J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 8(3) 231-257, 1999-2000

# ARBITRATION OF STATUTORY EMPLOYMENT DISCRIMINATION CLAIMS: WHAT HATH *GILMER* WROUGHT?

**JOAN PARKER**
*Arbitrator and Mediator*

**ABSTRACT**

The United States Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, enforcing mandatory arbitration of statutory employment discrimination claims, is the subject of intense debate in the employment community. Some employers have embraced mandatory arbitration agreements, even requiring assent to one as a term and condition of employment, while others decry these pre-dispute arbitration agreements as an indefensible denial of statutory rights. This article provides a comprehensive review of the judicial decisions interpreting and applying *Gilmer* in both the non-union and unionized sectors. It also discusses the necessary elements of a fair arbitration system. The author concludes that arbitration agreements that incorporate substantive and procedural fairness can be a meaningful and valuable alternative to litigating statutory employment issues.

When may an employer compel an employee to arbitrate employment discrimination claims arising under federal or state antidiscrimination laws? Does it make a difference if the agreement to arbitrate is between an individual and his/her employer rather than between an employer and union? Does the enforceability of the arbitration agreement depend on whether the employee works in certain industries?

Although not all of these questions have been fully or finally resolved, the United States Supreme Court's seminal decision in *Gilmer v. Interstate/Johnson Lane Corp.* [1] and lower court decisions since *Gilmer* have upheld the enforceability of predispute agreements to arbitrate statutory claims.





doi: 10.2190/B5E9-18RQ-EGQ8-CP2K
http://baywood.com

Judicial authority prior to the 1991 *Gilmer* decision had been spilt over whether plaintiffs who are subject to private employment arbitration agreements should be required to arbitrate statutory employment discrimination claims. Some courts had been willing to compel arbitration as a desirable and effective alternative to court litigation. Others had held that requiring arbitration would contravene legislative intent and undermine the effectiveness of antidiscrimination statutes which expressly provide that plaintiffs may bring their claims in court. In fact, decisions of the Supreme Court, most notably *Alexander v. Gardner-Denver* [2] discussed below, reflected the Court's view that "arbitral procedures, while well-suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII" [2, at 57-58] and other statutes.

During the late 1980s, however, the Supreme Court decided a series of cases, often referred to as the *"Mitsubishi" Trilogy* [3]. In these decisions, the Court "cast aside the 'lesser forum' concept, embraced the theory that arbitration is an alternate rather than inferior forum, and held that pursuit of statutory rights through arbitration does not alter the substance of the rights being resolved" [4, p. 4]. The *Mitsubishi* Trilogy produced the presumption of arbitrability of statutory claims under the Federal Arbitration Act (FAA) [5]. Pursuant to this presumption, the FAA may be used to compel the arbitration of statutory claims under a mandatory, binding arbitration agreement unless the language of the statute, its legislative history, or the statute's underlying purpose indicates otherwise.

The *Mitsubishi* Trilogy clearly signaled a change in judicial attitude toward the validity of arbitration for the resolution of statutory claims. Indeed, by the time it decided *Gilmer*, the Supreme Court asserted that attacks on arbitration "as a method of weakening the protections afforded in the substantive law to would-be complainants . . . are far out of step with our current strong endorsement of the federal statutes favoring it as a method of resolving disputes" [1, at 30].

Thus, *Gilmer* constituted a ringing endorsement for the application of private dispute settlement machinery to the resolution of statutory employment disputes. The decision sparked significant controversy, however, and left many important questions unanswered.

## THE *GILMER* DECISION

*Gilmer* held that a petitioner's claim under the Age Discrimination in Employment Act (ADEA) [6] was subject to compulsory arbitration. Gilmer was a manager of financial services employed by Interstate/Johnson Lane Corporation (Interstate) who, as a condition of his employment, was required to register as a securities representative with several stock exchanges. On his registration application with the New York Stock Exchange (NYSE), entitled "Uniform Application for Securities Industry Registration or Transfer," also known as a U-4 form,

Gilmer "agreed to arbitrate any dispute, claim, or controversy" arising between himself and Interstate "that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register" [signed 1981]. NYSE Rule 347 provided for arbitration of "any controversy between a registered representative and any member organization arising out of the employment or termination of employment of such registered representative."

Interstate terminated Gilmer in 1987 at the age of sixty-two. Gilmer, in turn, filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and then brought suit in the western district of North Carolina, alleging his discharge violated the ADEA. In response, Interstate filed a motion to compel arbitration, relying on the arbitration agreement in Gilmer's registration application, NYSE Rule 347 incorporated therein, and the FAA. The district court denied Interstate's motion. The Fourth Circuit Court of Appeals reversed [7], and the United States Supreme Court granted certiorari to resolve a conflict among the circuit courts regarding the arbitrability of ADEA claims.

In ruling that Gilmer's arbitration agreement was a bar to a lawsuit on his ADEA claim, the Court reasoned that: 1) allowing arbitration of ADEA claims would not contravene legislative intent or negatively affect the statute's remedial and deterrent powers; 2) arbitration of ADEA claims would not be inconsistent with the statutory framework or purposes of the ADEA; 3) arbitration would not undermine the enforcement powers of the EEOC because claimants subject to an arbitration agreement would still be free to file a charge with the EEOC, which has independent authority to investigate age discrimination claims; 4) arbitration can provide a fair and complete hearing of claims and can afford broad relief to ADEA claimants; 5) unequal bargaining power between employers and employees is not a sufficient reason for rejecting arbitration agreements, absent evidence of coercion or fraud; and 6) allowing arbitration would be fully consistent with the federal courts' liberal policy favoring the use of arbitration to resolve controversies [8].

In upholding the arbitrability of Gilmer's ADEA claim, the Court rejected his strongest argument, i.e., that the Court's own decisions in *Alexander v. Gardner-Denver* and its progeny precluded arbitration of employment discrimination claims. In *Gardner-Denver,* the Court had held that an employee's Title VII suit was not barred by a previous grievance arbitration pursuant to an arbitration clause contained in a collective bargaining agreement. The Court had rejected the idea that a union, in a labor agreement, could waive a bargaining unit employee's access to a judicial forum for the pursuit of individual civil rights claims and emphatically stated that "there can be no prospective waiver of an employer's rights under Title VII" [2, at 51].

In *Gilmer,* the Court distinguished *Gardner-Denver* on the grounds that *Gardner-Denver* rested on the recognition that an employee's contractual rights under a collective bargaining agreement were not coextensive with his/her statutory rights under Title VII. The Court also noted that in the union setting,

"the interest of the individual may be subordinated to the collective interests of all employees in the bargaining unit" [1, at 42, citing 2, at 58]. In distinguishing *Gardner-Denver* and claims arising under a collective bargaining framework, the Court stated:

> . . . since the [unionized] employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA, which . . . reflects a 'liberal Federal policy favoring arbitration agreements." Therefore, those cases provide no basis for refusing to enforce Gilmer's agreement to arbitrate his ADEA claim [1, at 34-35].

The Supreme Court's decision in *Gilmer* removed two major obstacles from compelling arbitration of employment discrimination disputes. First, the decision approved the use of arbitration for resolution of statutory claims, rejecting the argument that such claims are *per se* not subject to compulsory arbitration. Second, *Gilmer* endorsed the idea that predispute arbitration agreements, at least under some circumstances, could be enforced to require arbitration of employment discrimination disputes.

While rejecting "generalized attacks on arbitration" of statutory claims [1, at 30], the Court nevertheless emphasized that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum" [1, at 26, citing [9], at 628]. As is discussed below, that guiding principle has placed important responsibilities on parties who agree to use arbitration to resolve statutory issues and on the neutrals who, in hearing these cases, sit in place of federal courts.

## THE FEDERAL ARBITRATION ACT

*Gilmer* was decided pursuant to the Federal Arbitration Act, which provides, in pertinent part:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract [5, § 2].

