EMPLOYEE AND LABOR RELATIONS

INSTRUCTOR'S MANUAL

SHRM®

SOCIETY FOR HUMAN RESOURCE MANAGEMENT

Workplace Dispute Resolution

By Richard A. Posthuma, J.D., Ph.D., GPHR, SPHR

PROJECT TEAM

Author:	Richard A. Posthuma, J.D., Ph.D., GPHR, SPHR
SHRM project contributors:	Bill Schaefer, SPHR, CEBS
	Nancy A. Woolever, SPHR
External contributor:	Sharon H. Leonard
Copy editing:	Courtney J. Cornelius, copy editor
Design:	Jihee K. Lombardi, graphic designer

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For more information, please contact:
SHRM Academic Initiatives
1800 Duke Street, Alexandria, VA 22314, USA
Phone: (800) 283-7476 Fax: (703) 535-6432
Web: www.shrm.org/education/hreducation

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Introduction and Overview

This module is divided into three sections: negotiation, mediation and alternative dispute resolution–arbitration (ADR). It is a three-in-one learning module; instructors can pick and choose parts from one or more modules. Each module includes learning activities.

This module assumes that students have a basic understanding of negotiation and conflict management concepts. It can be used to supplement course work related to negotiation, labor relations, employee relations, collective bargaining, employment law and dispute resolution, etc.

The learning activities allow instructors the flexibility to pick and choose among several different options. For each activity, there are defined learning objectives, a description of the nature of the activity and time requirements.

TARGET AUDIENCE

This learning module is designed to be used with advanced undergraduate or graduate students with some knowledge of the human resource management field.

SEQUENCING

Each section may be taught as a stand-alone learning module. If all three modules are used, it is recommended that the instructor present the information in the following sequence: negotiation, mediation and alternate dispute resolution. Each section includes optional learning activities. In the negotiation section, there are nine activities ranging from 20 to 90 minutes of class time. These are probably best used if they are distributed over several class sessions. There are three activities in the mediation section ranging from 25 to 40 minutes of class time. These could be covered in one or two class sessions. The ADR section should take 50 minutes of class time. This topic can probably be covered in one class session.

The activities are ordered in a sequence that is intended to be most effective for student learning. For example, lecture and explanations of topics precedes role-play scenarios.

NEGOTIATION

The main focus of this module is negotiation—something HR managers do on a regular basis. They may not participate in formal negotiation with a labor union, but they frequently negotiate with subordinates, peers and superiors on many issues. The negotiation section includes several exercises and handouts that deal with more advanced negotiation concepts, such as game theory and logrolling, that are designed to facilitate teaching negotiation as it relates to HR. They are sequenced from the least to the most difficult. Each exercise may be used separately or in sequence.

Recommended Reading

Fisher, R., Ury, W., & Patton, B. (1991). *Getting to Yes.* Penguin Books.

Lewicki, R. J., Barry, B., Saunders, D. M., & Minton, J. W. (2003). *Negotiation, 4th Edition*. Irwin McGraw-Hill.

MEDIATION

Like negotiation, mediation often takes place in informal ways. In fact, HR managers often act as mediators between employees and supervisors. This section includes a checklist of introductory comments for mediators to use in a formal alternative dispute resolution (ADR) process. It also discusses tactics that can help mediators assist parties in dispute to reach an agreement.

ALTERNATIVE DISPUTE RESOLUTION

The third section focuses on ADR and arbitration. More and more, employers require their employees to submit their complaints to some form of dispute resolution process as an alternative to a formal lawsuit or complaint with an administrative agency. A PowerPoint presentation gives guidance on how to design and implement an effective ADR program. Students will be asked to choose from several examples of actual programs and evaluate the strengths and weaknesses of each.

Module 1: Negotiation

INTRODUCTION TO NEGOTIATION

Activity

Lecture and discussion using PowerPoint slide presentation.

Learning Objectives

Students will be able to identify negotiation concepts such as initial offers, target points, resistance points, BATNAs (Best Alternative To a Negotiated Agreement) and distributive (win-lose) versus integrative (win-win) negotiations.

Duration

50 minutes.

WORKPLACE NEGOTIATION ROLE-PLAYS

Activity 1: Negotiating a Dispute Over an English-Only Rule

Learning Objectives

Students will be able to:

- Apply negotiation concepts such as initial offers, target points, resistance points and BATNAs.
- Practice negotiation planning skills.
- Implement effective mediation tactics (optional).

Duration

Preparation:	20 minutes
Negotiation/mediation:	35 minutes
Discussion/debriefing:	20 minutes
Total exercise duration:	**75 minutes**

Teaching note

This dispute resolution exercise can be used to illustrate effective negotiation and/or effective mediation tactics. It can be done as either a negotiation role play with two parties or a mediation role play with three parties.

Students should have some prior exposure to negotiation and/or mediation concepts and principles before undertaking this exercise. This could be in the form of a lecture, readings, etc. Also, students should be aware that Title VII of the Civil Rights Act of 1964 prohibits employment practices that have either a disparate treatment against someone based on a protected class (e.g., race, sex, religion) or a disparate impact. In general, English-only rules are lawful as long as they are job-related, consistent with a business necessity and not implemented in a discriminatory manner.

Implementation

Participants will be given a copy of the general background information. Students will be assigned to the roles of the employee (Danny Maldanado), the street superintendent (Holmes Willis) and the mediator, if this will be conducted as a mediation exercise.

Next, participants will meet and attempt to find a resolution to the complaint.

Students should write down exactly what they want out of the negotiation before starting the session. To do this, they should specify four things:

- Initial offer. This is where they will start in the negotiation (i.e., their initial demands and offers).
- Target point. This is what they realistically expect to end up with at the conclusion of a successful negotiation.
- Resistance point. This is as far as they will go in making concessions to the other party without ending the negotiations.
- BATNA. This is their Best Alternative To a Negotiated Agreement.

In this case, the BATNA for both parties is letting the complaint go forward with the hope that either Danny or the city will eventually give up or win at trial and thereby have the policy upheld or thrown out. Both Danny and the city will need to estimate the cost and probability that there will be a trial and that they might win. The instructor should explain how the resistance point will be strongly influenced by their perceptions of the BATNA.

The instructor will conduct a post-negotiation discussion and debriefing, emphasizing the main learning objectives of the exercise.

The instructor can explain that this exercise was based on an actual case (*Maldanado v. City of Altus*) and may wish to distribute copies of the case after students complete the role play. The case is reprinted in the appendix. Discussion of the case enables the instructor to focus more on the legal issues involved, if that is desired. In general, the case held that employers may adopt English-only rules when they do not have a discriminatory motive for doing so and when they are based on legitimate business necessity.

Mediation Option

If the instructor wishes to use this as a mediation exercise, students should be provided the handout that gives the mediator a script of how to begin the mediation session (see the handout "Mediator Setting the Stage Script" on pages 45-46) and the handout that explains the effective tactics that mediators use (see the handout "Mediator Tactics Checklist: Effective Tactics for Mediators" on pages 47-48. The checklist can be found on page 30 in the student workbook). If desired, the instructor can assign the roles to particularly outgoing students who will act out the meeting in front of the class. Students who observe the role play could be given the checklist for effective mediator tactics and use it to check off the tactics they observe the mediator using.

Background Information for Participants

The City of Sunshine promulgated an English-only policy, and several Hispanic employees have complained that the policy discriminates against them. This role-play exercise is based on an actual federal court case.

The city provided three reasons for adopting the policy:

1. Workers and supervisors could not understand what was being said over the city's radios.
2. Non-Spanish-speaking employees informed management that they felt uncomfortable when their co-workers were speaking in front of them in a language they could not understand, because they did not know if their co-workers were speaking about them.
3. There were safety concerns with a non-common language being used around heavy equipment.

There are no written records of any communication, morale or safety problems resulting from the use of languages other than English prior to the policy's implementation. One employee did complain verbally about the use of Spanish by his co-workers before implementation of the policy, and other non-Spanish-speaking employees subsequently made similar complaints. There have been no incidents of safety problems caused by the use of a language other than English.

The English-only policy states:

> To ensure effective communication among and between employees and various departments of the city, to prevent misunderstandings, and to promote and enhance safe work practices, all work-related and business communication during the work day shall be conducted in the English language with the exception of those circumstances where it is necessary or prudent to communicate with a citizen, business owner, organization or criminal suspect in his or her native language due to the person's limited English language skills. The use of the English language during work hours and while engaged in city business includes face-to-face communication of work orders and directions as well as communication utilizing telephones, mobile telephones, cellular telephones, radios, computer or e-mail transmissions and all written forms of communications. If an employee or applicant for employment believes that he or she cannot understand communications due to limited English language skills, the employee is to discuss the situation with the department head and the human resources director to determine what accommodation is required and feasible. This policy does not apply to strictly private communication between co-workers while they are on approved lunch hours or breaks or before or after work hours while employees are still on city property if city property is not being used for the communication. Further, this policy does not apply to strictly private communication between an employee and a family member so long as the communication is limited in time and is not disruptive to the work environment. Employees are encouraged to be sensitive to the feelings of their fellow employees, including a possible feeling of exclusion if a co-worker cannot understand what is being said in his or her presence when a language other than English is being utilized.

Approximately 29 city employees are Hispanic, the only significant national-origin minority group affected by the policy. All plaintiffs are Hispanic and bilingual, each speaking fluent English and Spanish.

So far, no one has been disciplined for violating the English-only rule.

City employee Danny Maldanado filed a complaint with the Equal Employment Opportunity Commission over this policy. He believes it is a violation of Title VII of the Civil Rights Act of 1964 because it is discriminatory based on his race (Hispanic). Danny Maldanado and the street commissioner, Holmes Willis, are going to meet to try to voluntarily resolve this complaint before it goes further in the process. The instructor may also assign a mediator to help Danny and Holmes attempt to resolve this dispute.

The assignment is to read the information provided for the role and then meet with the opposing party to try to reach an agreement in which Danny will withdraw his complaint.

Role of Defendant Holmes Willis, Street Commissioner

You are in charge of the streets department for the City of Sunshine. You received a complaint that because department employees were speaking Spanish, other employees could not understand what was being said on the city radio. You informed the city's human resources director, Candy Richardson, of the complaint, and she advised you that you could direct employees to speak only English when using the radio for city business. Other non-Hispanic employees have also complained about the use of Spanish at work by some employees.

Although there have been no safety incidents related to the use of Spanish, you don't feel that it is necessary to have an accident before you implement the policy. Nevertheless, in response to the potential concerns of Hispanic employees, you did ease up on the enforcement of the policy so that workers could speak Spanish during work hours and on city property if everyone present understood Spanish.

You are willing to make some concessions about the policy, perhaps by reducing the scope or how and when it will be implemented. However, you are not willing to entirely rescind the policy.

Role of Danny Maldanado, an Employee in the Streets Department

You work in the streets department for the City of Sunshine. Holmes Willis told you and the other department employees that Spanish could not be spoken at work at all and that the city would soon implement an official English-only policy.

You believe that the policy has created a hostile environment for Hispanic employees, causing you and your Hispanic co-workers fear and uncertainty in your employment and subjecting you to racial and ethnic slurs like "beaner" and "wetback" and derogatory comments about the odor of Mexican foods. The English-only rule has created a hostile environment because it is pervasive—every hour of every workday—and you feel burdened, threatened and demeaned because of your Hispanic origin.

The English-only policy affects your work environment every day. It reminds you constantly that you are second-class and subject to rules that the Anglo employees are not subject to. You feel like this rule is hanging over your head and can be used against you at any point when the city wants a reason to write you up.

You are proud of your heritage and do not feel that your ability to communicate in a bilingual manner is a hindrance. There has never been a time that you were unable to perform your job because you spoke Spanish to another Spanish-speaking individual.

Moreover, the way that they are implementing this policy is a burden. Employees were told that the restrictions went beyond the written policy and prohibited all use of Spanish if a non-Spanish-speaker was present—even during breaks, lunch hours and private telephone conversations. You were told that the only time you could speak Spanish is when two Spanish-speaking employees are in a break room by themselves, and if anyone who doesn't speak Spanish walks in, to speak English. Spanish-speaking employees can no longer speak about anything in Spanish around anybody. Even if they were on the phone talking to their wives and having a private conversation with them and somebody happened to walk by, they were to change their language because it would offend whomever was walking by.

In fact, you have been teased and made the brunt of jokes because of the English-only policy and you are aware that other Hispanic co-workers have been teased and made the subject of jokes as well. Other city employees pull up and laugh, say things in Spanish and then say, "They didn't tell us we couldn't stop. They just told you." On one occasion, a police officer taunted you, saying, "Don't let me hear you talk Spanish."

Some of the guys from the street department poke fun at the policy, and when you go to other departments, they bring it up again and again. In fact, there is evidence that such taunting was not unexpected by management: Street Commissioner Willis told you and your co-workers about the policy in private because Willis had concerns about the other guys making fun of you. Mayor Gramling was quoted in a newspaper article as referring to the Spanish language as "garbage," although the Mayor claims that he used the word "garble" and was misquoted.

You want management to rescind the policy so you can speak Spanish whenever you want to. However, you recognize that there may be circumstances in which a limitation on the use of Spanish would be reasonable. Nevertheless, you'd also like management to do something about the harassment by co-workers that has resulted from the promulgation of the policy.

Mediator Role

You are the mediator in this case. A mediator gets the parties to talk about the facts and helps them reach a voluntary resolution of the dispute. Be careful not to act as a judge or arbitrator. Your job is not to decide who is right or wrong; rather, your job is to keep the lines of communication open and provide a process where the parties can reach an agreement themselves.

Discussion Questions With Possible Answers

Teaching note

The acronym FACTs summarizes four key elements of the negotiation planning process: Framing, Anticipation, Clarification and Tactics. The quip for negotiation teachers is, "Before you start to negotiate, you'd better get the FACTs." Below are the discussion questions for students and some possible answers.

