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TESTIMONY OF

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WOMEN'S LEGAL DEFENSE FUND
WOMEN WORK!
YWCA OF THE U.S.A.**

submitted to

**COMMISSION ON THE FUTURE OF
WORKER-MANAGEMENT RELATIONS**

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INTRODUCTION

On behalf of a diverse group of organizations representing women across all sectors of the labor force, we are again pleased to testify before the Commission on the Future of Worker-Management Relations. As you know, the women's equity community is broad based, and represents national membership organizations, legal and policy advocacy groups, policy research organizations, and grass-roots groups working for the betterment of women.

Our testimony today will address the third question put before the Commission by the Secretary of Labor:

What (if anything) should be done to increase the extent to which work-place problems are directly resolved by the parties themselves, rather than through recourse to state and federal courts and government regulatory bodies?

The task force of women's groups which we represent today has considerable experience representing women in the equal employment opportunity (EEO) process, and we have spent a significant amount of time and effort reviewing the subject of alternative dispute resolution (ADR). We have met with a number of experts, policy advocates, and interested individuals, read numerous fact-finding reports and other relevant documents, and we have explored the value of both mediation and arbitration as a means of alternative dispute resolution in unionized and non-unionized workplaces.

There are three guiding principles which are essential to any acceptable system of alternative dispute resolution.¹ First, it must provide a proper balance of power

¹ Our testimony is limited to workplace disputes arising from unlawful employment discrimination based on sex, since that is the area of expertise for most of our member organizations. We would urge the Commission to consult other experts for their recommendations about how to strengthen public enforcement of laws in other areas of employment disputes (e.g. minimum wage, overtime, employee benefits law and the like).

between the employer and the employee. Second, accountability to society at large is essential for fairness to the employee and for building appropriate incentives for employers to institute equitable employment practices. Third, the structure of the system must have enough integrity and continuity to encourage use by all parties.

We have reached two broad conclusions: (1) more effort should be put into enforcement of anti-discrimination laws and into prevention of discrimination and its attendant complaints, and (2) the reason for the continuing growth in employment complaints merits extensive, serious review by this Commission since it places a substantial burden on all parties involved and also directly impacts the mission(s) of a number of public enforcement agencies.

Finally, we have determined that ADR, particularly in a private, non-union context, is too complex to fully explore in a short period such as the Commission's current life. We recommend that the Commission continue its exploration of ways to resolve conflict in the workplace with emphasis on enhancing the public systems that are already in place. We support public agency, private employer, union, and public interest sector collaboration on these issues. We believe it is important that advocates for women, who are now the majority of Americans, be included in any continuing exploration of these issues. We believe we can make a valuable contribution, and we would like to be included in any continuing work or working group on ADR.

ISSUES AND RECOMMENDATIONS

I. Prevention of complaints through removal of the cause of complaints should be the first priority of the Commission in addressing dispute resolution.

We believe that the question of dispute resolution can best be addressed by first looking at how to prevent workplace disputes. Insofar as female employees are concerned, these disputes most often center around sex discrimination in hiring, discharge, pay and promotion, and on sexual harassment, including hostile working environments. Enforcement agencies, most especially the Equal Employment Opportunity Commission (EEOC), have a large backlog of cases and are presently lacking both staff and funding necessary to effectively deal with the ongoing flood of complaints. Therefore prevention of complaints should be a priority for the Commission, taking precedence over ways to deal with resolution of complaints once they occur.

To date, the Commission has given insufficient attention to the fact of discrimination in the workplace, focusing instead on inconvenience to the employer in dealing with non-meritorious cases. While we acknowledge that some non-meritorious cases are inevitable in a nation of more than 128 million workers, we ask the Commission to remember that the greatest source of discrimination complaints is discrimination. Indeed, on page 20 of the *Fact Finding Report*, the Commission finds that after such factors as work experience, industry differences or occupation are taken into account there still remains an "unexplained residual gap" in pay between women and men in any given labor market category. Most studies acknowledge that a large part of this "unexplained residual" is due to sex discrimination.^{2 3} Similarly, the

² Women, Work, and Wages: Equal Pay for Jobs of Equal Value, Donald J. Trieman and Heidi Hartmann, eds. National Academy Press, Washington, D.C. 1981.