It is the requirement that such clauses "shall be valid, irrevocable, and enforceable . . ." [5, § 2], which the Court held precluded a later suit under the ADEA in federal court. The FAA provides that proceedings in federal district courts shall be stayed pending the referral of such claims to arbitration and grants federal courts the authority to compel arbitration where the parties have refused or failed to do so. However, the FAA also provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, *or any other class of workers engaged in foreign or interstate commerce*" (emphasis added) [5, § 1]. The employees described in this section are not covered by the FAA, and employers may not enforce mandatory binding arbitration requirements against them. However, the meaning of the phrase "any other class of workers engaged in foreign or interstate commerce" [5, § 1] remains unresolved. The plain language found in this section seems to exclude from FAA coverage all contracts of employment. The Supreme Court specifically declined to decide this issue in *Gilmer*, as it had not been raised by the parties, probably because the arbitration clause at issue was contained *not* in Gilmer's contract of employment but in his registration form with the New York Stock Exchange.

The statutory phrase at issue may be interpreted broadly or narrowly. If a broad interpretation is adopted, employment contracts of all workers engaged in interstate commerce are excluded from the jurisdiction of the FAA. If a narrow interpretation is applied, the law excludes from coverage only the employment contracts of those workers actually and directly engaged in the interstate transportation industry.

Clearly, a broad interpretation would make mandatory, binding arbitration agreements unenforceable. However, most courts have held that the "employment contracts" exclusion should be limited to employees actually working in the transportation industry. These courts have adopted the view of the Third Circuit, as expressed in *Tenney Engineering, Inc. v. United Electrical, Radio & Machinery Workers:*

> [T]he intent of ["any other class of workers engaged in foreign or interstate commerce"] was . . .to include only those other classes of workers who are . . . actually engaged in movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it. The draftsmen had in mind [seamen and railroad workers] as to which special arbitration legislation already existed and they rounded out the exclusionary clause by excluding all similar classes or workers [10, at 452].

Nevertheless, there still is disagreement about the construction of section 1 of the FAA. Furthermore, some lower courts have suggested that the "employment contracts" exclusion should apply to all employment contracts because it is unreasonable to hold that statutory employment discrimination claims are subject

to enforceable binding arbitration agreements in some industries, but not in others [11, p. 999].

## UNIONIZED EMPLOYEES AND THE ARBITRATION OF STATUTORY CLAIMS

Also left unsettled by *Gilmer* is whether collective bargaining agreements containing arbitration provisions are to be treated differently than individual employment contracts. There is substantial disagreement among the circuit courts as to whether collective bargaining agreements are subject to enforcement under the FAA. In 1997, both the Second and Seventh Circuits held that the FAA does not exclude collective bargaining agreements [12, 13]. The Ninth Circuit and the Eleventh Circuit have not decided whether collective bargaining agreements are subject to the FAA [14].

The Sixth Circuit still finds that collective bargaining agreements are outside the scope of the FAA [15], as does the Fifth Circuit [16]. The Third Circuit recently reaffirmed its earlier decision in *Tenney,* finding that "the FAA's exemption of coverage . . . is limited to those employment contracts in the transportation industries and does not affect collective bargaining agreements in other areas" [17, at 226-227]. The Fourth Circuit, in *Austin v. Owens-Brockway Glass Container, Inc.,* stated that "in this circuit, the FAA is not applicable to labor disputes arising from collective bargaining agreements" [18, at 879].

The United States Supreme Court ducked the opportunity to clarify this and other issues when it decided *Wright v. Universal Maritime Service Corp.* in November 1998 [19]. There, the Court unanimously held that a longshoreman covered by a collective bargaining agreement and a seniority plan, both of which included arbitration provisions, did not have to arbitrate his Americans with Disabilities Act claim because the arbitration clause did not contain a waiver of the employee's statutory rights. Declining to resolve the tension between *Gardner-Denver* and *Gilmer,* and the issue of whether a union may waive an individual member's right to sue in court on a statutory Title VII claim, Justice Scalia wrote that it was "unnecessary to resolve the question of the validity of a union-negotiated waiver, since it [was apparent in this case] that no such waiver occurred" [19, at 369]. The Court held that the arbitration clause in the collective bargaining agreement between the union and the employer did not clearly and unmistakably cover statutory discrimination claims. As the Court stated, "[W]hether or not *Gardner-Denver's* seemingly absolute prohibition of union waiver of employees' federal rights survives *Gilmer, Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to protect against less-than-explicit union waiver in a CBA" [19, at 370]. *Wright* teaches that while an individual may be able to waive such a right under *Gilmer* through a generally worded arbitration agreement, that is a different situation from a union prospectively waiving the statutory rights of the employees

it represents. In the latter situation, the waiver, at a minimum, must be clear and unmistakable.

Thus, *Wright* leaves open the question of whether an arbitration clause in a collective bargaining agreement that clearly encompasses employment discrimination is enforceable. To date, the majority of federal courts of appeal have held that *Gardner-Denver* is still viable in the collective bargaining context and that a collective bargaining agreement's arbitration clause cannot waive an employee's right to sue in federal court. Notably, the Fourth Circuit in *Austin v. Owens-Brockway Glass Containers, Inc.*, ruled that *Gilmer* effectively undermined the viability of *Gardner-Denver* and held that a collective bargaining agreement's arbitration clause did bar individual employees from beginning their statutory claims in federal court [18]. In that case, the collective bargaining agreement contained both an antidiscrimination provision and a broad arbitration clause. Therefore, the employee was required to arbitrate her ADA claim. In the court's view, the collective bargaining agreement made Austin "a party to a voluntary agreement to submit statutory claims to arbitration" [18, at 885]. Not surprisingly, it was also the Fourth Circuit which, in *Wright*, dismissed the employee's statutory claim from court even where the contractual arbitration provision was broad and general.

In *Wright*, while the Supreme Court ruled that there was not a clear and unmistakable waiver of an employee's right to file suit in court, it did not answer the question of what language in a collective bargaining agreement would amount to a clear and unmistakable waiver. It did offer some guidance, however. Minimally, the collective bargaining agreement would have to contain a specific antidiscrimination provision, which would have to "make compliance with the [antidiscrimination statute at issue] a contractual commitment that would be subject to the arbitration clause" [19, at 370]. An iron-clad waiver might also take the form of a clause that specifically incorporated by reference each federal antidiscrimination law by name, indicated that its terms were subject to the agreement's arbitration provisions, and expressly authorized the arbitrator to rule on statutory as well as contractual issues. Further, the arbitration clause itself could cross-reference the antidiscrimination clause, eliminating any doubt as to whether the parties intended for such claims to be submitted to arbitration [20].

But even if the agreement's waiver met the "clear and unmistakable" standard, there is serious doubt as to whether such a waiver would be, *or should be*, valid under *Gardner-Denver*. *Gilmer* did not overrule *Gardner-Denver*, and the distinctions that the Court drew there between the arbitration of individual claims in a nonunion setting and the arbitration of statutory claims arising where there is a collective bargaining agreement are as valid as they were in 1974.

At times, there *is* tension between the rights of an individual employee and his/her union's obligation to support the collective good of the membership. This tension casts doubt on the appropriateness of the contractual grievance arbitration mechanism for the resolution of individual statutory claims. Additionally, it is

somewhat misleading to state that the mandatory arbitration provisions in labor contracts are voluntary agreements made by individual employees. The Fourth Circuit in *Austin*, for instance, decided that it did not have to be concerned about the possible tension between collective representation and statutory rights because Austin was party to a voluntary agreement and had explicitly agreed to the arbitration of her statutory complaint. The court did not recognize that while the agreement may have been voluntary on the part of the union, Austin was not a party to it [21, p. 150]. Moreover, not all bargaining unit members who are covered by a labor agreement have voted to ratify it. If not all members have voted approval of a provision requiring arbitration of statutory claims, then an Austin or Wright, or any other union member with an employment claim, may not have made a voluntary and knowing agreement concerning arbitration [21, p. 153].

