgepodge arrangements offer an exciting laboratory for resolving many more disputes by negotiation and mediation by the participants themselves while limiting governmental imposition of outcomes.

The current standards of work place protection in the United States have evolved through collective bargaining, legislation, administrative action, and court decisions. But here, more than in many countries, negotiated rule making and mediation and voluntary arbitration have played pivotal roles in achieving progress and workplace resolution with the parties retaining significant influence over outcomes. ADR thus provides experience and promise as the preferred procedure for the evolution for workplace dispute resolution.

It took collective bargaining in this country almost 150 years to develop collective agreements setting forth negotiated workplace protections with negotiated procedures for the enforcement of those agreements through grievance procedures culminating in arbitration. Written arbitral awards were not recognized by the judiciary as binding on the parties who had created those procedures until 1960 in the Steelworkers Trilogy[1]. It is well to remember how slow was this development. As late as 1940, only 10 percent of collective agreements provided for voluntary arbitration for the parties' self-enforcement of those agreements over issues of contract application and interpretation. The policies of the War Labor Board (1942-45) mandated that collective bargaining agreements provide grievance procedures with arbitration in disputes over the meaning and application of the agreement. President Truman's Labor Management Conference on November 5, 1945 unanimously advocated the adoption of grievance arbitration in every agreement. By the late 1950's, almost all collective bargaining agreements contained such provisions. In the Steelworkers' Decisions, the U.S. Supreme Court accepted the value and preference of such self-administered conflict resolution by arbitrators of the parties' own choice with their expertise in the law of the shop being endorsed by the courts as preferable to judicially imposed readings of the parties' agreement.

Unlike in continental Europe with Works Councils[2] and Labor Courts, or Great Britain with its Employment Tribunals[3], it has remained the province of unions and management in the United States to resolve their own disputes through reliance on ADR: With mediation of interest disputes covering the content of new collective bargaining agreements and arbitration of rights disputes the interpretation and application of such agreements.

The United States has not adopted comparable quasi-judicial institutions prevalent in other nations. Instead, we have relied upon legislation to create statutory rights leaving to employees who's legal rights have been violated, the burden of undertaking costly and time consuming litigation to enforce those rights. The result in our increasingly litigious society has been to limit to all but the wealthy employees with access to lawyers and

the courts, their asserted "equal protection before the law". Even for those statutes where assistance for bringing enforcement is available through administrative agencies, the budgetary funds available for inspectors and statutory enforcement have too often been reduced by budgetary constraints[4]. We are now in the process of attempting to develop appropriate institutions through ADR, consonant with the goals of the protective legislation and consistent with the expectations of the traditional access to the courts for their achievement.

The increasing statutory protection afforded to workers over the past several decades comes at a time of increasing pressure of drug and criminal cases on court dockets, reductions in funds available for agency enforcement, reduced reach fraction of the trade union movement, increasingly resistive and litigious employers, and judicial endorsement of privatized systems of dispute resolution.

The pressures are great to evolve a practical way of resolving more workplace disputes to bring greater justice to more workers. Workers in the United States do not now and are unlikely in the future to have access to any Labor Court or Employment Tribunal or Works Council to bring expeditious and low cost resolution to their workplace complaints. There is no prospect in the US of legislated works councils with the authority to resolve workplace disputes over statutory rights let alone just cause dismissal issues. Likewise, the efforts of the Uniform Law Commission to achieve state based mediation and/or arbitration of workplace disputes is unlikely of achievement. The proposal of Professor Paul Weiler for Employee Participation Committees (EPCs) to address the absence of forums to decide workplace disputes has not been widely discussed.[5]

We believe there are basic defects in US protection of worker rights to statutory protection and to standards of fairness in termination. We also believe it is clear that the US will not adopt a central common procedure similar to those in place in other countries to provide such workplace protection. Accordingly we propose a different approach to the disparate US structures to provide a more congruent system for seeking the necessary workplace protections.

The development of a rational and comprehensive procedure for utilizing ADR for employment disputes must recognize the existence of three areas or arenas where these disputes arise where ADR has had some impact and where the ADR procedures should be encouraged and expanded. It is recognized that some cases are not appropriate to ADR such as those involving class actions, significant issues of policy or legal precedent.

