

IS ALTERNATIVE DISPUTE RESOLUTION REALLY AN ALTERNATIVE FOR FEDERAL EMPLOYEES?: POSSIBLE SUGGESTIONS FOR ENCOURAGING FEDERAL EMPLOYEES TO PARTICIPATE IN ADR PROGRAMS

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I. INTRODUCTION

One of the missions of the U.S. Department of Transportation (“DOT”) is to provide equal employment opportunities for the employees of the agency.¹ The DOT must also deal with complaints regarding the effectiveness of the agency in carrying out this mission.²

Each agency in the federal government has its own method of handling complaints and dealing with issues.³ To this end, federal

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¹ See NORMAN Y. MINETA, U.S. DEP’T OF TRANS., EQUAL OPPORTUNITY POLICY STATEMENT (2001).

² See *infra* pp. 3-4, for a discussion on the processes set in place by the DOT for handling discrimination claims that come from employees or applicants. An employee might enter a complaint for hostile work environment. Hostile work environment claims may involve sexual harassment, religious, or racial discrimination. An employee could file a claim for unfair hiring practices. The most common complaints are filed when a DOT employee applies for a different position within the agency, is not hired for the position, and believes that the hired applicant is less qualified than the candidate that was not chosen by the DOT. The author of this Note investigated a claim brought by a Federal Aviation Administration employee who felt that he was being discriminated against based on his ethnicity and religion. In his complaint, he stated that his supervisor told him that he needed extra security clearance above other employees. This employee thought that the reason for this discrimination was because he was Israeli and Jewish.

³ A number of federal agencies have programs in place to deal with internal discrimination complaints. These programs will be mentioned throughout this Note. Some programs have been noted as being very successful—in particular, the Postal Service’s REDRESS program and the FAA’s Northwestern region’s program. These federal programs are mirrored by actions within the private sector. Private companies have been using ADR successfully for a number of years, and the success of these programs should be compared with the success of the programs

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agencies have created programs to assist in the resolution of complaints.⁴ Such Alternative Dispute Resolution (“ADR”)⁵ initiatives include mediation and summary jury trials.⁶ These efforts have resulted in initiatives such as: the Postal Services Resolve Employee Dispute Reach Equitable Solutions Swiftly (“REDRESS”) Program,⁷ federal legislation such as No FEAR,⁸ and the Contract

set in place by the federal government. *See, e.g., infra* note 211 discussing the Department of Education’s ADR program. *See also* OFFICE OF PERSONNEL MGMT, ALTERNATIVE DISPUTE RESOLUTION, A RESOURCE GUIDE: SECTION I: ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES AND AGENCY PRACTICES, available at <http://www.opm.gov/er/adrguide/section1-personnel.asp> (last visited Feb. 22, 2004) [hereinafter OPM, Resource Guide] discussing the ADR program developed by the Social Security Administration (“SSA”) using multiple techniques. The SSA has determined that its goal is to resolve the issue, whether it is the whole issue or just a portion. *See also* Memorandum from Attorney General Janet Reno (January 2001), available at <http://mediate.com/articles/reno.cfm> (last visited Feb. 22, 2004). The Department of the Air Force has also successfully used its ADR program to settle ninety-three percent of its cases.

⁴ *See id.*

⁵ The term “alternative dispute resolution” (ADR), will be used in this note in two ways. In this location it will be used as one of the programs implemented within the federal government as an alternative to traditional processes. Alternatively, ADR will also be used as a general descriptive phrase for any type of conflict resolution other than traditional litigation.

⁶ *See Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1089 (1990). Summary jury trials are pseudo-jury trials. Lawyers draft protocols or procedures together and then present them to a mock jury. This mock jury will then enter a non-binding verdict. The “litigants,” after observing the trial, can decide whether or not to settle. If they choose to settle, they are bound by the settlement. As with mini-trials, this allows parties to participate in a process with some of the formal qualities of an actual trial, but without excessive time and cost. *See infra* notes 60 & 65, discussing the advantages of mini-trials as a method of dispute resolution. Although summary jury trials and mini-trials are not often used in federal agency ADR programs, they are used in other fora and should be understood.

⁷ *See* OPM, Resource Guide, *supra* note 3. REDRESS, is an EEO mediation program created by the United States Postal Service to help resolve discrimination problems in a more satisfactory manner, as compared to the traditional process. The program works as follows; an employee who contacts an EEO counselor to file a discrimination complaint is offered mediation with an external mediator. This is similar to the DOT, except, when a DOT employee decides to file a complaint, he or she meets with an EEO counselor for counseling instead of with an external mediator. Under REDRESS, if the complaint is not resolved with the mediator, the complainant can then continue with the traditional complaint process. Again, in contrast to the DOT process, REDRESS has fewer steps. A DOT employee will first meet with a counselor, then be given the option of mediation or traditional methods. Contrast this with the procedure for a postal employee who can avoid the EEO counselor step altogether. The goal of this program is exactly what its name “REDRESS” specifies, to resolve any employee disputes that arise in an efficient and equitable manner. This program was designed to keep postal employees satisfied within this federal agency. *Id.*

⁸ In 2002, Congress passed the Notification and Federal Employee Anti-Discrimination and Retaliation Act, Pub. L. No. 107-174, 116 Stat. 566 (2002), in order to hold the federal government accountable for violations of anti-discrimination and whistleblower laws. One of the goals of the No FEAR Act was to protect whistleblowers from retaliation by their employers, particularly in recent times where corporations have come under fire for illegal practices. Additionally,

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The U.S. government began fostering use of ADR programs in the 1990s.¹⁰ One reason for the creation of these programs was to address the increase in discrimination complaints filed during this period.¹¹ This increase, coupled with the perception of the agencies’ existing, inefficient processes¹² and the fact that discrimination is only found in one percent of cases,¹³ presented an ideal scenario for the government to employ ADR.

No FEAR’s relationship to the federal government is one of accountability. For this reason, the No FEAR Act is an essential aspect of the DOT’s ADR program. Accountability regarding anti-discrimination is a method for creating an environment where there is less discrimination and fewer complaints. The hope of the No FEAR Act is to streamline the discrimination complaint process. The Department of Civil Rights hopes to use the No FEAR Act to improve the monitoring, accountability and enforcement of a fair and efficient complaint process, by having the No FEAR Act implemented in a “timely and high quality fashion.” See OFFICE OF THE SECRETARY, DEPARTMENTAL OFFICE OF CIVIL RIGHTS, STATE OF EQUAL EMPLOYMENT OPPORTUNITY DISCRIMINATION COMPLAINTS REPORT, at 14 (2002) [hereinafter DISCRIMINATION COMPLAINTS REPORT].

⁹ See 41 U.S.C. §§ 601-613 (1994). This Act, enacted in 1978 addresses contracts, express or implied, entered into by an executive agency for the procurement of property, construction, or services. As explained in the Notes of the Act, one of the considerations of Congress in passing this Act was to eliminate delays by the government in rendering decisions on complaints. *Id.* This element is key, because there is the potential that investigating a complaint could take excessive amounts of time. While working for the DOT’s Department of Civil Rights, the author of this Note noticed the amount of time required for each investigation. Without this Act, and its guidelines for deciding whether or not a complaint has merit, investigations could stretch on for years. Under the Act and the guidelines in place, investigators only have 180 days to complete an investigation with a possible ninety day extension if there are mitigating circumstances. The nature of an investigation requires investigators to take affidavits from witnesses and other parties, sometimes requiring extensive travel to properly meet with the parties involved in the complaint. Additionally, simply reading through a file can, in some cases, require several weeks of time. Files often include the complainant’s descriptions of discriminatory actions, medical records to prove the effects that the discriminatory acts had on the complainant, and reports by the EEO counselor. A complete file will also contain statements from witnesses, either supporting the complainant’s contentions, or defending the alleged discriminatory activity, as well as performance reports from the employee’s file or evaluations from a potential employee’s interview process.

¹⁰ See Judith Cohen, *The ADA Mediation Guidelines: A Community Collaboration Moves the Field Forward*, 2 CARDOZO ONLINE J. CONFL. RESOL. 1 (2001).

¹¹ U.S. GEN. ACCOUNTING OFFICE, ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS’ EXPERIENCES WITH ADR IN THE WORKPLACE 9 (1997) [hereinafter USGAO, EMPLOYER EXPERIENCES] (citing statistics that there was an increase in the number of discrimination complaints filed of fifty-five percent from 1991 to 1995, from complaints numbering 17,696 to complaints numbering 27,472).

¹² See *infra* notes 14-20. As discussed on the next page of this Note, the phases of the process through which a complainant must pass to file a formal discrimination complaint seem onerous to the objective observer.

¹³ Telephone Interview with Judith S. Kaleta, Senior Counsel for Dispute Resolution, Dispute Resolution Specialist (Sept. 12, 2003). The author of this Note met Judith Kaleta at a

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The DOT process of filing a complaint follows Equal Employment Opportunity Commission (“EEOC”) procedural guidelines.¹⁴ The first stage of the process is counseling.¹⁵ When an employee or applicant (complainant) decides that he or she has been discriminated against, he or she notifies the DOT’s Civil Rights department.¹⁶ The complainant is then directed to discuss the situation with an EEO counselor. The EEO counselor should explain to the complainant that he or she can elect to use the formal complaint process or pursue ADR.¹⁷ If the complainant elects to follow the formal complaint path, he or she will then file a formal written complaint which will be investigated or rejected by the agency’s Departmental Office of Civil Rights (“DOCR”).¹⁸ When the investigation is completed, the complainant can choose to have a hearing before an administrative judge, or to have the DOCR issue a Final Agency Decision (“FAD”).¹⁹ An employee who is not sat-

Roundtable Discussion at the DOT Headquarters in Cambridge, MA in July 2003. Ms. Kaleta works at the Center for Alternative Dispute Resolution, for the DOT. The Center offers training and education on conflict management, communication skills, basic and advanced mediation skills, interest-based problem solving, conflict management skills for managers and how to represent clients in mediation. The Center also provides services for dispute resolution, including facilitation and mediation. The Center also assists parties in finding ADR providers. See U.S. DEPARTMENT OF TRANSPORTATION, *CADR: CENTER FOR ALTERNATIVE DISPUTE RESOLUTION* (2003).

¹⁴ See *DISCRIMINATION COMPLAINTS REPORT*, *supra* note 8, at 6. This section of the report, labeled “The Informal Pre-Complaint Phase,” sets out the time limitations for filing discrimination complaints. Within forty-five days from the alleged discrimination action, the person bringing the action must contact an EEO counselor and receive counseling. The counseling must be completed within thirty days from the filing of the report. At the end of the pre-complaint phase, the counselor must file a report. *Id.*

¹⁵ See *id.* The complainant speaks with an EEO counselor informally. The counselor explains what the options are for the complainant. This method has been replaced by mediation by some federal agencies.

¹⁶ *Id.* There are Civil Rights departments in strategic locations across the country. These locations, however, are not in every state, which makes communication between the department and the complainant difficult. For example, the civil rights department in Massachusetts handles claims for the entire Northeast region.

