

**SETTLEMENT OF THE CLASS ACTION
FROM THE PERSPECTIVE OF THE MEDIATOR**

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INTRODUCTION

After a steady decline for years in the number of employment discrimination class actions filed, class action cases are on the upswing again. A number of high profile cases have been brought in the last several years, most notably the litigation involving claims of sexual or racial discrimination against Texaco, Smith, Barney, Publix, and Home Depot. There are several reasons for this upswing in the number of employment class actions. They include:

- The Civil Rights Act of 1991 allowing compensatory and punitive damages dramatically increases the potential exposure and burden of litigation for defendants in Title VII cases;
- The magnitude of the potential recovery and the burden of defense of a class action — plus the complexity of class action procedure — encourage large settlements; and
- The prospect of large attorneys' fees have encouraged plaintiff's lawyers to make the substantial up-front out-of-pocket investment necessary to file and prosecute class actions to the point where the

burdensomeness and potential for adverse outcome often will cause the employer to consider a substantial settlement.

The reemergence of discrimination class actions can be seen in recent headlines, such as:

CSX Settles Discrimination Suit, Charleston Gazette, Jan. 30, 1999, at 7A, available in 1999 WL 6709945.

Airline Industry Information: Boeing to Settle Class-Action Lawsuits Over Discrimination, Airline Indus. Info., Jan. 28, 1999, available in 1999 WL 10468214.

Boeing Plans to Pay \$15 Million to Settle Suits Alleging Job Bias, Wall St. J., Jan. 25, 1999, at C19, available in 1999 WL-WSJ 5438015.

UPS to Pay \$12 Million in Bias Suit Settlement, L.A. Times, Jan. 19, 1999, at C3, available in 1999 WL 2121905.

L. M. Sixel, Pennzoil Settles Racial Bias Lawsuit - Black Plaintiffs to Share \$6.75 Million, Hous. Chron., Nov. 11, 1998, at 1, available in 1998 WL 16781962.

Patrick McGeehan, Judge Approves Class-Action Settlement For Sex Harassment at Smith Barney, Wall St. J., July 27, 1998, available in 1998 WL-WSJ 3503104.

Smith Barney Inc.'s settlement of a class-action sex discrimination case was rejected..., Globe and Mail (Toronto), June 25, 1998, at B12.

Bias Case Could Cost Utility \$65 Million, L.A. Times, Feb. 11, 1998, at D3, available in 1998 WL 2397502.

Appendix "A" contains a more detailed description of settlements in some of the most significant recent class actions.

Most of these actions were settled with the assistance of a mediator.¹ This paper will address some of the issues that should be considered in selecting a mediator, entering into the

¹ Attached as Exhibit "C" is a more detailed description of cases that have settled with the assistance of a mediator.

class action mediation process, and negotiating a class settlement with the assistance of a mediator.

1. What Characteristics should you look for in selecting a mediator?²

Amongst the most important characteristics that a mediator must have are knowledge and experience in the subject matter of the litigation. In the employment litigation area, it is virtually impossible to serve effectively as a mediator without understanding not only the basic substantive and procedural issues surrounding class action litigation, but also some of the more subtle issues. For example, employment class actions often require in-depth understanding of the importance of the now famous footnote 15 in General Telephone Co. v. Falcon, 457 U.S. 147 (1982); the interrelationship between Rule 23(a) requirements of commonality, typicality and adequacy of representation as reflected in the Supreme Court's decision in East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977)³; the distinction between certification under Rule 23(b) (2) and (b) (3)⁴; the effect of decentralized

² It should be noted that the EEOC also has recently adopted its own mediation program, with federally selected mediators. Attached as Exhibit "D" is a description of the EEOC's mediation program. Also attached, as "Exhibit E", is a summary of a GAO study of mediation of employment disputes.

³ See, e.g., Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998) (the trial court's refusal to certify a class for recovery of compensatory and punitive damages under Rule 23(b)(3) was not an abuse of discretion, given that the case presented an overwhelming number of individual-specific issues and manageability problems; the case would have involved more than a thousand potential plaintiffs spread across two separate facilities, represented by six different unions, working in seven different departments, alleging discrimination over a period of nearly 20 years).

⁴ The Fifth Circuit recently held, for instance, that certification of a class under Fed. R.

operations on class certification,⁵ the importance of statistics in establishing or rebutting a prima facie case of adverse impact discrimination or class-wide intentional discrimination, e.g. Nash v. Consolidated City of Jacksonville, 905 F.2d 355 (11th Cir. 1990) and International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)⁶; and the

Civ. P. 23 (b)(2) may no longer be appropriate where the class seeks predominately compensatory and punitive damages. See Allison v. Citgo Petroleum Corp., 151 F.3d 402 (BNA) 1643 (5th Cir. 1998) (district court properly found that claims for compensatory damages are not sufficiently incidental to injunctive and declaratory relief being sought to permit them in class action under Rule 23(b)(2), since an award of compensatory damages requires individualized proof from each employee). Moreover, the court held that punitive damages may not be awarded in a (b)(2) class action, since they are not incidental to injunctive or declaratory relief. Compare Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 257 (5th Cir. 1974) (allowing (b)(2) class certification for award of back pay); Massie v. Illinois Dept. Of Transp., 78 Fair Empl. Prac. Cas. (BNA) 111 (N.D. Ill. 1998) (class action was certified under Rule 23(b)(2), even though plaintiffs seek back pay and compensatory damages, where those damages were ancillary to the claims for injunctive and declaratory relief).

⁵ Compare Boykin v. Viacom Inc., 75 Fair Empl. Prac. Cas. (BNA) 1047 (S.D.N.Y. 1997) (evidence that employer's hiring and promotion decisions are entirely decentralized and reflect no overarching company policy or practice precludes satisfaction of commonality and typicality requirements for class certification) and, Reyes v. Walt Disney World Co., 176 F.R.D. 654 (M.D. Fla. 1998) (Hispanic current and former employees alleging across-the-board class allegations predicated on racial/national origin animus did not satisfy the commonality and typicality requirements for maintaining class action, where they were employed by three separate departments or divisions, and each department or division had different decisionmakers) with Morgan v. UPS, 169 F.R.D. 349 (E. D. Mo. 1996) (class of black salaried employees satisfied commonality and typicality requirements for class certification as to claims that employer's policy of giving district managers unfettered authority resulted in discriminatory treatment of black salaried employees across United States in promotions and salaries; employer's personnel policies are uniform throughout country and are promulgated by national corporate office).

