

NOTES

ARBITRATING EMPLOYMENT DISCRIMINATION CLAIMS: THE LOWER COURTS EXTEND *GILMER V. INTERSTATE/JOHNSON LANE CORP.* TO INCLUDE INDIVIDUAL EMPLOYMENT CONTRACTS

I. INTRODUCTION

Suppose a hospital hires a new physician and the parties execute an employment contract. Paragraph twelve of the agreement contains an arbitration provision requiring that all disputes between the parties must be submitted to binding arbitration. Before the contract expires, the hospital discharges the physician. Believing she is a victim of discrimination, the physician files suit in federal court against her former employer. To her chagrin, she faces a Motion to Compel Arbitration of the statutory claims. Must she resolve her discrimination claims through arbitration?¹

Prior to the Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*,² submission of an individual employee's³ statutory discrimination claims to arbitration did not bar a subsequent suit in federal court.⁴ However, in *Gilmer* the Court enforced an arbitration agreement and concluded that an arbitrator's resolution of an age discrimination claim⁵ precluded resort to a judicial forum.⁶ The arbitration

1. This hypothetical is based on *Crawford v. W. Jersey Health Sys.*, 847 F. Supp. 1232 (D.N.J. 1994). In *Crawford*, West Jersey Physician Associates ("WJPA"), P.A., hired Carolyn S. Crawford, M.D., as the Medical Director of the Neonatal Intensive Care Unit. *Id.* at 1234. When WJPA hired Crawford, she signed an employment contract that contained an arbitration clause. *Id.* at 1234-35. Before the contract expired, West Jersey fired Crawford. *Id.* at 1235. Crawford filed suit and asserted several claims, including claims for sex and age discrimination. *Id.* The court granted West Jersey's motion to stay the civil action pending arbitration. *Id.* at 1244.

2. 500 U.S. 20 (1991).

3. This Note analyzes arbitration agreements in individual employment contracts. Agreements to arbitrate under collective bargaining agreements fall beyond the scope of the Note. For an explanation of collective bargaining agreements and why they are excluded from the Federal Arbitration Act, see *infra* note 10.

4. For a brief discussion of the Supreme Court's approach to statutory discrimination claims prior to *Gilmer*, see *infra* notes 27-49 and accompanying text.

5. The ADEA provides that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29

agreement in *Gilmer* appeared in a U-4 form, a document employers use to register employees with stock exchanges, including the New York Stock Exchange ("NYSE").⁷ The U-4 form is separate from the employment contract, which governs the employer-employee relationship. Subsequent decisions have extended *Gilmer* to compel arbitration of employment discrimination claims under arbitration clauses in individual employment contracts.⁸

Employment contracts differ from commercial and labor agreements under which courts typically uphold arbitration. Employment contracts do not involve commercial parties acting through arms length negotiation to resolve contractual disputes.⁹ Nor do they involve unions collectively bargaining for their members.¹⁰ Despite these differences between typical

U.S.C. § 623(a)(1) (1994).

6. *Gilmer*, 500 U.S. at 35.

7. As required by his employment, Gilmer registered as a securities representative with several stock exchanges, including the NYSE, by filing a "Uniform Application for Securities Industry Registration of Transfer," which is known as a "U-4 form." *Id.* at 23. Gilmer's form stated that he "agree[d] to arbitrate any dispute, claim or controversy' arising between him and Interstate [his employer] 'that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which [he] register[ed].'" *Gilmer*, 500 U.S. at 23. In *Gilmer*, the Court noted that "NYSE Rule 347 provides for arbitration of '[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative.'" *Id.*

8. See *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1441 (9th Cir. 1994), *cert denied*, 115 S. Ct. 638 (1994) (holding that the 1991 Civil Rights Amendment's provision for a jury trial does not evince a congressional intent to preclude arbitration); *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 935 (9th Cir. 1992) (holding that an arbitration agreement in an employment application required the employee to arbitrate claims for sexual harassment and gender discrimination under Title VII); *Maye v. Smith Barney, Inc.*, 903 F. Supp. 570, 574 (S.D.N.Y. 1995) (holding that arbitration agreements in employment contracts encompass civil rights claims); *Gateson v. ASLK-Bank, N.V./CGER-Banque S.A.*, No. 94 Civ. 5849, 1995 WL 387720, at *6 (S.D.N.Y. June 29, 1995) (concluding that discrimination claims are arbitrable); *Crawford v. West Jersey Health Sys.*, 847 F. Supp. 1232, 1242 (D.N.J. 1994) (holding that the FAA covers arbitration agreements in individual employment contracts and compels arbitration of discrimination claims); *Hull v. NCR Corp.*, 826 F. Supp. 303, 306 (E.D. Mo. 1993) (explaining that Title VII claims, like ADEA claims, are subject to arbitration); *DiCrisci v. Lyndon Guar. Bank of New York*, 807 F. Supp. 947, 952 (W.D.N.Y. 1992) (finding that the arbitration agreement in an employment contract mandated arbitration of employee's Title VII claims).

9. In his Supreme Court brief, Gilmer distinguished "business-oriented" claims from employment disputes, because the former do not implicate statutes "designed to provide minimum substantive guarantees to individual workers." Brief for Petitioner at 11, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (No. 90-18). For a similar conclusion with respect to claims under the Federal Employees Liability Act, see *Atchison, Topeka & Sante Fe Ry. v. Buell*, 480 U.S. 557, 564 (1987) (holding that a railroad employee bringing suit under the Federal Employees Liability Act cannot be compelled to arbitrate, even though Railway Labor Act provides for arbitration).

10. A collective bargaining agreement is an "[a]greement between an employer and a labor union which regulates [the] terms and conditions of employment." BLACK'S LAW DICTIONARY 263 (6th ed.

arbitration agreements and arbitration agreements in employment contracts, in *Gilmer*, the Supreme Court declined to decide whether the Federal Arbitration Act ("FAA")¹¹ governs an arbitration agreement in an individual employment contract.¹² However, lower courts subsequently

1990). The agreement "is enforceable by and against [the] union in matters which affect all members or large classes of members, particularly . . . employees." *Id.* Courts agree that § 1 of the FAA excludes collective bargaining agreements as "contracts of employment." *See* 9 U.S.C. § 1 (1994); *see also* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 40 n.9 (1987); *Bacashihua v. United States Postal Serv.*, 859 F.2d 402, 404-05 (6th Cir. 1988).

11. 9 U.S.C. §§ 1-14 (1988 & Supp. 1991). The Uniform Arbitration Act ("UAA"), 7 U.L.A. 5 (1985) has been adopted completely or with some modifications by 26 states and integrated, with some changes, in other state arbitration statutes, including those of California, Michigan, New York, and Texas. MARTIN DOMKE, *DOMKE ON COMMERCIAL ARBITRATION* § 4.02, at 41 (Gabriel M. Wilner ed., rev. ed. 1995). Issues relating to state law and the UAA are beyond the scope of this Note.

12. 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." 9 U.S.C. § 1 (1994).

The dissent in *Gilmer* asserted that the FAA excludes arbitration agreements in both individual employment contracts and collective bargaining agreements. *Gilmer*, 500 U.S. at 41-42. The dissent explained that the location of the arbitration agreement, whether in a U-4 form or an employment contract, should not change the result. *Id.* at 40. The majority, however, did not address the exclusion issue for two reasons: first, *Gilmer* did not raise it; second, the arbitration agreement fell within the U-4 form rather than the employment contract. Thus, the Court did not need to discuss the issue in order to reach its decision. *Id.* at 25 n.2.

Many courts define the language of § 1 as limited to workers actually engaged in interstate transportation or "in work so closely related . . . as to be in practical effect part of it." *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am. Local 437*, 207 F.2d 450, 452 (3d Cir. 1953); *see also* *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971); *Pietro Scalzitti Co. v. Int'l Union of Operating Engineers*, 351 F.2d 576, 579-80 (7th Cir. 1965); *Signal-Stat Corp. v. Local 475*, 235 F.2d 298, 301-02 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957), *reh'g denied*, 355 U.S. 852 (1957); *Bernhardt v. Polygraphic Co. of Am.*, 218 F.2d 948, 951 (2d Cir. 1955), *rev'd on other grounds*, 350 U.S. 198 (1956); *Scott v. Family Farm Life Ins. Co.*, 827 F. Supp. 76, 77-78 (D. Mass. 1993); *Dancu v. Coopers & Lybrand*, 778 F. Supp. 832, 833-34 (E.D. Pa. 1991), *aff'd mem.*, 972 F.2d 1330 (3d Cir. 1992); *In re Management Recruiters Int'l*, 765 F. Supp. 419, 421-22 (N.D. Ohio 1991).

