NOTE

Employment Law After Gilmer: Compulsory Arbitration of Statutory Antidiscrimination Rights

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In this article, the author argues that compulsory arbitration of statutory anti-discrimination rights pursuant to pre-dispute employment agreements is unconscionable and contrary to public policy. After analyzing the Supreme Court's 1991 decision in Gilmer v. Interstate/Johnson Lane Corp. and its implications in-depth, she sets out the "best" apparent grounds for challenging that case and its progeny. In Gilmer, the Court found a presumption favoring arbitration of discrimination claims, extending to a pre-dispute, binding arbitration clause in a securities licensing agreement. According to the Court, arbitration was no longer just a private means of resolving disputes between freely contracting parties, but also an alternate forum for resolution of public, statutory rights. Subsequently, a majority of the circuits have held that Gilmer extends to mandatory arbitration of discrimination claims under employment contracts as well. In conclusion, the author suggests a more viable model for resolution of employment disputes and recommends that Congress amend the Civil Rights Act of 1991 to bar pre-dispute binding arbitration of federal discrimination claims.

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Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.¹

In this statement, Congress encourages private resolution of employment disputes through alternative dispute resolution ("ADR"). Although this statement encourages the use of ADR processes—most of which are voluntary—it does not state a presumption favoring an arbitral over a judi-

cial forum for resolution of discrimination claims. Yet, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court held that a similar clause showed congressional intent to approve arbitration as an alternate forum. The Court found a presumption favoring arbitration of discrimination claims, extending to a pre-dispute, binding arbitration clause in a securities licensing agreement. According to the Court, arbitration was no longer just a private means of resolving disputes between freely contracting parties, but also an alternate forum for resolution of public, statutory rights.

Arbitration had become widely accepted in the twenty years preceding *Gilmer*, both in the courts and in the commercial and labor contexts. The attitude toward arbitration was significantly influenced by the increasingly overburdened judicial docket, as well as the burgeoning number of employment discrimination claims. However, concerns about judicial efficiency do not necessarily justify a broad delegation of public rights to a private and essentially uncontrolled and unreviewable arbitral process. Serious public policy and fairness issues are raised by *Gilmer* and the broad manner in which the lower courts have construed it. These issues should be considered in determining the future of compulsory arbitration of employment discrimination claims.

This article argues that compulsory arbitration of statutory anti-discrimination rights pursuant to pre-dispute employment agreements is unconscionable and contrary to public policy. The courts overall do not appear to agree with this evaluation. However, the executive branch—as represented by the Equal Employment Opportunity Commission (“EEOC”), National Labor Relations Board (“NLRB”), and a special commission established by the secretaries of Commerce and Labor—does apparently agree. Congress has yet to decide.

Part I of this article surveys the main issues related to the arbitration of employment disputes and explores some options for alternative systems. The “dialogue” among the participants, including the courts, executive branch, Congress, and employers, is reviewed in order to show that, despite the Supreme Court’s blithe assumptions in *Gilmer*, the debate rages on. In addition, Part I discusses the value of using voluntary ADR mechanisms to resolve discrimination disputes in the workplace, with a particular focus on the advantages to all parties of avoiding litigation. A simple structure of progressive procedures is set out and briefly analyzed.

Part II reviews the cases leading up to *Gilmer* that interpret pre-dispute binding arbitration clauses, and then follows with an in-depth discussion of

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3. See id. at 26.
4. See id. at 29.
5. See discussion infra Part II.A.
Gilmer and its implications. Part III analyzes the issues remaining after Gilmer and how the lower courts have addressed them. This Part also surveys the primary arguments against enforcing compulsory arbitration clauses, briefly analyzing how these arguments have succeeded or failed in the courts. Part III then sets out the "best" apparent grounds for challenging Gilmer and its progeny, both in court and in the legislature.

The article concludes by suggesting a more viable model for resolution of employment disputes. Finally, it is recommended that Congress amend the Civil Rights Act of 1991 to bar pre-dispute binding arbitration of federal discrimination claims.

I
OVERVIEW: THE ISSUES AND THE DEBATE

The courts now almost uniformly compel arbitration of employment discrimination claims based on pre-dispute agreements. Nonetheless, binding arbitration should not become the norm in the workplace, for both workplace efficiency and public policy reasons. The disparity of bargaining power between employers and employees, the involuntary nature of the arbitral process, the lack of judicial guidance and oversight, and the submergence of important public law matters into a private process all argue against pre-dispute, binding arbitration. Adamant opposition by federal agencies, plaintiffs' lawyers, and employees, as well as growing opposition by arbitration associations and legislators, indicate a profound problem.

The nature of the dispute and the decision-maker should frame consideration of whether discrimination claims should be subject to compulsory arbitration. In addition, the many parties affected by the "choice" of an arbitral forum—such as judges, agencies, plaintiffs, attorneys, and arbitrators—each play an important role in deciding whether compulsory arbitration constitutes a viable alternative to courts for resolving employment discrimination claims.

A. The Role of the Arbitrator

Traditionally, the arbitrator's role does not encompass matters of public rights and duties, nor does it require knowledge of or adherence to relevant law.7 Discussing the value and dangers of the growing trend toward arbitration, Judge Harry Edwards addressed the problem raised by the fundamental disparity between disputes traditionally resolved in arbitration and those that implicate constitutional or public law.8 He argues that "we must

8. See Edwards, supra note 7, at 671.
[first] determine whether ADR will result in an abandonment of our constitutional system in which the 'rule of law' is created and principally enforced by legitimate branches of government and whether rights and duties will be delimited by those the law seeks to regulate."

In a similar vein, Professor Owen Fiss argues that adjudication fundamentally differs from private dispute resolution. Specifically, he says that judges "possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties . . . but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes. . . ."10

When "the object of litigation is the vindication of constitutional or statutory policies" the dispute can be characterized as "public" in nature.11 Public and private disputes are not always easily distinguishable, as most disputes implicate both public and private elements.12 In general, public disputes involve the vindication and explication of statutory or constitutional policies, and they address issues of public concern and regulation.13 Issues arising from the relations between individuals, such as those defined by standard commercial agreements, are paradigmatically "private" in nature.14 In contrast, the employment relationship in general comprises both public and private rights and responsibilities. However, when an employment claim arises under a federal antidiscrimination statute, it clearly implicates an important "public" dispute: the vindication of statutory rights.15

Title VII and other antidiscrimination statutes manifest an important public policy in favor of equal protection in the workplace.16 These statutes are intended to be preventative as well as remedial, and they address both individual, intentional discrimination and class-based, disparate impact discrimination.17 In contrast, arbitration traditionally focuses on specific disputes arising under privately negotiated contracts, in which the arbitrator’s role is limited to interpreting the agreement between the parties.18

9. Id.
10. Fiss, supra note 7, at 1085.
11. Id.
12. See id. at 1087-89. See also Edwards, supra note 7, at 671; Fuller, supra note 7, at 357.
13. See Chayes, supra note 7, at 1283–84. See also Fuller, supra note 7, at 357; Edwards, supra note 7, at 671.
15. See generally, Fiss, supra note 7.
The arbitrator’s task . . . is to “effectuate the intent of the parties rather than the requirements of enacted legislation.” The arbitrator’s specialized competence is “the law of the shop, not the law of the land,” and “the factfinding process in arbitration usually is not equivalent to judicial factfinding.”19

The goals of Title VII and other antidiscrimination statutes cannot be fulfilled by compulsory arbitration because of the inherent limitations of the private arbitral forum.20 Private, confidential resolution of discrimination claims by an arbitral panel would thus seem contrary to the public policy against discrimination in the workplace, particularly in determining systemic discrimination claims, which frequently involve class-wide rights.

Because arbitrators are essentially interpreters of private agreements that designate an arbitral forum for dispute resolution, they are not bound by legal precedent, and their opinions (if written at all) are not reversible for errors of law.21 In general, arbitral awards will be vacated only on the basis of evident partiality or other misconduct by the arbitrator, where “the award was procured by corruption, fraud, or undue means,”22 or on certain public policy grounds.23 As Judge Posner pungently put it:

[T]he question for decision by a federal court asked to set aside an arbitration award . . . is not whether the arbitrator[s] . . . erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract . . . If they did, their interpretation is conclusive.24

Although it is unclear whether such extreme judicial deference to arbitral awards will be extended to arbitral determinations of statutory antidiscrimination rights, currently no cases indicate that the standard of review will be heightened. Yet, in determining civil rights claims, arbitrators step outside their traditional role of ascertaining the relations of parties pursuant to their agreement and enter a complex, contentious, and evolving area of public law designed to protect fundamental rights.

20. See Mitsubishi Motors Co. v. Soler, 473 U.S. 614, 648 (Stevens, J., dissenting) (“Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable . . . . And as this Court has recognized, ‘[arbitrators have no obligation to the court to give their reasons for an award.’”’) (internal citation omitted).
23. See, e.g., Iowa Elec. Light & Power Co. v. Local Union 204, 834 F.2d 1424, 1426-29 (8th Cir. 1987).
The current trend of increasing the scope and reach of pre-dispute arbitration clauses endangers these rights. Unless explicit restrictions and controls are introduced, the civil rights of employees may be fatally undermined, and the foxes will, in truth, be guarding the henhouse,\textsuperscript{25} without even minimal judicial oversight of important public rights.

\section*{B. Responses of the Various “Players” to Gilmer and Its Progeny}

Judicial endorsement of arbitrators’ ability to determine statutory claims has stimulated widespread debate about whether that confidence is justified. The reactions by various “players” suggest a significant and growing concern by those in the best position to understand the consequences of \textit{Gilmer}.

\subsection*{1. Legal Practitioners}

Labor lawyers in California recently threatened to boycott any ADR firm that participates in compulsory arbitration of employment disputes because, in their opinion, such arbitrations circumvent constitutional and statutory rights.\textsuperscript{26} In addition, the National Employment Lawyers Association (“NELA”) has threatened a broad attack against ADR firms to inhibit indirectly the use of compulsory arbitration clauses.\textsuperscript{27} Under that proposal, NELA members would stop referring even voluntary mediation disputes to ADR firms that perform work for companies whose employees must agree to compulsory arbitration as a condition of employment.\textsuperscript{28} At last report, NELA delayed the boycott after JAMS/ENDISPUTE, a major dispute resolution company, issued a policy statement opposing compulsory arbitration pending the release of an EEOC report on compulsory arbitration of employment disputes.\textsuperscript{29}

\subsection*{2. Arbitrators}

Even within the arbitration industry, there is little agreement on this issue. Alternative dispute resolution professionals have been debating how, and even whether, they should act as neutral arbitrators of employment dis-

\textsuperscript{25} In his dissent in \textit{Barrentine v. Arkansas-Best Freight Sys., Inc.}, 450 U.S. 728 (1981), Chief Justice Burger said:

Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. \textit{For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens.} Id. at 750 (emphasis added).


