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**Touro Law Review**

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Volume 14 | Number 3

Article 11

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1998

## **Arbitration of Workplace Discrimination Claims: Federal Law and Compulsory Arbitration**

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### **Recommended Citation**

Case, Norris (1998) "Arbitration of Workplace Discrimination Claims: Federal Law and Compulsory Arbitration," *Touro Law Review*: Vol. 14: No. 3, Article 11.

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Cases: Arbitration and Discrimination

# ARBITRATION OF WORKPLACE DISCRIMINATION CLAIMS: FEDERAL LAW AND COMPULSORY ARBITRATION

## Norris Case\*

### Introduction

For employees in the non-union workplace, compulsory arbitration of employment discrimination is generally permissible and increasingly prevalent. However, employers with unionized workforces generally may not compel arbitration of employment discrimination claims.<sup>1</sup> Although there is conflicting law among the federal courts, an increase in mandatory arbitration does not appear to be the trend for resolving employment discrimination disputes in union settings.<sup>2</sup> Indeed, union employees will most likely continue

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<sup>1</sup> See *Alexander v. Gardener-Denver* 415 U.S. 36 (holding that an employee is not precluded from litigating an employment discrimination claim in federal court where he has raised the same claim in arbitration); See also *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 24 (1990) (rejecting compulsory arbitration of statutory discrimination claims for unionized employees). See also *Barentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

<sup>2</sup> See *Felt v. Atchinson, Topeka & Santa Fe Railway Co.*, 60 F.3d 1416 (9th Cir. 1995) (holding that a railroad employees' Title VII, religious discrimination claim was not subject to arbitration under a collective bargaining agreement); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992) (holding that an employees' Title VII, sexual harassment, claim was not subject to compulsory arbitration under Federal Arbitration Act). But see *Austin v. Owens-Broadway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996) (holding that a discharged employee was compelled to arbitrate her Title VII and ADA claims under a collective bargaining agreement); *Maye*

to have the option of pursuing claims for race, gender, age, disability, and other discrimination through the grievance-arbitration machinery as well as through judicial process.<sup>3</sup> This article addresses the relevant precedent concerning mandatory arbitration of statutory discrimination claims. In addition, this article surveys the conflicting law on compulsory arbitration and reasons for and against utilizing compulsory arbitration.

### **Background: Availability of Mandatory Arbitration of Discrimination Claims For Unionized Employers**

In *Alexander v. Gardner-Denver*,<sup>4</sup> the Supreme Court held that an employee is not precluded from litigating an employment discrimination claim in federal court where he has raised the same claim in arbitration pursuant to a collective bargaining agreement.<sup>5</sup> The Court ruled that an employee does not waive his individual statutory rights under Title VII of the Civil Rights Act of 1964 [hereinafter "Title VII"]<sup>6</sup> by exercising his collectively bargained rights.<sup>7</sup>

Gardner-Denver Company hired Harrell Alexander, Sr., a black man, in May 1966, to work as a maintenance worker in its Denver

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v. Smith Barney, Inc., 897 F. Supp. 100 (S.D.N.Y. 1995) (holding that an employee was compelled to arbitrate a Title VII claim under a "principals of employment" agreement signed by all employees).

<sup>3</sup> See generally *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974); *Barentine v. Arkansas Best-Freight System, Inc.*, 450 U.S. 728 (1981); *McDonald v. City of West Branch*, 466 U.S. 284 (1984); *Bates v. Long Island Railroad Co.*, 997 F.2d 1028 (2d Cir. 1993); *Lachance v. Northeast Publishing, Inc.*, 965 F. Supp. 177 (D. Mass. 1997).

<sup>4</sup> 415 U.S. 36 (1974).

<sup>5</sup> *Id.* at 54.

<sup>6</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Title VII assures "equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." *Alexander*, 415 U.S. at 44. See also *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding the requirement that an applicant have a high school education and pass a standardized intelligence test as violative of Title VII in that the requirement was not job related and operated to disqualify a disproportionate number of African-Americans).

<sup>7</sup> *Alexander*, 415 U.S. at 51-52.

Colorado facility.<sup>8</sup> Two years later, Alexander was awarded a trainee position as a drill operator.<sup>9</sup> Nevertheless, he was discharged one year later, for allegedly producing too many defective parts.<sup>10</sup> Immediately after the discharge, Alexander filed a grievance under the collective bargaining agreement between his employer and his union, Local 3029, United Steelworkers of America, alleging that he had been unjustly discharged.<sup>11</sup> Pursuant to the collective bargaining agreement, a four-step grievance was processed by the union against Gardner-Denver.<sup>12</sup>

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<sup>8</sup> *Id.* at 38.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 39 (“The grievance stated: ‘I feel I have been unjustly discharged and ask that I be reinstated with full seniority and pay.’”).

<sup>12</sup> *Id.* at 40-41 n. 3. The grievance procedure of Gardner-Denver as set forth in the collective bargaining agreement was a four step procedure with a fifth step consisting of a referral to arbitration. *Id.* The four grievance steps are standard collectively bargained grievance procedures, and are enumerated as follows:

Step 1. An attempt shall first be made by the employee with or without his assistant grievance committeeman (at the employee's option), and the employee's foreman to settle the grievance. The foreman shall submit his answer within one (1) working day and if the grievance is not settled, it shall be reduced to writing, signed by the employee and his assistant grievance committeeman, and the foreman shall submit his signed answer of such grievance.

Step 2. If the grievance is not settled in Step 1, it shall be presented to the Superintendent, or his representative, within two (2) working days after the Union has received the Foreman's answer in Step 1. The Superintendent or his representative shall submit his signed answer two (2) working days after receiving the Grievance.

Step 3. If the grievance is not settled in Step 2, it shall be presented to the manager of Manufacturing or his representative within five (5) working days after the Union has received the answer in Step 2. The manager of Manufacturing or his representative shall meet with the representatives of the Union to attempt to resolve the grievance within five (5) working days following the presentation of a grievance. The Manager of Manufacturing or his representative shall submit his signed answer within three (3) working days after the date of such meeting.