¹⁷ See *id.* If ADR is used, the process must be completed within ninety days. Successful settlements are sometimes reached during this timeframe, via the formal complaint process. *Id.* It seems, however, that ADR is not even being offered at this point in the process.

¹⁸ See *id.* After the counselor files a report following the EEO counseling, the discrimination act enters its formal phase. The complaint is received by the DOCR, and if ADR was not used, then the DOCR can choose to conduct its investigation or dismiss the complaint. The complaint can be dismissed for untimeliness or lack of jurisdiction. Otherwise, the complaint will be investigated by the DOCR. If a complaint is accepted, the investigator has 180 days to investigate the complaint. The investigation can be extended for another 180 days, if the complaint is amended by the complainant or consolidated by the DOCR. *Id.*

¹⁹ *Id.* Once the investigation is complete and a report of investigation has been issued, the complainant has thirty days in which to request a hearing, or get a FAD from the agency. If the

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ified with the FAD can appeal or file a civil action in district court.²⁰

Alternatively, the complainant may select the ADR path. There is, however, the potential that ADR might be rejected by the agency.²¹ According to the Center for Public Resources (“CPR”) Institute for Dispute Resolution, ADR programs are important elements within the arena of employment disputes.²² ADR programs allow for disputes to be handled at an early stage.²³ ADR also provides employees with opportunities to voice their complaints and for management to learn about sources of employee dissatisfaction.²⁴

While the goals of ADR programs are admirable, statistics show that ADR is not being used to its fullest potential. The DOT reports that of the 1,409 individuals counseled in the informal stage of the complaint process in 2002, ADR was only offered in 557 cases and was only accepted in 212.²⁵

If ADR programs provide such a wonderful alternative, then why is Alternative Dispute Resolution not used more frequently by

complainant chooses the FAD, the DOCR then has sixty days in which to issue its decision. If the complainant chooses an EEOC hearing, an administrative judge will decide the case and order relief upon a finding of discrimination. Once the judge renders a decision, it is the responsibility of the DOT to issue a final order. If the DOT wishes, it can issue an order either appealing or implementing the judge’s decision. *Id.* at 6-7.

²⁰ *See id.* at 7. If the complainant is dissatisfied, he or she can then file an appeal with the EEOC. If the complainant is dissatisfied with the appeal’s result, the complainant may choose to file an action in the U.S. District Court. The judicial appeal process can ultimately be followed all the way to the U.S. Supreme Court. As the appeals process continues, the district court will review the discrimination claim under the *de novo* standard of review. *Id.*

²¹ *See id.* at 9. Of the ADR offers made to employees, it was rejected over sixty percent of the time. Twenty percent of the offers rejected were rejected by management. Although most rejections came from the complainants, the low percentage of rejections from management may be emblematic of the lack of knowledge on the part of members of management.

²² *See* CPR Institute for Dispute Resolution, *CPR Program to Resolve Employment Disputes*, at <http://www.cpradr.org> (last visited Oct. 8, 2003) [hereinafter CPR Institute, *Employment Disputes*]. The CPR Institute was created in 1979 as a center to promote the use of private and public dispute resolution. The Institute provides advice and support for private and public entities that choose to use ADR for conflict resolution. *Id.*

²³ *See id.* at Overview. The Institute finds that it is better for employees to air their complaints at the earliest time, and not let the problem fester. The goal of the internal agency ADR programs is to insure that disputes are “nipped in the bud” before they worsen. Two of the mechanisms suggested by the CPR Institute for dealing with problems at the earliest possible time, are the “open door policy” and the “employee hotline.” *Id.*

²⁴ *See id.* The Institute suggests a number of mechanisms to help with the resolution of employment conflicts including employee hotlines, review boards, and open door policies. Such policies serve to help both employees and management. *Id.*

²⁵ *See* DISCRIMINATION COMPLAINTS REPORT, *supra* note 8, at 9. These statistics, published by the DOT, were put out in order to show the relatively low usage of ADR in 2002. *Id.*

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DOT employees? This Note will examine the various dispute resolution programs employed by the federal government. Part One of this Note will look at the different federal programs and determine their usefulness. Part Two will establish that ADR is not being used to its potential. Part Three will discuss the reasons for the low ADR usage. Part Four will suggest options for increasing ADR usage in federally implemented programs. Finally, Part Five will conclude that if the federal agencies took advantage of their own programs, the possibilities for change are great.

II: AN EXAMINATION OF DISPUTE RESOLUTION PROGRAMS

The term ADR has many different uses. For example, Congress defines ADR in the Administrative Dispute Resolution Act of 1996 as an “[a]lternative means of dispute resolution means any procedure that is used to resolve issues in controversy, including but not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, use of ombuds, or any combination thereof.”²⁶

This Note will establish the merits of different kinds of dispute resolution programs. One of the benefits of the use of ADR programs is that dispute resolution methods allow the complainant to pursue a resolution without having his or her case dismissed. Since the overwhelming majority of the cases dealt with by the federal government on an internal level are civil, there is often a risk that these cases will be decided on a summary judgment basis.²⁷ This concern is particularly applicable to the DOT. If a DOT employee brought a discrimination claim against an agency and supervisor, he or she might have a difficult time introducing concrete proof of

²⁶ Administrative Dispute Resolution Act of 1996, 5 U.S.C.S. § 571 (2003), available at <http://www.mediate.com/articles/adra96.cfm#> (last visited Nov. 2, 2003). Mediate.com explains Congress' findings and policy regarding the Alternative Dispute Resolution Act. Congress' problem with the current state of administrative proceedings is that they are too expensive and lengthy, and are less likely to result in a positive outcome for either party. This is in contrast to the alternative means of dispute resolution used effectively in the private sector, which have been less expensive, less contentious, and result in agreed upon decisions faster. *Id.*

²⁷ See Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 141-42 (2000). ADR shows the transactional nature of the litigation culture in its desire to cut costs through quick settlements and avoid the court system. At the same time, in an effort to alleviate court dockets, many courts have begun to decide more cases on the basis of summary judgment, which according to Mollica, risks overriding the constitutional rights of due process and civil jury trials.

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the discrimination into the trial, making it easy for the agency to move for summary judgment.²⁸

A. Arbitration as a Method of Dispute Resolution

One of the most widely used alternatives to traditional litigation in the federal government is arbitration.²⁹ Arbitration has become particularly popular with the advent of mandatory arbitration clauses in contracts of nonunion employees.³⁰ For the most part, courts across the country have upheld arbitration clauses and deferred to decisions made by arbitrators.³¹ Many judges, including justices on the Supreme Court,³² have even upheld the arbitration clauses found in employment contracts,³³ even though such contracts were thought to be exempt under the Federal Arbitration Act (“FAA”).³⁴ One reason cited by the courts is

²⁸ *Id.* at 168. Mollica explains that in a number of employment cases, summary judgment “went to the heart of the employer’s alleged discriminatory intent.” Given the difficulty of proving the intent, many plaintiffs failed to prove even a prima facie case of discrimination. *Id.*

²⁹ See, e.g., Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 AM. BUS. L.J. 105 (1997). Levin explains that in recent years the private sector has begun to use binding arbitration as the preferred method of dispute resolution. The benefits appear to be that arbitration is a “quicker, less expensive, and more private alternative to litigation.” *Id.* at 106. While this is beneficial for private sector businesses, according to Levin, it remains to be seen whether the same method will work in the public sector as well.

³⁰ See Michael R. Holden, *Arbitration of State-Law Claim by Employers: An Argument for Containing Federal Arbitration Law*, 80 CORNELL L. REV. 1695, 1695 (1995). These arbitration clauses are being used by employers who want to prevent being taken to court by their nonunion employees. These clauses are part of the initial contract, signed, on a mandatory basis (“you had to sign it to work here” *Id.*) by employees when they begin work. Such clauses waive the employees’ rights to assert claims in a judicial forum.

³¹ See Levin, *supra* note 29, at 105-06.

³² See, e.g., *Allied-BruceTerminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the petitioner’s arbitration clause with the respondent was valid under the Federal Arbitration Act). As explained by Levin, *supra* note 29, in this case, the Supreme Court declared the enforceability of certain types of arbitration clauses, particularly those involving interstate commerce.

³³ See Levin, *supra* note 29, at 113. The standard clause used in many contracts is by the American Arbitration Association (“AAA”). The AAA has stated that its standard arbitration provision is very effective and has been used in “over a million disputes.” *Id.*

³⁴ Holden, *supra* note 30, at 1699-1702. According to the Federal Arbitration Act, federal and state courts are required to enforce arbitration agreements that fall under their purview. Even though the Federal Arbitration Act seems to have excluded employment contracts, the courts have read the exclusionary clause narrowly and allowed businesses to require the arbitration of employment contracts. *Id.*

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the Congressional endorsement of the use of arbitration as a form of conflict resolution.³⁵

Courts have favored arbitration over litigation and have been endorsing arbitration since the FAA passed.³⁶ The FAA was enacted in the 1920's to ensure judicial enforcement of arbitration clauses, but certain employment contracts were specifically excluded from the scope of the Act.³⁷ Courts, however, have read this employment contract exclusion narrowly and increasingly, employers have inserted arbitration clauses into employment contracts to avoid suits by non-union employees.³⁸ This reading of the Act has been so widespread that arbitration clauses seem to have become the preferred method of dispute resolution with regard to employment disputes.³⁹ The courts' ability to include employment contracts under the FAA comes from a reading of the commerce clause power.⁴⁰

The minority has taken a different view on the issue of arbitration clauses in employment contracts, resulting in two different

³⁵ See Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 639 (1996). According to Sternlight, historically, courts only enforced arbitration agreements when they seemed to have been accepted by both parties. Recently, courts have shifted their view. Now, courts are looking to Congress for guidance on some aspects, but also looking to social policy to determine the enforceability of arbitration clauses. The courts' "focus on various social policies marked a significant shift from its exclusive focus on individual consent." Sternlight believes that the courts have rejected the question of inequality in bargaining power and hold irrelevant the notion that this inequality affects the ability of the parties to arbitrate. *Id.* at 653.

³⁶ See *id.* at 661. Although the Court clearly favors arbitration, it has not provided any reasoning for why it does favor it. Sternlight does address some possibilities for why the Court favors arbitration, and many of the reasons are the same as those that make dispute resolution an attractive option in general. These reasons, in particular, include a desire to conserve judicial resources which is similar to the general cost-effectiveness of other dispute resolution methods. *Id.* at 661.

³⁷ See Federal Arbitration Act, 9 U.S.C. § 1 (2003), specifies that the enforcement of arbitration clauses is applicable to a number of transactions, however, it does not apply to the "contracts of employment of seamen, railroad employees, or any other class of worker engaged in foreign or interstate commerce." *Id.*

³⁸ See Holden, *supra* note 30, at 1701.

³⁹ See *id.* The courts' reading of the FAA is narrow enough to nullify the exclusion to cover most employee contracts.

⁴⁰ See *id.* The Act states that employment contracts of seamen, railroad employees or any other workers who are engaged in commerce, foreign or domestic are exempt from arbitration clauses. *Id.* However, this brings about the question of what is the interpretation of the word commerce. In fact, the scope of the clause is an issue that has not been determined by the Supreme Court.