These courts rely on the legislative history of the FAA. *Tenney*, 207 F.2d at 452-53. When Congress debated the language of the FAA, the Seamen's Union asserted that seamen's wages come under admiralty jurisdiction and should not be subject to arbitration agreements. *Id.* at 452 (citing W.H.H. Piatt et al., *Report of the Committee on Commerce, Trade and Commercial*, 48 A.B.A. REP. 284, 287 (1923)). The drafters responded by adding the § 1 exclusionary clause for seamen and railroad workers, the two groups of transportation workers for which Congress had already created special arbitration legislation. *Id.* Thus, the drafters "rounded out the exclusionary clause by excluding all other . . . classes of workers [similar to seamen and railroad workers]." *Id.* at 453.

A small minority of courts have held that § 1 excludes employment contracts, concluding that the FAA cannot be applied to such contracts. *See, e.g., Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 311 (6th Cir. 1991); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110, 1119 (3d Cir. 1993) (noting in dicta that the FAA does not apply to employment contracts); *United Elec., Radio &*

enforced such arbitration clauses.¹³ Thus, an individual employee can waive the right to a judicial forum and a jury trial and agree to send statutory employment discrimination claims to arbitration.¹⁴

This Note examines the judicial extension of *Gilmer*. Part II discusses the historical development of contractually mandated arbitration and its intersection with federal civil rights statutes. Part III explains the *Gilmer* decision and its effect on the enforcement of arbitration agreements. Part IV discusses courts' extension of *Gilmer* to include individual contracts of employment and outlines the debate regarding enforcement of such arbitration agreements in the employment context. Finally, Part V supports the extension of the *Gilmer* doctrine and proposes procedural safeguards to further protect an employee's substantive civil rights under arbitration. This proposal allows parties to enjoy the benefits of arbitration while addressing the perceived weaknesses of arbitration procedures.

II. THE HISTORICAL DEVELOPMENT OF CONTRACTUALLY MANDATED ARBITRATION AND ITS INTERSECTION WITH EMPLOYEE CIVIL RIGHTS STATUTES

Arbitration is a voluntary process of dispute resolution in which the parties choose a private judge to evaluate the evidence presented at a hearing and to grant relief.¹⁵ Arbitrators may be selected by the parties themselves, appointed pursuant to the rules of the American Arbitration Association, or designated by a court.¹⁶ Both parties agree in advance upon the procedural rules the arbitrator will follow and agree¹⁷ that the

Mach. Workers of Am. v. Miller Metal Products, Inc., 215 F.2d 221 (4th Cir. 1954) (holding that an arbitration provision in a collective bargaining agreement fell outside the scope of § 1). These courts support the position adopted by the chairman of the ABA Committee responsible for drafting the bill: The FAA "is not intended [to] be an act referring labor disputes, at all. It is purely an act to give the merchants the right or privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it." *Id.* (quoting *Hearings on S. 4213 and S. 4214 Before the Subcomm. on the Judiciary*, 67th Cong., 4th Sess. 9 (1923)).

13. See *supra* note 8.

14. Based on the Supreme Court's analysis in *Gilmer*, it appears that almost all types of statutory claims, employment-related or otherwise, would be subject to binding arbitration. See William M. Howard, *The Evolution of Contractually Mandated Arbitration*, *ARB. J.*, Sept. 1993, at 27, 33. Howard argues that nonunion employers will soon routinely use predispute arbitration agreements. *Id.* at 34.

15. BLACK'S LAW DICTIONARY 105 (6th ed. 1990). See also FRANK ELKOURI & EDNA A. ELKOURI, *HOW ARBITRATION WORKS* 2 (4th ed. 1985).

16. See DOMKE, *supra* note 11, §§ 20:00-20:01, at 301-03. (discussing how arbitrators are appointed).

17. ELKOURI & ELKOURI, *supra* note 15, at 2. Though the decision is binding, courts may vacate an arbitrator's award under some circumstances. See, e.g., *infra* note 265.

decision will be binding.¹⁸

Congress enacted the FAA¹⁹ in 1925 to overcome judicial hostility toward arbitration and place arbitration agreements "upon the same footing as other contracts."²⁰ The FAA establishes arbitration clauses as "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."²¹

For almost thirty years following the enactment of the FAA, no court decided a significant reported case involving the statute.²² Beginning in the 1950s, however, courts started to distinguish between contractual and statutory rights.²³ While the courts considered private contractual rights suitable for arbitration, they concluded that because some statutory rights implicate public rights, their resolution should be reserved for the courts.²⁴ This "public policy" exception²⁵ to the FAA kept a judicial forum open to parties despite the existence of a binding arbitration agreement.²⁶

18. ELKOURI & ELKOURI, *supra* note 15, at 222. Numerous trade and professional associations follow the American Arbitration Association ("AAA") procedures. *See* DOMKE, *supra* note 11 § 2:02, 16-17. The AAA also promulgates special rules for arbitration of employment disputes. AMERICAN ARBITRATION ASS'N, EMPLOYMENT DISPUTE RESOLUTION RULES (1993) (pamphlet) [hereinafter EDR RULES].

19. United States Arbitration Act, ch. 213, 43 Stat. 883-86 (1925) (codified as amended at 9 U.S.C. §§ 1-14 (1994)).

20. H.R. REP. NO. 96, 68th Cong., 1st Sess. 1, 2 (1924). Refusal to uphold arbitration agreements dates back to the courts of England, which viewed "irrevocable arbitration agreements as 'ousting' the courts of jurisdiction, and refused to enforce such agreements for this reason." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974) (citing H.R. REP. NO. 96, 68th Cong., 1st Sess. 1, 2 (1924)). "This view was adopted by American courts as part of the common law up to the time of the adoption of the Arbitration Act." *Id.*

21. 9 U.S.C. § 2 (1994).

22. Search of WESTLAW, Allfeds database (Mar. 29, 1996).

23. *See* Note, *Agreements to Arbitrate Claims Under the Age Discrimination in Employment Act*, 104 HARV. L. REV. 568, 570 n.19 (1990) (citing *Wilko v. Swan*, 346 U.S. 427, 434 (1953) (refusing to find a waiver of judicial forum in a dispute encompassing the Securities Act of 1933)); *Hanes Corp. v. Millard*, 531 F.2d 585, 593-94 (D.C. Cir. 1976) (refusing to uphold an arbitration agreement in a patent dispute); *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827-28 (2d Cir. 1968) (allowing resolution in a judicial forum despite existence of an arbitration agreement in an antitrust dispute).

24. Note, *supra* note 23, at 570.

25. *Id.* Courts supporting the public policy exception have held that some statutory rights are important "not only to the parties but also the public at large." *Id.* These courts refused to send statutory claims to arbitration but agreed that arbitration "may be appropriate for contractual rights." *Id.*

26. *See* Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481 (1981). Sterk argues that courts should not enforce arbitration agreements when they are "the product of unequal bargaining power, or of unequal transaction costs that make it likely that one party will draft an agreement that the other will sign without first questioning or reviewing the agreement's arbitration clause." *Id.* at 486-87.

In *Alexander v. Gardner-Denver Co.*,²⁷ the Supreme Court upheld an employee's right to judicial resolution of his Title VII²⁸ claims even though an arbitrator had previously dismissed the claims. The Court reasoned that statutory and contractual claims are separate and distinct causes of action, especially in the context of employee civil rights.²⁹ Each claim, according to the Court, has an "independent origin" and is equally available to the aggrieved employee.³⁰ Thus, statutes such as Title VII "supplement rather than supplant existing laws"³¹ and an employee cannot prospectively waive the right to judicial resolution of Title VII claims.³²

In support of its holding, the Court outlined four reasons why arbitration is inappropriate as the final method of resolving Title VII claims. First, the Court argued that labor arbitrators have neither the experience nor the authority to resolve Title VII claims.³³ Second, the Court, concerned about

27. 415 U.S. 36 (1974). The employee in *Alexander* filed a grievance under the union collective bargaining agreement alleging, but not explicitly claiming, racial discrimination. *Id.* at 39. The arbitrator ruled that the employee was "discharged for just cause," and the employee subsequently brought suit in federal court under Title VII, 42 U.S.C. §§ 2000e to 2000e-17. *Id.* at 42-43. The District Court held that the arbitrator's decision precluded the suit and granted summary judgment for the employer. *Id.* The Court of Appeals affirmed. *Id.*

28. 42 U.S.C. §§ 2000e to 2000e-17 (1994). Title VII provides that:

[i]t shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1982).

29. *Alexander*, 415 U.S. at 47-49.

30. *Id.* at 52.

31. *Alexander*, 415 U.S. at 48-49. Under the Court's reasoning, Title VII plaintiffs would not face an election of remedies problem. *Id.* at 49. The mere fact that the employee agrees to arbitrate his contractual disputes does not mean that he must similarly submit to binding arbitration of his statutory claims.

32. *Id.* at 51. The Supreme Court held that in the collective bargaining context, there can never be a prospective waiver of an individual employee's rights under Title VII. *Id.* However, the Court recognized that an individual employee could waive a Title VII cause of action as part of a voluntary settlement. *Id.* at 52.