The first area is in the traditional arena of statutory protections through employment legislation with administrative agencies dedicated to the traditional channels of litigation for enforcement through federal or state courts. Such statutory enactments afford the greatest potential for universal employee protection. But, they also, through our traditional reliance on the adversarial nature of our litigation system, impose the burdens of undertaking such litigation more effectively with lawyers or less effectively through self representation to achieve the promised implementation of the law. The Fair Labor Standards Act and the National Labor Relations Act are illustrative of such legislation. A number of anti-discrimination statutes such as Title VII, ADA, ADEA, and FMLA extend protections to all employees except for those exemptions of small sized workplaces that vary by statute. Enforcement too often is haltingly available through the aegis of the EEOC with its authority to grant "right to sue" letters for direct court access. The expectation of litigation as the device for statutory enforcement is too often illusory. The EEOC has provided in recent years for some mediation of claims under its jurisdiction by staff and outside volunteers. The Massachusetts Commission Against Discrimination has developed a program for mediating and/or voluntarily arbitrating claims of alleged violations of the statutes it is empowered to enforce. The U.S. Department of Labor has awarded a grant of

\$1,100,00 to the Alliance for Dispute Resolution for a two-year program to test the use of mediation of cases under its authority. And the Federal Court system diverts to mediation a few cases which heretofore would go to the end of the queue pending the more traditional resort to the courts to litigate such matters.

The second area where workplace employment disputes come to the fore is in the organized workforce where voluntary grievance arbitration has become the universal procedure for resolving workplace disputes involving many of the same standards as protected by federal or state legislation. But, while statutes may have their universal application, and while agency enforcement and ultimately litigation may be the anticipated antidote to statutory violation, the collective bargaining arena provides much more restricted workplace protection. The authority of the arbitrator is restricted to the terms of the parties' negotiated agreement. Even if the parties agree to prohibit discrimination and to empower the arbitrator to enforce that negotiated language, it is the parties' agreement and not the statute, which is to be applied and enforced. The arbitrator is bound by the terms of the parties negotiated agreement and can not rule on matters outside the four corners of that agreement. The agreement is negotiated between the union and the employer; it is the union, which decides which cases are to be appealed to arbitration while the employee retains the right to file with the administrative agencies or the courts for enforcement of any statutory rights. The Supreme Court in *Alexander v. Gardner Denver*[6] recognized the restrictions of the private collective bargaining contractual relationship and the authority of the arbitrator created thereby. It preserved the statutory right of employees, despite their union membership, despite their invocation of their contractual right to have an arbitrator enforce the collectively negotiated standards, and despite an adverse arbitrator's decision, to initiate litigation to enforce individual statutory rights. As noted in footnote 19 of that decision, protection of the individual rights to sue should not be thwarted by a private agreement between a union and employer where potential collusion between those two signatories to the agreement might deprive an employee of access to an independent assessment of whether these had been statutorily barred discrimination.

But, in this arena as well, ADR may be effective in resolving some statutory disputes. An employee processing a grievance over discrimination to arbitration under the collective bargaining agreement may reach agreement in the grievance steps or receive a contractual arbitration award, which is sufficiently acceptable to preclude initiation of independent litigation.

And although the courts still respect *Alexander v. Gardner Denver* as preserving the individual employees right to initiate litigation, there have been formulas such as that proposed by the Eleventh Circuit Court in the *Brisentine*[7] case to encourage more extensive use of the collective bargaining arbitration forum to resolve statutory disputes. In the *Brisentine* formulation, the parties' arbitrator may issue an award binding an individual employee on the statutory claim as well as a contractual dispute if: 1) the employee has the individual right to appeal to and agrees to be bound by the arbitration, 2) the contract specifies which statutes are to be incorporated into the parties' agreement, and 3) the contract grants the arbitrator the authority to interpret and apply the statute, including matters of statutory remedy.

While such an innovative approach has appeal as a procedure where the employee has the right to full exercise of his rights, the declining coverage of collective bargaining agreements in the labor market, now representing some 14.9 per cent of the work force, militates against statutory collective bargaining arbitration as an effective tool in non-union workplaces.

