

Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace

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I. INTRODUCTION

There is currently a vibrant dialogue among scholars of employment law and dispute resolution regarding aspirations for justice in the new social compact at work. At issue are questions of the fairness of mandatory arbitration, the justice of mediation, and a voice at the workplace in the face of declining unionism. In this article, we review the results of a longitudinal study of employment mediation for discrimination cases in a major, unionized employer, the United States Postal Service (USPS). We argue here that the design of this program, which entails voluntary mediation in the transformative model

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and not mandatory arbitration, furthers goals of justice at the workplace while preserving worker access to traditional remedies and producing substantial benefits in efficiency of dispute processing for employer and employee alike. First, we briefly introduce dispute system design (DSD) in the workplace. Second, we address the problem of one-party control over DSD and how it can be used to shape programs. Third, we describe the dispute system design of the USPS REDRESS Program. Fourth, we report on the results of the longitudinal evaluation of the program, the National REDRESS Evaluation Project. We conclude that a well-designed and implemented mediation program can afford meaningful workplace justice.

II. DISPUTE SYSTEM DESIGN IN THE WORKPLACE

Historically, organizations reacted to conflict; they did not systematically plan how to manage it. They used existing administrative or judicial forums to address it.¹ Eventually, however, organizations became dissatisfied with the traditional time-consuming and costly processes that often did not produce satisfactory outcomes,² while businesses realized that workplace conflict often resulted in inefficiency and that a quality conflict management system was essential.³ Lipsky, Seeber and Fincher suggest that the rise of ADR in the workplace reflects a changing social contract between employers and employees.⁴ While employers dictated the workplace rules in the first part of the twentieth century, unions and collective bargaining began to change the top-down workplace structure; these negotiations yielded the private justice system of grievance arbitration. Today, with unionism in decline, a new system of conflict resolution is emerging.⁵

These changes have led to the concept of dispute system design (DSD), a phrase coined by Professors William Ury, Jeanne Brett, and Stephen Goldberg to describe the purposeful creation of an ADR program by an organization to manage conflict through a series of steps or options for process.⁶ They argued that dispute resolution processes

1. DAVID B. LIPSKY, RONALD L. SEEBER & RICHARD D. FINCHER, *EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS* 6 (2003).

2. *Id.*

3. *Id.*

4. *Id.* at 36.

5. *Id.* at 29-74 (discussing a much more detailed account of the changing social contract in the United States).

6. WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COST OF CONFLICT* 41-64 (1988).

can focus on interests, rights, or power,⁷ but that these systems will function better for stakeholders if they focus primarily on their interests. A healthy system should only use rights-based approaches (arbitration or litigation) as a fallback when disputants reach an impasse; parties should not generally resort to power-based approaches.

There are growing numbers of workplace DSD programs in settings from federal, state, and local governments to a variety of private and nonprofit organizations.⁸ Organizational DSDs can take

Interest-based systems focus on the disputants' underlying needs (interests), such as those for security, economic well-being, belonging to a social group, recognition from others, and autonomy or control. Rights-based processes focus on legal entitlements under the language of a contract, statute, regulation, or court decision. Power-based systems are least effective as a basis for resolving conflict; workplace examples include strikes, lockouts, and corporate campaigns. Their work on dispute system design grew from experience with industrial disputes in the coal industry. After a series of wildcat strikes, it became clear that the traditional multi-step grievance procedure culminating in binding arbitration was not meeting the needs of coal miners, unions, and management. Ury, Brett, and Goldberg suggested an experiment: grievance mediation. This involved providing mediation, a process for resolving conflict based on interests, as soon as disputes arose. The addition of the grievance mediation step changed the traditional rights-based grievance arbitration dispute system design to one including an interest-based 'loop-back', i.e., a step that returned the disputants to negotiation, albeit with assistance.

7. *Id.* at 3-19. Recent experimental work empirically supports the emphasis on interests in DSD. See Jean Poitras & Aurélie Le Tareau, *Dispute Resolution Patterns and Organizational Dispute States*, 19 INT'L J. CONFLICT MGMT. 72 (2008).

8. For review articles on field studies and evaluation of the uses of mediation and DSD in the contexts of employment, education, criminal justice, the environmental, family disputes, civil litigation in courts, and community disputes, see Symposium, *Conflict Resolution in the Field: Assessing the Past, Charting the Future*, 22 CONFLICT RESOL. Q. 1, 1-320 (2004). See generally, CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* (1996). This article focuses on institutional DSD, but DSD occurs outside the context of a single organization. In environmental conflict resolution, which is characterized by the participation of many parties representing diverse stakeholders, DSD is the first phase of the process. See generally THE CONSENSUS BUILDING HANDBOOK 61-168 (Lawrence Susskind et al. eds., 1999) (discussing issues of who designs and structures a consensus process, the design phase, and the design committee). Similarly, courts and administrative agencies engage in DSD when they adopt alternative dispute resolution programs or supervise mass tort claim systems. For extensive background on DSD efforts in the federal government, see Interagency Alternative Dispute Resolution Working Group, <http://www.adr.gov/> (last visited Oct. 8, 2008). For evaluation reports reflecting the results of DSD in the federal courts, see Federal Judicial Center, <http://www.fjc.gov/> (last visited Oct. 8, 2008). For similar reports reflecting DSD in state courts, see National Center for State Courts, <http://www.ncsc.org> (last visited Oct. 8, 2008). For an analysis of evaluations of state and federal court ADR programs with descriptions of their design, see the website of the Resolution Systems Institute, <http://aboutrsi.org/publications.php?sID=9> (last visited Oct. 8, 2008). DSD has addressed the design of legal institutions and constitutions. See Janet Martinez & Stephanie Smith, *An Analytic Framework for Dispute System Design*, 14 HARV. NEGOT. L. REV. 123 (2009).

myriad forms, including multi-step procedures culminating in mediation and arbitration, ombuds⁹ programs giving disputants many different process choices, or simply a single step binding arbitration design. Although many have unique features, almost all of these DSDs have a similar singular purpose: settling disputes. This goal makes perfect sense to the organization; settling disputes early saves an employer time and money.¹⁰ This transactional approach to DSD focuses on tangible problems that can be resolved through concrete solutions usually involving an economic component, for example, a cash payment in exchange for the employee withdrawing a complaint. The REDRESS program departs from this approach; its goals are primarily focused on improving workforce conflict management skills and workplace climate.

III. A TYPOLOGY OF DISPUTE SYSTEM DESIGNS AND THE PROBLEM OF ONE-PARTY CONTROL

Dispute systems vary across two separate dimensions of disputant self-determination or control: control over the full system design, and control over a given case using a specific process provided by that design.¹¹ Control over DSD includes the power to make choices regarding what cases are subject to the process, which process or sequence of processes are available (for example, mediation, early neutral evaluation or binding arbitration), what due process rules apply, and other structural aspects of a private justice system.¹²

9. An ombuds program is an organizational dispute system design in which one person, generally with direct access to upper management, serves as a contact point for all streams of conflict in the organization, and assists employees and consumers with identifying an appropriate process for addressing disputes. See The International Ombudsman Association, <http://www.ombudsassociation.org> (last visited Oct. 7, 2008). See also Mary Rowe, *An Organizational Ombuds Office in a System for Dealing with Conflict and Learning from Conflict, or "Conflict Management System,"* 14 HARV. NEGOT. L. REV. 279 (2009).

10. That is the widespread perception. See, e.g., the account of JAMS mediator Cecilia H. Morgan, *Peacemakers and the Law: Employment Dispute Resolution Processes 2004*, 11 TEX. WESLEYAN L. REV. 31 (2004).

11. For purposes of this discussion, I will use the term "control" to discuss the dispute system design level of analysis. I have previously used the terms "self-determination" and "control" synonymously, recognizing that in other contexts, authors may distinguish between the two.

12. Some employers provide funds for employees to pay for legal services. See Michael Z. Green, *Ethical Incentives for Employers in Adopting Legal Service Plans to Handle Employment Disputes*, 44 BRANDEIS L.J. 395, 401-03 (2006). Professor Green also argues that unions should provide lawyers for members who allege discrimination; See Michael Z. Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U. PA. J. LAB. & EMP. L. 55, 61-62 (2004).

Within a DSD, control over a given case can address process and/or outcome. One or more parties may give control over the process to a mediator, while they both retain control over the outcome. In mediation, the outcome may be impasse or a voluntary, negotiated settlement. In arbitration, one or more parties may give control over outcome to a third party to issue a binding decision.

Dispute systems, and arguably the justice they produce, vary depending on who is exercising this control. The three key questions are: 1) who is designing the system, 2) what are their goals, and 3) how have they exercised their power.¹³ Historically, the public civil justice system has been the product of design by a third party: the judicial branch with funding from the legislative branch acting for the benefit of disputants. Meanwhile, private justice systems traditionally arose when both or all parties to a dispute negotiated dispute system design in their contracts, as in labor relations or commercial contracts. Moreover, parties typically negotiated dispute system design in the shadow of the public justice system—specifically, courts and administrative agencies that are third party DSDs. In the past three decades, however, a new phenomenon has emerged and flourished; a single disputant with superior economic power often takes unilateral control over designing a dispute system for conflicts to which it is a party. Furthermore, the more powerful party often elects a DSD that effectively restricts recourse to the public civil justice system through adhesive binding arbitration clauses.¹⁴

13. Lisa B. Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, 67 *LAW & CONTEMP. PROBS.* 221, 222 (2004) (arguing that control over dispute system design shifts the settlement value of cases in commercial mandatory arbitration); Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 *U. MIAMI L. REV.* 873, 880 (2002) (arguing that control over dispute system design changes outcomes in employment arbitration); Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 *J. DISP. RESOL.* 101, 101-02 (2002) (arguing that control over dispute system design makes a difference in mediation outcomes).

14. See Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 *OR. L. REV.* 861, 864-65 (2004) (arguing that some employers use mandatory arbitration to manage risk, and that repeat players should pay more for the privilege). See also, Alexander J.S. Colvin, *Institutional Pressures, Human Resource Strategies, and the Rise of Nonunion Dispute Resolution Procedures*, 56 *INDUS. & LAB. REL. REV.* 375, 375 (2003) (finding that rising individual rights litigation and increased judicial deferral to nonunion arbitration are institutional factors leading to increased adoption of mandatory arbitration in the workplace); Alexander J.S. Colvin, *From Supreme Court to Shopfloor: Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution*, 13 *CORNELL J.L. & PUB. POL'Y* 581 (2004); Stephan Landsman, *ADR and the Cost of Compulsion*, 57 *STAN. L. REV.* 1593, 1593 (2005) (arguing that risks of compelled ADR include the "likelihood that adhesion contract drafters will use arbitration clauses and related requirements to short-circuit existing legislation with

The REDRESS program is a product of one-party control; however, the USPS exercised this control to design a system that attempted to maximize disputant control over both process and outcome at the individual case level. In this way, it avoids the significant public policy issues raised by other DSDs such as adhesive arbitration plans. Moreover, as we report in Part IV, the USPS has made progress toward its goals of improving employee conflict management skills and workplace climate.

What follows is a brief survey to illustrate the typology of DSDs that emerge when control over DSD is combined with choices about control over process (mediation) and outcome (arbitration). We examine six categories of DSDs related to employment disputes: third-party, two-party, and one-party designs involving arbitration, and third-party, two-party, and one-party designs involving mediation.¹⁵ We argue that as a general matter, DSDs adopted by the disputants through mutual negotiation and those adopted by third parties for the benefit of disputants are fairer than most one-party designs. We also argue that it is possible to create a fair one-party design if that design returns control over process and outcome to the disputant at the individual case level.

newly drafted provisions protective of their special interests, that contract drafters will, in some cases, go even further and use their drafting power to squelch all claims, and that ADR providers will be sorely tempted to cast their lot with adhesion contract drafters in order to win and retain valuable business”); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1673 (2005) (surveying the emergency of mandatory arbitration in lieu of civil litigation for employment and consumer claims and concluding that it is unjust).

15. Lisa Blomgren Bingham has presented this typology previously, and thus the discussion here is abbreviated and references recent literature in illustration. For additional examples in each of the six categories, see Lisa B. Bingham, *Control Over Dispute Design and Mandatory Commercial Arbitration*, *supra* note 13, at 225-48 (examples beyond employment); Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, *supra* note 13, at 889-902 (arbitration examples); Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, *supra* note 13, at 109-23 (mediation examples). For a review of empirical and field studies on dispute resolution in employment, see Lisa B. Bingham, *Employment Dispute Resolution: The Case for Mediation*, 22 CONFLICT RESOL. Q. 145, 145-67 (2004). For a responsive commentary calling for new multivariate research, see David B. Lipsky & Ariel C. Avgar, *Commentary: Research on Employment Dispute Resolution: Toward a New Paradigm*, 22 CONFLICT RESOL. Q. 175, 175-189 (2004).

A. *Third Parties Adopt Binding Arbitration Programs for Disputants.*

Third parties may have the power to adopt binding arbitration programs either through constitutional sovereign governmental authority¹⁶ or because the parties agree voluntarily to submit to their jurisdiction. The International Criminal Court, for example, represents a third party dispute system design in the emerging arena of global ordering to which states voluntarily submit.¹⁷ In addition, Professor Ackerman has comprehensively described a third party dispute system design in his study of the September 11th Victim Compensation Fund, which was created under federal mandate.¹⁸ He examines the legislation, the Fund's implementation, and its substantive and procedural fairness, concluding that the dispute system design dealt with difficult circumstances in a principled and fundamentally fair manner, despite criticisms that Congress failed to provide either a clear standard for its performance in terms of distributive justice or a mechanism for appeal.¹⁹ After a period of criticism of the existing designs for resolving conflicts over amateur sports in Canada, the government recently created the Sport Dispute Resolution Centre of Canada (SDRCC),²⁰ a third party design that ameliorates problems with systems designed unilaterally by the national governing bodies of individual sports.²¹

Commentators have begun to suggest that the ills or abuses associated with mandatory arbitration can essentially be cured with a

16. For example, public sector binding interest arbitration provides an impasse resolution process for state and local government employees. See, e.g., Richard W. Laner & Julia W. Manning, *Interest Arbitration: a New Terminal Impasse Resolution Procedure for Illinois Public Sector Employees*, 60 CHI.-KENT L. REV. 839 (1984).

17. Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 COLUM. J. TRANS-NAT'L L. 377 (2006) (discussing the relation between state control over the dispute system and willingness voluntarily to agree to be bound by its outcomes).

18. Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to a National Tragedy*, 10 HARV. NEGOT. L. REV. 135 (2005). The 9/11 Fund could be viewed as a DSD to compensate victims who died in the course of their employment from causes outside the scope of what would ordinarily be considered in workers compensation, since the proximate cause is the criminal act of terrorists.

19. *Id.* at 138-39.

20. Anik L. Jodouin, *The Sport Dispute Resolution Centre of Canada: An Innovative Development in Canadian Amateur Sport*, 15 J. LEGAL ASPECTS OF SPORT 295 (2005).

21. See Bingham, *Control Over Dispute Design and Mandatory Commercial Arbitration*, *supra* note 13.

statute²² that both mandates arbitration for employment and consumer claims but at the same time regulates the process. This statutory approach is essentially proposing a third party design for mandatory arbitration to ensure comparable statutes of limitations, relief, representation, and due process protections to those available in litigation, while limiting the nature of discovery so as not to lose arbitration's efficiency benefits.²³ Similarly, the various due process protocols proposed for employment, consumer, and health care disputes represent third-party design efforts by groups of stakeholders who are not parties to a given dispute but have an interest in the perceived integrity of dispute resolution in their respective fields.²⁴

As this brief survey illustrates, third party arbitration designs are subject both to public criticism and to revision in response to that criticism. There is both transparency and accountability either because the third party is a public sector entity or because it is a non-

22. *Recent Proposed Legislation: Arbitration - Congress Considers Bill to Invalidate Pre-Dispute Arbitration Clauses for Consumers, Employees and Franchisees - Arbitration Fairness Act of 2007*, S. 1782, 110th Cong., 121 HARV. L. REV. 2262 (2008). It is of course possible to view the existing legal infrastructure within which all dispute resolution operates as a form of third-party dispute system design adopted through constitutional legislative processes and enforced through the executive and judicial branches of government. Critiques of current law permitting adhesive or mandatory arbitration can be seen through this lens. However, it is also necessary to examine the very real power that the existing legal infrastructure leaves in the hands of organizations to determine the structure of a DSD, and precisely how they exercise it. *See, e.g.*, Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. REV. 1, 50 (2005) (concluding that court-ordered and agency-initiated arbitration involve state action but contractual arbitration does not).

23. Frederick L. Sullivan, *Accepting Evolution in Workplace Justice: The Need for Congress to Mandate Arbitration*, 26 W. NEW ENG. L. REV. 281 (2004). Professor Resnik has examined the evolution of contracts that limit or change available civil procedure, and suggested that the rules of bargaining for legally binding judgments need to identify what bargains are outside the law. Judith Resnik, *Competing and Complementary Rule Systems: Civil Procedure and ADR: Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005). These calls for legislation represent invitations for government as a third party to control DSD.

24. JOHN T. DUNLOP AND ARNOLD M. ZACK, *MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES* (1997). For a discussion of the effectiveness of *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of Employment* (www.adr.org), see Richard A. Bales, *Beyond the Protocol: Recent Trends in Employment Arbitration*, 11 EMP. RTS. & EMP. POL'Y J. 301 (2007); Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165 (2005). For a discussion of protocols in health care, consumer, and employment class arbitrations, see Carole J. Buckner, *Due Process Class Arbitration*, 58 FLA. L. REV. 185 (2006). One might also consider ethical codes for neutrals and advocates as third-efforts to control what happens in a dispute resolution process. *See* Robert C. Bordone, *Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes*, 21 OHIO ST. J. ON DISP. RESOL. 1 (2005).

profit organization fulfilling a mission affected with the public interest. As a result, these designs are more likely to be substantively fair.

B. *The Disputants Mutually Choose Binding Arbitration.*

Disputants may mutually agree to submit their conflict to a third party for a binding decision. Binding arbitration includes both binding or rights arbitration of grievances²⁵ and interest arbitration to create future contractual relationships.²⁶ The practice has a long and laudable history in labor relations and commercial dealings; it is the cornerstone of a compact for workplace justice between labor and management, providing consideration for an agreement not to strike.²⁷ Indeed, binding arbitration is central to commercial dealings among the Fortune 500 through their adoption of the CPR Pledge, in which they pledge to use ADR with each other prior to litigation.²⁸ It is also the DSD of choice in the construction industry, although it is possible for it to be either the product of two-party design through an arm's length negotiation or imposed unilaterally by the stronger economic party in a one-party DSD.²⁹ In theory, when both parties control arbitration DSD, they can build in provisions to make it fair and balanced, such as mutual selection of the arbitrator. Labor arbitration, for example, is subject to repeated refinement when the parties renegotiate the underlying collective bargaining agreement. They may select a permanent umpire and change the identity of that umpire based on experience. They may build in provisions that shift the administrative costs of arbitration. However, each change is subject to bilateral negotiation and renegotiation over time based on experience. This too tends to yield a DSD that is substantively fair at least as compared to one-party designs.

25. DUNLOP & ZACH, *supra* note 24, at 4. See also Martin H. Malin and Jeanne M. Vonhof, *The Evolving Role of the Labor Arbitrator*, 21 OHIO ST. J. ON DISP. RESOL. 199 (2005) (examining how labor arbitrators are incorporating external law and parties' expectations of the role of the arbitrator are changing).

26. See Stephen M. Yoost, *The National Hockey League and Salary Arbitration: Time for a Line Change*, 21 OHIO ST. J. ON DISP. RESOL. 485 (2006).

27. For a comprehensive treatise on labor arbitration, see FRANK ELKOURI & EDNA ELKOURI, *HOW ARBITRATION WORKS* (Edward P. Goggin ed., 2003).

28. See Int'l inst. Conflict Prevention & Resolution, <http://www.cpradr.org> (last visited Oct. 12, 2008).

29. Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65 (1996); Dean B. Thomson, *Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators*, 23 HOFSTRA L. REV. 137 (1994).

C. *One Disputant Imposes Arbitration on the Other: Mandatory, Adhesive Arbitration.*

In a one-party arbitration design, the stronger economic disputant imposes an arbitration clause on the weaker through a take-it or leave-it adhesive contract; as a result, these designs have also been termed 'mandatory arbitration.'³⁰ These designs have been subject to substantial criticism due to perceived abuses of one-party control to deny due process protections such as access to counsel, discovery, the availability of class actions, a reasoned decision, among others; to eliminate access to class actions; and to shift the costs of arbitration onto the weaker party through choice of forum and fee-shifting.³¹ Commentators have distinguished between two-party and one-party designs in discussions of how courts and legislatures should respond to changing uses of commercial arbitration.³² Many commentators have begun to suggest standards and norms that employers should consider in exercising unilateral power to impose a dispute system design upon employees. For example, Professor Reuben advocates that employers design programs that are consonant with notions of democratization in the American workplace.³³ Such notions include fundamental values of political participation, legal and social capital, accountability, rationality, personal autonomy, and equality, which must be weighed against substantive expertise, informality, speed, and finality in the context of binding arbitration.³⁴ Reuben concludes

30. See Bingham, *Control Over Dispute Design and Mandatory Commercial Arbitration*, *supra* note 13.

31. *Id.*

32. See, e.g., Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171 (2003) (arguing that mutually negotiated, arm's length agreements to expand the scope of judicial review for arbitration should be enforced, but arguing against enforcement for standard form contracts for consumer goods). *But see* Michael H. LeRoy and Peter Feuille, *The Revolving Door of Justice: Arbitration Agreements that Expand Court Review of an Award*, 19 OHIO ST. J. ON DISP. RESOL. 861 (2004) (concluding based on an empirical analysis that justice is biased in favor of parties with superior bargaining power when courts give effect to expanded review clauses). The U.S. Supreme Court recently rejected the argument that the parties have the DSD power to expand judicial review by contract, holding instead that the Federal Arbitration Act contains the sole grounds for judicial review of expedited binding arbitration awards. *Hall St. Assocs., LLC v. Mattel, Inc.*, 128 S.Ct. 1396 (2008).

33. Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11 (2005). One might argue that the decline in unionism represents the demise in workplace democracy and a return to the old substantive due process notions of freedom of contract so soundly rejected when Oliver Wendell Holmes, Jr. decried the Supreme Court's imposing Mr. Herbert Spencer's values in *Lochner*, but that is a dialogue for another day.

34. *Id.* at 67-68.

that voluntary, mutual agreement to arbitration is superior to one-party adhesive arbitration in its consistency with these democratic values.³⁵ Nonetheless, despite mounting scholarly criticism, employers and corporations have continued to adopt adhesive, mandatory binding arbitration plans.³⁶ It is important to recognize that this is a voluntary choice; employers could instead choose to adopt a mediation design that gives employees more control over their dispute at the individual case level. Moreover, most arbitration plans are designed to address termination of employment; by definition, a DSD that addresses only the end point of the employment relationship is unlikely to make a difference in ongoing conflict at the workplace.

D. *Third Parties Design a Mediation Program for Disputants.*

The success of ADR generally has been most evident in the growth of third party mediation program designs in courts, public agencies, and other settings. When a court³⁷ or public agency adopts mediation or non-binding arbitration programs for disputants and is not a party to the dispute, the resulting framework constitutes a third-party DSD. Even within third party mediation designs, models can provide more or less disputant control at the case level based on the model of mediation chosen.³⁸ This section will first address the choice of mediation model. It will then briefly survey examples of third party mediation designs. Finally, it will turn to third party designs that provide a point of comparison for the USPS REDRESS program, specifically, mediation programs for complaints of discrimination at the workplace.

There is an ongoing dialogue regarding the definition and boundaries of various forms of mediation practice, or mediation models

35. *Id.*

36. Jean Sternlight, *Creeping Mandatory Arbitration: Is it Just?* 57 STAN. L. REV. 163 (2005) (surveying the emergence of mandatory arbitration in lieu of civil litigation for employment and consumer claims and concluding that it is unjust).

37. See, e.g., Dr. Julie MacFarlane and Michaela Keet, *Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program*, 42 ALTA L. REV. 677 (2005) (reporting a quantitative and qualitative analysis of a court-connected mediation program). See generally Resolution Systems Institute, <http://www.aboutrsi.org/> (last visited Oct. 13, 2008) (including its database and an analysis of court ADR programs); The Federal Judicial Center, <http://www.fjc.gov> (last visited Oct. 13, 2008).

38. Of course, the question of disputant control in courts is not limited to court-connected ADR programs. Professor Moffitt has argued for more disputant control over litigation procedures. Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. W. L. REV. 461 (2007).

such as evaluative, facilitative, or transformative.³⁹ Certain mediation behaviors in a given context do make a meaningful difference in a disputant's experience. In 1996, Professor Leonard Riskin offered a grid of mediation styles called the Problem Definition Continuum that describes "what mediators do" in terms of either evaluation or facilitation along one axis, and ways of defining the problem as either broad or narrow along the other axis.⁴⁰ The evaluative mediator focuses on helping the parties understand the strengths and weaknesses of their case by providing assessment, prediction, and direction.⁴¹ Evaluative mediators generally ask the parties to make formal opening statements presenting their case, and then conduct one or more caucuses to meet privately with disputants. The mediator focuses on collecting facts, identifying issues, and analyzing the parties' legal arguments to develop a sense of the case's economic value. In other words, the mediator evaluates who is likely to win and how much the winning party will probably recover. In order to press the parties to settle, the mediator will judiciously share this evaluation with each side at strategic moments. The mediator may propose a particular settlement. This model also tends to involve a more directive mediator, one who will not hesitate to 'arm-twist' the parties to achieve settlement. Attorneys sometimes appreciate this approach because it helps them control unrealistic clients.

On the other end of the what mediators "do" axis, Riskin described the facilitative mediator, who focuses on clarifying and enhancing communication between the parties and helping them decide what to do.⁴² The mediator generally will listen to opening statements and may conduct caucuses, but the focus of the process is not on the legal merits of the dispute, so much as on the parties' underlying needs and how those needs might be met in an interest-based settlement. The mediator generally will avoid evaluating the case, but may engage in 'reality-testing' to help the parties achieve a more

39. See Michael L. Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEGOT. L. REV. 69 (2005) (arguing that prescriptive acontextual definitions do not sufficiently advance our inquiry into how specific mediator practices function, and that there are five key questions we should consider about mediation: who is allowed to do it; who should get regulatory benefits; to whom should the market turn for services; what works; and what behavior is appropriate?). See also Jonathan M. Hyman, *Swimming in the Deep End: Dealing with Justice in Mediation*, 6 CARDOZO J. CONFLICT RESOL. 19 (2004) (arguing for an approach to justice in mediation based on the detailed facts and context of each case).

40. Leonard L. Riskin, *Understanding Mediator's Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 17 (1996).

41. *Id.* at 44.

42. *Id.* at 24.

objective sense of their alternatives to a negotiated settlement. The mediator will help the parties engage in brainstorming to generate ideas for resolving the dispute, and will also suggest options to include in a settlement.

The second axis entails problem definition, ranging from litigation issues (narrow) to community interests (broad) to capture the goals of mediation. The primary goal of both facilitative and evaluative mediation is settlement, defined as reaching an agreement or solving a problem. In response to the criticism that the narrow/broad continuum does not capture all the potential goals of mediation, Professor Riskin revised the grid.⁴³ He substituted the word 'directive' for evaluative and the word 'elicitive' for facilitative to better describe how to anchor the role of the mediator in the grid.⁴⁴ He then proposed a new grid 'system' to capture the range of decisions in mediation and the extent to which participants can affect them, including matters of substantive compared to procedural decision-making,⁴⁵ In part, Riskin revised the grid to encompass new models of mediation, such as the transformative model.