The law of *Gardner-Denver* is not that "statutory claims cannot be the subject of required arbitration," but that unions may not prospectively waive the rights of individual members to a judicial forum for vindication of those rights [21, pp. 51-52]. The law of *Gilmer* is that voluntary agreements to arbitrate statutory claims are enforceable when made by individuals who knowingly and voluntarily waive their rights to a judicial forum. As one commentator put it:

> Unions stand in place of their members only in certain circumstances, those in which an individual's right is extinguished and transferred to the union so that it may represent the collective interests of its members in matters concerning labor relations. This principle is at the heart of the decision in *Alexander*. Rights derived by individuals from employment statutes are not the kind of right that reside in a union [21, p. 164].

The same point was cogently made by the Seventh Circuit in *Pryner v. Tractor Supply Co.* [13, 22]. Writing for the court, Judge Posner expressed concern about the inability of the labor agreement to protect an individuals statutory rights. He noted, in particular, that the union normally has control over whether or not to take cases to arbitration. In performing this function, "[t]he union may take into account tactical and strategic factors such as its limited resources and consequent need to establish priorities . . . as well as its desire to maintain harmonious relations among the workers and between them and the employer" [13, at 362].

> The collective agreement is the symbol and reality of a majoritarian conception of worker's rights . . . The statutory rights at issue . . . are rights given to members of minority groups because of a concern about the mistreatment of minorities by majorities . . . The employer's position delivers the enforcement of the rights of these minorities into the hands of the majority, and we do not think that the result is consistent with the policy of these statutes or justified by the abstract desirability of allowing unions and employers to cut their own deals [13, at 362].

Other federal courts, both before and after *Wright,* have also expressed a skepticism about precluding employees covered by collective bargaining agreements from pursuing statutory claims in court. In *Brisentine v. Stone & Webber Engineering Corp.,* the plaintiff was not required to submit his Title VII claims to the grievance/arbitration process under the labor agreement [23]. Disagreeing with the Fourth Circuit's *Austin* decision, the Eleventh Circuit noted: 1) the tension between the union's interests and those of an employee regarding the prosecution of individual statutory rights; 2) the uncertainty surrounding the application of the FAA to collective bargaining agreements; and 3) the fact that the arbitrator had authority only to interpret the contract and not to decide a statutory issue. The court held that, with *Gilmer* in force but with *Gardner-Denver* not having been overturned, three elements must be met for a mandatory arbitration provision in a collective bargaining agreement to bar litigation of a federal statutory claim. They are 1) the employee must have agreed individually to the contract containing the arbitration clause; 2) the agreement must authorize the arbitrator to resolve federal statutory claims, not just contractual issues; and 3) the agreement must give the employee the right to insist on arbitration if the statutory claim is not resolved to his/her satisfaction in the grievance procedure [23].

The Third Circuit, in *Martin v. Dana Corporation,* analyzed *Gilmer's* treatment of *Gardner-Denver,* considered what other circuits had done, and found that litigation of the employee's Title VII claim was barred because the employee or the union could have compelled arbitration under the collective bargaining agreement, which expressly provided for arbitration of federal and state discrimination claims [24]. The court, however, subsequently vacated the decision and granted rehearing *en banc.* The *en banc* court then vacated the order granting rehearing and referred the case back to the panel to determine whether the employee "could initiate arbitration on his own" [24, at 871]. In an unpublished decision, the court found that the union controlled access to arbitration, that *Gardner-Denver* controlled the case, and that the contractual arbitration clause did not bar the Title VII action [25].

In the time since the Supreme Court decided *Wright,* the lower courts have had little call to break new ground in their decisions [4, p. 13]. The Fourth Circuit has adhered to its position that a union, through the vehicle of a collective bargaining agreement, effectively may waive the rights of bargaining unit members to a judicial forum. The court, however, is demanding more specific, less-general language than it accepted in *Austin,* and to date, it has not found any language that meets the standards established in *Wright.* One other court of appeals and several district courts have also had occasion to apply *Wright.* In none of those cases did the collective bargaining agreements at issue contain clear and unmistakable waivers, such as would get the court beyond the threshold issue and into the question of whether the employee, as a matter of law, was required to submit his statutory claim to the contractual arbitration process.

The arbitration of unionized employee's statutory employment claims is still a murky area. Employers have often criticized *Gardner-Denver* because it affords "two bites at the apple." The employee can proceed to arbitration under the labor agreement and, irrespective of the outcome in that forum, bring a complaint in federal court alleging a statutory violation, based on the same underlying facts. Employers may, therefore, be inclined to negotiate clear and unmistakable waivers into their collective bargaining agreements so that contractual and statutory claims wind up before one, and only one, tribunal.

It is doubtful, however, that many unions will be willing to negotiate such waivers. In my own practice, I have not seen any that meet the court's standards relative to clarity and specificity. Moreover, many union advocates counsel strongly against the inclusion of such waivers in collective bargaining agreements [20].

Some have argued that nondiscrimination clauses should be removed from collective bargaining agreements, in which case individual employees would have to pursue statutory claims without union assistance in the appropriate agencies and courts. It has also been suggested that employers might require unionized employees, as individuals, to sign separate, mandatory predispute arbitration agreements which would be enforceable, according to *Gilmer*, under the FAA [21, p. 171]. Still others have suggested that if employers and unions want to keep nondiscrimination language in their contracts, they should devise a plan by which statutory rights are preserved, the needs of all parties are considered, and the individual employee does not go it alone and unarmed against a more powerful employer and union. Max Zimney, general counsel of the Union of Needletrades, Industrial and Textile Employees (U.N.I.T.E.), has long advocated a process under which a collective bargaining agreement can be "Gilmerized" by an employee's postdispute election of binding arbitration [26]. A full discussion of the Zimney proposal is beyond the scope of this article. The point here is that the arbitration of statutory employment disputes involving unionized employees raises issues that are distinct from those in which the dispute is limited to an employer and individual employee in a nonunion setting. With respect to the former, the law is far from settled.

## *GILMER* AND ITS PROGENY

What is clear since *Gilmer* is that at least with respect to individual employment contracts, statutory discrimination claims will not be treated any differently than other statutory claims under the FAA's presumption of arbitrability. While the issue in *Gilmer* was an ADEA claim by a securities representative, the holding has been expanded to other types of claims and other types of employees. In fact, with the exception of the Ninth Circuit, every U.S. court of appeals that has considered the issue has interpreted *Gilmer* to require arbitration of all forms of statutory discrimination. Moreover, binding arbitration agreements may be

contained, not only in employment contracts but also in handbooks, manuals, and employers' personnel policies and practices [27, p. 79].

In 1998, the Ninth Circuit ruled, in *Duffield v. Robertson Stevens & Company,* that the 1991 amendments to the Civil Rights Act of 1964 reflected a legislative intention to preclude arbitration of statutory discrimination disputes [28]. A district court judge in Boston agreed with the Ninth Circuit in *Rosenberg v. Merrill Lynch,* but the First Circuit rejected the district judge's rationale in a decision critical of the Ninth's Circuit *Duffield* decision [29]. In *Seus v. John Nuveen & Co.,* the Third Circuit held, contrary to *Duffield,* that an arbitration agreement as part of the securities industry registration application is valid and enforceable under the FAA with respect to both Title VII and ADEA claims [30]. In that court's view, the 1991 amendments to the Civil Rights Act do not demonstrate any congressional intent to prohibit arbitration of statutory claims; to the contrary, the amendments reflect congressional approval of arbitration [30].

The conflict between *Duffield* in the Ninth Circuit and *Rosenberg* and *Seus* in the First and Third Circuits suggested that the United States Supreme Court might move quickly to clarify the open issues. The court sidestepped that opportunity, however, when it denied *certiorari* in *Duffield.* It is possible that *Duffield* may yet be superseded by another Supreme Court decision. At least one commentator suggested it may subsequently be distinguished on the basis that it concerned only a "captive" securities industry arbitration panel and not an external private panel such as those appointed under the auspices of the American Arbitration Association [27, p. 79].

During 1998, the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE) modified their rules, effective January 1, 1999, so that registered employees were no longer required to submit statutory employment claims to arbitration based solely on U-4 agreements. However, individual securities industry companies are allowed to develop their own ADR programs, including predispute mandatory arbitration agreements. It is likely that these individual programs will include provisions requiring the submission of both statutory and nonstatutory disputes to a single private arbitration tribunal so that the parties will not be faced with forum-shopping and bifurcated proceedings [27].