Commission refers to sexual harassment as an "interpersonal issue." Sexual harassment is indeed interpersonal, but it is a violation of civil rights laws and should be given the serious attention such illegal conduct deserves.

There are a number of lines of inquiry the Commission can pursue and steps the Commission can recommend that would reduce the incidence of discrimination, and thereby reduce the incidence of formal complaints.

Recommendations:

1. *Give employees easier access to unions.* Much previous testimony has been directed at ways to increase access to union representation for employees. We believe this is crucial for decreasing the level of conflict in the workplace, thereby decreasing the number of complaints. The Commission correctly points out that public opinion surveys have long made it clear that most Americans approve of unions in general and the right of employees to join a union, and that women often express a greater preference for unionization than men. The Commission finds that only 45 percent of nonunion firms have some form of employee grievance procedure, in contrast to 98 percent of all unionized firms, and further finds that "in most workplaces with collective bargaining, the system of labor-management negotiations works well. Conflict is relatively low, and unions and firms have developed diverse forms of cooperative arrangements."³ This being the case, one way to increase conflict resolution by the parties themselves rather than by recourse to court proceedings and regulatory bodies is to increase the number of workplaces in which employees are represented by unions. The fact of union representation apparently increases the employer's incentive to settle disputes, and

³ Pay Equity: Empirical Inquiries, Robert T. Michael, Heidi Hartmann, and Brigid O'Farrell, eds. National Academy Press, Washington, D.C. 1989.

⁴ Fact Finding Report, Commission on the Future of Worker-Management Relations, U.S. Department of Labor, May, 1994, p. 64.

increases the likelihood that the employee complaint will be settled to the employee's satisfaction long before litigation is necessary.⁵

Further, many unions have negotiated effective EEO and affirmative action programs and/or have secured significant discrimination "remedies" – e.g., wage rate adjustments for women's jobs, integration of seniority lines, job posting and expanded training opportunities – through collective bargaining and other concerted activities. These achievements reflect both the prophylactic effect of unionization in averting individual and class claims of unlawful discrimination, and also the effects of creating a more equitable balance of power for the employee – leveling the playing field.

The Commission correctly points out that it is increasingly difficult to write and enforce standard regulations that fit well with a workforce containing many part time and contingent workers, and small employers with 15 or fewer workers who are not covered by the EEOC. We have testified previously as to the importance of giving these workers access to representation and protection of existing laws. Indeed, any conflict resolution scheme that can be devised is meaningless to workers who have been "defined out" of the system by virtue of their non-standard employment arrangements, or the size of their workplaces.

2. *Remove the caps on damages for sex discrimination in the 1991 Civil Rights Act by passing the Equal Remedies Act now before Congress.* The 1991 Civil Rights Act contains caps on damages that may be awarded to employees who have proved gender and certain other types of discrimination. These caps have the effect of establishing a "fee schedule" for discrimination. Employers can continue discriminatory practices that save them money (but cost employees) for years before a complainant is successful in

⁵ While no one knows for sure how many grievances are handled by unions in a year, one of the most reliable estimates comes from Lewin and Peterson (The Modern Grievance Procedure in the United States, 1986), indicating that the number is somewhere between 7 and 11 million.

proving discrimination. When these savings are balanced against a known fine, particularly if combined with the low probability of successful litigation by employees, the *expected value* of discrimination becomes higher than the *expected value* of the fine. In other words, it is cheaper to discriminate and pay an occasional fine of known amount (a mere cost of doing business) than to correct the discriminatory practices.⁶

If there were no caps on damages for discrimination, prevention of discrimination might become the most cost-beneficial alternative for employers. To use a simple analogy, you and I are less likely to park illegally if we know the fine is \$150 instead of \$5. In the Commission's own words "The prospect [of six or seven figure awards] does serve as a deterrent to improper management decisions. . ."⁷

3. *Make enforcement of existing laws tougher.* It is generally recognized that the anti-regulatory environment of the 1980s produced an atmosphere of lax enforcement of employment laws. Some employers undoubtedly responded to this environment with decreased attention to practices that lead to worker complaints, particularly where no union was present to monitor such activities. Just as employers are less likely to discriminate if they know they will be punished, some may actually increase discriminatory activity if they know that agencies lack enforcement resources.