And that non-unionized sector is the third arena to which attention must be paid as a vehicle for utilizing more widespread use of employment ADR. The United States has traditionally been, and remains today, a society where "employment at will" prevails. That is what differentiates us from those countries where Labor

Courts provide a broad protection against arbitrary or unjust dismissal. In the United States, the employees' protection against dismissal is restricted to the just cause protections afforded to the portion of the workforce that is governed by collective agreements. The only legal recourse against dismissal in the non-union sector in the United States is based upon proof of a statutory violation such as termination for seeking to invoke statutory rights under OSHA or LMRA or even under certain whistleblower statutes or for violation of statutory prohibitions against employee discrimination such as under Title VII, ADA, ADEA, and the like.

In this statutory realm, numerous employers have even sought to preclude employees from invoking their limited statutory protections against termination by requiring them to sign as a condition of hire or continued employment, a commitment to arbitrate such alleged statutory violations. In its controversial 1991 *Gilmer* [8] decision, the U.S. Supreme Court expanded the applicability of the Federal Arbitration Act from a device for monitoring commercial transactions to apply it to employment contracts as well, on the theory that arbitration was merely a substitute forum for the courts. A number of employers exploited the *Gilmer* decision to craft arbitration schemes where they often designated the arbitrator, denied the right of representation, barred deposition, discovery, and written opinions, and retained the right to unilaterally change the procedure. The courts have been consistent in accepting the voluntary and knowing nature of such arbitration "agreements" and have not dealt with the assertion of some that they are in reality "contracts of adhesion". Any doubt as to the determination of the Supreme Court to fend off challenge to mandatory employer promulgated systems, was removed by its March 21, 2001 decision in *Circuit City Stores, Inc v. Adams* extending the Federal Arbitration Act to all employees except those who are actual workers in interstate transportation.[9]

In this Federal Arbitration Act arena the ADR procedures appear firmly in place, only their fairness has been challenged. Following the Report of the Commission on the Future of Worker-Management Relations, in an effort to level the playing field a number of interested institutions (AAA, ABA, ACLU, FMCS, NAA, NELA, SPIDR) created a Due Process Task Force which developed a set of criteria called the Due Process Protocol[10], to assure the fairness of such mandated arbitrations. While the group was unable to reach agreement on the triggering issue of whether the employees' commitment to arbitrate be made voluntarily, post-dispute rather than required pre-dispute, they did reach agreement in May 1995 on the elements of a demographically diverse panel of trained mediators and arbitrators, the employees right to representation and the right jointly to select the neutral, the right to dispositions and discovery, and the responsibility of the arbitrator to follow the law and authority to grant statutory remedies. In the past five years, the Due Process Protocol has been adopted by all of the designating agencies that are commonly utilized by employers in implementing their procedures with the result that most procedures do now in fact conform to the Protocol. Its standards have, in addition, been endorsed by courts as credible due process requirements for mandatory arbitration procedures.

But now, ADR in the non-unionized sector holds greater promise. The *Gilmer* Decision and its progeny authorized employers to craft their own mediation and arbitration schemes as a binding alternative to the traditional right of workers to turn to administrative agencies and to the courts to enforce statutory rights. The Due Process Protocol brought a measure of fairness to what had previously been procedures clearly favoring the employer. With experience in ADR, with recognition of the benefits of fairness in ADR, and with government agencies such as MCAD and the Department of Labor encouraging mediation and voluntary arbitration as preferable to litigating enforcement disputes, there is now even greater hope that employer-promulgated mediation and arbitration with standards of fairness will indeed become the vehicle for mutually resolving workplace disputes to the satisfaction of more workers and employers than could ever be achieved

through litigation.

While events have moved more rapidly to ADR in the employment field in the last decade than in many previous decades, much must be done to meld these three arenas into a viable system of workplace justice.

Some of the new acceptance and credibility of ADR is a shifting of hope and faith from the more traditional arenas of dispute resolution. The statutory protections of litigation have been smothered in the increased reliance on lawyers and adversarial litigation with high cost, endless appeal, a prolonged time for restitution, and a shift of retribution for past wrongs in place of positive efforts to create solutions for future relationships. The enforcement agencies lose funding for enforcement, the courts seek to extricate from such matters by pushing ADR so they can handle the flood of other cases. The labor management community and its arbitrators see its acclaimed arbitration system applied to a shrinking universe of collective bargaining relationships. Whether it be through malevolence or neglect, the focus of dispute resolution is shifting away from the traditional expectations and conventional wisdom that the courts will protect the legal rights of all. The increasing societal skepticism concerning the impartiality of the courts and law enforcement open the door to ADR with its enhanced emphasis on participant control of the outcome as the preferred resolution of conflict.