33. *Id.* at 52-53, 56-57. The Court explained that the arbitrator, in making his decision, must look to the collective bargaining agreement as his sole source of authority. *Id.* at 53. The arbitrator must decide the dispute by interpreting the intent of the parties as expressed in the collective bargaining agreement and has no "authority to invoke public laws that conflict with the bargain of the parties." *Id.* When an arbitrator reaches a decision inconsistent with the collective bargaining agreement, courts must not enforce the arbitrator's award. *Id.* (citing *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

the relative informality of arbitration procedures, found arbitration fact-finding procedures inadequate protection for employees' Title VII rights.³⁴ Specifically, the Court noted that an arbitration proceeding record generally did not constitute as complete a representation as a trial record. Furthermore, the Court emphasized that the usual rules of evidence do not apply to an arbitration proceeding.³⁵ Also, procedures utilized in civil trials, such as "discovery, compulsory process, cross-examination, and testimony under oath are often severely limited or unavailable."³⁶

Third, the Court noted that arbitrators are under no obligation to give reasons for their decisions.³⁷ Presumably, the Court worried that such a practice shields the decision from public or judicial scrutiny and deprives subsequent arbitrators and judges of the precedential value of the opinion. Finally, the Court expressed concern about the "union's exclusive control over the manner and extent to which an [employee's claim] is presented."³⁸ Inherently, the collective bargaining process subordinates the rights of an individual employee to the interests of all employees in the bargaining unit.³⁹ Moreover, the union's interests may not always align with those of the individual employee, especially if the union itself is discriminatory. Thus, an employee may find it difficult to establish a breach of the union's duty of fair representation.⁴⁰

Subsequent decisions, resting on similar concerns, upheld *Alexander's* protection of statutory civil rights in the employment context.⁴¹ In *Barrentine v. Arkansas-Best Freight System*,⁴² the Supreme Court allowed employees to submit Fair Labor Standards Act ("FLSA") claims brought

34. *Id.* at 57.

35. *Id.* at 58. The Federal Rules of Evidence do not apply in arbitration proceedings. When arbitrating employment claims, parties often follow the AAA *EDR Rules*, see *supra* note 18, which give the arbitrator discretion to allow discovery upon request of the parties. For a discussion of the EDR RULES, see *infra* note 245.

36. *Alexander*, 415 U.S. at 57-58 (citing *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 (1956); *Wilko v. Swan*, 346 U.S. 427, 435-37 (1953)).

37. *Id.* (citing *United Steelworkers*, 363 U.S. 593, 598)).

38. *Id.* n.19 (citing *Vaca v. Sipes*, 386 U.S. 171 (1967)); *Republic Steel Corp. v. Maddon*, 379 U.S. 650 (1965)).

39. *Alexander*, 415 U.S. at 57-58 (citing *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944)).

40. *Id.* (citing *Humphrey v. Moore*, 375 U.S. 335, 342, 348-51 (1964)).

41. See, e.g., *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (holding that giving preclusive effect to arbitration awards in 42 U.S.C. § 1983 actions would "severely undermine the protection of federal rights that the statute is designed to provide."); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 732 (1981) (concluding that courts should not defer to an arbitrator's decision on issues involving "minimum substantive guarantees to individual workers").

42. 450 U.S. 728 (1981).

pursuant to the union's collective bargaining agreement to a judicial forum after an arbitrator had rejected the claims.⁴³ The Court reasoned that statutes designed to provide "minimum substantive guarantees" to individual workers involve special concerns.⁴⁴ Under FLSA, for example, employees cannot waive or otherwise contractually limit their rights to minimum wage and overtime pay.⁴⁵ Moreover, FLSA requirements preempt conflicting provisions in a collectively bargained compensation agreement.⁴⁶ The Court explained the four concerns it discussed in *Alexander* and added a fifth concern: Arbitrators are often unable to award as broad a range of relief as judges in the civil court system.⁴⁷ Specifically, FLSA authorizes courts to award actual and liquidated damages, attorneys fees, and costs.⁴⁸ However, an arbitrator can generally award only the compensation authorized by the collective bargaining agreement.⁴⁹

In a trilogy of cases that included *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,⁵⁰ *Shearson/American Express, Inc. v. McMahon*,⁵¹ and *Rodriguez de Quijas v. Shearson/American Express, Inc.*,⁵² the Supreme Court reversed the longstanding presumption against arbitration of statutory claims.⁵³ In its 1985 *Mitsubishi* decision, the Court adopted a policy requiring rigorous enforcement of private agreements to arbitrate⁵⁴ and expressly supported a strong presumption in favor of

43. *Id.* at 730.

44. *Id.* at 737.

45. *Id.* at 740.

46. *Id.* at 740-41.

47. *Id.* at 745.

48. *Id.* (citing 29 U.S.C. § 216(b)).

49. *Id.*

50. 473 U.S. 614 (1985).

51. 482 U.S. 220 (1987), *reh'g denied*, 483 U.S. 1056 (1987).

52. 490 U.S. 477 (1989).

53. *Rodriguez*, 490 U.S. at 481; *McMahon*, 482 U.S. at 226; *Mitsubishi*, 473 U.S. at 625. In addition to its decisions upholding arbitration, the Supreme Court has rejected claims that civil rights statutes always deserve special treatment. *See, e.g., Marek v. Chesny*, 473 U.S. 1, 10 (1985) (explaining that evidence did not show that "Congress, in considering § 1988, had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned"); *Crawford v. Bd. of Educ.*, 458 U.S. 527, 542 (1982) (holding that a "dual court system is not established simply because civil rights remedies are different from those available in other areas").

54. *Mitsubishi*, 473 U.S. at 626 (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-21 (1985)). The Supreme Court has also invalidated state laws limiting the enforceability of arbitration agreements. In 1984, the Court struck down a California law because it undercut the presumption of arbitrability created by the FAA. *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (citing 9 U.S.C. § 2). The Court reasoned that Congress intended for the FAA to apply "in state as well as federal

arbitration.⁵⁵ The parties in *Mitsubishi* raised one claim involving antitrust violations under the Sherman Act.⁵⁶ The defendant argued that its statutory rights under the Sherman Act could not be submitted to binding arbitration.⁵⁷

The Court rejected the defendant's argument and explained that the FAA fails to provide a basis for disfavoring agreements to arbitrate statutory claims, unless, in the statute itself, Congress expressly prohibits a waiver of a judicial forum.⁵⁸ Instead of characterizing the agreement as a waiver of substantive rights, the majority described an arbitration agreement as a forum selection clause under which a party agrees to resolve the dispute in "an arbitral, rather than a judicial forum."⁵⁹ The Court concluded that courts should only refuse to enforce agreements to arbitrate statutory claims if the agreement "resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any

courts." *Id.* at 15-16. In addition, the Court held that the California law violated the Supremacy Clause of Article Six of the United States Constitution because it undermined the FAA presumption of arbitrability. *Id.* at 16.

55. *Mitsubishi*, 473 U.S. at 625 (supporting a presumption of binding arbitration) (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). For other decisions supporting a presumption of arbitrability, see *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (holding that "arbitration under the act is a matter of consent [and that] parties are . . . free to structure their arbitration agreements as they see fit"); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 239 (1987) (enforcing parties' agreement to arbitrate and explaining that *Mitsubishi* upholds a strong presumption of arbitrability), *reh'g denied*, 483 U.S. 1056 (1987); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960) (supporting arbitration agreements between parties); *Saari v. Smith Barney, Harris Upham & Co.*, 968 F.2d 877, 882 (9th Cir. 1992) (holding that claims under the Employee Polygraph Protection Act are subject to binding arbitration). *But see* *Bird v. Shearson Lehman/American Express, Inc.*, 871 F.2d 292, 296-97 (2d Cir. 1989) (holding that statutory ERISA claims are not subject to binding arbitration because Congress intended that plan participants and beneficiaries be able to seek protection in a judicial forum, particularly a federal court).

56. 473 U.S. at 619-20.

57. *Id.* at 621. The defendant alleged that "Puerto Rico law precluded enforcement of an agreement obligating a local dealer to arbitrate controversies outside Puerto Rico."

58. *Id.* at 627-28.

59. *Id.* at 628. Some commentators argue that employees are free to make choices regarding their rights to a judicial forum. See G. Richard Shell, *ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 567 (1990).