## WHERE DOES THE EEOC STAND?

The Supreme Court in *Gilmer* did not discuss the type of remedies that the EEOC may seek upon receiving a charge from an individual who is covered by an arbitration agreement and who claims discrimination. The Court briefly stated that "arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief" [1, 114 L.Ed. 2nd 26, at 40]. Many have interpreted this to mean that the EEOC has independent authority to investigate

and conciliate the charge and to file suit should its conciliation efforts fail. Furthermore, the EEOC has repeatedly asserted that the implementation of a mandatory, binding arbitration agreement does not prevent the agency from litigating claims against the employer for injunctive relief or any other relief necessary to uphold the public interest [31, p. 76].

The EEOC has adopted a policy opposing "mandatory arbitration programs that make agreement to binding arbitration of employment discrimination claims a precondition for getting or keeping a job, or that attempt to preclude an individual's right to have the EEOC process [his or her] charge" [32, p. 26]. The National Labor Relations Board also opposes any mandatory arbitration scheme that bars an employee from filing administrative complaints with that agency. The Second Circuit, in *EEOC v. Kidder Peabody & Co.*, considered the EEOC's suit for monetary damages for investment bankers who were covered by an arbitration agreement and who alleged their terminations were based on age discrimination [33]. The court ruled that, although the EEOC may have authority to investigate discrimination charges brought by an individual employee and to seek injunctive relief with respect thereto, the EEOC may not seek individual relief, including monetary compensation, for an individual who has signed an arbitration agreement. The court reasoned that the FAA expresses strong congressional preference in favor of enforcing valid arbitration agreements freely entered into by contracting parties. Moreover, *Gilmer* held that preclusion of individual suits based on valid arbitration agreements is not inconsistent with the remedial purposes underlying the ADEA. The EEOC may investigate and remedy pattern, practice, and collective claims against the employer, but must stay its hand in regard to individual employees who have signed arbitration agreements [27, p. 80].

The Sixth Circuit, however, has reached a contrary result. In *EEOC v. Frank's Nursery*, the issue was whether the EEOC was barred from pursuing a Title VII claim because the employee waived her right to sue as part of an arbitration agreement [34]. The EEOC filed suit on behalf of a former Frank's employee, alleging that Frank's had engaged in unlawful practices by discriminating against the employee because of her race and by compelling employees to sign an employment application requiring them to submit Title VII claims to arbitration. Reversing the district court, which had granted Frank's motion to compel arbitration and which dismissed the EEOC's complaint, the Sixth Circuit held that the EEOC is not precluded from seeking "substantive relief" such as compensatory and punitive damages and back pay with prejudgment interest. The court noted that the legislative scheme created under Title VII gives the EEOC independent authority to pursue an action when it concludes that the public interest is best served by filing a suit. The individual has no authority to contract away her right to file a charge with the EEOC or to withdraw a charge without the EEOC's permission. The court concluded that under both the legislative history and the language of Title VII, the EEOC is not "an ordinary plaintiff" that may be bound

by procedural requirements applicable to private litigants under Title VII [34, at 467].

Significantly, the Sixth Circuit held that permitting the EEOC to pursue monetary and injunctive relief was not inconsistent with the purposes of the FAA or the holding in *Gilmer*. To hold otherwise, said the court, would undermine the EEOC's independent right to sue in federal court to vindicate the public interest against employment discrimination. The court also reversed the lower court's ruling that the EEOC was required to plead a class action in the same manner as an ordinary litigant. According to the court, the EEOC is authorized to seek general injunctive relief even if it only identifies one individual who has been the subject of discrimination [35].

The Second and Sixth Circuit decisions discussed herein illustrate yet another area of uncertainty: the extent to which the EEOC is bound by a private arbitration agreement between an individual employee and employer. Until this issue, as well as questions related to the EEOC's remedial authority vis-a-vis arbitration agreements, are resolved, employers need to be mindful of the possibility that their arbitration programs will come under attack by that agency.

## THE CONTROVERSY OVER MANDATORY ARBITRATION OF EMPLOYMENT DISPUTES

Postdispute agreements to arbitrate existing disputes do not raise particularly troubling issues. At least since *Gardner-Denver*, the law on postdispute waivers has been fairly clear. After disputes have arisen, plaintiffs may enter into "knowing and voluntary" waiver agreements in which they trade potential claims under federal laws like the ADEA, Title VII, and ADA for monetary or other consideration [36]. Predispute agreements to arbitrate nonstatutory claims arising under individual contracts have also been relatively noncontroversial.

While the judicial attitude toward mandatory arbitration of statutory issues has been increasingly hospitable in recent years, the debate still continues over both the validity and wisdom of *predispute* agreements to arbitrate *statutory* employment issues. Proponents of predispute, mandatory arbitration agreements see arbitration as a reasonable and fair alternative to litigating statutory employment claims [36, p. 1349]. Opponents charge that the law is now sanctioning a new form of "yellow dog" contract that is coercive and violative of public policy [37, p. 7] and that the federal judiciary's endorsement of the arbitration of statutory discrimination claims during the last decade is "an intellectual and legal scandal . . . [which] is occurring in broad daylight" [38]. Even the National Academy of Arbitrators is on record as "opposing mandatory arbitration as a condition of employment when it requires explicit or implicit waiver of direct access to either a judicial or administrative forum in pursuit of statutory rights [39].

Why is the debate so highly charged? And what are the advantages and disadvantages of the arbitration process in regard to employment disputes?

Supporters of mandatory employment arbitration contend that:

1. Arbitration provides relatively quick resolution of employment disputes without the exorbitant financial, personal, and professional costs that accompany litigation.
2. Arbitration lowers legal expenses for both parties, including possibly reducing the employer's advantage in outspending, outlawyering, and outlasting an employee in court litigation. Thus, employees who otherwise lack the resources to retain counsel and litigate their claims arguably benefit from the availability of arbitration.
3. Arbitration brings to the dispute knowledgeable, impartial, and experienced neutrals to decide the issues, as opposed to less-informed lay juries whom many believe are highly biased against employers. With expert decision makers, it is more likely that awards will be more predictable, fair, and consistent than those formulated by juries, especially in regard to awards for emotional distress and punitive damages.
4. Arbitration allows disputes and their resolutions to remain private.
5. Arbitration is often a less-embittering process than court litigation and may encourage voluntary settlement during the pendency of the proceeding [31, p. 78; 40, p. 10].

The major criticisms of mandatory, predispute agreements for the arbitration of statutory issues come from plaintiff's attorneys and employee advocates. They believe that:

1. By making arbitration agreements a condition of employment, employees are improperly compelled to surrender statutory rights to a trial in a judicial forum. Employment issues and decisions are shielded from judicial scrutiny; consequently, employees are denied both the substantive and procedural protections available in court.
2. Mandatory binding arbitration agreements do not guarantee that cases will be heard by competent, unbiased arbitrators. Inasmuch as employees are less likely than employers to select arbitrators in the future, they are at a disadvantage; in other words, the "repeat user" effect may compromise the arbitrator's impartiality in favor of the employer.
3. Arbitration may result in less favorable and effective remedies, even where employer wrongdoing has been proved, inasmuch as arbitrators may be less generous toward employees than juries.
4. Mandatory employment plans may have the intended or unintended effect of discouraging employees to join unions.

5. Courts are in a position to develop consistent interpretations of law that will provide better guidance to employers and employees than independent, *ad hoc* arbitration awards [41].

While it is true that employers are the leading proponents of mandatory, binding arbitration agreements, it is incorrect to assume that arbitration necessarily benefits employers at the expense of employees. First, the very availability of arbitration may inspire employees to pursue claims in that forum which they would not litigate in court. The speed and simplicity of arbitration, along with the real possibility that the employer will bear the financial cost of the process, may result in an increase in the number of claims an employer will have to defend.

