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TRANSFORMING WORKPLACE CULTURE THROUGH MEDIATION: LESSONS LEARNED FROM SWIMMING UPSTREAM

*Cynthia J. Hallberlin**

Good evening and thank you Professor Bush and Dean Rabinowitz for inviting me to come and speak today. It is an honor and a privilege to speak to this group. I would like to begin by telling you a little bit about where I have come from as a way of explaining where I am going as an alternative dispute resolution (“ADR”) systems designer. I graduated from Antioch Law School and like many of you who are law students or lawyers, I was trained to be a trial attorney. During law school, I worked at the National Labor Relations Board and graduated with a strong interest in labor and employment law, which lead me to the Office of Labor Law at the United States Postal Service (“Postal Service”). I was a trial attorney for about a dozen years, litigating before a variety of federal courts and administrative tribunals, before I defended two cases that changed my perspective of myself “as trial attorney extraordinaire.”

The first case involved the Postal Service’s Inspection Service, a department that investigates postal-related crimes. Employees at the Inspection Service cannot be hired after the age of thirty-seven. In this case, a Latino man applied to become a Postal Inspector at the age of thirty-five and a half. The application process dragged on for eighteen months because of a series of mishaps by the Postal Service, who lost his medical records, sent him back for more medical tests, and misplaced other information. By the time the process was completed, the applicant turned thirty-seven and was rejected because of his age.

Upset with this rejection, the applicant sued the Postal Service for national origin discrimination, and under the theory of disparate treatment, he pointed to a thirty-five year old African-American female who applied the same week, and was hired as a Postal Inspector in only

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six months. After three days of trial in Federal District Court, I closed my case by arguing that, while the Postal Service may have been guilty of bureaucratic bungling, it did not treat this applicant in a discriminatory manner. In his decision, the judge noted that he had never seen such egregious incompetence, but also admitted that there was no evidence of intentional discrimination. Surprisingly, two weeks later I received a letter from the plaintiff stating that he appreciated the way I handled the defense of his case and that he understood and regretted not having the opportunity to have had the case explained to him the way I explained it in court. If he had understood the issues from the beginning, he would have never initiated a lawsuit. I found this admission remarkable and began to question the purpose of my litigation strategy.

About a year later, I had another trial which led me to question litigation as an effective tool in resolving workplace disputes. In a Midwestern city, an employee in human resources sued the Postal Service for age discrimination after she was denied a promotion. This woman was an extremely difficult employee. She picked fights and argued with anyone and everyone in her office and to top it off, she was a compulsive liar. This enabled me to use my "Perry Mason" routine and impeach her testimony several times. By the time her cross-examination ended, her credibility was shattered. Later that evening, feeling energized by my courtroom triumph, I received a call from opposing counsel who at this point was desperate to settle. At first I hesitated, and then I told opposing counsel I would call my client. After my client congratulated me for doing such a fine job, I asked him what outcome he preferred in this case. He stated that he could not bear the thought of working with "that woman" again the following Monday. I then realized that the essence of "victory" was not a ruling on the issue of discrimination, but rather the plaintiff's immediate resignation. I ended up settling the case on these terms which made my client extremely happy.

These cases led me to consider that the real "winners" in litigation are the lawyers and the real "losers" are both parties. I began to understand that even if the Postal Service wins on the legal merits, both parties often have to continue an employment relationship where they have to spend forty hours weekly with people whom they did not like before the trial and, most certainly, cannot stand after a trial.

Several months later, after returning from maternity leave, I was dispatched to Florida to investigate and take depositions in an interminable class action lawsuit. The suit had been settled years before with a consent decree that was about to expire, and Plaintiff's counsel

had alleged numerous breaches of that settlement. After I had deposed numerous Postal Service employees, I was left with the feeling of how disenfranchised and unhappy these employees seemed. The Postal Service had recently restructured and had significantly reduced the number of Equal Employment Opportunity (“EEO”) counselors. The remaining counselors were scattered, leaving many employees feeling isolated. Returning to Postal Service headquarters, I suggested that we might find a better way to handle these complaints. Instead of throwing money at the problem, we could try to build a better mousetrap by offering employees mediation in lieu of traditional EEO counseling.