\textsuperscript{27} See id.

\textsuperscript{28} See id.

crimination disputes.\textsuperscript{30} The JAMS/ENDISPUTE policy is one example of this debate.\textsuperscript{31} Other groups, such as the American Arbitration Association ("AAA"), have focused instead on developing more effective employment dispute resolution systems that encourage greater use of uncontroversial voluntary methods.\textsuperscript{32} The range of voluntary options range from informal grievance procedures to AAA-administered mediation and arbitration.

One of the strongest criticisms against compulsory arbitration stems from the absence of due process protections in the arbitral forum. Attempting to address this issue, the AAA has endorsed a "due process" protocol setting out procedural protections, and JAMS/ENDISPUTE adopted a policy on compulsory arbitration ensuring the employee's right to an attorney, discovery, statutory remedies, and participation in selecting the arbitrator.\textsuperscript{33}

3. \textit{Employers}

Surprisingly, given the pervasive sense in the literature and case law that employers favor compulsory arbitration, a survey in 1992 found that most employers preferred legal action over arbitration, "believing that it encourages employees to settle out of court to avoid legal proceedings that can drag on for years."\textsuperscript{34} Employers also expressed concern about arbitrators having a pro-labor bias, the competence of arbitrators to evaluate legal claims, and the unsettled state of the law in this area.\textsuperscript{35} The survey did not, however, distinguish between responses to arbitration in Union and non-Union settings.

Between 1992 and 1995, the perception of employers changed. A recent survey of Fortune 500 companies found that most of the respondents were considering establishing some form of peer review or mediation procedures, and 78 percent were willing to have an outside arbitrator resolve their employment disputes.\textsuperscript{36} However, these employers still generally dis-

\textsuperscript{31} See Weidlich, \textit{supra} note 29, at A1.
\textsuperscript{32} See Dick, \textit{supra} note 30, at 54 (noting that a court-affiliated mediator recently facilitated "the largest settlement ever in a class action discrimination suit in Washington, D.C. All parties to the dispute expressed great enthusiasm . . . .").
\textsuperscript{33} See id.
\textsuperscript{34} Employers Reluctant to Embrace Mandatory Arbitration, Survey Finds, \textit{DAILY LAB. REP.} (BNA), Apr. 30, 1992, at A14.
\textsuperscript{35} See id.
\textsuperscript{36} E. Patrick McDermott, \textit{Survey of 92 Key Companies: Using ADR to Settle Employment Disputes}, 50-JAN DISP. RESOL. J. 8, 8 (1995). These companies cited as key advantages the lower cost of ADR and the need to provide adequate due process or a voice to employees. \textit{Id.} at 11. This interest in ADR may also stem from recent court decisions that have limited damages awards against employers with effective and responsive grievance mechanisms. In these cases, where the employers did in fact effectively respond to discrimination complaints, the courts have awarded no or minimal damages. See, \textit{e.g.}, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Kauffman v. Allied Signal, Inc., 970 F.2d 178 (6th Cir. 1992), \textit{cert. denied}, 506 U.S. 1041 (1992); Bennett v. Corroon & Black Corp., 845 F.2d 104 (1988); Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307 (5th Cir. 1987). However, if the employer's response is ineffective in stopping the harassment, courts will find damages even if there was an
trust ADR processes, expressing the fear that they might encourage more employees to file grievances. 37

The respondents said that the Civil Rights Act of 1991 ("1991 Act") was the greatest factor in changing their attitude toward ADR. 38 Because the 1991 Act established a right to a jury trial and compensatory and punitive damages in discrimination claims, the risks at trial for the employer increased substantially. 39 Many employers also emphasized that increasingly unpredictable jury damage awards affected their opinion of ADR processes, because the "[jury award] variability has undesirable effects on the behavioral incentives of primary actors and on settlement decisions." 40 They believe that arbitration may limit the size and variability of damage awards and perhaps allow mandatory waiver of punitive damages.

Employers continue to express concern about the possible adverse consequences of ADR and the unsettled state of the law after Gilmer. 41 Many companies are waiting for Congress and the Supreme Court to further define the role of arbitration in the employment context. However, a number of large companies have begun to impose clauses that require arbitration of discrimination claims, including ITT, Hughes, Rockwell, and Blue Cross/Blue Shield. 42 The trend toward use of such clauses is demonstrated by the fact that by 1995 approximately 95 percent of AAA arbitrations arose from pre-dispute arbitration agreements. 43

4. The Executive Branch

The EEOC, although it advocates mediation of discrimination claims and has instituted pilot voluntary mediation programs around the country, opposes compulsory arbitration. 44 Its managing board has recently authorized the EEOC to "receive and process charges regardless of the existence of any such agreement, and regardless of the existence of any employer-

37. See id. at 12.
38. See id. at 13.
39. See id.
40. Peter H. Schuck, How to Respond to the "Problems" of the Civil Jury, 77 JUDICATURE 5, 5 (1994). Arguably, a greater good would ensue if more claimants were awarded smaller amounts in a shorter time, without being forced out of their jobs by the highly adversarial proceeding of full-scale litigation. See also DAVID W. EWING, JUSTICE ON THE JOB 6-7 (1989) (With an effective grievance procedure using ADR processes, more grievances may be resolved, more quickly, and often before the employment relationship is severed.).
41. See McDermott, supra note 36, at 13.
44. See Motions on Alternative Dispute Resolution Adopted by EEOC, DAILY LAB. REP. (BNA), Apr. 26, 1995, at D28.
sponsored ADR program." In general, the EEOC seems to be mobilizing against pre-dispute arbitration of discrimination claims. Further, the EEOC has set as a litigation priority claims "alleging patterns of discrimination, including . . . those presenting unresolved legal issues—among them . . . mandatory arbitration of discrimination claims. . . ."

The EEOC has taken action consistent with this policy, which is also supported by the Court's statement in Gilmer that the EEOC may bring suit even where an individual plaintiff, or class of plaintiffs, must submit to compulsory arbitration. For example, the EEOC filed suit in 1994 against a securities company on behalf of brokers whose claims would have been arbitrable under Gilmer. In addition, the EEOC succeeded in enjoining a company from requiring employees to sign a compulsory arbitration clause, which appeared to be targeted at employees who had filed discrimination claims. The court found the policy to be "so misleading and against the principles of Title VII of the Civil Rights Act of 1964 that its use violates the law." A month later, the company entered into a consent decree settling the matter.

The NLRB has also taken a position against pre-dispute arbitration clauses. The NLRB recently filed its first case challenging such a clause, and it appears to be following a policy of making such challenges to support the statutory rights of workers.

In addition, a commission appointed by the secretaries of Labor and Commerce to study worker-management relations recommended that "binding arbitration agreements should not be enforceable as a condition of employment." The report went on to say that Congress should pass legislation ensuring that individuals have a choice of forum for enforcing their statutory employment rights.

45. Id.
46. EEOC Sets Charge, Litigation Priorities; Delegates Authority to General Counsel, DAILY LAB. REP. (BNA), Feb. 9, 1996, at D3.
48. See Dick, supra note 30, at 54.
50. Id. (quoting an April 19, 1995 order granting a preliminary injunction in EEOC v. River Oaks Imaging and Diagnostic, 1995 WL 264003 (S.D. Tex. 1995)).
52. See Weidlich, supra note 29, at A1.
54. See id.
5. The Legislative Branch

Legislators have begun to react as well. In the 1994 term, congressional legislation was introduced to amend certain discrimination statutes: Title VII, the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), and the Rehabilitation Act. This bill would have barred compulsory arbitration of equal employment opportunity disputes, giving plaintiffs who allege workplace discrimination a choice between a judicial and arbitral forum. Although the legislation was not passed, it is likely to be reintroduced as the debate continues.

The judicial and executive branches are in direct conflict in their interpretation of congressional intent regarding arbitration of claims arising under the various Civil Rights Acts. The EEOC, which is the agency charged with authorizing and enforcing the Civil Rights Acts, sharply disagrees with the courts that determine rights under those Acts. Clearly, it will be necessary for Congress to intervene if the dispute is to be resolved.

C. The Value of ADR Processes for Resolving Employment Discrimination Claims

Claims alleging discriminatory terms and conditions of employment, discharge, or failure to promote are rarely litigated. The few cases pursued generally result in significant costs to all parties and in irreparable damage to the employment relationship. As an alternative, employers could set up responsive grievance procedures, which would provide a progressive system of dispute resolution culminating in arbitration. Under such a system, many such disputes could be resolved without severing the employment relationship, and the employer's goal of a more productive work force could be achieved.

1. Why ADR—for Both Employers and Employees

When found to have intentionally discriminated, an employer may mitigate its damages by showing that an effective internal grievance procedure was in place and was used responsively when the complaint was raised. Further, as a general principle, studies have found that an effective ADR system resolves many workplace disputes before they become irremediable, thus preventing unnecessary and expensive litigation.

55. S 2012 was introduced by Sen. Russell Feingold (D-Wisc.), but no action was taken by Congress during the 1994 term. See Feingold Proposal Would Prohibit Mandatory Arbitration of EEO Disputes, DAILY LAB. REP. (BNA), Apr. 15, 1994, at D14.

56. See id.


Many victims of discrimination put up with abuse for months or years before filing suit; most just wish that the discrimination would stop, and that the harasser would be separated from them, so that they would be able to work in a positive environment. For example, sexual harassment claimants initially just want the harasser to be disciplined and his power over the claimant (and others similarly situated) eliminated; it is only after months or years of being denied relief that the victims turn to litigation.

Litigation through appeal can take three to eight years. By the time the case is decided or settled, enormous legal fees have accrued on both sides, the employment relationship has long been severed, and reinstatement is not a viable option. Even if the plaintiff wins, the award cannot make her whole. In fact, the average claimant loses, so arbitration may offer recourse to employees who would otherwise have none. In contrast, an arbitral decision on average takes nine months from when the claim is filed.