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readings of such clause by the federal courts.⁴¹ These readings have led to confusion.

The Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*⁴² endorsed arbitration of certain federal anti-discrimination claims. In *Gilmer*,⁴³ the Supreme Court held that the FAA required Gilmer to arbitrate his Age Discrimination in Employment Act (“ADEA”) claim because he signed a mandatory arbitration clause.⁴⁴ The Supreme Court further opined that Gilmer was not foregoing any substantive claims by arbitrating; it was merely a change in forum. While arbitration brings with it many of the same benefits as other types of ADR, the use of arbitration leads to binding decisions that are essentially not reviewable by that courts.⁴⁵ This aspect of arbitration has raised some red flags among organizations that administer employment arbitrations.⁴⁶

There are several problems involved with the use of arbitration as a method of dispute resolution. First, even though one of the goals of arbitration is to reduce the cost of resolving disputes, it has been noted that the recent increase in the complexity of arbitration is raising the cost of its use to the litigation level.⁴⁷ A sec-

⁴¹ *See id.* The courts have read the Act in two different ways; (1) the exclusion clause does apply to all of the subsequent sections of the Act, allowing employment contracts to be excluded in the same way that other types of contracts can be reached, or (2) the Act must be read on a section-by-section basis, which would allow for some sections not be read as connected to the previous sections.

⁴² 500 U.S. 20 (1991).

⁴³ *See id.*

⁴⁴ *See id.* The Supreme Court held that the FAA required arbitration “unless Congress itself had evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” Since Congress had evinced no such intention when it enacted the Age Discrimination in Employment Act, the FAA required arbitration of the claim.

Id. at 26.

⁴⁵ *See Levin, supra* note 29, at 106. Arbitration is a quicker, cheaper and more private alternative to litigation. “Other extolled virtues include simplicity, informality, and the benefit of having experienced and knowledgeable decision-makers.” Furthermore, when arbitration is binding, “finality is another positive and complementary attribute of arbitration.” *Id.* On the other hand, arbitration is more similar to litigation than other ADR methods. Proofs and arguments are presented and a decision is ultimately made, by a third party rather than the interested parties.

⁴⁶ *See id.* at 166-67. Some organizations have gone so far with their dislike of these adhesive arbitration clauses that the AAA has stated that it will not help companies develop mandatory arbitration programs for employment disputes. It further clarified its position by stating that the only cases that it will take are those where the employee has had an opportunity to challenge the company’s arbitration policy in court. To that end, it has taken the lead on following Due Process Protocols. *Id.* at 168-169.

⁴⁷ *See Sternlight, supra* note 35, at 694. Binding arbitration, while once thought to be cheaper than trial, is not necessarily cheaper, especially since most cases do not ever reach the trial stage of litigation. At which point, arbitration must be compared to litigation, not trial.

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ond problem is the possibility of a finding that the agreement to arbitrate is a contract of adhesion.⁴⁸ A third problem is the lack of choice that goes along with methods of “forced” dispute resolution.⁴⁹ Despite some efforts to ensure the fairness of arbitration,⁵⁰ the mere presence of arbitration clauses may prove to be a thorn in the side of federal agencies deciding how to deal with complaints from their employees. Because of the adversarial nature of arbitration, many of the benefits derived from ADR programs will be moot. One of the government’s goals in using ADR programs in resolving disputes is to maintain a collegial atmosphere within the work environment, a purpose which could be frustrated by arbitration.

Taking all of the positive and negative factors of arbitration into account, there are several conclusions at which we can arrive. First, arbitration should not be the only dispute resolution method offered in employment contracts. Second, if arbitration clauses are to be included in contracts, such arbitration should only be used if it is voluntarily agreed to by both parties.⁵¹ If the parties are given a choice, then we should allow them to choose their preferred method of resolving their dispute.⁵² The final conclusion, particularly with regard to government agencies, is to prohibit arbitration

And, as arbitration becomes more complex, the cost of arbitrating a matter increases to the point of being on par with litigation.

⁴⁸ Levin, *supra* note 29, at 169. There is a question whether such arbitration agreements actually create a waiver of the constitutional right to trial. There is a possibility that adhesive arbitration agreements may be unconstitutional since they could constitute a deprivation of the constitutional right to trial.

⁴⁹ See *id.* at 180. Levin points out in his conclusion that in order for arbitration to be truly successful, those involved must be familiar with the process and should have had the opportunity to decide, from the beginning, whether arbitration is the form of dispute resolution that they wish to use. *Id.*

⁵⁰ See *id.* at 172. Some states have enacted legislation to increase the fairness of arbitration clauses in employment contracts. Statutes have ranged from requiring that parties receive special notices when they sign a contract agreeing to arbitration, to enlarging the size of the arbitration clauses within contracts so the clauses are clearly visible and distinguishable from the rest of the contract that may go unread. However, these state enactments fall by the wayside when the contract deals with interstate commerce, for these transactions are only subject to the Federal Arbitration Act and the Due Process Protocol, not state legislation.

⁵¹ See Sternlight, *supra* note 35, at 711.

⁵² See Cynthia B. Dauber, *The Ties That Do Not Bind: Nonbinding Arbitration in Federal Administrative Agencies*, 9 ADMIN. L.J. AM. U. 165, 169-170 (1995). Luckily, according to the Administrative Dispute Resolution Act, while the use of ADR is authorized as an alternative to litigation, federal agencies have the choice of whether to apply these various dispute resolution methods.

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as a method for dispute resolution.⁵³ In fact, despite the *Gilmer*⁵⁴ holding, there is resistance to using mandatory arbitration as a means of dispute resolution.⁵⁵ If arbitration is not used as a method of dispute resolution for the federal government, then other alternatives must be examined to determine if they would be appropriate.

B. Mini-trials as a Method of Dispute Resolution

Mini-trials are a different form of alternative dispute resolution, although they are used more often in the private sector.⁵⁶ The goal of dispute resolution methods such as mini-trials is to determine which party is most likely to prevail.⁵⁷ In practice, mini-trials are similar to regular trials, but with the goal of negotiating a settlement, rather than obtaining a verdict.⁵⁸ Mini-trials are similar to

⁵³ See *id.* at 189. Arbitration, if used in a federal setting, might inhibit the protection of individual rights. Furthermore, given the occasional complexity of arbitration, similar backlogs and delays might occur. This would, in effect, defeat the purpose of alternative dispute resolution. *Id.* at 190. Therefore, there is concern regarding the use of arbitration as a method of dispute resolution for federal agencies.

⁵⁴ *Gilmer*, 500 U.S. 20. Although *Gilmer* is not applicable to federal employees, the holding remains important to this discussion.

⁵⁵ See Michele L. Giovagnoli, *To Be or Not To Be?: Recent Resistance to Mandatory Arbitration Agreements in the Employment Arena*, 64 UMKC L. Rev. 547, 550 (1996). Giovagnoli points out that the use of arbitration in employment agreements has raised fairness and procedural due process concerns. In order to alleviate these concerns, a number of steps must be taken to ensure that the process adheres to the standards of due process. These steps include; (1) employees having the right to representation and access to all available information; (2) at least partial reimbursement by the employer; (3) sufficient pre-trial discovery; (4) availability of trained and knowledgeable mediators and arbitrators; (5) consensus from both parties on the choice of mediator or arbitrator; (6) all issues must be disclosed and the lack of bias of the mediator or arbitrator is established; (7) a licensed arbitrator who can award the same type of relief as the court can; (8) a mutually acceptable payment arrangement should be reached between the parties; (9) the final agreement is binding and will only be subject to limited review. *Id.* at 573-75.

⁵⁶ See discussion *infra* beginning of Part I.

⁵⁷ See Michael S. Wilk, *Mediation of a Bankruptcy Case*, 2003 ABI JNL. LEXIS 83, *5 (2003). With a third party involved, there will be a determination of who the prevailing party will be. If this is a binding decision, then that decision will close the case. If the decision reached is non-binding, then the party which does not prevail will be encouraged to settle. This is in contrast to traditional mediation where settlement is reached during the process, rather than after the process has concluded.

⁵⁸ See Agencies' use of alternative means of dispute resolution, 1 C.F.R. § 305.86-3, app. (1992), available at <http://www.law.fsu.edu/library/admin/acus/305863.html> (last visited Nov. 31, 2003). "A mini-trial is a structured settlement process in which each side presents a highly abbreviated summary of its case before senior officials of each party authorized to settle the case.

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arbitration hearings except that they lack the formalities and potential expense.⁵⁹ There are also different kinds of mini-trials: private and judicial.⁶⁰ The format of mini-trials is very similar to that of normal trials.⁶¹ It is important to note, however, that mini-trials are voluntary proceedings.⁶² Parties present their cases in a summarized manner, and put forth evidence and submissions before a type of tribunal.⁶³ The mini-trial can be useful as a means of resolving complex matters, which would otherwise necessitate litigation.⁶⁴ The benefits of using mini-trials are similar to those of other alternative dispute resolution programs,⁶⁵ but mini-trials are also beneficial for their own reasons,⁶⁶ including the notion of formality, the absence of the excessive costs associated with a real

A neutral adviser sometimes presides over the proceeding and will render an advisory opinion if asked to do so. Following the presentations, the officials seek to negotiate a settlement.” *Id.*

⁵⁹ Sarah Johnston, *Current Public Law and Policy Issues in ADR: ADR in the Employment Discrimination Context: Friend or Foe to Claimants*, 22 *HAMLIN J. PUB. L & POL’Y* 335, 337 (2001). Johnston argues that the mini-trial’s lack of a “staggering degree of adversarial energy” is not necessarily a bad thing. *Id.*

⁶⁰ See Hayden R. Brainard, *Study: Survey and Study of Technology Development and Transfer Needs in New York*, 9 *ALB. L.J. SCI. & TECH.* 423, 445 (1999). In private mini-trials, it is only the parties themselves that hear the case, while in judicial mini-trials, a judge, or neutral third party hears arguments and attempts to come up with a solution to settle the dispute. Although both of these methods are similar to litigation, they are more creative and flexible, and inevitably, less costly.

⁶¹ See 1 C.F.R. § 305.86-3, *supra* note 58. Mini-trials can be compared to actual trials in the way issues are addressed. Mini-trials are used when litigation techniques, like discovery, are necessary. The structure of minitrials is designed to address mixed, and even complicated, issues of law and fact. While the use of mini-trials might be helpful in some circumstances, just like ADR in general, it is not appropriate in all situations. *Id.*

⁶² See Dr. Loukas A. Mistelis, *ADR in England and Wales*, 12 *AM. REV. INT’L ARB.* 167, 209 (2001). By using mini-trials as a tactic for dispute resolution, parties have a greater number of options open to them, in contrast to litigation. A tribunal of neutrals can render non-binding decisions, and a tribunal of company neutrals can use the mini-trial to facilitate settlement. The parties involved can also make a decision between them to have a neutral advisor present, but not to have that advisor act as an arbitrator or mediator.