⁶ See also Forehand v. Florida State Hosp. at Chattahoochee, 89 F.3d 1562 (11th Cir. 1996) (employer's proffered "workforce" benchmark -- percentage of black applicants for each individual pay grade and job category -- properly adopted in lieu of black employee/applicants' proffered applicant flow data pool -- applicant-pool for all competitive positions -- in their pattern-or-practice promotion discrimination claim in which 25 percent of promotions are competitive and 75 percent of promotions are non-competitive; proper comparison is between racial composition of "at issue" jobs and racial composition of

impact of the Civil Rights Act of 1991 on various certification issues. See Celestine v. Citgo Petroleum Corp., 165 F.R.D 463 (W.D. La. 1995); Zapata v. IBP, Inc., 167 F.R.D. 147 (D. Kan. 1996) (plaintiffs hired before enactment of the Civil Rights Act of 1991 and plaintiffs hired thereafter died not share common questions of law regarding their hostile work environment claim under 42 U.S.C. § 1981).

Also of importance is whether, assuming that class certification is denied, the plaintiffs can still use pattern-or-practice evidence and for what purpose. See Lowery v. Circuit City Stores, Inc., 158 F.3d 742 (4th Cir. 1998) (individuals do not have private, non-class cause of action for pattern-or-practice discrimination under 42 U.S.C. §1981 or Title VII and may not avail themselves of the burden-shift presumptions of pattern-or-practice, even though they may use evidence of pattern or practice to prove their own claims), petition for cert. filed, 67 U.S.L.W. 3409 (Dec. 14, 1998) (No. 98-972). Finally, consideration should be given to whether unnamed plaintiffs will be allowed to opt out of the class if they disapprove of the settlement. See Eubanks v. Billington, 110 F.3d 87 (D.C. Cir. 1997) (district court did not abuse its discretion in refusing to permit two Library of Congress employees to opt out of settlement of class action certified under Rule 23(b)(2), where one employee had not taken any steps or expended any resources to pursue individual lawsuit apart from filing administrative complaint, other employee also chose to wait instead of pursuing his individual claim; fact that they received less under settlement agreement than they might have expected to receive if they had prevailed in individual lawsuits did not

qualified labor market and such composition differed depending on whether jobs are competitive, and applicant flow data would overstate discrimination; there would be distortion from "workforce" benchmark but it would be much less).

warrant letting them opt out).

Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231 (1997), also is a case that the mediator should be prepared to address, because of the limitations it placed on certifying a class for settlement purposes only. Amchem Products was an asbestos products liability case involving a proposed settlement on behalf of an enormous but amorphous proposed class of persons occupationally exposed to asbestos in the past and their family members, who might be expected to have severe health problems of one type or another in the future, and who had not made claims of their own or been included in any of the previous asbestos litigation. Some of the members of the proposed class were asymptomatic, and were unknown. Their individual claims would be barred by the settlement, and they would have to receive compensation from the settlement fund under terms far less advantageous than those with present claims. 117 S. Ct. at 2241-42. The proposed class "potentially encompasses hundreds of thousands, perhaps millions, of individuals." Id. at 2237.

The Supreme Court held that the "sprawling class" certified by the district court did not meet the requirements of Rule 23. The Court held that the "claims or defenses" aspect of the typicality requirement, like the common questions under Rule 23(b)(3), are the questions that would be significant if the case were to be litigated, not questions that pertain to a settlement. Id. at 2249 n. 18. Settlement is relevant to a class determination, but only to a limited extent. Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. R. Civ. P. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of the rule -- those designed to protect absentees by blocking unwarranted or overbroad class

definitions – still must be met, and may even be heightened in the settlement context.

The tax consequences of a settlement also should be considered. The proceeds of a settlement or judgment in discrimination case generally are taxable under current law.⁷

Only settlements of claims for personal injuries – meaning physical injuries – are non-taxable.⁸ Moreover, awards of punitive damages are taxable. However, there may be ways to creatively structure a settlement to minimize the tax consequences to the settling parties.

Perhaps of equal importance, though, is the mediator's commitment to reaching a settlement of the case. Class actions are generally not settled in a day, or even a week, or a month. They often take several months to resolve and require a willingness to work through almost always emotional and often intellectually challenging issues. Too often, one of the parties is willing to abandon the process because of emotional or ego-based motivations and, among other things, it is the mediator's task to find some way to get over that hurdle.⁹

The mediator also has to work well with all sides. To do so, the mediator must both be, in fact, and perceived to be neutral, while willing to work through any particular problem facing each side. For example, if one side has a misperception of the import of certain events or governing legal principles, the mediator can often provide direction -- indeed, point to case law -- that can resolve the issue. Further, where one of the parties is reluctant to accept

⁷ Under the 1996 Small Business Job Protection Act., Congress amended the Internal Revenue Code to tax all proceeds of damages awards and settlements in employment cases, unless the damages are on account of a physical injury or sickness. See 26 U.S.C. § 104.

⁸ Id.

⁹ Management attorney Paul Grossman of Paul, Hastings, Janofsky and Walker for instance, said in a Feb. 5, 1998 meeting of the American Bar Association that he wants a mediator with "fire in the belly" -- one who feels he will die if the case doesn't settle. He said that as an employer representative he comes to the mediation prepared to "let it all hang out."

his or its counsel's assessment of the case, then a mediator, particularly a mediator whose practice is primarily on the same side as that party, will often effectively bolster or challenge that party's assessment of the case.

Finally, simply the ability to persuade is an important characteristic. While in less complex cases the mediator sometimes is only a carrier of messages, that is not the case in larger class actions. Not only must the mediator accurately carry messages/offers between the parties, but he or she must be able to interpret them, help explain the substance of the message, and persuade as appropriate.

2. How should the mediator prepare for initial mediator sessions?

Each mediation is different. Generally, however, the mediator needs to have a sound understanding of the basic issues of the particular case. This requires a review of the major or more significant pleadings of the case. Depending on the stage of the case, that would include the complaint and answer, any dispositive motions such as a motion to dismiss, class certification motion, motion for summary judgment, and any evidentiary motions. Any Daubert motions also need to be reviewed for their outcome can be critical. Further, since in class actions the case may turn in substantial measure on the testimony of experts, the mediator needs also to be familiar with both the experts' reports and any court rulings on their admissibility.

Next, the mediator should preliminarily meet separately at least with the lead lawyers for each side. In those meetings, issues such as authority to settle important substantive

questions as well as goals or particular needs of counsel and their clients should be identified. In addition, the mediator should meet with representatives of the employer and the named plaintiffs to ensure that a clear statement of their respective interests and objectives is established.

Finally, where the mediation is pursuant to court order, a conference with the judge may be appropriate to understand the court's perspective on the case. Quite often, judges in these cases are anxious to have the matter resolved, and they may be willing to rule on certain key motions during the mediation simply to facilitate the settlement process.

3. Who should attend mediation itself?

Efforts should be made to ensure that at work sessions the number of participants is not so large as to become unwieldy. When there are more than four to six lawyers in attendance, the process has a tendency to breakdown as there are too many cooks stirring the broth. Also present at these meetings should be the employer's operations and HR managers who have actual knowledge of the particular areas at issue, and who will be impacted by any injunctive relief that is part of a settlement.