Justice Stevens, writing the dissenting opinion in *Mitsubishi*, presents an argument based upon the expectations of the parties. *Mitsubishi*, 473 U.S. at 650. According to Stevens' argument, lawyers and employees, especially executives, would not expect arbitration clauses to cover statutory claims because arbitration usually occurs in the context of commercial or labor dispute and courts have repeatedly distinguished between statutory and contractual rights. *Id.* Based on Stevens' argument, it would be unfair to deny a judicial forum for resolution of statutory claims if the parties never intended arbitrators to resolve such claims. See *id.*

contract.”⁶⁰

The Court also dismissed the defendant’s argument that arbitration procedures are inappropriate for resolving complex statutory claims.⁶¹ The Court reasoned that parties can select arbitrators based on their expertise.⁶² The court stated that appointing an arbitrator who is very familiar with the statute at issue makes arbitration more adaptable than civil litigation.⁶³ Further, arbitration allows for a more expedient resolution of disputes and avoids “the monstrous proceedings” that give litigation “an image of intractability.”⁶⁴

Two years after *Mitsubishi*, in *Shearson/American Express, Inc. v. McMahon*,⁶⁵ the Supreme Court established a two-prong test (“*McMahon* test”) for determining whether parties should arbitrate.⁶⁶ First, the Court must examine the text of the statute and the legislative history to determine if Congress intended to exclude statutory claims from the FAA.⁶⁷ If neither the text nor the legislative history of the statute clearly shows Congress’ intent to override the FAA, the Court must determine whether there is an “inherent conflict”⁶⁸ between arbitration and the statute’s underlying purpose.⁶⁹ If no congressional exemption exists, the FAA mandates enforcement of agreements to arbitrate statutory claims.⁷⁰ Further, the burden is on the party opposing arbitration to show that

60. *Mitsubishi*, 473 U.S. at 627 (citing 9 U.S.C. § 2).

61. *Id.* at 633-34.

62. *Id.* at 633.

63. *Id.* (noting that “adaptability and access to expertise are hallmarks of arbitration.”).

64. *Id.*

65. 482 U.S. 220 (1987), *reh’g denied*, 483 U.S. 1056 (1987).

66. *Id.* at 226-27. The *McMahon* test refined the analysis used by the Court in *Mitsubishi*. The *Mitsubishi* Court first determined whether the arbitration agreement encompassed the statutory issues. 473 U.S. at 628. If it did, the Court secondly considered whether external legal constraints, such as fraud, illegality, or overwhelming economic power, should bar arbitration. *Id.*

The *McMahon* test is more favorable to arbitration than the Court’s analysis in *Mitsubishi*. A legal constraint, such as overwhelming economic power, would be easier for plaintiffs to show than a standard requiring plaintiffs to “demonstrate that Congress intended to make an exception to the Arbitration Act for claims arising under [a statute.]” *McMahon*, 482 U.S. at 227.

67. *Id.*

68. *Id.* It appears that the Court intended to construe the “inherent conflict” standard narrowly. *See id.* at 227-42. The Court established such a strong presumption in favor of arbitration that plaintiffs would presumably have to show a very clear congressional statement of intent in order to override the presumption. *See Note, supra* note 23, at 586 (concluding that the inherent conflict standard should be narrowly construed).

69. *McMahon*, 482 U.S. at 227.

70. *Id.* at 226.

Congress intended to preclude a waiver of judicial forum under the statute.⁷¹

The *McMahon* Court held that the plaintiffs were bound by their arbitration agreement to submit their claims under the Securities Exchange Act of 1934 ("Exchange Act") and the Racketeer Influenced and Corrupt Organizations Act ("RICO") to binding arbitration.⁷² The Court rejected the plaintiffs' argument that the Exchange Act's language precludes binding arbitration.⁷³ The section at issue, section 29(a), declares void "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of [the Act.]"⁷⁴ The plaintiffs argued that section 29(a) prohibits waiver of section 27 of the Exchange Act, which provides that federal district courts "have exclusive jurisdiction [over] . . . all suits in equity and actions at law brought to enforce any liability or duty created by this Chapter."⁷⁵ The Court held that the statutory language of section 27 is insufficient to show a congressional intent to preclude binding arbitration.⁷⁶

The Court also rejected the plaintiff's argument that there is an irreconcilable conflict between arbitration and the underlying purposes of RICO.⁷⁷ Citing *Mitsubishi*, the Court stated that the mere complexity of RICO does not render the statute inappropriate for arbitration, because arbitration is flexible enough to allow appointment of arbitrators with expertise in RICO matters.⁷⁸ In addition, the Court concluded that occasional overlap between RICO's civil and criminal provisions does not preclude arbitration of civil claims.⁷⁹

Finally, the Court rejected the plaintiff's broad argument that public interest in the enforcement of RICO precludes submission of claims to arbitration.⁸⁰ In fact, the Court concluded that allowing arbitration of RICO claims furthers the public interest because few civil suits are actually brought and a private forum, such as arbitration, might encourage civil

71. 482 U.S. at 227.

72. *Id.* at 238, 242.

73. *Id.* at 238.

74. *Id.* at 227 (citing 15 U.S.C. § 78cc(a)).

75. 15 U.S.C. § 78aa (1994).

76. *McMahon*, 482 U.S. at 238.

77. *Id.* at 242.

78. *Id.* at 239.

79. *Id.* at 239-40.

80. *Id.* at 241-42.

enforcement.⁸¹

In 1989, the Court further extended its presumption in favor of arbitration in *Rodriguez de Quijas v. Shearson/American Express, Inc.*⁸² In *Rodriguez*, the Court held that parties can waive a judicial forum for claims involving the Securities Act of 1933 ("Securities Act") and the Exchange Act.⁸³ Similar to the Exchange Act provision at issue in *McMahon*, section 14 of the Securities Act prohibits binding agreements "to waive compliance with any provision" of the Securities Act.⁸⁴ The Court applied the rationale it used in *McMahon* and similarly concluded that the language of section 14 is insufficient to establish a congressional intent to prohibit binding arbitration.⁸⁵

Although the Supreme Court ostensibly resolved any questions about the validity of arbitration agreements, the picture is still incomplete. The *Mitsubishi* line of cases adopted a strong presumption of arbitrability, but because they did not involve statutory civil rights claims, they did not explicitly overrule *Alexander*,⁸⁶ which supported special treatment for such statutory rights.⁸⁷ In addition, the Supreme Court analyzed arbitration in only two contexts: cases decided under collective bargaining agreements and cases brought under boilerplate U-4 forms in the securities industry. The Supreme Court had not ruled on a case that involved individual contracts of employment between employers and employees.⁸⁸

However, by 1989, both the Third and Fourth Circuits faced the issue of whether individual employees may agree in their employment contracts to binding arbitration.⁸⁹ The Third Circuit, in *Nicholson v. CPC International, Inc.*,⁹⁰ and the Fourth Circuit, in *Gilmer v. Interstate/Johnson Lane*

81. 482 U.S. at 241-42.

82. 490 U.S. 477 (1989).

83. *Id.* at 481. *Rodriguez* overruled *Wilko v. Swan*, 346 U.S. 427 (1953) (stating that "[t]o the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law . . . it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes").

84. *Rodriguez*, 490 U.S. at 479 (citing 15 U.S.C. § 77n).

85. *Id.* at 482.

86. 490 U.S. 477.

87. For a discussion of the Supreme Court's analysis in *Alexander*, see *supra* notes 27-40 and accompanying text.

88. Search of WESTLAW, Allfeds database (Mar. 29, 1996).

89. *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221 (3d Cir. 1989), *reh'g and reh'g in banc denied*, No. 88-5588 (3d Cir. July 10, 1989), *overruled by Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990), *aff'd*, 500 U.S. 20 (1991).

90. 877 F.2d 221 (3d Cir. 1989).

Corp.,⁹¹ specifically discussed whether claims brought under the Age Discrimination in Employment Act ("ADEA")⁹² must be arbitrated where the arbitration agreement is valid.⁹³ Although the cases were factually similar, the courts reached very different conclusions.

In *Nicholson*, the employee signed an "Executive Employment Agreement" containing an arbitration clause.⁹⁴ Approximately one year later, Nicholson's employer eliminated his position.⁹⁵ He filed a timely age discrimination charge with the Equal Employment Opportunity Commission ("EEOC")⁹⁶ and sued his employer in state court for claims related to age discrimination.⁹⁷ After removing the case to federal court, the employer moved for an order compelling arbitration of all claims, pursuant to the arbitration clause in the employment agreement.⁹⁸

The Third Circuit held that an employee cannot be compelled to arbitrate an age discrimination claim.⁹⁹ The court applied the *McMahon* test¹⁰⁰ to determine whether Congress intended to preclude a waiver of judicial forum or whether arbitration presents an inherent conflict with the ADEA's underlying purposes.¹⁰¹ Although the court failed to find language in the ADEA that defines the effect of an arbitration agreement, the court indicated that the "statutory scheme reflects Congress' careful structuring

91. 895 F.2d 195 (4th Cir. 1990).

92. Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-34 (1994)).

93. *Nicholson*, 877 F.2d at 222; *Gilmer*, 895 F.2d at 196.

94. *Nicholson*, 877 F.2d at 222-23. The arbitration clause provided that:

[a]ny dispute or controversy arising under or in connection with this Agreement shall be settled exclusively by arbitration, conducted before a panel of three arbitrators in New York City in accordance with the rules of the American Arbitration Association then in effect. Judgment may be entered on the arbitrators' award in any court having jurisdiction. The expense of such arbitration shall be borne by the Company.