In transformative mediation, the goal is framed as empowerment and recognition. Empowerment is movement away from weakness to strength, becoming clearer, more confident, articulate and decisive.⁴⁶ Recognition is movement from self-absorption to responsiveness, becoming more attentive, open, trusting, and understanding of the other party.⁴⁷ Settlement is not a goal but rather sometimes an outcome that derives from empowerment and recognition. Transformative mediators do not unilaterally structure the process by setting ground rules, asking for opening statements, calling caucuses, brainstorming, and the like. Instead, the mediator will ask the participants how they would like to structure the process, and if necessary, will offer them a series of choices or examples. The mediator does not evaluate or offer opinions on the merits of the dispute, does not pressure participants to settle, and does not recommend particular settlement terms or options. Instead, the mediator attempts to highlight

43. Leonard L. Riskin, *Decisionmaking in Mediation: The Old Grid and the New Grid System*, 79 NOTRE DAME L. REV. 1, 22-23 (2003).

44. *Id.* at 30.

45. *Id.*

46. *Id.* at 55.

47. *Id.* at 48.

moments in the discourse when one participant recognizes and acknowledges the perspective of the other.⁴⁸

Thus, the choice of mediation model in a DSD is important for participants' experiences. For example, in court-connected mediation programs in which disputants are often represented by counsel, lawyers often prefer mediators who evaluate the merits and value of the case.⁴⁹ Professor Welsh has criticized mediator strong-arm tactics in court-connected evaluative mediation and suggested that courts give disputants a cooling off period within which to reject a tentative settlement.⁵⁰ DSDs may call for face-to-face mediation, telephone mediation as in certain federal appellate models, or even mediation through text over the internet or online dispute resolution.⁵¹ These varying models affect the nature of the interaction between disputants.

Court-connected mediation designs include both court rules established to foster use of mediation and the legal infrastructure to make mediation fit within the context of civil litigation.⁵² Examples include the recent growth in mediation of federal cases at the appellate level, whether by court employees or by creation of a roster of private mediators.⁵³ Some argue that court-connected mediation is

48. For more detail on specific mediator behaviors in transformative practice, see Joseph P. Folger & Robert A. Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 *MEDIATION Q.* 263, 266–76 (1996).

49. See Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 *MO. L. REV.* 473, 475 (2002). But see Lela P. Love & John W. Cooley, *The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary*, 21 *OHIO ST. J. ON DISP. RESOL.* 45, 70 (2005) (arguing for well-informed party consent before a mediator engages in evaluation of a case in order to maximize party self-determination).

50. See Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 *HARV. NEGOT. L. REV.* 1, 6-7 (2001).

51. See David Allen Larson, *Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR*, 21 *OHIO ST. J. ON DISP. RESOL.* 629 (2006) (describing the differences between online dispute resolution and face-to-face mediation).

52. For a thorough discussion of the Uniform Mediation Act and recent international rule developments, see Ellen E. Deason, *Competing and Complementary Rule Systems: Civil Procedure and ADR: Procedural Rules for Complementary Systems of Litigation and Mediation – Worldwide*, 80 *NOTRE DAME L. REV.* 553 (2005).

53. See Shawn P. Davisson, *Privatization and Self-Determination in the Circuits: Utilizing the Private Sector Within the Evolving Framework of Federal Appellate Mediation*, 21 *OHIO ST. J. ON DISP. RESOL.* 953, 954 (2006) (discussing the prevalent DSD of mediation by court staff in the federal sector contrasted with the choice to hire a private sector mediator in state courts).

appropriate even for the most significant cases, such as those involving major issues of public policy like disputes over school prayer and abortion. These cases call for a broader model of mediation engagement and a more deliberative process of consensus-building.⁵⁴ There has been a tendency in many court designs to take a hands off approach. After mandating mediation at a certain point in the litigation, courts generally leave the actual process up to private mediators either through disputant choice or a roster.⁵⁵ Recently, there have been calls for courts to take a more active role in regulating the systems they have designed.⁵⁶ Professor Shestowsky has called for courts to consider disputant preferences for different aspects of process when designing their programs.⁵⁷

Public agencies have adopted third-party DSDs to manage conflict among the public and external stakeholders, such as regulatory enforcement of laws regarding discrimination or workplace safety. Professor Nancy Welsh has provided an example of a state agency, specifically a department of education, which adopts a mediation program for school boards and parents for disputes over special education placements for children.⁵⁸ Other commentators describe the model of public sector labor relations, in which the state mandates a mediation or advisory arbitration and fact-finding program for labor

54. See Jeffrey R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881, 884–87 (2004).

55. Courts will, however, address issues of mediator misconduct. See James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation about Mediation*, 11 HARV. NEGOT. L. REV. 43, 95–98 (2006).

56. See Peter N. Thompson, *Enforcing Rights Generated In Court-Connected Mediation-Tension Between The Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 514–15 (2004); see also Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U.L.Q. 787, 831–38 (2001) (calling for courts to deliver disputants an experience of procedural justice in court-connected mediation programs).

57. See Donna Shestowsky, *Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63 (2008). For excellent syntheses of the procedural justice literature as applied to court-connected dispute resolution, see Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549 (2008). See also Donna Shestowsky, *Misjudging: Implications for Dispute Resolution*, 7 NEV. L. REV. 487 (2007).

58. See Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 580–83 (2004) (describing how the Pennsylvania Department of Education's mediation program design affects disputant perception of self-determination and procedural justice before and after participation in a state special education mediation, and arguing that parties may value evaluative mediation behaviors in the context of adequate opportunities for voice).

management disputes among public employers and public employee unions that are forbidden the right to strike.⁵⁹ For instance, the National Labor Relations Board has implemented mediation and conciliation in its enforcement process for unfair labor practice charges and other cases.⁶⁰ In some cases, an agency's entire mission and existence is devoted to dispute system design services for disputants, as in the case of the United States Institute for Environmental Conflict Resolution⁶¹ or the Federal Mediation and Conciliation Service.⁶² In all of these examples, as is the case with third party arbitration designs, there is both transparency and accountability in that the design is subject to public criticism and revision.

Third party designs need not be connected to a court or public agency, however. Professor Clark Freshman has explored the use of mediation within various forms of community, including communities formed based upon common religious, racial, or ethnic backgrounds, or based upon gender preferences, and argues that this choice among competing contexts for mediation makes a difference in the experience of the disputants.⁶³ The phrase "community mediation" has also been used to describe non-profit and grassroots

59. See generally Mitchell H. Rubinstein, *Advisory Labor Arbitration Under New York Law: Does it Have a Place in Employment Law?* 79 ST. JOHN'S L. REV. 419 (2005) (describing the use of advisory arbitration in public sector labor relations and arguing that it may play a useful role in one party dispute system designs by reducing litigation of private sector employment disputes).

60. See Valerie A. Sanchez, *A New Look at ADR in New Deal Labor Law Enforcement: The Emergence of a Dispute Processing Continuum Under the Wagner Act*, 20 OHIO ST. J. ON DISP. RESOL. 621, 640 (2005).

61. U.S. Institute for Environmental Conflict Resolution, <http://www.ecr.gov> (last visited Oct. 7, 2008).

62. Consider, for example, the role of the Federal Mediation and Conciliation Service, which not only provides direct mediation services to the public and private sectors in labor relations, but also is providing services to assist parties with DSD. See Peter Robinson, Arthur Pearlstein, & Bernard Mayer, *DyADS: Encouraging "Dynamic Adaptive Dispute Systems" in the Organized Workplace*, 10 HARV. NEGOT. L. REV. 339, 340 (2005). See also Federal Mediation & Conciliation Service, <http://www.fmcs.gov/internet/> (last visited Oct. 7, 2008).

63. See Clark Freshman, *The Promise and Perils of "Our" Justice: Psychological, Critical and Economic Perspectives On Communities and Prejudices in Mediation*, 6 CARDOZO J. CONFLICT RESOL. 1, 2 (2004) (describing conflicting values and the tension between community values, individual autonomy, and perpetuation of prejudice in mediation within a given community). *But cf.* Josefina M. Rendon, *Under the Justice Radar?: Prejudice in Mediation and Settlement Negotiations*, 30 T. MARSHALL L. REV. 347 (2005) (reporting results of a survey of mediators on the relationship between disputant race or nationality and the outcome of mediation and settlement).

organizations at the local level that seek to help neighbors resolve conflict outside the public justice system.⁶⁴

Some argue that mediation services through a provider such as the American Arbitration Association⁶⁵ or JAMS⁶⁶ represent third party DSDs. For purposes of this discussion, however, that one party with superior economic power can impose the choice of these providers on the other disputant renders them one-party designs. This distinction becomes clear when one considers SquareTrade, the online dispute resolution service provider selected by eBay. This third party provider resolves disputes between users of eBay; eBay itself is not a disputant for the great majority of these cases.⁶⁷ Some criticize the development of these non-governmental third party designs for online dispute resolution and argue for greater government third party control.⁶⁸

Thus, third party mediation designs vary widely in the model of mediation, the level and nature of disputant interaction, and the control they give the disputants over process at the individual case level. The REDRESS program provides mediation for employment discrimination complaints. To give a point of comparison for REDRESS (a one-party mediation design) with other mediation programs for discrimination complaints, we will briefly review selected third-party DSDs mandating or providing voluntary mediation for discrimination in federal and state administrative agencies. The Equal Employment Opportunity Commission (EEOC) has made extensive use of mediation for complaints of discrimination.⁶⁹ Researchers have evaluated

64. See generally National Association for Community Mediation, <http://www.nafcm.org> (last visited Oct. 7, 2008).

65. See generally American Arbitration Association, <http://www.adr.org> (last visited Oct. 7, 2008).

66. See generally Jackson Automated Management Systems, Inc., www.jams.com (last visited Oct. 7, 2008).

67. See Orna Rabinovich-Einy, *Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 HARV. NEGOT. L. REV. 253 (2006) (arguing that SquareTrade's efforts to collect data to ensure accountability in mediation, if augmented, can provide a model for improving accountability in private unregulated mediation services over formal attempts to regulate community and court-referred mediation programs).

68. See Thomas Schultz, *Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust*, 6 N.C. J.L. & TECH. 71 (2004) (arguing that government is the most trustworthy regulator for emerging online dispute resolution programs and that minimal regulation can provide effective accountability).

69. Anne Noel Occhialino & Daniel Vail, *The 40th Anniversary of Title VII of the Civil Rights Act of 1964 Symposium: Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671 (2005) (describing the history and evolution of the EEOC and its mediation program).

its effectiveness.⁷⁰ Others have documented the context of litigation and claiming activity—the shadow within which such mediation occurs—⁷¹ and the alternate path these cases can take through, for example, summary judgment.⁷² In fact, one of the largest workplace mediation programs exists within the Equal Employment Opportunity Commission (EEOC). The EEOC's program uses internal or staff mediators, and it also hires external mediators as independent contractors. Field offices use these staffing models but in addition will assign pro bono, or volunteer mediators to some cases. All mediators receive training in both mediation and the laws enforced by EEOC⁷³ and typically use evaluative techniques.⁷⁴

There have been several studies of mediation at the EEOC. In 1994, Professor Craig McEwen evaluated the EEOC's Pilot Mediation Program⁷⁵ using exit surveys from 267 mediations and 125 follow-up mail surveys. He reported that 66% of the charging parties and 72% of supervisors were satisfied with the outcome.⁷⁶ Additionally, 95% of the parties trusted the mediator and said they had been treated with respect,⁷⁷ and 84% and 83% of the charging parties and supervisors,

70. See E. Patrick McDermott & Danny Ervin, *The Influence of Procedural and Distributive Variables on Settlement Rates in Employment Discrimination Mediation*, 2005 J. DISP. RESOL. 45, 59 (2005) (finding that the likelihood of settlement at mediation significantly correlated with both parties reporting that the mediation was perceived to be fair and that the mediator was perceived to have generated realistic options, and concluding that charging party representation, but not supervisor representation, was likely to reduce the chance of settlement).

71. See Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663 (2005) (finding significant under-claiming in the area of discrimination despite a growth in case filings and exaggerated reports of liability in the litigation arena); Laura Beth Nielsen & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 STAN. L. & POL'Y REV. 237 (2004) (finding a relationship between media coverage and negative public perceptions of discrimination litigation).

72. See D. Theodore Rave, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875 (2006).

73. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, HISTORY OF THE EEOC MEDIATION PROGRAM, <http://www.eeoc.gov/mediate/history.html> (last visited Oct. 7, 2008).

74. See PATRICK MCDERMOTT ET AL., U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *The EEOC Mediation Program: Mediators' Perspective on the Parties, Processes, and Outcomes* (2001), <http://www.eeoc.gov/mediate/mcdfinal.html> (last visited Oct. 7, 2008).

75. See CRAIG MCEWEN, Center for Dispute Settlement, *An Evaluation of the Equal Employment Opportunity Commission's Pilot Mediation Program (1994)*. Copy on file with the authors.

76. See *id.* at 66.

77. See *id.*

respectively, said they would use mediation again.⁷⁸ After several months, participants continued to have positive opinions of the mediation process.

In 2000, McDermott, Obar, Jose, and Bowers prepared a comprehensive evaluation of the EEOC's mediation program.⁷⁹ By March 2000, the EEOC had conducted over 11,700 mediations.⁸⁰ The researchers concluded the program was even more acceptable to the parties than the original study suggested. For example, the new research indicated 91% and 96% of charging parties and supervisors respectively would use mediation again. In 2001, another report by McDermott, Obar, Jose, and Polkinghorn presented mediator feedback on the dynamics of the mediation process, including conduct that facilitates resolution of the dispute.⁸¹ The most recent EEOC report addresses the reasons for the lack of employer participation in the EEOC mediation program.⁸² The report concludes that it is the perceived merits of the case and not the perceived quality of the mediation program that determines whether or not the employer will mediate a charge.⁸³

Similarly, the Massachusetts Commission Against Discrimination (MCAD) program is a state level example of a third-party agency design. In 1995, MCAD agreed on a protocol for resolving discrimination claims through mediation and arbitration.⁸⁴ Initiated in 1996, the ADR program is voluntary, fee-for-service, and requires parties to have legal representation to participate.⁸⁵ Mediators in the program use a mix of facilitative and directive strategies.⁸⁶ In 2000, Kochan,

78. *See id.*

79. PATRICK McDERMOTT ET AL., U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *An Evaluation of the Equal Opportunity Commission Mediation Program* (2000), <http://www.eeoc.gov/mediate/mcdfinal.html> (last visited Oct. 7, 2008).