From the plaintiffs' side, it may not be appropriate or practical to have the class representative plaintiffs present at the negotiations themselves. Issues are often emotional and feelings between the employer and the employees may impair the process -- a process that is aimed at resolving not only claims of the named representatives, but also the claims of possibly thousands of other class members.

4. How should the mediation be structured in a complex case?

Complex cases usually involve three basic components for settlement: injunctive relief, monetary relief to the class members/named plaintiffs and attorneys' fees. To initiate the settlement process, the best starting point is usually a letter from plaintiffs' counsel setting out their demands and their rationale therefor on at least the injunctive and monetary portion of the settlement. Attorneys' fees should be set aside for the later stages of the negotiations. This is true despite the Supreme Court's having ruled that attorneys' fees can be negotiated simultaneously with class relief. Evans v. Jeff D., 475 U.S. 717 (1986).^{10/} Reputable plaintiffs' counsel however generally are not willing to negotiate attorneys' fees prior to resolving in principle injunctive and monetary relief for class members. While class monetary relief and attorneys' fees are obviously of considerable importance, many of the more respected plaintiffs' class counsel will be most interested in injunctive relief, *i.e.* relief that results in fundamental changes in the employer's practices that have caused the statistical imbalances in the workforce.

In furtherance of that goal, they may well insist on meaningful changes in the hiring,

^{10/} The Supreme Court in Evans v. Jeff D. overruled Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977) where the Third Circuit had found it improper for class counsel to negotiate fees simultaneously with the substantive class settlement. Despite Jeff D.'s overruling of Prandini, the delaying of the negotiation of attorneys' fees until after the substantive settlement terms have been reached will lessen any concerns that the settlement was collusive or that Plaintiffs' counsels' representation was inadequate. Where one of the parties demands negotiation of fees simultaneously with other relief, it is possible to obtain a Court pre-approval waiver for simultaneous negotiations. See Court Awarded Attorney's Fees, Report of the Third Circuit Task Force, 108 F.R.D. 238, 269.

promotion, training, or other aspects of the employer's employment practices. Where this is the case, the parties need to determine very early in the mediation process whether there are reasonable grounds upon which an injunctive relief bargain can be struck. Often, the injunctive relief sought by the plaintiffs will not require a total overhaul of the employer's employment practices or a change in its culture. Where that is the case, usually common ground for settlement can be found on this issue. This middle ground usually cannot be found, however, in those instances where the plaintiffs are insisting upon controlling the details of the employer's selection process or establishing some type of hiring, promotion, or training quotas. Thus, where the plaintiffs are demanding, for example, two promotions of an employee in a protected category for every five promotions, the employer will often reject settlement because the settlement will in its eyes undermine its ability to operate its business effectively. It will accordingly be willing to take its chances in court. Conversely, in those cases where plaintiffs are requiring the employer to hire in a manner consistent with realistic, availability pools of qualified interested applicants, that is usually something that an employer can accept.^{11/} Nevertheless, even using realistic availability pools, the reporting requirements and related issues are still onerous and these terms of the agreement can be the

^{11/} The heart of the injunctive relief in many class employment settlements today is a posting or registration of interest ("ROI") settlement provision. These provisions often provide a fair compromise where the plaintiffs and the employer claim that members of the protected class do not have the same level of interest in certain positions as do unprotected employees; e.g. there is a dispute as to women's interest in traditionally male positions. Job posting/ROI settlement provisions require the employer to post or identify as open for registration covered positions and then for the employer to have a good faith obligation to select qualified applicants in accordance with the demographic composition of those pools. By setting up such a process, the employer's undifferentiated availability pools is pared down to the qualified and interested employees and each side's hypothesis as to the availability of qualified minorities/ females can be tested. A copy of the terms of a sample registration of

subject of literally weeks of intense negotiations.

Assuming common ground can be found with respect to injunctive relief, monetary relief for the class is usually the next item on the agenda. By the time injunctive relief has been hammered out, monetary questions can often be more easily addressed. Of course, as a part of the discussion of the amount of any monetary relief, the parties need to also reach an accord as to whom and how the monies are to be distributed -- i.e. the claims procedure itself. Along with that, issues of notice to the class members and all the sundry due process issues attendant to that discussion must be covered. Other areas that will trigger extended discussions include (1) whether the form of the settlement is a consent decree or settlement agreement, (2) designation of a compliance official, (3) dispute resolution procedures, (4) the document maintenance program, (5) monetary distribution procedures, (6) costs, (7) length of the decree/agreement, (8) claims procedure, (9) evaluation programs, (10) and a host of other related issues.

5. Is the Settlement Fair, Reasonable, and Adequate?

Federal Rule of Civil Procedure 23(e) imposes on the trial judge the duty of protecting absentee class members by its assuring that the settlement represents adequate compensation for the release of class claims. In re Warner Communications Sec. Litig., 798 F.2d 35 (2d Cir. 1986).

To assist it in carrying out this duty, courts will often turn to some iteration of the

interest provision is attached as Appendix B.

nine-factor Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975) test. These Girsch factors are: (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation and (10) incentive payments to the named plaintiffs. Id.

The primary overall concern for the court is the total value of the settlement, both as to the injunctive and monetary relief in relation to the risk of loss of the litigation. The Girsh factors assist in this analysis.^{12/} See In re Baldwin-United Corp., 105 F.R.D. 475, 482 (S.D. N.Y. 1984) (comparing advantages of an immediate cash settlement with the risks of long and uncertain litigation); Thomas v. Albright, 139 F.3d 227 (D.C. Cir. 1998) (settlement of black foreign service officers' Title VII action against State Department was fair to class as whole, where settlement redressed past discrimination in assignments, deterred future discrimination, and prohibited retaliation; the settlement provided for promotions, monetary compensation and reinstatement of four officers who were terminated when they failed to get tenure, it provides \$3.8 million in compensation, which was at the high end of what class could have expected after trial, and only 15 percent of class members objected to the

^{12/} In carrying out its Rule 23 responsibilities, the courts also closely examine settlements that have the earmarks of collusion or that have been obtained prior to certification. Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982). On these issues, the courts will generally ask certain basic questions such as: Is the settlement relief significantly less than what appears appropriate given the preliminary discovery? Did the parties achieve settlement with little or no discovery? Did the parties negotiate simultaneously on attorneys' fees and class relief?

settlement terms), cert. denied, 119 S. Ct. 576 (1998).

But Girsh and its progeny also require significant consideration of how the settlement impacts individual class members. In that regard the court often considers how class members who are in subgroups or who have different types of claims, or claims different value, are treated. Thus, if a transfer/promotee class that includes all hourly employees is resolved by a settlement that addresses only promotions to management positions, that portion of the settlement relief may well be rejected. Likewise, if the monetary fund is distributed per capita without regard to seniority, that also may not be approved. In sum, the relief must be properly tailored to the claimed injury of all members of the class. In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab.Litig., 55 F.3d 768 (3d Cir. 1995).