Id. at 223. This clause is an example of a typical prospective arbitration agreement. Such an agreement is one that the parties execute before a dispute actually arises.

95. *Id.* at 223.

96. Title VII, 42 U.S.C. § 2000e-4, creates the Equal Employment Opportunity Commission, and 42 U.S.C. § 2000e-5 empowers the EEOC to "prevent any person from engaging in any unlawful employment practice" as set forth in Title VII.

97. *Nicholson*, 877 F.2d at 223.

98. *Id.*

99. *Id.* at 230 (citing *Criswell v. W. Airlines, Inc.*, 709 F.2d 544, 547-49 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1553 (10th Cir. 1988); cf. *Swenson v. Management Recruiters Int'l, Inc.* 858 F.2d 1304, 1305-07 (8th Cir. 1988), *reh'g denied*, 872 F.2d 264 (8th Cir. 1989), *cert. denied*, 493 U.S. 848 (1989).

100. See *supra* notes 66-71 and accompanying text.

101. *Nicholson*, 877 F.2d at 224.

of the procedure to be followed in enforcing the rights granted by the Act."¹⁰² In addition, the court found statements in the legislative history suggesting that Congress intended to protect the ultimate resolution of ADEA claims in a judicial forum.¹⁰³ However, the court determined that the legislative history, like the statutory text, did not conclusively represent congressional intent.¹⁰⁴

The *Nicholson* court concluded that arbitration presents an inherent conflict with the statutory scheme of the ADEA.¹⁰⁵ First, the court in *Nicholson* believed that mandatory arbitration would discourage employees from seeking EEOC involvement.¹⁰⁶ As the majority explained, filing a charge with the EEOC is a prerequisite to court action under the ADEA,¹⁰⁷ but employees will have little incentive to file discrimination charges with the EEOC if they cannot subsequently proceed to a judicial forum.¹⁰⁸ Thus, the court implied that eliminating discriminatory conduct in the workplace would be more difficult if employees do not notify the EEOC of such conduct.¹⁰⁹ The court explained that any process that allows employers to avoid EEOC scrutiny "is necessarily incompatible with the congressional scheme for the ADEA."¹¹⁰

Second, the Third Circuit determined that arbitration is an inappropriate forum for resolving ADEA claims.¹¹¹ The court argued that arbitral

102. *Id.* at 224. Because enforcement proceedings under the ADEA are governed by FLSA enforcement proceedings, the court examined the Supreme Court's decision in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), and held that *Barrentine* requires that claims under statutes designed to protect individual workers are not subject to binding arbitration. *Id.* at 225 (citing 450 U.S. at 737). However, because *Barrentine* involved a collective bargaining agreement, the court held that the case is not dispositive of situations involving individual employment contracts. *Id.* at 225.

103. *Id.* at 226. The court considered Senator Kennedy's 1978 amendment to the ADEA, which granted an explicit right to a jury trial. *Id.* at 226-27 n.5 (citing 29 U.S.C. § 626(c) (1988)). However, because the Court found that a similar right to a jury trial also exists for claims brought under the Sherman Act, which the Court determined arbitrable in *Mitsubishi*, the court refused to rely on this part of the ADEA's legislative history. *Id.*

104. *Id.* at 226.

105. *Id.* at 227.

106. *Id.* The court explained that employees, by filing charges with EEOC, trigger investigation of and collection of much of the information on employers. *Id.* Without employee-initiated charges, the EEOC may only obtain information from investigations it initiates itself. *Id.* Thus, the EEOC would never have reason to suspect particular employers of discriminatory practices unless an employee notifies the EEOC of the employer's conduct. *Id.*

107. *Id.* (citing 29 U.S.C. § 626(d) (1988)).

108. *Id.*

109. *See id.* at 227-28.

110. *Id.* at 227-28.

111. *Id.* at 228.

boards lack the power to award broad, equitable relief granted to courts under 29 U.S.C. § 626(b),¹¹² because an arbitrator's power does not extend beyond the particular parties and their disputes.¹¹³

Finally, the court noted that individual employees may lack sufficient bargaining power.¹¹⁴ In particular, the court reasoned that older employees with limited job mobility may feel coerced into signing an arbitration agreement presented by an employer.¹¹⁵ Similarly, employers may be able to force new employees with limited bargaining power to sign an arbitration agreement or remain unemployed.¹¹⁶ Based on its three key concerns, the Third Circuit concluded that Congress did not intend prospective arbitration agreements in individual employment contracts to preclude access to a judicial forum.¹¹⁷

112. 877 F.2d at 228.

113. *Id.* Because arbitration is limited to the parties involved, arbitrators may be limited in their ability to counter broad discriminatory conduct against all employees when deciding the individual discrimination claims. *Id.* For a brief explanation of employment discrimination law and theories, see Christine G. Cooper, *Employment Discrimination Law and the Need for Reform*, 16 VT. L. REV. 183 (1991).

Significantly, the court based its argument on arbitration processes in general rather than on the expertise of modern arbitrators. *Nicholson*, 877 F.2d at 229. The court suggested that the prior suspicion of the competence of arbitrators expressed in *Alexander* and *Barrentine* is unfounded in light of the Supreme Court's establishment of a strong presumption in favor of arbitration in *Mitsubishi* and *McMahon*. *Id.* at 229 (citing *Alexander*, 415 U.S. at 56-59; *Barrentine*, 450 U.S. at 743-45).

114. *Nicholson*, 877 F.2d at 229.

115. *Id.*

116. *Id.* The court recognized that this type of duress may not render a contract voidable but cautioned that "we cannot close our eyes to the realities of the workplace." *Id.* Some commentators characterize arbitration agreements as "conditions of employment." See John A. Gray, *Have the Foxes Become the Guardians of the Chickens? The Post-Gilmer Legal Status of Predispute Mandatory Arbitration as a Condition of Employment*, 37 VILL. L. REV. 113, 119 (1992). Gray explains that:

(W)hile an agreement to arbitrate is . . . a choice of forum and not a surrender or waiver of substantive statutory rights or remedies, there is a 'take it or leave it' coercive aspect to the agreement, even though theoretically the employer is also surrendering its right to take the employee to court.

Id.

The defendants argued that *Nicholson*, an attorney and experienced executive, was well aware of the nature of the arbitration agreement and thus, was not in an unequal bargaining position. *Nicholson*, 877 F.2d at 229. However, the court refused to adopt different rules based on the characteristics of particular plaintiffs. *Id.*

117. *Id.* at 230. The majority concluded that a contrary decision would encourage arbitration agreements, and thereby shift ADEA enforcement from the courts to arbitral forums. *Id.* The majority explained that Congress should select the forums in which to enforce the ADEA. *Id.* at 231. See also Howard, *supra* note 14, at 27 (explaining that it is "just a matter of time" before predispute agreements will become the norm in most nonunion employment relationships). The court distinguished a prospective waiver, which relinquishes an employee's rights with respect to potential future disputes, from an individual's release of an ADEA claim once the discriminatory acts have "already transpired."

Rejecting the *Nicholson* court's rationale, the Fourth Circuit, in *Gilmer v. Interstate/Johnson Lane Corp.*,¹¹⁸ held that Congress did not preclude arbitration of ADEA claims under arbitration agreements between employers and employees.¹¹⁹ Interstate, the defendant-employer, required Gilmer, the plaintiff-employee, to register a U-4 form with the NYSE,¹²⁰ requiring arbitration of all employment disputes.¹²¹ Upon discharge, Gilmer brought suit in federal court alleging a violation of the ADEA.¹²² In response, Interstate filed a motion to compel arbitration under the FAA.¹²³ Relying on the *Alexander* line of cases, the district court denied Interstate's Motion to Compel Arbitration.¹²⁴ The Fourth Circuit Court of Appeals reversed.¹²⁵

Applying the *McMahon* test, the Fourth Circuit found nothing in the

877 F.2d at 230. The latter release, according to the court, would be permissible. *Id.*

The *Nicholson* dissent argued that the FAA mandates enforcement of arbitration agreements in individual employment contracts and that the ADEA does not evince a congressional intent to exclude ADEA claims from arbitration. *Id.* at 244. First, the dissent noted that since *Mitsubishi*, courts have dismissed concerns over the competence of arbitrators and the sufficiency of arbitration procedures. *Id.* at 234. The dissent reasoned that ADEA disputes are no more complex than antitrust disputes, which are subject to binding arbitration agreements, *id.*, and are often simpler. *Id.* In addition, the dissent argued that just because the usual civil trial procedures are not completely available, this does not mean that arbitration restricts the substantive rights of the parties. *Id.* (citing *Mitsubishi*, 473 U.S. at 628).

The dissent also refuted the majority's argument that arbitration would limit the role of the EEOC. *Id.* at 237. For support, the dissent cited a recent EEOC regulation proposing "that courts enforce voluntary nonprospective waivers of all substantive ADEA rights without EEOC supervision, which would effectively circumvent EEOC involvement." *Id.* (citing 29 C.F.R. § 1627.166 (1988)).