80. *Id.*

81. McDERMOTT ET AL., *supra* note 80. According to mediators' responses in the study, a flexible and open attitude on the part of participants facilitates resolution; in addition, the mediators identified certain mediator behaviors that aid resolution, including the capacity to reframe issues, to help parties see different vantage points, to clarify ideas, to defuse negative emotions, and to promote "win-win" solutions. *Id.*

82. PATRICK McDERMOTT ET AL., U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *An Investigation of the Reasons for the Lack of Employer Participation in the EEOC Mediation Program* (2003), <http://www.eeoc.gov/mediate/mcdfinal.html> (last visited Oct. 7, 2008).

83. *Id.*

84. Arnold Zack & Michael Duffy, *ADR and Employment Discrimination: A Massachusetts Agency Leads the Way*, *DISP. RESOL. J.* 28, 29 (1996).

85. *Id.* at 30-31.

86. Thomas Kochan, Brenda Lautsch & Corinne Bendersky, *An Evaluation of the Massachusetts Commission Against Alternative Dispute Resolution Program*, 5 *HARV. NEGOT. L. REV.* 233, 274 (2000).

Lautsch & Bendersky published the results of a three-year study of MCAD's ADR program.⁸⁷ Their evaluation examined overall program development and administration, the processes used to handle and resolve cases, and the outcomes and parties' reactions to the ADR cases in comparison to the outcomes and reactions of parties in traditional MCAD processes.⁸⁸ The study includes data from 95 ADR mediation cases and 56 comparison MCAD cases. The study concluded that the program showed promise; for example, 63% of those who chose mediation reached a settlement compared with 21% for those in the traditional MCAD process.⁸⁹ Additionally, participants expressed a higher degree of satisfaction with the process than the outcomes: 63% of claimants and 77% of supervisors said they would use mediation again while 50% of claimants and 68% of the supervisors were satisfied with the outcomes.⁹⁰

In sum, third-party DSDs using varying models of mediation for complaints of discrimination at the work place have performed reasonably well. These studies suggest that they are generally perceived by the disputants as fair. However, these programs carry with them a presumption of fairness due to the fact they are designed by authoritative third parties, not by a single disputant. A one-party design carries a higher burden to prove fairness.

E. *Disputants Mutually Choose Mediation.*

Parties to a contract who anticipate a dispute may voluntarily and mutually agree to mediation of future disagreements, as in the case of the corporations who sign the CPR Pledge and adopt rules of the CPR Institute.⁹¹ Professor Peppet recently described the potential for expanded use of private mediators in the realm of contract formation and deal-making, outside the context of court or agency and wholly within the private sector.⁹² In this category of the typology, the parties determine the source of mediation services, timing of mediation, scope of the process, norms and values they bring into it, and all aspects of DSD. This category raises the fewest concerns over fairness. The disputants themselves control all aspects of process and outcome. While this is only one category within the typology, many

87. *Id.* at 234.

88. *Id.* at 238.

89. *Id.* at 273.

90. *Id.* at 274.

91. See Int'l inst. Conflict Prevention & Resolution, <http://www.cpradr.org> (last visited Oct. 12, 2008).

92. Scott R. Peppet, *Contract Formation in Imperfect Markets: Should We Use Mediators in Deals?*, 19 OHIO ST. J. ON DISP. RESOL. 283 (2004).

commentators assume that this describes all of ADR they fail to differentiate DSDs that are the product of other forms of control over design.

F. *One Disputant Unilaterally Adopts a Mediation Program for Cases to Which it is a Party.*

An employer may choose to provide mediation to employees in addition to, or as an alternative to, an adhesive arbitration plan. If the employer unilaterally selects the design features for its mediation program, this too becomes a one-party design. Employers have a strong incentive to adopt institutional structures to create the appearance that they are complying with laws regulating the employment relation, particularly laws that take the form of broad and ambiguous mandates.⁹³ They are also in a position to choose what structures they create. While private sector employers have tended to embrace adhesive mandatory arbitration plans, public sector employers have favored mediation, in part because federal law prohibited mandatory arbitration in federal agencies.⁹⁴ Public administrative agencies at the local,⁹⁵ state, or federal level of government may participate in one-party as well as third party DSDs. They adopt one-party DSDs for disputes to which they are a party, such as with their own employees and contractors.⁹⁶ In the context of employment, when an agency unilaterally adopts a mediation program for its own employees, this represents an example of a one-party dispute system

93. See Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992).

94. The Administrative Dispute Resolution Act provides "(a) An agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding." 5 U.S.C. § 572 (2008) (emphasis added). Moreover, federal agencies comply with EEOC regulations; the EEOC has also taken the position that mandatory arbitration clauses are contrary to the purpose of EEO laws. EEOC Notice Number 915.002 (July 10, 1997) <http://www.eeoc.gov/policy/docs/mandarb.html> (accessed 6/19/09).

95. See e.g., D. Hardison Wood & David Mark Leon, *Measuring Value in Mediation: A Case Study of Workplace Mediation in City Government*, 21 OHIO ST. J. ON DISP. RESOL. 383 (2006) (reporting favorable results of a cost-benefit analysis of New York City's Center for Mediation Services, created within the administrative hearings office of city government).

96. See generally Lisa B. Bingham & Charles Wise, *The Administrative Dispute Resolution Act of 1990: How Do We Evaluate Its Success?*, 6 J. PUB. ADMIN. RESOL. & THEORY 383 (1996) (reviewing the state of implementation of dispute resolution in the federal government and finding widespread adoption of mediation programs in employment, some in procurement, and a few in regulatory disputes).

design. Increasingly, there are calls for employment mediation programs throughout the public sector.⁹⁷ In one breakthrough study, researchers compared disputant preferences and trust and found differences between internal employer one-party DSDs and outside, third party providers of services in the case of bullying, both general and racially-motivated.⁹⁸

The USPS program, named REDRESS⁹⁹ is an example of a one-party dispute system design for mediation of discrimination complaints. Initial USPS pilot programs used a facilitative model of mediation.¹⁰⁰ However, the program goals involved moving conflict management upstream, so that employees and supervisors addressed their differences before rather than after a complaint was filed.¹⁰¹ USPS studied the literature and determined that the transformative model best gave employees the opportunity to safely express themselves and to understand each other so that they could regain the capacity to work together effectively.¹⁰² Transformative mediation does not have settlement as its goal.¹⁰³ Transformative mediation views the most important aspect of mediation as its potential to

97. See, e.g., Jason Schatz, *Imposing Mandatory Mediation of Public Employment Disputes in New Jersey to Ameliorate an Impending Fiscal Crisis*, 57 RUTGERS L. REV. 1111 (2005) (arguing for New Jersey to unilaterally adopt mandatory mediation for employment disputes with state employees and mandate that local governments adopt mediation plans for municipal employees).

98. See Suzy Fox & Lamont E. Stallworth, *Employee Perceptions of Internal Conflict Management Programs and ADR Processes for Preventing or Resolving Incidents of Workplace Bullying: Ethical Challenges for Decision-Makers in Organizations*, 8 EMP. RTS. & EMP. POL'Y J. 375 (2004) (finding differences in perceptions of one-party and third-party designs depending upon the perceived severity of the bullying offense and its nature).

99. The acronym stands for Resolve Employment Disputes Reach Equitable Solutions Swiftly.

100. For research on the early facilitative pilot programs, see Jonathan F. Anderson & Lisa B. Bingham, *Upstream Effects From Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS*, 48 LAB. L.J. 601 (1997); Lisa B. Bingham, *Mediating Employment Disputes: Perceptions of REDRESS at the United States Postal Service*, 17 REV. OF PUB. PERSONNEL ADMIN. 20 (1997).

101. Jonathan F. Anderson & Lisa B. Bingham, *Upstream Effects From Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS*, 48 LAB. L.J. 601 (1997).

102. Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the United States Postal Service REDRESS™ Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399, 406 (2001).

103. See generally ROBERT A. BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (2004) [hereinafter BUSH & FOLGER 2004]. The 2004 edition is a revised and updated version of the original landmark book: ROBERT A. BUSH, JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

transform the people who are in the very midst of the conflict.¹⁰⁴ It frames conflict as a crisis in some human interaction that tends to destabilize parties' perception of self and other, leaving both more vulnerable and self-absorbed.¹⁰⁵ The model views conflict as an interaction between parties¹⁰⁶ and seeks to change its quality from negative and destructive to positive so that parties recapture their sense of competence and connection and reestablish a constructive or neutral interaction.¹⁰⁷

There are substantial arguments for using the transformative model of mediation in institutional settings like employment where the employer is unilaterally designing, implementing, and paying for the mediation program.¹⁰⁸ In these contexts, there is the risk that the mediation program will be perceived as biased toward management. Moreover, employers prevail on the majority of workplace complaints of discrimination. In court-connected practice, it is common for mediators to assess the strengths and weaknesses of a legal case and share this with the parties. When they are represented by counsel and have no continuing relationship, and when the parties request it, this may be a desirable service. However, in an employment program run by the employer, this may lead to a situation where mediators (paid for by the employer) are (truthfully and objectively) telling employees in the vast majority of cases that they have no legitimate legal claim. Rather than hearing this as objective evaluation from a third party mediator, employees may perceive it as mediator bias. To avoid this result, some institutions have adopted dispute system designs requiring the transformative model of practice, in which evaluation is not an appropriate mediator behavior.¹⁰⁹

Employers and their counsel typically turn to dispute resolution to reduce the costs and risks associated with litigation.¹¹⁰ However, this is a very limited set of goals. Mediation at the workplace has the potential to build conflict management skills while at the same time

104. *Id.*

105. Robert Bush, *Handling Workplace Conflict: Why Transformative Mediation?*, 18 HOFSTRA LAB. & EMP. L.J. 367 (2001); see also BUSH & FOLGER 2004, *supra* note 109, at 46-51.

106. See BUSH & FOLGER 2004, *supra* note 103, at 53.

107. *Id.*

108. For a review of recent empirical literature on employment dispute resolution, see Lisa B. Bingham, *Employment Dispute Resolution: The Case for Mediation*, 22 CONFLICT RESOL. Q. 145 (2004).

109. See Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101 (2002).

110. See generally John Lande, *Failing Faith in Litigation? A survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 1 (1998).

contributing to systemic change that accomplishes cost savings and dispute processing efficiencies. Adhesive arbitration does not contribute these to benefits for a variety of reasons, but primarily because it tends to address decisions to end the employment relationship downstream from that point at which conflict first arose. As between one-party arbitration and one-party mediation designs, the weight of the evidence suggests mediation designs further not only the goals of cost savings and efficiency, but also enhance voice and procedural justice.¹¹¹ To review in more detail a case in point, we now turn to the REDRESS program data.

IV. MEDIATION AT THE UNITED STATES POSTAL SERVICE: REDRESS

In 1994, the United States Postal Service (USPS) sought to address an alarming increase in equal employment opportunity complaints. The USPS had substantial experience settling cases, for example, during “arbitration weeks,” in which the USPS and its unions handled dozens of grievances during one week, but these only temporarily reduced grievances. Federal court cases had been settled through a wide variety of mechanisms (settlement conferences, court ordered mediation and neutral case evaluation), but nothing seemed to make a lasting difference in the number of disputes that were initiated. The USPS needed more than an effective settlement tool. It needed to address the root causes of conflict between labor and management that had deeply embed itself in the culture over many years. Management sought a tool that could improve workplace culture through increased communication and understanding between the employees involved in a dispute. It was with this purpose, improving employee communication, that the USPS created REDRESS.

This largest employment mediation program in the world (mediating over 1,000 disputes a month across 90 different cities) was tracked and evaluated for over 12 years, from its initial pilot in 1994, through national implementation in 1998, until 2006.¹¹² The substantial financial and human investment in implementing such a

111. For more discussion, see generally Lisa B. Bingham, *Employment Dispute Resolution: The Case for Mediation*, 22 CONFLICT RESOL. Q. 145 (2004).

112. We do not here address in detail the history, implementation, management, and structure of the program, as that information has been documented and published elsewhere. See LISA B. BINGHAM, IBM CENTER FOR THE BUSINESS OF GOVERNMENT, *MEDIATION AT WORK: TRANSFORMING WORKPLACE CONFLICT AT THE UNITED STATES POSTAL SERVICE* (2003); Lisa B. Bingham, Cynthia J. Hallberlin, and Denise A. Walker, *Mediation of Discrimination Complaints at the USPS: Purpose Drives Practice*, in 2007 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 268 (Paul F. Gerhart & Stephen F. Befort eds., 2008).

massive program with an innovative model of mediation motivated management to measure its success.

The unique purpose of the program—to improve workplace climate—created a challenge: how does one define success? Most employment mediation programs traditionally evaluate success based on settlement rates, but that was not the program's driving goal. The USPS needed to identify indicators of success that measure more than settlement rates. What follows is a summary of the research evaluating the effectiveness and unique purpose of the program. The USPS chose to collect data from a variety of sources using a combination of measures: procedural justice, distributive justice, interactional justice, case closure rates, complaint filing rates, and formal complaint flow-through rates. In addition, it periodically assessed program implementation for consistency with the transformative model. First, we briefly describe the REDRESS program's design. Second, we describe the design and implementation of the National REDRESS Evaluation Project. Lastly, we describe process or formative evaluation results. Part V addresses summative or outcome evaluation results.