While these issues and other settlement approval concerns are not the mediator's primary focus, they should be an integral part of the mix. The mediator's client is the deal. Simply getting the parties to sign an agreement is not necessarily enough. While the mediator should seek to interpose his views only on a limited number of subjects, in those circumstances where the deal that is being negotiated has fundamental flaws that may cause it to be rejected by the Court, the mediator should not hesitate to identify both the issue and the supporting case law.

6. Settlement of Attorneys' Fees Issues

Finally, the parties will turn to attorneys' fees. That can be handled in multiple ways.

By this point, however, the parties usually can see some light at the end of the tunnel and would like to end the process sooner, and not later. For that reason, the parties often opt to settle and not separately litigate attorneys' fees.

Where the parties do choose to resolve the attorneys' fee issue without the intervention of the court or an arbitrator, several basic concepts must be kept in mind.

At the outset, they must understand that a thorough judicial review of fee applications is required of all class action settlements. This is true even where the fees are structured separately. Courts have repeatedly recognized that the defendant generally (but not always) has little interest in who gets its monies; its concern is with the total amount of its payment obligation. Piambino v. Bailey, 757 F.2d 1112 (11th Cir. 1985). Thus, the divergence in financial incentives presents a "danger...that the lawyers might urge a class settlement at a low figure...in exchange for red-carpet treatment on fees." Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991).

Also important to consider is plaintiffs' attorneys' fee justification. If the claims are based upon a federal fee shifting statute such as Title VII or § 1988, it may be that the fees will have to be based upon a lodestar theory and not a common fund theory. See Evans v. City of Evanston, 941 F.2d 473. Further, under Blum v. Stenson, 465 U.S. 886 (1984), and City of Burlington v. Dague, 505 U.S. 557 (1992), the lodestar may well be closer to a ceiling than a base number against which a multiplier is applied. If, however, there is a supplemental or pendant state law claim, then the use of a multiplier or common fund analysis may be possible.

If the parties cannot strike a bargain on attorney's fees, then there are a variety of

means to resolve simply the attorneys' fees issue. For example, it can be turned over to the judge for his or her determination or arbitrated before a neutral arbitrator. The decision can further be facilitated by the use of a "high-low," or "baseball" settlement agreement, or other procedure that increases the likelihood of an expeditious resolution of this aspect of the case.

7. **How does the negotiation style of the parties affect the mediation?**

As in all negotiations, negotiating style is critical. The parties can seek to use the mediator primarily as a message-carrier, or attempt to persuade the mediator that their position is the correct one and have the mediator argue that position to the opposing party. Generally, the latter style is more effective. Clearly, where a knowledgeable neutral third party is given a convincing basis to argue a party's position, that has the potential of substantially impacting the process. While bottom-line positions probably should not be shared with a mediator, certainly a party's interest and need for a particular result can be well advanced through the mediator.

Appendix "A"

Recent Settlements of Class Action Employment Cases

- **UNITED PARCEL SERVICE:** United Parcel Service agreed to pay \$12.1 million to about 12,000 employees to settle allegations that it discriminated against African American employees in pay, promotion, and job assignments. The suit was filed in the U.S. District Court for the Northern District of California in April 1997 by 16 plaintiffs, all of whom work at the company's facility in Oakland, Calif. The plaintiffs alleged that the company routinely passed over African American workers for promotion in favor of less-experienced white workers, failed to pay black supervisors the same wages as whites, and retaliated against those who complained of discrimination and harassment (Carter v. United Parcel Svc. of America Inc., No. C-97-01590 (N.D. Cal.), settlement reached 1/18/99). In a joint statement, UPS and the plaintiffs said the settlement is fair to both sides and will avoid a lengthy and costly trial. Under the settlement, about \$8.2 million will be offered to the roughly 12,000 current and former African American part-time hourly employees. The remainder will go to pay attorneys' fees. The agreement also requires UPS to do a better job of telling applicants and employees about job opportunities and promotion procedures, and training managers, including new pamphlets and posters discussing how to move ahead, along with a new training for supervisors and managers.
- **THORN AMERICAS:** Thorn Americas, a Midwest consumer rental firm will pay \$6.75 million to settle a class action alleging it discriminated against African Americans in hiring, pay, and promotions and maintained a racially hostile work environment. The lawsuit covers several regional markets in Missouri, Nebraska, Kansas, and Iowa (Allen v. Thorn Americas Inc.), No. 97-1159-CV-W-SOW, W.D. Mo., judgment entered 11/24/98). In August 1997, five plaintiffs sued Thorn Americas Inc. d/b/a Rent-A-Center under 42 U.S. Code § 1981. The agreement settles all claims by African Americans who applied for employment or worked from August 1992 through Oct. 13, 1998. Members of a subclass of certified job applicants from 1992 to 1998 each received \$100 while a subclass of African American employees who worked for Rent-A-Center during that period received \$3,000 for each six months of employment. The subclasses included approximately 350 former employees, plus rejected applicants. Plaintiffs who were named class representatives also received incentives.
- **THE UNIVERSITY OF SOUTH FLORIDA:** The University of South Florida agreed to pay \$894,000 to settle class-action claims that the state-funded institution discriminates against female faculty in pay practices and promotion decisions. The bulk of the settlement -- \$750,000 -- will be distributed over a three-year period to correct salary inequities among all university employees. The remaining \$144,000, which includes attorneys' fees, will be equally divided among five of the six named plaintiffs. Plaintiff Kristin Shrader-Frechette, who resigned in August and is employed by the University of Notre Dame, continued to pursue her individual claims against USF (Shrader-Frechette v.

Florida Board of Regents, No. 98-CV-225, M.D. Fla., settlement reached 11/12/98).