Finally, the dissent dismissed the majority's argument regarding inequality of bargaining power. *Id.* at 242-43. Noting some disparity in bargaining power in every contractual relationship, the dissent explained that eliminating age discrimination is not defeated or undercut by upholding the arbitration agreement. *Id.* at 243.

118. 895 F.2d 195 (4th Cir. 1990), *aff'd*, 500 U.S. 20 (1991).

119. *Id.* at 197. See also *Pierce v. Shearson Lehman Hutton, Inc.*, No. 90-C-0722, 1990 WL 60751 (N.D. Ill. Apr. 26, 1990). The court in *Pierce* applied the *McMahon* test and reached the same conclusion as the *Gilmer* Court. *Id.* at *2. After considering the *Nicholson* opinion, the *Pierce* Court agreed with the *Gilmer* decision, because it gave "appropriate weight to the Supreme Court's encouragement of arbitration." *Id.* at *3. The plaintiff in *Pierce* relied on the *Alexander* line of cases, but the court distinguished the cases because the disputes involved collective bargaining agreements. *Id.* The court concluded that individual agreements to arbitrate, unlike collective bargaining agreements, do not deny substantive rights. *Id.*

120. 895 F.2d at 196 n.1. For a more detailed description of the U-4 form, see *supra* note 7 and accompanying text.

121. *Id.* at 196.

122. *Id.*

123. *Id.*

124. *Id.* The district court refused to uphold the arbitration agreement and send the ADEA claim to binding arbitration. *Id.*

125. *Id.*

“text, legislative history, or underlying purposes of the ADEA” that indicated congressional intent “to preclude enforcement of arbitration agreements.”¹²⁶ According to the Fourth Circuit, courts should be reluctant to imply statutory intent to preclude arbitration where Congress has not expressed one, because it would undermine the strong presumption in favor of arbitration.¹²⁷

The court analyzed Gilmer’s arguments against arbitration and dismissed each of them.¹²⁸ First, the majority analyzed the role of the EEOC and concluded that enforcement of private arbitration agreements does not render the agency ineffective.¹²⁹ Effectuating the purposes of the ADEA, the majority explained, does not require EEOC involvement at all levels of dispute resolution.¹³⁰ The FAA provides multiple forums, and individuals are free to settle ADEA claims without EEOC involvement.¹³¹ In addition, arbitration of the dispute does not preclude filing a charge with the EEOC.¹³² The filing enables the EEOC to “investigate, conciliate, or enforce [the charge] through litigation.”¹³³ The court also discussed the ADEA enforcement model, which is based on FLSA, and concluded that Congress’ choice of courts as the initial forum for EEOC enforced dispute resolution did not constitute congressional intent to preclude private arbitration agreements.¹³⁴

Secondly, the court rejected Gilmer’s concern with the arbitrator’s power to award damages.¹³⁵ The majority noted that arbitrators possess broad equitable powers to grant any remedy “necessary to right the wrongs within their jurisdiction.”¹³⁶ For example, the majority recognized that arbitrators may order reinstatement or promotion of employees.¹³⁷ The court explained that even if arbitrators do not have the full equitable power and

126. 895 F.2d at 197.

127. *Id.*

128. *Id.* at 197-203.

129. *Id.* at 197-98.

130. *Id.* at 198. The Court explained that the EEOC’s effectiveness “is not now, nor has it ever been, dependent on its participation in the resolution of *all* claims under the ADEA.” *Id.* at 197.

131. *Id.* at 198.

132. *Id.*

133. *Id.*

134. *Id.* at 199. Although the ADEA provides that suits should be brought in a judicial forum, the Court concluded that the statute does not preclude parties from reaching a private agreement to arbitrate their disputes. *Id.*

135. *Id.* at 199-200.

136. *Id.* at 199.

137. *Id.*

discretion accorded to courts, this alone “does not deny the utility of this alternative means of resolving disputes.”¹³⁸ The court concluded that Congress enacted the ADEA cognizant of the extent of arbitral power and chose not to prohibit arbitration of ADEA claims.¹³⁹

Third, the majority rejected Gilmer’s contention that the ADEA’s provision for a jury trial indicates congressional intent to preclude waiver.¹⁴⁰ The court reasoned that the jury trial provision “does not mandate that every ADEA trial be a trial by jury.”¹⁴¹ For support, the court noted that the ADEA clearly allows claimants to waive a trial by jury.¹⁴²

The court also supported its holding by emphasizing that federal courts serve as only one of the forums for resolution of ADEA claims.¹⁴³ The court explained that Congress’ grant of concurrent jurisdiction to federal and state courts provides evidence of its intent to allow waiver of the judicial forum.¹⁴⁴ According to the majority, this broad right of forum selection includes the right to select arbitration.¹⁴⁵

Finally, the majority dismissed Gilmer’s assertion that arbitration procedures are inadequate for ADEA claims.¹⁴⁶ The majority held that ADEA claims are proper for arbitration because they involve “simple, factual inquiries” that are no more complex than claims under the Sherman Act or RICO, which the court has previously held suitable for arbitration.¹⁴⁷ Finally, possible judicial review of an arbitrator’s decision ensures compliance with the statute.¹⁴⁸

III. RESOLVING THE CONFLICT: THE SUPREME COURT IN *GILMER* UPHOLDS ARBITRATION OF AN INDIVIDUAL EMPLOYEE’S AGE DISCRIMINATION CLAIM

In 1991, the Supreme Court granted certiorari to resolve the conflict among the circuits regarding the enforcement of individual agreements to

138. 895 F.2d at 199.

139. *Id.* (citing *Rodriguez v. United States*, 480 U.S. 522 (1987) (holding that in passing a statute, Congress is presumed to act “with full awareness” of existing legislation)).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 200.

144. *Id.*

145. *Id.* at 201.

146. *Id.*

147. *Id.* (citing *McMahon*, 107 S. Ct. at 2344).

148. *Id.* at 202 (citing *McMahon*, 107 S. Ct. at 2340).

arbitrate employment discrimination claims.¹⁴⁹ In *Gilmer*,¹⁵⁰ the Court held that the FAA mandates enforcement of such agreements when found in a U-4 form.¹⁵¹ Further, the Court concluded that final arbitration of employment discrimination claims bars judicial action by the employee.¹⁵²

The Court found no inconsistencies between agreements to arbitrate age discrimination claims and the social policy of prohibiting discrimination in the workplace.¹⁵³ The Court explained that even though arbitration is limited to the specific disputes of the parties involved, this neither prevents the arbitral forum from furthering broad social purposes nor inhibits the development of the law.¹⁵⁴ To support its holding, the Court noted that the "Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 [are all] designed to advance important public policies but . . . claims under those statutes are appropriate for arbitration."¹⁵⁵

The Court rejected *Gilmer's* challenges to arbitration procedures.¹⁵⁶ First, the Court noted its earlier rejection of the argument that arbitrators are incompetent¹⁵⁷ and dismissed *Gilmer's* assertion that arbitration panels will be biased. The Court further justified its preference for arbitration procedures by indicating that the NYSE rules applicable to *Gilmer* provided

149. 498 U.S. 809 (1990).

150. 500 U.S. 20 (1991).

151. *Id.* at 35. It is important to note that the arbitration agreement in *Gilmer* appeared in a U-4 form rather than an employment contract like the agreement in *Nicholson*. *See id.* at 23; *see supra* note 7 and accompanying text; *see also Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 222. Lower courts, however, are using the *Gilmer* decision to extend the validity of arbitration agreements to all types of employment contracts, even though *Gilmer* did not technically condone such use. *See Maye v. Smith Barney, Inc.*, 903 F. Supp. 570, 574 (S.D.N.Y. 1995); *Gateson v. ASLK-Rank, N.V./CGER-Banque S.A.*, No. 94-C-5849, 1995 WL 387720, at *6 (S.D.N.Y. June 29, 1995); *Nghiem v. NEC Elec., Inc.*, 25 F.2d 1437, 1441 (9th Cir.), *cert. denied*, 115 S. Ct. 638 (1994); *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 935 (9th Cir. 1992); *Crawford v. West Jersey Health Sys.*, 847 F. Supp. 1232, 1242 (D.N.J. 1994); *Hull v. NCR Corp.*, 826 F. Supp. 303, 306 (E.D. Mo. 1993); *DiCrisci v. Lyndon Guar. Bank of New York*, 807 F. Supp. 947, 952 (W.D.N.Y. 1992).

152. *Id.* at 26.

153. *Id.* at 27.

154. *Id.* at 27-28.

155. *Id.* at 28. The Court rejected *Gilmer's* argument that arbitration would undermine the role of the EEOC. *Id.* at 29. The Court noted, as an example, that even though the Securities and Exchange Commission is very involved in the enforcement of the Securities Exchange Act of 1934 and the Securities Act of 1933, the Court has held claims under both statutes subject to binding arbitration. *Id.* at 29 (citing *McMahon*, 482 U.S. at 220; *Rodriguez*, 490 U.S. at 477 (1989)).