A. Overview of the National REDRESS Program

The unique design of REDRESS is that it returns maximum control over the mediation process and outcome to the participants at the case level. It accomplishes this through a combination of features, including the choice of mediation model, training for participation, timing of mediation, and authority to participants at the table to reach a settlement. In addition, for 12 years, it provided continuous monitoring and evaluation by an independent outside entity, Indiana University.

The National REDRESS program provides mediation for equal employment opportunity (EEO) disputes involving complaints of discrimination under Title VII of the Civil Rights Act of 1964,¹¹³ the Age Discrimination in Employment Act of 1967,¹¹⁴ and the Rehabilitation Act of 1973.¹¹⁵ These Federal laws prohibit discrimination based on race, sex, color, national origin, religion, age, and disability, and also prohibit sexual or racial harassment or retaliation for raising a claim of prohibited discrimination or harassment.

113. 42 U.S.C. § 2000 (1991).

114. 29 U.S.C. § 633 (2006).

115. 29 USC §§701, et seq. (1991).

The organizational structure of the USPS was such that, given a choice, both supervisors and employees would litigate through the traditional EEO process rather than mediate.¹¹⁶ The USPS recognized that the named respondents to a complaint would be supervisors in most cases. Therefore, to be successful, REDRESS had to be structured in a manner that would change employees' preferences so that they would want to mediate before pursuing litigation.¹¹⁷ For this reason, the timing of the intervention, the neutrals used in the mediation process, and the nature of the intervention were critical factors in encouraging employees to pursue mediation before litigation.¹¹⁸

The USPS conducted focus groups with stakeholders as part of its initial design process, but did not negotiate about the specifics of the program.¹¹⁹ The key system design features that continue to be part of the program are that mediation is voluntary for the EEO complainant, but mandatory for the supervisor who represents the USPS as an organizational entity. As required by EEOC regulations,¹²⁰ complainants are entitled to bring any representative that they choose to the table. These can include lawyers, union representatives, professional association representatives, family members, co-workers, or friends. The USPS, as a party, also designates a representative. The supervisor must have settlement authority, or be in immediate telephone contact during the process with someone else in the organization authorized to approve the settlement. Mediation occurs privately during work hours, and generally occurs within two to three weeks of a request. That the national REDRESS program is voluntary for complainants but mandatory for supervisors, is comparatively fast, and uses outside mediators that meet stringent training requirements provided incentives for supervisors to mediate.¹²¹

116. For a detailed discussion of game theory within the USPS, see Tina Nabatchi, *Game Theory and Dispute System Design: Making Mediation a Dominant Strategy in the U.S. Postal Service 19 (2004)* (unpublished manuscript submitted to the 17th Annual Conference of the International Association for Conflict Management, on file with authors, Indiana University).

117. *Id.* at 22-23.

118. *Id.* at 23.

119. As an EEO program, REDRESS was not a mandatory subject of collective bargaining. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Moreover, the same program applied across multiple bargaining units.

120. 29 C.F.R. § 1614.605 (1992).

121. See generally Nabatchi, *supra* note 116.

The Task Force created a national roster of approximately 1,500 experienced mediators.¹²² National outreach produced the most diverse roster then available, comprised of 44 percent women and 17 percent minorities,¹²³ reflecting a fairly high level of racial diversity. In a sample of 671 active mediators, 570 were Caucasian, 77 were African-American, 4 were Asian-American, 3 were Native American, and 17 were Latino.¹²⁴

B. *National REDRESS Evaluation Project*

From inception of the pilot program in 1994 to 2006, the USPS worked with the Indiana Conflict Resolution Institute (ICRI) at the Indiana University School of Public and Environmental Affairs to evaluate the REDRESS program.¹²⁵ First, we discuss the evaluation design for this longitudinal research relationship. Second, we discuss results of process evaluations conducted to assess whether the program was implemented as designed. Third, we report on settlement and case closure rates.

1. *Overview of Evaluation Design*

REDRESS was fully implemented by July 1, 1999, six months ahead of schedule. The evaluation design entailed collecting data from multiple independent sources and using both qualitative and

122. See Traci G. Gann & Cynthia J. Hallberlin, *Recruitment and Training of Outside Neutrals*, in *THE FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK* 623, 627 (Marshall J. Breger et al., eds., 2001).

123. The USPS did not limit the roster to mediators who were lawyers with substantive employment law expertise since mediators were not expected to evaluate cases. Instead, the roster included mediators from psychology, counseling, and social work, as well as teachers, academics, human resource professionals, and retirees from these professions. Many of the mediators had extensive experience in family and domestic relations practice. See Gann & Hallberlin, *supra* note 121.

124. David Pitts et al., *Individualism, Collectivism, & Transformative Mediation 8* (2002) (unpublished manuscript prepared for presentation at the 15th Annual Conference of the International Association for Conflict Management, Salt Lake City, Utah, on file with Indiana Conflict Resolution Institute, Indiana University).

125. ICRI was a social science research laboratory that conducted field and applied research on conflict resolution programs with general support from the William and Flora Hewlett Foundation. In collaboration with Task Force officials, ICRI developed and implemented a longitudinal, multi-faceted evaluation design for the National REDRESS program. ICRI and USPS established systems for continuous, contemporaneous, distributed data collection, which initially included participant exit surveys and data tracking reports filled out by the mediator. Both forms were mailed to ICRI. The USPS also kept internal records called "Mediator Activity Reports" that included information on the complainant, scheduling time, participation rate and on cases settled before mediation.

quantitative methods. Sources included participants, their representatives, non-participant employees, the mediators, program administrators, and archival datasets. Indiana University designed two instruments in collaboration with the USPS to track and assess program: the participant exit survey and a data tracking form. Both of these forms were used from the inception of the national program until 2006, when Indiana University concluded its data collection.

The confidential exit survey collected information about each party's role (complainant, supervisor, or a representative of either the complainant or supervisor), position (supervisor, manager, or craft employee), and if applicable, the nature of the representative (attorney, union official, coworker, or other such as friend or family member).¹²⁶ The survey asked participants if the dispute was fully, partially, or not resolved, and used indicators on a five-point Likert scale—ranging from very satisfied to very dissatisfied or strongly agree to strongly disagree—to measure participants' satisfaction with the process, mediator, and outcome.¹²⁷ Additional measures assessed the 'transformative' aspects of the model as implemented in the program, such as questions addressing disputant empowerment and recognition and mediator behaviors. These data provided the basis for a wide variety of analyses.

The final totals¹²⁸ for surveys in the Indiana University REDRESS™ database are reflected in Table 1 below, which shows the total number of analyzed surveys for each type of participant in the REDRESS™ program:

126. Lisa B. Bingham et al., *Exploring the Role of Representation in Employment Mediation at the USPS*, 17 OHIO ST. J. ON DISP. RESOL. 341, 359 (2002). The survey was distributed by mediators at the close of the session and mailed directly to researchers.

127. These measures are common and have a strong theoretical foundation in procedural justice research on mediation. For a review of the procedural and organizational justice literature and a factor analysis examining and validating the relationship of survey indicators to this literature, see Tina Nabatchi et al., *Organizational Justice and Workplace Mediation: A Six Factor Model*, 18 INT'L J. OF CONFLICT MGMT. 148 (2007).

128. The purpose of the analysis is to capture details about the REDRESS™ program for all fiscal years; therefore, all surveys manually entered into the database between October 1, 1999 and September 30, 2006 were considered for the analysis. Surveys also include a Scantron form adopted in August 2005. Surveys that were missing an answer to Question 29 ("When did you reach settlement or end mediation?") were excluded from statistical analysis and therefore omitted from the dataset. After cleaning the data, the dataset includes 227,196 surveys, including 19,553 Scantron forms. This is the largest employment mediation database in the world. By comparing exit surveys entered with mediator tracking reports on how many surveys they distributed at each sessions, researchers determined that the national response rate was in excess of 75%.

TABLE 1. PARTICIPANTS BY CATEGORY AND SURVEY RESPONSES

Type of Participant	Number of Surveys
Complaint	65,612
Supervisor	62,430
Complainant's Representative	48,299
Supervisor's Representative	50,855
Total	227,196

The exit survey and mediator tracking report were part of the DSD of REDRESS. Both contained national zip codes. The USPS tracked program results by geographic region, and the Indiana Conflict Resolution Institute did periodic analyses for program administrators. This enabled it to create incentives for regional program managers to increase participation. In addition, that all players in the system were conscious of the continuous outside evaluation gave the program internal credibility.

2. *Process Evaluation of Program Implementation*

The program's implementation was assessed through three sources of information: participation rate, an email survey of program administrators, and a mediator survey. The reasoning was that the program could only affect workplace conflict management if it was implemented as designed and then people used it: "We knew that to really have an impact, we needed as many people as possible to accept mediation."¹²⁹ The USPS set *participation rate*, the percentage of all employees offered mediation who agreed to participate in the process, as the key indicator of success for each district and area.¹³⁰ Initially, the USPS set a goal of a 70% participation rate.¹³¹ Subsequently, it raised the bar to 75%. Each time the target was

129. Cynthia J. Hallberlin, *Transforming Workplace Culture Through Mediation: Lessons Learned From Swimming Upstream*. 18 HOFSTRA LAB. & EMP. L.J. 375, 379 (2001).

130. *Id.*

131. In order for people to use the program, someone had to have an incentive to encourage them. Goals for participation rates gave everyone associated with the program that incentive. With participation rate as the target, it did not matter whether anyone believed mediation had any likelihood of success. The goal was simply to get people to talk to each other in a safe, private environment. If they resolved their conflict, that was a good thing, but if they failed to do so, it did not reflect adversely on the program staff. In contrast, had the program used settlement rate as the measure, there would have been a counterincentive; program staff might have counseled what they perceived as hard-to-settle or intractable cases out of the program.

raised, the program met this national goal.¹³² Participation rates were also used as a factor in bonuses for certain categories of managers. This indicator was a key element of the USPS design of REDRESS.

To assess how program administrators were implementing the program at the district level, researchers prepared a brief email survey for USPS EEO ADR Specialists and Coordinators asking them to describe what they had seen or heard mediators do or say that fostered or interfered with party empowerment or recognition (the basic facets of transformative mediation). The surveys were designed to see if the Specialists were connecting mediator behavior with transformative theory in their evaluations of mediators. In addition, they provided preliminary evidence about how the mediators were implementing and enforcing the transformative model and how they cultivated empowerment and recognition among the parties.¹³³ The qualitative responses were coded using Folgers and Bush's ten hallmarks¹³⁴ of transformative mediation as a framework.¹³⁵ Based on an analysis of these results, researchers concluded that the program was largely being implemented as designed.¹³⁶

Lastly, researchers developed and administered a mail survey to all mediators who served in the REDRESS program between April 1998 and July 2001 as listed on the USPS mediator roster. The survey was developed around the ten hallmarks of mediation.¹³⁷ It asked mediators to indicate how frequently they employed different transformative and directive/evaluative behaviors and tactics in their sessions. In addition, the survey asked mediators to categorize specific behaviors as transformative or directive/evaluative and to categorize statements made by disputants as reflecting an either more or less

132. Headquarters staff eventually developed a one-page bar chart showing participation rate graphically for each of the 85 geographic districts, with recognition and awards for those with the highest participation levels, to create an incentive structure for EEO staff to support the program, market it, and work to maintain its reputation among employees. In FY 2004, the participation rate was 88.1%.

133. Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS REDRESS™ Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399, 405-06 (2001).

134. See Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263 (1996).

135. Nabatchi & Bingham, *supra* note 133, at 408-09.

136. *Id.* This is known as a process evaluation, one that examines whether a program has in fact been implemented. See generally, Mary Ann Scheirer, *Designing and Using Process Evaluation*, in HANDBOOK OF PRACTICAL PROGRAM EVALUATION 40-68 (Joseph S. Wholey et al., eds., 1994).

137. Folger & Bush (1996), *supra* note 134.

transformative practice.¹³⁸ Again, analysis reflected that responses were consistent with the training mediators received in the model.

3. *Settlement and Case Closure Rates*

Typically, mediation programs use *settlement rate*, the percentage of all cases submitted to mediation that resulted in a settlement, as their barometer of success.¹³⁹ In Fiscal Year 2004, the settlement rate or the “resolved at the table” rate for the REDRESS program was 54.4%. However, settlement is explicitly *not* a goal of transformative mediation. Instead, the goal of REDRESS was to provide the participants with opportunities to take control of their own conflict (empowerment) and reach a better understanding of the other participant’s perspective (recognition). This might provide an opportunity for participants to resolve their conflict, but that was not the mediator’s objective. Given this, the USPS also maintained records on case closure rates, as distinguished from settlement rates.¹⁴⁰ Case closure includes not only cases where the parties reached a resolution in mediation, but cases where the parties conclude a formal settlement within 30 days thereafter, or where the complaining party drops, withdraws, or fails to pursue the case to the formal EEO complaint stage. The case closure rate varied from 70% to 80% and as of FY 2004 it was 72.3%.

While the USPS tracked case closure, it established human resource management incentives in terms of participation rates, not closure rates. It did not keep individual level data on mediators or hire and fire them based on case closure rates. These too were design choices intended to avoid creating incentives for mediators to press the parties to settle.

V. THE REDRESS EVALUATION RESULTS

Use of the REDRESS program has steadily increased since its inception.¹⁴¹ A primary feature of the REDRESS evaluation design was exit surveys that mediators distributed to the disputants at the

138. For a preliminary report of some of these results, see Tina Nabatchi et al., *Evaluating Transformative Mediation in Practice: The Premises, Principles, and Behaviors of USPS Mediators*, IACM 2006 Meetings Paper (2006), available at <http://ssrn.com/abstract=916008>.