Second, by resorting to arbitration instead of litigation, employers may preclude the use of defenses that may exculpate them if the employee's claim were addressed in federal court. An arbitrator's lack of knowledge of the law of employment discrimination, or lack of familiarity with case precedent, can hurt the employer has much as the employee.

Third, in arbitration employers may lose the advantages of the strict burden of proof imposed on employees bringing statutory employment claims. In federal court, this burden does not shift. Arbitrators, however, are not bound by the Federal Rules of Evidence and may not apply the burden of proof as rigidly as would a federal judge [31, p. 78].

Fourth, employers arguably surrender a "formidable arsenal of [procedural] weapons" in using arbitration. Procedural weapons that are typically used in court litigation include the motion to dismiss for failure to state a claim, the motion for a more definite statement, and a motion for judgment on the pleadings. If the plaintiff survives these challenges, extensive and costly discovery will generally follow. At the conclusion of the plaintiff's case, the employer will move for judgment as a matter of law, and this motion will be repeated at the close of all the evidence. Even if the plaintiff prevails, the employer can renew its motion for a new judgment, move for a new trial, and appeal to the appropriate United States Court of Appeals, or by petition for a writ of certiorari, to the Supreme Court [42].

These kinds of procedural weapons available to an employer in court can impede a plaintiff's case and encourage a settlement at various stages before trial. While an employer does not lose the right to appeal an arbitrator's determination, grounds for such an appeal are limited. Thus, an employer who uses mandatory, binding arbitration may save money, but at the same time, it may give up the opportunity to use its financial resources to prolong a case in an effort to bring about a favorable judgment or settlement. Thus, it is incorrect to assume that the process of arbitration inherently is more advantageous to employers than employees.

While opposition and uncertainty still surround the use of mandatory binding arbitration for the resolution of statutory employment issues, more and more

employers are implementing arbitration procedures in employment contracts, handbooks, and policies. These employers include Frito Lay, Philip Morris, Cigna Insurance, J.C. Penney, Lenscrafters, Brown & Root, Chrysler Corporation, Bear Stearns, and Credit Suisse Bank. Moreover, the benefits of such programs increasingly are being recognized by employees as well as employers. A survey of employee attitudes in regard to use of arbitration in employment disputes shows that 83 percent of American workers support the use of arbitration instead of courts to settle disputes with management. In that survey, most employees felt that arbitration would make it easier for ordinary workers to secure a speedy and fair hearing, that it would be less expensive than retaining a lawyer and going to court, and that it was a meaningful substitute for litigation under federal civil rights laws [43]. Given the findings, it may be that the debate about mandatory, binding arbitration of statutory claims is more heated among lawyers and legal scholars than it is among employers and employees.

## DEVELOPING FAIR SYSTEMS FOR INDIVIDUAL EMPLOYMENT ARBITRATION

As was noted above, the National Academy of Arbitrators is opposed to predispute, mandatory binding arbitration of statutory claims where employees are compelled to waive their right to a judicial forum. The Academy's 1997 "Statement on Condition of Employment Agreements," recognized, however, that "given the current case law, Academy members may serve as arbitrators in such cases" [39]. There has been substantial debate within the National Academy of Arbitrators on the subject of mandatory, binding arbitration of employment disputes, and the Academy's official position is not endorsed by many of its members, including legal scholars and esteemed practitioners who have suggested that the debate often sets up "a false comparison between an idealized picture of litigation and a demonized picture of arbitration" [44]. In fact, the NAA's incoming president, Theodore St. Antoine, recently stated that the case against mandatory arbitration has not been fully proven:

> The ordinary worker with a small monetary claim is going to have a very difficult time getting a lawyer to take his or her case to court (good plaintiff's lawyers from coast to coast tell me they take about one in a hundred clients that come to them) and the EEOC is too overburdened to litigate more than a handful of high-profile cases with lots of money or a major principle at stake. Isn't it arguable that, PROVIDED all due process standards are observed, the ordinary Jane or Joe would be better off with the reality of arbitration than with the theoretical but unrealized right to sue? To get that, PREdispute arbitration agreements may be the price that has to be paid; few employers are going to accept POSTdispute agreements to arbitrate small claims, and few plaintiffs' lawyers are going to agree to arbitrate large claims (they want to get before a jury) [45].

St. Antoine and others have criticized the National Academy for speaking too broadly and confidently about the deficiencies of mandatory arbitration of statutory claims without the empirical evidence that should have been gathered before the organization took an official position.

My own experience with mandatory arbitration suggests that employers are not the only beneficiaries of predispute arbitration agreements. Several of the matters I have handled lead me to believe that the employees, in all likelihood, would have had difficulties in obtaining a trial. In a few, I was able to work out a mediated settlement, even though the employees' cases were not particularly strong because the employer saw the chance to get a speedy, inexpensive, nonprecedential resolution. In these cases, if there had not been a predispute mandatory arbitration program, it is doubtful that the employees would have had their claims heard by any neutral tribunal.

The real issue, therefore, that should occupy our time is the development of fair procedures that will inspire confidence in binding arbitration as a meaningful alternative to court litigation. Demanding that employees waive statutory rights in advance of disputes without guaranteeing them adequate safeguards is a short-sighted solution that only encourages hostility toward arbitration and invites judicial skepticism.

Some employers, for instance, have designed arbitration programs so inherently biased that even pro-arbitration courts have refused to uphold them. The case that quickly comes to mind on this point is *Hooters of America, Inc. v. Phillips,* which was decided by the Fourth Circuit Court of Appeals in April 1999 [46]. In that case, Phillips, a female employee, quit her job after management allegedly ignored her claims that she had been sexually harassed. When she sought to file suit under Title VII, the employer sued to compel arbitration under the FAA because Phillips had signed an arbitration agreement providing that all employment disputes, including any claim of discrimination or sexual harassment, would be submitted to binding arbitration [46].

The arbitration agreement provided that the employee and employer would resolve any claims pursuant to the company's alternate dispute resolution (ADR) rules and procedures, as promulgated by the company from time to time. Employees received a copy of the rules, but only upon written request. Initially, each employee was given a copy of the arbitration agreement at a staff meeting and given five days to review the document and accept or reject it. No employee, however, was given a copy of the Hooters rules and procedures at that time. Phillips had signed the agreement.

Upon review, the Fourth Circuit held that predispute agreements to arbitrate Title VII claims are valid and enforceable. However, Hooters "materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith" [46, at 938]. In fact, in the court's view, the

Hooters rules were "so one-sided that their only possible purpose [was] to undermine the neutrality of the proceeding" [46, at 938].

The offending rules required the employee to provide the company notice of her claim at the outset, including the nature of the claim and the specific acts or omissions that were its basis. Hooters, on the other hand, was not required to file any responsive pleadings or to notice its defenses. Additionally, when the employee filed her notice, she had to furnish the company with a list of all fact witnesses with a brief summary of the facts known to each. The company, however, was not required to reciprocate [46].

The Hooters rules for selecting a panel of three arbitrators were also less than fair. The employee and Hooters each were to select an arbitrator, and those two, in turn, would select a third. The problem, however, was that the employee's arbitrator and the third arbitrator had to be picked from a list of names created exclusively by Hooters. In other words, the company had complete control of the panel of decision makers and could include any individuals it wanted regardless of past or present relationships [46].

Nor was fairness to be found once the proceedings got underway. While Hooters could expand the scope of the arbitration to any matter, whether or not related to the employee's claim, the employee was not permitted to raise any matter not included in the notice of claim. Additionally, Hooters was allowed to move for summary dismissal of the employee's claims before a hearing was held, whereas the employee was not permitted to seek summary judgment. Hooters, but not the employee, could record the arbitration hearing by audiotaping, videotaping, or verbatim transcript. The rules also granted the company the right to bring suit in court to vacate or modify the arbitration award when it could show, by a preponderance of the evidence, that the panel exceeded its authority. No such right was granted to the employee. In addition, the rules stated that upon thirty days' notice, Hooters, but not the employee, could cancel the agreement to arbitrate. Finally, Hooters reserved the right to amend the rules "in whole or in part whenever it wishes and without notice" to the employee [46, at 939]. As the court observed, nothing in the rules even prohibited Hooters from changing the rules in the middle of an arbitration proceeding [46].