Some commentators, and many employers, critique the variability of damages awarded by juries, claiming that the decisions are unfair and that the “variability has undesirable effects on the behavioral incentives of primary actors and on settlement decisions.” Arguably, a greater good would ensue if more claimants were awarded smaller amounts in a shorter time, without being forced out of their jobs by the highly adversarial proceeding of full-scale litigation. An effective grievance procedure using ADR processes may instead allow more grievances to be resolved more quickly and before the employment relationship suffers permanent damage.

2. The EEOC Backlog: One Year and Counting

To file a discrimination claim under the ADA, Title VII, or the ADEA, the charging party must first file a charge with the EEOC and wait for the agency’s investigation and determination on the merits of the claim. In 1994, the General Accounting Office (“GAO”) predicted that the processing time for discrimination claims would double by fiscal year 1996, to an aver-
age of 20 months;\textsuperscript{67} by November 1994, the delay had already reached 19 months.\textsuperscript{68} According to the GAO, the EEOC carried forward approximately 89,000 “unresolved claims” from fiscal year 1993,\textsuperscript{69} and in 1995 the estimated backlog reached 110,000.\textsuperscript{70} While the number of claims filed increased dramatically, EEOC staff and resources shrank.\textsuperscript{71}

In 1989, the EEOC litigated 598 suits, which represented only about 1 percent of the charges it received; by 1993, the EEOC litigated only 471 suits, which represented about 0.5 percent of the charges received for processing.\textsuperscript{72} Because of the severe backlog, and its effect on both the timing and outcome of cases, the EEOC has called for a significant restructuring of how discrimination claims are handled.

The EEOC strongly opposes compulsory arbitration;\textsuperscript{73} instead it emphasizes voluntary mediation in its proposed resolution of the case backlog. In fact, the EEOC does not recommend even post-dispute agreements to arbitrate discrimination claims that are not settled through mediation, apparently believing that these cases can only be properly resolved in the judicial forum.

3. Why ADR—Finding Counsel

An employment discrimination suit is a high-risk and time-consuming proposition, for both plaintiffs and their attorneys, even assuming that an attorney will take the case.\textsuperscript{74} Most employment plaintiffs’ attorneys rarely take cases on a contingent fee basis.\textsuperscript{75} It is common for plaintiff’s attorneys to reject 90 percent of the employment discrimination cases that come to them—even many they consider meritorious—because economics mandate that only the most valuable cases be pursued in litigation.\textsuperscript{76} For example, employment discrimination suits commonly involve ten or more depositions, unlike the average of three taken in housing discrimination cases.\textsuperscript{77}

\textsuperscript{67} See id.
\textsuperscript{69} See United States General Accounting Office Reports, EEOC’s Expanding Workload-Increasing in Age Discrimination and Other Charges Call for New Approach, GAO/HEHS 94-32, 1994 WL 809974, *10 (F.D.C.H.) (Feb. 9, 1994). The report cites 73,124 claims plus 15,767 ADEA charges carried forward. Id.
\textsuperscript{70} See Peter Eisler, Waiting for Justice: Complainants Now Sit for at Least a Year, USA TODAY, Aug. 15, 1995, at 1A.
\textsuperscript{71} The EEOC legal staff has been reduced from 514 to 386. United States General Accounting Office Reports, supra note 69, at *13.
\textsuperscript{72} See id.
\textsuperscript{73} See supra Part I.B.4.
\textsuperscript{75} See id.
\textsuperscript{76} See id. In fact, discrimination claims have become so problematic, and sometimes economically disastrous, that many attorneys no longer even represent employment discrimination plaintiffs. See id.
\textsuperscript{77} See id.
Reports indicate that even claimants with seemingly viable cases are rejected by 10–15 attorneys before one takes the case, or the claimant gives up; lawyers report that they regularly refuse cases that seem meritorious.

For those claimants who find an attorney to take their case, though, the up-front expenses and grueling years of litigation still prevent many meritorious claims from being pursued through litigation. Even where an attorney will take the case on contingency, claimants bear out-of-pocket expenses of between $5,000 and $20,000. Because of the great time and expense involved in employment discrimination claims, as well as the often painful scrutiny of their lives by defendants, many plaintiffs either give up or settle before getting to court. By that time, they have almost invariably lost their jobs, alienated their co-workers, and have no viable chance for reinstatement. Although a small fraction of plaintiffs receive large awards, most receive very little after expenses and fees are paid, and many ultimately feel violated and abused by the system.

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78. See id. Many attorneys will not take an employment discrimination case without a retainer of $2500–$5000, which all but bars claims by lower-level employees, who do not have the resources to pay attorney fees and to withstand the years of litigation, and whose possible compensation is too low for the claim to be viable. Additionally, even though the prevailing party in a discrimination suit receives attorney fees, many factors argue against attorneys' willingness to adopt the risk: (1) the plaintiff may not prevail, (2) out-of-pocket expenses average $10,000 to $20,000, (3) attorney billables may reach up to $50,000 before judgment, (4) defendants frequently litigate the attorney fees, and (5) fees are regularly reduced by order of the court. See id.


80. “Plaintiffs' lawyers say many women drop cases or settle for unfairly low amounts after realizing the interrogations they are likely to face. . . . Unless you've had a perfect life—and most people's lives are not like that—it's a real problem.” Ellen E. Schultz & Junda Woo, The Bedroom Play: Plaintiffs' Sex Lives Are Being Laid Bare in Harassment Cases, Defense Lawyers Use Tactic to Counteract Litigants as Suits Get More Costly, WALL ST. J., Sept. 19, 1994, at A1. In U.S. District Courts, the median time from filing to trial in a civil suit in 1994 was 18 months, with 6.2% of the cases more than three years old. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS 167 (1994). See also Ford Motor Co. v. EEOC, 458 U.S. 219, 228 (1982) (“Delays in litigation unfortunately are now commonplace, forcing the victims of discrimination to suffer years of underemployment or unemployment before they can obtain a court order awarding them the jobs unlawfully denied them.”).

81. For those who bring discrimination claims while still employed, the workplace frequently becomes intolerable. Although employers are barred statutorily from retaliating, employees who bring discrimination claims are subject to intensified harassment and often ostracized by co-workers; many ultimately quit to escape the hostile environment. See, e.g., H.R. 1, THE CIVIL RIGHTS ACT OF 1991: HEARINGS BEFORE THE COMMITTEE ON EDUCATION AND LABOR OF THE HOUSE OF REPRESENTATIVES, 102d Cong., 2d Sess. 121-23 (1991) (“A court awards a victim who remains on the job an injunction against the behavior, which often does little more than intensify the conduct.”); Shauna K. Candia, Comment, The Hostile Work Environment: Are Federal Remedies Hostile, Too?, 13 U. HAW. L. REV. 537, 542-43 (1991) (“An employee-victim of sexual harassment may ‘lose’ her job in different ways: the victim may be fired in retaliation [or] feel[ ] compelled to quit . . . .”). Even where the plaintiff can prove retaliatory or constructive discharge, the viability of her claim is limited by the potential award, as is the underlying claim. 42 U.S.C. § 2000e-5(g) (1996).

82. See, e.g., Leal, supra note 79. Large employers and their attorneys view it differently. As one attorney put it: “Juries walk in there ready to put employers' feet to the fire.” Kenneth Labich & Theresa Elben, How to Fire People and Still Sleep at Night, FORTUNE, June 10, 1996, at 64. “Tens of
4. Special Problem Areas of Discrimination Claims

Sexual harassment suits pose particular difficulties for claimants. The alleged harasser is almost invariably a more powerful superior, such as a manager or senior executive, and making an accusation endangers the claimant’s employment. Frequently, the harassment continues for years before reporting because of the substantial risks involved: “Often a victim decides it is better to put up with the harassment than to file a formal complaint and risk conflict with co-workers, retaliation or career suicide.” Claimants are also often disbelieved. In fact, some claimants have been sued for libel by the alleged harasser.

Sexual harassment claims were relatively infrequent prior to enactment of the 1991 Act. Central to the increase of claims was the fact that the 1991 Act provided for punitive and compensatory damages for intentional discrimination; before then, backpay and reinstatement were the only available forms of relief. The availability of additional remedies, combined with Anita Hill’s testimony in the Clarence Thomas hearings, led to an upsurge in complaints filed. However, the claimant may be subjected to days of grueling depositions, and probing inquiries about her sexual history.

The 1991 Act strengthened sexual harassment and other discrimination suits by allowing punitive damages, emotional-distress awards and the right to a jury trial. Thus, thousands of such cases are being filed every year, and [a Manhattan employment discrimination defense attorney] estimates that at least three in four result in a settlement or jury award for the plaintiff.”


84. Neuborne & Ellis, supra note 59, at 68.

85. See, e.g., Sara P. Felman-Schorrig & James J. McDonald, Jr., The Role of Forensic Psychiatry in the Defense of Sexual Harassment Cases, 20 J. PSYCHIATRY & L. 5, 6 (1992) (“[S]exual harassment claims are highly prone to exaggeration and embellishment, if not outright fabrication. A plaintiff may seek to twist innocent behavior . . . [as] revenge for some unfavorable but unrelated job action . . . to obtain a lucrative payoff . . . [or she may] falsely impute to ‘harassment’ in the workplace emotional trauma [stemming from] . . . spousal abuse, marital discord, financial problems, and the like.”).

86. See Neuborne & Ellis, supra note 59.


90. See Schultz & Woo, supra note 80, at A1.
defense lawyers increasingly turn to harsh tactics, including probing inquiries into claimants' mental health, relationships, sex lives, childhood molestation, abortions, and venereal disease. The approach of defense attorneys tends to be particularly brutal in claims alleging emotional distress. According to plaintiff's lawyers, many women drop their cases or agree to unreasonably low settlements when they realize the kind of interrogations they will have to endure.

II

COMPULSORY ARBITRATION CLAUSES: FROM GARDNER-DENVER TO GILMER

A. Enforcement of Pre-Dispute Arbitration Clauses Before Gilmer

In 1974, the Supreme Court in Alexander v. Gardner-Denver Co. held that compulsory arbitration under a collective bargaining agreement did not preclude the employee from bringing a subsequent Title VII claim in court. The Court emphasized that the legislative history showed congressional intent to "accord parallel or overlapping remedies against discrimination." Contractual and statutory rights were of a "distinctly separate nature," and it was reasonable to have the claim heard in both the arbitral and judicial forums because "consideration of the claim by both forums may promote the policies underlying each." Resolution of Title VII rights belonged in the judicial forum, which is appropriate for determining the rights and duties accorded by statute, whereas the arbitral forum appropriately determined the contractual relations between parties.