At the fourth step of the grievance process, Alexander raised for the first time, a charge of racial discrimination.<sup>13</sup> The employer denied the grievance and Alexander's claim of discrimination.<sup>14</sup> After the grievance was denied, and prior to arbitration, Alexander filed a charge of racial discrimination with the Colorado Civil Rights Commission, which was referred to the Equal Employment Opportunity Commission [hereinafter "EEOC"].<sup>15</sup> At his arbitration hearing, Alexander testified and evidence was presented in connection with his claim of racial discrimination.<sup>16</sup> Notwithstanding the evidence submitted by the union and Alexander, the arbitrator upheld Alexander's discharge.<sup>17</sup>

The EEOC determined that there was not reasonable cause to believe a violation of Title VII had occurred.<sup>18</sup> Accordingly, Alexander received a notice of his right to sue.<sup>19</sup> Thereafter, he filed a complaint in the District Court for the District of Colorado, alleging a violation of Title VII.<sup>20</sup> The employer moved for summary judgment, claiming that the issues had already been

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Step 4. If the grievance is not settled in Step 3, it shall be referred to the Personnel Manager, and/or his representatives and the International representative and chairman of the grievance committee within five (5) working days after the Union has received the Step 3 answer. Within ten (10) working days after the grievance has been referred to Step 4, the above mentioned parties shall meet for the purpose of discussing such grievance. Within five (5) working days following the meeting, the Company representatives shall submit their signed answer to the Union. The Union representatives shall signify their concurrence or non-concurrence and affix their signatures to the grievance.

*Id.*

<sup>13</sup> *Id.* at 42.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 42-43.

<sup>18</sup> *Id.* at 43.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

submitted to and decided by the arbitrator, and were therefore precluded.<sup>21</sup>

The district court agreed with the employer, finding that Alexander elected to pursue his remedies through arbitration under the non-discrimination clause of the collective bargaining agreement, and was therefore precluded from filing a subsequent suit under Title VII.<sup>22</sup> The Tenth Circuit Court of Appeals affirmed the district court's decision.<sup>23</sup> However, the Supreme Court reversed, holding that, at least in the collective bargaining agreement context, an agreement to arbitrate a discrimination claim does not preclude an employee from seeking subsequent relief under Title VII, including pursuing the Title VII claim in court.<sup>24</sup> Moreover, the Court held that such employment discrimination claims will be reviewed *de novo*.<sup>25</sup>

The *Alexander* Court rejected the election of remedies analysis espoused by the district court, and held that Title VII is not necessarily linked to the grievance-arbitration machinery of collective bargaining agreements.<sup>26</sup> Essential to the Court's decision was its determination of the question of whether invocation of rights under the collective bargaining agreement constituted a waiver of an employee's individual statutory rights.<sup>27</sup> The statutory Title VII right invoked by Alexander was an individual right, as compared with the majoritarian processes of collectively bargained

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* See also *Alexander v. Gardner-Denver Company*, 346 F. Supp. 1012 (D. Colo. 1971).

<sup>23</sup> *Alexander*, 415 U.S. at 43. See also *Alexander v. Gardner-Denver Company*, 466 F.2d 1209 (10th Cir.1972).

<sup>24</sup> *Alexander*, 415 U.S. at 49.

<sup>25</sup> *Id.* at 60.

<sup>26</sup> *Id.* at 45-47. The District Court, which was affirmed by the Court of Appeals, held Alexander was "bound by the arbitral decision and had no right to sue under Title VII." *Id.* at 45. This holding was "dictated by notions of election of remedies and waiver and by the federal policy of favoring arbitration of labor disputes." *Id.* at 46. The United States Supreme Court in reversing held that the statutory enforcement rights of Title VII are vested in the plenary power of the federal courts. *Id.* at 47.

<sup>27</sup> *Id.* at 49 (holding that an "individual does not forfeit his [Title VII] cause of action if he pursues his grievance to final arbitration.").

rights.<sup>28</sup> Thus, the Court held, a waiver of a significant and definite individual right may not occur by the exercise of collective rights.<sup>29</sup>

The Court also found problematic, the utilization of the grievance-arbitration machinery as an alternative to adjudication by the courts.<sup>30</sup> Indeed, the Court was openly critical of arbitration as a forum for statutory disputes under Title VII by stating:

Arbitral disputes, 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. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of the enacted legislation. Where the collective bargaining agreement conflicts with Title VII, the arbitration must follow the agreement.<sup>31</sup>

The Court noted that the relative unfamiliarity of labor arbitrators with statutory discrimination law was a significant reason for not substituting court adjudication with more informal labor arbitration.<sup>32</sup> Also, the Court recognized that in arbitration, the usual rules of evidence do not apply, and rights to discovery and cross-examination are often circumscribed.<sup>33</sup> The Court's reluctance concerning arbitration as a forum for Title VII claims, led to its holding that labor arbitrations would not have preclusive effect over judicial claims of discrimination.<sup>34</sup>

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<sup>28</sup> *Id.* at 51.

<sup>29</sup> *Id.* at 51-52. Since *Alexander*, the Court has generally maintained the position that individual statutory rights are not waived in the grievance-arbitration process. See, e.g., *Barrantine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (holding an individual's right to pursue claims under the Fair Labor Standards Act are not precluded if such issues were also arbitrated under a collective bargaining agreement).

<sup>30</sup> *Alexander*, 415 U.S. at 47.

<sup>31</sup> *Id.* at 56-57.

<sup>32</sup> *Id.* at 57-58.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 51 (asserting that congressional intent behind Title VII, that employees not be subject to workplace discrimination, would be defeated if the collective-bargaining process served as a waiver of these rights and barred a federal Title VII cause of action).

In more recent years, the Supreme Court has retrenched from the broad pronouncements enumerated in the *Alexander* decision.<sup>35</sup> Recently, the Court has urged the use of arbitration to resolve employment discrimination claims.<sup>36</sup> In fact, although the holding in *Alexander* still stands, federal district and courts of appeal have issued several decisions limiting the scope of *Alexander*.<sup>37</sup>

### The Supreme Court Promotes Mandatory Arbitration of Statutory Discrimination Claims: *Gilmer v. Interstate/Johnson Lane*<sup>38</sup>

In 1991, the Supreme Court breached new territory in the employment discrimination landscape by allowing an employer to enforce mandatory arbitration provisions of an employment agreement.<sup>39</sup>

Robert Gilmer was hired by Interstate as a financial services manager.<sup>40</sup> As a condition of his employment, Gilmer was required to register “as a securities representative with several stock exchanges, including the New York Stock Exchange” [hereinafter “NYSE”].<sup>41</sup> Gilmer completed, as part of his registration, an application<sup>42</sup> in which he “agree[d] to arbitrate any dispute, claim, or controversy [between Gilmer and

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<sup>35</sup> See generally *Rojas v. TK Communications, Inc.*, 87 F.3d 745 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592 (6th Cir. 1995); *Miller Brewing Co. v. Brewery Workers Local Union*, 739 F.2d 1159 (7th Cir. 1984); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1982); *Golenia v. Bob Baker Toyota*, 915 F. Supp. 201 (S.D. Cal. 1996).