⁶³ *Id.* The tribunal can take on a number of characteristics and functions. It can be a neutral advising body, who can point out to the parties the strengths and weaknesses of their cases, allowing them to approach a settlement on their case particularly by using non-binding decisions. In a business setting, the tribunal can be a chairman or senior executive who administers the mini-trial as a means to settlement only.

⁶⁴ See *id.* See also 1 C.F.R. § 305.86-3, *supra* note 58.

⁶⁵ See *id.* Mini-trials aim to create a “prompt and cost effective resolution. . . [with] its goal, to narrow the area of controversy, to dispose of collateral issues, and to encourage a fair and equitable settlement.” *Id.*

⁶⁶ Giovagnoli, *supra* note 55, at 553.

Several benefits of mini-trials include: (1) evidence is presented to the decision-maker directly; (2) the process serves as a reality orientator because both perspectives are disclosed and heard; (3) the process is shorter than traditional litigation; (4) parties experience characteristics of the traditional legal system without the costs and

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trial, and the efficiency of the procedure.⁶⁷ The mini-trial can be classified as a form of structured mediation.⁶⁸

While this type of dispute resolution seems flawless to a certain extent, mini-trials are not without their problems. Although one of the clear goals of the alternative dispute resolution process is time-efficiency, a mini-trial can potentially last as long as three months.⁶⁹ While this may be shorter than the average trial, for many, three months is too long to wait for a decision that merely encourages, as opposed to requires, settlement. This timing problem is not the only difficulty that exists with mini-trials. They have been found to be inefficient and a waste of judicial resources.⁷⁰ Additionally, in some areas of usage, mini-trials can only be used when there are factual issues in dispute.⁷¹

C. Mediation as a Method of Dispute Resolution

The Administrative Dispute Resolution Act⁷² listed a number of methods of dispute resolution such as, conciliation, facilitation, mediation, fact-finding, and ombuds.⁷³ Mediation is viewed by

delays; and (5) the procedure is valuable where time is of the essence and a quicker resolution is imperative.

Id.

⁶⁷ *See id.*

⁶⁸ *See* Michael Pyles, *Assessing Dispute Resolution Procedures*, 7 *AM. REV. INT'L ARB.* 267, 278 (1996). Mini-trials are a specific form of mediation. Most mediation techniques are usually informal. The parties sit down with the mediator and talk, but there are some that can be more formal. The most well-known formal mediation technique is the mini-trial.

⁶⁹ *See* Lauren Springer, *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Comment: Choice of Forum From a Contractor's Perspective*, 37 *AM. U.L. REV.* 1237, 1250 (1988). "The mini-trial process should last between one and three months." *Id.*

⁷⁰ *See* Thomas G. Buchanan III, *Franklin v. Healthsource of Arkansas: Arkansas Adopts the Made-Whole Doctrine*, 51 *ARK. L. REV.* 773, 799 (1998). One of the benefits of negotiation as a way to arrive at a settlement is the idea of avoiding trial. However, if a mini-trial is the method of resolution chosen, there is essentially a trial anyway, thereby frustrating that goal.

⁷¹ *See* Springer, *supra* note 69, at 1250. In the 1980s, the Claims Court set out a general order, calling for the reduction of costs in resolving disputes. One of the methods encouraged by this order is the mini-trial. But with this encouragement comes the caveat that mini-trials can only be used when the factual issues in dispute can actually be resolved using legal principles. Additionally, the reason that mini-trials can only be decided when there are material issues of fact, is because if there were no material issues of fact, the issue would have been decided on summary judgment.

⁷² *See* Alternative Means of Dispute Resolution in the Administrative Process, 5 *U.S.C.S* § 571 (2003).

⁷³ *See id.* The definitions for these various processes have been culled from a variety of locations. "Conciliation means a process in which a neutral facilitates settlement by clarifying issues and serving as an intermediary for negotiations in a manner which is generally more infor-

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some as the best possible method of dispute resolution. This position is reinforced by a statement from the Secretary of the Treasury that qualifies ADR and mediation as the most appropriate methods for resolving disputes.⁷⁴ The American Bar Association (“ABA”), in its Recommendations for the Administrative Conference of the United States, placed the use of mediation on the top of its list of settlement techniques.⁷⁵

Mediation is not without its flaws, but as compared to other dispute resolution methods, the author of this Note concludes that ADR is the best method of dispute resolution for the federal government in general and the DOT in particular. It is clear that this position is shared by many within the government. Therefore, an in-depth look at why ADR is not as successful for the DOT as it should be is warranted.

III: ADR IS NOT BEING USED TO ITS FULLEST POTENTIAL WITHIN THE DOT

The federal system for redressing complaints “has been criticized by federal managers, as well as by employee representatives, as adversarial, inefficient, time consuming, and costly.”⁷⁶ Therefore, the next logical step is to determine a less adversarial, more

mal and less structured than mediation.” H.B. 818, 2002 Gen. Assem., § 8.01-576.4 (Va. 2002). Facilitation “helps parties reach a decision or a satisfactory resolution of the matter to be addressed. While often used interchangeably with ‘mediator’, a facilitator generally conducts meetings and coordinates discussions, but does not become as involved in the substantive issues as does a mediator.” 1 C.F.R. § 305.86-3, *supra* note 58. Factfinding is a “proceeding [that] entails the appointment of a person or group with technical expertise in the subject matter to evaluate the matter presented and file a report establishing the ‘facts.’ The factfinder is not authorized to resolve policy issues. Following the findings, the parties may then negotiate a settlement, hold further proceedings, or conduct more research.” *Id.* The use of an ombuds “involves the use of an employee or organization component to whom complaints or problems can be brought with the hopes of quick, informal resolution.” 46 C.F.R. Part 502 (2001). 1 C.F.R. § 305.86-3, *supra* note 58.

⁷⁴ See U.S. SEC’Y OF THE TREASURY, RESOLVING WORKPLACE Disputes [hereinafter Resolving Workplace Disputes], available at <http://www.mediate.com/articles/oneill.cfm#> (last visited Nov. 2, 2003). In the Memorandum for all Treasury Employees, the Secretary of the Treasury identifies mediation as the best way to “assist parties in finding creative, mutually acceptable and early resolution of disputes.” *Id.*

⁷⁵ See 1 C.F.R. § 305.86-3, at § D *supra* note 58. “10. In many situations, agencies already have the authority to use techniques to achieve dispute settlements. Agencies should use this authority by routinely taking advantage of opportunities to (a) explicitly provide for the use of mediation.” *Id.*

⁷⁶ *Id.* at 4.

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efficient and cost effective solution through the use of ADR. Given all of the benefits of ADR, the ADR Act has not been enforced in any of the federal agencies.⁷⁷ According to the Report put out by the DOT DOCR, an ADR alternative was offered to employees “less than 40 percent of the time, and when offered, it was rejected 61 percent of the time at both the informal and formal phases.”⁷⁸ The following is a breakdown of statistics of ADR use in the Department of Transportation as compiled by the DOCR.

In Fiscal Year (“FY”) 2002, a total of 1,409 individuals were counseled during the informal phase of the EEO process.⁷⁹ The DOT has stated that this is a significant reduction (1.3 percent) in employee complaints for this year.⁸⁰ In total, only “.54 percent of DOT employees filed EEO complaints in FY02.”⁸¹ While the number of complaints filed seems small, and the DOT is pleased with the reduction, the low ADR usage is worrisome.

Of the 1,409 complaints, ADR was offered as an alternative to the formal complaint process in only 557 of these cases.⁸² Of these 557 complaints, ADR was then rejected by both complainants and agency management as follows:

In 227 cases ADR was rejected as an option by the complainant.

In 118 cases ADR was rejected as an option by management.

In total, therefore, ADR was accepted in *only* 212 cases during FY02.⁸³

The DOT reported that:

ADR activities during the informal and formal phases of the EEO complaint process remained relatively low in FY02. It appeared that ADR was offered less than 40 percent of the time, and when offered it was rejected 61 percent of time at both the informal and formal phases. Over 20 percent of the ADR offers were rejected by management, but complainant rejections re-

⁷⁷ See Dauber, *supra* note 52, at 176. The ADR Act is a basis, not a final determination, of requirements. According to Dauber, it is not enough for the Act to just set out minimal requirements; Congress should actually compel federal agencies to create better and more effective programs for resolving disputes. *Id.* at 177.

⁷⁸ DISCRIMINATION COMPLAINTS REPORT, *supra* note 8, at 9.

⁷⁹ See *id.* at 1, 7, 9.

⁸⁰ See *id.* at 1.

⁸¹ *Id.*

⁸² See *id.* at 9.

⁸³ See *id.* at 9.

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portedly outnumbered management rejections by 92 percent at the informal phase and by 52 percent at the formal phase⁸⁴

The DOT has recognized that ADR usage during the informal and formal complaint processes is low, and that “the causes for the relatively high levels of rejection by complainants are not clear” and that this problem “requires attention.”⁸⁵

A. Reasons for Low ADR Usage

After ADR programs were implemented in governmental agencies, research found that “ADR availability or use was not pervasive . . . within federal agencies that reported having some ADR capability.”⁸⁶ In an attempt to increase the use of ADR, the DOT plans to actively promote the use of ADR, reduce possible existing confusion about ADR programs and increase the leadership commitment and participation in ADR programs.⁸⁷ In order to substantively increase ADR use, the DOT has made an effort to identify specific problem areas.⁸⁸

1. Problem Area #1: Employees do not know enough about the process to make an educated decision about whether or not they should elect ADR

The first identified problem area is that employees are unable to make educated decisions about whether to elect ADR processes because EEO counselors provide insufficient information. Within this general problem area, there are a number of smaller issues involved. First, employees may be confused about their options. This confusion occurs frequently when EEO counselors do not possess sufficient information and/or knowledge about the process.⁸⁹ One aspect of this sub-problem is that EEO counselors are not full time mediators.⁹⁰ Their involvement in the mediation process as EEO counselors is one aspect of their current federal employ-

⁸⁴ *Id.* at 9-10.

⁸⁵ *Id.*

⁸⁶ USGAO, *EMPLOYER EXPERIENCES*, *supra* note 11, at 14.

⁸⁷ *See* *DISCRIMINATION COMPLAINTS REPORT*, *supra* note 8, at 6.

⁸⁸ *See infra* pages 16-22.

⁸⁹ *See* *DISCRIMINATION COMPLAINTS REPORT*, *supra* note 8, at 14.

⁹⁰ *See id.*

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ment.⁹¹ At times they might not be as attentive to their role as mediators when there are other matters before them.⁹²

The lack of support by human resources is not without reason. Within governmental agencies there exists something akin to the trickle-down effect with regards to ADR usage. Just as employees do not choose ADR because they have not been fully educated, human resources professionals do not encourage the use of ADR since it has not been marketed to them on a large enough scale.⁹³ To ensure the use of ADR, agencies must make marketing a priority to “get the word out to all potential users.”⁹⁴

Another possibility is that people take comfort in what they know.⁹⁵ The formal complaint process is the tried and true version of how federal complaints are resolved. Since the federal government has been using administrative adjudicative proceedings for a long time, employees will often choose the administrative proceeding even if the results are not as positive.⁹⁶

The CPR Institute sets out guidelines for the agreements an employee must submit when he or she chooses mediation.⁹⁷ These

⁹¹ See *id.* The report states that one of the goals of the Department of Civil Rights is to “provide more timely and professional EEO counseling services by introducing permanent, full-time counselors in a centralized system.” *Id.* From this goal, it can be understood that the EEO counselors who currently handle complaints are not counselors all of the time. They have other jobs in addition to their positions as EEO counselors.