1. **Framing:** Frames are perspectives, or ways in which we understand a problem. How did you frame this problem before you started the negotiation? Did you see it as a win-lose situation, or did you see the possibility that perhaps both Danny and the city could get something good out of this situation? Did your frames influence how you conducted yourself and the outcomes of the negotiation?

   Answer: The frame, or way of thinking about a conflict, often influences the outcome of negotiation. Negotiators who think about multiple issues and see possibilities for joint gains often come up with better outcomes. If this conflict is viewed simply as a battle over who is right, Danny or the city, it could be seen as a distributive win-lose negotiation. However, there is the potential that the city and Danny could work together to come up with something more than just a settlement to a lawsuit: perhaps a mutual agreement about implementation of a human relations training program, so all managers and employees learn to treat each other with respect and dignity regardless of their personal characteristics.

2. **Anticipation:** Did you anticipate all the issues that arose in the negotiations? Sometimes negotiators see things from only their own point of view and don't think about what the other party really wants. Did you clearly identify the other party's expected wants and desires before you started the negotiation? Did this help you come to a better agreement?

   Answer: Thinking about what the other party really wants and not just what they say can help negotiators focus on underlying interests and not just their positions. By focusing on the other party's and your own interests, you can uncover other issues and possibly find new or creative solutions rather than the obvious positional bargaining such as the amount of a monetary settlement. Danny is clearly interested in being treated with respect. He might want an apology—something that would cost the city very little. The city may be interested in appeasing the other non-English-speaking employees. If Danny recognizes this as a legitimate interest of the other employees—because it shows respect to them by speaking in a language they can understand—there might be an increased opportunity to reach an agreement.

3. **Clarification:** Did you start the negotiation offering or demanding more than what you were willing to settle for? Did you have a clear idea of what you would be willing to give up and what points you wanted to hold firm to, or did you just wing it and hope for the best? Could you have reached a better agreement if you had planned where you would make concessions?

   Answer: Negotiators sometimes fail to recognize that there is usually some expectation of game-playing in negotiation. Because of this, they start the negotiations too close to their target point. This can cause frustration when they don't get what they want and can frustrate the other party when they do not see concessions being made. This can be misinterpreted and lead to a breakdown in communications. Other times, negotiators adopt "pie in the sky" extreme positions that are so vague the other party doesn't know now to respond. These problems can be avoided if negotiators evaluate the situation objectively and begin the negotiation with challenging yet discussable positions and clear expressions of their interests.

4. **Tactics:** Did you think beforehand about the tactics you would use during the negotiation? For example, did you decide to make the first move, or did you wait for the other party to start in the hope that they might not ask for too much? Did you think about how quickly you might make concessions and how large your concessions would be, and did you stick to this plan throughout the negotiation?

   Answer: Effective negotiators have a good idea of the tactics they will use before they start a negotiation. One question that often arises is whether you should make the first move and state what you want before the other party. Sometimes an inexperienced negotiating opponent will make a mistake and not ask for enough. If you think this might happen, then letting the other party state their demands first could be a good strategy. On the other hand, if you start the negotiation with your challenging yet discussable demands, you get to set the stage for the range of possible negotiation outcomes that is closer to what you want. Thus, it is often better to take the opportunity to state your demands first. Also, during negotiations, the changes in each party's position often move the parties closer together, to what might result in an agreement. These position changes are sometimes called "bids." What some people don't realize is that big changes in the size of your bid send a subtle signal to the other party that you may be willing to make more concessions. Also, the timing of bids matters: The faster a negotiator responds to the other party, the more anxious they appear—sending the signal that they are willing to make more concessions. Making smaller changes in your bids or taking longer to respond sends a signal to your opponent that you may not be willing to make many more concessions.

Activity 2: New Employee Salary and Benefits Negotiation

Learning Objectives

Students will learn how to apply negotiation concepts like planning, BATNA, integrative versus distributive negotiations, competitive versus collaborative strategies, and compromising versus collaborating.

Duration

Preparation:	20 minutes
Negotiation:	35 minutes
Discussion/debriefing:	35 minutes
Total exercise duration:	**90 minutes**

Overview

This is a simulated negotiation between an employer and a job candidate. You will be negotiating over wages and other issues related to this new job. If you reach an agreement, the candidate is hired. If you cannot reach an agreement, the candidate will not be hired. Your role instructions will tell you what issues are important to you. Each issue is assigned point values. Your assignment is to get as many points as possible.

Instructions to All Participants

- Read the role you have been assigned.
- Become familiar with your payoff table and take time to write notes on it. You may keep your copy of this sheet.
- Plan your negotiations ahead of time. Identify your BATNA, target and resistance points.
- Bargain with your partner and try to reach an agreement.
- If you reach an agreement, summarize the terms on the employment contract.
- If you do not reach an agreement, check the box indicating no agreement.
- If you reach an agreement, calculate the total number of points each of you received individually.
- Print your name and ID number on the employment contract even if you did not reach an agreement.
- Hand in the employment contract to get credit for the exercise.

HR Manager Role

This is a two-party negotiation between a job candidate and an HR manager. You will play the HR manager. The other person will play the job candidate.

You will negotiate seven topics:

Topic	Maximum possible points
Annual salary	4,800
Date for first salary review	1,500
First-year vacation	1,200
Insurance effective date	225
Job location	2,800
Professional development	1,800
Starting date	4,000
TOTAL:	**16,325**

Each topic has been assigned a point value. The number of points you can obtain for each topic is listed in the payoff table. Your goal is to get the highest number of points.

There are different levels of possible agreement on each topic. The number of points varies for each topic and each level of agreement. Some issues are more important to you than others. The reasons for the relative importance of each issue are described below.

Annual salary: As the HR manager, you want to hire this applicant for the lowest possible salary. A lower salary means lower costs for your employer. This is one of your most important issues, because the salary is the biggest cost item for this employment contract. You might be willing to give the applicant a higher salary if he or she makes significant concessions on other issues.

Date of first salary review: Job applicants are often interested in the starting salary, but also want to know when they might be eligible for a pay raise. For you, as the HR manager, this is less important than the amount of the total annual salary because it involves only a possible incremental change in the salary amount at some point in the future. You want the review to occur later to postpone the cost of a higher salary and to have more time to evaluate the employee's job performance.

First-year vacation: Often, job applicants want some paid vacation during their first year on the job. However, the HR manager, you believe that they should receive vacation only after they have worked for a year or more. You are somewhat flexible and may be willing to give the applicant some vacation time if the applicant offers good reasons.

Insurance effective date: This defines the date when the employee's insurance will become effective and when the employer will begin to pay a monthly premium. It is a relatively less important item to the HR manager, because the cost of offering the insurance effective sooner is relatively small compared with other items.

> Do not tell the other person how many points you are getting. Do not let the other negotiator see your payoff table. Your payoff table is your own confidential information.

Job candidate role

This is a two-party negotiation between a job candidate and an HR manager. You will play the job candidate.

You will negotiate seven topics:

Topic	Maximum possible points
Annual salary	4,800
First-year vacation	4,000
Starting date	1,200
Insurance effective date	900
Date of first salary review	2,500
Professional development	3,000
Job location	2,800
TOTAL:	**19,200**

Each topic has been assigned a point value. The number of points you can obtain for each topic is listed in the attached payoff table. Your goal is to get the highest number of points.

There are different levels of possible agreement on each topic. The number of points varies for each topic and each level of agreement. Some issues are more important to you than others.

> Do not tell the other person how many points you are getting. Do not let the other negotiator see your payoff table. Your payoff table is confidential.

HR MANAGER PAYOFF TABLE

Topic	Options	HR Manager Points
Annual salary	$30,000	4,800
	$33,000	3,600
	$39,000	2,400
	$41,000	1,200
	$44,000	0
Date of first salary review	1 month	0
	2 months	300
	3 months	600
	6 months	1,200
	1 year	1,500
First-year vacation	0 days	1,200
	2 days	900
	5 days	600
	7 days	300
	10 days	0
Insurance effective date	Day hired	0
	1 month	75
	2 months	150
	3 months	225
Job location	El Paso	0
	San Antonio	700
	Albuquerque	1,400
	Phoenix	2,100
	Los Angeles	2,800
Professional development (tuition, professional memberships, etc.)	$0	0
	$500	300
	$1000	600
	$1500	1,200
	$2000	1,500
	$2500	1,800
Starting date	August 1	4,000
	August 15	3,000
	September 1	2,000
	September 15	1,000
	October 1	0

CANDIDATE PAYOFF TABLE

Topic	Options	Job Candidate Points
First-year vacation	0 days	0
	2 days	1,000
	5 days	2,000
	7 days	3,000
	10 days	4,000
Starting date	August 1	0
	August 15	300
	September 1	600
	September 15	900
	October 1	1,200
Insurance effective date	Day hired	900
	1 month	600
	2 months	300
	3 months	0
Salary	$30,000	0
	$33,000	1,200
	$39,000	2,400
	$41,000	3,600
	$44,000	4,800
Date of first salary review	1 month	2,500
	2 months	2,000
	3 months	1,500
	6 months	500
	1 year	0
Professional development (tuition, professional memberships, etc.)	$0	0
	$500	500
	$1,000	1,500
	$1,500	2,000
	$2,000	2,500
	$2,500	3,000
Job location	El Paso	2,800
	San Antonio	2,100
	Albuquerque	1,400
	Phoenix	700
	Los Angeles	0

COMBINED PAYOFF TABLE

Topic	Options	HR Manager Points	Job Candidate Points
First-year vacation	0 days	1,200	0
	2 days	900	1,000
	5 days	600	2,000
	7 days	300	3,000
	10 days	0	4,000
Starting date	August 1	4,000	0
	August 15	3,000	300
	September 1	2,000	600
	September 15	1,000	900
	October 1	0	1,200
Insurance effective date	Day hired	0	900
	1 month	75	600
	2 months	150	300
	3 months	225	0
Salary	$30,000	4,800	0
	$33,000	3,600	1,200
	$39,000	2,400	2,400
	$41,000	1,200	3,600
	$44,000	0	4,800
Date for first salary review	1 month	0	2,500
	2 months	300	2,000
	3 months	600	1,500
	6 months	1,200	500
	1 year	1,500	0
Professional development (tuition, professional memberships, etc.)	$0	0	0
	$500	300	500
	$1,000	600	1,500
	$1,500	1,200	2,000
	$2,000	1,500	2,500
	$2,500	1,800	3,000
Job location	El Paso	0	2,800
	San Antonio	700	2,100
	Albuquerque	1,400	1,400
	Phoenix	2,100	700
	Los Angeles	2,800	0

EMPLOYMENT CONTRACT

Job candidate will be employed under the following terms.

Instructions: Both parties initial at the agreed level for each topic.

Topic	Agreement	Options	No Agreement
First-year vacation	_____	0 days	
	_____	2 days	
	_____	5 days	
	_____	7 days	
	_____	10 days	
Starting date	_____	August 1	
	_____	August 15	
	_____	September 1	
	_____	September 15	
	_____	October 1	
Insurance effective date	_____	Day hired	
	_____	1 month	
	_____	2 months	
	_____	3 months	
Salary	_____	$30,000	
	_____	$33,000	
	_____	$39,000	
	_____	$41,000	
	_____	$44,000	
Date of first salary review	_____	1 month	
	_____	2 months	
	_____	3 months	
	_____	6 months	
	_____	1 year	
Professional development (tuition, professional memberships, etc.)	_____	$0	
	_____	$500	
	_____	$1,000	
	_____	$1,500	
	_____	$2,000	
	_____	$2,500	
Job location	_____	El Paso	
	_____	San Antonio	
	_____	Albuquerque	
	_____	Phoenix	
	_____	Los Angeles	

Names of Negotiators:

Human Resource Manager:_____ ID#:_____

Job Candidate:_____ ID#:_____

Teaching note

Instructors should read these notes before beginning the salary negotiation exercise. These notes and the discussion questions with answers for instructors provide additional guidance on how to use this exercise to facilitate practical application of several important negotiation concepts.

This exercise is based on the experiences of several recent college and university graduates. The exercise is designed for use in undergraduate or graduate courses in organizational behavior or HR management, and deals with topics relevant to recruiting, staffing, employee compensation, conflict management and negotiation.

This exercise enables students to practice using concepts from these content areas related to an issue that is relevant to them. They are highly motivated to direct their attention to this task, consequently enhancing the learning that can take place.

This negotiation exercise follows the tradition of previous negotiation exercises by Neale (1997), and Schroth, Ney, Roedter, Rosin and Tiedman (1997), which dealt with new university graduate salary negotiations. However, unlike Schroth et al. exercise, which dealt with a recent MBA graduate negotiating for salary and locations in New York and California, this negotiation exercise is made more adaptable to a broader range of college and university settings and for both undergraduate and graduate students. The cities mentioned in this exercise where the alternative job locations occur are local and regional to a particular university in the southwest United States. This was intentional, because it better reflects the type of job offers that many graduates may receive. The locations can be readily adapted to any college or university setting by changing the names to local or regional cities.

Instructors may wish to pre-sort the roles of candidate, HR manager (High-BATNA) and HR manager (Low-BATNA) so you can easily distribute the roles evenly during class. (See additional information on BATNAs below).

It is helpful to review with students what each of the negotiation terms mean; for example, professional development money is the amount the candidate can spend per year on professional development (e.g., training).

Students should be given 20 minutes to prepare for negotiations and 30 minutes to negotiate. The remainder of the class will be used to summarize the outcomes and discuss the major points illustrated in this exercise.

This negotiation exercise can be used to illustrate several concepts, including those described below.

Preparation for Negotiations

Negotiators often fail to prepare for negotiations, and achieve less than optimal outcomes as a result. In this exercise, there is a tendency for some participants to wing it and start negotiations without fully understanding the payoffs. This typically results in confusion or frustration when they are faced with a better-prepared opponent.

BATNAs

The BATNA is a powerful influence on negotiation outcome. To make this exercise reflect real-life negotiations related to new hires, the HR manager's BATNA is manipulated as either high or low. In the low condition, the alternative candidate that could be hired will give the HR manager only 5,800 points. However, in the high condition, the HR manager's alternative will yield 10,425 points. This is a particularly relevant issue for new college and university graduates who often assume that the employer has many good options and they have none.