There now appear to be new efforts at achieving the goals of law, specifically employment law through the use of new tools. Eight elements are to be noted.

(1) The first element is developing mediation as a congruent alternative to litigation of employment disputes. Its acceptability is bolstered by recognizing the shift in preference from litigation and confrontation in a lawyer-driven judicial forum toward one in which, through mediation, the parties have the opportunity peacefully to resolve their disputes, even disputes over statutory enforcement rights. While currently the focus appears to be on arbitration as a substitute for litigation, the evidence shows that mediation is gaining primacy as the parties preferred forum for resolving their employment disputes. The evidence of this is the extent to which disputes scheduled for arbitration under the MCAD scheme were in fact resolved by the parties in mediation[11]. It is also borne out by the way in which mediation is endorsed as the preferred way of resolving statutory enforcement disputes under the Alliance/DoL program. This shift to mediation is an endorsement of how all disputes should be resolved, by negotiation between the disputants. Mediation is, after all, merely an assist to disputing parties by introducing a facilitator to encourage the parties to resolution. Thus, mediation, as distinguished from litigation, and even arbitration, avoids surrender of the parties' control over the outcome to some outsider, either an arbitrator or a judge. The parties' retain control of their dispute and its resolution. They may in the course of their negotiation or mediation, jointly decide that some portion or the whole of their dispute should be handled by arbitration. Arbitration in that circumstance is merely an addendum to the negotiation/mediation process.

The increasing endorsement of mediation may also be due in part to its participatory role for the claimant, not only in taking part in the discussions and in the selection of the preferred mediator, but in formulating a prospective resolution. Too often in litigation and even in arbitration, the claimant's goals and voice are lost to the lawyers, who often shift what might have been a need to vent, or ask apology, or structure a prospective training program, into a monetary claim, wherein the claimant may not even be called to testify. Certainly in litigation the surrender of control to an outside-designated judge, or in arbitration to a lawyer-selected arbitrator usually denies the claimant an active role in the dispute resolution process. In mediation, the claimant has the opportunity to vent, the opportunity to share in the selection of the mediator, including perhaps one from the same ethnic minority, and the right to decide on the outcome of the dispute, even if it

only be an apology, or the formulation of procedures to avoid future repetition of the perceived wrong.

(2) Once it is accepted that mediation is the preferred format contrasted to litigation to resolve such workplace disputes, it is essential to establish as the second element that the system creating the mediation opportunity is fair. The Due Process Protocol recognized and endorsed the goal of a trained roster of demographically diverse arbitrators and mediators with the claimants' right to share in selecting the parties neutral. As noted above, that Protocol has achieved credibility as the preferred procedure for making available arbitrators of employment disputes. But, it also sets the standards for selecting mediators as well.

The Gilmer Decision endorsed employer constructed ADR systems, which often included access to an employer-designated person to serve as mediator. The current move is to make available to disputants through a neutral designating agency, mediators for joint selection of the parties. The Alliance for Education in Dispute Resolution has undertaken to create a nation-wide roster of trained mediators, with particular emphasis on women and minorities to heighten the comfort level of minority disputants.

The shift of emphasis to mediation has intensified scrutiny of the mediator rosters to assure their diversity as well as their competence and neutrality to assist the parties in their quest for resolution of their dispute.

(3) This leads us to the third element, assurance of a mediator who is not only experienced and acceptable, but also one who is well versed in the substance of the dispute between the parties. The conventional wisdom has long been that mediators are valuable solely because of their process skills in bringing conflicting parties together. That may be true in disputes where both parties are of equal power or where both are adequately represented by lawyers or other spokespersons. And it may also be true where the subject matter of the dispute is so arcane that there is no body of experienced mediators with knowledge or expertise in the field. But, it is different in the employment field where certain statutes, such as discrimination laws are often the focus of the dispute and where one of the disputants, the employer, is so much more likely to have experience with, and knowledge of, the laws and of the consequences of an unresolved impasse than the employee. That is particularly true where the claimant has no experienced representative or where a designated representative or even lawyer would have no experience in a knowledge of the statutes at stake.

Employment mediation is unlike collective bargaining mediation of either interest or right disputes where both the union and management are likely to have experienced spokespeople, or are at their peril if they do not.