- **PENNZOIL CO.:** Pennzoil Co. agreed to pay \$6.75 million to settle a race discrimination class action filed in 1996 by 11 African American current and former employees who alleged discrimination against black employees in pay and promotions. The settlement amount includes attorneys' fees and costs (Alexander v. Pennzoil Co., No. H96-2653, S.D. Tex., settlement 11/11/98). Damages will be distributed to all African Americans who worked in salaried positions at Pennzoil in the four-year period between Aug. 16, 1994, and Aug. 17, 1998. Approximately 700 current and former employees would be covered by the settlement, according to Pennzoil. The company also agreed to put a senior-level employee in charge of overseeing equal employment opportunity policies. Pennzoil said it would expand and improve its EEO-related communications, training, recruitment, and community activities.
- **SOUTHWEST SUPERMARKETS INC.:** An Arizona grocery store chain agreed to pay \$1 million and implement anti-discrimination measures to settle a sexual harassment class action filed last year by the Equal Employment Opportunity Commission. Under the proposed settlement, Southwest Supermarkets agreed to pay \$800,000 in compensatory damages to 44 current and former female employees identified by EEOC and to distribute \$200,000 to any additional employees who come forward with harassment claims. The retailer also agreed to extensive corrective relief, including procedures to permit Spanish-speaking employees to report harassment (EEOC v. Southwest Supermarkets Inc., No. CIV 97-1940 PHX PGR, D. Ariz., decree filed 10/26/98). EEOC claimed that the women, many of whom were employed in entry-level jobs in various Southwest stores in the Phoenix and Tucson areas, were physically and verbally harassed by more than 35 men and that some were retaliated against for complaining about the behavior and constructively discharged. As part of the corrective relief, Southwest has hired an EEO administrator to locate potential claimants, investigate their claims, and determine damages to be paid from the \$200,000 escrow fund, with EEOC's final approval. The company must retain a consultant to provide annual sexual harassment and retaliation training in English and Spanish to all Southwest employees. The settlement also obligates the company to provide a third-party avenue for employees to make discrimination complaints in English and Spanish.
- **ORANGE COUNTY, FLA.:** Orange County, Fla., agreed to pay \$500,000 in damages and \$1 million in attorneys' fees and costs to settle a class action brought by 32 white male firefighters who alleged the county's affirmative action policies discriminated against them. The firefighters claimed that, beginning in 1992, they were not considered for hire or for promotion by the Orange County Fire and Rescue Division because of their race and gender, were deterred from applying for promotion because of the department's unwritten affirmative action policy, and were retaliated against for protesting the department's hiring and promotion decisions (Nolin v. Orange County, No. 94-620-CIV-ORL-19, M.D. Fla., dismissed 10/23/98). The suit alleged that the county's affirmative action goals and preferential hiring and promotion of African Americans and women

discriminated against qualified white male applicants and those seeking promotion to state-certified positions in the department, including firefighter, engineer, lieutenant, battalion chief, assistant chief, commander, and chief. The plaintiffs claimed to represent more than 200 potential class members.

- **BORG-WARNER PROTECTIVE SERVICES CORP.:** A federal district court judge has approved a \$2.1 million settlement of a class action suit filed against Borg-Warner Protective Services Corp. by job applicants who alleged that the company's "political litmus test" violated California labor law. The settlement will provide as much as \$1,250 to each applicant who was rejected because of the test and \$500 to those who took the test and subsequently were hired. At issue was a test administered about 8,000 times that asked applicants yes-no questions about their personal attitudes. The test was administered by Burns International Security Services, a subsidiary of Borg-Warner. Some of the questions included: "Most employers try to underpay their employees if they can," and "The drinking age should be lowered." Responses were scored according to a grading manual, and applicants were ranked high risk, medium risk, or low risk. In the lawsuit, the plaintiffs alleged that the questionnaire violated California Labor Code Section 1101-02, which prohibits job discrimination on the basis of political affiliation or participation.
- **MITSUBISHI MOTOR MANUFACTURING OF AMERICA INC.:** On June 23, 1998, a federal judge approved the landmark \$34 million settlement of the Equal Employment Opportunity Commission's class action sexual harassment suit against Mitsubishi Motor Manufacturing of America Inc. EEOC v. Mitsubishi Motor Manufacturing of America Inc., No. 96 C 1192, (C.D.Ill. 6/23/98). Under the agreement, Mitsubishi agreed to compensate all eligible claimants from a \$34 million fund --the largest such fund in a sexual harassment case. Victims of harassment will be compensated at various levels ranging from \$300,000 to a few thousand dollars. The EEOC believes more than 350 women will be compensated under the agreement. The settlement also requires Mitsubishi to revise its existing sexual harassment policies and procedures to reflect compliance with the consent decree's "MMMA Statement of Zero-Tolerance Policy and Equality Objectives." In addition, the company agreed to establish a three-person panel to oversee the execution of the entire agreement. The so-called "decree monitors" will determine whether Mitsubishi is meeting its zero-tolerance goals and provide status reports to the company, the EEOC, and the court during the three years of the settlement.
- **HOLIDAY INN-OAK LAWN:** The Equal Employment Opportunity Commission settled a class action suit alleging that Holiday Inn-Oak Lawn engaged in discriminatory hiring practices against blacks. Under the settlement, Holiday Inn also agreed to change its hiring practices (EEOC v. Oak Lawn Ltd., No. 96 C 0959, N.D. Ill., settlement reached 5/29/98). In its complaint, the EEOC alleged that the hotel engaged in discriminatory practices by denying African Americans so-called "front-of-the-house" positions and singling out African American job candidates by coding their applications with the number 8 somewhere on the document. In the agreement, Holiday Inn consented to pay

\$1 million to black applicants who applied, but were not hired, for "front-of-the-house" positions from 1990 through 1995. Although Holiday Inn did not admit to any discriminatory practices, the consent decree also contains an injunction barring it from engaging in any employment practice that discriminates on the basis of race. The consent decree also bars the company from indicating the race of the applicant on employment applications. The hotel agreed to offer jobs to class members eligible for consideration for each position it fills other than management, dishwasher, or cook. Holiday Inn retained the right to determine if specific class members are qualified for a given position. Class members hired under the requirements of the consent decree are to be given credit for service as of the date of their original application. During the three-year term of the consent decree, Holiday Inn agreed to provide the EEOC with periodic reports regarding its hiring of class members and others.

- **MERRILL LYNCH & CO.:** Merrill Lynch & Co. settled a class action brought by female employees alleging sex discrimination claims. The plaintiff class consisted of 2,500 current and former Merrill Lynch employees, all of whom may be able to take advantage of the settlement. One attorney involved with the case estimated the total cost of the settlement could run into the hundreds of millions of dollars (Cremin v. Merrill Lynch & Co., No. 96-3773, N.D. Ill., settlement reached 5/4/98). If approved by the court, the settlement would end litigation filed in 1996 by one current and seven former female employees of Merrill Lynch. The suit alleged class sex discrimination in the company's handling of wages, promotions, pregnancy leaves, and other conditions of employment. The settlement establishes a process for members of the class to pursue claims against Merrill Lynch and creates a separate resolution process for handling all future civil rights claims. Neither of these processes involves binding arbitration through the New York Stock Exchange or the National Association of Securities Dealers. Under the settlement, women employed in Merrill Lynch's domestic retail brokerage business at any time since Jan. 1, 1994, will be able to seek compensation under the Claims Resolution Process. While the process will be established to handle gender discrimination claims, other employment-related claims--including sexual harassment--also may be brought. The process will require an investigation by the company and then mediation. If no settlement is reached, the claim will be subjected to binding arbitration. The arbitrators, selected jointly by the class counsel and Merrill Lynch, will have experience in employment law, not the securities industry. In addition, Merrill Lynch will set up the Merrill Lynch Employment Dispute Resolution Program to handle future civil rights claims from any employee. Under the program, Merrill Lynch employees would have access to mediation and independent arbitration systems similar to those created under the Claims Resolution Process. The dispute resolution program, however, also would allow employees to pursue their claims in court.
- **IMMIGRATION AND NATURALIZATION SERVICE:** The Department of Justice and an attorney for African-American agents of the Immigration and Naturalization Service have agreed on the basic terms of a settlement of a class action race bias suit against the agency. The settlement would provide almost \$5 million in back pay for more than 800