After the exercise, it is useful to summarize the agreements the participants reached. This can be written on a blackboard. This will facilitate illustration of the concepts included in the exercise. The chart should include columns for each issue, the number of points each party achieved and the total points for both parties.

Alternatively, copies of the *Summary of Negotiation Exercise* chart can be distributed to participants. Then, as each negotiation team reports their results, students can record the results of other teams. This will enable them to see the results and study them after the class is finished. This chart is separated into two sections—one in which the HR manager has a high BATNA and the other for the HR manager with a low BATNA.

There are two versions of the HR manager role; one with a low BATNA and the other with a higher BATNA. The HR manager with the higher BATNA should achieve a higher agreement, or it may be less likely that those parties reach an agreement.

Resistance Points

This case illustrates the concept of resistance points, or the limit to which a negotiator will go until he or she walks away from the agreement.

Target Points

This case also illustrates how a careful negotiator sets target points or goals for the negotiations before the discussions begin.

Splitting the Difference Versus Integrative Solutions

Often in negotiations, there is a tendency to "split the difference"—to agree to some solution that is the midpoint between the two positions. It is likely that in several negotiations conducted by the participants, they will use this as a settlement method. However, this exercise also includes varying payoff schedules. This means that the split-the-difference solution might not be the optimal payoff in terms of getting both parties the highest number of points.

For example, if both parties split the difference on the starting date and the first year vacation time, the result is 2,600 points for each party and a total of 5,200 points for both parties. However, if they agree to 10 days of vacation the first year and a starting date of August 1st, each party achieves 4,000 points and the total points for both parties is 8,000.

Distributive, Integrative and Compatible Issues

There are three types of issues in this exercise: distributive, integrative and compatible. Salary is a distributive issue (i.e., what one party gains, the other party loses in an equal amount). Typically, parties tend to split the difference on distributive issues. However, the tendency to split the difference may result in less than optimal outcomes for both parties if the issues are not distributive.

Professional development is a compatible issue because both parties want the same thing. Often negotiators assume that the other party's position is directly opposing to theirs, and they are unable to discover compatible issues. During the discussion following the negotiation, it will be helpful to identify how many negotiation teams discovered that this was a compatible issue.

All the other issues are integrative. Integrative issues are valued differently by the parties. This enables them to use these issues to achieve higher joint outcomes if they engage in logrolling. In logrolling, one party makes a concession on one issue that is less valuable to them in exchange for receiving a concession on a more important issue while the other party does the same thing.

Negotiating From a Position of Weakness

New graduates often feel like they are negotiating from a position of weakness because they may have only one good job offer. However, even when a job candidate has a low BATNA, many parties will reach an agreement in which the candidate's outcomes are higher than their BATNA. This exercise demonstrates how those in a weak bargaining position can still achieve significant gains.

Discussion Questions With Possible Answers

1. Did you prepare a target point and resistance point before the negotiation? Did this help keep you focused on your own goals, or did you let your opponent take the lead in the negotiations?

   Answer: Too often negotiators want to just jump into the negotiation without first formulating a strategy. This exercise gives students a chance to practice applying the skill of planning before a negotiation begins. By having a good idea about where you want to end up in negotiations, you can have a better idea of where you should start.

2. Were you able to identify the different types of issues—distributive, integrative and compatible? Were you able to use these to your mutual advantage?

   Answer: Negotiators often assume that everything must be a win-lose type of issue. This exercise illustrates the idea that when there is more than one issue that the parties value differently, they can trade these issues to achieve integrative solutions where the joint outcome for both parties is higher. In fact, it is sometimes the case that both parties want the same thing (compatible issues). In this case, both parties want more professional development for the employee because that will benefit both. Unfortunately, too often some negotiators fail to see this as a win-win opportunity.

3. Did you assume that there was a "fixed pie"—that everything your opponent gained was something you lost?

   Answer: There are several examples of issues in this negotiation where the payoffs are differently valued in such a way that the joint gains of both parties could be hired, and a successful agreement could be reached within the range of outcomes set by both parties' BATNAs.

4. Did a BATNA affect your negotiations? How? Was your resistance point the same as your BATNA?

   Answer: Sometimes it is better not to agree. This is the case if your opponent insists on things that are beyond your resistance point. However, the payoff schedules in this exercise are designed so that there are multiple possibilities for agreements within the ranges set by the parties' BATNA-influenced resistance points. Nevertheless, personal experience with this exercise shows that one out of five negotiating pairs will not reach an agreement. This gives the instructor the opportunity to discuss and illustrate the types of things that can interfere with successful negotiations.

MANAGING DIFFICULT CONFLICTS

Activity 1: Lecture

Lecture using PowerPoint slides.

Learning Objectives

Students will understand several different models for handling difficult conflict situations including managing anger, recognizing and reducing conflict spirals, reducing tension and restricting precedents.

Duration

50 minutes.

Activity 2: The Employee Benefits Question—An Exercise in Managing Conflict and Diffusing Tension

Learning Objectives

To provide students with practical experience applying concepts related to tension reduction and conflict resolution: managing anger, reducing conflict spirals, reducing tension, restricting precedents, illustration of competing and accommodating and collaborating conflict styles.

Duration

Read the case:	10 minutes
Small group discussions:	20 minutes
Class discussion/debriefing:	20 minutes
Total exercise duration:	**50 minutes**

Teaching note

The case is based on a true story, although the names have been changed to protect the privacy of the individuals involved. The case gives students an opportunity to evaluate the pros and cons of alternative methods to diffuse a potentially violent situation while trying to balance other objectives such as cost reduction, policy compliance and precedent-setting.

A True Story

On Wednesday, March 2, Fred Daily, a student intern in the human resource management office of the Houston Manufacturing Company (HMC), was working in the office that had been assigned to him. HMC is a unionized automobile parts manufacturer in Westvale, Michigan, with 800 employees. Fred's job was to answer employee questions about their health insurance benefits, help them file claims, and explain the forms and letters that they received from the health insurance company.

On that day, Wilbur Smith came into Fred's office. His face was flushed red, his posture was aggressive, and he was using an angry tone of voice. Wilbur demanded that the company pay his medical bills. He started to explain the problem to Fred, who felt overwhelmed by the situation. Fred called the human resource manager, Ricardo Martin, for help. At first, Ricardo thought that Fred should handle the problem himself, but Fred insisted that Ricardo talk with the visibly angry Wilbur.

Ricardo brought Wilbur into his office to discuss the situation. Still clearly upset, Wilbur took out the pile of medical bills and letters from the insurance company and threw them on Ricardo's desk, demanding that the company pay the bills.

Ricardo did not know Wilbur or his situation because he had started working for HMC only six months earlier. However, recognizing that it was important to get Wilbur to calm down, both to avoid a violent incident and to get a clear explanation of the situation from Wilbur, he asked Wilbur to take a seat. Ricardo was concerned not only for Wilbur, but also for his own personal safety; just two weeks earlier, an HR manager at a nearby plant had been shot and killed by an angry former employee. Ricardo repeatedly said things like, "I really want to help you but I don't know this situation," and "I care about you … please tell me your story because I don't know what happened." Wilbur interrupted, saying things like, "You're all alike" and "You know what's going on" and "Are you going to pay or not?"

Eventually, Wilbur sat down and told Ricardo his story. Wilbur was married to Wanda Smith, and they had both worked for HMC for 30 years. They had been high-school sweethearts and had lived their whole lives in the small town where the HMC plant was located. Everyone in the community knew and liked the Smiths. Only a few months ago, they retired on the same day and looked forward to spending the rest of their days together, fishing, traveling, visiting family, etc.

Two days after their retirement party, Wanda was diagnosed with a painful and terminal form of cancer. Wanda was depressed and angry for herself and for what this would do to Wilbur. She didn't want to spoil Wilbur's retirement—the time they had looked forward to for so long. She saw how it pained Wilbur to watch her suffer.

She decided to end her suffering. In her first suicide attempt she slit her wrists, but Wilbur found her in time. He called the ambulance, and they rushed her to the hospital and saved her. Her second suicide attempt was to swallow a bottle of drain cleaner. Wilbur found her coughing and vomiting. Again he called the ambulance. They rushed her to the emergency room, pumped her stomach and saved her. In addition, she received follow-up counseling to help her deal with the tragedy of her situation.

A few weeks later, on a sunny Saturday morning, Wanda told Wilbur that she wanted to make his favorite breakfast, blueberry pancakes with nuts. She asked him to go to the store, only a few minutes away, to pick up the mix. He repeatedly asked her if she was OK, and she assured him that everything was fine.

When he returned from the store, he found her in flames on the front yard of their home. She had dowsed herself with gasoline. He quickly wrapped her in a carpet and called the ambulance again. They came, brought her to the emergency room and treated her burns. She was admitted to the hospital, where she survived for 21 days.

Wilbur told Ricardo that all the medical bills had been submitted to the insurance company—bills for the ambulance, the physicians who treated Wanda, the hospital, the laboratory tests, etc. The bills had been submitted to the local claims review office, where clerical employees read them and entered information into a computer database for a benefit determination. Letters that explained what was covered and what was not were mailed from the company's Dallas claims processing office. Wilbur had been receiving several letters each week, which listed the amount charged and showed that the amount covered was "0." There was a footnote on the letters that stated, "No coverage for self-inflicted injuries."

Ricardo knew that HMC retirees received Medicare supplemental health insurance coverage, which pays for the difference between Medicare benefits and the health insurance that employees received before they reached age 65. He eventually found out that the total cost of Wanda's uncovered medical expenses was approximately $15,000. The company's insurance plan was funded on a self-insured basis, which meant that the company essentially paid for all actual medical expenses and the insurance company assumed little risk. The insurance company basically provided a claims handling service.

Teaching note

This exercise is a useful application of the concepts presented in the PowerPoint presentation that accompanies this learning module. The presentation could be used to introduce the concepts before students conduct the exercise. Alternatively, the exercise could be conducted first, followed by the PowerPoint lecture, using the students' experiences in the exercise to illustrate the concepts presented.

This exercise works best if students form small groups, with each group working on an answer that is subsequently discussed with the class. Experience with this exercise shows that students will typically make one of the following recommendations:

- Offer to help the employee find some other source of funding, but deny the request that the employer pay the claim.
- Offer to participate or help manage a fundraising campaign in which the employer might match the contributions made by the community to make sure the bills get paid.
- Pay the bills outright.

Discussion Questions With Possible Answers

1. Assume you are the HR manager, Ricardo Martin. How do you handle this situation?

   Answer: Specific issues you should address are:

   - Employee perceptions of the value of their fringe benefits.
   - The cost of the benefits to the employer.
   - Concern about setting a precedent for other situations.

   This open-ended question encourages discussion about the exercise. The instructor should prompt students to talk about their experiences without giving evaluative comments. Then, asking the next two questions, the instructor can refocus and channel student thinking into effective methods to handle difficult conflicts. Much of the material in the PowerPoint presentation, *Managing Difficult Conflicts*, is useful here.

2. Did you experience anger or a conflict spiral in this exercise? What could have been done to avoid or manage it better?

   Answer: There are several methods mentioned in the PowerPoint presentation, *Managing Difficult Conflicts*, included with this learning module.

3. Is there a possible win-win situation here, where both parties come out ahead? If so, what is it?

   Answer: Often in conducting this exercise, students fall into one of three categories. They decide to:

   - Deny claims: Simply deny the request to pay the claim, but do so in a respectful way.
   - Pay claims: Pay the claims out of a desire for goodwill.
   - Matching/helping: Come up with some sort of compromise solution in which the company assists in finding a way to pay the claims, such as with a matching grant to donations received.

   Students should be prompted to come up with a win-win solution. A fourth possible solution is for the employee and the employer to work together to ask the health care providers to waive or reduce their fees in this unusual circumstance. In this way, both the employer and the employee come out ahead because neither would have to pay.

   Each of these outcomes has potential costs and benefits, and each can be characterized as falling into one of several conflict styles. These ideas are illustrated in the table on the next page.

EMPLOYEE BENEFITS QUESTION: POSSIBLE RESOLUTIONS

Recommendation	Costs	Benefits	Conflict Style
Deny claims	Company reputation as heartless.	Lower cost for employer.	Competitive/distributive (win-lose)
Pay claims	Potential precedent, others will want their claims paid too.	Positive reputation for company as caring and kind.	Accommodating/distributive (win-lose)
Matching/helping	Company pays something; but not too much, not necessarily generous; also administrative expenses and time.	Shows some concern for employees, but limited.	Compromising
Request fee waivers/reductions	Time spent writing and calling health care providers.	Neither employer nor employee will have to pay.	Collaborative/integrative (win-win)

Commentary

Legal obligation: With the facts presented in the case, there is no legal obligation on the part of the employer to pay the claim. In a few cases, students have mistakenly suggested that the employee might have some type of tort lawsuit against the doctors, but there is no evidence of malpractice in this case.

Precedent: In cases like this, there is a chance a precedent might be set; however, since the employee is retired, he will not be able to file a grievance that would bind the employer.

Goodwill: Because the employee was well-liked by his peers and this is a small-town plant, it is likely that whatever the employer does that goes beyond any perceived obligation would have positive benefits in terms of public relations or employee goodwill.

Cost: In the actual case, the HR manager found out that the outstanding bills totaled approximately $30,000. Thus, paying them would be a substantial expense to the employer. An important learning point for students is that checking first to see how much money was at stake was a good move by the HR manager.

Postscript

In the actual case, the HR manager authorized full payment of the outstanding claims. He did, however, get a verbal authorization from the vice president before he did so. As far as the HR manager's reason for his decision, he stated, "Yes, it was about creating goodwill, but I mainly did it because I thought it was the right thing to do." Two weeks after the incident, the president of the local union came to the HR manager's office and asked what happened. He acknowledged that he really didn't have any jurisdiction to represent the retired employee.

GAME STRATEGIES IN NEGOTIATION

Activity 1: Reading and Discussion

Students read the handout. Instructor discusses the handout.