In most employment disputes, the involvement of a mediator knowledgeable only of process and lacking in substantive or statutory expertise would tilt the table in favor of the more knowledgeable and doubtless more experienced employer. It is for this reason that the Due Process Protocol prescribed that mediators of such disputes be trained in substance and process. That is also why the Alliance in the year 2000 trained some 100 mediators with the American Bar Association and DoL experts providing the statutory input to help level the playing field. Such trained mediators are not there to serve as advocates for the claimants, and indeed under mediators' ethical standards are properly barred from so doing. But a mediator trained in employment law has the tools to protect against unwary exploitation of the claimant and the knowledge of the potential consequences of impasse leading to litigation to provide both parties with the benefit of prior experience while protecting their role as neutrals.

(4) The fourth element of the development structure for a credible mediator alternative to litigation for resolving employment disputes has been the legitimization and acceptance of the Due Process Protocol as the

benchmark of fairness with its standard of substantively trained mediators. This is still a work in progress, but it is happening. The adoption of the Protocol by Jams/Endispute, AAA, CPR, NMB, NASD, FMCS, and other institutions and agencies has notably put the proponents of Gilmer type employer crafted system, and also the pertinent government agencies, on notice that mediators must be neutral and knowledgeable in process and substance, and that claimants must have access to a demographically diverse roster of mediators including women and minorities to aid them in their selection of a trustworthy and effective mediator.

As noted earlier, the Supreme Court in its 1991 seminal decision in *Gilmer* had sanctioned the mandatory submission to arbitration of statutory employment claims under the standard U-4 agreements which all new stock brokers [registered representatives] were required to sign as a condition of employment with securities firms. In the U-4 the broker agrees to arbitrate employment disputes with his or her firm. Within the past two years the National Association of Securities Dealers (NASD) focused on the recommendations of a special Task Force, which had been reviewing the arbitration procedures, used for its industry wide system. Under the first change, in January 1999, the NASD no longer required that a broker must arbitrate statutory employment discrimination claims pursuant to the U-4 agreement. The firm however, can require the broker to arbitrate other employment disputes as a condition of employment. The second change, effective January 2000, amended the Code of Arbitration Procedure to incorporate additional requirements for the administration of statutory employment discrimination disputes in the NASD forum, effectively adopting the Due Process Protocol.[12]

The utilization of statutorily experienced arbitrators who donned their mediator caps to resolve most of the CMAD cases, the traditional endorsement of mediators by the EEOC to resolve its inventory problems, and the more recent imposition of that requirement in the Alliance/DoL structure bodes well for increasing reliability and effectiveness of statutory mediation efforts. The institutional acceptability of mediation has traveled a long way from the era when process competence alone constituted mediator qualification. Even adding the requirement of labor and employment knowledge may still be insufficient to instill in parties sufficient confidence in mediation and their mediator to accept that the mediators statutory knowledge and experience will help to diffuse the anxieties of those who have traditionally looked to the courts for protection of their legal position. This anxiety or perhaps self-interest is most manifested in the reluctance of lawyers to surrender the potentially much more lucrative litigation track with its motions, depositions, discovery, and endless appeals. Yet, more and more advocates are becoming receptive to the greater effectiveness of mediation in attaining client satisfaction in contract to the risky win/lose potential of litigation. Moreover, under mediation it is far more likely for an employee to retain a job than in the protracted situation where the employee is suing the employer in court.

As promising as is the endorsement of statutory mediation by government agencies such as the EEOC, DoL, and MCAD, the widespread acceptance of the Protocol standards and the prospect of mediated resolutions meeting the missions of these agencies in the employment field, the more hopeful prospect is the same formula being adopted in other fields. The prevalence of enforcement statutes and obligations of administrative agencies and departments throughout the government opens up the door to comparable training in other statutes with mediation becoming an alternative in fields beyond employment law.

(5) Ancillary to the benefits of achieving agency support for mediation in the non-union/statutory law sector is the prospect of a comparable innovation and expanded use of mediation for unions and management to undertake the resolution of similar disputes involving bargaining unit personnel. The current construction of the union/management dispute resolution procedure calls for arbitration as the expeditious vehicle for the parties resolving their contract and discipline disputes, but the contractual provisions in most agreements

barring discrimination and the potential benefit to both parties for expeditious resolution of employment disputes which might escalate the Brisentine or Gilmer Decision conflicts, raises the possibility of the parties introducing a mediation route for resolution of employment based conflict in the unionized sector with all the benefit of mediation as set forth above. The availability of statutorily trained employment mediators to resolve employment disputes in a track parallel to the grievance and arbitration track may help the parties fulfill the goals of their contractual dispute resolution system by resolving such conflicts promptly, with active employee participation and as the preferred alternative to statutory litigation. Such an approach is not dissimilar to the role of the umpire in the early days of collective bargaining arbitration where mediation was often the umpire's preferred tool for resolving the parties' dispute.