Not surprisingly, the Fourth Circuit found Hooters' arbitration program utterly unsatisfactory and justifying rescission of the arbitration agreement. It concluded its opinion by noting that a system so skewed in the employer's favor constituted a denial of arbitration in any meaningful sense of the word [46].

While the Hooters system was probably the most outrageous arbitration scheme to be challenged in court, others have also been struck down where employers have overreached and designed one-sided plans, compelled employees to sign documents that were unclear, imposed unfair panel selection rules, and severely limited the remedies an arbitrator could award. Employers who use their arbitration agreements and rules as a way to stack the deck are participating in a self-defeating exercise. As Nolan wrote:

> If an arbitration agreement is merely a choice of forums, as the Supreme Court found it to be in *Gilmer*, the federal courts' support of employment arbitration will continue unabated. If the arbitration agreement limits important substantive or procedural rights provided by statute, however, or if the particular arbitration system is otherwise unfair a court is far more likely to find the agreement unconscionable [47, p. 46].

## WHAT ARE THE NECESSARY ELEMENTS OF A FAIR ARBITRATION SYSTEM?

Safeguards have to be build into predispute, mandatory arbitration agreements at the contracting stage, as well as at the level of utilization. As a threshold matter, employees should be required to give up the right to a judicial forum only if they effectuate a knowing and voluntary waiver. This means that employees have to be afforded the opportunity to read and sign the arbitration terms. The arbitration policy should be highlighted in bold print on job applications, in employee handbooks, and in periodic distributions to employees. Moreover, the mandatory provisions should not be printed solely in an employee handbook or other company policy statement. The arbitration provisions should be printed in a separate contract that places the employee on notice of the waiver. The contract should state in clear, specific, and unambiguous language the terms of the arbitration agreement and contain a provision explaining the rights and claims the employee is waiving. The agreement, for example, should state that the employee is waiving the right to a jury; it should also spell out the types of disputes and statutory claims subject to its coverage. Finally, the employee should be advised to consult with a lawyer before signing the document and be given a reasonable amount of time to have this consultation.

Given the perceived inequality of bargaining power between an employer and employee, as well as the significance of the statutory rights that are being waived, it is essential that an employer's actions at the contracting stage meet these minimum requirements. Ensuring a knowing waiver not only helps to insulate the arbitration agreement from subsequent attacks as to fairness; it also can be an effective employee relations tool. As one commentator noted, employers should emphasize that in waiving recourse to the courts, employees assure themselves access to an efficient, informal, and simpler system for workplace justice. Additionally, frank discussion with employees about ADR may well reduce resistance to arbitration and encourage them to "buy in" to the process [31, pp. 79-80]. In this regard, the arbitration policy should be republished periodically and discussed at employee meetings. Employees should sign attendance sheets at discussion meetings as evidence they were aware of the policy.

With respect to the arbitration process itself, the Supreme Court in *Gilmer* provided little specificity as to due process requirements. In recent years, however, the ADR community has developed rules designed to enhance fairness and

eliminate structural bias in arbitration programs. In 1994, the Task Force on Alternative Dispute Resolution in Employment began its inquiry into ways of providing due process in cases involving mediation or arbitration of statutory employment disputes. The task force included representatives of the American Arbitration Association, the American Civil Liberties Union, the Labor and Employment Section of the American Bar Association, the National Academy of Arbitrators, the National Employment Lawyers Association, and the Society of Professionals in Dispute Resolution. From their work came a report, "A Due Process Protocol for the Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship," published in 1995 [48].

The task force failed to achieve consensus on several issues, including whether mandatory, predispute agreements to arbitrate should be enforceable and what constitutes a knowing waiver to arbitrate. The task force was able to agree, however, on several standards that ought to apply in all private mediation and arbitration procedures:

1. Employees must be afforded the right to representation.
2. Adequate, but limited, pretrial discovery should be provided. Although the system should seek to preserve the advantages of speed, simplicity, and economy, there has to be a reasonable amount of fact-finding through document and information requests, depositions, and subpoenas. If discovery is too restricted or unbalanced, an employee will have no chance of proving a violation. It is difficult to say how much discovery is enough; it has to vary case-by-case. The objective should be an open, but nonburdensome approach, with the arbitrator empowered to resolve any discovery dispute that may arise.
3. The selection procedures for the arbitrator(s) must be scrupulously fair, even-handed, and structured so that all parties have an equal right to participate in the appointment process.
4. The arbitrator(s) or mediator(s) selected must not only be impartial, but also trained in the relevant discrimination laws and knowledgeable of the established case precedents. Toward this end, the Due Process Protocol recommended both the creation and maintenance of special rosters of arbitrators with appropriate skills and a training program to hone those skills. The American Arbitration Association has adopted those recommendations, and it currently maintains "blue ribbon" panels of employment arbitrators who have been specially selected to hear statutory employment cases on the basis of their skills and experience.
5. The arbitrator must be bound by all the applicable rules, procedures, and laws that pertain in court. Most importantly, the arbitrator must be authorized to award the same remedies as are available in court, including

compensatory and punitive damages, and an award of attorney's fees to a prevailing plaintiff.

6. The arbitrator should give a written opinion addressing the issues and providing reasons in support of his/her award.
7. The arbitration decision must be final and binding with a limited scope of review [48].

The American Arbitration Association (AAA) has also developed its own *National Rules for the Resolution of Employment Disputes* [49]. These rules provide that the AAA will "administer dispute resolution programs which meet the due process standards as outlined in these rules and the Due Process Protocol" [49, p. 5]. In this regard, the AAA reserves the right to refuse to administer the case if a dispute resolution program on its face does not meet the minimum due process standard of the Due Process Protocol. Moreover, the AAA's rules go even further than the Due Process Protocol through their inclusion of specific rules relative to qualifications of arbitrators, discovery, order of proceedings, initiation of the arbitration process, and submission of claims [49].

The National Academy of Arbitrators (NAA) has also issued a set of *Guidelines on Arbitrations of Statutory Claims Under Employer-Promulgated Systems* [50]. The purpose of the guidelines is "to provide an outline of practical, procedural, and evidentiary questions of application that the arbitrator might encounter in deciding whether to hear these cases [alleging violation of antidiscrimination statutes] and, if so, how they might be resolved" [50]. Specifically, the NAA guidelines address questions related to whether the arbitrator should accept a particular case, whether the selection procedures and arbitration rules are fair, whether there is any conflict of interest, whether the arbitrator's remedial powers are broad and consistent with law, whether the parties have adequate rights of representation, whether the compensation arrangements are fair, and whether the procedures allow for adequate discovery and for adherence to fair and reasonable standards of due process. In sum, the NAA guidelines are, in effect, a checklist of the elements that constitute a just system for arbitral adjudication of statutory claims [50].

## ALLOCATING THE COSTS OF ARBITRATION

The Due Process Protocol addressed the important issue of costs, stating that the costs of arbitration should be shared except when "the economic condition of a party does not permit equal sharing" [48, p. 39]. According to the protocol, when equal sharing is not feasible, the parties should agree on the allocation or permit the arbitrator to allocate the costs [48].

Cost sharing on an equal basis is the time-honored method used in labor arbitration. The concept, at least initially, was also adopted in employment arbitration because of the concern that the arbitrator's neutrality would be

compromised if s/he were paid by only one party. It quickly became clear, however, that whereas labor arbitration has institutional participants, i.e., unions and employers, that can foot the bill, employee plaintiffs in employment arbitration may not have the financial ability to share costs, even recognizing that an arbitrator can order reimbursement in the event the employee prevails.