<sup>36</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

<sup>37</sup> See generally *Rojas v. TK Communications, Inc.*, 87 F.3d 745 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592 (6th Cir. 1995); *Miller Brewing Co. v. Brewery Workers Local Union*, 739 F.2d 1159 (7th Cir. 1984); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1982); *Golenia v. Bob Baker Toyota*, 915 F. Supp. 201 (S.D. Cal. 1996).

<sup>38</sup> 500 U.S. 20 (1991).

<sup>39</sup> *Id.* at 26-27.

<sup>40</sup> *Id.* at 23.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* Gilmer completed a standard application, the “Uniform Application for Securities Industry Registration or Transfer.” *Id.*



Interstate] that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which [he] registers.”<sup>43</sup>

In addition to the securities registration application, Gilmer was subject to NYSE regulations concerning arbitration.<sup>44</sup> Particularly, NYSE required arbitration of “[a] controversy between a registered representative and any other[sic] member organization arising out of the employment or termination of employment of such registered representative.”<sup>45</sup>

After six years of employment with Interstate, Gilmer was terminated.<sup>46</sup> Notwithstanding his agreement to arbitrate employment disputes, Gilmer filed a charge with the EEOC age discrimination in violation of the Age Discrimination in Employment Act [hereinafter “ADEA”].<sup>47</sup> Gilmer, thereafter, filed a complaint alleging age discrimination in violation of the ADEA in the United States District Court for the Western District of South Carolina.<sup>48</sup>

Interstate responded to Gilmer’s complaint by filing a motion to compel arbitration pursuant to the Federal Arbitration Act [hereinafter “FAA”].<sup>49</sup> Interstate’s position was that the arbitration agreement signed by Gilmer required that his ADEA claim be arbitrated.<sup>50</sup> The district court, relying on the Supreme Court’s

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 23; N.Y.S.E. RULE 347.

<sup>46</sup> *Gilmer*, 500 U.S. at 23.

<sup>47</sup> *Id.* at 23-24. *See* 29 U.S.C. §§ 621-634 (1994). The purpose behind the ADEA is to prevent an employer from discriminating against any person regarding hiring, discharging, compensation, privileges, or terms and conditions of employment based upon that person’s age. *See* 29 U.S.C. § 623(A).

<sup>48</sup> *Gilmer*, 500 U.S. at 23.

<sup>49</sup> *Id.* at 24.

<sup>50</sup> *Id.* In *Gilmer*, in Justice Stevens’ dissenting opinion, joined by Justice Marshall, Justice Stevens wrote that the FAA excludes contracts of employment such as the Interstate/NYSE contracts from its coverage. *Id.* at 36-37 (Stevens, J., dissenting). Accordingly, Justice Stevens concluded that the U-4 arbitration agreement was not enforceable under the FAA. *Id.* (Stevens, J., dissenting). The majority had bypassed this argument by finding that Gilmer’s contract was

earlier ruling in *Alexander*, denied Interstate's motion to compel arbitration.<sup>51</sup> The district court concluded that "Congress intended to protect ADEA claimants from the waiver of a judicial forum."<sup>52</sup>

Interstate appealed the decision of the district court to the Fourth Circuit Court of Appeals.<sup>53</sup> The Fourth Circuit reversed, finding that there was no legislative history precluding the arbitration of ADEA claims, and that *Alexander* did not preclude mandatory arbitration.<sup>54</sup>

Gilmer sought review in the Supreme Court, and the Court granted certiorari "to resolve [the] conflict among the circuits."<sup>55</sup> In addressing the issue of whether the ADEA claim was subject to mandatory arbitration, the Court first assessed the mandate of the FAA to "reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts."<sup>56</sup> By the time the *Gilmer* case was heard it was clear that a panoply of statutory claims could be arbitrated.<sup>57</sup> In fact, the Court noted that numerous statutory claims were subject to arbitration under the broad mandate of the FAA.<sup>58</sup>

The Court also emphasized that by pursuing arbitration as a means of resolving a statutory claim, a party does not forego his or her substantive statutory rights.<sup>59</sup> Rather, a party's substantive statutory rights remain unaffected by an arbitration agreement.<sup>60</sup>

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not an employment contract, because his contract was a contract with the securities exchanges, not with his employer, Interstate. *Id.* at 25 n.2.

<sup>51</sup> *Id.* at 24.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 26.

<sup>58</sup> *Id.* The Court observed that arbitration was held to be enforceable in connection with claims under the Sherman Act, 15 U.S.C. §§1-7; §10(b) (1997) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) (1997); the civil provisions of the Racketeer Influenced and Corrupt Organizations Act [RICO], 18 U.S.C. §1961 (1984); and, §12(2) of the Securities Act of 1933, 15 U.S.C. §771(2) (1997). See *Gilmer*, 500 U.S. at 26.

<sup>59</sup> *Id.* at 26.

<sup>60</sup> *Id.*

The Court concluded that arbitration should generally be permitted as a viable means of resolving statutory claims, unless legislative intent evinces a desire to otherwise preclude arbitration.<sup>61</sup>

Gilmer raised several challenges to mandatory arbitration of ADEA claims, arguing that the ADEA was designed to further not only individual interests, but broader social policies which the arbitration process is not designed to address.<sup>62</sup> Responding to this assertion, the Court recognized that arbitration tends to address specific disputes and does not generally focus on the broader social objectives incorporated in the ADEA.<sup>63</sup> Nevertheless, the Court concluded that “so long as the prospective litigant effectively [vindicates his] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”<sup>64</sup>

The Court was equally unpersuaded by Gilmer’s claim that by compelling arbitration, the EEOC’s role in enforcing the age discrimination statute would be undermined.<sup>65</sup> The Court found that an aggrieved party’s right to file a charge with the EEOC will not be precluded if they pursue arbitration.<sup>66</sup> Furthermore, the Court noted, the EEOC has independent authority to investigate claims of discrimination, irrespective of the initiation of judicial action.<sup>67</sup>

Gilmer further argued that compulsory arbitration of statutory age discrimination claims is inappropriate, because compulsory arbitration would deprive claimants of the judicial forum provided for in the ADEA.<sup>68</sup> The Court summarily rejected this proposition, finding that no provisions existed in the ADEA which preclude waiver of the judicial forum in favor of arbitration.<sup>69</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 27.

<sup>63</sup> *Id.* at 27-28.

<sup>64</sup> *Id.* at 28.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 29.