My supervisors in the Postal Service Law Department agreed and we convinced opposing counsel to include in the final settlement a new mediation program that would use exclusively outside mediators. This is how REDRESS™ began in three small cities in Florida. I also gave this new mediation program a name: REDRESS™, which stands for Resolve Employment Disputes, Reach Equitable Solutions Swiftly. I believed it was important to give the program an identity that would also describe its purpose and delineate it as a new initiative.

As soon as REDRESS™ began in 1994, it had an immediate impact. Employees were given the opportunity to meet face-to-face with the person with whom they had a problem. Mediations were scheduled within weeks after discrimination complaints were filed. Employees reported great satisfaction with the process. As the anecdotal evidence accumulated, there seemed to be a groundswell of interest in REDRESS™ and more cities asked for this program. REDRESS™ spread to over twenty cities during the next eighteen months. In an organization where mail was counted by the inch and delivery was counted by the minute, I knew I needed to be able to quantify the positive effects of REDRESS™ to solidify management support. With this goal in mind, I teamed with Professor Lisa Bingham at Indiana University to design an outcome study for the REDRESS™ program.

Professor Bingham traveled to Florida and conducted interviews to explore the impact of mediation on employees and supervisors. The results were remarkable. Ninety-two percent of supervisors, many of whom had been through more than one mediation, reported that they could understand and communicate better with their employees, and sixty-two percent of employees reported the same results.¹ I took this evidence back to the Postal Service’s management committee and they

1. Jonathan F. Anderson & Lisa Bingham, *Upstream Effects From Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS*, 48 LAB. L. J. 601, 607-08 (1997).

were greatly encouraged by these results.²

Management's receptivity to REDRESS™ was facilitated by the General Accounting Office's well-publicized report on the many problems in the Postal Service workplace culture. Facing political pressure to improve these problems, the Postmaster General seized on the REDRESS™ data and within a week handed me 105 full-time positions, \$22 million dollars and a mandate to roll REDRESS™ out nationally making it available to all postal employees who sought equal employment opportunity counseling.

And that is not all. REDRESS™ was charged with the mandate of both resolving EEO complaints and improving workplace culture. Almost overnight I needed to decide how to fulfill this mandate and accomplish these goals. I turned to Professor Baruch Bush and Joe Folger's book *The Promise of Mediation* and chose their transformative framework as the exclusive approach for REDRESS™ mediations³ I had read the book several years ago and became convinced that the power of the ideas expressed in transformative mediation held more potential for change in the workplace than any other approach. I knew almost any type of mediation could result in "settlements," but the Postal Service wanted more. Postal management wanted to improve the workplace environment by enhancing employees' communications skills. I needed more than "deals." I was looking for improved relationships. So I made a bold decision to use transformative mediation as the exclusive model in REDRESS™ mediations.

Implementing the transformative model was a significant shift for the Postal Service, which was operating under a par-military structure of command and control. A transformative mediator's primary goal is not settlement—but rather to help the participants reach clarity about their concerns and to recognize each other's position and interests. In other words, if the parties want to settle, that is fine, if it comes from their impetus, their power, and their capacities, rather than settling in response to the mediator's urging. This non-directive approach was foreign to the Postal Service; an organization based on a hierarchical authority.

To make this work, the REDRESS™ team hired Professors Bush and Folger to design a model advanced transformative mediation curriculum, trained ninety trainers who were dispatched to nearly 100 cities training over 3,000 mediators. Once trained, these 3,000 mediators

2. See *id.* at 608.

3. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

were then required to do a *pro bono* mediation where they were evaluated by a REDRESS™ staff person to ascertain whether or not they were practicing within this framework. Each mediator was given feedback after their session and maintained on the roster if they exhibited an understanding of the model. If not, the mediator was evaluated again or removed from the roster. This approach provided the quality assurance I needed to ensure only the best mediators were working for REDRESS™. But that was only part of the challenge. I knew the program needed more than highly skilled transformative mediators.