139. F. E. Sander, *The Obsession with Settlement Rates*, 11 NEGOT. J. 329, 329-332 (1995).

140. Hallberlin, *supra* note 129, at 379.

141. In 1999, the USPS held 8,274 mediation sessions in which 8,801 cases were mediated (often more than one case involving the same disputant is mediated in a single session). By 2002, it held 10,806 sessions for 11,085 cases. In 2004 it held

close of the mediation session. Satisfaction levels with the REDRESS program based on these surveys have remained stable and were consistent for a five-year period.¹⁴² We report here on a final, comprehensive national analysis of the exit survey and mediator tracking report databases.¹⁴³ The aggregate national exit survey analysis report examines all of the surveys entered between 1999 and 2006. The report gives percentages of participants who reported that they strongly agree or agree or were very satisfied or somewhat satisfied with each indicator. These results are compiled in detail in Appendices 1 and 2 respectively. The exit survey has questions that reflect the three dominant theories used to explain participant satisfaction with dispute resolution processes: interactional justice (satisfaction

11,496 sessions for 11,663 cases. Conversations with Kevin Hagan, then REDRESS Program Manager, USPS.

142. Researchers analyzed the mean process, mediator, and outcome indices nationally by four-week accounting periods. Participants rate their satisfaction on a five-point Likert scale, ranging from highly dissatisfied (coded 0) to highly satisfied (coded 5). The mean process and mediator indices exceed 4.5 consistently over a period of years, while the mean index of satisfaction with outcome is slightly over 4 for this same period. Often, skeptics criticize claims about participant satisfaction in ADR programs based on theory of a honeymoon effect. They claim that people respond positively to any new program just because it is novel; however, the USPS REDRESS program is no longer new. There is no obvious decline in participant satisfaction associated with permanent institutionalization of the program in July 2001 after the termination of the REDRESS Task Force. Moreover, there is no evidence that external events (exogenous variables) affected the program at the national level, such as the terrorist attacks of September 11, 2001 and the subsequent terrorist anthrax attacks of October 2001. There is a drop in the transformative index figure that is an artifact associated with a change in survey design. However, participant satisfaction with the program is remarkably stable, and cannot be attributed to a temporary honeymoon effect from a new program. See LISA B. BINGHAM, IBM CENTER FOR THE BUSINESS OF GOVERNMENT, *MEDIATION AT WORK: TRANSFORMING WORKPLACE CONFLICT AT THE UNITED STATES POSTAL SERVICE* (2003) (depicting a graphic representation of this time series analysis).

143. A number of interim reports and publications have also included analyses of samples from these two datasets. See Lisa B. Bingham et al., *Mediating Employment Disputes at the United States Postal Service: A Comparison of In-house and Outside Neutral Mediators*, 20 REV. PUB. PERSONNEL ADMIN. 5 (2000) (finding higher satisfaction with the fairness and impartiality of and higher full or partial settlement rates with outside mediators than with inside USPS employee mediators); Lisa B. Bingham et al., *Exploring the Role of Representation In Employment Mediation at the USPS*, *supra* note 125 (finding higher satisfaction with and higher full or partial settlement rates with mediation when the employee's representative is either a union representative or they are self-represented); Yuseok Moon & Lisa B. Bingham, *Transformative Mediation at Work: Employee and Supervisor Perceptions on USPS REDRESS Program*, 11 INT'L. REV. PUB. ADMIN. 43 (2007) (reporting interim exit survey results); Tina Nabatchi et al., *Organizational Justice and Workplace Mediation: A Six Factor Model*, 18 INT'L. J. CONFLICT MGMT. 148 (2007) (reporting that in employment mediation workplace justice has six factors, not four as traditionally modeled).

with the interpersonal treatment experienced during mediation), procedural justice (satisfaction with the process), and distributive justice (satisfaction with the outcome). First, we address the transformative indicators, specifically, survey questions designed to assess whether mediators are practicing within the transformative model and to assess whether participants are experiencing empowerment and recognition, which we argue are related to interactional justice. Second, we address procedural justice indicators of satisfaction with process, mediator, and outcome, including the impact of representatives on these indicators and reports of full or partial settlement. Third, we report the results of interview studies of a random sample of employees before and after REDRESS. Fourth, we report the results of an interview study of supervisors before and after mediation training. Finally, we report analyses of archival data on complaint filings.

A. *Transformative Indicators*

Several questions in the exit survey ask participants about behaviors associated with transformative mediators, behaviors associated with directive (evaluative) mediators and participant behaviors that indicate party empowerment and recognition.

1. *Mediator Behaviors*

The exit survey asks participants several questions designed to determine whether mediators are engaging in behaviors associated with the transformative model. The majority of complainants (78.6%) and supervisors (73.2%) agreed or strongly agreed that the mediator helped disputants clarify their goals (see Appendix 1). More importantly, the majority (62.4% of complainants and 62.8% of supervisors) also agreed or strongly agreed that the mediator helped them understand the other person's point of view. Similarly, the majority agreed or strongly agreed that the mediator helped the other person understand their point of view (57.9% of complainants and 58.8% of supervisors). This improved understanding is a primary goal of transformative mediation.

As a check on mediator strong-arm tactics, exit surveys ask whether participants agree that the mediator predicted who will win, evaluated the strengths and weaknesses of their case, or pressured them to accept a settlement. Ideally, in the transformative mediation model, participants should not experience this mediator behavior. In general, the rates at which participants in the REDRESS program agree or strongly agree that mediators have engaged in these behaviors is relatively low, which is good evidence that the mediators are

implementing the model as designed. There is an interesting pattern in this data, however, in that there is a slight difference in the rates between the complainants and all other participants. Complainants report that mediators predict who will win about 11.5% of the time, while all others report this happens between 9.2% and 9.8% of the cases. Complainants report that mediators evaluated strengths and weaknesses in about 32% of the cases, while all others including complainants' representatives report this happened in 20.8% or less of the cases. Complainants report that they felt pressured to accept a settlement in 15.2% of the cases, while their own representatives and others report that this happened in 10.9% or fewer of the cases.

While these differences are small, they are consistent, and because of the very large sample size, even small differences are statistically significant. They may reflect complainant sensitivity to an outside neutral. Complainants are the moving parties; they are the ones pushing to alter the status quo by taking issue with an event or decision at work. Because they are pushing against the status quo by filing a complaint, they may be more sensitive to any mediator communication that might be perceived to reflect on the complaint's merits. However, on the whole, these results suggest mediators are avoiding directive and evaluative behaviors in the substantial majority of cases.

2. *Evidence of Empowerment and Recognition*

Interactional justice is a model used by organizational justice researchers to explain perceptions of fairness.¹⁴⁴ The interactional justice model suggests that interpersonal treatment impacts employee satisfaction with both organizational decision-making and perceptions of fairness.¹⁴⁵ Interactional justice research suggests that elements of communication are critical to employee perceptions of fairness including honesty, respect, propriety of questions, justification, kindness, politeness, consideration and treatment with dignity

144. See R.J. Bies & J.S. Moag, *Interactional Justice: Communication Criteria of Fairness*, in *Research on Negotiation in Organizations* 43-55 (R.J. Lewicki, B.H. Sheppard & M.H. Bazerman eds., 1986); R. Folger & R. Cropanzano, *Process and Procedural and Interactional Justice*, in *ORGANIZATIONAL JUSTICE AND HUMAN RESOURCE MANAGEMENT* 25-49 (R. Folger & R. Cropanzano eds., 1998).

145. See Bies & Moag, *supra* note 144, at 45-55; Folger & Cropanzano, *supra* note 144, at 25-49; B.H. SHEPPARD ET AL., *ORGANIZATIONAL JUSTICE: THE SEARCH FOR FAIRNESS IN THE WORKPLACE* (1992).

and respect.¹⁴⁶ These allow disputants to provide an explanation of their behavior that describes their decision-making process and allocates responsibility. This kind of explanation is called a causal account.

Bush and Folger theorize that transformative mediation can successfully address interactional elements of conflict by enabling the parties to describe their own issues and seek their own solutions. This suggests that transformative mediation has the potential to transform workplace culture by fostering good communication and conflict management skills between employees and supervisors.¹⁴⁷ Showing regard for people's concerns, giving apologies or showing empathy, sensitivity, truthfulness, respect, propriety of questions, and justification¹⁴⁸ are clearly connected to the transformative model of mediation.¹⁴⁹

At the core of the transformative model are the concepts of empowerment and recognition. In theory, a disputant who experiences empowerment will become more open to the other disputant and more able to hear and understand the other person's perspective. This, in turn, will lead to recognition—that is, the ability to accept and to some degree validate the other person. The experience of empowerment and recognition may lead to settlement. This dynamic occurs to a greater or lesser degree in all forms of mediation. However, the distinctive nature of the transformative model is that it makes this dynamic of interaction, not settlement, the mediator's goal.

In REDRESS, 69.8% of all complainants and 70.3% of supervisors agreed that the other person in the conflict listened to them during mediation.¹⁵⁰ While it may seem tautological that people will listen to each other in mediation, this is in fact a critical component

146. See Bies & Moag, *supra* note 144, at 45-55; D.P. Skarlicki & R. Folger, *Retaliation in the Workplace: The Roles of Distributive, Procedural and Interactional Justice*, 82 *J. APPLIED PSYCHOL.* 434, 434-443 (1997).

147. See BUSH & FOLGER 2004, *supra* note 103.

148. J. Greenberg, *The Social Side of Fairness: Interpersonal and Informational Classes of Organizational Justice*, in *JUSTICE IN THE WORKPLACE* 79-103 (R. Cropanzano ed., 1986).

149. Tina Nabatchi & Lisa B. Bingham, *Expanding our Models of Justice in Dispute Resolution: A Field Test of the Contribution of Interactional Justice* (2002) (unpublished manuscript presented at the International Conflict Management Association (IACM), on file with Indiana Conflict Resolution Institute, Indiana University).

150. See Rebecca Nesbit et al., *Relationship between Interactional Justice and Settlement* (2005) (unpublished manuscript, on file with Indiana Conflict Resolution Institute, Indiana University).

often missing from a disputant's experience of justice in an organization. In mediation, the parties listen to each other. The majority of REDRESS complainants (55.1%) and supervisors (60.3%) report that they agree or strongly agree with the statement that they learned about the other person's viewpoint (see Appendix 1).

The ability to listen to each other and learn about each other's viewpoints makes it possible for the participants to move toward one of the ultimate goals of the model: recognition. In exit surveys, 61.9% of complainants and 70.9% of supervisors agreed or strongly agreed that they acknowledged as legitimate the other person's perspective, views, or interests. While the majority of participants report that they acknowledged the other disputant, the data suggest that the other disputant does not always hear this acknowledgment. Nearly half of complainants (49.3%) and supervisors (47%) report that the other person acknowledged them. Nevertheless, the gap is not large, and these percentages suggest that there is substantial exchange of perspectives during mediation.

Interestingly, representatives perceive listening and learning, and hear apologies and acknowledgements, more than the parties they represent. For example, the final aggregate national analysis shows that management representatives thought the other party listened 77.5% of the time, while 70.3% of supervisors reported the same. Similarly, 74.7% of complainant representatives reported that the other party listened, while the complainants themselves averaged 69.8%. This may simply reflect the fact that representatives generally have greater distance from the conflict and more objectivity than the disputants themselves.

The most telling indicator of recognition is an apology.¹⁵¹ An apology is often not possible in litigation because it can be treated as an admission of guilt and evidence of liability in the US,¹⁵² although

151. See BUSH & FOLGER 2004, *supra* note 103.

152. See Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221 (1999) (arguing for a change in the rules of evidence to permit parties to apologize without the apology constituting an admission against interest); William K. Bartels, *The Stormy Seas of Apologies: California Evidence Code Section 1160 Provides a Safe Harbor for Apologies Made After Accidents*, 28 W. ST. U. L. REV. 141 (2000). *But see* Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819 (2002) (analyzing proposals to change the rules of evidence in connection with apologies); Donna L. Pavlick, *Apology and Mediation: The Horse and Carriage of the Twenty-First Century*, 18 OHIO ST. J. ON DISP. RESOL. 829 (2003) (advocating a place for authentic apology in mediation before litigation).

its role in face-saving internationally is well recognized.¹⁵³ Its use in dispute resolution has become the subject of substantial empirical research¹⁵⁴ and comment.¹⁵⁵ Increasingly, commentators have recognized the role of apology in DSD in organizations, particularly in health care.¹⁵⁶ In fact, the value of an apology is such that some argue courts should have the power to order one as an equitable remedy in civil rights cases.¹⁵⁷

For purposes of this discussion, apology is significant because it is an indicator that the REDRESS model is producing evidence of recognition as a behavior among disputants. REDRESS complainants and supervisors generally agree on the frequency with which apologies occur to the complainant. Supervisors report that they apologize

153. See, e.g., Richard B. Bilder, *The Role of Apology in International Law and Diplomacy*, 46 VA. J. INT'L L. 433 (2006); Max Bolstad, *Learning from Japan: The Case for Increased Use of Apology in Mediation*, 48 CLEV. ST. L. REV. 545 (2000); Hilary K. Josephs, *The Remedy of Apology in Comparative and International Law: Self-Healing and Reconciliation*, 18 EMORY INT'L L. REV. 53 (2004); Ilhyung Lee, *The Law and Culture of the Apology in Korean Dispute Settlement (With Japan and The United States in Mind)*, 27 MICH. J. INT'L L. 1 (2005).

154. See Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460 (2003) (examining the role of no apology compared to a full or partial apology plays in inducing the plaintiff to accept a settlement); Jennifer K. Robbennolt, *What We Know and Don't Know About the Role of Apologies in Resolving Health Care Disputes*, 21 GA. ST. U.L. REV. 1009 (2005); Margaret Etienne and Jennifer K. Robbennolt, *Apologies and Plea Bargaining*, 91 MARQ. L. REV. 295 (2007).

155. See Jennifer Gerarda Brown, *The Role of Apology in Negotiation*, 87 MARQ. L. REV. 665 (2004) (examining the purposes of an apology and what makes it effective); Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997) (providing a theory of when, where, and how apologies may play a role in dispute resolution); Erin Ann O'Hara and Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121 (2002) (examining the role of apology in dispute resolution and litigation through the lenses of evolutionary biology and economics). *But see* Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135 (2000) (criticizing the use of apology in mediation for utilitarian or strategic purposes and arguing for deeper reflection on the moral dimension of apology).