That same imperative in the non-unionized sector holds open the prospect of unions offering to support claimants in pursuing claims within the employer promulgated mediation structure even in the non-unionized sector. That option is available in many Protocol compliant enterprises where the employer offers employees access to representation of their own choosing while mediating cases of statutory claims. If the AFL-CIO can market a credit card to workers in non-unionized plants in the hope that it will stimulate union membership and lead to broader unionization, why not undertake a program of mediating employment disputes as a companion effort, perhaps through a low cost legal service insurance program for employees in non-unionized plants. Implementation of such a venture would provide union organizers with insights and possible evidence of employer misdeeds to provide an effective tool for organizing such plants.[13]

Although such an initiative may not provide the organization breakthrough that unions now seek, it would demonstrate union support of worker solidarity and be consistent with its historical support of pro-worker programs and practices.

(6) A sixth precondition is the effort to establish mediation as the preferred vehicle for resolving statutory workplace disputes.

The prior experiments of the EEOC with mediation by internal staff and by utilizing external paid and volunteer mediators and the present research grant of the Alliance at the DoL demonstrate not only the interest in developing a workable set of tools for reaching statutory enforcement disputes. It also suggests that the mediation alternative works, and from the higher success ratio by in-house EEOC mediators endorses the conclusion that statutorily trained mediators may be the preferred neutrals to launch a much more widespread program of mediating employment disputes. With an administration in power professing desirability of private initiatives and less governmental intrusion, the time may be ripe for a policy shift in favor of a broader endorsement of mediation of employment disputes with pressure on the agencies and employers to recognize mediation as an preferred vehicle for statutory or enforcement dispute resolution. Certainly timely mediation of disputes involving ERISA can forestall months of expenditures spent on staff lawyers investigating such cases. Additionally, if the current DoL model is followed the expectation of the defendant employer paying half the cost of the mediators services more than justifies the expenditures of DoL funds for the other half. That is particularly true when one recognizes the expensive legal costs to the Department of extended litigation with the deep pocket employer challenging the Solicitor's enforcement efforts through protracted appeals.

The pioneering efforts of the DoL Solicitors Office in contracting with the FMCS to enhance the sensitivity of the nationwide solicitor staff to the benefits of mediation shows that attorney hostility toward mediation is surmountable. Comparable effort with the staff and particularly the lawyers in other agencies should persuade them of the merits of mediation and that its gains and benefits outweigh any perceived fear that

extensive utilization of mediation will some how erode their enforcement mission or threaten their enforcement budget if too many cases are so resolved. The evidence as to the small percentage of available enforcement cases that are accepted by the solicitors offices suggest that there will always be sufficient cases to proceed to litigation particularly those involving class action, or where the agency feels important legal precedent is to be made, or ultimately when one of the parties just does not want to mediate.

(7) Perhaps the most pivotal element in legitimizing mediation as a beneficial tool in the enforcement arena, would be the judiciary endorsement and expanded encouragement in using the process. Although U.S. District courts are mandated to encourage the use of mediation, there is limited familiarity with mediators possessing the desired statutory expertise. Additionally, those mediators who are involved in the procedures are usually volunteers. If the courts or the Justice Department are serious in their professed endorsement of mediation and expect to have it achieve prominence or credibility as a tool of litigation reduction, efforts must be mounted to identify the substantively qualified mediators and to call upon such qualified mediators when cases arise in their field of expertise. Consistent with that effort must also be a drive to secure adequate funding for the mediators to overcome the prevailing notion of an amateur effort by substantively unskilled do-gooders who approach substantive legal issues with a one-size fits all approach. It is just not true or acceptable to dispute parties on statutory issues that any process-qualified neutral can mediate any dispute regardless of the complexity of the statutory issue involved and regardless of the disparity of sophistication of the two parties to the mediation.