Learning Objectives

To facilitate understanding of advanced negotiation topics such as anchors, expected payoffs, high-ball and low-ball tactics, sequential information and risk aversion.

Duration

Class discussion: 45 minutes.

Teaching note

The reading for this activity should be assigned to students before a lecture and discussion. Use the handout as lecture notes.

This section is challenging, and it is best if students have a chance to read the material and reflect on it before it is discussed in class. Since some people learn better by reading, others by hearing and some by a combination of reading and hearing, this section gives students the opportunity to grasp these more difficult concepts using the learning method that best fits their learning style.

Process

Step 1. Students should read the material.

Step 2. The instructor should present this material in a lecture and give students the opportunity to answer questions.

Discussion Questions With Possible Answers

1. How do you decide what anchors you will use in a negotiation? Do you set your anchors based on what other people are doing? Is this a good idea?

   Answer: Anchors refer to standards of comparison. For example, if we see that other employers are offering 2 percent wage increases, we might set an anchor of 2 percent for our negotiation with the employees. Sometimes, though, anchors are based on factors that are illogical. Just because someone else is doing it doesn't necessarily mean that it is important for you. Too often, anchors induce parties to not make concessions on issues, and this often prevents them from reaching an agreement that could benefit them.

2. When you plan your negotiation strategy, do you consider how your opponent might respond to your offers and demands? If so, do you adjust your positions based on what you expect your opponent will do? Can you anticipate his or her moves?

   Answer: Anticipating what the opponent will do helps negotiators formulate an effective strategy. Suppose that the union demands a 7 percent wage increase. The employer might be willing to agree to a 4 percent wage increase. However, if it offers a 4 percent wage increase right away, the union might expect that the employer will eventually settle for more. Thus, the employer will begin the negotiation by offering only a 1 percent wage increase. By doing so, the employer signals to the union that it will have to make a significant concession on its wage demands to reach an agreement. Since a 4 percent wage increase would require the union to drop its demand by three percentage points and the employer to increase its offer by three percentage points, the offer of a 1 percent wage increase sends a signal to the union about where the employer expects the negotiation will eventually end up.

3. If you open the negotiation with an extremely high or low offer, are you prepared to handle the possibility that your opponent might break off negotiations? If this happens, do you think that if you try to bring your opponent back to the negotiation by making a big concession, it will make you look foolish or uncredible?

   Answer: Sometimes negotiators start off with a very high demand (or very low offer) in the hope that they get a surprisingly pleasant response from their negotiating counterpart. Perhaps their counterpart is more desperate than they had anticipated. If so, this high-ball, low-ball tactic could be effective. For example, the employer might be able and willing to pay a 3 percent wage increase; but just to see how desperate the employees are, the employer might begin with a demand for a 3 percent wage cut. In the context of dealing with employees, this tactic is often not appropriate. The employment relationship is usually expected to continue over a long period of time. Thus, tough tactics like this could damage the relationship and result in long-term resentments. It is probably better to start with ambitious but discussable positions when dealing with employees in negotiation situations so as not to generate negative feelings.

4. Some people are more concerned with having a certain outcome. Others might be willing to take a bigger risk in exchange for a bigger payoff. How averse are you to risk? How much are you willing to give to make sure you get what you want?

   Answer: Employees are often concerned with job security and are more risk-averse than employers. Thus, they might be willing to give up some other things of equal economic value in exchange for guarantees of job security.

Student Reading: Game Strategies in Negotiation

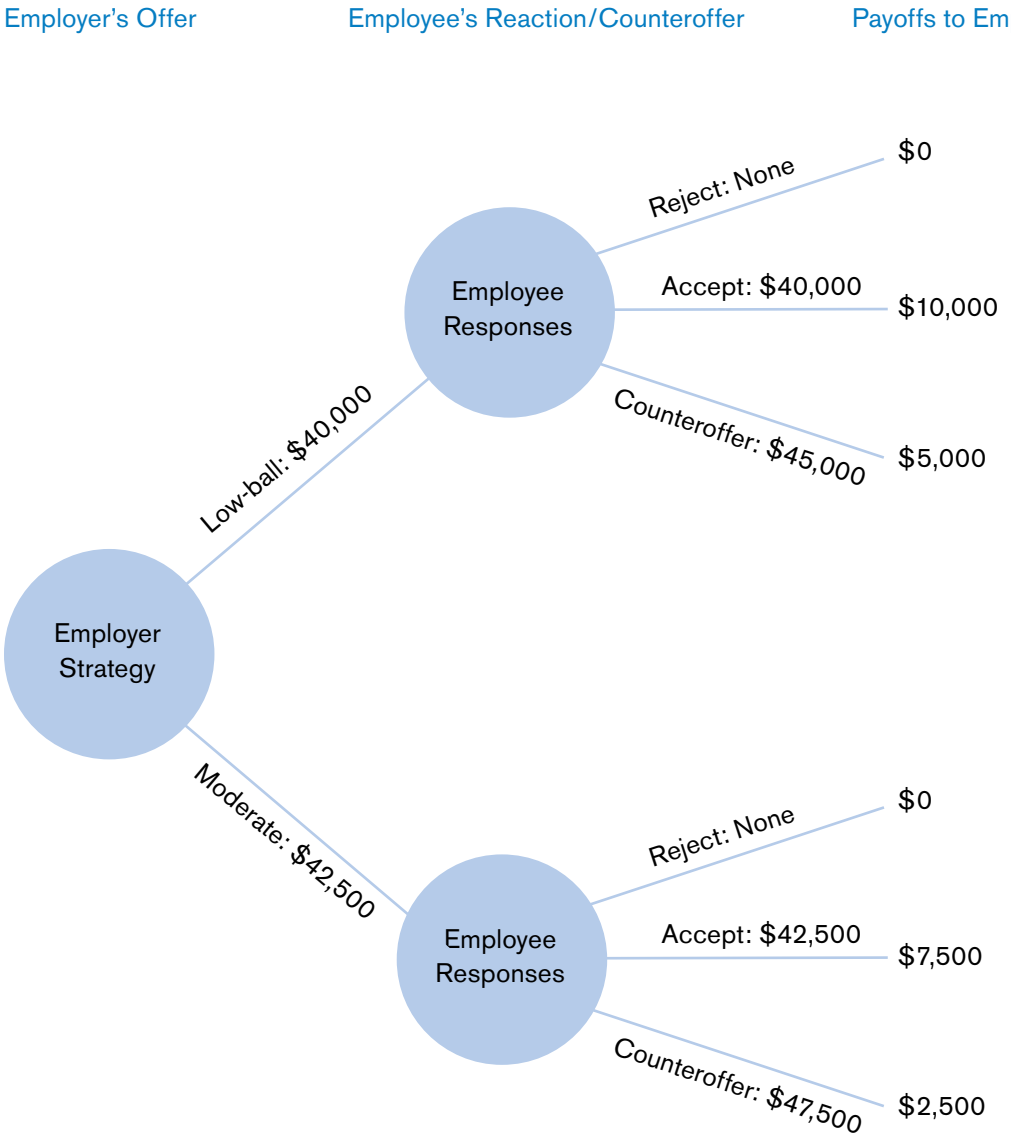
It is helpful to think ahead of time about how you and your negotiating opponent may act during negotiations. Offers and counteroffers can be represented in a game tree. A typical game tree looks like Figure 1. This diagram illustrates salary offers made by an employer and possible responses from the employee. In this example, the value of the employee's services to the employer is $50,000. The employer is trying to decide between two possible salary offers to the employee. One salary offer is a low-ball offer (quite a bit lower than what might be expected) of $40,000. If the employee accepts this amount, it would result in greater net value to the employer ($50,000-$40,000 = $10,000). There is a risk, however, that the employee might reject the salary offer and take another job somewhere else. The employer also expects that the employee might come back with a counteroffer.

The second salary offer is a more moderate $42,500. The employee still might reject this more moderate offer; however, the employee is probably more likely to either accept this offer or come back with a counteroffer.

Sequential Information

The game tree (on the next page) illustrates the different stages of the negotiation process, called sequential information. First, the employer chooses its strategy, either low-ball or moderate, and makes the offer to the employee. The employee responds in one of three ways: rejecting the offer and terminating the negotiations; accepting the offer; or making a counteroffer back to the employer. The payoffs for the employer for each of these possible outcomes are calculated by subtracting the amount of the salary from the value of the job to the employer. The payoffs are shown on the right-hand side of the figure.

FIGURE 1. GAME TREE: EVALUATING SALARY OFFER STRATEGIES



Expected Payoffs

In the following table, we add the concept of probability to the calculation of the employer's payoffs. We call these the expected payoffs of the negotiation because they are what we anticipate will actually happen under any circumstance.

This table has two sections. The top section assumes the employer adopted a low-ball strategy. The bottom part assumes the employer adopted a more moderate strategy. For each strategy, the payoffs to the employer are multiplied by the probability that they will occur. The total of the payoffs, multiplied by the probability, is the expected payoff to the employer for each strategy.

TABLE 1. EVALUATING SALARY OFFER STRATEGIES

Employer Strategy	Value of Employee Services	Employer Wage Offer	Employee's Response	Employee Salary Request	Probability of Employee's Responses	Payoffs to Employer	Expected Payoffs
			Reject	None	25%	$0	$0
Low-Ball	$50,000	$40,000	Accept	$40,000	50%	$10,000	$5,000
			Counteroffer	$45,000	25%	$5,000	$1,250
					100%		
						Total Expected	$6,250
			Reject	None	10%	$0	$0
Moderate	$50,000	$42,500	Accept	$42,500	70%	$7,500	$5,250
			Counteroffer	$47,500	20%	$2,500	$500
					100%		
						Total Expected	$5,750
						Net Savings:	$500

Bottom Line: Employer expects a higher payoff (or to save $500) by using a low-ball strategy.

Expected payoffs take into account the probability of various events. To calculate these probabilities, multiply the value of the outcome by the probability that each outcome will occur. In Figure 1, the payoffs to the employer were based on the amount the employer would have received under any of the scenarios. However, only one of the scenarios will actually occur. The employer needs a way to estimate the effect of making a low-ball or moderate offer before knowing how the employee will react. This can be done by multiplying the amount of each of the possible payoffs by the probability that each one would occur. In Table 1, there are three possibilities for the low-ball strategy. The employer can estimate the probabilities that the employee will choose any one of these three. The total of all the probabilities should equal 100 percent. Then, the payoff for each strategy is multiplied by the probability that it will occur. Add together these three figures, and you get the expected payoff from using a low-ball strategy. Do the same thing for the three possible outcomes of the moderate strategy, and you get the expected payoff of using a moderate strategy. In this example, the expected value of using a low-ball strategy is

$500 higher than adopting a moderate strategy, so the employer will probably choose the low-ball strategy.

Anchors

Quite often in negotiations, the prices or amounts that the parties state openly to their opponent become anchors. Anchors are figures that are used to make comparisons. We compare a new price to the base or anchor figure to decide if the new figure is better or worse than the anchor. In this illustration, the employer's initial salary offer can be thought of as an anchor. In responding to the employer's offer, the employee could decide to make a counteroffer. In this example, the employee's counteroffer in the first scenario is $45,000 and the employee's counteroffer in the second scenario is $47,000. The employee might decide how much more to ask for in his or her counteroffer based in part on the amount that the employer initially offered (the anchor). By offering less in the low-ball strategy, the employee's counteroffer may have been lower. Thus, the employer's initial offer in the low-ball strategy served as an anchor that pulled down the amount that the employee asked for in his or her counteroffer.

Risk Aversion

Sometimes people are worried, concerned or afraid that something bad will happen. When they have a high level of these types of feelings, they are called risk-averse because they are trying to avoid the risks presented by their options. In this case, if the employer is risk-averse, it would probably choose the moderate strategy because even though the expected payoffs are higher for the low-ball strategy, there is a higher risk under the low-ball strategy (25 percent) that the employee will not accept any offer and the outcome for the employer will be $0. The risk that the employee will turn down the job is only 10 percent in the moderate offer. Thus, the more risk-averse the employer, the more likely the employer would be willing to spend more money to make sure that the job candidate gets hired.

High-Ball, Low-Ball

A common negotiating tactic is for one or both parties to make offers or demands that are a long way away from what they expect is reasonable. Negotiators may adopt a high-ball or low-ball strategy just to see how far their negotiating opponent is willing to go in making concessions. Or they might use it to set an anchor that is more favorable to their negotiating position. For example, an employer may state a very low starting salary just to see if the employee might accept it or to reduce the amount that the employee will request in a counteroffer.

Nevertheless, some negotiators will react negatively to what they think is an inappropriately high-ball (or low-ball) offer. They might walk away indignantly or become frustrated by what they believe is a ridiculously unfair offer. If you think your negotiating opponent is using this tactic, it might be helpful to ask him or her to present a more reasonable offer before you continue the negotiation. This can help to frame the range of negotiations closer to your expectations and avoid the setting of anchors that would pull you too far away from your own target point or goals for the negotiations.

Activity 2: Logrolling Example

Learning Objectives

To comprehend, understand and be able to apply the concept of logrolling to actual workplace negotiation situations.

Duration

Approximately 60 minutes

Teaching note

Negotiation teachers often find that logrolling is one of the most difficult concepts for students to grasp. Nevertheless, it is one of the potentially most useful ideas in negotiation because it can help negotiators obtain better outcomes for themselves and their negotiating counterparts. Because of the difficulty and importance of this concept, it is presented in a separate learning exercise.

Logrolling requires that negotiators make tradeoffs on two or more issues they value differently to increase the overall joint gains for both parties. Students naively think that they understand this idea when they simply make compromises on different issues to reach an agreement. True logrolling requires more than one issue, and it requires that the parties value the issues differently.

Logrolling requires both negotiators to give in on something they value less in exchange for something that they value more. To illustrate the point, suppose that I have five apples and five oranges. You also have five apples and five oranges. I like apples better than oranges, though, and you like oranges better than apples. If I give you all of my oranges and you give me all of your apples, we are both better off.