To ensure the program met its goals, we had to identify indicators that measured more than settlement rates. To do this we created two new concepts: “participation” and “closure.” Participation occurred at the beginning of the process. This was an important indicator since mediation was a voluntary decision by the employee who brought the complaint of discrimination. To maximize the number of people who voluntarily accepted the offer of mediation, we devised a participation rate of seventy-percent which measured the number of employees who when offered mediation accepted it. This rate became a national goal for the entire Postal Service and was tracked on a monthly basis. We knew that to really have an impact, we needed as many people as possible to accept mediation. We also understood that acceptance would be increased if the organization supported the process and encouraged employees to utilize it. By making participation a goal, the program got the support it needed. Today, that participation rate is seventy-four percent nationally.⁴

Although I understood that outcome was important, I did not want to track settlement rates. To do so would have diluted the message that the Postal Service wanted to improve the workplace environment through better communication skills. So I came up with a new indicator: “closure rates.” This is a much broader concept than settlement that included withdrawing, dropping, or settling a complaint as a result of mediation. REDRESS™’s goal was to capture the broadest impact of mediations. Out of the 20,000 cases that were mediated the first two years after full implementation, eighty-percent of them were closed. This meant that only twenty-percent of individuals who had gone through mediation continued their complaint in the formal EEO complaint process. For those employees who did not choose mediation, over twice

4. Kevin Hagen, Acting National REDRESS™ Coordinator, at the Society for Professionals in Dispute Resolution/CREnet Conference, New Mexico (Sept. 15, 2000).

as many, forty-four percent continued in the formal process.⁵ This was an extremely important measure of success, but it did not capture the whole story.

Two interesting trends emerged when REDRESS™ was first implemented. Initially, there was an increase of informal complaints at the Postal Service. I expected this since REDRESS™ was a new program and employees were testing this new approach. However, by the end of the first full year, informal complaints dropped eight percent. I was even more surprised when the number of formal complaints dropped thirty percent after the two years. Formal complaints are filed after an informal complaint is not resolved. Formal complaints must be investigated, with affidavits and document production and can result in a hearing and ultimately a trial in court. In 1997, before REDRESS™ was implemented, there were over 14,000 formal complaints filed. In 2000, less than 10,000 formal complaints were filed. As complaints dropped, the satisfaction level of REDRESS™ participants remained high in mediation. Over 25,000 exit surveys were reviewed by the researchers at Indiana University for analysis. Participants rated the process, the mediator, and the outcome. The results were extraordinary.

First, there was no real statistical significance between the satisfaction of employees and their supervisors in their levels of satisfaction with the process and the mediators. Each group satisfaction was around ninety percent. Both supervisors and employees believed the REDRESS™ process and the mediators were fair.⁶ This satisfaction was reflected in word of mouth reports regarding the program, a critical factor in encouraging participation.

Satisfaction with outcome was somewhat less for both parties—as you might expect, sixty-five to seventy percent—since not every employee's case was resolved. But over two-thirds of employees and supervisors reported that they believed as they left mediation the experience would have a long-term impact on their future relationship with the other person in the dispute. Again, there was evidence that

5. *Hearing Before the House Gov't Reform Subcomm. on Civil Serv. on the REDRESS™ Mediation Program*, 106th Cong. (Mar. 29, 2000) (statement of Cynthia J. Hallberlin, National REDRESS™ Program Manager United States Postal Service).

6. See generally Yuseok Moon and Lisa B. Bingham, *Transformative Mediation at Work: Employee and Supervisor Perceptions*. Paper presented at International Association for Conflict Management, St. Louis, MO, June 20, 2000; Lisa B. Bingham, *Report of the National REDRESS Evaluation Project*, at the ABA Dispute Resolution Section Conference, Apr. 26-28, 2001. Because of the large size of the dataset, slight differences between employees and supervisors achieve statistical significance; however, generally they are not large enough to be meaningful in terms of program evaluation.

mediations had the potential to transform workplace culture.