For nearly 20 years, a majority of courts interpreted Gardner-Denver to preclude compulsory arbitration of discrimination claims under employment agreements, in both the collective bargaining and private employment context. However, during the same period, arbitration of other statutory claims became increasingly common, due in part to the ever-increasing number of claims filed and the consequent overload of the federal
docket. ADR in general became acceptable, and arbitration in particular came to be seen as an efficient remedy for the burgeoning workload.

By the 1980s, statutory claims were no longer accorded a general right to resolution in a judicial forum. The Court held statutory claims subject to binding arbitration and enforceable pursuant to the Federal Arbitration Act ("FAA"), including claims arising under the Sherman Act, § 10(b) of the 1934 SEC Act, and the civil enforcement provisions of RICO. In sum, the Court had come to view arbitration as an alternate forum that is just as capable of determining statutory rights as is the judicial forum.

B. Gilmer v. Interstate/Johnson Lane Corp

In 1991, the judicial metamorphosis from the presumption against arbitration to one in favor of arbitration was virtually complete. In Gilmer v. Interstate/Johnson Lane Corp., the Court held a discrimination claim under the ADEA subject to arbitration pursuant to a pre-dispute arbitration clause in the New York Stock Exchange ("NYSE") licensing application and to the FAA. In doing so, the Court stated that any "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration," even under federal antidiscrimination statutes. In the Court's view, the arbitral forum provided sufficient safeguards to protect the parties' procedural due process rights, and the party's substantive rights were not affected by the choice of forum.

While not explicitly overruling Gardner-Denver, the Court expressly distinguished and limited this case. As the Court interpreted it, Gardner-Denver did not address the general issue of whether a binding arbitration clause forecloses a judicial forum for deciding employment discrimination claims, but rather was limited to the narrow issue of "whether arbitration of contract-based claims [under a collective-bargaining agreement] precluded judicial resolution of subsequent statutory claims." The Court said, "[s]ince the 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 sub-

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100. See generally Edwards, supra note 7; Chayes, supra note 7.
104. See id.
106. Id. at 26 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).
107. See id.
108. See id. at 34 n.5, 35.
109. Id. at 35.
sequent statutory actions." 110 Denying that any tension existed between resolution of private contractual disputes and public statutory rights, the Court emphasized instead that the interests of the union and the represented employee may not be in perfect alignment. 111 Thus, it was the disparity between interests that warranted subsequent judicial review of the discrimination claim in Gardner-Denver.

The majority opinion in Gilmer focused on the issues of whether compulsory arbitration frustrated the purpose of the ADEA and whether it was inconsistent with two prior decisions regarding arbitration of employment disputes. 112 The issue of whether FAA § 1, which exempts "contracts of employment of . . . any . . . class of workers engaged in foreign or interstate commerce," precluded arbitration of employment disputes had not been raised on appeal. 113 Consequently, the Court only mentioned the question in a footnote, saying that it did not have to reach the issue because the challenged arbitration clause was not part of a "contract of employment" at all, 114 for, although binding on Mr. Gilmer's employment, the clause was located in the NYSE licensing application. 115

Mr. Gilmer, a registered securities representative, had brought suit in federal court alleging that his employer had discharged him in violation of the ADEA. 116 His employer moved to compel arbitration pursuant to the arbitration clause in the NYSE registration application. 117 The Court held that Mr. Gilmer's claim was subject to compulsory arbitration, based on the FAA provision stating that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," and based on the federal policy favoring arbitration. 118 On review, the Court considered three main arguments against subjecting this ADEA claim to mandatory arbitration, but found them all without merit. 119

Although conceding that the text of the ADEA and its legislative history did not necessarily preclude arbitration, Mr. Gilmer argued that compulsory arbitration of ADEA claims was inconsistent with the statute's framework and would frustrate its purpose. 120 The Court, however, did not "perceive any inherent inconsistency between those policies [addressing in-

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110.  Id.
111.  See id.
113.  Id.
114.  Id. at 25 n.2.
115.  See id.
116.  See id. at 23–24.
117.  See id. at 24.
118.  Id.
120.  See id. at 26–27.
dividual grievances and furthering important social policies] and enforcing agreements to arbitrate age discrimination claims.\(^{121}\)

Relying on *Gardner-Denver*, Mr. Gilmer argued that statutory claims could not be waived in an arbitration agreement because such a waiver would violate important public policy objectives.\(^{122}\) However, the Court was "unpersuaded by the argument that arbitration [would] undermine the role of the EEOC in enforcing the ADEA. An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action."\(^{123}\) The EEOC could thus independently prosecute any claims it found to be meritorious, even if the individual claimant was limited to compulsory arbitration.\(^{124}\) Congress had not precluded arbitration or other non-judicial forums for resolution of ADEA claims. This "flexible approach to resolution of claims" allowed for "concurrent jurisdiction" and the selection of alternative forums under the ADEA.\(^{125}\)

Based on the fact that the agreement was a contract of adhesion, Mr. Gilmer argued that arbitration of ADEA claims should not be enforced because the unequal bargaining power between employers and employees made the contract unconscionable.\(^{126}\) The Court denied the validity of this argument as well, saying, "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."\(^{127}\)

Mr. Gilmer also challenged the adequacy and fairness of arbitration procedures in deciding statutory claims.\(^{128}\) However, the Court found this "generalized attack" to be insufficient and "out of step" with the times, given the "current strong endorsement of the federal statutes favoring this method of resolving disputes."\(^{129}\) Although Mr. Gilmer made broad allegations of bias in the arbitral proceeding, the Court "decline[d] to indulge in the presumption" of lack of competence or impartiality, and noted that "the NYSE arbitration rules . . . provide protections against biased panels."\(^{130}\) The specific built-in protections emphasized by the Court included information regarding arbitrators' backgrounds, one peremptory challenge and un-

\(^{121}\) Id. at 27.
\(^{122}\) See id.
\(^{123}\) Id. at 28.
\(^{124}\) See id. The EEOC is in fact systematically pursuing claims that are subject to compulsory arbitration, partly as a direct challenge of compulsory arbitration. See *supra* Part I.B.4. for a discussion of the objections which the EEOC has made to compulsory arbitration of discrimination claims.
\(^{126}\) See id. at 32-33.
\(^{127}\) Id. at 33.
\(^{128}\) See id. at 30.
\(^{129}\) Id. (quoting Rodrigues de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989)).
limited challenges for cause, and mandatory disclosure of any conflict of interest.\textsuperscript{131}

While Mr. Gilmer objected to the limited discovery available in arbitral proceedings, the Court found no evidence that he could not prove his claim without extensive discovery, nor that the NYSE discovery provisions were insufficient.\textsuperscript{132} Mr. Gilmer alleged that arbitration was deficient because arbitrators often do not issue written opinions, which would “result[ ] . . . in a lack of public knowledge of employers’ discriminatory policies . . . and a stifling of the development of the law.”\textsuperscript{133} However, NYSE rules required a written opinion, including a summary of the issues and description of the award, which the Court thought addressed these concerns more effectively than do standard, private settlement agreements.\textsuperscript{134}

Mr. Gilmer also challenged compulsory arbitration of his ADEA claims because judicial review of the arbitral decision was extremely limited.\textsuperscript{135} However, the Court gave this argument short shrift, stating that the scope of judicial review was “sufficient to ensure that arbitrators comply with the requirements of the statute,” and that private settlements were common and not subject to any judicial review.\textsuperscript{136}

In his dissent, Justice Stevens forcefully argued that arbitration of ADEA claims should not be compelled. He believed that “[t]he Court today . . . skirts the antecedent question whether the coverage of the Act even extends to arbitration clauses contained in employment contracts, regardless of the subject matter of the claim at issue.”\textsuperscript{137} Emphasizing that broad injunctive relief was essential to eliminating discrimination and that arbitrators did not have the power to grant such relief, he asserted that compulsory arbitration of ADEA claims would frustrate the purpose of the ADEA.\textsuperscript{138}

\textbf{C. Issues Remaining after Gilmer}

\textit{Gilmer} left open as many issues as it resolved. The Court held that ADEA claims were arbitrable under a securities licensing agreement; that unequal bargaining power did not make such an agreement unenforceable; and that there was a strong presumption in favor of arbitration rooted in the FAA, the case law, and the endorsement of ADR processes in the ADEA. However, the Court left open such questions as: (1) whether employment agreements, as opposed to securities licensing agreements which affected employment, were exempt from coverage of the FAA; (2) whether the deci-

\begin{itemize}
  \item \textsuperscript{131} See id.
  \item \textsuperscript{132} See id. at 31.
  \item \textsuperscript{133} Id. at 32.
  \item \textsuperscript{134} See id. at 31–32.
  \item \textsuperscript{135} See id. at 32 n.4.
  \item \textsuperscript{136} Id. (quoting Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987)).
  \item \textsuperscript{137} Id. at 36 (Stevens, J., dissenting).
  \item \textsuperscript{138} See id. at 41-42.
\end{itemize}
sion applies outside of the highly regulated securities arbitration context and to statutes other than the ADEA; (3) what would make a pre-dispute arbitration clause an unenforceable contract of adhesion; (4) what would constitute a sufficiently specific attack on fairness of the arbitral process to demonstrate unconscionability; and (5) what constitutes valid waiver of the right to a judicial forum for vindication of statutory discrimination rights.

Some of these unresolved issues have been addressed by state and lower federal courts. However, while trends can be discerned and predicted, no resolution of the issues can be reached until the Supreme Court rules or Congress intervenes.

III

COMPULSORY ARBITRATION OF STATUTORY DISCRIMINATION CLAIMS AFTER GILMER

Subsequent decisions by both state and federal courts help to answer some of these questions that remain concerning the scope of the Court's decision in Gilmer. Although these decisions have tended to construe the scope of Gilmer broadly and its exceptions narrowly, the Supreme Court has not yet endorsed these far-reaching interpretations. Nevertheless, given that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration," and given the generally broad sweep of its decision in Gilmer, the Court will likely find these broad interpretations to be correct.

A. Contracts of Employment Exclusion

The Court in Gilmer declined to decide whether arbitration of employment disputes in general is enforceable under the FAA; that is, the Court did not address the "scope of the §1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment" and the §1 exclusion had been consistently held not to apply to securities registration applications. In his dissenting opinion, Justice Stevens asserted that "arbitration clauses contained in employment agreements are specifically exempt from coverage of the FAA . . . ." Thus, the agreement could not be compelled pursuant to the FAA. However, this position was neither taken by the majority nor specifically answered.