members of the affected class, ensure 29 "top management" positions for black agents, and overhaul INS procedures for selecting and promoting agents to sought-after positions within the agency. The monetary award will be allocated according to a formula based on affected agents' time of service, the number of years not promoted, and the number of times turned down for a promotion. The result will be that some agents will receive back pay totaling a few thousand dollars, and others as much as \$20,000, he added. The initial lawsuit, Potter v. Reno, filed by 19 black Los Angeles-based INS agents, alleged that the plaintiffs were denied promotions and training for supervisory positions within the INS, retaliated against because of their race, and subjected to a racially hostile work environment.

- **HOME DEPOT INC.:** In late 1997, a federal district judge in New Orleans approved a settlement in which Home Depot Inc. agreed to pay \$3 million and to change some of its human resource management practices to settle three sex discrimination lawsuits. The \$3 million includes \$1 million for the sex bias claimants and \$2 million for attorneys' fees and costs. The \$1 million will be dispersed to the six named plaintiffs in amounts ranging from \$70,000 to \$90,000, with \$50,000 going to others who filed charges of discrimination. The company also agreed to pay \$3,000 each to approximately 45 potential claimants (Griffin v. Home Depot Inc., No. 95-0180, E.D. La., 12/5/97). In addition to the monetary relief, Home Depot agreed to provide training on equal employment opportunity and diversity for its managers and supervisors, and to change the company's internal mechanisms for monitoring complaints. A compliance officer will be designated and made responsible for monitoring compliance with the terms of the decree. That officer may be a division vice president of human resources who would report directly to the human resources committee of Home Depot's board of directors. The company agreed to publicize its policy against discrimination on the basis of sex and to maintain an internal complaint procedure for gender discrimination complaints or other alleged violations of the decree. Home Depot agreed to improve the way that information is provided to managers who make decisions regarding promotions and employee development and training.
- **HOOTERS:** The Hooters restaurant chain in late 1997 agreed to pay \$3.75 million to settle a sex discrimination class action filed by job applicants and employees who alleged that the restaurant chain unlawfully refused to hire men as waiters, bartenders, and hosts. In addition to paying \$2 million to class members, Hooters Inc. agreed to pay \$1.75 million for plaintiffs' attorneys' fees and costs, and to provide injunctive relief (Gonzalez v. Hooters Inc., Nos. 93 C 7709, 94 CV 6338, and 97 C 2563, N.D. Ill., 9/10/97). The seven named class representatives will receive different portions of \$98,700, and it is expected that other class members will receive approximately \$900 each. The agreement sets out the procedure for notifying potential class members of the opportunity to submit claims.
- **DETROIT EDISON CO.:** Detroit Edison Co. agreed to pay between \$17.5 million and \$65 million to former employees to settle a race and age discrimination class action

claim. (Gilford v. Detroit Edison, No. 93-333296-NO, Mich. Cir. Ct., 2/9/98). In addition to the payment, to be determined by an arbitration panel, Detroit Edison said it will create long-term programs for career development and job opportunities for minority employees. Attorneys and company officials said the settlement has five main areas—a consent judgment, agreement to arbitrate, human resources programs, employment re-entry and job movement, and a monitoring program. The consent judgment includes a provision that will allow employees who opted out of the class action to opt back in for the settlement. Under the agreement to arbitrate, both sides together will choose a neutral arbitrator who will resolve only the issue of the total amount of money the company should pay as settlement. That amount would be at least \$17.5 million but no more than \$65 million under the agreement. Payments will be made to current and former employees who can demonstrate either economic or non-economic injury. Attorneys said the arbitrator should begin hearing workers' cases this summer. About 3,500 employees affected by the downsizing could be eligible for payments, company officials said. The settlement also establishes a five-year monitoring program of the settlement's implementation headed by a "special master," retired Genessee County Circuit Court Judge Valdemar L. Washington. The monitoring committee also will include three members from the plaintiff class, three current employees and two community advisers represented by ministers from the Council of Baptist Ministers. The monitoring committee will have authority over parts of the settlement and many Detroit Edison personnel policies. That authority includes dispute resolution under the consent judgment, "final and binding decisions" on firings, job movement and re-entry as well as review of hiring, firing, and promotions statistics. The settlement's human resources programs section includes provisions that Detroit Edison set up a dispute resolution process, career counseling, recruitment program, a minority suppliers and contractors program, a cultural audit and an ethics council, among other requirements. Under the employment re-entry section of the settlement, the utility will create a program for the possible re-entry of employees who accepted voluntary separation offers such as early retirement. Up to 20 equivalent full-time positions will be offered to those deemed forced to accept voluntary separation offers because of fraud, discrimination, coercion, or duress. Current employees who were "adversely impacted by their departments' reorganizations" will be eligible to apply for certain internal job openings, according to Detroit Edison.

- **THE ARKANSAS HUMAN SERVICES DEPARTMENT:** The Arkansas Human Services Department agreed to a settlement valued at more than \$3.6 million in a federal class action contending that it discriminated against black nurses and mental health workers at the Arkansas State Hospital. (McFadden v. Arkansas State Hospital, No. LR-C-78-153, E.D. Ark., 12/9/98). Under the agreement, approximately 100 members of the class will share payments of \$1 million and receive educational leave benefits valued at \$1 million or more. Plaintiffs' attorney will receive \$1.25 million plus up to \$75,000 in litigation costs. The state will also fund a scholarship for African American nursing students at the University of Arkansas at Pine Bluff, a predominantly black state university. Under the agreement, McFadden and one other employee, Addie Morris, a registered nurse who served as an interim administrator of the hospital but was not

offered the job permanently, will be allowed to go on leave with pay immediately until they qualify for retirement in two years. McFadden will be given a promotion in rank so that he can retire at a higher salary. The decree also gives the black employees the right to take educational leave to improve their status. If they take it all in one year, they will be paid full salary while on leave. If they elect to take it over two years, they will have to work 20 hours a week. The educational leave provision could cost more than the \$1 million estimated by the state if enough employees choose to take it.

Appendix "B"

Not available.