Situations like this occur frequently in the workplace. Employers could offer employees something they value less in exchange for something they value more, and both parties could benefit. This segment of the negotiation learning module is designed to illustrate how this can happen in actual work situations. Once negotiators understand that they may value things differently than their negotiating counterparts, they can be sensitive to and look for possible exchanges that can benefit both parties.

Process

Step 1: Distribute the logrolling example and tell students to read and study it.

Step 2: Explain and discuss logrolling.

Step 3: Instruct students to write a brief scenario in which an employer and employee negotiate over two issues they value differently. They must list the issues and describe how the employer values one issue more than the employee. Next, they should describe how they could trade off on these two issues so that both parties benefit.

Student Handout: Logrolling Example

In logrolling, parties trade off on two or more issues they value differently.

Consider the following: Party A will pay either $100 or $50 to Party B. Party A prefers to pay less and to pay it in the future. However, for Party A, the amount is more important than the timing. Party B prefers to receive more and to receive it now. For Party B, the timing is more important than the amount.

The box below shows the amount and timing of payments, with points assigned to each. Note how the values reflect the different preferences of the parties. The total value to each party is their valued points. Valued points are calculated by multiplying the points times the values.

Party A					Party B			
Amount	Points	Values	Valued Points		Amount	Points	Values	Valued Points
$100	50	1.00	50		$100	100	0.50	50
$50	100	1.00	100		$50	50	0.50	25
Timing					Timing			
Now	50	0.50	25		Now	100	1.00	100
1 Month	100	0.50	50		1 Month	50	1.00	50
			Options	Party A	Party B	Total		
		1.	$100 Now	75	150	225		
		2.	$100 Future	100	100	200		
		3.	$50 Now	125	125	250		
		4.	$50 Future	150	75	225		

Analysis

The most logical agreement in the above example is Option 3, a payment of $50 now. Party A is likely to refuse Option 1 because he or she can do much better under other options. Party B is likely to refuse Option 4 because he or she can do much better under other options. Both parties benefit equally from Option 2; however, they both get more points under Option 3. This might also be called an optimal agreement, because any other agreement would result in fewer points for the two parties combined.

This is an example of how differences in time preferences created the possibility of logrolling. Other common logrolling scenarios arise when parties have different risk preferences or different expectations about what will happen in the future.

Could this happen in the real world? Consider a worker who sues his employer for workers' compensation or discrimination and wins. He is entitled to receive future payments in small monthly installments over many years. However, he'd like to remodel his kitchen now, so he's willing to accept a smaller lump-sum payment.

The discounted future cash flows of the long-term payments (also called net present value) are much larger than the lump sum he's being offered. Yet, if it's big enough, he'll accept a lump-sum payment up front because his time preferences are different than the employer's. Thus, they will agree on a logrolled settlement. In fact, this is a very common scenario.

Student Assignment: Write a Logrolling Scenario

1. Write a brief scenario in which an employer and employee negotiate over two issues they value differently.
2. List the issues.
3. Describe how the employer values one issue more than the employee.
4. Describe how they could trade off on these two issues so that both parties benefit.

GRADING RUBRIC FOR LOGROLLING ASSIGNMENT

Factor	Evaluation	Possible Points	Actual Points
Scenario	Did the student describe a negotiating scenario between an employer and an employee?	20	
Two issues	Did the student list two issues that the parties were negotiating?	20	
Value differences	Did the student explain how the parties valued these issues differently?	20	
Trade-offs	Did the student explain how the parties could make concessions on the issue that they valued less in exchange for gains on the issue they valued more?	40	
	Total Points	**100**	

NEGOTIATION QUIZZES

Learning objective

To assess student learning.

Duration

25 minutes

Teaching note

This quiz may be used in conjunction with a lecture or reading on negotiation concepts. There are several good sources of instruction available. For example, the "Stanford Video Guide to Negotiating" (Kantola Productions) can be used in conjunction with this quiz. After viewing the video, students can complete the quiz to ensure they have grasped the concepts presented. Similarly, this quiz could be used after students read relevant materials in a good negotiation text, such as Lewicki, Barry, Saunders and Minton's *Negotiation* (Irwin McGraw Hill) or Fisher, Ury and Patton's *Getting to Yes* (Penguin Books).

Fill-in-the-Blank Negotiation Quiz

Instructions: Fill in the blanks using the terms on the back side of this sheet.

Student's name (please print): _____

1. _____ negotiations are win-lose and are resolved when one party loses and the other party wins.
2. _____ negotiations are win-win and both parties can get more.
3. The size of the pie gets bigger in_____ negotiations.
4. The resources that parties can split are increased when they work together _____ as opposed to competitively.
5. Sometimes people make a(n) _____ to a course of action and continue to try the same thing over and over again, or spend more money or resources on something even though they see it is not working.
6. Base figures on which we judge the favorability of something are called _____ . People tend to look for these standards even when they don't necessarily make sense.
7. People can react very differently to something when the perspective or _____ of reference changes.
8. BATNA means_____ .
9. The _____ is as far as you will go in a negotiation without walking away from the deal. It is closely related to your BATNA.
10. _____are bids, offers and specific figures.
11. _____underlie positions. By understanding your own and the other party's_____, you can focus on meeting them and not get stuck focusing on positions.
12. Big or rapid changes in the size of your bid suggest that you are willing to make further_____.
13. After the negotiations are settled, one party might try to get one more little concession, often called a _____ . A good response to this is to initiate a post-settlement negotiation in which you explore opportunities for both parties to get more out of the deal.

Answers to Fill-in-the-Blank Quiz

1. Distributive
2. Integrative
3. Integrative or collaborative
4. Collaboratively
5. Irrational escalation of commitment
6. Anchors
7. Frame
8. Best alternative to a negotiated agreement
9. Reservation price
10. Positions
11. Interests, interests
12. Concessions
13. Nibble

Quiz With the Correct Answers

1. Distributive negotiations are win-lose and are resolved when one party loses and the other party wins.
2. Integrative negotiations are win-win and both parties can get more.
3. The size of the pie gets bigger in integrative or collaborative negotiations.
4. The resources that the parties can split are increased when they work together collaboratively as opposed to competitively.
5. Sometimes people make an irrational escalation of commitment to a course of action and continue to try the same thing over and over again, or spend more money or resources on something even though they see it is not working.
6. Base figures on which we judge the favorability of something are called anchors. People tend to look for these standards even when they don't necessarily make sense.
7. People can react very differently to something when the perspective or frame of reference changes.
8. BATNA means best alternative to a negotiated agreement.
9. The reservation price or resistance point is as far as you will go in a negotiation without walking away from the deal. It is closely related to your BATNA.
10. Positions are bids, offers and specific figures.
11. Interests underlie positions. By understanding your own and the other party's interests, you can focus on meeting them and not get stuck focusing on positions.
12. Big or rapid changes in the size of your bid suggest that you are willing to make further concessions.
13. After the negotiations are settled, one party might try to get one more little concession, often called a nibble. A good response to this is to initiate a post-settlement negotiations in which you explore opportunities for both parties to get more out of the deal.

Multiple-Choice Negotiation Quiz

1. Ruben is offered a job for a salary of $16,000 per year. He is not currently working and has no other job offers. The recruiter stated that the salary for this job would be $16,000 to $20,000. What should Ruben do?
   - **a.** Accept the job because the employer is probably already at its resistance point.
   - **b.** Tell the employer, "I'd really like to accept your offer, but I would prefer that the salary be $18,000." He'd do this because he thinks the employer won't rescind its offer since his response was put so kindly, and the employer's resistance point is probably higher than $16,000.
   - **c.** Ask for $21,000 because of his BATNA.
   - **d.** Negotiate the offer at $20,000 because that offer would be closer to his target point of $21,000.
2. In which of the following are there both a third party and a binding outcome?
   - **a.** Arbitration.
   - **b.** Mediation.
   - **c.** Conciliation.
   - **d.** Negotiation.
3. Juan is negotiating with his boss for time off this summer. He has already earned two weeks' paid vacation, but he's asked his boss for two extra weeks off (unpaid) so that he can travel with his wife to Europe. He could still take the trip if he got two weeks paid and one week unpaid. Which of the following is true about Juan?
   - **a.** His resistance point is two weeks paid and two weeks unpaid.
   - **b.** His target point request is two weeks paid and one week unpaid.
   - **c.** His BATNA is two weeks paid and two weeks unpaid.
   - **d.** The settlement range is somewhere between zero and two weeks total paid and unpaid.
4. You are negotiating with a co-worker over who will work on the weekend, either you or he. You will need to work with this person in the future and may have to deal with work schedule issues again sometime. During the discussion, he becomes red-faced and you conclude that he is angry. You should:
   - **a.** Tell him that he appears angry and suggest that he take a break.
   - **b.** Tell him that this can be a distributive negotiation in which there can be a "win-win" solution.
   - **c.** Tell him that you'd like to take a break for a little while and talk about it later.
   - **d.** Use the high-ball/low-ball tactic.

5. If you'd like to get a pay raise, but you don't have any other job offers right now, which of the following is true about your BATNA?
   a. You have a great BATNA.
   b. By quitting, you'd improve your BATNA.
   c. By getting your MBA or getting a job offer from a different employer, you'll improve your bargaining power.
   d. Your pay raise is your BATNA.
6. Which of the following mediation tactics is the most likely to bring about a positive negotiation atmosphere?
   a. Scheduling caucuses.
   b. Issuing a binding ruling.
   c. Investigation and interrogation.
   d. Humor.
7. You might give a low-ball offer to a job candidate because:
   a. You want to set a low anchor for the negotiation.
   b. You believe that the candidate is particularly well-qualified.
   c. You have a big budget available to you.
   d. None of the above.
8. Logrolling is most like which of the following:
   a. Trading apples and oranges.
   b. Trading apples and oranges when I like apples more than oranges and you like oranges more than apples.
   c. Rolling over your opponent with high-ball offers.
   d. None of the above.
9. Assuming that there is a "fixed pie" in negotiation is most like:
   a. Integrative bargaining.
   b. Distributive bargaining.
   c. Mediation.
   d. Arbitration.
10. Expected payoffs from multiple possible outcomes take into consideration:
   a. BATNAs.
   b. FATNAs.
   c. RATNAs.
   d. Probabilities.

Multiple Choice Quiz Answers

1. b
2. a
3. b
4. c
5. c
6. d
7. a
8. b
9. a
10. d

MASTER NEGOTIATOR AWARD CERTIFICATE

Teaching note

Sometimes it's fun to award students certificates if they do well in the negotiation exercises. You will find a blank certificate on the following page. You can just fill in the date and student's name, and have your department chair sign it. It is often amazing how little things like this leave a positive and lasting impression on students.

MASTER NEGOTIATOR

In recognition of superior achievement during the _____ ,

_____Semester Course on Negotiation Principles and skills,

as reflected by the evaluation of his/her peers and instructor,

_____

is hereby awarded the honorary title of Master Negotiator.

_____ _____

Instructor Department Chair

Module 2: Mediation

Teaching note

This module includes a PowerPoint presentation that introduces students to the concepts and processes involved in mediation. There are two handouts that can be used to reinforce the concepts discussed in the lecture and subsequent discussion. The handouts should be given to students participating as mediators in the English-only rule negotiation role-play exercise.

INTRODUCTION TO MEDIATION

Learning Objectives

By the end of this module, students will:

- Learn how mediation is different from negotiation and arbitration.
- Understand the basic concepts of mediation.
- Apply mediation tactics to workplace disputes.

Activities

- PowerPoint lecture and discussion.
- Handouts used with the mediation option in the English-only rule negotiation exercise.

Duration

Lecture and discussion:	30 minutes
Mediation role-play exercise (optional):	40 minutes
Follow-up and discussion:	25 minutes
Total:	**95 minutes**

MEDIATOR SETTING THE STAGE SCRIPT

Teaching note

This script is for use by students acting as mediators in the role-play exercises. It can be used with the second negotiation exercise in this learning module. Alternatively, it could be used with mediation role-play exercises available from other sources. There are several mediation role-play exercises available from the Dispute Resolution Research Center at Northwestern University or Willemette University.

Instructions

Below is a script that students acting as mediators should read to introduce themselves to the disputing parties. New or inexperienced mediators may wish to use this checklist to make sure they cover all the important topics.

Use this checklist with the English-only rule negotiation exercise. After students have been assigned to the roles of Holmes Willis and Danny Maldanado, a third student will be assigned to play the mediator role. That student should meet with Holmes and Danny to help them find a way to resolve their dispute. To begin the meeting, the student acting as the mediator should read this script.

Mediator Setting the Stage Script

At the beginning of the mediation session, the mediator should read this script.

Good morning [or afternoon].

My name is_____ , and I'll be the mediator for today.

Let me take just a few moments to talk about mediation to set the stage for our discussions.

Mediator's Job

As a mediator, I'm not a judge or jury, and I will not decide the case for you.

Rather, my job is to coordinate communication between you so you may better understand the other party's position and, if you voluntarily agree, to settle this dispute.

I will not give legal advice or opinions—that's the job of the attorneys.

Process

Mediation is an informal, voluntary and confidential process.

Informal

- It's intended to be less costly than a trial where the process is more formal and more expensive.
- There are no records taken of the meeting, no court reporters, no tape recorders, etc.
- I might take some notes but my notes will be destroyed after the meeting is over.
- Although the meeting is less formal, we will conduct ourselves in an orderly fashion.
- Each side will have an opportunity to talk about the case from their perspective.
- After that, each side can respond to or ask questions of the other side.

Voluntary

- Our goal is to reach a settlement of all or part of the issues in the case.
- No one will force or coerce you into reaching an agreement.
- When we reach a settlement, you may write the terms of the agreement yourselves or i can assist you in recording the terms of your agreement.

Confidential

- The process is confidential, and I will not reveal what is discussed in the mediation unless everyone agrees.
- We may break into separate meetings or caucuses. If we do that, whatever you say to the mediator will remain confidential unless you give your permission to reveal it to the other party.
- The purpose of confidentiality is to help parties to be willing to openly discuss their case in the hope that they can reach a mutually agreeable settlement.