REDRESS™ success stories spread throughout the country and postal employees started asking for mediation for many types of disputes. This grassroots support and the research findings led to fundamental changes in the Law Department. The General Counsel, Mary S. Elcano, embraced the REDRESS™ program and implemented important changes in the Law Department's approach to dispute management. Shifting the focus from reactive to proactive lawyering. To create this shift, the General Counsel encouraged the use of ADR by issuing "Guidelines for Selecting Cases for ADR," and training attorneys in case selection, client preparation and advocacy in a variety of ADR settings. The Law Department created a new position, Chief Counsel of Alternative Dispute Resolution, to oversee these changes. This new executive position was supported by a team of attorneys who took on the role of "negotiation counsel," partnering with field attorneys as experts on the process of negotiation strategies. The attorneys on this team would often work with field offices to "triage cases" and determine their appropriateness for ADR in accordance with the Law Department's guidelines. This triage process evolved into the piloting of an Early Case Assessment Program for district court cases, which required attorneys to evaluate all cases for ADR within thirty days after filing an Answer. Finally, Law Department management monitored the implementation of ADR by tracking the "ADR attempts" in each field office. In other words, how often cases were recommended for ADR to opposing counsel. In consultation with the General Counsel, each field office established goals for "ADR attempts" and ADR training. Some recommended cases were unable to complete an ADR process because of the reluctance of opposing parties.

In conclusion, I would like to share with you several lessons learned from the experience of designing, implementing and managing the worlds largest employment discrimination mediation program. First, I had to face the realization that institutions, like people, are simply change-resistant. Make no mistake that "conflict" is a big business in this country and in the Postal Service as well. Employees in this industry include lawyers, EEO professionals, labor representatives, unions, contracting officers, EAP professionals and so on. Second, in order to garner support from these employees who are in this "industry," collaboration was essential. I had to cajole, convince and almost beg a wide variety of critical stakeholders. It was clear to me that without their support, or at least acquiescence, REDRESS™ would have never enjoyed success, as the best ideas would have never been enough. Third,

real supporters are created through actual experience, not through direction. My passion and belief in the transformative model could only be transferred to my staff, our mediator roster, and ultimately to many thousands of employees who participated in REDRESS™ because their experience in training and or mediations were meaningful. Before implementing REDRESS™ we trained over 20,000 people in over a hundred cities on the basic tenets of transformative mediation. I firmly believe that it was this training that helped prepare the ground to plant the seeds to make mediation blossom and grow in this institution. Fourth, I learned to think big, but act small. Piloting a program is critical so that there is time to learn from mistakes. And finally, conducting research, evaluating and communicating the results to stakeholders is essential to a program's success.

Before I end my remarks, I would like to share with you what we commonly refer to as "peace stories," real stories in the field that occurred as a result of mediation. "In this case the supervisor told us at some length at the outset that he knew the worker to not be the good worker she had just presented herself to be. The two then went on to argue how bad each were. The mediator caucused after over a half-hour of their mutual harangue. In the private session the worker told the mediator how scared she was as a part-time flexible ("PTF") of the supervisor. In the supervisor session when told of that fear, he recalled having been assaulted once in his career and the fear he felt coming to work every night—the connection. It took an abundance of time and the worker's representative's pleading to convince the worker to even meet together again with the supervisor after her caucus. When they came together, he stood over the worker and we could see her fear, but he extended his hand as he stood there, and apologized profusely to her for having done anything which caused her fear; he explained at some length about his own prior fear—the admission—which humanized him to her. She took his hand—we all cried. He told her his word is his bond, that as long as she remained as a PTF working with him, that she would never have another complaint or reason to fear. Great Stuff.

I would like to close my remarks with the following observation, paraphrasing a line from the newly elected Senator of New York Hillary Clinton: It takes an institution to make significant change. Transformative mediation transformed the lives of postal employees two people at a time, at different tables, in different cities and different communities across the country each day. Not every four to five hour session changed lives, but many did. And one by one each individual experience accumulated, eventually making a difference in the

workplace.

I cannot leave here today without thanking the many REDRESS™ mediators who have traveled on subways and by car to come and hear this lecture and whose work I feel honored to have shared. I would also like to recognize the former REDRESS™ Coordinator of New York, Mitch Sturman, and the current REDRESS™ coordinator, Pam Zuczek who have worked tirelessly to make New York's REDRESS™ program so successful. Finally, I am pleased to recognize the current Director of EEO, Laree Martin who, although she had no involvement in the development or implementation of REDRESS™, is now in charge of its future. I want to thank them all and wish them well as they continue to bring REDRESS™ into the workforce and make a difference.