139. See, e.g., cases cited infra note 149 (narrowly construing the §1 contracts of employment exception); cases cited infra notes 161–66 (extending holding in Gilmer to other antidiscrimination statutes); cases cited infra note 239 (broadly construing "voluntary and knowing waiver").


141. Id. at 25 n.2.

142. Id. at 36 (Stevens, J., dissenting).

143. See id.
Section 1 of the FAA states 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." The legislative history of the FAA is somewhat ambiguous. Some commentators asserted that Congress intended all affected employment contracts to be exempt from coverage. Others argue that §1 was inserted in response to political pressure by the AFL-CIO and other unions to assuage their concerns, but that the FAA was not meant to apply to any other contracts of employment. In contrast, some commentators argue that Congress intended to exclude only transportation workers from compulsory arbitration.

Logically, one could argue that the FAA reaches employment contracts only by way of the Commerce Clause, and that when the FAA was enacted in 1925 commerce was still narrowly defined. Thus, this exclusion clause was intended to assuage concerns by the very employees who might be affected—those engaged in interstate commerce. Because the Commerce Clause did not reach other employment contracts, they were unaffected by the FAA. However, this argument may be countered by the observation that if §1 was intended to exempt all contracts of employment, the drafters would have clearly stated as much. This seems to be the view endorsed by the majority of the circuits.

The First, Second, Third, Sixth, Seventh, Tenth, and D.C. Circuits have explicitly held that the §1 exemption applies only to contracts of employment for workers involved in, or closely related to, the actual movement of goods in interstate commerce. These Circuits generally base

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[T]he primary concern animating the FAA was the perceived need by the business community to overturn the common-law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities. . . . At the Senate Judiciary Subcommittee hearings on the proposed bill, the chairman of the ABA committee responsible for drafting the bill assured the Senators that the bill "is not intended [to] be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. . . ."

Gilmer, 500 U.S. at 39 (Stevens, J., dissenting).


148. The concept of the commerce power was far more limited when the FAA was enacted in 1925. Compare Hammer v. Dagenhart, 247 U.S. 251 (1918) with United States v. Darby, 312 U.S. 100 (1941).

149. See, e.g., Dickstein v. Dupont, Inc., 443 F.2d 783, 785 (1st Cir. 1971) (§ 1 limited to employees "involved in, or closely related to, the actual movement of goods in interstate commerce"); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972) (§ 1 applies "only to those actu-
their narrow interpretation on the expansive approach taken by the Supreme Court with regard to the policy favoring arbitration, as well as on the growing consensus among the Circuits. The Sixth Circuit recently rejected prior dicta in which it had broadly construed the exception, and which its district courts had taken as controlling, and joined the other circuits in a narrow interpretation of the §1 exception. Nonetheless, some commentators have argued that the trend among the circuits is toward a broad reading of the §1 exclusion. However, this interpretation does not appear to be borne out by the evidence. A number of circuits have not yet decided the question, in part because most challenges to compulsory arbitration of "employment" disputes arise in either the securities or collective bargaining context. In these circuits the district courts are generally split, and the Fourth Circuit has not ruled on the issue since 1954. The Ninth Circuit characterized the issue of whether the FAA applies to employment agreements in general as "an unresolved question."

151. See Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 596-602 (6th Cir. 1995). For a recent state supreme court decision taking the same approach, see Brown v. KFC National Management Co., 921 P.2d 146, 156 (Haw. 1996), which found a separate arbitration agreement attached to the employment application enforceable and governed by the FAA.
152. See generally Sharona Hoffman, Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?, 17 BERKELEY J. EMP. & LAB. L. 131 (1996). Hoffman argues that arbitration clauses in employment contracts are beyond the scope of the FAA, and that this is consistent with the decisions of the majority of circuits. However, one of the cases she cites involved dicta that has since been explicitly overruled; others appear to be dicta or have been called into questions by other circuit decisions; and one that broadly construes the exception where it was necessary to the decision is from 1954. While I would wish that this optimistic view of the trend among the circuits were correct, my research indicates the opposite. Further, the circuits appear to agree that a majority of the circuits have construed the §1 exclusion narrowly. See, e.g., Asplundh, 71 F.3d at 596-602.
153. See, e.g., Arce v. Cotton Club of Greenville, Inc., 883 F. Supp. 117, 119 n.2, 123 (D. Miss. 1995) (broadly construing the §1 exception, while noting that other district courts in the Fifth Circuit had narrowly construed the provision).
154. See United Elec., Radio & Mach. Workers v. Miller Metal Prods., Inc., 215 F.2d 221, 224 (4th Cir. 1954) (declining to adopt a narrow construction because the inclusive language in §2 was intended to reach the full extent of the commerce power and narrowly reading the exclusionary clause would be inconsistent).
B. Applicability of Gilmer Outside the Securities Industry and the ADEA

A basic question not addressed by the Court in Gilmer was whether the case's holding extends beyond the securities regulation context. That is, should statutory discrimination claims generally be subject to compulsory arbitration by private, unregulated arbitrators? Throughout Gilmer, the Court emphasizes the extensive self-regulation of the securities industry and the protections built into the arbitral system. For example, in rejecting the "generalized attack" on the fairness of the arbitral proceeding, the Court asserts that "NYSE arbitration rules, which are applicable to the dispute in this case, provide protection against biased panels." 156

Nonetheless, while many cases involving compulsory arbitration of employment discrimination claims arise within the securities industry, 157 courts have also consistently compelled arbitration in the non-securities context. 158 Although compulsory arbitration is unlikely to be challenged successfully merely because it arises outside the securities industry, it may well be vulnerable to a "specific attack" on the fairness of a non-regulated arbitral proceeding.

Although the major arbitration providers regulate themselves, the scope and detail of their rules do not bind the participants to the same extent as do the NYSE arbitration rules, which many commentators find inadequate at best. 159 In general, non-securities employers are free to choose their own arbitration panels and procedures without regard to industry regulations, because the process is private and based solely on contract. This freedom enables them to choose arbitrators who tend to rule in their favor. Because they normally have absolute control over the contractual terms, employers can retain full discretion over whether to allow the employees any choice in selecting arbitrators. Further, even if both parties are given peremptory challenges of arbitrators, repeated arbitration of disputes gives

156. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991) (pointing out that bias was avoided by making information available about employment histories of arbitrators, one peremptory challenge and unlimited challenges for cause, disclosure to both parties of any arbitrator bias).
157. In December 1996, I conducted a survey on Westlaw of all federal cases addressing compulsory arbitration of employment discrimination claims. In that search, approximately 45 percent involved arbitration clauses in securities licensing agreements.
158. See, e.g., cases cited supra note 149.
159. See Richard A. Bales, Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements, 47 BAYLOR L. REV. 591, 606-08 (1995) [hereinafter, Bales, Compulsory Arbitration] (pointing out that the selection procedures under the NYSE rules are biased in favor of the employers and that the arbitrators are overwhelmingly white and male and have an average age of sixty); G. Richard Shell, ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an 'Adequate Substitute' for the Courts?, 68 TEX. L. REV. 509, 569 n.437 (1990) (stating that securities arbitrators cannot be effectively screened and that arbitrators selected from a pool created by the institutions accused of discrimination may be "steeped in . . . discriminatory biases").
employers greater access to information over time, so they can "shop" for arbitrators who make "reasonable" decisions.

Further, people of color and women constitute the overwhelming majority of non-ADEA discrimination plaintiffs, so enforcing arbitration and thereby precluding the right to trial by a jury composed of a fair cross-section of the community would seem inevitably to skew the outcomes for these plaintiffs. Race, sex, and disability claims are most vulnerable to this systemic bias.

Yet without much discussion, the lower courts have extended the decision in Gilmer beyond the ADEA context, finding mandatory arbitration clauses enforceable for a range of statutory claims, including those arising under Title VII, the ADA, the Equal Pay Act, and 42 U.S.C. § 1981, although these claims are frequently raised in the securities licensing context. In possibly the furthest extension of Gilmer to other statutes, the Ninth Circuit compelled arbitration of a claim under the Employee Polygraph Protection Act despite a provision in the statute prohibiting waiver of any rights under the Act. The court held that arbitration was a matter of contractual forum selection and thus did not constitute even procedural waiver.

Most arbitrators are simply not competent to decide employment discrimination claims: they are experts in interpreting contracts, and few have specialized training in this labyrinthine area of law. Many lawyers find the field hard to navigate after years of education and professional experience. Yet Gilmer and its progeny relegate this complex area of law to largely unregulated arbitrators who lack special expertise, who are not required to provide written opinions, and whose decisions are subject to only the most cursory judicial review.

Compulsory arbitration of discrimination claims in general, and outside of the ADEA/securities context in particular, appear to violate principles of fundamental fairness. It would seem inevitable that arbitrators who are consistently hired by the same large employers will tend to develop

160. While women and people of color are not guaranteed a true "jury of their peers," they are much more likely to have women and people of color on a jury than in an arbitral panel, given that juries are reasonably representative of the local community. See, e.g., infra notes 217-18.

161. See, e.g., Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991) ("[W]e have little trouble concluding that Title VII claims can be subjected to compulsory arbitration."); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 935 (9th Cir. 1992) (similar).


165. 29 U.S.C. § 2005d (1996) (stating that "rights and procedures ... may not be waived by contract or otherwise").


167. See id.

168. See discussion supra Part I.C.3.
a systematic bias in favor of those employers. But the Court rejected that argument in *Gilmer*. It is at least arguable that securities arbitration is highly regulated and thus procedurally fair, and that the predominantly older-white-male arbitrators would be generally more sympathetic to the predominantly white male securities-industry ADEA plaintiffs. The same cannot be said for the non-securities, non-ADEA context.

C. Contracts of Adhesion

Contract law developed for the “paradigmatic agreement” freely negotiated by two parties of approximately equal bargaining power. The concept of “contracts of adhesion” arose with the development of standardized form contracts, and is defined as a contract in which the stronger party may impose disparate terms on a weaker party because of unequal bargaining power. In an adhesion contract, the bargaining power is inherently unequal, because one party controls the terms and drafting of the agreement, which the other party may not even read before signing, and the terms are not subject to negotiation. Nonetheless, courts do not find that such unequal bargaining power, as such, makes a contract unenforceable, and courts are usually unresponsive to parties attempting to avoid contracts by simply claiming adhesion. Instead, they presume that the parties are aware of the terms and conditions and have entered into an enforceable contract.