That existing structures for enforcement of the EEO laws do not work well is no accident or mystery. Although there have been increases in the number of complaints due to additional jurisdictions, existing structures do not work because they were

⁶ The damages caps in the 1991 Civil Rights Act work a particular disadvantage on women and disabled workers, whose federal remedies are limited to those in Title VII and the Americans with Disabilities Act, as amended by the 1991 CRA. African-Americans have causes of action under the post-Civil War statutes, which do not include damages caps.

⁷ Fact Finding Report, Commission on the Future of Worker-Management Relations, U.S. Department of Labor, May, 1994, p. 113.

deliberately undermined with a starvation of resources and by specific policies that created non-enforcement at both the EEOC and the OFCCP. Likewise, the means of repairing the problems at these agencies is no mystery. By increasing resources devoted to enforcement activities, increasing the number of enforcement staff, and changing enforcement policies to increase class actions and other aggressive enforcement tools, these agencies can be turned around. Agency changes are discussed at length in section III.

4. *Require increased disclosure of employment statistics.* Employees now suffer from an information imbalance. Employers are able to learn virtually everything about the employee, including credit records, traffic tickets, smoking behavior, past salaries and health information. Employees often cannot get the most basic information about employment practices, such as number of females in a given job classification or average salary levels for different job classifications. This information imbalance directly addresses the Commission's question as to how the level of trust and quality of the relationships among workers, labor leaders, managers, and other groups in society and the workplace can be enhanced.

On page 126 of the *Fact Finding Report*, the Commission makes the seemingly unsupported statement that as much, if not more, of legal expenditures in employment disputes are borne "by law-abiding employers defending themselves against non-meritorious claims and going through all the internal procedures and paperwork needed to demonstrate compliance" as are borne by guilty employers. Disclosure of relevant employment statistics would surely cut down on conflict and litigation. Exactly what form these statistics should take is beyond the scope of this testimony, but even low-level disclosure such as an expanded EEO-1 form recommended by the GAO in 1981^a

^a Further Improvements Needed in EEOC Enforcement Activities, HRD-81-29, United States General Accounting Office, April 9, 1981.

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showing the number of males and females by race and ethnicity in each job category along with wage data in each would be valuable. As it stands now, employees who suspect discrimination in pay or promotion, for example, have no way to know whether their fears are unfounded. With proper statistics readily available, potential plaintiffs could see whether their claims would likely be successful. The same statistics could be used by potential defendants to monitor their own practices and avoid inequities that could lead to complaints and litigation. Disclosure requirements such as these are contained in the Fair Pay Act (H.R. 4803) now before Congress.

We agree with the Commission that employees can play a valuable role in enforcing the laws when properly trained, equipped, and organized. But for employees on the job to be in a good position to monitor whether their employers are complying with the government's standards and engaging in fair employment practices, they must have sufficient information.

II. In equal employment opportunity disputes that cannot be prevented, the government's role should be to facilitate enforcement of laws and quick resolution with a publicly administered system; an option to consider is publicly administered voluntary ADR through existing enforcement agencies. We do not recommend, and indeed would oppose the Dunlop Commission's proposing at this time that any new, private, system for resolving employment disputes be created, or establishment of any mandatory public system of ADR.