⁹² See Telephone Interview with Judith S. Kaleta, *supra* note 13.

⁹³ USDOT, PROGRAM EVALUATION *infra* note 102, at 28. The DOT’s Program Evaluation Team, who published the Evaluation report stated that whether or not the ADR program succeeds depends on how committed the major players are. It is the responsibility of the human resources managers to advertise the program to all potential users. The Program Evaluation Team had a number of ideas for how to go about marketing the program. One of the ideas that the Team had was a kick-off event at DOT Headquarters with posters, brochures, and promotional materials. The DOT publicized the event by publishing articles and posting the event on agency web-sites. There were no statistics on whether the advertising helped, but there were calls from employees interested in becoming mediators. The FAA made a promotional video and instituted mediation awareness briefings. *Id.* at 28-29.

⁹⁴ *Id.*

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ CPR Institute, *Employment Disputes*, *supra* note 22, at § A.2 and § A.6(a)-(c). The CPR Institute identifies the following guidelines: the employee agrees to use mediation to deal with his or her claim voluntarily; the employee must also specify the damages sought; the employee has read and accepted all of the procedures set out by the mediation program; the employee has had the opportunity to discuss the matter with his or her representative; the employee has specified the name of the representative; the impartial mediator has been chosen by both parties; the employee understands the costs that he or she will have to pay to use the mediation; the employee has signed the agreement showing that he or she has been fully educated and understand all aspects of the mediation. *Id.*

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guidelines are emblematic of the types of issues that the employee must be aware of in order to be fully educated about mediation.⁹⁸

2. Problem Area #2: Employees do not trust internal neutrals, who are trained ADR professionals within the agency, actually to be neutral

The second problem area is a lack of trust of internal neutrals by agency employees. In some agencies, employees are expected to multi-task. An employee can train to become an EEO counselor or even an ADR mediator.⁹⁹ For employees who feel that they have been discriminated against, however, the problem is that an EEO counselor is a member of the same agency that was involved in the discrimination. This may create trust issues for the employee and cause him or her to think twice about pursuing ADR.¹⁰⁰

Logically, the use of an external mediator might be the best method for mediating such a dispute. However, external mediation is not required by the EEOC.¹⁰¹ Despite the concerns about a lack of trust, only the United States Coast Guard has “discouraged the use of EEO Counselors based on their perceived identification with management.”¹⁰²

3. Problem Area #3: Cost & Administrative Time (Inconvenience)

The benefits of mediation include the resolution of “disputes as early as possible, in an appropriate and cost-effective manner, and at a lower organizational level, without having to involve high-level management.”¹⁰³ While there are little to no costs incurred by using internal mediators, the process of obtaining external mediators may seem arduous and prohibitively costly to an agency. To request an approved ADR contracting officer, an agency must “(1) prepare a Request for Quotation using a performance-based statement of work; (2) transmit the Request for Quotation to contractors; (3) evaluate the quotes; and (4) select the contractor to

⁹⁸ *See id.*

⁹⁹ Andrew Colsky, *The Federal Government and ADR: How Things Get Done*, at <http://www.mediate.com/government/cosky1.cfm#> (last visited Nov. 2, 2003).

¹⁰⁰ Telephone Interview with Judith S. Kaleta, *supra* note 13.

¹⁰¹ *See UNITED STATES DEP'T OF TRANSPORTATION, PROGRAM EVALUATION OF THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN THE DEPARTMENT OF TRANSPORTATION (2001)* [hereinafter *USDOT, PROGRAM EVALUATION*].

¹⁰² *Id.* at 24.

¹⁰³ *RESOLVING WORKPLACE DISPUTES*, *supra* note 74.

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receive the order.”¹⁰⁴ One of the goals of the Interagency Working Group is “the development of procedures that permit agencies to obtain the services of neutrals on an expedited basis.”¹⁰⁵ It is clear from this statement that there are problems obtaining neutrals, which is why it is easier for the DOT to just use their own EEO counselors as “in-house” mediators.

4. Problem Area #4: Employees and management are unable to get past positional thinking

The goal of federal ADR programs is to allow managers and employees to work together to “solve problems [to] lead to improved long-term relationships and better work products.”¹⁰⁶ The ADR process requires that employees and managers sit down face to face in an attempt to resolve whatever issues are at hand.¹⁰⁷ This process is intended to assist in the establishment of trust between the complainant and management; however, this is not always successful.¹⁰⁸ On a psychological level, it is often difficult to sit down and tell the person sitting across the table how they have wronged you.

There is also resistance to ADR from the management level.¹⁰⁹ Agency management might be more inclined to negotiate directly or accept whatever the decision would be after the formal process is complete rather than participate in negotiations led by a mediator.¹¹⁰ The reasoning behind management’s disinclination to

¹⁰⁴ USDOT, PROGRAM EVALUATION, *supra* note 101, at 25.

¹⁰⁵ Colsky, *supra* note 99. In 1998, President Clinton created an Interagency Alternative Dispute Resolution Working Group to encourage federal agencies to share ADR information between them. The goal of this Working Group was to allow federal agencies to coordinate on ADR program development, training of agency personnel, development of procedures to obtain the services of neutrals and record-keeping to keep track of the benefits of ADR use. The Working Group is comprised of members of the Cabinet, and other agencies with a significant interest in dispute resolution. The following developed out of the initial Working Group: the ADR Steering Committee, ADR Council and the Working Group Sections. The Working Groups sections are: Contracts and Procurement, Civil Enforcement, Workplace Disputes, and Claims Against the Government. The ADR Steering Committee is comprised of ADR professionals and serves as the main method for advancement of ADR in the federal government. The ADR Council was established to address policy issues generated by the expansion of ADR programs. *Id.*

¹⁰⁶ RESOLVING WORKPLACE DISPUTES, *supra* note 74.

¹⁰⁷ See USDOT, PROGRAM EVALUATION, *supra* note 101.

¹⁰⁸ See Telephone Interview with Judith S. Kaleta, *supra* note 13.

¹⁰⁹ See *id.*

¹¹⁰ See David Marcus, *Is There a Role for Administrative Law Judges in ADR?*, at <http://www.mediate.com/articles.cfm#> (last visited Nov. 2, 2003). This resistance to third party use is one issue where management and employees are clearly split. Employees would rather have a

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utilize third party negotiation is that government agencies negotiate from a position with more power relative to the complainant/employee.¹¹¹ If employees are aware of this motivation, they might be discouraged from pursuing ADR for these reasons in addition to others.

The guidelines set out by the CPR Institute state that once mediation has been agreed upon, the parties must together settle on who will mediate the dispute.¹¹² These guidelines have not been adopted by the DOT. As such, the mediators available for the mediation of DOT employment disputes are “in house” and susceptible to suspicion by employees seeking redress for discrimination.

5. Problem Area #5: There is little support from Human Resources and legal communities to encourage employees to engage in ADR

As stated many times by ADR professionals, proponents, and Congress, mediation is considered less costly than litigation and administrative proceedings.¹¹³ The use of mediation should be en-

completely neutral party, to ensure that all negotiations and settlements are fair. Management, however, might want to use someone who is attached to the agency or negotiate directly with the complainant. There are several potential reasons for this. One may be that internal negotiations will cost less, since an external person will not have to be brought in. A second possibility is that management is more concerned with having the negotiation result in its favor, then to have employees satisfied with the outcome. As Marcus later points out in this article, the statistics from Oregon have shown that there is only a forty percent success rate when the two parties negotiate directly with each other, versus a ninety percent success rate when administrative law judges facilitate the mediation.

¹¹¹ *See id.* “This is perhaps natural, given that the government agency negotiates from a position of power and mediation is generally intended to balance out the power between the disputing parties.” *Id.* Marcus explains that there are exceptions, where government agencies serve as forums for resolving disputes between parties. Examples of this are the Workers’ Compensation Board and the Construction Contractors Board/Landscape Contractors Board in Oregon.

¹¹² *See* CPR Institute *Employment Disputes*, *supra* note 22, at § A.6(c). The parties’ agreement upon a mediator is a condition of mediation, according to the CPR Institute. The CPR Institute is in the position to help in selecting a mediator. The parties must sign an agreement stating that they wish to participate in mediation. In order to facilitate this process, the CPR Institute has created an Employment Disputes Panel. This panel is made up of mediators who have expertise in employment law and in mediation. Once a mediator is selected, the parties can choose whether or not they wish to be represented by attorneys. Representation is not a requirement. However, if there is representation, it must be equal. Even if there is representation, the parties must interact directly with the mediator and must personally agree to settlement. In the event that neither party is satisfied with the mediation, either party can withdraw from the mediation at any time after the first meeting. *Id.*

¹¹³ The Administrative Dispute Resolution Act of 1996, in the Congressional Findings section, has determined that methods of Alternative Dispute Resolution are the most inexpensive ways to resolve a dispute. The Secretary of the Treasury, in his Memorandum for All Treasury Employees, committed himself to insuring that disputes are resolved in the most cost-effective

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couraged simply on the basis that it is the most cost effective.¹¹⁴ This might be the case if internal mediators are being used, but when external mediators are being used, “some agencies require the office requesting mediation to pay for the neutral services.”¹¹⁵ To avoid having to pay for external mediators, agencies might choose to use only internal mediators. As discussed previously,¹¹⁶ however, employees are often hesitant to use internal mediators.

The resistance by lawyers within federal agencies has also created obstacles to ADR in the DOT. Attorneys, like human resources professionals and employees, are often not sufficiently educated on the methods and benefits of mediation. Therefore, they are skeptical of mediation and do not encourage clients to pursue ADR, no matter how beneficial it might be to their case.¹¹⁷ There are also psychological factors involved, in that “many attorneys are reluctant to be the first to propose mediation for fear that their proposal may be seen as a sign of weakness.”¹¹⁸

IV: SUGGESTIONS FOR INCREASING ADR USAGE WITHIN THE DOT

Despite its limitations, ADR benefits the way agencies handle workplace disputes. Its ideal program involves only the employee

manner. *See supra* note 77. The Air Force’s ADR program is designed to settle disputes “early, cheaply, quickly and amicably.” GSA OFFICE OF EQUAL EMPLOYMENT OPPORTUNITY, THE COST SAVINGS ASSOCIATED WITH THE AIR FORCE ALTERNATIVE DISPUTE RESOLUTION PROGRAM, at <http://www.mediate.com/articles/adrairforce.cfm> (last visited Nov. 3, 2003). David Marcus also adds that mediation is a method of dispute resolution that saves time and expense and allows the parties to arrive at the solution that is appropriate for their situation. *See Marcus, supra* note 110.

¹¹⁴ *See Marcus, supra* note 110.