Generally, courts impose two limitations on enforcing adhesion contracts: (1) when the contract or term does not fall within reasonable expectations of weaker party; and (2) when the contract or term, although within the reasonable expectation of the parties, is unduly oppressive or “unconscionable” considering the circumstances. Although it has been argued that form terms of contracts of adhesion should be presumptively unenforceable, the courts continue to presume enforceability.


173. *See* Graham, 171 Cal. Rptr. at 610. A contract of adhesion is “a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” *Id.* at 611 (quoting *Neal v. State Farm Ins. Cos.*, 10 Cal. Rptr. 781, 784 (1961)).


175. *See* Graham, 171 Cal. Rptr. at 610.


177. *See generally* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HAV. L. REV. 1174 (1983) (arguing that the real question with respect to contracts of adhesion is one of how power is judicially allocated between commercial interests and individuals).
The Court in *Gilmer* did not address the criteria for deciding when compulsory arbitration clauses in employment contracts made between parties with extremely unequal power would constitute unenforceable contracts of adhesion. Instead, the Court said this issue should be decided on a case-by-case basis and failed to provide any guidelines. Thus, how unequal the bargaining power would have to be for a compulsory arbitration agreement to be held an unenforceable contract of adhesion remains unanswered.

There is little dispute that employment agreements generally involve unequal bargaining power and that the employee has little control over her employment. As Frank Tannenbaum put it more than thirty-five years ago:

We have become a nation of employees . . . [M]ost of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. . . . [T]he substance of life is in another man's hands.

While high-powered executives may have some power to negotiate terms, the average prospective employee can choose merely between signing the agreement or foregoing the job. However, the majority in *Gilmer* specifically stated that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." In dissent, Justice Stevens pointed out that the Court had put aside any concern about "inequality of bargaining power between an entire industry, on the one hand, and an individual customer or employee, on the other."

Although the majority did not allow Mr. Gilmer's "generalized attack" to succeed, it left the door open by saying that a "claim of unequal bargaining power is best left for resolution in specific cases" and that arbitration agreements could be set aside on the "grounds for revocation of any contract," which, presumably would include the doctrines of unconscionability and absence of waiver.

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179. FRANK TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951). For a recent reiteration of this view, see William L. Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 IDAHO L. REV. 201 (1985). "The opportunity for self employment in America has steadily declined. Ninety percent of our work force can be classified as wage or salary earners. We have become a nation of employees dependent upon others for almost all of our income . . . ." *Id.* at 204-05.
180. *Gilmer*, 500 U.S. at 32. This attitude is consistent with the typical approach that enforces contracts of adhesion where one party has clearly inferior bargaining power. *See*, e.g., *Smith v. Navistar Int'l Transp. Corp.*, 957 F.2d 1439, 1445 (7th Cir. 1992); *Edart Truck Rental Corp. v. B. Swirsky & Co. Inc.*, 579 A.2d 133, 138 (Conn. App. 1990).
182. *Id.* at 33.
183. *Id.* (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985)).
D. Unconscionability

The Court denied Mr. Gilmer's "generalized attack" on the fairness of the arbitral process, which included challenges to the competency, diversity, and biased assignment of panels. However, the Court said that the process may be vulnerable to a specific challenge with a sufficient record. It was left to the lower courts to determine what constitutes a sufficiently specific attack on fairness of the arbitral process to demonstrate unconscionability.

Courts generally will refuse to enforce a contract if it is unconscionable, and contracts of adhesion are more likely to be found unconscionable than those negotiated by parties with equal bargaining power. Although unconscionability has not been precisely defined, it includes the elements of extreme unfairness in terms, "gross disparity" of price, and absence of meaningful choice.

Courts traditionally held contracts to be unconscionable when one party's behavior clearly violated the standard business practices and mores of the time, or when the contract terms were considered unduly oppressive. One commonly cited early English case defined an unconscionable agreement as one that "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." Perhaps more relevant to the issue of compulsory arbitration of employment disputes, Justice Frankfurter said that unconscionability existed where one party took advantage of the "necessities and distress" of the other. In modern cases, "[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." That is, both procedural and substantive unconscionability

184. Id. at 30-31.
185. See id. at 33.
186. Codified for sale of goods in U.C.C. § 2-302 (1994). Comment 1 states that the "basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the contract."
187. See, e.g., Farnsworth, supra note 171, § 4.28.
189. See id. at 476. Early courts of equity applied the doctrine of unconscionability to protect "widows and the weak-minded" from those who might take advantage of them. Paul M. Morley, Comment, Commercial Decency and the Code: The Doctrine of Unconscionability Vindicated, 9 Wm. & Mary L. Rev. 1143, 1144-45 (1968).
must normally be present for a court to find a contract unenforceable. However, since Gilmer, no court has found a compulsory arbitration clause unconscionable and therefore unenforceable.

1. An Unconscionable Arbitration Clause—Graham v. Scissor-Tail

In 1981, the California Supreme Court in Graham v. Scissor-Tail found that a form contract was adhesive and its compulsory arbitration clause was unconscionable "because it designate[d] an arbitrator who, by reason of . . . status and identity, is presumptively biased in favor of one party." The court considered the bias egregious in Scissor-Tail, given that "a contractual provision designat[ed] the union of one of the parties to the contract as the arbitrator of all disputes arising thereunder including those concerning the compensation due under the contract." The court determined that this designation of arbitrators did "not achieve the 'minimum levels of integrity' which we must demand of a contractually structured substitute for judicial proceedings." This argument may have some validity in the non-securities, unregulated employment arbitration context; however, it has not been successfully raised to date.

2. A “Non-Generalized Attack” on Arbitration

The Court in Gilmer said a "generalized attack" on the arbitral process was insufficient; specific allegations of bias must be made. Thus, nonspecific allegations of cronyism, bias, and denial of competent review will not suffice. However, the Court emphasized that NYSE arbitration rules, which controlled the arbitration at issue, provided explicit protections against biased panels.

193. Procedural unconscionability applies to the bargaining process, and asks whether there has been some misconduct or a disparity in bargaining power not rising to the level of force, fraud or duress. Substantive unconscionability involves the question of whether the bargain itself was grossly unfair. See Farnsworth, supra note 171, § 4.26.

194. See Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1469 (D.C. Cir. 1997) ("Because the courts will always remain available to ensure that arbitrators properly interpret the dictates of public law, an agreement to arbitrate statutory claims of discrimination is not unconscionable or otherwise unenforceable."); Rojas v. TK Communications, Inc., 87 F.3d 745, 749 (5th Cir. 1996) ("Because her [unconscionability] claim relates to the entire agreement, rather than just the arbitration clause, the FAA requires that her claims be heard by an arbitrator."); Gammaro v. Thorp Consumer Discount Co., 15 F.3d 93, 95-96 (8th Cir. 1994) (ruling that arbitration clause was not unconscionable); Johnson v. Hubbard Broad., Inc., 940 F. Supp. 1447, 1454 (D. Minn. 1996) (holding that in the absence of fraud, mistake, duress, coercion, or unconscionable terms, a literate party who signs an arbitration agreement, even in ignorance of its contents, remains bound by its terms and conditions).

195. 171 Cal. Rptr. 604 (1981). "When it can be demonstrated . . . that the clear effect of the established procedure of the arbitrator will be to deny the resisting party a fair opportunity to present his position, the court should refuse to compel arbitration." Id. at 616.

196. Id. at 612.
197. Id. at 617.
198. Id.
200. See id.
Although this premise appears legally unassailable now, it is subject to the criticism that the NYSE arbitration procedures were set up to resolve commercial and commission disputes between parties to securities transactions, not to resolve employment disputes, and particularly not to determine statutory or constitutional rights. Since Gilmer, the securities industry has apparently recognized the problem and begun to implement internal reforms. These reforms include changing the selection procedures for employment arbitrators, increasing the representation of women and minorities by recruiting more diverse arbitrators, and providing securities arbitrators with training in employment discrimination law. However, this self-regulation does not ensure that any individual panel will follow protective procedures, be diverse, or apply the relevant law. In the private dispute resolution system, these issues remain within the sole control of the parties.

3. Gardner-Denver and Unconscionability Analysis

The Court in Gilmer did not explicitly overrule Alexander v. Gardner-Denver, which had held that an employee’s statutory right to a trial on Title VII claims was not foreclosed by binding arbitration under a collective bargaining agreement. Thus, the criteria set out in Gardner-Denver for determining the weight to be accorded an arbitral decision in a subsequent judicial forum could provide the basis for an unconscionability analysis. Defining these criteria, the Court stated:

Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of the particular arbitrators.

The Court in Gilmer subsequently distinguished Gardner-Denver as limited to the right to a judicial forum for discrimination claims in the collective-bargaining context. Nonetheless, these factors remain relevant to defining the type of arbitral proceedings that provide an acceptable surrogate for judicial determination of statutory rights. This fairness analysis is particularly appropriate given the fact that "courts should be ever mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims."
The Court stated in *Gardner-Denver* that Title VII vests unwaivable rights in employees, so a prospective waiver of substantive rights is not enforceable.\(^{208}\) Later, in *Gilmer*, the Court distinguished between procedural and substantive statutory rights, holding that procedural rights may be waived or altered and that the choice of an arbitral forum, as such, involves such a waivable procedural right.\(^{209}\) However, the Court did not address whether Mr. Gilmer’s waiver was “voluntary and knowing” because he did not raise that issue. Nor did the Court examine whether the right to a jury trial and punitive damages were substantive or procedural rights.


The 1991 Act was enacted shortly after *Gilmer* to amend a number of discrimination statutes, including Title VII and the ADA. Among other changes, the 1991 Act added the right to a jury trial and to punitive and compensatory damages for intentional discrimination.\(^{210}\) The 1991 Act also encouraged use of ADR processes for resolving discrimination disputes, in a clause similar to one already included in the ADEA and discussed by the Court in *Gilmer*.\(^{211}\) Although strong public policy arguments can be made against compulsory arbitration of employment discrimination claims, the Court stated in *Gilmer* that the presumption in favor of arbitration outweighed many general policy concerns and was not inconsistent with other concerns.

a. Right to a Jury Trial

*Gilmer* did not address the issue of whether the right to a jury trial may be barred by a compulsory arbitration clause, because this right was not available until enactment of the 1991 Act. The right to a jury trial is fundamental to the system of justice in this country, such that improper denial of a jury trial is considered one of those extraordinary situations in which writs of mandamus are granted.\(^{212}\) Prospective denial of this right would seem to violate the intent of the 1991 Act.