The United States Supreme Court has perhaps unwittingly provided an impetus to mediation of statutory disputes by its recent decisions interpreting the 11th Amendment as prohibiting federal court suits by employees against state government employers for violation of federal employment statutes. Starting with its June 23, 1999 decision in *Alden v. State of Maine*[14] in which it held the employer could not be sued in federal court for a claimed violation of the Fair Labor Standards Act, and most recently with its February 21, 2001 decision in *Board of Trustees of the University of Alabama v. Garrett*[15] exempting state governments from suits over alleged breach of the Americans with Disabilities Act, the court has demonstrated the need for a credible forum for resolving federal statutory disputes for state employees. With the high rate of Union membership in state employment collective bargaining agreements may provide the vehicle for resolving such workplace disputes. But state governments seeking to provide resolution of such frustrated disputes might also consider offering an alternative of mediation to employees as a means of bringing finality and workplace resolution to disputes which might otherwise continue to fester and bring disruption to workplace tranquility.

(8) The final and crucial requirement in the effort to achieve recognition of mediation as an accepted procedure in the enforcement of statutory rights is the need for the courts, the government agencies, and society to recognize the primacy of disputing parties reaching their own dispute resolution facilitated by the expert assistance of a trained mediator. The overwhelming risk of a win/loss outcome when a case is litigated in court can readily be avoided by mediation. Whether or not the results of mediation achieve parity with what the courts may impose on such disputing parties, the stake of the parties in reaching a resolution within their own control while still compatible with the law and within an enforcement context, makes such outcomes, ultimately a benefit to society at large.

[1] *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 US 593 (1960).

[2] See Chantal Rivest, "Voluntary European Works Councils", *European Journal of Industrial Relations*, July 1996, pp.235-253; Herman Knudsen and Niklas Brun, "European Works Councils in the Nordic Countries: An Opportunity and a Challenge for Trade Unionism", *European Journal of Industrial Relations*, July 1998, pp. 131-155; Miguel Martinez, Lucio and Syd Weston, "European Works Councils and Flexible Regulation: The Politics of Intervention", *European Journal of Industrial Relations*, July 2000, pp. 203-216; Kirsten. S. Wever, "Five Unspectacular Cases from Germany", *Industrial Relations*, October 1994, pp. 467-481. Adolph Sturmfthal, *Workers Councils, A Study of Workplace Organization on Both Sides of the Iron Curtain*, Cambridge, Harvard University Press., 1964. Joel Rogers and Wolfgang Streek, *Works Councils: Consultation, Representation and Cooperation*, 1995.

[3] For a discussion of the British arrangements see, *British Journal of Industrial Relations*, December 2000, Special Edition based on Analyses of Britain's 1998 Workplace Employee Relations Survey, "Discipline, Dismissals and Complaints to Employment Tribunals" by K.G. Knight and Paul L. Latrell, pp.533-555.

[4] 4See Commission on the Future of Worker-Management Relations, Report and Recommendations, December 1994, pp.43-47, 54.

[5] See Paul C. Weiler, *Governing the Workplace, The Future of Labor and Employment Law*, Cambridge, Harvard University Press, 1990, pp. 282-306.

[6] 415 U.S. 36 (1974).

[7] *Brisentine v. Stone and Webster Engineering Corp.*, 117 F.3d 519.

[8] *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991).

[9] No.99-1379. Argued November 6, 2000

[10] John T. Dunlop and Arnold M. Zack, *Mediation and Arbitration of Employment Disputes*, San Francisco, Jossey-Bass Publishers, 1997 Appendix B: "The Protocol: Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship pp. 271-78; Appendix C: Massachusetts Commission Against Discrimination: Policy 96-1; Policy on Alternative Dispute Resolution, pp.179-92.

[11] Thomas A. Kochan, Brenda A., Lautsch, Corinne Bendersky, "An Evaluation of the Massachusetts Commission Against Discrimination Alternative Dispute Resolution Program", *Harvard Negotiation Law Review*, Spring 2000, pp.233-78.

[12] Source reference: Jay S. Siegel, a member of the Task Force, is Chairman of the NASD National Arbitration and Mediation Committee.

[13] Richard B.Freeman and Joel Rogers, *What Workers Want*, Ithaca, ILR Press, 1999 .

[14] 119 S Ct 2240(1999).

[15] No. 99-1240, February 21, 2001