156. See Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 FORDHAM URB. L.J. 1447 (2000) (examining an organization's interests regarding apology in conflict); Ashley A. Davenport, *Forgive and Forget: Recognition of Error and Use of Apology as Preemptive Steps to ADR or Litigation in Medical Malpractice Cases*, 6 PEPP. DISP. RESOL. L.J. 81 (2006) (surveying models for intervention); Carole S. Houk and Lauren M. Edelstein, *Beyond Apology to early Non-Judicial Resolution: The MedicOm Program as a Patient Safety-Focused Alternative to Malpractice Litigation*, 29 HAMLINE J. PUB. L. & POL'Y 411 (2008) (describing a conflict management system to provide neutral, independent and confidential conflict management experts to both patient and provider).

157. Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261 (2006) (providing arguments for and guidance for courts on the compelled apology).

to the complainant about some aspect of the dispute about 30.9% of the time, and complainants report they received an apology about 29.1% of the time. Although this analysis does not match exit surveys from employees and supervisors in the same mediated case, these numbers tend to corroborate each other. There is less agreement about complainants apologizing to supervisors; complainants report they apologize 24.1% of the time, while supervisors hear an apology in 16.3% of their exit survey reports.

Recent studies on the REDRESS program have found that when the participants report listening to each other, acknowledging each other's views, and sometimes, giving apologies, they are more satisfied with the outcome of mediation and its fairness.¹⁵⁸ This corroborates other empirical research suggesting some relationship between apology, at least a full one, and settlement.¹⁵⁹

The nature of this communication (listening, acknowledging, and apologizing) is bilateral and between those closest to the dispute. This is substantially different from what happens to disputants in an adjudicatory process, such as arbitration, administrative adjudication, or litigation. By practicing these communication skills and by having the mediator model conflict resolution behaviors when he or she paraphrases or highlights a moment of recognition between the parties, the participants in mediation may be learning conflict management skills to take back to the workroom.

B. *Procedural Justice Indicators*

The exit survey was designed with questions that reflect the literature of procedural justice (satisfaction with the process) and distributive justice (satisfaction with the outcome). Procedural justice suggests that, in addition to the resolution, the actual process of reaching a decision is a factor in participant satisfaction.¹⁶⁰ Procedures that afford participants an opportunity to participate in the decision-making process by expressing their voice are generally

158. Tina Nabatchi et al., *Organizational Justice and Workplace Mediation: A Six Factor Model*, 18 INT'L. J. CONFLICT MGMT. 148 (2007). Recent analyses of matched supervisor and employee exit surveys from the same case suggest that apology correlates with settlement.

159. Jennifer K. Robbenolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460 (2003) (examining the role a full or partial apology plays in inducing the plaintiff to accept a settlement, and finding 1) that a full apology is most strongly associated with settlement and 2) that a partial apology may lessen the likelihood of settlement).

160. See R. J. Bies & D. L. Shapiro, *Voice and Justification: Their Influence on Procedural Fairness Judgments*, 31 ACADEMY MGMT J. 676-85 (1988); J. THIBAUT, & L.

perceived as being more fair than procedures which do not. Distributive justice is based on the idea that individuals' attitudes and behaviors are motivated by their self-interests and material gains.¹⁶¹ Therefore, the distributive justice model suggests that participants will be most satisfied with the outcome of a dispute resolution process when they "win" their case because winning is associated with a gain.¹⁶² This section explores the satisfaction levels of the participants in the REDRESS program with process, mediator, and outcome. Appendix 2 provides final national analysis of the percentages of participants who reported that they were very satisfied or somewhat satisfied with each indicator.

The exit survey was constructed to permit comparative analysis of perceptions of justice and fairness across groups including the complainant, supervisor who was the agent of the legal respondent (USPS), the complainant's representative, and the supervisor's representative, also referred to as management's representative. These comparative analyses were done twice a year by geographical district to monitor the continued perceptions of the program.

1. *Complainant & Supervisor Perceptions of Process and Mediator*

Researchers created averages of certain groups of indicators using the percentage of those who completed the exit survey and reported they were somewhat satisfied or very satisfied with various aspects of the mediation (See Appendix I). Complainant and supervisor satisfaction with the process of mediation is high and comparable.¹⁶³ As to the mediation process, 91.2% of complainants and 91.6% of supervisors who participated in the program were somewhat satisfied or very satisfied. Both complainants (93.6%) and supervisors (93.2%) were particularly satisfied with the way in which mediation affords them an opportunity to present their views. Complainants

WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975); W.G. Austin & J.M. Tobiasen, *Legal Justice and the Psychology of Conflict Resolution*, in THE SENSE OF INJUSTICE: SOCIAL PSYCHOLOGICAL PERSPECTIVES 227-74 (R. Folger ed., 1984).

161. E. WALSTER, G.W. WALSTER & E. BERSCHIED, EQUITY: THEORY AND RESEARCH (1978).

162. *Id.*

163. These results are consistent with early analyses of the pilot facilitative model; see Lisa B. Bingham, *Mediating Employment Disputes: Perceptions of REDRESS at the United States Postal Service*, 17 REV. OF PUB. PERSONNEL ADMIN. 20 (1997). They are also consistent with a later analysis of interim data on the national transformative model, see Yuseok Moon and Lisa B. Bingham, *Transformative Mediation at Work: Employee and Supervisor Perceptions on USPS REDRESS Program*, 11 INT'L. REV. PUB. ADMIN. 43 (2007).

and supervisors were also satisfied with the way the process permitted them to participate (94.5%, 93.8%), and the way they are treated in mediation (91.7%, 94.5%).

In addition, the second average addressed perceptions of the mediators. The great majority of complainants (total index average of 96.5%) and supervisors (total index average of 96.9%) reported satisfaction with the mediators who were assigned to their case. The index included measures of respectfulness, impartiality, fairness, and performance. On each of these measures individually, between 95.3% and 98.0% of all complainants and between 96.2% and 98.2% of all supervisors were either somewhat satisfied or very satisfied with the mediators. It is significant that complainants are so satisfied with the mediators' impartiality given that the USPS created the roster, assigned individual mediators to each case, and paid the full costs of the process. These results, accordingly, suggest that the program design has successfully addressed any latent concerns regarding mediator bias.

2. *Complainant and Supervisor Satisfaction With Outcome*

To assess levels of distributive justice, the survey included a question about the resolution achieved in the case (full, partial, or no resolution) and a series of questions about the participant's satisfaction with the outcome of a case. The substantial majority of employees and supervisors who participated in the program were satisfied or highly satisfied with the outcome of mediation (on average, 64.2% and 69.5% respectively based on the final national aggregate data). Complainants and supervisors most frequently reported satisfaction with the speed of the outcome (82.3% and 75.5% respectively) and their control over it (66.5% and 73.4% respectively). The biggest gap between complainants and supervisors concerns the fairness of the outcome; 59.7% of complainants and 69.8% of supervisors report satisfaction with outcome fairness. However, this difference is consistent with the great body of procedural justice research in which the moving party (grievant in labor relations and plaintiff in litigation) reports lower outcome satisfaction; scholars generally account for this through the difference in expectations going into the process. Moving parties expect more.¹⁶⁴

Measures of satisfaction with outcome are affected in part by whether or not the participants reach a full or partial resolution of the dispute. However, participant satisfaction with the mediation

164. See literature reviewed in Bingham (2002), *supra* note 163, at 20.

process and the mediators remains high even when the disputants do not fully resolve the dispute.¹⁶⁵

3. *Representatives Satisfaction*

The REDRESS program differs from some private sector dispute system designs in that it allows employees to bring any representative they choose to the mediation session, including lawyers, union representatives, professional association representatives, and friends or family. Some employees chose not to bring a representative. Although best practices guidelines like the *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship*¹⁶⁶ require free access to representatives during the ADR process, some consultants have suggested it is preferable to exclude outside representatives, particularly lawyers, because they may interfere with settlement. In the private sector, dispute system designs are sometimes marketed as a way to avoid a union organizing campaign. REDRESS illustrates a DSD that affords full access to an employee's representative of choice in a unionized workplace and nevertheless achieves its goals for conflict management at the workplace.

Representatives' satisfaction rates generally parallel complainants and supervisors; they are generally the same and often higher than their respective clients. For example, the final aggregate national average percent satisfaction with the process was 92.0% and 93.4% for complainant and management representatives respectively. Satisfaction with mediator overall was 96.1% for complainants' representatives and 97.2% for supervisors' representatives. Outcome satisfaction overall was 67% and 72.5% respectively.

The fact that the representatives support the program is significant. Many employees bring their union representatives. Traditionally, labor relations within the Postal Service have been adversarial. Indeed, at the outset of the program, the American Postal Workers Union (APWU) advised the union representatives not to participate in the program. However, because the USPS worked with the union representatives from the outset in the design of the program, the local union reps became important partners and supporters of the program.

165. Moon, *supra* note 163, at 43.

166. AMERICAN ARBITRATION ASSOCIATION, *EMPLOYMENT DUE PROCESS PROTOCOL* (1995), <http://www.adr.org/sp.asp?id=28535> (last visited Oct. 7, 2008) (outlining a due process protocol for mediation and arbitration of statutory disputes arising out of the employment relationship).

The support from both complainant and supervisor representatives is a strong indicator of the program's fairness. Representatives are often repeat players whose perspectives are shaped by experience across multiple cases.

4. *The Impact of Representatives on Outcomes*

In addition to satisfaction levels, we looked at the impact that representatives have on the mediation session and its outcome.¹⁶⁷ In general, representation had a positive impact on settlement. The settlement rate for mediations where neither party was represented was 55%, whereas the settlement rate for mediations where both parties were represented was 61%, a statistically significant difference of 6%.¹⁶⁸ Representation was associated with longer sessions. The mean duration where neither party was represented was 152 minutes, but that number rose to 184 minutes for mediations where both parties were represented.

Researchers also compared resolution rates among different types of complainant representation: fellow employee, attorney, union representative, or "other." The highest rate of partial and complete resolution (65%) occurred with union or professional association representatives. Fellow employees as representatives produced a 60% resolution rate, while attorney representatives produced a resolution rate of only 50%. It is possible that the cases with attorney representation were more difficult to settle because attorneys hoped to recover monetary damages and attorneys' fees in adjudication. It is also possible these were stronger cases on the merits. However, researchers had no way of assessing the relative strength of the participants' claims across different categories of representation.

C. *Organizational Level Evaluation*

This section explores the research at the organizational level of the REDRESS program. One of the goals of the USPS was to improve the way employees and supervisors handle conflict, and ultimately to empower the participants to more efficiently manage their conflict for themselves, resulting in a better, more productive work environment. This section first discusses supervisors using conflict resolution after participating in REDRESS training and mediation. Second, we describe research on the workplace climate pre- and post- REDRESS

167. Lisa B. Bingham et al., *Exploring the Role of Representation in Employment Mediation at the USPS*, *supra* note 126, at 356.

168. *Id.* at 361.

and compare different dispute processes. Finally, we discuss how REDRESS decreased EEO complaint filing at the USPS.

1. *Supervisors using conflict resolution*

Napoli reports evidence of changes in the way that supervisors describe how they handle conflict at the workplace before and some months after experiencing a three-day REDRESS mediation training or REDRESS mediation.¹⁶⁹ Her research indicates that supervisors change how they manage conflict in response to both the training and the mediation.¹⁷⁰ For example, before training, 13% of the participants said that they communicated openly to manage conflict at work but after training the number jumped to 50% of the supervisors.¹⁷¹ Similarly, before training 30% said they give direct orders to manage conflict at work but after training, only 19% managed conflict that way. Before training, 10% of supervisors thought that listening works best for managing conflict, but after training, 38% felt that listening works best.¹⁷² In general, comparing the “before training” data with the “after training” data shows a movement among supervisors to integrate better conflict management techniques.¹⁷³

The mediation results are similar to the training results. For example, before participating in a mediation session, 50% of supervisors said they would communicate openly to manage conflict at work compared to 71% after the mediation.¹⁷⁴ Before mediation, 27% of supervisors thought that listening works best for managing conflict, but after training, 43% felt that listening works best.¹⁷⁵ Overall, Napoli’s research shows that as a result of participating in REDRESS training and mediations sessions, supervisors listen more, are more open to expressing emotion, and take less of a top-down hierarchical approach to managing conflict.

169. See Lisa-Marie Napoli, *USPS SUPERVISORS AND CONFLICT MANAGEMENT TECHNIQUES: EVALUATING TRAINING AND MEDIATION INTERVENTIONS* 61 (2004) (unpublished dissertation, Indiana University) (on file with authors).

170. *Id.* at 61-62.

171. *Id.* at 86.

172. *Id.* at 89.

173. *Id.* at 101.

174. *Id.* at 106.

175. *Id.* at 106.