¹¹⁵ USDOT, PROGRAM EVALUATION, *supra* note 101, at 26. According to the Postal Service, one of the reasons behind the success of the REDRESS program is the high quality of mediators employed. There is, however, a high cost associated with obtaining these mediators. To counter this cost, sometimes agencies must pay for their own services, while other agencies establish a central fund. Using the \$1 million set aside for mediation services by the Attorney General, agencies should be able to encourage the use of ADR with a clean conscience because their office will not have to cover the cost of the mediation.

¹¹⁶ *See infra* Part III.

¹¹⁷ *See* CPR Institute, *Employment Disputes*, *supra* note 22, at § B.1. This skepticism is largely due to a lack of education on the part of the attorneys. In some sense, those who do not promote mediation might be right. Caution before proceeding with mediation might be warranted, as mediation is not appropriate in every circumstance. Another way that attorneys are considered impediments to the use of mediation, is that some are “predisposed against mediation until after formal discovery has concluded.” *Id.*

¹¹⁸ *Id.*

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and the neutral sitting down and talking to each other in order to maintain good relations between the employee and the management.¹¹⁹ This description is reminiscent of mediation.¹²⁰ Additionally, the ADR program put into place by the DOT for its employees, using trained EEO counselors, is almost identical to the “internal mediator” process as explained by the United States General Accounting Office.¹²¹ ADR is being used successfully in private companies, federal, state and local agencies.¹²² If ADR is used correctly, it can settle disputes “quickly, cheaply, and amicably.”¹²³ “[B]eyond the demonstrable monetary savings, the ADR program avoids considerable human suffering as well.”¹²⁴ ADR also allows the employee to actually be heard.¹²⁵ With all of these benefits, ADR usage should be increased at the DOT. The question that must then be answered is: what can the DOT do to increase the use of ADR in its formal and informal complaint processes?

A. Suggestion #1: Make ADR mandatory

While “EEOC Regulations encourage agencies to settle EEO cases” and use ADR techniques to do so,¹²⁶ the Postal Service’s REDRESS program is mandatory. The key words are “en-

¹¹⁹ DISCRIMINATION COMPLAINTS REPORT, *supra* note 8, at 6-7. The DOT process for dealing with discrimination complaints is to have the complainant sit down with an EEO counselor to discuss the complaint and try to reach a settlement. Of all the methods of dispute resolution previously discussed, this type of dispute resolution used by the DOT most closely mirrors that of mediation. *Id.*

¹²⁰ Mediation is defined as involving “a neutral third party to assist the parties in negotiating an agreement. The mediator has no independent authority and does not render a decision; any decision must be reached by the parties themselves.” See 1 C.F.R. § 305.86-3, App. *supra* note 58.

¹²¹ U.S. GEN. ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: MOST PRIVATE-SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION 2 (1995) [hereinafter USGAO, PRIVATE-SECTOR EMPLOYERS]. “Internal mediation is a process for resolving disputes in which a neutral person – trained in mediation methods – from within the company helps the disputing parties negotiate a mutually acceptable agreement.” *Id.* As previously discussed, the DOT plans to use internal employees among other possible options as trained mediators.

¹²² See Colsky, *supra* note 99.

¹²³ GSA OFFICE OF EQUAL EMPLOYMENT OPPORTUNITY, THE COST SAVINGS ASSOCIATED WITH THE AIR FORCE ALTERNATIVE DISPUTE RESOLUTION PROGRAM, at <http://www.mediate.com/articles/adrairforce.com> (last visited Nov. 3, 2003).

¹²⁴ *Id.*

¹²⁵ See USGAO, EMPLOYER EXPERIENCES, *supra* note 11, at 26.

¹²⁶ See *Dep’t of the Airforce v. Federal Labor Relations Authority*, 316 F.3d 280, 281 (D.C. Cir. 2003).

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courage,” rather than “must.”¹²⁷ According to the Office of Personnel Management, the mandatory nature of the Postal Service’s REDRESS program¹²⁸ is one of the reasons for its success. Under REDRESS, a complainant who contacts an EEO counselor engages in mediation with an approved outside mediator in lieu of counseling by the EEO counselor.¹²⁹ If the complaint remains unsettled, the complainant may continue with the traditional process.¹³⁰ Essentially, mediation is mandatory. In the DOT, when the complainant arrives for counseling, he or she must choose between ADR and a formal complaint process. For Postal Service employees, ADR comes first, and if necessary, the formal complaint process comes later. Additionally, the Postal Service appears to only use external rather than internal mediators, which seems to encourage employees to take part in the process.¹³¹

A form of mandatory ADR is supported by many courts.¹³² For example, Texas trial courts can refer cases to ADR.¹³³ In *Texas Parks and Wildlife Department v. Ernest Ray Davis*¹³⁴ the court decided that it could compel parties to mediate.¹³⁵ This is also supported by Texas Civil Practice Code, which states that “a court may, on its own motion or the motion of a party, refer a pending dispute for resolution by an alternative dispute resolution procedure.”¹³⁶

ADR can be applied to the DOT situation. If courts can compel parties to enter into mediation, then the DOT could similarly

¹²⁷ *Id.*

¹²⁸ OPM, Resource Guide, *supra* note 3.

¹²⁹ *See id.*

¹³⁰ *See id.*

¹³¹ *See id.*

¹³² *See Mandatory Mediation and Summary Judgment Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1087-88 (1990) [hereinafter *Mandatory Mediation and Summary Jury Trials*]. This Note lays out the three types of mandatory ADR processes: non-binding court-annexed arbitration, mediation and summary jury trial. These types of mandatory ADR are very different from each other. While arbitration is an adversarial process similar to traditional litigation and gives third parties decision-making authority, mediation and summary jury trials allow for resolution of disputes only by mutual consent of the parties. *Id.*

¹³³ *See Texas Parks and Wildlife Dep’t v. Ernest Ray Davis*, 988 S.W.2d 370, 375 (Tex. App. 1999). When it issued its sanction, the Texas Court of Appeals cited Chapter 154 of the Texas Civil Practice and Remedies Code which states that according to procedure, a trial court can send a dispute to alternative dispute resolution programs *sua sponte*.

¹³⁴ 988 S.W.2d at 375.

¹³⁵ *See id.* According to the court, the Texas Civil Practice and Remedies Code, *see supra* note 136, states that the trial court can refer a case to ADR without a motion by the parties. Although, the court has the power to compel the parties to mediate, it lacks the power to force parties to settle.

¹³⁶ TEX. CIV. PRAC. & REM. CODE § 154.021 (2003).

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be more forceful in urging its employees to pursue ADR as opposed to the formal complaint process. According to rules of civil procedure, parties are encouraged or required to have scheduling conferences prior to going to trial.¹³⁷ During these conferences, ADR should be discussed and even encouraged in the same manner as settlement.¹³⁸ For this to work, judges and attorneys must be trained to know when to suggest ADR, as mediation is not warranted in every case.¹³⁹

ADR has not been more widely implemented because courts have determined that judges do not have the authority to order ADR unless they have been explicitly given the authority to do so, either by local rule or statute.¹⁴⁰ According to *Team Design v. Gottlieb*,¹⁴¹ courts can compel parties to sit down and talk, but they cannot force the parties to resolve their differences using ADR.¹⁴² *Team Design*¹⁴³ also sets out the court's definition of mediation. The court states that the two essential aspects of mediation are "(1) the fact that it is non-binding and (2) that it is conducted by a neutral person"¹⁴⁴ This Tennessee court agrees with the Texas court in *Texas Parks and Wildlife Department v. Ernest Ray Davis*,¹⁴⁵ in that, "the trial court, even without the parties' request or consent but after consultation with the lawyers and the parties to require the parties to participate in a judicial settlement confer-

¹³⁷ See, e.g., 28 U.S.C. § 651 (2002).

¹³⁸ *Wainwright's Vacations v. Pan American Airways*, 130 F. Supp.2d 712, 716 (D.MD 2001) (discussing how the court in this case decided motions, while at the same time issuing a scheduling order which determined the appropriateness of having an ADR conference). According to FED. R. CIV. P. 16(a) & (c), a court will direct parties to attend conferences to discuss a variety of matters, including settlement options before trial. This case, however, also determined that parties should discuss ADR as an alternative to litigation during these conferences.

¹³⁹ USGAO, *EMPLOYER EXPERIENCES*, *supra* note 11, at 4.

¹⁴⁰ See *Mandatory Mediation and Summary Jury Trial*, *supra* note 132 at 1086. There have been instances where courts have ordered mandatory ADR. While many courts have found that mandatory ADR is constitutional, other courts have stated that judges cannot order ADR on their own accord without an explicit rule allowing them to do so. Within court-annexed ADR, there is a difference between voluntary and mandatory ADR. Voluntary ADR can be used as a complete alternative to litigation in that the decision can be binding. This is "in contrast [to] mandatory ADR [which] is only a precondition to litigation." *Id.* at 1087.

¹⁴¹ 104 S.W.3d 512 (Tenn. Ct. App. 2002). At issue in this case is the trial court's authority to conduct or require the parties' participation in court-annexed mediation. According to the Court of Appeals, in order to utilize court-annexed mediation, the court must conduct the mediation according to guidelines set by the Tennessee Supreme Court. The key factor in court-annexed mediation is that the dispute resolution methods are not binding. *Id.* at 517, 519.

¹⁴² See *Team Design v. Gottlieb*, 104 S.W.3d 512 (Tenn. Ct. App. 2002).

¹⁴³ See generally *id.*

¹⁴⁴ *Id.* at 527.

¹⁴⁵ *Texas Parks Dep't*, 988 S.W.2d at 370.

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ence, mediation, or a case evaluation . . . or other appropriate alternative dispute resolution proceedings.”¹⁴⁶ Additionally, since not all “employee disputes are suitable for mediation,”¹⁴⁷ making ADR mandatory will not solve every problem.

In the end, however, it is unclear whether courts actually possess the authority to require ADR.¹⁴⁸ In fact, courts throughout the country cannot agree on the power of the courts to require ADR, making across the board decisions difficult.¹⁴⁹

B. Suggestion #2: Education of the public about ADR.

The lack of education on ADR programs is not limited to the DOT. It is lacking in a number of other agencies as well. Many people do not know about ADR, and to make it mandatory will inevitably cause difficulties since people fear what they do not know. There are several outlets where education of the public is taking place. One example is the Center for Public Resources and its Program to Resolve Employment Disputes.¹⁵⁰ The CPR Employment Disputes Committee has authored a report citing that the most important use of ADR is to deal with employment disputes early on, and to nip such disputes in the bud.¹⁵¹ Another example is the American Arbitration Association (“AAA”)¹⁵² which developed the National Rules for the Resolution of Employment Disputes (“Rules”) as an initiative to provide the most effective procedures for ADR usage.¹⁵³

1. ADR Program Options

The AAA addresses this matter under two headings within its introduction to the Rules: “Designing an ADR Program,” and

¹⁴⁶ *Team Design*, 104 S.W.3d at 519.

¹⁴⁷ CPR Institute, *Employment Disputes*, *supra* note 22, at § B.1.

¹⁴⁸ *See generally Mandatory Mediation and Summary Jury Trial*, *supra* note 132, at 1089.