156. *Id.* at 30-32.

157. *Id.* at 30 (citing *Mitsubishi*, 473 U.S. at 634).

specific protections, such as peremptory challenges, against biased panels.¹⁵⁸ Second, the Court dismissed Gilmer's concern that limited discovery provisions in arbitration would render it difficult to prove discrimination.¹⁵⁹ The Court explained that ADEA claims do not require more extensive discovery than claims brought under other statutes, such as RICO, which the Court has already held subject to arbitration.¹⁶⁰ Although arbitration procedures may not be as extensive as procedural rules in federal court, the Court argued that a party, by agreeing to arbitrate, "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."¹⁶¹ The Court also reasoned that parties in arbitration will benefit because arbitrators are not bound by the rules of evidence and thus are able to more easily admit otherwise objectionable evidence.¹⁶²

Next, the Court rejected Gilmer's argument that sending ADEA claims to binding arbitration will result in a lack of public knowledge of employers' discriminatory practices and will inhibit the development of the law.¹⁶³ The Court reasoned that merely because some ADEA claims will be subject to arbitration does not mean that courts will cease to address those claims.¹⁶⁴ In addition, NYSE rules require that arbitration awards be in

158. 500 U.S. at 30. For example, the rules require that parties "be informed of the employment histories of the arbitrators and that they be allowed to make further inquiries into arbitrators' backgrounds." *Id.* (citing 2 N.Y.S.E. GUIDE (CCH) ¶ 2608, at 4315 (Rule 608) (1991) [hereinafter NYSE GUIDE]). Furthermore, the court noted that "each party is allowed one peremptory challenge and unlimited challenges for cause." *Id.* (citing NYSE GUIDE ¶ 2609, at 4315 (Rule 609)). Arbitrators are also required to disclose "any circumstances which might preclude [them] from rendering an objective and impartial determination." *Id.* (citing NYSE GUIDE ¶ 2610, at 4315 (Rule 610)). The FAA also provides that courts may overturn arbitral decisions "[w]here there was evident partiality or corruption in the arbitrators." *Id.* at 30-31 (citing 9 U.S.C. § 10(b) (1988)).

159. 500 U.S. at 31.

160. *Id.*

161. *Id.* at 31 (citing *Mitsubishi*, 473 U.S. at 628).

162. *Id.*

163. *Id.* at 31-32. Gilmer argued that if parties arbitrate employment discrimination claims, courts will be unable to develop consistent sources of case law to further social policies behind the antidiscrimination statutes. *Id.* at 31. For further discussion of this theory, see Michael Lieberman, *Overcoming the Presumption of Arbitrability of ADEA Claims: The Triumph of Substantive over Procedural Values in Nicholson v. CPC, Int'l, Inc.*, 138 U. PA. L. REV. 1817, 1822 (1990) ("[d]isplacing the judicial forum in favor of arbitration for discrimination claims may discourage grievants from seeking relief, thus undermining the purpose of the antidiscrimination statutes"); Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1085-86 (1984) (opining that "when the parties settle, society gets less than what appears. . . . Parties might settle while leaving justice undone"). For this reason, some commentators conclude that commercial arbitration, which is essentially transactional in focus, cannot lead to broad institutional reforms. See generally G. Shell, *supra* note 59.

164. 500 U.S. at 32.

writing, contain the names of the parties, summarize the issues in controversy, describe the award issued, and be made available to the public.¹⁶⁵

Finally, the Court dismissed Gilmer's concerns about the ability of arbitrators to award broad equitable relief.¹⁶⁶ Instead, the Court determined that arbitrators have broad powers to grant equitable relief.¹⁶⁷ Supporting its position, the Court noted that nothing precludes the EEOC from bringing actions seeking class-wide and equitable relief.¹⁶⁸

After rejecting Gilmer's procedural concerns, the Court similarly disregarded Gilmer's claim that his employer possessed superior bargaining power.¹⁶⁹ According to the Court, mere inequality of bargaining power fails to establish that arbitration agreements are never enforceable in the employment context.¹⁷⁰ As an example, the Court noted that relationships between securities investors and dealers often involve unequal bargaining power, but agreements to arbitrate in those contexts are enforceable.¹⁷¹ The Court also explained that § 2 of the FAA requires enforcement of arbitration agreements except when "such grounds as exist at law or in equity for the revocation of any contract."¹⁷² In *Gilmer*, the Court concluded that there were no such grounds because there was no indication that Gilmer was coerced or defrauded into signing the arbitration clause in his U-4 form.¹⁷³

Although the Court upheld the arbitration agreement in *Gilmer*, it declined to overrule the *Alexander* line of cases, which refused to allow binding arbitration of discrimination claims.¹⁷⁴ However, the Court distinguished the cases on several grounds.¹⁷⁵ First, the *Alexander* line of cases did not involve the enforceability of agreements to arbitrate statutory claims.¹⁷⁶ Rather, they discussed whether "arbitration of contract-based

165. *Id.* at 31-32 (citing NYSE GUIDE, *supra* note 158, ¶ 2627(a),(e), at 4321 (Rule 627); ¶ 2627(f), at 4322 (Rule 627)).

166. *Id.* at 32.

167. *Id.*

168. *Id.*

169. *Id.* at 32-33.

170. *Id.* at 33.

171. *Id.* (citing *Rodriguez*, 490 U.S. at 484; *McMahon*, 482 U.S. at 230).

172. *Id.* (citing 9 U.S.C. § 2 (1988)).

173. *Id.*

174. *Id.* at 35.

175. *Id.*

176. *Id.*

claims precluded subsequent judicial resolution of statutory claims.”¹⁷⁷ In *Alexander*, the employees had never agreed to arbitrate their statutory claims. Moreover, the Court indicated that the labor arbitrators in *Alexander* were not authorized to arbitrate such claims because the arbitration agreement only covered contract-based claims.¹⁷⁸

Second, the arbitration in the *Alexander* line of cases was governed by a collective bargaining agreement negotiated by the union rather than by an individual employment contract negotiated by the individual employee.¹⁷⁹ Under the agreement, the unions represented the employees in the arbitration proceedings.¹⁸⁰ Thus, bargaining unit interests prevailed over individual interests. Finally, the cases were not decided under the FAA, so the parties were not bound by the strong presumption of arbitrability.¹⁸¹ Because these cases are so factually distinguishable from *Gilmer* and thus inapplicable to the *Gilmer* decision, the Court did not expressly overrule their holdings.

The Supreme Court left two critical issues unresolved in *Gilmer*. First, because the arbitration agreement in *Gilmer* fell within a securities registration agreement rather than within the employment contract itself, the Court did not rule on whether § 1 of the FAA prohibits enforcement of arbitration agreements in individual employment contracts.¹⁸² Second, because the Court did not expressly overrule *Alexander*, it is unclear whether statutory civil rights claims are subject to binding arbitration based on arbitration agreements in individual employment contracts rather than in securities registration forms.

IV. EXTENDING *GILMER*: ENFORCING ARBITRATION AGREEMENTS IN INDIVIDUAL EMPLOYMENT CONTRACTS

Since the Supreme Court’s decision in *Gilmer*, Congress, the courts and the Executive Branch seem willing to enforce arbitration agreements in employment contracts and to compel arbitration of statutory discrimination claims. In addition, the EEOC initiated pilot alternative dispute resolution (“ADR”) programs in Houston, Philadelphia, New Orleans, and Washing-

177. 500 U.S. at 35.

178. *Id.*

179. *Id.*

180. *Id.* Lower courts subsequently explained that *Gilmer* does not apply to collective bargaining agreements. See *Griffith v. Keystone Steel & Wire Co.*, 858 F. Supp. 802, 804 (C.D. Ill. 1994).

181. *Gilmer*, 500 U.S. at 35.

182. See *supra* note 12.

ton, D.C.¹⁸³ The voluntary programs use outside mediators¹⁸⁴ rather than EEOC employees to handle disputes.¹⁸⁵ These developments indicate widespread support for out-of-court, alternative dispute procedures such as arbitration.

A. Executive and Legislative Developments

The policy decisions of the executive administration, under President George Bush, evidenced support for arbitration. President Bush vetoed the Civil Rights Act of 1990, which encouraged arbitration of Title VII claims but stated that plaintiffs should not be bound by an arbitrator's decision.¹⁸⁶ However, President Bush signed the Civil Rights Act of 1991 ("the 1991 Act"),¹⁸⁷ which encouraged the use of alternative dispute resolution but removed the provision stating that plaintiffs should not be bound by the arbitral decision.¹⁸⁸ Section 118 of the 1991 Act explicitly

183. *EEOC's Pilot Mediation Program Off to Slow Start, Official Says*, DAILY LAB. REP. (BNA), May 4, 1993, at A14 to A15 [hereinafter *EEOC Program*].