<sup>69</sup> *Id.*

After the Court rejected Gilmer's substantive challenges to mandatory arbitration of the age discrimination claim, it considered challenges to the adequacy of the arbitration process.<sup>70</sup> Gilmer argued that arbitration panels would be biased towards employers.<sup>71</sup> The Court disagreed, citing several protections offered under the NYSE arbitration rules.<sup>72</sup>

Under the NYSE procedures, the parties would be informed about the arbitrators' employment history.<sup>73</sup> The parties could make inquiries concerning the arbitrators' background.<sup>74</sup> Each party could exercise one peremptory challenge to an arbitrator without cause, and an unlimited amount of challenges for cause.<sup>75</sup> Finally, the FAA provides for vacation of an arbitration award where it is evident that the arbitrator was partial or corrupt.<sup>76</sup>

Gilmer also argued that the discovery procedure in arbitration would make it difficult to prove discrimination.<sup>77</sup> To this argument, the Court responded that age discrimination does not require any more extensive discovery than other statutory claims.<sup>78</sup> The Court suggested that a party trades "the procedures and opportunity for

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<sup>70</sup> *Id.* at 30.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 30-31. 9 U.S.C. § 10(b)(1970). Section 10(b) states:

The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

*Id.*

<sup>77</sup> *Gilmer*, 500 U.S. at 31.

<sup>78</sup> The Court also pointed to NYSE discovery regulations, which set forth rules on the taking of depositions, document production, information requests, and subpoenas. *Gilmer*, 500 U.S. at 30-32 (relying on Arbitration, N.Y.S.E. Guide (CCH), ¶¶ 2608-10, 2612(d), 2619-20, 2627(a), 2627(e), 2627(f) (Nov. 1995)).

review” available in a judicial forum for the expedited process of arbitration.<sup>79</sup>

Another flaw in the arbitral mechanism cited by Gilmer, is the lack of arbitral jurisprudence that arises from the failure of some arbitrators to publish their opinions.<sup>80</sup> The Court observed, however, that NYSE rules required arbitration awards be in writing, and that the awards summarize both the controversy and a description of the award.<sup>81</sup> Based on these requirements, the Court rejected Gilmer’s claim alleging a deficiency in arbitral precedent.<sup>82</sup> Furthermore, judicial decisions would continue to offer guidance for practitioners in the arbitral forum.<sup>83</sup>

One of the most significant challenges raised<sup>84</sup> by Gilmer was that the unequal bargaining power that exists between employers and employees should preclude enforceability of employment agreements with compulsory arbitration provisions.<sup>85</sup> The Court rejected this challenge, finding that inequality in bargaining power does not require invalidation of an employment contract.<sup>86</sup> Rather, the Court found that each contract must be weighed separately to determine if there are grounds for revocation, such as “fraud or overwhelming power.”<sup>87</sup>

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<sup>79</sup> *Id.* (reasoning that limited discovery is a tradeoff for more expeditious proceedings and relaxed rules of evidence).

<sup>80</sup> *Id.* at 31-32.

<sup>81</sup> *Gilmer*, 500 U.S. at 30-32 (relying on Arbitration, N.Y.S.E. Guide (CCH), ¶¶ 2608-10, 2612(d), 2619-20, 2627(a), 2627(e), 2627(f) (Nov. 1995)).

<sup>82</sup> *Id.* at 32.

<sup>83</sup> *Id.* at 31.

<sup>84</sup> Gilmer also argued that arbitrations do not complement the ADEA inasmuch as they do not allow for broad equitable relief and class actions. *Gilmer*, 500 U.S. at 32. The Court found that although the ADEA provides for such relief, conciliation of individual disputes, by means of arbitration, should be permitted since there is no preclusion against such conciliation in the ADEA. *Id.*

<sup>85</sup> *Id.* at 32-33.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 33. The Court stated:

Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds “for the revocation of any contract.” . . . There is no indication in this case, however,

Although the Court reached a different result in *Gilmer* than in its earlier decision in *Alexander*, the Court refrained from overruling *Alexander* on its merits.<sup>88</sup> Instead, the Court drew a distinction between an “employee’s contractual right under a collective bargaining agreement” and an employee’s individual statutory rights, observing that employees’ collective bargaining rights should not necessarily interfere with employees’ exercise of individual statutory rights.<sup>89</sup> By so holding, the Court drew a sharp distinction in the labor and employment law landscape, rejecting compulsory arbitration of statutory discrimination claims for unionized workers, while requiring non-unionized workers to arbitrate their employment discrimination claims [a strange result indeed].<sup>90</sup>

### **Lower Federal Courts Have Reached Conflicting Results Concerning Mandatory Arbitration of Statutory Discrimination Claims Brought by Unionized Employees**

Until recently, federal courts consistently held, pursuant to *Alexander*, that an employee could not be compelled to arbitrate discrimination claims where the employee’s collective bargaining agreement provided for arbitration.<sup>91</sup> However, in 1996, in *Austin v. Owens-Brockway Glass Container Inc.*,<sup>92</sup> the Fourth Circuit Court of Appeals held that *Gilmer* and its progeny have altered the landscape so significantly in the area of compulsory arbitration of

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that *Gilmer*, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause or his registration application. As with the claimed procedural inadequacies discussed above, this claim of unequal bargaining power is best left for resolution in specific cases.

*Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 34-35.

<sup>90</sup> *Id.*

<sup>91</sup> See, e.g., *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923 (3d Cir. 1958); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992).

<sup>92</sup> 78 F.3d 875 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 432 (1996).

discrimination claims<sup>93</sup> that *Alexander* has become obsolete.<sup>94</sup> The *Austin* court concluded that it is of no moment that an agreement to arbitrate occurs in the context of a collective bargaining agreement or in the context of individual employment contracts.<sup>95</sup>

In the dissent in *Austin*, Judge Hall criticized the majority's disregard for the decision in *Alexander*.<sup>96</sup> Particularly, he wrote that the majority failed to make a critical distinction between the individual rights of the unionized employee and the employee's collective rights.<sup>97</sup> By inexplicably failing to adequately consider this distinction, the majority never reached the issue of whether the individual's invocation of collective rights is sufficient to waive the individual statutory rights.<sup>98</sup>

Other courts have adhered strictly to *Alexander* denying compulsory arbitration in union settings.<sup>99</sup> For example, the Seventh Circuit in *Pryner v. Tractor Supply Co.*<sup>100</sup> applied *Alexander*, and dismissed the employer's motion to stay two Title

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<sup>93</sup> See *Almante v. Coca-Cola Bottling Co.*, 959 F. Supp. 569 (D. Conn. 1997) (adopting the Fourth Circuit's analysis). In *Almante*, the court found that specific language in a collective bargaining agreement arbitration provision, which permitted arbitration of federal employment claims constituted a specific waiver of the employees rights to seek relief in the judicial forum. *Id.* The collective bargaining agreement in that case provided that employees were required to submit to arbitration claims under "Federal Laws, order[s] and regulations pertaining to equal employment opportunity." *Id.* at 574 n. 2. Inasmuch as that collective bargaining agreement specifically included statutory discrimination claims, the district court ordered mandatory arbitration of the employee's race discrimination claim. *Id.*

<sup>94</sup> *Austin*, 78 F.3d at 880-85.