OK, let's begin. Who would like to go first?

MEDIATOR TACTICS CHECKLIST

Teaching note

This checklist is for use by students who will be observing others who are acting as mediators in role-play exercises. It can be used with the English-only rule negotiation exercise in this learning module or with mediation role play exercises available from other sources. There are several exercises available from the Dispute Resolution Research Center at Northwestern University or Willemette University.

The following page is a checklist that students can use to monitor the actions of students who are mediators in a dispute resolution exercise.

After students have been assigned to the roles of Holmes Willis and Danny Maldanado, a third student will be assigned to play the role of mediator. That student should conduct a meeting with Holmes and Danny to help them to find a way to resolve their dispute. If the meeting is conducted in front of the class, the rest of the students will use this checklist to evaluate the performance of the mediator. The goal is to identify what, if any, tactics the mediator used successfully. Following the mediation role-play exercise, have the class discuss the tactics they observed.

Mediator Tactics Checklist: Effective Tactics for Mediators

The following tactics have proven to be effective in helping parties voluntarily resolve their disputes. Whether any particular tactic will be effective depends on the context and the nature of the negotiations and the underlying causes of the dispute. Put a check mark by each mediation tactic you observe.

1. Pressure

- ☐ Try to change (or maybe lower) a party's expectations.
- ☐ Push a party to make compromises.
- ☐ Tell a party that its positions are unrealistic.

2. Processes

- ☐ Simplify the agenda by eliminating or combining issues.
- ☐ Call for caucuses or keep the parties at the table and bargaining.
- ☐ Control the timing or pace of negotiations.
- ☐ Teach the parties about bargaining processes (give and take, positions v. interests).

3. Friendliness

- [ ] Try to gain trust and confidence.
- [ ] Use humor to lighten the atmosphere.
- [ ] Let them blow off steam in front of you.
- [ ] Try to speak their language.

4. Avoid negative emotions

- [ ] Control expressions of hostility.
- [ ] Suggest proposals that will help the parties avoid the appearance of defeat.

5. Discuss alternatives

- [ ] Discuss other settlements or patterns of agreements.
- [ ] Point out the costs of disagreement (e.g., walking away from a good deal; litigation).
- [ ] Suggest that the parties review their needs with their constituency.
- [ ] Help them deal with problems with their constituency or superiors.
- [ ] Have the parties prioritize the issues.

Module 3: Alternative Dispute Resolution

DESIGNING AN INTERNAL ADR PROGRAM

Learning Objectives

By the end of this module, students will understand the following concepts:

- Peer review.
- Arbitration.
- Ombudsman.
- Open-door policies.

In addition, students will understand issues regarding enforceability of arbitration agreements and will evaluate and design an ADR program.

Activities

- PowerPoint lecture and discussion.
- Writing an evaluation of ADR programs.

Duration

Lecture and discussion: 90 minutes.

Teaching note

After presenting the lecture on designing an effective internal ADR program, students can be given the assignment described on the next page. It requires them to compare and evaluate different ADR programs and to write a memo that recommends specific language for their employer. A grading rubric is provided so students know how they will be graded. Instructors should use this rubric to evaluate the student's memos.

ASSIGNMENT: EVALUATE AND RECOMMEND A SPECIFIC ADR PROGRAM

After listening to the lecture on designing an effective internal ADR program, you will write a memo that evaluates the ADR programs of other employers and then draft a program for your employer. Write a one- to two-page memorandum and attach a draft of the language that describes your program.

You will write the memo in standard business format. Discuss the strengths and weaknesses of three or more programs. Examples will be provided to you. You may not copy and paste the exact language of other programs; you should write your own description of an ADR program.

You will be graded according to the following factors:

GRADING FACTORS FOR THE MEMO AND ATTACHED ADR PROGRAM

Grading Factors	Scale	Points Actually Earned
Did the memo evaluate strengths and weaknesses of several ADR programs?	10 points	
Did the memo explain the advantages of adopting an ADR program?	10 points	
Did the memo state the criteria that were being used to draft the ADR program?	10 points	
Did the memo state that a proposed draft of the ADR program was attached?	10 points	
Did the ADR program have an explanation of the purpose and intent?	10 points	
Did the ADR program specify the procedures that would be used?	10 points	
Did the ADR program specify the types of complaints that could be submitted?	10 points	
Did the RFP require the vendor to identify its qualifications?	10 points	
Did the ADR program specify who would be involved in the process?	10 points	
Did the ADR program specify the extent to which it is mandatory?	10 points	
Grammar.	Subtract two points for each error.	
Spelling.	Subtract two points for each error.	
	Total points	

EXAMPLES

These are actual policies that had been disseminated by the EEOC. They can be accessed online at www.eeoc.gov/abouteeoc/task_reports/practice.html

INTERNAL ADR PROGRAMS

A. Voluntary Policies

Trucking Firm's Open-Door Policy

If, at any time, you desire to bring to the attention of any member of management your suggestions, observations, problems or concerns regarding the company or yourself, we urge you to do so by whatever means you choose, verbal or written.

The company's open-door policy allows and encourages you to discuss any matter freely, openly, or in confidence, and without fear of any recrimination or retaliation whatsoever. You should exercise this right first with your immediate supervisor and, if necessary, succeeding levels of management up to and including the company's president.

Restaurant's Non-Union Grievance Policy

The company is committed to providing the best possible working conditions for its employees. Part of this commitment is encouraging an open, frank atmosphere in which any problem, complaint, suggestion or question receives a timely response from the company's supervisors and managers. Undisclosed problems will remain unresolved and eventually lead to a decay of work relationship, dissatisfaction in working conditions and a decline in operational efficiency.

The company strives to ensure fair and honest treatment of all employees. Supervisors, managers and employees are expected to treat each other with mutual respect. Employees are encouraged to offer positive and constructive feedback. If employees disagree with established rules of conduct, policies or practices, they are encouraged to express their concern.

If a situation occurs where employees believe that a condition of employment or decision affecting them is unjust or inequitable, they are encouraged to bring the matter to management's attention.

Employees are encouraged to present problems to their immediate supervisor. If the supervisor is unavailable or the employee believes it would be inappropriate to contact that person, the employee should consult with his or her immediate supervisor's supervisor. If this is inappropriate, then the employee should feel free to contact the director of human resources or an officer of the company. Employees are always encouraged to follow their chain of command.

If the employee is not satisfied with the response of the appropriate officer of the corporation, the employee may bring the matter to the president's attention by filing a written copy of the request and response or action taken.

Not every problem can be resolved to everyone's total satisfaction, but only through understanding and discussion of mutual problems can employees and management develop confidence in each other. This confidence is important to the operation of an efficient and harmonious work environment.

B. Binding Policies

National Chain Restaurant's ADR Policy

Don't get mad. Get it resolved! If you ever feel like our principles of fairness, caring and respect have been ignored—you have a problem with the way something was handled or you disagree with a disciplinary action—the open-door policy is the way to deal with it. But if you're still upset, there's a way to give your side of the story and get the situation resolved with fairness and zip. We call it the dispute resolution procedure, or DRP.

After you go through the open-door process, DRP gives you three additional steps:

1. Peer review.
2. Mediation.
3. Arbitration.

As a company staff member, you agree to use DRP as the only method for resolving any eligible disputes you may have with the company, instead of going through the much more complicated, costly and time-consuming hassle of taking it to court.

You'll find out more about DRP during orientation, and your manager will give you a couple of brochures about it. It's all part of living up to our pledge that "You Count!"

Manufacturer's ADR Policy (Part of Initial Employment Application)

Pre-Dispute Resolution Agreement

It is the desire of ____[Employer's Name]_____, whenever possible, to resolve disputes in a fair and expeditious manner, reflecting the interests of the concerned parties. Although there is no outstanding dispute between the parties, it is recognized that, as with any relationship, differences may arise, which may not be resolved and regarding which the parties may seek relief before a court or arbitrator.

In consideration of the company employing you, you and the company each agrees that, in the event either party (or its representatives, successors or assigns) brings an action in a court of competent jurisdiction relating to your recruitment, employment with or termination of employment from the company, the plaintiff in such action agrees to waive his, her or its right to a trial by jury, and further agrees that no demand, request or motion will be made for trial by jury.

In consideration of the company employing you, you further agree that in the event that you seek relief in a court of competent jurisdiction for a dispute covered by this agreement, the company may, at any time within ninety (90) days of the service of your complaint or original petition on the company, at its option, require all or part of the dispute be arbitrated by one arbitrator in accordance with the rules of the American Arbitration Association. You agree that the option to arbitrate any dispute is governed by the federal Arbitration Act and fully enforceable. You understand and agree that if the company exercises its option, any dispute arbitrated will be heard solely by the arbitrator and not by a court.

This Pre-Dispute Resolution Agreement will cover matters directly or indirectly related to the employment relationship, including your recruitment, employment or termination by the company; including, but not limited to, claims involving laws against discrimination, whether brought under federal and/or state law, and/or claims involving co-employees but excluding worker's compensation claims.

The right to a trial by jury is of value.

You may wish to consult with an attorney prior to signing this agreement. If so, take a copy of this form with you.

Dated:_____

_____

Signatures of applicant, witness and company representative

SAMPLE ADR POLICIES

Barnett Banks, Inc.

Background

Barnett Banks, Inc. (Barnett) is the leading financial institution in Florida and ranks in the top 25 in the United States. The company offers a comprehensive line of banking and related financial services to retail and business customers in its primary markets of Florida and southern Georgia. Nearly 20,000 workers are employed by the company, which is headquartered in Jacksonville.

Alternative Dispute Resolution

Under Barnett's Direct Dialogue Program, employees are encouraged to bring their work-related question, problem, suggestion or complaint to their immediate supervisor, who will respond as thoroughly and promptly as possible. If further follow-up is needed, employees may address their concern with their supervisor's superior or with the human resources department. Employees may not be penalized for bringing a complaint under the program. Barnett emphasizes that unless suggestions or problems are raised, supervisors cannot respond; two-way communication helps small problems stay small, where they are most easily resolved; and that early attention to problems allows those concerned to explore all the alternatives and decide which solution is best.

Barnett has an ombudsman for employees who are not comfortable discussing work-related issues with their supervisor or the human resources department. The ombudsman is available to discuss problems involving disagreements with supervisors, performance evaluation issues, working conditions, job content, relationships with other staff, harassment (including sexual harassment) and discrimination. The ombudsman maintains absolute confidentiality, remains impartial and assures open discussion without fear of reprisal. The ombudsman is there to help the employee explore alternative solutions to problems and disagreements. In more complicated situations, but only with the employee's permission, the ombudsman will intervene and attempt to reach an agreement that is satisfactory to everyone involved.

B E and K, INC.

Background

B E and K, Inc. (B E and K), is a global engineering and construction, maintenance and environmental firm headquartered in Birmingham, Ala. The company has 7,900 employees.

Alternative Dispute Resolution

B E and K has a five-option program called the Employee Solution Program. The program has been in effect since September 1, 1996.

Option one embraces an open-door policy. The open door is a voluntary process that allows the employee to talk with his/her immediate supervisor or with a higher manager without fear of retaliation. The employee is encouraged to solve the problem at the lowest possible level, but may take it as far up the chain of command as needed.

Option two is the employee hotline. A program coordinator is ready to answer the hotline and refer the employee to an advisor who can provide free, expert and confidential advice. The advisor can tell the employee about available problem-solving options. The employee might want to remain anonymous and just ask a few questions, or he or she may wish to discuss all the details of the situation with the advisor and be coached through the open-door process.

Option three is the conference. A conference is a meeting in which the employee and a B E and K representative sit down with someone from the employee solution program to talk about the employee's dispute and choose a process for resolving it. The goal is to help the parties agree to settle the dispute and choose someone to help with it.

Option four is mediation. If the dispute is based on a legally protected right, such as discrimination based on age, race or sex, and has not been resolved in options one, two or three, the employee or the company may request mediation. If either party requests mediation, the other party is required to participate, although it is a non-binding process. The employee and B E and K are responsible for resolving the dispute. If the employee requests mediation, the employee must pay a $50 processing fee, but B E and K will pay all other mediation fees. All meditations will be conducted by the American Arbitration Association or another independent organization that provides mediation services.

Option five is arbitration. If the dispute has not been resolved using any of the other options, either the employee or B E and K may request arbitration. The employee may elect to make the arbitration binding, but it is not a requirement of the program. If the employee requests arbitration, the employee must pay a $50 processing fee. The arbitrator makes a decision after both sides present their evidence, witnesses and arguments at an arbitration hearing. Arbitrations are conducted by the American Arbitration Association or another independent organization that provides arbitration services. The parties select an arbitrator from a list of qualified candidates. If the arbitrator decides in the employee's favor, the employee may be awarded anything the employee might seek through a court of law.

If the employee believes the dispute involves or may involve a legally protected right, the employee may request legal consultation under the plan during options four or five. Once approved by the program coordinator, the employee may consult a lawyer of the employee's choice. B E and K will pay 90 percent of the employee's legal fees through the legal consultation plan, up to a maximum of $2,500.

The employee is not required to hire a lawyer to participate in mediation and arbitration. If the employee chooses not to bring a lawyer, the company will also participate without a lawyer.

Employees still may go to the EEOC. Accordingly, employees are free to consult the appropriate state human rights commission, the EEOC or any other government regulatory body regarding the workplace issue. The employee may file a charge at any time to preserve the employee's rights, but B E and K will ask the commission to hold the charge in abeyance pending the program's action. It also appears that the company's process should never take more than 180 days. Nevertheless, B E and K hopes that the program is so effective that employees will not need to go anywhere else. If the employee files a lawsuit, B E and K will ask the court to refer it to its employee solution program.

In terms of results, B E and K, for the time period September 1, 1996, to May 15, 1997, successfully resolved 87 out of 94 cases. Of the successfully resolved cases, the two largest categories were unfair termination (39) and unfair treatment or harassment (17).