Appendix "C"

Following is a summary of recent class action employment cases that were settled with the assistance of a mediator:

- **DHMJ, INC.:** A mediator assisted in settling a claim by 40 nursing home workers alleging overtime pay violations, resulting in a settlement worth up to \$100,000 if a proposed class action settlement is approved. The suit filed in Alameda County Superior Court alleged violations of the California Labor Code and state Department of Industrial Relations wage orders for failure to pay time and a half. (*Beccera v. DHMJ, Inc.*, No. H200818-9 (Cal. Super. Ct., settlement reached 12/2/98)). The parties "could have spent years in litigation" but tentatively resolved the issue with the use of "an exceptional mediator," according to counsel for the nursing home's owner.
- **FINA:** Texas oil refiner, Fina, has settled race discrimination charges by a group of minority employees in the Equal Employment Opportunity Commission's first pre-determination settlement of a class action by mediation. The total settlement amount exceeded \$1million, including attorneys' fees, according to EEOC. The parties agreed not to disclose the exact amount of the fees. The settlement also calls for the company to establish a neutral ombudsman and to change some workplace policies. The investigation was suspended by the EEOC District pending the outcome of the voluntary mediation sessions, with EEOC reserving the right to continue the investigation and issue a determination. Mediation sessions, coordinated by a mediator from EEOC Houston contractor Mediation Alliance Inc., began in March 1998 and continued intermittently until agreement on all major issues was reached by July. Participants in the mediation included FINA, a negotiating committee selected by minority employees, the employees' attorneys, and international and local union representatives from the Oil, Chemical and Atomic Workers, which represents employee sat the refinery. "I was very satisfied with the process and I think all the managers would agree with that," one attorney for the defendant said. "The outcome was far better than anything that could have been obtained through administrative proceedings." In exchange for agreeing not to pursue litigation against the company, 62 workers will receive \$5,000 each. Class members included all non-management minority employees at the refinery as of September 1997.
- **THE TEXAS COMMISSION FOR THE BLIND:** The Texas Commission for the Blind (TCB) agreed Dec. 21 to pay \$50,000 to Joanna States and \$5,000 to Sharon Fernandez to settle their claims that TCB discriminated against employees with visual impairments. In the law suit, the federal government alleged and TCB denied that TCB violated the Americans with Disabilities Act by failing to make reasonable accommodations for disabled employees, including failing to provide certain employee manuals and information in accessible formats and failing to ensure that necessary adaptive equipment was furnished in a timely manner. In addition, the government alleged that TCB created a hostile work environment by subjecting a disabled employee to disability-based harassment. Without admitting liability, TCB agreed to ensure that all employee

manuals, training information, and other printed materials are provided in an accessible format, such as Braille, large print, or computer disk, to employees with vision impairments in a timely manner; to designate an ADA coordinator to handle disability discrimination complaints and to refer cases that cannot be resolved to independent mediation; and to advise all current and future employees of their rights and responsibilities under the agreement. According to the Justice Department, this is the first time the department has used a formal out-of-court mediation to resolve ADA claims after finding alleged discrimination, but before starting litigation. The "agreement demonstrates what an effective tool mediation can be in resolving civil rights cases," Bill Lann Lee, acting assistant attorney general for civil rights, said in a statement.

- **SUNDOWNER OFFSHORE SERVICES:** On the eve of trial, the parties settled the sexual harassment case that led to the U.S. Supreme Court's landmark Oncale ruling last term finding that Title VII of the 1964 Civil Rights Act prohibits same-sex harassment. Joseph Oncale, an oil rig roustabout, Oct. 21 settled his sexual harassment suit against his former employer, Sundowner Offshore Services. The parties reached settlement after mediation by Judge Lance M. Africk.
- **INTERNATIONAL LONGSHORE AND WAREHOUSE UNION AND THE PACIFIC MARITIME ASSOCIATION:** Fifteen black dock workers agreed to an \$800,000 settlement to end a race discrimination lawsuit against three Seattle and Tacoma locals of the International Longshore and Warehouse Union and the Pacific Maritime Association. Judge Franklin Burgess of the U.S. District Court for the Western District of Washington ordered the dock workers and the ILWU and the PMA, which represents stevedoring companies that move cargo in and out of West Coast ports, into mediation after eight days of trial. He approved the settlement on June 8. The settlement was unusual in that it came as a result of a judge's order to try mediation mid-way through a trial. Pre-trial settlement conferences were unsuccessful, but the parties reached agreement with the help of a federal magistrate two and one-half days after Burgess ordered the mediation.
- **ARMY NATIONAL BANK:** The holding company that operates a bank on a U.S. Army base agreed to pay more than \$220,000 to settle an Equal Employment Opportunity Commission suit alleging that the company fired a 59-year-old bank manager because of his age and in retaliation for his filing of an EEOC charge. The agreement provides that the defendants do not admit to any violation of the Age Discrimination in Employment Act. Plaintiff was executive vice president of the Army National Bank in Fort Leavenworth, Kan., before being demoted to manager of the bank's branch in Fort Leonard Wood, Mo. The defendant specializes in providing banking services to military personnel on military installations. Plaintiff was employed by the bank and by its holding company, Dickinson Financial Corp. The bank contended that Plaintiff was fired at age 59 because he had violated company policy by granting a loan to his son. After taking the case to mediation, EEOC and the defendants reached a settlement agreement in which plaintiff released all claims arising out his employment with the bank.

- **SPARTAN:** A major Michigan grocery chain agreed to pay three former employees and one current employee \$1.3 million following a discrimination lawsuit settled through mediation last month. The lawsuit, filed by four African American employees under Michigan's Elliott-Larsen Civil Rights Act, listed numerous incidents of harassment. Grand Rapids, Mich.-based Spartan said it was glad to have reached the settlement through mediation. The agreement was reached through a process called Michigan Mediation. Michigan Mediation is a mediation process available in Michigan state courts following the discovery process in which the court chooses a three-person mediation panel to resolve the case. The panel includes one plaintiff's attorney, one defense attorney, and one neutral attorney. In this case, the court agreed to appoint a special three-person mediation panel with the usual plaintiff-defendant-neutral representation but with each attorney having expertise in civil rights law.
- **SMITH BARNEY INC.:** Attorneys representing Smith Barney Inc. and 25 female current and former employees alleging sex discrimination reached an agreement settling claims by a class of all women who worked or will work for Smith Barney from 1993 through 1999 in its retail, investment banking, and capital markets divisions. The negotiators developed a program that includes mediation in determining the value of her claims, which include sex harassment, pregnancy discrimination, and glass ceiling issues. Unlike other employment discrimination class settlements, the money will not be distributed based on formulas. The agreement will also address psychological and medical examinations to prove emotional distress and after-acquired evidence. The parties began exploring the possibility of a settlement in January, and during the summer had four sessions led by mediator David Rotman, with the San Francisco mediation firm Gregorio, Haldeman & Piazza. More than 70 hours of discussions were held to find out what the plaintiffs themselves wanted to see in the settlement agreement. The ADR portion of the proposed settlement would establish a three-step claim process. The first step would be submission of a claim form to class counsel, who would forward it to the Duke Private Adjudication Center in Durham, N.C., for submission to Smith Barney. The company would have 60 days to make an offer, to be paid within 14 days if accepted by the claimant. If the offer is rejected, the claim could go to a neutral mediator taken from a pool of experienced professionals approved by attorneys for both sides, who would work to facilitate settlement. If that mediator is unsuccessful, the claimant could opt for a hearing by a three-member mediation panel, the composition of which must include at least one woman, at least one expert in dispute resolution, and at least two experts in employment law. The hearing could be closed or open at the claimant's option, and Smith Barney would pay the costs of mediation and up to \$5,000 in attorneys' fees for each of the second two stages. Unlike other class action settlements, this agreement puts no limits on damages. The district court later approved of most of the terms of the settlement but refused to approve the ADR provisions until those provisions were more "well-defined." Martens v. Smith Barney, 77 F.E.P. Cases (BNA) 532 (S.D.N.Y. 1998).
- **MITSUBISHI MOTOR MANUFACTURING OF AMERICA:** Mitsubishi Motor Manufacturing of America agreed to settle the claims of 27 women who filed a sexual