<sup>95</sup> *Id.* at 885.

<sup>96</sup> *Id.* at 887 (Hall, J., dissenting).

<sup>97</sup> *Id.* at 886-87 (Hall, J., dissenting).

<sup>98</sup> *Id.* (Hall, J., dissenting). Judge Hall also reflected on the Court's effort in *Gilmer* to distinguish *Alexander*, rather than overruling it. *Id.* (Hall, J., dissenting). By so doing, Judge Hall affirmed the court's commitment to assuring employees of their individual right to pursue statutory discrimination claims in the judicial forum. *Id.* (Hall, J., dissenting).

<sup>99</sup> See, e.g., *Varner v. National Super Markets*, 94 F.3d 1209 (8th Cir. 1996); *Felt v. Atchison, Topeka & Santa Fe*, 60 F.3d 1416 (9th Cir. 1995).

<sup>100</sup> 109 F.3d 354 (7th Cir. 1997).

VII actions pending grievance-arbitration.<sup>101</sup> Judge Richard A. Posner wrote the opinion, finding that *Alexander* was not overruled, or so eviscerated by *Gilmer*, as to be obsolete.<sup>102</sup> Furthermore, Judge Posner observed that the grievance-arbitration machinery in the collective bargaining context is an inappropriate forum for resolution of most workplace discrimination claims.<sup>103</sup> Most significantly, the union is responsible for processing employee grievances, not the individual employees.<sup>104</sup> Therefore, if the union decides not to proceed with an individual employee's grievance, that employee's statutory rights may be improperly foreclosed.<sup>105</sup> While an employee may sue the union for failing to grieve-arbitrate his or her claim<sup>106</sup>, a decision not to grieve-arbitrate will be reviewed deferentially by a reviewing court.<sup>107</sup> Judge Posner recognized that the grievance-arbitration machinery can create barriers for individual discrimination claimants who wish to exercise their rights.<sup>108</sup> For this reason, the court concluded that mandatory arbitration in connection with a collective bargaining agreement is improper.<sup>109</sup> Moreover, inasmuch as *Alexander* was not overruled, compulsory arbitration in the context of a collective bargaining agreement generally remains impermissible.<sup>110</sup>

### The Legacy of *Gilmer* In the Non-Union Workplace: Compulsory Arbitration Pursuant to An Employment Contract

Numerous decisions have been reached since *Gilmer* concerning the availability of compulsory arbitration of statutory discrimination

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<sup>101</sup> *Id.* at 364-65.

<sup>102</sup> *Id.* at 364.

<sup>103</sup> *Id.* at 362-63.

<sup>104</sup> *Id.* at 362.

<sup>105</sup> *Id.*

<sup>106</sup> Employees may bring claims against their union and employer for failure to grieve or arbitrate a grievance. See Labor Management Relations Act §301, 29 U.S.C. §185 (1947) (stating that employees may assert such claims as a breach of the union's duty of fair representation).

<sup>107</sup> *Pryner*, 109 F.3d at 362.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 363.

<sup>110</sup> *Id.*



claims in the non-union environment.<sup>111</sup> Indeed, employers, employees, the courts, and the EEOC have joined the sometimes heated debate pertaining to the viability of compulsory arbitration and voluntary arbitration in resolving statutory employment discrimination claims.<sup>112</sup>

With regard to compulsory arbitration, courts have generally followed the decision in *Gilmer*, and required arbitration.<sup>113</sup> However, some courts have nevertheless evaded compulsory arbitration by innovatively interpreting *Gilmer*, and incorporating certain themes from *Alexander*.<sup>114</sup> In *Prudential Insurance Co. v. Lai*,<sup>115</sup> the Ninth Circuit found that the public policy protecting victims from discrimination and harassment, through anti-discrimination statutes, is at least as strong as the public policy in favor of arbitration.<sup>116</sup> The court held that a plaintiff alleging discrimination under Title VII could only be forced to forego statutory remedies and arbitrate the discrimination claims if the plaintiff knowingly agreed to submit such disputes to arbitration.<sup>117</sup>

In *Lai*, plaintiffs Justine Lai and Elvira Viernes, sales representatives employed by Prudential Insurance Company of America, sued Prudential and their immediate supervisor in state court alleging that they had been raped by their supervisor, that

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<sup>111</sup> *Id.* See *Maye v. Smith Barney Inc.*, 897 F. Supp. 100 (S.D.N.Y. 1995) (holding that where employees brought a claim against their employer under Title VII and the New York Human Rights Law, that Congress did not intend to preclude the parties from arbitrating such claim); *Topf v. Warnaco*, 942 F. Supp. 762 (D. Conn 1996) (holding that an employee's statutory claims are subject to arbitration where a former employee alleged that his termination violated the Rehabilitation Act, the Age Discrimination in Employment Act).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* See *Oldroyd v. Elmira Savings Bank*, 956 F. Supp. 393 (W.D.N.Y. 1997) (holding that a claim for retaliatory discharge was not within the scope of the arbitration clause); *Krahel v. Owens-Brockway Glass Container, Inc.*, 971 F. Supp. 440 (D.C. Or. 1997) (holding that the employee's claims under Title VII were not barred by the arbitration clause in the context of collective bargaining agreement).

<sup>115</sup> 42 F.3d 1299, 1305 (9th Cir. 1994).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1301.

they were harassed, and that they were sexually abused.<sup>118</sup> Prudential responded by filing an action in the federal district court to compel arbitration of the state law claims and to stay the court proceedings.<sup>119</sup>

In seeking arbitration, Prudential relied on a provision in a U-4 employment form signed by Lai and Viernes.<sup>120</sup> The agreement contained a provision requiring the plaintiffs “to arbitrate any dispute, claim or controversy that . . . is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which [they] register.”<sup>121</sup> Plaintiffs thereafter registered with the National Association of Securities Dealers [hereinafter “NASD”], which required that “[a]ny dispute, claim or controversy eligible for submission under part I of this Code between or among members and/or associated persons . . . arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), shall be arbitrated under this Code”<sup>122</sup>

The district court granted Prudential’s motion to stay the court action and to compel arbitration.<sup>123</sup> On appeal, the Ninth Circuit Ct. of Appeals reversed and vacated the district court’s order.<sup>124</sup> The Ninth Circuit held that by signing the U-4 form, the plaintiffs did not agree to arbitrate their sexual discrimination claim.<sup>125</sup> Because both the U-4 form and the NASD arbitration clause had failed to refer to sex discrimination, or even generally to discrimination claims, the court concluded that the plaintiffs could not have understood that by signing those forms they would be subject to mandatory arbitration of their discrimination claims.<sup>126</sup> Indeed, the U-4 form did not even specifically refer to

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1302.