TRW

Background

TRW, Inc. (TRW), is a transportation parts and equipment company that manufactures and sells products and systems in two industry segments: automotive (automotive systems and components); and space and defense (spacecraft, software and systems engineering support and electronic systems). Founded in 1901, TRW is headquartered in Cleveland, Ohio, and employs more than 60,000 people in 27 countries.

Alternative Dispute Resolution

TRW's ADR policy applies to all U.S. employees except those already covered by a collective bargaining agreement. It applies to "covered disputes," defined in the policy as:

- Involuntary terminations such as discharges and layoffs, but only to the extent of a cognizable claim in the state or federal court jurisdiction in which the employee is located.
- Claims of unlawful discrimination, harassment or constructive discharge based on protected status. Additional disputes as may be decided by the business unit (e.g., disputes regarding discipline, promotion, pay increases).

TRW provides a number of ADR mechanisms for its employees to use. These include mediation, a senior management review process, peer review and arbitration.

The ADR procedure may be used concurrently by employees who file claims with appropriate federal, state or local administrative government agencies (e.g., EEOC). In all cases, TRW policy will comply with statutes of limitations for employment disputes in accordance with federal or state law. The only portion of the ADR process that is mandatory is arbitration, but the result is not binding on the employee. All of the other mechanisms are optional to the employee and none are binding on the employee. On the other hand, the senior management review process, peer review and arbitration are binding on TRW if accepted by the employee.

The specific ADR format to be used is the option of the particular TRW business unit. There are two recommended formats: a peer review panel or a neutral, third-party fact-finder (an arbitrator or a private judge). The chosen format must be in compliance with federal and state law and be approved in advance by the law department. The employee is not required to relinquish any rights that he/she would have in court. The law department must approve all ADR procedures. TRW seeks to ensure that adequate due process is provided so that the employee has the opportunity for a full and fair and impartial hearing.

TRW submitted the ADR process applicable to its Vehicle Safety Systems, Inc. With regard to this business unit, ADR begins with the option of mediation. Mediation is permitted, but is not a mandated additional step prior to any of the other ADR programs, including arbitration. The parties jointly select a mediator from the Federal Mediation and Conciliation Service, Endispute or other recognized mediation sources. Both parties have the right to consult with or be represented by an attorney or other representative at any part of the mediation process. Since mediation is not a binding process, the mediator does not have the power to impose a settlement on the parties. If the dispute is not resolved in mediation and the employee continues to pursue resolution of the dispute, any discussions in mediation by the parties or the mediator may not be referred to or have any bearing in any subsequent proceeding.

The employee might also wish to use the senior management review process. Under this mechanism, the employee discusses the problem with the plant manager or two progressively higher levels of management. The senior management review process will be final and binding on TRW if accepted by the employee, but the employee may choose to further use peer review or arbitration.

Under peer review, the dispute is submitted to a panel of employees, a majority of which must be the employee's peers. The panel consists of five members: two supervisory-level employees selected by the employee from a pool of supervisory-level employees, and three peers selected by the employee by drawing from the appropriate pool of peer panelists. The employee draws four names from the supervisor pool, selects two names to serve, selects one name as an alternate and discards one name. The employee will draw five names from the peer pool, select three names to serve, select one name as an alternate and discard one name. The panel leader is selected by panel members and initiates testimony by the employee and supervisor. No internal or external employee representation is allowed during the proceedings. Other

employees recommended by the employee or supervisor may be asked to present information. The panel may also seek advice from experts in the company regarding policy interpretation, etc. A majority of three panel members will determine the decision.

Each party is responsible for its own costs, with certain exceptions. TRW will pay the costs and fees of the mediator. The employee will not be responsible for the salaries of the employees on the peer panel.

Baltimore Gas and Electric

Employees should feel assured that they can raise issues or complaints without fear of retaliation or harassment, discuss grievances with their immediate supervisor or with the next level of management if the situation involves the immediate supervisor. A grievance coordinator provides guidance to the employee and makes recommendations to the supervisor to ensure prompt resolution, normally within 10 days. If the employee is dissatisfied with the decision, he/she can continue up the chain of command to the vice president or have the appeal heard by a peer review panel. The five panel members are randomly selected by the employee from two groups (a manager/supervisor pool and a non-supervisor pool)—three from the pool that is most like the employee and two from the remaining pool. The panel's decision is final and binding.

Bureau of National Affairs (BNA)

Under an internal EEO-complaint process, an employee alleging discrimination or harassment practice may initiate a complaint and forward it to the EEO office. Management is asked to respond, and the EEO office conducts an investigation, during which the employee and management are kept informed of the status of the investigation. The complaint may be dismissed if the EEO office indicates that the complaint has no merit. The EEO office conducts and coordinates conciliation efforts, but if the issue is not satisfactorily resolved, it documents efforts and reasons in writing to the company's general counsel.

Employees represented by a union can contact the union for assistance in resolving workplace problems and have a right to file a grievance against a manager if the manager's actions are unfair and in violation of provisions of bargaining agreement.

Employees not represented by a union are free to seek assistance and counsel from a representative of the human resources department.

CIGNA

As a result of focus group meetings throughout the country, the employee has the following options to address allegations of discrimination and other grievances: Speak-Easy, an internal grievance procedure that gives the employee the opportunity to talk to management about any work-related concerns; or peer review, which allows the employee to talk to his/her supervisor at the first step or to the person to whom his/her supervisor reports at the second step, and as the third step to make a choice between receiving a decision that is final and binding on the company from either a peer review panel or from the division head; and finally, arbitration, which the

employee is mandated to go through if dissatisfied with any of the previous decisions before going externally to a regulatory oversight agency (e.g., EEOC) or to court.

Dial Corporation

Dial has an internal complaint resolution process through which employees are encouraged to first seek assistance from their supervisor. If that is not appropriate, employees may seek assistance from their human resources representative or, if the employee prefers, from the director of diversity and people development who thoroughly and discreetly investigates the complaint and conducts a review of legal issues with appropriate legal staff. An investigative report goes to the senior vice president of human resources and the appropriate functional vice president in the organization where the alleged offense occurred; they decide whether allegations are supported by the investigatory findings.

Where the company or one of its leaders was in error, every effort is made to make a full resolution of the situation with the employee. Nothing in the internal process prevents or discourages the employee from pursuing other remedies available under various laws.

Fannie Mae

Fannie Mae's corporate justice system (CJS) was designed, developed and implemented by the Office of Diversity. Employees may seek information, consultation, assistance, counseling, mediation and/or file a complaint with the Office of Diversity. All employment disputes are handled by CJS, including allegations of discrimination, harassment, unfair treatment, violation of company policies/procedures, improper personnel policies/practices and gross mismanagement. All such matters are to be handled promptly, impartially and confidentially. In the voluntary dispute resolution process of mediation, where a trained, neutral mediator intervenes between disputants to identify issues, promote reconciliation, explore options, facilitate compromise and help arrive at a mutual agreement, it is the responsibility of the parties to agree on a solution and reach a negotiated settlement of their differences.

Intel

Intel's open-door program is staffed by senior specialists who are accessible to all employees and are highly trained, impartial fact-finders who look at all sides of concerned issues. The specialist meets with the employee to discuss the employee's concerns and issues; conducts a confidential investigation; analyzes all information with an eye toward compliance with company guidelines, corporate business principles, general fairness and the law; makes recommendations to the employee and management chain about how to best resolve the issues; helps find workable solutions; and gives information about the issues only to those individuals with a need to know. The employee is not penalized for participation.

International Business Machines (IBM)

Employees are encouraged to come forward and talk to their manager at any time they feel they have experienced harassment. Communication channels such as open-door, panel reviews and speak-up programs exist to help employees address their situations.

United Technologies Corporation (UTC)

UTC's Ombuds and DIALOG programs provide a neutral and confidential communication process as an alternative to established channels of expressing employee concerns. Any issue can be raised (except those covered by a collective bargaining agreement) in confidence and without fear of retribution to senior management for their awareness, consideration and response. UTC reports that the use of these programs has resulted in effective and expedient internal resolution of matters.

Wisconsin Electric Power

The company initiated the consulting pairs program, where consulting pairs teams take the lead in breaking down relationship barriers within the workforce. They confidentially mediate a broad range of issues to improve work relations among employees, facilitate "join-ups" for new or transferred employees to reduce the orientation period and allow them to contribute as quickly as possible. All team members must complete 15 days of training on race, gender and conflict resolution skills. Employees are encouraged to use a hotline, which triggers an assignment of the employee's issues to a pairs team that best mirrors the employee(s) involved. Consulting pairs serve for 18 months, and a total of 18 members are selected to represent approximately 500 employees.

SELECTED REFERENCES FOR DESIGNING AN INTERNAL ADR PROGRAM

Web Sites

Best Practices of Private Sector Employers: EEOC: www.eeoc.gov/abouteeoc/task_reports/practice.html.

Cornell University Institute on Conflict Resolution: www.ilr.cornell.edu/icr/links.html.

Society for Professionals in Dispute Resolution: www.spidr.org.

U.S. Office of Personnel Management, Alternative Dispute Resolution: Resource Guide: www.opm.gov/er/adrguide/toc.htm.

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Appendix: City of Altus on the English-Only Rule Case

MALDANADO V. CITY OF ALTUS (10TH CIRCUIT COURT OF APPEALS, 2006)

[abbreviated and condensed, citations omitted]

HARTZ, Circuit Judge.

Plaintiffs are employees of the City of Altus, Oklahoma (City). They appeal the district court's grant of summary judgment dismissing all their claims against the City, the City Administrator, and the Street Commissioner (collectively referred to as Defendants). All claims arise out of the City's English-only policy for its employees. Asserting claims of both disparate-impact and disparate-treatment, Plaintiffs contend that the English-only policy discriminates against them on the basis of race and national origin in violation of Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d2000e.

I. BACKGROUND

A. Factual Background

Plaintiffs' claims stem from the City's promulgation of an English-only policy. Approximately 29 City employees are Hispanic, the only significant national-origin minority group affected by the policy. All Plaintiffs are Hispanic and bilingual, each speaking fluent English and Spanish.

In the spring of 2002 the City's Street Commissioner, Defendant Holmes Willis, received a complaint that because Street Department employees were speaking Spanish, other employees could not understand what was being said on the City radio. Willis informed the City's Human Resources Director, Candy Richardson, of the complaint, and she advised Willis that he could direct his employees to speak only English when using the radio for City business.

Plaintiffs claim that Willis instead told the Street Department employees that they could not speak Spanish at work at all and informed them that the City would soon implement an official English-only policy. On June 18, 2002, Plaintiff Tommy Sanchez wrote a letter to Ms. Richardson and the City Administrator, Defendant Michael Nettles, expressing concerns about the new Street Department English-only policy and the proposed citywide policy. Sanchez was particularly concerned that his subordinates, Plaintiffs Ruben Rios and Lloyd Lopez, had been told of a policy that he knew nothing about. Citing the City's Personnel Policies and Procedures Manual, the letter informed Nettles that employees had not been given proper notice if this was a new administrative policy and questioned whether Willis and the City

had followed proper procedures in implementing the new policy. Sanchez reported that Willis had told him that the reason Hispanics speak Spanish "is because [of] . . . insecurities," and that Willis had suggested that he (Sanchez) "would feel uncomfortable if another race would speak their native language in front of [him]," id. The letter requested that "the City of Altus understand that we Hispanics are proud of our heritage and do not feel that our ability to communicate in a bilingual manner is a hindrance or an embarrassment. There has never been a time that because I spoke Spanish to another Spanish speaking individual, I was unable to perform our job duties and requirements." At the end of the letter Rios and Lopez signed a paragraph stating that "[t]he purpose of this correspondence is to serve as a discrimination complaint in accordance with the City of Altus Personnel Policies and Procedures Manual Section 102, in which we are requesting that an investigation be conducted into these charges and that a report be issue[d] within two weeks." Another employee (Leticia Sanchez) also complained orally to Richardson about Willis's instructing employees not to speak Spanish in any circumstances during work hours.

In July 2002 the City promulgated the following official policy signed by Nettles:

To insure effective communications among and between employees and various departments of the City, to prevent misunderstandings and to promote and enhance safe work practices, all work related and business communications during the work day shall be conducted in the English language with the exception of those circumstances where it is necessary or prudent to communicate with a citizen, business owner, organization or criminal suspect in his or her native language due to the person or entity's limited English language skills. The use of the English language during work hours and while engaged in City business includes face to face communication of work orders and directions as well as communications utilizing telephones, mobile telephones, cellular telephones, radios, computer or e-mail transmissions and all written forms of communications. If an employee or applicant for employment believes that he or she cannot understand communications due to limited English language skills, the employee is to discuss the situation with the department head and the Human Resources Director to determine what accommodation is required and feasible. This policy does not apply to strictly private communications between co-workers while they are on approved lunch hours or breaks or before or after work hours while the employees are still on City property if City property is not being used for the communication. Further, this policy does not apply to strictly private communication between an employee and a family member so long as the communications are limited in time and are not disruptive to the work environment. Employees are encouraged to be sensitive to the feelings of their fellow employees, including a possible feeling of exclusion if a co-worker cannot understand what is being said in his or her presence when a language other than English is being utilized.

Defendants state three primary reasons for adopting the policy:

1) workers and supervisors could not understand what was being said over the City's radios . . . ;

2) non-Spanish-speaking employees, both before and after the adoption of the Policy, informed management that they felt uncomfortable when their co-workers were speaking in front of them in a language they could not understand because they did not know if their co-workers were speaking about them; and 3) there were safety concerns with a non-common language being used around heavy equipment.

Although the district court observed "that there was no written record of any communication problems, morale problems or safety problems resulting from the use of languages other than English prior to implementation of the policy," [The District Court Order] noted that Willis had testified that at least one employee complained about the use of Spanish by his co-workers before implementation of the policy and other non-Spanish-speaking employees subsequently made similar complaints. Those city officials who were deposed could recount no incidents of safety problems caused by the use of a language other than English, but the district court found that some Plaintiffs were aware "that employee safety was one reason for the adoption of the policy." The court also stated that "it does not seem necessary that the City await an accident before acting."