We believe statements in the Commission's *Fact Finding Report* support this view:

Employment law, [in contrast to labor law] focuses on issues that are felt to be sufficiently vital to the body politic not to leave to private negotiations -- whether individual or collective. Some such concerns are directly financial: (e.g. what are the minimum wages that should be paid to people at work (under FLSA), and what must be done to insure the value and security of retirement income

promised for the future (under ERISA)). But as described above, many employment laws tend to focus on value-laden issues like racial and gender discrimination, occupational hazards, privacy invasions, and the like. Public policy holds that all employees have equal protection against denial of their rights in these areas, whatever their (or their employer's) market power.⁹

...these laws created public rights that could not be waived or altered by private agreement, and they entrusted interpretation and enforcement of the law's terms to a body selected by and accountable to the broader community, not the parties to an immediate dispute.¹⁰

The women's equity and civil rights communities have fought for 30 years for the protections afforded by our employment laws and the public agencies to administer and enforce those laws. Indeed, it was only with the enactment of the 1991 Civil Rights Act that victims of on-the-job sex discrimination became entitled under federal law to have their cases heard by juries, and to seek compensatory and punitive damages in some cases.

The fact that the mechanism for enforcement has been starved for lack of resources and deliberately undermined by explicit policies while having enforcement responsibility significantly increased does not serve as evidence that a new system should be created, but rather that existing systems should be given the resources to function effectively.

There is now a disturbing trend in non-unionized employment settings in which employees are being coerced into signing pre-employment binding arbitration agreements under which they must submit all future employment-related disputes, even Title VII discrimination claims, to arbitration rather than go to court. The Supreme

⁹ Fact Finding Report, p. 109.

¹⁰ Fact Finding Report, p. 116.

Court decision in Gilmer¹¹ has spurred usage of this practice in the securities industry (in which Gilmer arose) as well as in other industries. Moreover, when an employee has agreed to such a pre-employment prospective waiver of her rights, she must also abide by the terms of arbitration, such as who selects the arbitrator and the procedures of the hearing that the employer established in the pre-employment agreement. This is particularly alarming when taken with the finding by the General Accounting Office that approximately 89% of arbitrators used in the securities industry in 1992 were white men with little experience in labor law.¹²

Critics say this procedure privatizes the civil rights of complainants, and we agree. The Commission's own finding in citing the Lewin study of grievance procedures in non-unionized settings reinforces the view that private ADR is a perilous course for employees.¹³ The study found that senior management usually made the final judgment about whether to uphold or reverse the personnel decisions being challenged by an employee, and that nonunion employees faced significant risks in their future prospects with the firm if they took issue with their supervisor's action through such a review process.

We have other significant concerns about the effect of private, non-union ADR on employees' ability to vindicate their EEO rights, even in cases where it is not compelled as a condition of employment. ADR practitioners (arbitrator, mediator, ombudsman, or other) may experience undue influence in deciding cases, particularly

¹¹ Holding that an employee could be required to waive the right to sue for age discrimination and be required to submit his complaint to binding arbitration as a condition of employment.

¹² "Arbiters of Bias in Securities Industry Have Slight Experience in Labor Law," The New York Times, April 5, 1994.

¹³ Fact Finding Report, p. 116 citing David Lewin, "Grievance Procedures in Nonunion Workplaces: An Empirical Analysis of Usage, Dynamics, and Outcomes," 66 Chicago-Kent Law Review 828, 1990.

where their livelihood depends on being rehired by the employer. Because many lack substantive knowledge of anti-discrimination law, legal issues and statutory rights may get lost in compromise:

- Basic due process protections, such as notice, at least some right to discover information about the employer's case, and the right to have the outcome of arbitration reviewed by a court where appropriate, may not be afforded the employee.
- The ADR practitioner may not award or take into account the full remedies available under law, such as compensatory and punitive damages now available under Title VII. This deprives victims of discrimination of the remedies to which they may be entitled and dilutes the deterrent value of the law.
- The employee may not be allowed to be represented by an attorney or other representative in the ADR proceeding.
- An employee may feel pressured into agreeing to submit her claim to ADR because she wants to mitigate the animosity that her filing the claim created in her working environment -- or, simply, because the extreme difficulty in retaining an attorney or in getting the EEOC or other public agency to respond makes her believe that ADR is her best alternative.
- Companies may use the system in bad faith as a barrier to justice for the employee. For example, the complainant may find herself having to prove that the arbitration procedure is biased before she can proceed to the next step, placing an additional barrier in the way of resolution. Or, the employer's incentive may be to reduce legal fees and awards, not to obtain a quick resolution of the dispute. Finally, the employer may attempt to retaliate against an employer who attempts to vindicate her rights, and the ADR system may be ill-equipped -- or not equipped -- to deal with such retaliation.
- The process is almost always private, with no written decision, thus no public censure or accountability.
- Employers may simply refuse to comply with the terms of the settlement, and employees' avenues for enforcement may be limited or non-existent.