<sup>121</sup> *Id.* at 1301.

<sup>122</sup> *Id.* at 1302.

<sup>123</sup> *Id.* at 1301.

<sup>124</sup> *Id.* at 1305.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

“employment” disputes as being covered under the arbitration provision.<sup>127</sup>

The majority, in overturning the district court’s order to compel arbitration, agreed with the Seventh Circuit’s ruling in *Farrand v. Lutheran Brothers*.<sup>128</sup> In *Farrand*, the employer also sought to compel arbitration under the FAA.<sup>129</sup> *Farrand*, like *Lai*, involved a stockbroker registration form.<sup>130</sup> In *Farrand*, the Seventh Circuit found that the employer could not compel arbitration under the employee’s U-4 form, because the NASD rules did not specifically require arbitration of employment disputes.<sup>131</sup> The NASD rules in *Farrand*, unlike the NYSE rules in *Gilmer* did not specifically authorize arbitration in the context of employment disputes.<sup>132</sup>

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<sup>127</sup> *Id.*

<sup>128</sup> 993 F.2d 1253 (7th Cir. 1993)

<sup>129</sup> *Id.* at 1254.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 1255.

<sup>132</sup> The court recognized that the NASD rules covered disputes generally between customers and members, members and members, or between the NASD and registered clearing agencies, but not between employee-members and employers. *Id.* Specifically NASD Code of Arbitration Procedure, §1 states:

This Code of Arbitration Procedure is prescribed . . . for the arbitration of any dispute, claim or controversy arising out of or in connection with the business of any member of [NASD], with the exception of disputes involving the insurance business of any member which is also an insurance company:

(1) between or among members; (2) between or among members and public customers, or others; and (3) between or among members, registered clearing agencies with which [NASD] has entered into an agreement to utilize [NASD’s] arbitration facilities and procedures, and participants, pledgees or other persons using the facilities of a registered clearing agency, as these terms are defined under the rules of such a registered clearing agency.

*Id.* *Farrand*, 993 F.2d at 1254. By reading this section of the NASD code, it does not appear that arbitration of individual workplace discrimination claims are covered by this section. There is no reference to individual claims for discrimination. *Id.* For this reason, the court concluded that an employee, by agreeing to this provision, did not waive his right to pursue their individual statutory discrimination claim in court. *Id.*

Other appellate courts including the Third Circuit,<sup>133</sup> the Fifth Circuit,<sup>134</sup> the Sixth Circuit,<sup>135</sup> the Tenth Circuit,<sup>136</sup> and the Eleventh Circuit<sup>137</sup> have accorded *Gilmer* a less restrictive interpretation than the Seventh Circuit in *Farrand*. In fact, a survey of federal court decisions addressing this issue reveals that compulsory arbitration is generally favored.<sup>138</sup>

### The Employer Perspective

The availability of arbitration as a cost effective alternative to protracted litigation has caused many employers to seek out mandatory arbitration at the outset of employment. And in the union context, as demonstrated by *Almonte* and *Austin*, in limited circumstances a court may consider a well-tailored arbitration provision in a collective bargaining agreement to waive statutory rights. Indeed, unionized employees may seek to negotiate well-

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<sup>133</sup> See *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110 (3d Cir. 1993) (holding that trustees are subject to compulsory arbitration of ERISA claims).

<sup>134</sup> See *Williams v. Cigna Financial Advisors, Inc.*, 56 F.3d 656 (5th Cir. 1995).

<sup>135</sup> See *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991) (holding that a registered securities representative was required to arbitrate her statutory claims pursuant to arbitration clause in U-4 securities registration form).

<sup>136</sup> See *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994) (holding that a broker is required to arbitrate based on arbitration clause NASD registration).

<sup>137</sup> See *Bender v. A.G. Edwards & Son, Inc.*, 971 F.2d 698 (11th Cir. 1992) (holding that a broker is required to arbitrate under registration agreement with NASD and the New York Stock Exchange).

<sup>138</sup> Although the Second Circuit has not decided a case concerning compulsory arbitration under *Gilmer*, several courts in the Second Circuit have imposed mandatory arbitration based on *Gilmer*. See, e.g., *Maye v. Smith Barney, Inc.*, 897 F. Supp. 100 (S.D.N.Y. 1995) (holding that a discrimination claim was subject to mandatory arbitration, rejecting the analysis of the Ninth Circuit); *DiRussa v. Dean Witter Reynolds, Inc.*, 936 F. Supp. 104 (S.D.N.Y. 1996), *aff'd*, 121 F.3d 818 (2d Cir. 1997). In fact, despite the ruling in *Farrand*, the Seventh Circuit appears more receptive in recent cases to compulsory arbitration of discrimination claims. See *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50 (7th Cir. 1995) (holding agreements to arbitrate discrimination claims are valid and enforceable).

tailored and explicit arbitration provisions into their collective bargaining agreements in reliance of cases such as *Almonte* and *Austin*. However, as discussed *infra*, the general consensus among the federal courts is that mandatory arbitration agreements in the collective bargaining context is precluded.

*Gilmer* permits the adoption of mandatory arbitration by non-union employers.<sup>139</sup> However, as *Lai*<sup>140</sup> and *Farrand*<sup>141</sup> indicate, mandatory arbitration agreements must specifically inform the employee that his/her statutory rights to a judicial forum will be waived. Therefore, employers must carefully craft provisions in their handbooks,<sup>142</sup> manuals, and/or employment agreements to advise employees that statutory claims will be subject to mandatory arbitration.<sup>143</sup>

Employers should also be advised that even under mandatory arbitration regimes, certain due process requirements should be adhered to.<sup>144</sup> The Circuit Court for the District of Columbia in *Cole v. Burns International Security Services*<sup>145</sup> held that a minimum level of due process must be imparted upon the arbitral process in order for mandatory arbitration to withstand judicial scrutiny.<sup>146</sup> In *Cole*, Judge Harry T. Edwards, of the District of Columbia Circuit, ruled that certain standards set forth in *Gilmer*

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<sup>139</sup> *Gilmer v. Johnson*, 500 U.S. 20, 35 (1991).