The issue of who pays was squarely dealt with in the seminal decision of the United States Court of Appeals for the District of Columbia in *Cole v. Burns International Security Services, et al.* [51]. That case dealt with the enforceability of conditions of employment requiring individual employees to use arbitration in lieu of court for the resolution of statutory claims. Adhering to *Gilmer,* the court upheld the validity of predispute agreements that mandate arbitration of statutory claims as long as such agreements "do not undermine the relevant statutory scheme" [51, at 1466]. In *Cole,* the arbitration agreement at issue incorporated many of the substantive and procedural safeguards recommended in the Due Process Protocol, and it specifically provided for the selection of the arbitrator and conduct of the arbitration proceedings to be in accordance with the AAA's National Rules for the Resolution of Employment Disputes. The court noted these elements with approval, but it did not support implementation of that AAA rule which provides that "[t]he expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and witnesses, will be shared equally by the parties, unless the parties agree otherwise or the arbitrator directs otherwise in the award" [49, rule 37, p. 27]. Writing for the court, Chief Judge Harry Edwards held:

> Under *Gilmer,* arbitration is supposed to be a reasonable substitute for a judicial forum. Therefore, it would undermine Congress's intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court [51, at 1484].

Judge Edwards, formerly a labor arbitrator, was not particularly concerned that an arbitrator would be inclined to show bias toward the party that paid his/her fees. In his view, "[I]t is doubtful that arbitrators care about who pays them, so long as they are paid for their services" [51, at 1485]. Judge Edwards also pointed to other protections against the possibility of arbitrators systematically favoring employers because they are the source of business, most notably, the scrutiny of appointing agencies and plaintiffs' attorneys, who quickly would become wise to a corrupt arbitrator [51, at 1485].

Clearly, the opinion in *Cole* placed greater importance on access to arbitration than on the appearance of impropriety as a result of employers paying for the process. While the issue is not entirely settled, every court to review the issue since *Cole* has reached the same conclusion [52]. Therefore, employers drafting

mandatory, predispute arbitration agreements are well advised to provide that the employer will pay all costs beyond a nominal filing fee. In the least, such agreements should permit the arbitrator to waive the employee's financial commitment upon a showing of economic hardship.

## FUTURE DIRECTIONS

Undisputedly, the law regarding mandatory arbitration of employment discrimination disputes is still evolving. Unless experience proves that the process is highly inferior to court litigation, however, it is doubtful that it will be cast aside. While there may be "growing pains" as arbitration programs are developed and tested, we are past the point where we should challenge the fundamental advantages of ADR in the employment setting. This is particularly true when we consider the fact that our courts are being choked with employment discrimination matters. Twenty-five times more employment discrimination cases were filed in 1998 than in 1970, an increase almost 100 percent greater than all other types of civil litigation combined. There is currently a backlog of over 50,000 employment discrimination cases at the EEOC and thousands more at state and local governmental agencies. There are over 25,000 wrongful discharge and discrimination cases presently pending in state and federal courts nationwide [27, p. 78]. Most of these matters involve jury trials and lengthy proceedings. While plaintiffs win a majority of these cases, the average cases take three to five years to reach a jury, and many jury verdicts are reduced or set aside by the courts.

Thus, court litigation is not a panacea for workplace disputes. The results are unpredictable; the monetary costs are high, delays are inevitable, and the process often embitters the litigants, which makes settlement more difficult to achieve. The benefits of arbitration include speed, economy, informality, confidentiality, knowledgeable decision makers, and the potential for preserving relationships between parties. The task at hand is to make certain that employment arbitration fulfills its promise by developing procedures that are truly fair and that inspire the confidence of employers and employees. Just as labor arbitration has made an enormous contribution as a private system of industrial jurisprudence in the unionized setting, employment arbitration, if conducted properly, can become the preferred method for resolving statutory disputes. We should focus our energies on fashioning just systems for employment arbitration and giving them a reasonable opportunity to work.

* * *

Dr. Joan Parker is a nationally recognized arbitrator and mediator of employment and labor disputes. She serves as a permanent arbitrator under several national collective bargaining agreements, including those between the National Broadcasting Company and National Association of Broadcast Employees & Technicians,

Boeing and the United Automobile Workers, General Electric and the International Union of Electrical Workers, United Technologies and the International Association of Machinists & Aerospace Workers, Bell Atlantic-New Jersey and the International Brotherhood of Electrical Workers, AT&T and the Communications Workers of America, and Sikorsky Aircraft and the International Brotherhood of Teamsters. In the public sector, she is a permanent arbitrator under labor agreements with the State of Connecticut, New York City Metropolitan Transportation Authority, and Port Authority of New York and New Jersey.

She is a member of the American Arbitration Association's national employment arbitration and mediation panels and also a member of several corporate arbitration panels. In addition, Dr. Parker serves on the three-member Federal Reserve System Labor Relations Panel.

Dr. Parker was a professor at the Institute of Management and Labor Relations at Rutgers University and currently she continues to teach part-time at Rutgers as a visiting lecturer. Dr. Parker is a member of the National Academy of Arbitrators, a fellow of the International Academy of Mediators, and Vice Chair of the National Labor-Management Task Force of the American Arbitration Association.

Dr. Parker has authored two books and numerous articles on employment and labor relations topics, and is a frequent speaker at seminars and conferences across the country.

## ENDNOTES

1. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L.Ed. 2d 26 (1991).
2. *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974).
3. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).
4. Jacquelin Drucker, "Is There a *Wright* Way?" American Bar Association, 1999 Annual Meeting, Atlanta, August 11, 1999. Proceedings (Atlanta, GA), pp. 4-22.
5. Federal Arbitration ACt, 9 U.S.C. §§ 1-16 (1994).
6. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994).
7. 895 F.2d 195 (4th Cir. 1990).
8. See Stuart H. Bompey and Michael P. Pappas, "Is There a Better Way? Compulsory Arbitration of Employment Discrimination Claims after *Gilmer*, 19 *Employee Relations Law Journal*, 197, 199 (Winter 1993-94), pp. 197-216.
9. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).
10. *Tenney Engineering, Inc. v. United Electrical, Radio & Machinery Workers*, 207 F.2d 540 (3d Cir. 1953).
11. Robert J. Lewton, Comment, "Are Mandatory, Binding Arbitration Requirements a Viable Solution for Employers Seeking to Avoid Litigation Statutory Employment Discrimination Claims?" 59 *Albany Law Review*, 991, 999 (1996), pp. 991-1005.
12. See *Maryland Cas. Co. v. Realty Advisory Bd.*, 107 F.3d 979, 982 (2d Cir. 1997).

13. *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 356-58 (7th Cir. 1997), cert. denied, 118 S.Ct. 295 (1997).
14. See *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 934 (9th Cir. 1992) (noting that the FAA's application to employment contracts is unsettled, but the court will not reach the issue because it is not raised below); *Brisentine v. Stone & Webster Corp.*, 117 F.3d 519, 526 (11th Cir. 1997).
15. A district court may issue a stay upon finding that a plaintiff was not "in default" in seeking to compel arbitration if the case arises under the FAA, but the FAA does not apply to labor contracts. See *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 311-312 (6th Cir. 1991).
16. See *Rojas v. TK Comm., Inc.*, 87 F.3d 745 (5th Cir. 1996) ("[N]umerous other courts have addressed this very issue, the majority of which have determined that the exclusionary language present in §1 is to be narrowly construed" (at 748)).
17. See *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 226-227 (3d Cir. 1997); *Nieves v. Individualized Shirts*, 961 F.Supp. 782, (D.N.J. 1997) (quoting *Tenney* [10], at 453): see *Dancu v. Coopers & Lybrand*, 778 F.Supp 983 (E.D.Pa. 1991), aff'd 972 F.2d 1330 (3d Cir. 1992); see also, *Teamsters Local 312 v. Matlack, Inc.*, 118 F.3d 985, 995 (3d Cir. 2997). (Finding it had jurisdiction to vacate an arbitration award, the court still noted, "[i]n this case the parties undertook arbitration pursuant to their collective bargaining agreements, and the Federal Arbitration Act, 9 U.S.C. §10 [1995] is not binding."
18. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, (4th Cir. 1996), cert. denied, 519 U.S. 980 (1996).
19. *Wright v. Universal Maritime Service Corp.*, 119 S. Ct. 391, 152 L.Ed. 2d 361 (1998).
20. Richard S. Markowitz and Charles F. Szymanski, "Collective Bargaining Agreement or Contract of Adhesion: The Arbitration of Unionized Employees' Statutory Discrimination Claims," unpublished paper presented at Labor Management and Employment Law CLE Program for Lawyers and Business Professionals, sponsored by the American Arbitration Association, Philadelphia, Pa., April 16, 1999.
21. Janet McEneaney, "Arbitration of Statutory Claims in a Union Setting: History, Controversy and a Simpler Solution," 15 *Hofstra Lab. & Emp. Law Journal*, (Fall 1997), pp. 137-175.
22. Two cases were combined by the court in *Pryner* [13]. Both plaintiffs had been discharged and each filed suit. One claimed race discrimination under Title VII and the ADA. THe other focused on the ADEA. Both employees were covered by collective bargaining agreements containing provisions prohibiting discrimination based on race, disability, and/or age. Neither employee exhausted contractual remedies, and each filed suit seeking reinstatement, damages, and attorneys' fees. Both defendants moved to stay the suits pending arbitration and appealed when the district court denied their motions. (927 F. Supp. 1140 (S.D. Ind. 1996). The case presented two issues: whether the FAA extended to collective bargaining agreements, and whether a bargaining agreement requires the arbitration of a federal discrimination claim.
23. *Brisentine v. Stone & Webber Engineering Corp.*, 117 F.3d 519 (11th Cir. 1997).
24. *Martin v. Dana Corporation*, 114 F.3d 421 (3d Cir. 1997); vacated, rehearing, *en banc*, granted, op. withdrawn, 135 F.3d 765 (1997); vacated, 124 F.3d 590 (1997), subsequent unreported decision printed at 156 LRRM 3137 (3rd Cir. 12/16/97).