2. *Workplace Climate Before and After REDRESS*

In 2000, researchers conducted an interview study of a random sample of USPS employees at all levels of the workforce in three cities to examine the workplace climate before and after the introduction of the REDRESS program. The study also compared the three available dispute processes (grievance, EEO and REDRESS). Participants in the study were USPS employees (214 before and 211 after REDRESS) from three cities: San Francisco, New York, and Cleveland.¹⁷⁶ Researchers collected pre-REDRESS data in May and June 1998, and post-REDRESS data in April and May 2000.¹⁷⁷ One interesting and significant finding is that before REDRESS, 31% of employees and 44% of the supervisory personnel perceived that “doors were open,” meaning that employees, supervisors, and managers could easily approach each other to discuss problems. After REDRESS, these numbers increased; 53% of employees and 66% of supervisors reported that there are “open doors” creating opportunities for communication.¹⁷⁸ Before REDRESS, the second most common response to the question “how does your supervisor deal with conflict?” was that supervisors or managers deal with conflict by “yelling, arguing, disciplining, or intimidating” their opponents (17% of non-supervisory employees and 19% of supervisors). In the after interviews, this response was drastically less common—dropping by 15 percentage points to 3% for non-supervisory employees and 18 points to 1% for supervisory personnel.¹⁷⁹ While these results are encouraging, some of the significant findings of the research contradict the goals of the REDRESS program. For example, after REDRESS participants more frequently reported an increase in firing as a disciplinary method (from 2 to 11% for non-supervisors and 4 to 12% for supervisors) as well as an increase from 3% to 9% in non-supervisory personnel reporting their supervisors responded to conflict by telling them to “go file a complaint.”¹⁸⁰ These behaviors are not constructive approaches to communication or conflict management skills. On the other hand, the only procedural way to access the REDRESS program

176. Susan Summers Raines, Timothy Hedeem, Lisa Marie Napoli, and Lisa Blomgren Bingham, *A Tale of Three Cities: Communication and Conflict Before and After REDRESS* (2003) (unpublished report to United States Postal Service) (copy on file with authors).

177. *Id.* at 2.

178. *Id.* at 25.

179. *Id.* at 26.

180. *Id.* at 27.

was by filing an EEO complaint, so this response may reflect a certain pragmatic organizational reality.

After REDRESS, supervisory personnel felt that management was more willing to resolve differences cooperatively (53% report high or very high cooperativeness), but this perception was not shared by non-supervisory employees (only 28% total).¹⁸¹ The data also indicated a small but statistically significant decrease in the level of tension within workgroups at the USPS after REDRESS.¹⁸² There were also three significant findings regarding how employees deal with conflict after REDRESS. The percentage of employees who say they file a grievance decreased slightly, as did the percentage who say they file an EEO claim. Also, there was a slight decrease in those stating that they ask for a transfer to get away from the conflict.¹⁸³

The research also compares the three dispute processes available to employees (EEO, Grievance and REDRESS) on several levels. Half of the supervisors with experience in the traditional EEO and Grievance processes said there was no change in their relationship with the person after the process, but only 29% of the supervisory personnel involved in the REDRESS reported no change. This finding suggests that REDRESS is able to affect relationships.¹⁸⁴ Additionally, 40% of supervisors and 27% of non-supervisory employees stated that the REDRESS process improved communication and/or resolved the problem between the parties. This was only about 16% for both groups using the grievance process and 5% or less for those using the EEO process.¹⁸⁵ Finally, when asked how the process has affected the relationship with the other party, more than twice as many disputants stated that their relationships were better or much better after the REDRESS process (41% non-supervisory and 51% supervisors) than after the other two processes (for EEO 11 and 16% respectively, and for grievance procedures 20 and 22% respectively).¹⁸⁶

These before and after interviews also suggest that there is higher satisfaction with the EEO process after REDRESS in that before, 20% of non-supervisory employees and 44% of supervisors reported that EEO was a fair process. After, these percentages rose to

181. *Id.* at 30.

182. *Id.* at 33.

183. *Id.* at 37.

184. *Id.* at 97.

185. *Id.*

186. *Id.* at 98.

35 and 56% respectively.¹⁸⁷ The EEO process may be functioning differently because cases amenable to mediation are resolved quickly, allowing other perhaps more substantive or serious complaints of discrimination to progress more effectively within the system. However, this study has limitations in that the sample of over 200, although random, is small in relation to the size of the population, and many analyses entailed small sub-samples. Thus, these results, while promising overall, suggest a need for further future research.

3. *Decrease in EEO Complaint Filing*

Participant satisfaction is a necessary but insufficient condition for a dispute resolution program's success. In its absence, the program would certainly fail due to lack of employee participation. High participant satisfaction contributes to high participation rates. High participation rates in turn make it possible to examine whether the program is having an effect on the USPS system for handling disputes. Figure 1, showing a decline in formal EEO complaints from a high of over 14,000 in 1997 to around 8,500 in 2003 illustrates evidence of this effect. A statistical analysis indicated that the turning point in this trend and subsequent drop in formal complaints correlated with implementation of the program in each geographic district.¹⁸⁸ There were no exogenous factors at work during the period, and economic conditions were stable. This trend suggests that mediation has a positive impact on the USPS system for addressing complaints of discrimination, in that complaints are resolved through mediation at the informal stage and do not reach the formal stage. Controlling for changes in the size of the workforce, *informal* EEO complaint filings have dropped 30% since their peak before the USPS

187. *Id.* at 48.

188. See generally Lisa B. Bingham & Mikaela C. Novac, *Mediation's Impact on Formal Complaint Filing: Before and After the REDRESS Program at the United States Postal Service*, 21 REV. PUB. PERSONNEL ADMIN. 308 (2001). Bingham and Novac examined a natural field experiment afforded by the national roll-out of mediation for employment disputes. Theory suggested that early mediation would lead to earlier, more durable settlements and transaction cost savings. Researchers examined a national dataset including the number of informal and formal EEO complaints filed each accounting period (4 weeks) by zip code. They controlled for fluctuations in the number of employees (employee census) and geographic area by district and area. They found that implementation of the mediation program resulted in a significant decrease in the number of formal discrimination complaints and concluded that a well-designed employment dispute mediation program could resolve disputes at an earlier stage in the administrative process, and thereby reduce the number of formal complaints filed.

implemented REDRESS. Moreover, there is a change in the composition of the complainant pool. The complaints are now coming from 40% fewer people; this means that the people now filing complaints are more likely to be repeat filers. Finally, there has been a gradual increase in “pre-mediation,” or efforts by the parties to a dispute to resolve it after a request for mediation is made, but before they get to the table. The rate at which cases are resolved before mediation is was 14% in 2006.

Resolving workplace conflict earlier may have a variety of positive benefits. It avoids the hardening of positions and acrimony associated with a prolonged dispute. It may also contribute to improved communication between the disputants. There is some evidence that during mediation, the disputants experience and practice some positive conflict management skills.¹⁸⁹

These results are consistent with the original goals of the REDRESS DSD to move conflict management upstream.¹⁹⁰

VI. CONCLUSION

The REDRESS program is the most extensive, and most extensively studied, field test of employment mediation to date. Its evaluation illustrates how a properly structured DSD can produce systemic outcomes that benefit employer and employee alike. To our knowledge, there are no comparable data regarding one-party, adhesive arbitration DSDs in employment.

Control over dispute system design brings with it responsibilities. When employers design an employment dispute resolution system, they are designing a form of justice.¹⁹¹ Some employers have chosen to use that control solely for the purpose of risk management in order to alter the settlement value of a discrimination case. Through the imposition of mandatory arbitration, they use control over DSD to render it almost impossible for an employee to obtain recourse from the public justice system. They focus on transaction costs and distributive justice by designing a system to maximize their strategic advantage in their forum of choice.

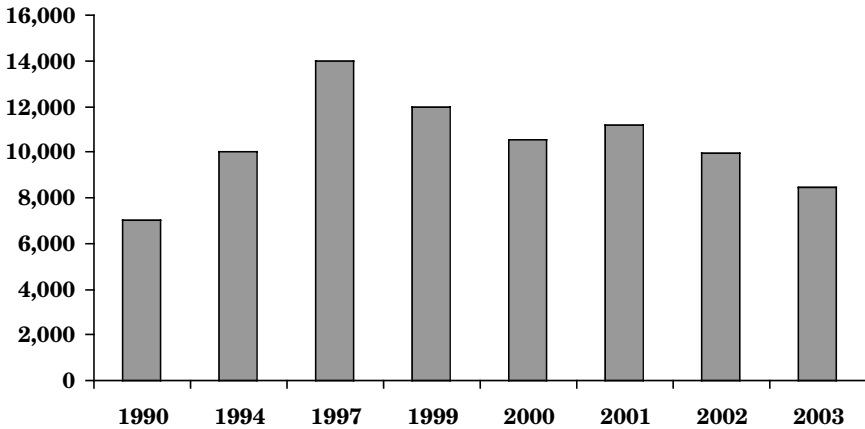
189. This evidence is described in the research on interactional justice. See Rebecca Nesbit et al., *supra* note 150.

190. For a description of upstream effects, see Jonathan F. Anderson & Lisa B. Bingham, *Upstream Effects From Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS*, 48 *LAB. L.J.* 601 (1997). See also Hallberlin, *supra* note 129.

191. Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 *OHIO ST. J. ON DISP. RESOL.* 1 (2009).

Other employers like the USPS, admittedly for whom unilateral imposition of binding arbitration is not a legal option, have instead pursued different objectives: improving opportunities for voice and seeking longer term change in conflict management in the workplace. While no program perfectly achieves its design, the evidence suggests that REDRESS has served its greater purpose, to improve the workplace climate. The institutionalization of the program, its voluntary use by employees, and the significant reduction of formal complaints all suggest that employers may achieve efficiencies through a DSD using mediation. Moreover, properly structured, a DSD that uses mediation, is voluntary and allows employees to pursue their cases to the public justice system can nevertheless produce substantial benefits for an employer through the management of conflict before it ripens into a claim or a case. This form of DSD is also a design for justice, but the goal is procedural justice and voice. When we are designing justice for the workplace, mediation is the better choice.

FIGURE 1. TREND LINE FOR FORMAL EEO COMPLAINT FILING BEFORE AND AFTER IMPLEMENTATION OF REDRESS



APPENDIX 1. REDRESS EXIT SURVEY DESCRIPTIVE STATISTICS
 Transformative Indicators

Percentages of Complainants and Respondents/Supervisors Who Reported “Strongly Agree” or [Agree]

	Complainant		Supervisor		Rep. Com.		Rep. Mgmt.	
	%	n	%	n	%	n	%	n
Number of Surveys		65612		62430		48299		50855
Transformative Mediators								
<i>Percent Agreement</i>	66.3%		64.9%		66.3%		66.8%	
Mediator Helped:								
Clarify My Goals	78.6%	50473	73.2%	44940	73.6%	34287	72.6%	36214
Me Understand Other Person's View	62.4%	33868	62.8%	33178	63.8%	25442	64.9%	27332
Other Person Understand My View	57.9%	31246	58.8%	30928	61.6%	24490	62.8%	26310
Directive Mediators								
<i>Percent Agreement</i>	28.7%		21.5%		21.5%		19.7%	
Predicting Who Will Win	11.5%	6136	9.2%	4838	9.8%	3933	9.5%	4002
Strengths and Weaknesses	32.0%	17294	19.8%	10453	20.8%	8294	16.8%	7078
Control of the Process	55.9%	30268	47.0%	24744	44.5%	17748	43.7%	18347
Pressure to Accept a Settlement	15.2%	9050	10.1%	5861	10.9%	4793	9.0%	4217
Empowerment & Recognition								
<i>Percent Agreement</i>	49.7%		50.3%		53.6%		54.6%	
Other Person Listened	69.8%	44976	70.3%	43324	74.7%	35033	77.5%	38813
Other Person Learned	58.6%	34039	56.4%	31677	64.9%	27384	64.6%	28944
I Learned Other's Viewpoint	55.1%	32173	60.3%	33998	64.1%	27164	67.1%	30230
Other Acknowledged	49.3%	31182	47.0%	28668	54.4%	25178	53.9%	26796
I Acknowledged as Legitimate	61.9%	35593	70.9%	39692	65.8%	27692	75.8%	33960
Other Apologized	29.1%	17274	16.3%	9394	29.9%	13045	17.0%	7941
I Apologized	24.1%	14150	30.9%	17751	21.4%	9247	25.9%	12057

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APPENDIX 2. REDRESS EXIT SURVEY DESCRIPTIVE STATISTICS
 Procedural Justice Indicators

Percentages of Complainants and Respondents/Supervisors Who Reported “Very Satisfied” or “Somewhat Satisfied”

	Complainant		Supervisor		Rep. Com.		Rep. Mgmt.	
	%	n	%	n	%	n	%	n
National								
Number of Surveys		65612		62430		48299		50855
Satisfaction with Process								
<i>Average Percent Satisfaction</i>								
Information about Process	91.2%	53450	91.6%	50061	92.0%	39378	93.4%	41238
Control over Process	90.5%	55670	88.2%	52062	90.7%	40758	90.8%	43862
Opportunity to Present Views	86.4%	60501	84.4%	57595	86.0%	43934	87.3%	47229
Fairness with the Process	93.6%	55982	93.2%	56294	92.9%	42587	94.1%	46939
Participation in Process	87.3%	55529	91.4%	53131	90.2%	40416	93.6%	43125
Understanding of Process	94.5%	55918	93.8%	54342	93.5%	41884	95.1%	44012
Treatment in Process	94.5%	54207	95.7%	53651	96.3%	40982	96.7%	44012
	91.7%		94.5%		94.4%		96.2%	43742
Satisfaction with Mediator								
<i>Average Percent Satisfaction</i>								
Mediator Respect	96.5%	58111	96.9%	55837	96.1%	42571	97.2%	44787
Mediator Impartiality	98.0%	61562	98.2%	59463	97.6%	45434	98.4%	48636
Mediator Fairness	95.3%	56839	96.2%	54997	95.4%	41749	96.6%	44197
Mediator Performance	96.1%	56907	96.8%	54660	95.9%	41567	97.1%	43784
	96.5%		96.5%		95.7%		96.6%	
Satisfaction with Outcome								
<i>Average Percent Satisfaction</i>								
Overall Outcome	64.2%	38414	69.5%	40755	67.0%	29644	72.5%	34347
Speed	59.7%	45394	66.2%	40257	62.6%	33664	68.5%	33554
Expectations of Outcome	82.3%	35053	75.5%	37906	82.3%	27286	78.9%	31814
Fairness of Outcome	59.8%	36028	67.1%	40615	63.2%	28549	70.3%	34538
Control over Outcome	59.7%	42371	69.8%	45014	63.6%	32137	73.0%	38502
Long-term Effects of Mediation	66.5%	36276	73.4%	39947	68.5%	28664	77.0%	33634
	57.4%		65.2%		61.9%		67.5%	

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