¹⁴⁹ *See id.* at 1090-91. Texas and Minnesota allow judges to order litigants to participate in nonbinding ADR. Florida and Oklahoma allow court ordered ADR, but only for arbitration and mediation.

¹⁵⁰ *See* CPR Institute, *Employment Disputes*, *supra* note 22, at Overview.

¹⁵¹ *See id.*

¹⁵² The AAA was founded in 1926 as an organization devoted to the resolution of disputes through ADR. One of the goals of the AAA is to provide education and training about all forms of dispute settlement. The AAA is the organization that has determined the standards for fair and equitable dispute resolution for over 75 years. Available at <http://www.adr.org/sp.asp?id=22075> (last visited Mar. 22, 2005).

¹⁵³ *See id.*

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“Alternative Dispute Resolution Options.” The AAA explains that an employment ADR system must be fair both in fact and in perception.¹⁵⁴ The AAA encourages use of in-house dispute resolution procedures, such as open door policies, ombuds, peer review, and internal mediation, in addition to external procedures such as mediation and arbitration.¹⁵⁵ The CPR Institute offers¹⁵⁶ companies and agencies options to assist in developing their own ADR programs. The desire of CPR is to establish mediation as a step in an organization’s formal dispute resolution program.¹⁵⁷ CPR requires that mediation be voluntary, and that both the employee and employer agree to it.¹⁵⁸ When both sides agree, CPR has claimed that satisfaction with mediation is high among both employers and employees.¹⁵⁹

2. Mediation

The AAA, as part of its Rules, has a section entitled “Employment Mediation Rules.”¹⁶⁰ These Rules explain how mediation is initiated, what qualifications a mediator must have, the authority of the mediator, and other pertinent details.¹⁶¹ CPR addresses mediation specifically in Section B of its report¹⁶² and provides a model procedure for the mediation of employment disputes. Although there are a number of benefits of mediation, CPR acknowledges that it has limitations and lists both the benefits and disadvantages of mediation.

3. Arbitration

Section C of the CPR report,¹⁶³ and most of the AAA’s Rules,¹⁶⁴ are devoted to arbitration. However, delving into this matter is needless since the DOT does not use arbitration as a method of dispute resolution.¹⁶⁵

¹⁵⁴ *Id.*

¹⁵⁵ *See id.*

¹⁵⁶ CPR Institute, *Employment Disputes*, *supra* note 22, at § A.

¹⁵⁷ *See id.* at § A.2.

¹⁵⁸ *See id.* at § A.2.

¹⁵⁹ *Id.* at § A.6(b).

¹⁶⁰ <http://www.adr.org/sp.asp?id=22075> (last visited Mar. 22, 2005).

¹⁶¹ *See id.*

¹⁶² *See* CPR Institute, *Employment Disputes*, *supra* note 22, at § B.

¹⁶³ *See* CPR Institute, *Employment Disputes*, *supra* note 22, at § C.

¹⁶⁴ <http://www.adr.org/sp.asp?id=22075> (last visited Mar. 22, 2005).

¹⁶⁵ USGAO, *EMPLOYER EXPERIENCES*, *supra* note 11, at 13.

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4. Introduction of ADR to Employees

As stated, the goal of the AAA as stated is to provide education and training to employees and act as a provider of ADR services. The AAA offers in-house training, seminars, and training of neutrals.¹⁶⁶ CPR addresses the communication of new dispute resolution procedures to employees in Section D of its report.¹⁶⁷ Employees will accept these procedures only if the presentation is done by the company in the correct manner.¹⁶⁸ However, CPR is realistic in its acknowledgement that, while mediation is strongly favored, not all disputes are suitable for mediation and issues should be examined on a case-by-case basis.¹⁶⁹ Part of the presentation should explain why ADR is more beneficial than the litigation process.¹⁷⁰ For example, while the formal process is not as costly as traditional litigation, ADR is still the more efficient, less adversarial and most cost-effective option.¹⁷¹ CPR requires that the dispute be mediated by “an experienced neutral third party, selected by agreement of both parties”¹⁷²

5. Program Implementation

Both the AAA and CPR recommend a multi-step process for mediating or arbitrating employment disputes.¹⁷³ The process offers both sides the choice of whether to use mediation after a dispute arises.¹⁷⁴ CPR provides a mediation checklist, designed to determine the appropriateness of mediation in employment disputes.¹⁷⁵ If the mediation is unsuccessful, the parties can then decide whether to resort to arbitration.

¹⁶⁶ <http://www.adr.org/EducationalServices> (last visited Mar. 22, 2005).

¹⁶⁷ *See id.* at § D.1.

¹⁶⁸ *Id.*

¹⁶⁹ *See id.* at § D.3.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *See id.* at § E.5-6. *See also* <http://www.adr.org/sp.asp?id=22075> (last visited Mar. 22, 2005).

¹⁷⁴ *See id.* at § E.1.

¹⁷⁵ *See id.* at § E.5. The steps for determining mediation in employment disputes are as follows: (1) the employee or employer proposes mediation; (2) the company determines whether the dispute is appropriate for voluntary mediation; (3) parties consult attorneys or representatives; (4) parties agree on how to pay the mediator's compensation; (5) parties select a neutral impartial mediator; (6) parties sign a submission agreement to use mediation; (7) mediator consults with the parties jointly, in person or by phone to discuss ground rules or adaptations; (8) parties submit information to mediator; (9) mediation process occurs; (10) mediator may propose settlement terms; (11) parties formally execute a settlement agreement in the event that mediation succeeds; (12) mediation terminates; (13) mediator returns parties' submissions or

6. Other Educational Options

The education of federal employees on the benefits of ADR must be general and easy to understand to be effective. A simple pamphlet published by individual agencies, setting out the various benefits of ADR¹⁷⁶ might be helpful.

The portrayal of mediation as a user-friendly informal process¹⁷⁷ is integral to its success. Taking Problem Areas Numbers Two and Three¹⁷⁸ into account, the concept of self-determination is essential. Employees must be made aware that they, not the mediator, have the control to resolve the conflict.¹⁷⁹ Additionally, if employees realize that they will only be bound by the rules that they determine, mediation might become a more attractive option.¹⁸⁰ Government employees will be more receptive to mediation and mediators if they are conscious of the fact that mediators use the facts as well as the parties' feelings and interests to come to a resolution.¹⁸¹ This in turn increases the likelihood of a settlement that is acceptable to all parties.

Another key point that governmental employees need to be educated about, is that ADR is a voluntary and informal pro-

destroys them (for confidentiality purposes); and (14) arbitration, if adopted by the company, in the event of unsuccessful mediation. *Id.*

¹⁷⁶ Giovagnoli, *supra* note 55, at 554. Some of the benefits of ADR and mediation in particular are as follows: "First, participants can fashion the agreement to satisfy unique needs. Second, the flexible process allows greater party control and increases participation in the resolution of the dispute Third, this ADR technique avoids the win-lose aspect of traditional litigation and provides moderate settlement for both parties. Fourth, mediation facilitates communication between the parties, serves as a reality check by allowing the parties to view both the strengths and weaknesses of the dispute and provides a second perspective of the conflict." *Id.*

¹⁷⁷ See David A. Ruiz, *Asserting a Comprehensive Approach for Defining Mediation Communication*, 15 OHIO ST. J. ON DISP. RESOL. 851, 853 (2000). Mediation as an informal process is one of its essential characteristics. When the process is informal, it can function as an open discussion allowing parties to speak candidly about problems and solutions.

¹⁷⁸ See *infra* pp. 17-19.

¹⁷⁹ See Ruiz, *supra* note 185, at 854. The mediator is present as a neutral third party, and little else. The mediator has no control over the establishment of a settlement, giving all power of the settlement to the parties themselves. This, in turn, helps the parties in complying with the settlement and decisions made, since the resolution was arrived at by them.

¹⁸⁰ See *id.* at 853. Parties can discuss anything they wish. They can be as creative and as flexible as they want to be when determining the format of the mediation, the issues at play and the remedies available, whether legal or otherwise.

¹⁸¹ See *id.* at 854-55. Another benefit to mediation is its flexible nature. Mediation does not require the use of formal evidence rules. This allows the mediator to delve into past issues between the parties in order to look to the future and use all matters to arrive at the correct decision to benefit all the parties in the most fair and equitable way possible.

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cess.¹⁸² Furthermore, in choosing to pursue ADR as a means of resolving a dispute, they are not submitting themselves to a binding procedure.¹⁸³ If DOT employees are not satisfied with the outcome of the mediation, they can still use the formal complaint procedure, or file a claim in court and proceed with formal litigation.¹⁸⁴

C. Suggestion #3: Needs Assessment Program

There should be a needs assessment,¹⁸⁵ followed by a pilot program to determine exactly how an ADR program should be run and tailored to the DOT itself.¹⁸⁶ Among the needs to be addressed is the issue of confidentiality.¹⁸⁷ A pilot program could help determine how best to maintain confidentiality while mediating employment disputes.¹⁸⁸ Another target for a pilot program is to alleviate concerns about mediators who are working for the agency rather than as a neutral. A pilot program could test different ways of choosing mediators, particularly allowing the parties to choose their own.¹⁸⁹

¹⁸² See *id.* at 853. The informal nature of mediations allow for a give and take between the parties in a free and open manner. Knowing that the mediation is going to be conducted in this manner lends a candid air to the process, permitting the parties to voice their concerns and opinions as well as to discuss potential options for settlement, options that will be satisfactory for both sides.

¹⁸³ See *id.* at 854. The goal of mediation is to find a creative method of meeting the needs of the parties. Mediators have little authority over the settlement. The parties to the mediation are the ones who have control over the settlement and outcome. This is the concept of self-determination.

¹⁸⁴ See *DISCRIMINATION COMPLAINTS REPORT*, *supra* note 8, at 6-7.

¹⁸⁵ See *USDOT, PROGRAM EVALUATION*, *supra* note 101, at 12. According to the Federal ADR Program Manager's Resource Manual, there are four steps involved in creating an ADR program. The four steps are: (1) needs assessment; (2) program design; (3) program implementation; and (4) program evaluation. The purpose of "needs assessment" is to identify the dispute resolution needs and concerns. There are certain needs that an ADR program has, including a staff to handle intake, schedule cases, and address logistical issues. *Id.*

¹⁸⁶ See *generally* *USDOT, PROGRAM EVALUATION*, *supra* note 101.

¹⁸⁷ See *generally* *Ruiz*, *supra* note 181. In order for mediation to still be regarded as an alternative to litigation, the confidentiality of mediation proceedings must be protected.

¹⁸⁸ See *USDOT, PROGRAM EVALUATION*, *supra* note 101, at 16.

¹⁸⁹ *Giovagnoli*, *supra* note 55, at 554. It is a crucial aspect of mediation that parties choose the mediator to assist them in handling that specific dispute.