We strongly oppose expanded use of mandatory arbitration in the equal employment opportunity law context. The Supreme Court recognized twenty years ago, in *Alexander v. Gardner-Denver*, the preeminent role of federal courts in determining issues of liability and relief under Title VII, and the general unsuitability of the arbitral procedures for resolving discrimination disputes. *Gilmer* notwithstanding, nothing has changed in the nature of arbitration since *Gardner-Denver* that renders arbitration a more suitable vehicle for resolving discrimination disputes. The government should never give its imprimatur to employers to coerce individual workers, particularly women workers who are not protected by a union, to choose between agreeing to ADR and their jobs.

Certain situations, such as some class actions or cases bearing on significant policy questions or that may have precedential value, are especially ill-suited to ADR in any context, and should not be subject to ADR.

Recommendation:

We support, and recommend that the Commission support, legislation similar to the bills recently introduced by Representative Schroeder and Senator Feingold that make it illegal for employers to obtain voluntary or involuntary arbitration agreements before a dispute arises and that makes unenforceable pre-dispute arbitration agreements to resolve employment discrimination claims.

III. Public systems exist for enforcement of employment law, and these system have the potential to greatly reduce the number of workplace complaints as well as facilitate the handling of complaints that do arise. Unlike private ADR systems in non-union settings, these systems have both accountability and continuity .

We have identified a number of promising avenues for innovation using public sector systems that are already in place with specific mandates to prevent discrimination in the workplace and resolve disputes that arise, and we know that this list is not exhaustive. We urge the Commission to investigate these and other avenues and, in doing so, to formally solicit the views of those agencies whose jurisdictions and missions are implicated by the Commission's proceedings. Specifically, the Commission should further explore:

1. *Increasing the amount and specificity of information submitted on the EEO forms, such as including wages by employment category, gender, and race.* This could cut down on non-meritorious complaints and cause employers to engage in management practices to prevent discrimination. It has long been recognized that EEO forms are insufficient to detect sex and race discrimination, particularly in pay. As stated previously, the GAO recommended expansion of EEO-1 as long ago as 1981 to facilitate enforcement.¹⁴ Such reporting would impose no additional burden on employers, since compensation records are already kept and no business is ignorant of what its employees are paid.
2. *Devoting resources at the Equal Employment Opportunity Commission to targeting systemic discrimination and bringing class actions, thereby reducing the number of workplace violations and attendant complaints.* The EEOC has now had 30 years of experience with workplace discrimination and discrimination complaints, and the agency knows which practices indicate likely violations.

¹⁴ Further Improvements Needed in EEOC Enforcement Activities, HRD-81-29, United States General Accounting Office, April 9, 1981.

If Commissioner's charges could be filed based on testing or on probable violations after reviewing the EEO-1 forms and other compliance information, employers could be confronted with their own numbers and motivated to change discriminatory practices. In addition, EEOC should conduct random audits of employers not covered by federal contract compliance obligations to investigate such employers independent of specific individual complaints. Increased use of technology would facilitate this process and help the agency deal with repeat violators; computers now allow the EEOC to detect employers with a history of complaints.

Additional resources should also include systemic follow-up of conciliation agreements, court orders, and consent decrees. There is currently no system for monitoring these agreements, therefore no data on final outcomes. Compliance should be monitored beyond dollar settlement payments (i.e. Have employment and workplace conditions changed as a result of these actions?).