A 1994 survey of the securities industry indicated that 97 percent of registered securities arbitrators were white and 89 percent male, with an

\(^{208}\) Id. at 51. Presumably, this principle would apply to similar antidiscrimination statutes as well, as they address the same individual rights. The Court said, “Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual’s right to equal employment opportunities. Title VII’s strictures are absolute and represent a congressional command that each employee be free from discriminatory practices.” Id.

\(^{209}\) *Gilmer*, 500 U.S. at 26.


\(^{211}\) Id. § 108.

average age of 60.213 In 1993, 94 percent of the more than fifty thousand neutral arbitrators registered with the AAA were male, and 93 percent of the labor arbitrators registered with the National Academy of Arbitrators were male.214 These extremely homogenous arbitration panels “do not even approximate the ethnic, cultural, gender and age diversity of the pool of citizens from which civil jury panels are drawn.”215 Nevertheless, courts have not accepted general claims of unbalanced representation as sufficient to show bias,216 which seems remarkable in light of the statutory right to a jury trial under the 1991 Act. The Supreme Court has recognized a right to a jury selected from a cross-section of the community and prohibited race- and gender-based peremptory challenges of jurors, including in civil cases.217 Given this recognition of the right to a reasonably representative jury pool, the “alternative forum” of arbitration should encompass that right. Protecting the rights of a person claiming invidious discrimination in employment would thus appear to include—at a minimum—the right to a representative factfinding body.

For example, courts have extended Gilmer to Title VII claims alleging hostile work environment sex discrimination.218 Because hostile work environment is determined on the basis of what would seriously affect the working conditions of a reasonable person219 or a reasonable woman,220 these claims are particularly inappropriate in a non-jury, unrepresentative arbitration context.221 Limiting hostile environment claims to review by


216. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991); Olson v. American Arbitration Ass'n, 876 F. Supp. 850, 852 (N.D. Tex. 1995) (granting defendant's Rule 12(b)(6) motion for failure to state a claim, finding that the plaintiff's allegations were mere speculation based upon stereotypical characteristics of panel, and that she did not allege any facts tending to show bias).


220. See Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991).

221. See Margaret A. Jacobs, Men's Club-Riding Crop and Spurs: How Wall Street Dealt with a Sex-Bias Case, WALL ST. J., June 9, 1994, at A6 (describing pervasive bias in arbitration of sex discrimination claims in the securities industry).
arbitral panels can only perpetuate the deeply embedded bias regarding what is acceptable in the workplace and continue to marginalize women.222

b. Availability of Punitive and Compensatory Damages

When the Court decided *Gilmer*, punitive damages were not available as a remedy for discrimination claims. In the Court’s view, arbitration was a reasonable alternative forum because it did not conflict with congressional intent; thus binding arbitration did not constitute an impermissible “waiver of judicial remedies for the statutory rights at issue.”223 Further, the Court asserted that the arbitral forum could “provide a fair and complete hearing of claims and . . . afford broad relief . . .”224 Hence, exclusion of punitive damages by contract or state law, or informally by the tendency of arbitrators not to award punitive damages, would conflict with the basic rationale of *Gilmer*. The Court has held that arbitrators may award punitive damages despite state law prohibitions against that authority and indicated that such damages may constitute important substantive rights.225 However, it has not yet been expressly decided whether these remedies are procedural—and thus waivable—or substantive.

Although some statutes define a set formula for punitive damages, the 1991 Act laid out guidelines but left the amount to a case-by-case determination.226 Some employers would like to contractually limit availability of punitive damages in arbitration. Traditionally, arbitrators have not given punitive damages, which is a public law penalty rather than a contractual remedy. Also, common sense would indicate that arbitrators depend professionally on repeat business. Thus, since large employers, rather than individual employees, provide repeat business, arbitrators could be motivated to minimize conflict with those clients. Consequently, the available data shows that arbitrators tend to avoid awarding punitive damages except in the most egregious cases. Combined with the marked lack of judicial review on the merits, it seems likely that punitive damages will rarely be granted in arbitration even if not contractually precluded.

However, provision of punitive damages signals a strong public commitment to eliminating discrimination from the workplace, which creates an inherent conflict between public law and the private forum of arbitration. The main approaches to resolving this problem include: (1) severance of the damages claim from arbitration; (2) striking the arbitration clause and sub-

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224. *Id.*
mitting the entire dispute to a judicial forum; and (3) allowing the arbitrator
to award punitive damages despite the limitation. A majority of courts
have held that a statutory right to punitive damages preempts contractual
limitations imposed by employers. Yet, if punitive damages are contract-
tually precluded, arbitrators would exceed their authority under the contract
by awarding punitive damages. Perhaps in view of this ethical conundrum,
the leading approach taken to date involves severance, in which the dispute
itself is arbitrated and damages are later determined in court.

5. **Reviewability**

According to the FAA, arbitral awards can be vacated for “manifest
disregard of the law.” Courts have construed this provision narrowly,
holding that error, misinterpretation, or misapplication of law are not cause
for vacating a judgment. For example, an arbitrator could simply as-
sert—contrary to the established legal standard—that because the claimant
was unable to show that her ability to work was severely impaired she could
not prevail on a hostile environment sexual harassment claim, but a court
could not overturn that decision. In short, manifest disregard involves egre-
gious error on the order of an arbitrator saying, “This person was clearly
discharged for discriminatory reasons, and she meets all the legal require-
ments for her claim, but I don’t think discrimination is wrong so she loses
anyway.” Clearly, this is contrary to the public policy opposing discrimina-
tion in the workplace. Further, since arbitrators outside the labor context do
not usually provide written opinions, their awards become virtually unre-
viewable even for “manifest disregard.”

The Court in *Gilmer* asserted that judicial review of arbitration was
“sufficient to ensure that arbitrators comply with the requirements of the
statute,” pointing out that settlements receive no review. But the Court
did not discuss the fundamental difference between compulsory arbitration
and settlement. Pre-dispute agreements to arbitrate precede the cause of
action and bind the parties regardless of whether they believe justice has
been served. In contrast, settlement involves voluntary resolution of a dis-
pute, often made after a claim has been filed in court and after substantial

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227. See id.
228. See Bales, supra note 159, at 614 (discussing how different courts have handled the issue of
statutory punitive damages under arbitration clauses limiting damages).
Posner’s analysis in this case is often cited as the definitive description of the standard of reviewing
arbitration decisions. See supra note 24 and accompanying text.
231. The only arbitration decisions available for review, and thus apparently the only written deci-
sions, were labor and securities arbitrations. The Court in *Gilmer* took this as a given, denying the
plaintiff’s concern because the NYSE rules require all arbitration awards to be in writing. *Gilmer v.
232. Id. at 32 n.4 (quoting Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232
(1987)).
discovery and negotiation; settlement is, in fact, more akin to mediation than to arbitration. The inequity arises from the pre-dispute, binding nature of the agreement, not from the fact that it is privately made.

Inequity also stems from the standard of review. While "manifest disregard" may be an appropriate standard for reviewing private arbitrations of freely negotiated private agreements, the equation changes when arbitrators determine public antidiscrimination rights rather than individual contractual relations. Discrimination statutes derive from important public policy objectives and are intended to protect civil rights. Discrimination law involves complex interaction between statutes, case law, and statutory amendments. The strong public interest in vindicating these important rights argues for a reconsideration of the standard of judicial review of arbitral decisions. That is, the strong presumption of finality may have to change with regard to the statutory discrimination claims. Rather than asking simply whether the arbitrator "interpreted the contract," courts should also concern themselves with whether the arbitrator applied the appropriate legal standard.

E. Waiver

Compulsory arbitration of statutory claims implicates the more fundamental issue of waiver. To be enforceable, adhesion contract terms must be within the reasonable expectation of the weaker party; that is, any waiver of rights must be knowing and voluntary. However, the issue of what constitutes adequate waiver of statutory rights was not addressed by the Supreme Court in Gilmer because it was not raised by the plaintiff. He did not claim that the agreement was not knowingly and voluntarily entered into, although that argument has been raised since in cases with similar facts.\(^{233}\)

What constitutes valid waiver of the right to a judicial forum for vindication of statutory discrimination rights remains unsettled, though Gardner-Denver\(^ {234} \) arguably still controls with regard to prospective waiver of Title VII rights. According to the Court in Gardner-Denver, to "determin[e] the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent . . . was voluntary and knowing."\(^ {235} \)

The Supreme Court had addressed the general question of waiver in the adhesion contract context in Fuentes v. Shevin.\(^ {236} \) The Court stated that when there was great disparity in bargaining power, the "purported waiver provision" was in a form contract, and weaker party was not "actually aware or made aware of the significance of the fine print now relied upon as

\(^{233} \) See generally Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299 (9th Cir. 1994), cert. denied, 116 S.Ct. 61 (1995). See also cases cited infra note 240.

\(^{234} \) 415 U.S. 36 (1974).

\(^{235} \) Id. at 52 n.15.

\(^{236} \) 407 U.S. 67 (1972).
a waiver of constitutional rights," the waiver could not be considered to have been made "voluntarily, intelligently, and knowingly."237 Some courts have found a presumption against waiver in contracts of adhesion, stating that a "gross inequality in bargaining power [can suggest] that the asserted waiver was neither knowing nor intentional."238

In a recent decision, Prudential Insurance Co. of America v. Lai, the Ninth Circuit found that the plaintiffs did not waive their right to a judicial forum for their discrimination and harassment claims: lack of knowing and voluntary waiver precluded compulsory arbitration of the plaintiffs' Title VII claims.239 The employer had moved to compel arbitration pursuant to a mandatory arbitration clause similar to that challenged in Gilmer.240 Although the court did not question whether Gilmer should be extended to the Title VII context, it found that the important public policy embodied in Title VII mandated that waiver of any statutory rights be knowing and voluntary.241 The court noted that "Congress intended there to be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies and procedural protections prescribed in Title VII and related state statutes."242

Basing her opinion on the legislative history of the provision encouraging arbitration in the Civil Rights Act of 1991, Judge Schroeder said that the "congressional concern that Title VII disputes be arbitrated only 'where appropriate,' and only when such a procedure was knowingly accepted, reflects our public policy of protecting victims of sexual discrimination and harassment through the provisions of Title VII and analogous state statutes."243 The court focused on what the employees would reasonably understand was covered by the mandatory arbitration clause; that is, "even assuming that appellants were aware of the nature of the U-4 form, they could not have understood that in signing it, they were agreeing to arbitrate sexual discrimination suits."244

This decision potentially limits the scope of Gilmer significantly. Under this interpretation of waiver, statutory discrimination claims may be essentially exempted from compulsory arbitration unless the agreement ex-

237. Id. at 95 (internal citations omitted).
240. See Lai, 42 F.3d at 1301.
241. See id. at 1304.
242. Id.
243. Id. at 1305 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974)).
244. Lai, 42 F.3d at 1305 (emphasis added).
plicitly discloses which rights are covered. While the principles seem intuitively correct, given the policies underlying Title VII, and logical as a matter of statutory interpretation, Lai does not appear to be leading other courts in a new direction.