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D. Suggestion #4: Expansion of ADR use

If ADR-type programs were used in a greater variety of disputes, it may help increase the pervasiveness of its use by government. ADR is not only helpful in EEO disputes, but can also be used in other circumstances such as contracting and procurement, working with outside stakeholders on environmental issues, and determining the enforcement of DOT regulations.¹⁹⁰

Utilizing additional ADR techniques is another way to expand its use. Historically, the General Accounting Office found that ADR was more widely used in the private sector where there was a greater variety of techniques, versus the federal sector.¹⁹¹ The General Accounting Office found that private companies use ombudsman advisors, mediation, peer panels, management review boards and arbitration.¹⁹² In contrast, federal agencies, with a few exceptions, use only mediation.¹⁹³

E. Suggestion #5: Use of external mediators only

As previously stated, the United States Coast Guard disapproves of the use of internal mediators.¹⁹⁴ Instead of training EEO counselors to be ADR facilitators, there are a number of other suitable alternatives for the DOT to use. Currently, there is a General Services Administration program in place to provide other agencies with a list of contractors.¹⁹⁵ These contractors serve as “ADR neutrals, including mediators.”¹⁹⁶ An example of contracting usage is the Air Force who “had a contract with Resolution Group to provide mediation services.”¹⁹⁷

Another potential collection of external mediators is the pool of Administrative Law Judges.¹⁹⁸ Currently, a complainant who

¹⁹⁰ See USDOT, PROGRAM EVALUATION, *supra* note 101, at 35.

¹⁹¹ See USGAO, EMPLOYER EXPERIENCES, *supra* note 11, at 2.

¹⁹² See *id.* at 12-14.

¹⁹³ See *id.*

¹⁹⁴ See USDOT, PROGRAM EVALUATION, *supra* note 101.

¹⁹⁵ See *id.* at 25.

¹⁹⁶ *Id.*

¹⁹⁷ *Dep't of the Air Force v. Federal Labor Relations Authority*, 316 F.3d 280, 281 (2003).

¹⁹⁸ Marcus, *supra* note 110. In Oregon, the Workers' Compensation Board promotes the use of mediation as opposed to a hearing process. The mediators used by the Workers' Compensation Board are Administrative Law Judges, who have had training as mediators. The use of the Administrative Law Judges has so far been successful with “most mediations resulting in settle-

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has had a claim investigated by the Department of Civil Rights can request either a hearing before an administrative law judge or a final agency decision. Therefore, in the event that ADR use becomes wide-spread, Administrative Law Judges may have more time on their hands. Impartiality, a characteristic of the Administrative Law Judge is a great asset for mediators. Additionally, Administrative Law Judges are trained to conduct settlement conferences between parties.¹⁹⁹ In fact, using these judges might be the answer to a number of the problem areas mentioned above. Administrative Law Judges “can and should perform to better serve the citizens contesting agency actions and to minimize the cost to . . . agencies of effectively fulfilling their missions.”²⁰⁰

The Air Force method of selecting mediators helps with a number of issues. The selection of mediators on a case-by-case basis will help to mitigate the mistrust caused by bringing in EEO counselors, mediators from other Air Force locations, or other federal agencies.²⁰¹ Additionally, the Air Force tries to match mediators to the types of cases in which they specialize.²⁰²

F. Suggestion #6: Miscellaneous Suggestions

There are several reasons why ADR is not being used effectively within the Department of Transportation. The biggest problem may be that the process is “too voluntary.”²⁰³ In contrast, the United States Postal Service has implemented a mandatory ADR

ment.” *Id.* One of the other reasons for the success of the program is that in the event that an employee is not satisfied with the outcome of the mediation, or no settlement is reached, the case can go back into the pool for hearings. The case will then be heard by a different judge who would have had no contact with the judge who acted as a mediator.

¹⁹⁹ *See id.*

²⁰⁰ *Id.*

²⁰¹ *See* USGAO, *EMPLOYER EXPERIENCES*, *supra* note 11, at 23. The key to the success of the Air Force’s program has been the elimination of the distrust created by the use of internal government employees as negotiators. The Air Force model of individualized selection helps increase the employees’ comfort level during the ADR process in two ways. First, by utilizing mediators with particular specializations and, second, by bringing in mediators who are not federal or Air Force employees.

²⁰² *See id.* With mediators that specialize, employees will be more comfortable expressing their views to the mediator.

²⁰³ The ability to choose whether or not to pursue ADR after meeting with an EEO counselor is very different from the approach of the Postal Service, where an employee must first go through ADR and then if it does not work, the traditional process may be used.

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program.²⁰⁴ The mandatory aspect of the program is only part of the ADR process, but according to the United States Postal Service, it has been very effective. Is mandatory ADR really the right direction for the DOT to follow? There are other possible alternatives:

The Office of Personnel Management has cited the Northwest Region of the Federal Aviation Administration for its highly successful ADR program and gave it the OPM Director's Award for Outstanding ADR Programs in 2001.²⁰⁵ This office of the FAA has had an ADR program in place since 1991, which has been regarded very highly within the federal government.²⁰⁶

Why has the FAA's program has been so successful, while the DOT's ADR statistics are lagging? According to a newsletter published by the Federal Aviation Administration, its Neutral Evaluation process may be at the root of the agency's success.²⁰⁷ When employees are unable to resolve grievances, they enter the Neutral

²⁰⁴ The Postal Service program is mandatory because mediation is done in lieu of counseling. For the DOT, the complainant must first go through EEO counseling, then decide whether to go through ADR. For Postal Service employees, they automatically go through ADR and then decide whether to settle via mediation, or go through the formal complaint process. *See* OPM, Resource Guide, *supra* note 3.

²⁰⁵ 2001 Office of Personnel Management Director's Award for Outstanding ADR Programs, at <http://www.opm.gov/er/adr2000.asp> (last visited Oct. 8, 2003).

The ADR program of the Northwest Mountain Region of the Federal Aviation Administration is recognized for its efficient and creative use of limited resources in its design and implementation. The program's strong emphasis on a proactive approach to addressing conflict and conflict resolution and its creative use of training methods (e.g., drawing on the resources of a highly-regarded local dispute resolution center) to help people know when and how to use ADR are also noteworthy. The agency established the Northwest ADR Program in October of 1991. Its stated goals were to: (1) strengthen its already effective Internal Discrimination Complaint Program, (2) increase the diversity of the conflict resolution techniques in use, (3) eliminate a small backlog of EEO discrimination complaints, and (4) be one of the first Civil Rights Staffs to establish an ADR program. The program covers EEO disputes using the ADR techniques of mediation, conciliation, negotiation, and facilitation. The agency primarily uses internal neutrals but also does use mediators provided through a local shared neutrals program. The agency's strategic plan has goals for training managers, supervisors, and non-supervisory employees in mediation awareness. Training materials including videos are available and have been used by others outside the agency. The overall resolution rate of disputes is 85.1%. The agency uses a complaint log, separate mediation tracking report, in-depth reviews, mediation evaluation sheets, and training course evaluations to evaluate results under the program.

Id.

²⁰⁶ *See id.*

²⁰⁷ Karl (Pete) Seidel, *Air Traffic and NATCA Expand Neutral Evaluation – An Alternative Dispute Resolution Process*, FAA Labor Relations Newsletter, December 2000, available at <http://www1.faa.gov/agc/article.htm> (last visited Dec. 1, 2003).

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Evaluation process²⁰⁸ where each party selects a representative to state their case to a neutral evaluator.²⁰⁹ The evaluator may be asked to assist the parties in reaching a settlement agreement.²¹⁰ If the parties reach a settlement, they may commit to that settlement in writing.²¹¹ If they cannot agree, then the dispute may be sent to binding arbitration.²¹²

This program may have been successful for this region of the Federal Aviation Administration, but it is important that ADR methods be tailored to the agency at issue. For example, the Department of Education²¹³ has a distinct dispute resolution program.²¹⁴ One of the methods that it employs is to use school-age students as mediators.²¹⁵

Another alternative is to focus on expanding the number of trained mediators. While the current status of mediator training for the DOT is tolerable, only EEO counselors are currently being trained.²¹⁶ With a Certified Mediator Program,²¹⁷ such as the one put in place by the Department of the Navy,²¹⁸ allowing employees to be trained as mediators will eliminate the problem of positional thinking, show a greater number of employees the inner workings of the ADR process and allow for greater confidence in the system as a whole.

Other agencies have examined programs which are aimed to eliminate or deal with disputes before they even arrive at the com-

²⁰⁸ See *id.*

²⁰⁹ See *id.*

²¹⁰ See *id.*

²¹¹ See *id.*

²¹² See *id.*

²¹³ The Department of Education was created in 1980. The goals of this department are to “ensure equal access to education and to promote educational excellence throughout the nation . . . establishing policies on federal financial aid for education, and distributing as well as monitoring those funds. Collecting data on America’s schools and disseminating that research. Focus national attention on the educational issues. Prohibiting discrimination and ensuring equal access to education.” About ED - ED.gov, available at <http://www.ed.gov/about/landing.jhtml?src=gu> (last visited Mar. 2, 2004).

²¹⁴ See Morton Inger, *Conflict Resolution Programs in Schools*, ERIC/CUE Digest Number 74, available at <http://www.ericfacility.net/ericdigests/ed338791.html> (last visited Dec. 1, 2003).

²¹⁵ See *id.*

²¹⁶ See DISCRIMINATION COMPLAINTS REPORT, *supra* note 8, at 14.

²¹⁷ See 2002 OPM Director’s Award for Outstanding ADR Programs, at http://www.opm.gov/er/adrguide_2002/winners2002.asp (last visited Dec. 1, 2003).

²¹⁸ See The United States Navy’s originated from the Continental Navy, created in 1775. In 1789, under the Constitution, Congress was allowed to create the Navy. Nine years later, the Department of the Navy was created by Congress in order to have in place an executive department which would be responsible for all United States naval affairs. History of the Department of the Navy, available at <http://www.history.navy.mil/faqs/faq31-2.htm> (last visited Mar. 2, 2004).

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plaint stage. The Federal Labor Relations Authority has implemented a program called the Collaboration and Alternative Dispute Resolution Program.²¹⁹ The difference between this and the DOT's ADR program is that alternative dispute resolution is being used to resolve disputes that do not involve the normal EEO-type issues. One example, is the use of ADR to resolve bargaining impasses.²²⁰ This use of ADR helps employees to understand the benefits of ADR in a different light.

V: CONCLUSION

Although ADR appears to be becoming more widespread in the private sector, it is under-utilized by the DOT. Despite its tremendous benefits, ADR is not always the solution. All types of dispute resolution methods should be examined in light of the agency practices to determine what method, if any, is best suited for the particular needs of that agency.

In the relatively young field of ADR, we should educate as many people as possible. As people learn more about the use of ADR, they will become more comfortable with ADR, and it will become a more widely used method of dispute resolution. The DOT could benefit from increased ADR usage since it would probably decrease the number of formal complaints filed each year. The DOT could potentially benefit from the use of external mediators, possibly take from a pool of administrative law judges. The DOT could take advantage of the models provided by other government agencies, and mold such a program to meet with its unique needs. There is hope that with increased education of employees and management, as well as the use of truly neutral mediators, the DOT will take full advantage of the ADR possibilities which stand before it.

²¹⁹ See FLRA, *Collaboration and Alternative Dispute Resolution Activities*, at <http://www.flra.gov/24.html> (last visited Dec. 1, 2003).

²²⁰ See *id.*