3. *Instituting mechanisms for collaboration and cooperation between agencies.* Employers who are violating the law in one area (such as wages or safety) may be violating the law in other areas. Reviews and enforcement actions by other agencies (e.g. OSHA or the Wage and Hour Division) are likely to turn up information that suggests a review of the employer's fair employment practices is in order. For example, while inspecting a work site where there is exposure to toxic chemicals, the OSHA inspector may note that there are no women -- is this because the employer has excluded all women of childbearing age, a clear violation of Title VII?

4. *An improved quick-response system for tracking cases and case disposition.*

Restructuring the charge processing system and eliminating the backlog are critical to an effective EEOC. Based on our experience with charge processing and our review of the GAO report concerning the "rapid-charge" system that was used in the past, we

believe an improved quick-response system for tracking cases and case disposition should be investigated, particularly in light of technology now available.

5. *More aggressive public education programs.* One example of public education would be EEOC and other EEO enforcement agencies instituting high-profile public relations campaigns to inform the public of awards paid by companies that have been found to discriminate. In addition to strong enforcement efforts, the agencies should also insure through aggressive public education that employers know their obligations and employees know their rights under EEO laws.

6. *Continue to experiment with and evaluate alternative methods of resolution of EEOC charges.* One example is the EEOC's pilot mediation program in which certain claims of discrimination are handled through mediation prior to the EEOC's investigating those claims.¹⁵ Other options such as the establishment of an in-house arbitration service (for use on a voluntary basis) at the EEOC should be investigated, since one of the most difficult issues to deal with in private ADR is possible bias on the part of arbitrators, and the inherent power imbalance that comes from the employer hiring the ADR practitioner directly. These uses of ADR may well be beneficial to employees -- by providing them with less costly, quicker, and more accessible methods for resolving their disputes with their employers. Before any such programs are made permanent, however, they must be evaluated carefully to insure that charging parties are not receiving lower average backpay awards than charging parties not participating in such programs.

¹⁵ To date, this is a relatively small program. According to data we have received, only 920 cases were considered appropriate for mediation through this program (compared to a total yearly intake EEOC intake of over 80,000 cases). Both the employer and employee agreed to mediation (a precondition for mediation to go forward in this program) in only 34 percent of the 920 cases; of those, just over half (156) were resolved through mediation and the other half were returned to the usual EEOC process.

7. *Increasing funding for and use of city, state and county civil and human rights commissions.* Such fair employment practice bodies, which are usually established by law or ordinance and may be funded in part through grants from the EEOC, allow citizens access to a publicly administered grievance procedure in employment discrimination cases. Many cases are resolved during the investigation process before a hearing takes place, and because the final hearing is public, the respondent has an incentive for quick resolution.¹⁶ Indeed, it is common for Commissions to resolve cases within 180 days of the complainant's filing.¹⁷ The entire investigation remains on the local level, so employees are not subjected to the federal court system which may be intimidating.

8. *At the Office of Federal Contract Compliance Programs, the new, aggressive enforcement policy that has recently been put in place should be reinforced* with steps such as dramatically increasing its enforcement staff (down over 50% from its level 14 years ago), and expanding the sanctions that the OFCCP can impose on contractors that violate the Executive Order to include debarment for a minimum fixed term, withholding of progress payments, and remedial monetary sanctions.

Recommendation:

We recommend that Congress appropriate sufficient funds for public agencies to function in accordance with their mandates to end employment discrimination.

Recognizing that the government must operate in a fiscally responsible manner, such appropriation would save billions of dollars lost by employees to discriminatory practices, and save a like amount in litigation costs for both employees and employers.

¹⁶ Eighty percent of the cases before the Public Employment Relations Board (PERB) in the state of New York are settled in mediation. Source: Richard Curren, Office of Conciliation, PERB, Albany, New York, personal communication.

¹⁷ Dr. James McClellan, Director of the Alexandria, Virginia Human Rights Commission, personal communication. Ninety percent of Alexandria's case load is employment discrimination cases.