<sup>140</sup> *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994).

<sup>141</sup> *Farrand v. Lutheran Brothers*, 993 F.2d 1253, 1255 (7th Cir. 1993).

<sup>142</sup> *Patterson v. Tenet Health Care Inc.*, 113 F.3d 832 (8th Cir. 1997) (holding that an employee may be bound by an arbitration provision in an employee handbook); *Fregara v. Jet Aviation Business Jets*, 764 F. Supp. 940 (D. N.J. 1991) (holding an arbitration provision in an employee handbook to be binding on the employee).

<sup>143</sup> See, e.g., *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (9th Cir. 1997). In *Nelson*, the court held that any agreement to waive the right to a judicial forum must be "explicitly presented to the employee and the employee must explicitly agree to waive the specific right." *Id.* at 762.

<sup>144</sup> See Marjorie Icenogle & Robert Shearer, *Emerging Due Process Standards in Arbitration of Employment Discrimination Disputes: New Challenges for Employers*, LAB. L. J. 81-90 (1997) (asserting the criteria that employers should apply in order to withstand due process challenges to their compulsory arbitration policies).

<sup>145</sup> 105 F.3d 1465 (D.C. Cir. 1997).

<sup>146</sup> *Id.* at 1482.

must be met in the arbitral process in order for mandatory arbitration to be upheld.<sup>147</sup> Arbitrators should be neutral (selected by both employees and employers), discovery should be adequate rather than minimal, the arbitrator's award must be written, and the relief provided should be the same relief provided by statute.<sup>148</sup> In addition, Judge Edwards held that the cost of the arbitral forum should be borne completely by the employer.<sup>149</sup> If the employee is required to pay any costs associated with the arbitration proceeding, the agreement for mandatory arbitration will be unenforceable.<sup>150</sup>

The *Cole* court further concluded that in order to guarantee substantive protection to employees, arbitral rulings should be subject to meaningful judicial review, a standard higher than ordinary deferential review applied by district courts reviewing arbitration awards.<sup>151</sup> In essence, Judge Edwards seeks to create a hybrid procedure for arbitration review under the FAA.<sup>152</sup> The court in fact urged a more heightened judicial review when the issues raised in arbitration address "novel or difficult legal" issues.<sup>153</sup> By introducing heightened review, it appears that arbitration may become a less expedient means of resolving discrimination claims, as arbitrators will become more involved in the claims adjudication. In any event, it appears that employers must be prepared for such hybridization of the arbitration process, in exchange for the option to impose compulsory arbitration.

### The EEOC's Position

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 1482-83.

<sup>149</sup> *Id.* at 1485.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 1486-87.

<sup>152</sup> The Second Circuit, in *DiRussa v. Dean Witter Reynold, Inc.*, 121 F.3d 818 (2d Cir. 1997), recognized that courts may be called upon to administer a higher standard of review when considering arbitration awards issued in statutory employment discrimination cases. *Id.* at 825. Nevertheless, the *DiRussa* court failed to rule on this issue since it was never raised in the *DiRussa*'s complaint. *Id.* Curiously, the *DiRussa* court also rejected an award of attorneys fees despite finding age discrimination in that case. *Id.* at 823.

<sup>153</sup> *Cole*, 105 F.3d at 1487.

The EEOC has taken the position that "mandatory binding arbitration of discrimination claims as a condition of employment not only denies the victims of discrimination their right of access to the courts, but also prevents the courts from performing the essential role of enforcing civil rights laws."<sup>154</sup>

The EEOC further contends that mandatory binding arbitration as a condition of employment may also present structural biases in favor of employers.<sup>155</sup> For example, an employer will have the advantage of familiarity with the arbitral process, which may give it an inherent benefit. Indeed, unlike the management-union model, an individual employee and his/her counsel may be entirely unfamiliar with the particular nuances of the arbitral process.<sup>156</sup> Furthermore, the employer may represent to the "neutral" arbitrator a potential source of future business. The EEOC's most recent Policy Statement, dated July 10, 1997, reaffirmed the Commission's opposition to binding arbitration as a condition of employment.<sup>157</sup>

Since 1988, the EEOC has litigated over 28 employment discrimination suits challenging the growing trend toward mandatory binding arbitration.<sup>158</sup> The EEOC has unsuccessfully argued against mandatory binding arbitration in at least three circuit courts: the Fifth, Sixth, and Eleventh Circuit Courts of Appeal. At the trial level in other circuits, the issue remains unresolved.<sup>159</sup>

Notwithstanding the EEOC's position on mandatory arbitration, the Commission does encourage voluntary alternative dispute resolution (including arbitration) after the employment dispute has arisen.<sup>160</sup> In fact EEOC statistics reflect that charging parties are

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<sup>154</sup> Mark Hansen, *Contract Disputes*, A.B.A. J., at 26.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* Arbitrators, unlike judges, often abandon the rules of evidence permitting inclusion of evidence which may be objectionable under most federal or state rules of evidence. *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> EMPL. DISCRIM. REP., 9 BNA 124 (July 23, 1997).

increasingly opting for EEOC-sponsored mediation of employment disputes.<sup>161</sup>

Notwithstanding support for voluntary dispute resolution, the EEOC firmly opposes pre-dispute agreements or policies to arbitrate statutory claims.<sup>162</sup> In fact, in a Massachusetts case, *Rosenberg v. Merrill Lynch*,<sup>163</sup> the EEOC argued that *Gilmer* is no longer viable in the wake of recent congressional legislation. First, the EEOC argued that the Civil Rights Act of 1991<sup>164</sup> encourages voluntary rather than mandatory arbitration. Under the 1991 Civil Rights Act “[w]here appropriate and to the extent authorized by law, the use of alternative dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under [Title VII and the ADEA].”<sup>165</sup>

The EEOC finds support in the congressional record in arguing against mandatory arbitration. One of the sponsors of the 1991 Civil Rights Act opined that the 1991 Act “contemplates the use of voluntary arbitration to resolve specific disputes after they have arisen, not coercive attempts to force employees in advance to forego statutory rights.”<sup>166</sup>

The EEOC has also taken the position<sup>167</sup> that compulsory agreements to arbitrate ADEA disputes are precluded by the Older Workers Benefit Protection Act of 1990 [hereinafter “OWBPA”].<sup>168</sup> The OWBPA was passed to prevent employer coercion of employees into involuntary and unknowing waiver of

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<sup>161</sup> *Id.*

<sup>162</sup> EMPL. DISCRIM. REP., 9 BNA 118 (July 23, 1997).