Defendants offered evidence that the restrictions in the written policy were actually relaxed to allow workers to speak Spanish during work hours and on City property if everyone present understood Spanish. But Plaintiffs offered evidence that employees were told that the restrictions went beyond the written policy and prohibited all use of Spanish if a non-Spanish-speaker was present, even during breaks, lunch hours, and private telephone conversations. Plaintiff Lloyd Lopez stated in his deposition that "we were told that the only time we could speak Spanish is when two of us are in a break room by ourselves, and if anybody other than Hispanic comes in, we are to change our language." In addition he said, "We no longer can speak about anything in general in Spanish around anybody. Even if we were on the phone talking to our wives and we were having a private conversation with them and somebody happened to walk by, we were to change our language because it would offend whoever was walking by." Lopez understood, however, that the policy permitted him to speak Spanish if he was alone in a truck with another Spanish-speaking co-worker. Plaintiff Ruben Rios testified in his deposition that he similarly understood the policy to exclude the use of Spanish during breaks and the lunch hour if non-Hispanic co-workers were present. When asked specifically whether he understood that the policy allowed Spanish to be spoken between co-workers during lunch or other breaks, he stated that "[a]s long as there was another Hispanic person, we could speak in Spanish but away from other individuals, non-Hispanic people." And Plaintiff Tommy Sanchez testified that he was told that he could not speak Spanish at all, but added that Richardson explained to him that "[t]hat's not the way [the City] meant it." The City has not disciplined anyone for violating the English-only policy.

Plaintiffs allege that the policy created a hostile environment for Hispanic employees, causing them "fear and uncertainty in their employment," and subjecting them to racial and ethnic taunting. They contend "that the English-only rule created a hostile environment because it pervasively—every hour of every workday—burdened, threatened and demeaned the [Plaintiffs] because of their Hispanic origin." Plaintiffs each stated in their affidavits:

The English-only policy affects my work environment every day. It reminds me every day that I am second-class and subject to rules for my employment that the Anglo employees are not subject to. I feel that this rule is hanging over my head and can be used against me at any point when the City wants to have something to write me [up] for.

Evidence of ethnic taunting included Plaintiffs' affidavits stating that they had "personally been teased and made the subject of jokes directly because of the English-only policy[,]" and that they were "aware of other Hispanic co-workers being teased and made the subject of jokes because of the English-only policy." Plaintiff Tommy Sanchez testified in his deposition that each time he went to the City of Altus he was reminded of the restrictions on his speech by non-Hispanic employees. He stated that these other employees of the City of Altus "would pull up and laugh, start saying stuff in Spanish to us and said, 'They didn't tell us we couldn't stop. They just told you.'" Id. at 660. Sanchez also testified that an Altus police officer taunted him about not being allowed to speak Spanish by saying, "'Don't let me hear you talk Spanish.'" He further testified that "some of the guys from the street department would . . . poke fun out of it [the policy]", and that when he went to other departments "they would bring it up constantly." As evidence that such taunting was not unexpected by management, Lloyd Lopez recounted in his deposition that Street Commissioner Willis told Ruben Rios and him that he was informing them of the English-only policy in private because Willis had concerns about "the other guys making fun of [them]." Plaintiffs also provided evidence that Mayor Gramling was "quoted in a newspaper article as referring to the Spanish language as 'garbage,' " although the Mayor claims that he used the word garble and was misquoted.

B. EEOC Proceedings

Each Plaintiff filed a discrimination charge with the EEOC, complaining that the English-only policy constituted national-origin discrimination. Plaintiffs Danny Maldanado and Tommy Sanchez also alleged retaliation in their charges, and Danny Maldanado and Freddie Perez claimed that they had been subjected to "harassment and intimidation resulting in a hostile work environment."

II. DISCUSSION

A. Disparate-Impact Claims

Plaintiffs remaining disparate-impact claims arise under Title VII. Title VII defines unlawful employment practices as follows:

(a) Employer practices

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

One might say that Plaintiffs have not been subjected to an unlawful employment practice because they are treated identically to non-Hispanics. They claim no discrimination with respect to their pay or benefits, their hours of work, or their job duties. And every employee, not just Hispanics, must abide by the English-only policy. But the Supreme Court has "repeatedly made clear that although Title VII mentions specific employment decisions with immediate consequences, the scope of the prohibition is not limited to economic or tangible discrimination, and that it covers more than terms and conditions in the narrow contractual sense." The conditions of work encompass the workplace atmosphere as well as the more tangible elements of the job. Title VII does not tolerate, for example, a racist or sexist work environment "that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment[.]" internal quotation marks omitted). In their disparate-impact claim, Plaintiffs allege that the City's English-only policy has created such an environment for Hispanic workers. Discrimination against Hispanics can be characterized as being based on either race or national origin.

To prevail on these claims, Plaintiffs need not show that the policy was created with discriminatory intent. In the leading case on the subject, Griggs v. Duke Power Co., the Supreme Court held that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." These kinds of claims, known as disparate-impact claims, "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Thus, "[a] disparate-impact claim . . . does not require a showing of discriminatory intent." To be sure, claims based on a hostile work environment commonly are disparate-treatment claims, which do require proof of discriminatory intent. Indeed, Plaintiffs here bring such a disparate-treatment claim as well as this discriminatory-

impact claim. But there is no reason to prohibit discriminatory-impact claims predicated on a hostile work environment.

Under the statute a plaintiff first must "demonstrate[] that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." "This prima facie case, in many respects, is more rigorous than in a disparate treatment case because a plaintiff must not merely show circumstances raising an inference of discriminatory impact but must demonstrate the discriminatory impact at issue." If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."

1. Prima Facie Case

The district court … concluded that Plaintiffs had "not shown that requiring them to use the English language in the workplace imposed significant, adverse effects on the terms, conditions or privileges of their employment, so as to create a prima facie case of disparate impact discrimination under Title VII." Even under Spun Steak, however, English-only policies are not always permissible; each case turns on its facts. Here, Plaintiffs have produced evidence that the English-only policy created a hostile atmosphere for Hispanics in their workplace. As previously set forth, all the Plaintiffs stated that they had experienced ethnic taunting as a result of the policy and that the policy made them feel like second-class citizens. Tommy Sanchez testified to instances of taunting by an Altus Police officer, Street Department employees, and other non-Hispanic employees of the City. As evidence that such harassment would be an expected consequence of the policy, Lloyd Lopez testified that Street Commissioner Willis told him that he was notifying him of the policy in private because of concern that other employees would tease Hispanic employees about the policy if they learned of it.

Some of this evidence, as the district court pointed out, has diluted persuasive power because of the absence of specifics—who made what comment when and where. In a typical hostile work environment case, we might conclude that the evidence of co-worker taunting did not reach the threshold necessary for a Title VII claim.

There are, however, other considerations with respect to a policy that allegedly creates a hostile work environment. The policy itself, and not just the effect of the policy in evoking hostility by co-workers, may create or contribute to the hostility of the work environment. A policy requiring each employee to wear a badge noting his or her religion, for example, might well engender extreme discomfort in a reasonable employee who belongs to a minority religion, even if no co-worker utters a word on the matter. Here, the very fact that the City would forbid Hispanics from using their preferred language could reasonably be construed as an expression of hostility to Hispanics. At least that could be a reasonable inference if there was no apparent legitimate purpose for the restrictions. It would be unreasonable to take offense at a requirement that all pilots flying into an airport speak English in communications with the tower or between planes; but hostility would be a reasonable inference to

draw from a requirement that an employee calling home during a work break speak only in English. The less the apparent justification for mandating English, the more reasonable it is to infer hostility toward employees whose ethnic group or nationality favors another language. For example, Plaintiffs presented evidence that the English-only policy extended beyond its written terms to include lunch hours, breaks, and even private telephone conversations, if non-Spanish-speaking co-workers were nearby. Absent a legitimate reason for such a restriction, the inference of hostility may be reasonable.

Our task in this appeal is not to determine whether Plaintiffs have established that they were subjected to a hostile work environment. Rather, in reviewing the grant of summary judgment to Defendants, we are to decide only whether a rational juror could find on this record that the impact of the English-only policy on Hispanic workers was "sufficiently severe or persuasive to alter the conditions of [their] employment and create an abusive working environment."

It is in this context that we consider the EEOC guideline on English-only workplace rules. Under the relevant provisions of the guideline: (1) an English-only rule that applies at all times is considered "a burdensome term and condition of employment," presumptively constituting a Title VII violation; and (2) an English-only rule that applies only at certain times does not violate Title VII if the employer can justify the rule by showing business necessity. The EEOC rationales for the guideline are: (1) English-only policies "may 'create an atmosphere of inferiority, isolation, and intimidation' that could make a 'discriminatory working environment'"; (2) "English-only rules adversely impact employees with limited or no English skills . . . by denying them a privilege enjoyed by native English speakers: the opportunity to speak at work"; (3) "English-only rules create barriers to employment for employees with limited or no English skills"; (4) "English-only rules prevent bilingual employees whose first language is not English from speaking in their most effective language"; and (5) "the risk of discipline and termination for violating English-only rules falls disproportionately on bilingual employees as well as persons with limited English skills.

2. Business Necessity

In Griggs, the Supreme Court held that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." The Court stressed that "[t]he touchstone is business necessity. If an employment practice which operates to [discriminate against a protected minority] cannot be shown to be related to job performance, the practice is prohibited."

Defendants' evidence of business necessity in this case is scant. As observed by the district court, "[T]here was no written record of any communication problems, morale problems or safety problems resulting from the use of languages other than English prior to implementation of the policy." And there was little undocumented evidence. Defendants cited only one example of an employee's complaining about the use of Spanish prior to implementation of the policy. Mr. Willis admitted that

he had no knowledge of City business being disrupted or delayed because Spanish was used on the radio. In addition, "city officials who were deposed could give no specific examples of safety problems resulting from the use of languages other than English. . . ." Moreover, Plaintiffs produced evidence that the policy encompassed lunch hours, breaks, and private phone conversations; and Defendants conceded that there would be no business reason for such a restriction.

On this record we are not able to affirm summary judgment based on a business necessity for the English-only policy. A reasonable person could find from this evidence that Defendants had failed to establish a business necessity for the English-only rule.

DISPARATE-TREATMENT

1. Discrimination

Plaintiffs allege that the City engaged in intentional discrimination in violation of several statutes. As previously noted, Title VII bars discrimination in employment on the basis of race or national origin. Section 1981 provides equal rights to make and enforce contracts and to the benefits of laws for the security of persons and property. Section 1983 prohibits those acting under color of state law from depriving others of their federal rights; the right invoked by Plaintiffs is the right to equal protection of the laws under the Fourteenth Amendment.

The same analytical framework is applicable to all Plaintiffs' theories of intentional discrimination. "[I]n [disparate-treatment] discrimination suits, the elements of a plaintiff's case are the same . . . whether that case is brought under §§ 1981 or 1983 or Title VII." To prevail under a disparate-treatment theory, "a plaintiff must show, through either direct or indirect evidence, that the discrimination complained of was intentional."

Plaintiffs contend that they were intentionally discriminated against by the creation of a hostile work environment. We have already held that there is sufficient evidence to support a finding of a hostile work environment. The issue remaining, therefore, is whether those who established the English-only policy did so with the intent to create a hostile work environment.

To begin with, the disparate impact of the English-only rule (creation of a hostile work environment) is in itself evidence of intent. Here, Plaintiffs can rely on more than just that inference. First, there is evidence that management realized that the English-only policy would likely lead to taunting of Hispanic employees: Street Commissioner Willis allegedly told two Hispanic employees about the policy in private because of concern that non-Hispanic employees would tease them if they learned of it. Also, a jury could find that there were no substantial work-related reasons for the policy (particularly if it believed Plaintiffs' evidence that the policy extended to nonwork periods), suggesting that the true reason was illegitimate. Further, the policy was adopted without prior consultation with Hispanic employees, or even prior disclosure to a consultant to the City who was conducting

an investigation of alleged anti-Hispanic discrimination during the period when the English-only policy was under consideration. Finally, there is evidence that during a news interview the Mayor referred to the Spanish language as "garbage."

In our view, the record contains sufficient evidence of intent to create a hostile environment that the summary judgment on those claims must be set aside.

2. Retaliation

Plaintiffs also claim that they were retaliated against for engaging in conduct protected under Title VII and 42 U.S.C. § 1981. We begin by noting that only Plaintiffs Danny Maldanado and Tommy Sanchez alleged retaliation claims in their EEOC charges. With respect to the retaliation claims raised by all other Plaintiffs under Title VII, the courts "lack jurisdiction to review Title VII claims that are not part of a timely-filed EEOC charge." We affirm the dismissal of those Title VII claims.

We have said that the elements of a retaliation claim under § 1981 are identical to those required under Title VII. Plaintiffs must show that "(1) [they] engaged in protected opposition to discrimination; (2) [they were] subject[ed] to adverse employment action; and (3) . . . there exists a causal connection between the protected activity and the adverse action."

Plaintiffs claim that their protected conduct was the June 18 letter, written by Sanchez and also signed by Ruben Rios and Lloyd Lopez. We assume that sending the letter was protected conduct for Plaintiffs Sanchez, Rios, and Lopez. But it is too great a stretch to infer that adoption of the English-only policy was retaliation for the letter. After all, the policy had already been imposed in the Street Department, where Sanchez, Rios, and Lopez worked—that is why Sanchez wrote the letter. And the citywide policy was no more stringent than the Street Department policy; if anything, it was more lenient.

Because of the lack of evidence of a causal connection, we agree with the district court that Defendants were entitled to summary judgment on the retaliation claims.

III. CONCLUSION

We REVERSE the district court's grant of summary judgment to the City on Plaintiffs' claims of (1) disparate-impact and disparate-treatment under Title VII; (2) intentional discrimination under 42 U.S.C. § 1981; and (3) denial of equal protection under 42 U.S.C. § 1983; and we REMAND for further proceedings on those claims. In all other respects the district court's judgment is AFFIRMED.

[Dissenting Opinion and Footnotes Omitted]

1800 Duke Street
Alexandria, VA 22314-3499