harassment suit in 1994 alleging that they were subjected to a hostile work environment at the automaker's Normal, Ill., plant. The terms of the settlement agreement are confidential. According to published reports, the company agreed to pay \$9.5 million to settle the suit, and the settlement will provide some plaintiffs with as much as \$500,000. Citing the confidentiality agreement, sources on both sides refused to confirm those reports. Under the settlement, Mitsubishi plans to contribute \$100,000 to not-yet-identified women's causes in the Bloomington-Normal, Ill., area. Mediation was "very helpful" in resolving the claims of the 27 plaintiffs, Delta's counsel said. He praised retired federal judges Prentice H. Marshall and James R. Carrigan, who acted as mediators, for "getting the parties closer" and Judge Michael M. Mihm of the U.S. District Court for the Central District of Illinois for "push(ing) it over the goal line."

- **MARTIN MARIETTA CORP.:** Martin Marietta Corp., now Lockheed Martin, agreed to pay \$13 million in back pay and restore 450 jobs over five years at an estimated cost of \$171 million in a settlement of an age discrimination lawsuit. Judge Wiley Y. Daniel of the U.S. District Court for the District of Colorado gave preliminary approval to a consent decree in the class action case covering an estimated 2,000 employees fired from nonunion jobs at Martin's astronautics group between Jan. 1, 1990, and Dec. 31, 1994. EEOC's suit, originally filed in May 1994, charged that the company violated the Age Discrimination in Employment Act by targeting its employees aged 40 and over for a series of massive layoffs and forced retirements over a five-year period. In announcing the settlement, EEOC Chairman Casellas praised the work of mediators who produced the out-of court result. He noted that the settlement was obtained years before a resolution might have been reached had the case gone to trial. "This proves alternate dispute resolution and strong enforcement are not mutually exclusive," he said. Martin said it agreed to settle the case "to mitigate the costs of the likely protracted litigation that occurs in cases of this nature."
- **MONSANTO AND CHEVRON CHEMICAL COS:** Monsanto and Chevron Chemical Cos. agreed to pay 43 former employees \$18.25 million to settle a lawsuit in which the former employees and the Equal Employment Opportunity Commission alleged age, race, and disability bias. The settlement will compensate the former employees for back pay, other lost earnings, and tort-like damages, including emotional distress, according to a consent decree approved by Judge George F. Gunn of the U.S. District Court for the Eastern District of Missouri. Neither Chevron nor Monsanto admitted any wrongdoing by signing the agreement. The companies also agreed to provide a minimum of four hours of training to individuals responsible for employee-performance evaluations and hiring, and firing, according to the decree, which is effective for three years. The agreement settles a lawsuit filed in June 1994 by 43 former employees claiming race, age, and disability bias in violation of the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act. EEOC later joined the suit in support of the plaintiffs, with an additional claim alleging that the companies destroyed employment records that contained information relevant to hiring decisions. The settlement was reached after months of negotiations, including sessions

with a private mediator, according to the joint statement. EEOC Chairman Gilbert Casellas commended the plaintiffs' private lawyers, mediation personnel, and the company representatives. "This settlement not only represents significant relief to the parties, but shows that mediation and strong enforcement are not incompatible," he said.

Appendix "D"

Summary of EEOC Mediation Program

- The EEOC recently launched its new mediation program. The option to mediate employment discrimination claims is voluntary and will be "offered to as many charging parties as possible," according to an EEOC spokesperson. Some 400 discrimination charges filed with the Equal Employment Opportunity Commission will be offered for resolution through mediation under an agreement between the commission and the Federal Mediation and Conciliation Service. Approximately 50 FMCS staff throughout the country will mediate charges filed with EEOC's 25 district offices. EEOC district offices will identify charges suitable for the mediation process. According to the EEOC, the ideal type of charge for mediation is a situation where the employee is still employed by the employer and has an immediate interest in working out a solution. Not all charges are considered by the agency to be suitable for mediation. For example, charges that represent a pattern and practice of discrimination and cases that impact a class of individuals are not suitable for EEOC mediation. Also charges that fit into the national and local enforcement plans probably would be excluded. According to the agency, once a charge is identified as one for possible mediation, the EEOC district office will extend an offer to mediate to the charging party. If accepted, the offer will extend to the employer. If both sides accept, an acknowledgment is sent to EEOC headquarters, which would then send the case to FMCS for mediation. Before the mediation begins the parties will be required to sign an agreement specifying that they will participate in the mediation program and that they have been informed that the proceedings are confidential. Each mediation may last a maximum of 60 days, but if no agreement is reached at that point, the charge will be returned to EEOC and considered a new charge.

Appendix “E”

Summary of GAO Report on Mediation

- Interest in alternative dispute resolution continues to grow in both the public and private sectors and participants are generally satisfied with its results, according to a General Accounting Office report. GAO, the independent research arm of Congress, reviewed the experiences of five federal agencies and five companies in an Aug. 12 report to the House Government Reform and Oversight Subcommittee on Civil Service. Most of the private and public institutions studied had data showing that ADR programs--especially mediation--“resolved a high proportion of disputes, thereby helping them avoid formal redress processes and litigation.” The limited data that organizations had gathered on their ADR programs showed that mediation, peer panels, management review boards, and arbitration “all appeared to contribute to the resolution of workplace results,” according to the report. “Although comprehensive data were lacking, ADR was perceived to have saved time and money,” GAO said. “Mediation appeared particularly useful, leading to resolution in a high percentage of cases” at all but one of the institutions. The review was conducted between July 1996 and April 1997. Internal evaluation of ADR by the employers was limited, GAO found, but employers said they intended to continue using the approach and “believed it was worthwhile.” Some of the lessons organizations reported learning from their experience with ADR was the importance of top management commitment, involvement of employees in the development of the program, the advantage of early intervention, and the necessity to balance the desire to settle or close a case against the need for fairness.