IV. Since private companies are free to create alternative dispute resolution systems as they choose, it is important that basic protections be mandated for employees when such systems are created and used, and that abuses in such systems be sharply curbed. We believe that employees pursuing EEO claims through such systems should be able to preserve their right to seek redress through legal channels should private ADR fail to safeguard their rights.

Any dispute resolution system relied upon or subject to review by an enforcement agency such as the EEOC should have built-in procedures for monitoring outcomes, to ensure not only that these safeguards are met but also that the agency's mission to end employment discrimination is fulfilled. Specifically, the EEOC should ensure that ADR-participating employers that discriminate unlawfully are properly deterred from continuing to discriminate, and that ADR-participating employees that are the victims of discrimination receive appropriate relief.¹⁸

In the matter of constructing a workable and fair private non-union ADR system, we believe the inherent power imbalance between the employee and employer may be a fatal flaw. For example, there is no obvious solution to the question of who pays for the services of the ADR practitioner. If the employee is required to pay an equal share with the employer, the cost may be prohibitive. If the employer is required to pay the full share or even most of the cost, the practitioner may be biased in favor of the deeper pockets of the employer. Similar problems arise in the question of who chooses the ADR professional, and by what method.

There are other substantive safeguards that should be required of any private ADR system used for EEO complaints:

¹⁸ For example, the EEOC should regularly monitor the average back pay and other awards for charging parties in ADR and compare it to the average for charging parties not in ADR, to evaluate the two systems and to ensure that those in ADR are getting a "fair shake."

- All forms of ADR must be fully voluntary for both parties. We strongly oppose expanded use of mandatory arbitration in the EEO law context. Employers should not be able to coerce individual workers, particularly women workers who are not protected by a union, to choose between agreeing to ADR and their jobs. We thus support making it illegal for employers to obtain voluntary or involuntary arbitration agreements before a dispute arises, and making unenforceable pre-dispute arbitration agreements to resolve employment discrimination claims.
- The ADR practitioner must have and apply substantive expertise in the substantive law at issue (such as equal employment opportunity law); arbitrator errors of law should always be reviewable grounds for the employee to challenge the ADR outcome.
- Arbitrators should be authorized to give (and other ADR practitioners should consider) all of the remedies available under law, including punitive and compensatory damages, and their failure to award or include in the negotiations the possibility of such damages should be grounds for overturning the ADR agreement.
- Employees must be given the opportunity to be represented by counsel or other representatives (e.g. unions, women's advocacy, civil rights groups); those who are not so represented must be given sufficient information about the law, remedies, and their rights to make informed choices, and sufficient time to consider the information to determine whether to go forward.
- The importance of a neutral decision-maker cannot be overstated, and judicial review of the outcome of any ADR should always be available to challenge a biased decision-maker or process.
- To protect against the inherent bias of the ADR practitioner stemming from the "repeat user"¹⁹ problem, especially in non-union settings, the employee should always have a role equal to that of the employer in choosing the ADR practitioner.
- Basic "due process" concerns such as notice and access to relevant information, and additional circumstances in which judicial review is appropriate, must be addressed before arbitration should be enforceable.

¹⁹ Where ADR practitioners may knowingly or unknowingly exhibit a bias in favor of the employer in order to be hired in the future.

Recommendation:

To protect against abuse and to safeguard the rights of the employees who are using ADR, we urge the Commission to propose adoption of a series of limitations on ADR, whenever it is used in the EEO context. If resolution of a case through ADR does not contain these safeguards, it should be unenforceable. These safeguards should be adopted by Congress and used by the EEOC and other enforcement agencies to evaluate privately arrived at settlements of employment discrimination disputes.

CONCLUSION

We have determined that ADR, particularly in a private, non-union context, is too complex to fully explore in a short period such as the Commission's current life. We recommend that the Commission continue its exploration of ways to resolve conflict in the workplace with emphasis on enhancing the public systems that are already in place. We support public agency, private employer, union, and public interest sector collaboration on these issues. We believe it is important that advocates for women, who are now the majority of Americans, be included in any continuing exploration of these issues. We believe we can make a valuable contribution, and we would like to be included in any continuing work or working group on ADR.