The implications of Lai outside of the Ninth Circuit are still unclear, but the trend appears unpromising. To date, other courts have either declined to follow, limited to its facts and declined to extend, or explicitly disagreed with the decision. Regardless of whether the lack of knowing and voluntary waiver argument would succeed in court outside the Ninth Circuit, this decision certainly has moral authority. Thus, an employer would be well advised to include clear language explaining that compulsory arbitration will extend to employment discrimination claims as well as contractual disputes.

A standard arbitration clause, which states that "disputes arising in connection with employment," does not adequately notify a prospective employee that she is waiving the right to a judicial forum for determination of statutory discrimination rights. Most people would not consider that their public, antidiscrimination rights were subsumed under the standard clause. It is not reasonable to assume that employees would understand that by signing an employment agreement containing such a clause they were waiving their right to a jury trial, and to have their claims heard in a court that is bound by legal precedent, rules of evidence and procedure, and subject to appellate review.

Perhaps most important, an employee would not reasonably understand that any challenge to systemic disparate treatment or disparate impact discrimination would likely be subject to compulsory arbitration as well. Even if the waiver were voluntary and knowing, serious questions are raised by allowing an individual to waive the rights of a class—all of whom are presumably bound by the same arbitration clause. When


247. See Beauchamp v. Great West Life Ins. Co., 918 F. Supp. 1091, 1095-96 (E.D. Mich. 1996). "The portions of the legislative history relied upon by the Ninth Circuit are slender reeds upon which to rest the weighty and novel conclusion that an arbitration clause is only binding when the claimant has actual knowledge that his particular employment discrimination claims will be covered by the agreement." Id. at 1096.

248. There is as yet no case law on this issue. However, the EEOC has already filed claims on behalf of a group of securities brokers who were apparently unable to raise the claim themselves, as individuals or as a class. Because the class representative must bring the claim on behalf of herself and
bringing a disparate impact claim, a plaintiff represents a class of those affected by the discrimination. Based on extensive statistical evidence, the court determines whether that protected class was adversely affected by discriminatory practices. The plaintiff must first show that the challenged policy or practice, even if facially neutral, disproportionately disadvantages members of a protected class, and that there is no business justification for the policy. To do this, the plaintiff must demonstrate a significant disparity between the relevant labor market and work force numbers. Only after the disparate impact determination are individual claims addressed. If the plaintiff meets her initial burden, the employer must prove there were no other available alternatives to this practice. Even if arbitrators began hearing these disparate impact cases, and they applied the appropriate law, such claims require extensive discovery in order to establish their statistical basis. Arbitration, however, generally limits the discovery available to a plaintiff.

As more employers begin to require arbitration as a condition of employment, the reach of antidiscrimination law will contract and narrow because arbitrators do not, or cannot, address class claims, and because they are not required to apply the law. Although, as the Court pointed out in Gilmer, the EEOC may still pursue statutory discrimination claims on behalf of an individual or a class, the serious case backlog at EEOC significantly restricts the scope of agency action. In essence, the system needs
the “private attorneys general” to effectuate the purpose of the federal antidiscrimination statutes. Shunting private plaintiffs into a compelled arbitral forum runs counter to this purpose.

F. Proposed Requirements and Limits on Employment ADR Procedures

Rather than relying on pre-dispute binding arbitration, it would be more productive for employers to develop and implement detailed, progressive ADR grievance procedures to handle employment disputes, including claims of discrimination and harassment.

An effective ADR grievance system involves progressive stages of increasingly formal and binding procedures. Ideally, the grievance enters each step only by consent of both the complainant and the accused. A model procedure includes an initial investigation by an outside neutral or neutrals. If the parties do not resolve the dispute after the investigation report is filed, the parties may agree to mediation by different outside neutrals. Mediation remains voluntary throughout. However, if mediation does not resolve the dispute, the parties may then agree to submit the claim to binding arbitration. Otherwise, the plaintiff should be free to bring her claim in court.

If an employer were to include compulsory arbitration as part of its grievance procedure, the clause should fully disclose which claims will be subject to arbitration. The prospective employee must “knowingly and voluntarily” waive the right to a judicial forum, and “knowledge” should include notice of which statutory rights are covered, including sexual harassment and disparate impact claims, and which “procedures” may not be available, such as the right to a jury trial.

Regardless of whether the arbitration stems from pre- or post-dispute agreements, when arbitrators decide statutory discrimination claims, they must adhere to higher standards and they must be instructed to apply the law to the dispute. Arbitrators determining statutory employment rights should have minimum qualifications, including thorough knowledge of the relevant law, a solid grasp of the discovery process, and sufficient understanding of the rules of evidence. Procedural requirements might include a written opinion that sets out both the facts and legal analysis each case.

256. A panel of legal and feminist activists has recommended that employers establish a clear written policy that clearly prohibits and defines harassment and sets out progressive discipline for offenses. Neuborne & Ellis, supra note 59, at 68-69.

257. For sexual harassment claims, the panel recommends that both formal and informal complaint procedures be available, with several people, including a woman, designated to take complaints. Id. This procedure would apply just as well to other discrimination claims.

258. For a detailed analysis of when employers should institute arbitration systems and to whom they should apply, see Mathiason, supra note 61, at 44-63. He also lays out requirements of a fair arbitral process, including specific hearing procedures such as discovery and testimony under oath, burdens of proof; he also states that the opinion and award should be in writing, explicitly decide all issues presented, and set forth the legal principles supporting each part of the decision. Id. at 54-55.
In addition, arbitrators should be educated in the standards for awarding compensatory and punitive damages, and be authorized to award them. Further, employment discrimination arbitrators should be subject to extensive licensing and monitoring to ensure that civil rights are sufficiently protected. Arbitration organizations should make concerted efforts to recruit minorities, women, and disabled persons to be arbitrators. Options to prevent bias include precluding an arbitrator from arbitrating for the same employer more than a set number of times, or binding an employer to a particular organization for a certain time-period to prevent "shopping" for pro-employer arbitrators.

For disparate impact and other claims that may require broad injunctive relief, arbitrators should be permitted to make preliminary determinations of whether the arbitral forum is appropriate. If the panel finds that an injunction might be necessary, the case should be removed to a judicial forum. Similarly, if the panel finds that a disparate impact claim appears meritorious and is outside the competence of the arbitrators to decide, that claim should not be arbitrated.

Finally, the standard of judicial review of arbitral decisions must be reconsidered when arbitrators determine statutory discrimination rights. At a minimum, instead of simply asking whether the arbitrator "interpreted the contract," courts should ask whether the arbitrator applied the appropriate legal standard. Those arbitral decisions that do not apply the law properly should be overturned.

IV

Conclusion

The 1991 Act states that "[w]here appropriate and to the extent authorized by law, . . . arbitration, is encouraged," but it remains unclear what is "appropriate" and to what extent the law authorizes arbitration. Plaintiffs’ attorneys threaten boycotts of organizations that participate in compulsory arbitration of employment discrimination claims. Arbitral organizations debate the equity of compulsory arbitration and drastically amend their own rules. The EEOC, NLRB, and Commerce and Labor Departments explicitly oppose compulsory arbitration of statutory employment claims. And Congress continues to consider legislation barring compulsory arbitration of statutory discrimination rights. At the same time, employers are beginning to recognize that many workplace grievances can no longer be ignored or litigated without serious costs.

261. Id.
263. See discussion supra Part I.B.5.
These polar extremes are unsatisfactory in terms of both workplace productivity and the risk of huge adverse verdicts. Employees are realizing that the courts protect only the strongest of plaintiffs against the most egregious discrimination, after long and costly proceedings. It is time for employers to establish, and courts and legislators to encourage, progressive grievance procedures that incorporate ADR processes. However, compulsory arbitration of statutory rights cannot be condoned.

Two years before *Gilmer* was decided, Judge Harry Edwards aptly summarized the fundamental problems with that decision and its consequences:

> [I]f ADR is extended to resolve difficult issues of constitutional or public law—making use of nonlegal values to resolve important social issues or allowing those the law seeks to regulate to delimit public rights and duties—there is real reason for concern. *An oft-forgotten virtue of adjudication is that it ensures the proper resolution and application of public values.*

> In our rush to embrace alternatives to litigation, we must be careful not to endanger what law has accomplished or to destroy this important function of formal adjudication.\(^{265}\)

I have argued here that arbitration of statutory discrimination rights pursuant to pre-dispute employment agreements is unconscionable, contrary to public policy, and inconsistent with the Civil Rights Act of 1991. Unfortunately, it must be conceded that the federal and state courts have almost uniformly rejected these claims and tended to extend the reach and scope of *Gilmer*. Nonetheless, I conclude that: some of the best arguments have not been raised in court, so the doctrine has not yet been fully tested; and, even where these issues have been decided, the courts are wrong in viewing arbitration simply as an alternate forum for determination of public law.

If the judiciary is unwilling or unable to curtail this radical encroachment on statutory antidiscrimination rights, Congress should step in and do so. Congress should amend the Civil Rights Act to bar enforcement of pre-dispute binding arbitration of any claims arising under federal antidiscrimination laws. To address the legitimate concerns underlying the trend toward ADR, Congress should incorporate provisions supporting voluntary ADR processes, in accordance with EEOC recommendations. It is time for deference to the agency charged with enforcement of antidiscrimination statutes and for increased attention to protecting individual rights.

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\(^{265}\) See Edwards, *supra* note 7, at 676 (emphasis added).