<sup>163</sup> See Amicus Curiae Brief for the Equal Employment Opportunity Commission, *Rosenberg v. Merrill Lynch*, No. Civ. A. 96-12267-NG 1998 WL 81907 (D. Mass. Jan. 26, 1998).

<sup>164</sup> Pub. L. 102-166.

<sup>165</sup> Pub. L. 102-166, §118 (42 U.S.C. § 1981).

<sup>166</sup> 137 CONG. REC. H9530 (Daily ed. Nov. 7, 1991) (statement of Rep. Edwards). But see *Austin*, 78 F.3d at 881-82 (relying on the Civil Rights Act of 1991 for the proposition that Congress intended to further the use of all arbitration including mandatory arbitration when it incorporated provisions supporting “alternative means of dispute resolution.”).

<sup>167</sup> See Amicus Curiae Brief for EEOC, at 10-15, *Rosenberg v. Merrill Lynch*, Civ. No. 96-12267-NG (D. Mass. 1997).

<sup>168</sup> Pub. L. 101-433.



employee rights. The EEOC asserts that under OWBPA a waiver is not considered knowing and voluntary if the rights or claims occur after the waiver is executed.<sup>169</sup> If the EEOC's position is adopted, then all pre-dispute waivers in ADEA actions will be unenforceable.

The EEOC also contends that the legislative history of OWBPA illustrates unambiguously the intention of Congress to protect the ADEA claimant's right to trial by jury.<sup>170</sup> Accordingly, waiver of the right to a jury resulting from mandatory arbitration would contravene congressional intent.

In light of support in the congressional record, the potential unavailability of full statutory remedies, and the Commission's concerns regarding employees' inability to prospectively, knowingly and voluntarily waive their statutory rights, the EEOC has strongly resisted the utilization of mandatory arbitration. Furthermore, the EEOC policy statement concerning its opposition to mandatory arbitration suggests that its position will not readily change.

### The Employee Perspective

There is a dramatic gap between unionized and non-unionized workers. As previously discussed, unionized workers in most jurisdictions have the opportunity to prosecute discrimination claims in two forums: arbitral and judicial. Meanwhile, their non-unionized counterparts who execute agreements with arbitration clauses generally are subject to mandatory arbitration in non-union settings. Furthermore, many jurisdictions that require mandatory arbitration construe arbitration provisions so broadly that claims for any type of employment discrimination will be covered.

For non-union employees, then, compulsory arbitration appears to be an increasingly utilized method of resolving complaints

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<sup>169</sup> *Id.* at 11 (citing 29 U.S.C. §626(f)(1)(C)(1994)).

<sup>170</sup> *Id.* at 13-14. The loss of the right to jury was identified by sponsors of the legislation as a principal justification for adopting a limitation on the waiver of ADEA rights. S. REP. No. 79, 101st Cong., 1st Sess. 12-13; H.R. REP. No. 664, 101st Cong., 2d Sess. 24.

alleged under employment discrimination statutes. Employees are now faced with compulsory dispute resolution regimes that, from the employees' perspective, appear to be deficient.

One significant contention of employee advocates is that arbitration is biased in favor of employers because the bargaining power of employers is significantly greater than employees. The *Gilmer* Court summarily rejected this notion, finding that an agreement to arbitrate is like any other contract, and if it is found to be coerced or fraudulent, it will be invalidated.<sup>171</sup> Otherwise, such agreements will be enforceable.

Another criticism of the arbitral forum is that arbitration procedures are too informal, and that the rules of evidence and discovery are not strictly followed. The Supreme Court rejected these arguments in *Gilmer* as well, finding that a discrimination claimant bargains away certain procedural formalities in exchange for the expedience and cost effectiveness of the arbitral process.<sup>172</sup>

In the face of the judicial rejection of challenges to arbitration, employees face a new landscape in resolving their discrimination complaints. In this new environment, the discrimination claimant must be prepared to advance his or her claim through the less mechanistic and more informal arbitral procedures. Employees must anticipate potential biases in the system that favor the employer, create strategies for investigating and choosing arbitrators, and frame subpoenas and discovery, among other things.

In addition, Marjorie Icenogle and Robert Shearer offer several recommendations for improving the compulsory arbitration regime for employees.<sup>173</sup> For example, agreements to arbitrate should be willing and knowing agreements to arbitrate. An employer could assure that the agreement to arbitrate is willing and knowing by, among other things, circulating literature explaining the advantages and disadvantages of arbitration, allowing employees adequate time

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<sup>171</sup> 500 U.S. 20, 33.

<sup>172</sup> *Id.* at 30.

<sup>173</sup> Marjorie Icenogle and Robert Shearer, *Emerging Due Process Standards in Arbitration of Employment Discrimination Disputes: New Challenges for Employers*, LAB. L. J., Spring, 1997, at 89-90.

to consult with advisers or attorneys regarding their decision to arbitrate, and adopting policies that do not penalize employees who choose not to arbitrate.<sup>174</sup>

Employees should also demand from their employers that arbitration procedures do not work to their disadvantage. For example: they should be allowed to choose their representative, participate in the selection of an arbitrator, have access to the arbitrators' work histories prior to selection, have access to written arbitrators decisions, and among other things, have access to information that is relevant to the dispute.

It is now incumbent on employees when faced with a compulsory arbitration system to pursue inclusion of as many of the above criteria as possible. Inclusion of such standards in the arbitration process may minimize the deficiencies inherent in mandatory arbitration of statutory claims.

## Conclusion

Arbitration has gained a hold in an arena once reserved only for judicial resolution. Now federal courts are more and more reluctant to exercise jurisdiction over statutory claims of employment discrimination where arbitration agreements have been entered into. Indeed, federal courts are compelling arbitration with increasing frequency. The expanding employment discrimination docket may have triggered the courts' frustration with litigation, and its inclination towards arbitration.<sup>175</sup> Thus, understandably, courts will more likely compel arbitration of employment claims and preclude private litigation of such claims. In light of this trend and the cautions imparted by *Gilmer* and recent decisions, both employers and employees should commence setting essential due process standards for arbitral dispute resolution of statutory claims.

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<sup>174</sup> *Id.*

<sup>175</sup> Commentator Micheal Delikat provides several statistical indicators reflecting an increase in employment discrimination claims, and suggests that courts will more likely direct such claims to arbitration in an effort to manage their dockets. Micheal Delikat, *Binding Arbitration of Employment Claims: The Shifting Landscape*, 22 EMPL. REL. L. J., No. 4, Spring, 1997 at 25.