25. For other pre-*Wright* decisions that adopted the *Gardner-Denver* approach, see *Penny v. United Parcel Service,* 128 F.3d 408; *Tran v. Tran,* 54 F.3d 115 (1995); *Varner v. National Super Markets,* 94 F.3d 1209 (8th Cir. 1996); and *Harrison v. Eddy Potash, Inc.,* 112 F.3d 1437 (10th Cir. 1997).
26. Max Zimny, "Arbitration of Statutory Employment Disputes Under Collective Bargaining Agreements," *Proceedings of NYU Annual Conference on Labor* (Samuel Estreicher, ed., 1996), pp. 175-178.
27. Evan J. Spelfogel, "Mandatory Arbitration vs. Employment Litigation," *Dispute Resolution Journal,* May 1999, pp. 78-81.
28. *Duffield v. Robertson Stevens & Company,* 144 F.3d 1182 (9th Cir. 1998), cert. denied, 119 S.Ct. 445 (1998).
29. *Rosenberg v. Merrill Lynch,* 995 F. Supp. 190 (D. Mass. 1998); affirmed on other grounds, 170 F.3d 1 (1st Cir. 1999). The First Circuit was faced with the securities industry form arbitration agreement. The court held "as a matter of law that the application of predispute arbitration agreements to federal claims arising under Title VII and the ADEA is not precluded by the Older Worker Benefit Protection Act or by the 1991 amendments to Title VII" [at 21]. However, the court refused to enforce an arbitration agreement where the employee did not know, and the clause by its own terms did not say, that it applied to employment disputes. For this reason, the court found that the arbitration of the agreement was not appropriate under the 1991 amendments to Title VII. The First Circuit also indicated that it was following the *Wright* analysis of requiring a knowing and voluntary waiver in a nonunion setting.
30. *Seus v. John Nuveen & Co.,* 146 F.3d 175 (3d Cir. 1998).
31. Andrea Fitz, "The Debate Over Mandatory Arbitration in Employment Disputes," *Dispute Resolution Journal,* February 1999, pp. 34-76.
32. Richard C. Reuben, "Two Agencies Review Forced Arbitration—EEOC Gets Injunction Against Company that Told Workers 'Accept ADR or Quit'," *A.B.A.J.,* August 1995, p. 26. Discussion of July 1997 policy statement.
33. *EEOC v. Kidder Peabody & Co.,* 156 F.3d 298 (2d Cir. 1998).
34. *EEOC v. Frank's Nursery,* 177 F.3d 448, 79 Fair Empl. Prac. Cas. (BNA) 936 (6th Cir. 1999).
35. Judith Batson Sadler, "Mandatory Arbitration: Recent Developments After *Gilmer* in the Evolving Area of Dispute Resolution Through the Use of Mandatory Arbitration Agreements," American Bar Association, 1999 Annual Meeting, Proceedings, Atlanta, Georgia, pp. 23-24.
36. Samuel Estreicher, "Predispute Agreements to Arbitrate Statutory Claims," 72 *New York University L. Rev.* (December 1997), pp. 1344-1375.
37. Judith P. Vladeck, "Yellow Dog Contracts Revisited," *New York Law Journal,* July 24, 1995, p. 7.
38. Joyce E. Cutler, "Arbitration: Suits Challenge Mandatory Arbitration as Depriving Employees of Their Rights," *Daily Lab. Rep.* (BNA), March 3, 1995, cited in Estreicher, n. 36, p. 1348, available in LEXIS, BNA Library, DLABRT File (quoting Cliff Palefsky of the San Francisco law firm of McGuinn, Hillsman & Palefsky). Mr. Palefsky represented the plaintiffs in *Duffield v. Robertson Stephens & Co., Inc.* [28].
39. Statement of the National Academy of Arbitrators on Condition of Employment Agreements, adopted at 50th Annual Meeting, Chicago, May 21, 1997.

40. Mei L. Bickner, Christine Ver Ploeg, and Charles Feigenbaum, "Developments in Employment Arbitration," *Dispute Resolution Journal* 52:1, January 1997, pp. 15-18.
41. See Joseph D. Garrison, "The Employee's Perspective: Mandatory Binding Arbitration Constitutes Little More than a Waiver of a Worker's Rights," *Dispute Resolution Journal* 15, *53*:4, p. 15, (Fall 1997). H. David Kelly, Jr., "Practical Concerns Affecting the Arbitration of Statutory Claims," *Dispute Resolution Journal, 53*:4, November 1998, pp. 50-55.
42. William H. Howard, "Arbitrating Employment Discrimination Claims: Do You Really Have To? Do You Really Want To?" 43 *Drake L. Rev.* 255, 288-290 (1994), pp. 288-290.
43. See Worker Representation and Participation Survey Focus Group Report, Princeton Survey Research Associates, Princeton, New Jersey, April 1994.
44. Dennis Nolan, Informal Letter to Members of the National Academy of Arbitrators, November 25, 1998.
45. Theodore St. Antoine, Informal Letter to Members of the National Academy of Arbitrators, November 25, 1998.
46. *Hooters of America, Inc. v. Phillips,* 173 F.3d 933 (4th Cir. 1999).
47. Dennis Nolan, "What's Justice Got to Do With It?" *Dispute Resolution Journal, 53*:4 (November 1998), pp. 40-49.
48. "A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship," May 9, 1995. See "A Due Process Protocol for Resolving Employment Disputes Involving Statutory Rights," 50 *Dispute Resolution Journal* 37 (Oct.-Dec. 1995), pp. 37-39.
49. National Rules for the Resolution of Employment Disputes, American Arbitration Association, effective June 1, 1997, Date of Printing: February 23, 1998, New York, NY, 40 pps.
50. Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems, National Academy of Arbitrators, 1997.
51. *Cole v. Burns International Security Services, et al.,* 105 F.3d 1465 (D.C. Cir. 1997).
52. See, for example, *Shankel v. B-G Maintenance Management of Colorado, Inc.,* 163 F.3d 1230 (10th Cir. 1999). The court held that an arbitration agreement the employee entered into as a condition of continued employment did not fall within the FAA exception and therefore was flawed. The former employee's action under Title VII, ADA, and ADEA was allowed to proceed because the arbitration provision required the employee to pay a portion of the arbitrator's fees. It was for that reason that the arbitration provision was found to be unenforceable. The court expressly relied on *Cole v. Burns International Security Service* [51] in reaching its decision.

Direct reprint request to:

Joan Parker
48 Tunbridge Road
Haverford, PA 19041