184. Mediation is similar to arbitration in that a neutral third person, the mediator, helps disputing parties reach an agreement in a private, informal dispute resolution process. BLACK'S LAW DICTIONARY 981 (6th ed. 1990). However, a mediator, unlike an arbitrator, "has no power to impose a decision on the parties." *Id.*

185. See *EEOC Program*, *supra* note 183, at A14 to A15. The program only covers Title VII, ADEA, and Americans with Disabilities Act ("ADA") on the "issues of discharge, discipline, and terms and conditions of employment." *Id.* Reasonable accommodation, class action, and equal pay claims are ineligible for mediation under the pilot program. *Id.* at A15.

The EEOC reserves jurisdiction and the right to take over proceedings if the parties are unable to reach an agreement through mediation. *Letter and Memo from EEOC Legal Counsel Thomisina V. Rogers*, DAILY LAB. REP. (BNA), Apr. 5, 1993, at F1 to F2.

186. See *Joint Explanatory Statement of the Comm. of Conference*, H.R. CONF. REP. NO. 856, 101st Cong., 2d Sess. 26 (1990). In August of 1994, Reps. Pat Schroeder, Edward Markey, and Marjorie Margolies-Mezvinsky introduced H.R. 4981, which was similar to a bill introduced earlier that year in the Senate, S. 2012, by Sen. Russell Feingold. 140 CONG. REC. E1753 (daily ed. Aug. 17, 1994) (remarks of Rep. Schroeder on H.R. 4981); 140 CONG. REC. S4266-67 (remarks of Sen. Feingold on S2012). The bill would have prevented employers from forcing workers to resolve employment discrimination claims through arbitration. *Bill Would Allow Workers to Sue Over Harassment*, L.A. TIMES, Aug. 18, 1994, at D2 [hereinafter *Harassment Bill*]. The legislation would have amended seven federal laws, including the 1964 Civil Rights Act. *Id.* While workers could voluntarily choose arbitration, they would still have the option to sue in court. *Id.* Rep. Schroeder explained: "In essence, what we're doing is reversing the *Gilmer* decision and saying you cannot make employees give up their federal rights at the time they are hired." *Id.* Asserting that arbitration can be biased, Rep. Markey said: "The counsel for O.J. Simpson would be hard-pressed to find fair representation (on the arbitration boards)." *Democrats Target Brokerages' Labor Practices*, DENVER POST, Aug. 18, 1994, at C2.

187. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

188. See *id.* Alternative dispute resolution ("ADR") is a term used to describe "procedures for settling disputes by means other than litigation." BLACK'S LAW DICTIONARY 78 (6th ed. 1990). In

states that "the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts."¹⁸⁹ Because the Civil Rights Act of 1991 excluded the provision for a judicial forum when parties agree to binding arbitration, it seems clear that Congress intended to recognize binding arbitration agreements in individual employment contracts.

Also in 1991, President Bush promulgated Executive Order 12778,¹⁹⁰ which encouraged the use of voluntary dispute resolutions by federal agencies.¹⁹¹ President Bush specifically encouraged informal methods of dispute resolution such as "informal discussions, negotiations, and settlements," rather than formal court proceedings.¹⁹² The President hoped the order would provide a model for similar reforms in the private sector and at the state level.¹⁹³ The Bush Administration's support for ADR influenced the lower courts.

B. Judicial Developments

Lower courts have applied the Supreme Court's analysis in *Gilmer* to uphold arbitration agreements in individual employment contracts, even those that compel arbitration of statutory discrimination claims.¹⁹⁴

addition to arbitration, ADR encompasses such processes as mediation and mini-trials. *Id.* ADR, which is usually less costly and more expedient, is now used in a variety of contexts, including divorce actions, motor vehicle and medical malpractice tort claims, and other disputes that would otherwise involve court litigation. *Id.*

189. Pub. L. No. 102-166, 105 Stat. 1071, 1081 (1991). Section 118 clearly applies to individual employment contracts. *See* Gray, *supra* note 116, at 131 n.64. For further evidence of Congress' intent to allow alternative dispute methods such as arbitration, see 28 U.S.C. § 473(a)(6) (1994) (authorizing federal courts "to refer appropriate cases to alternative dispute programs").

190. Exec. Order No. 12,778, 56 Fed. Reg. 55,195 (1991).

191. *Id.* at 55,195-96.

192. *Id.* at 55,196.

193. *Id.* at 55,195.

194. *See, e.g.,* *Maye v. Smith Barney, Inc.*, 897 F. Supp. 100, 109 (S.D.N.Y. 1995) (stating that it is "well-settled" that federal statutory claims, including discrimination claims, are subject to binding arbitration). In December 1994, the Supreme Court seemed to endorse the post-*Gilmer* trend by denying certiorari to *Nghiem v. NEC Elec., Inc.*, a case in which the Ninth Circuit enforced an arbitrator's resolution of an employee's discrimination claims and denied a judicial forum. 25 F.3d 1437, 1441 (9th Cir.), *cert. denied*, 115 S. Ct. 638 (1994).

Arguably, *Nghiem* was an easy case. The employee initiated arbitration proceedings pursuant to the company "Problem Resolution Process," presented evidence and argument in arbitration hearings, and submitted a fifty page closing brief before filing suit in state court. *Id.* at 1439. The court interpreted Nghiem's voluntary actions as a waiver of any objections he might have had over the authority of the arbitrator. *Id.* at 1440. The Ninth Circuit cited *Fortune, Alsweet & Eldridge, Inc. v. Daniel*, 724 F.2d 1355, 1357 (9th Cir. 1983), a factually similar case in which the same circuit confirmed an arbitration

Plaintiffs argue that the courts have extended the *Gilmer* rationale too far and present two key arguments against binding arbitration of discrimination claims: First, Congress intended to preclude arbitration of Title VII claims;¹⁹⁵ and second, plaintiffs must knowingly waive statutory rights in order to be bound by arbitration.¹⁹⁶

I. Congressional Intent to Preclude Arbitration of Title VII Claims

The Ninth Circuit, in *Mago v. Shearson Lehman Hutton, Inc.*,¹⁹⁷ did not agree that Congress intended to preclude arbitration of Title VII claims. Instead, the court, applying *Gilmer*, held that Title VII claims were subject to binding arbitration. In *Mago*,¹⁹⁸ a female employee, Mago, brought a Title VII action against her employer, Shearson, alleging sexual harassment and gender discrimination.¹⁹⁹ Shearson moved “to stay the proceedings and compel arbitration under the terms of its employment agreement” with Mago.²⁰⁰

Mago, like the plaintiff in *Gilmer*, relied on the *Alexander* line of cases and argued that Congress intended to prohibit binding arbitration of Title VII disputes because arbitration presents an “inherent conflict”²⁰¹ with the underlying purposes of Title VII.²⁰² The Ninth Circuit found the Supreme Court’s decision in *Gilmer* dispositive. Because Title VII and the ADEA

award, noting that it had “long recognized a rule that a party may not submit a claim to arbitration then challenge the authority of the arbitrator to act after receiving an unfavorable result.” *Id.* See also *Teamsters Local Union No. 764 v. J.H. Merritt & Co.*, 770 F.2d 40, 42 (3d Cir. 1985) (citing *Daniel* and upholding an arbitration award). If a case more difficult than these were to arise, the Supreme Court might decide to review the *Gilmer* extension.

195. See *infra* notes 197-205 and accompanying text.

196. See *infra* notes 206-24 and accompanying text. In addition to these two arguments, plaintiffs sometimes make the futile argument that § 1 of the FAA does not govern arbitration agreements in individual employment contracts, but courts have uniformly rejected the argument. See, e.g., *Crawford v. W. Jersey Health Sys.*, 847 F. Supp. 1232, 1240-41 (D.N.J. 1994); *Hull v. NCR Corp.*, 826 F. Supp. 303, 306 (E.D. Mo. 1993). For further discussion of the debate over § 1 of the FAA, see *supra* note 12.

197. 956 F.2d 932 (9th Cir. 1992).

198. *Id.*

199. *Id.* at 934. Mago brought her claims pursuant to 42 U.S.C. § 2000e-2 (1982), which prohibits employers from discriminating against pregnant female employees. *Id.*

200. *Id.* at 934. The arbitration clause required Mago to arbitrate “any controversy concerning compensation, employment, or termination of employment with Shearson.” *Id.*

201. “Inherent conflict” refers to the *McMahon* test. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987). For a discussion of the *McMahon* test, see *supra* notes 66-70 and accompanying text.

202. 956 F.2d at 935.

contain similar goals and substantive provisions,²⁰³ Mago's claims under Title VII were subject to binding arbitration just like Gilmer's claims under the ADEA.²⁰⁴ Thus, after *Gilmer*, courts have refused to interpret congressional intent to preclude binding arbitration of individual employment discrimination claims.²⁰⁵

2. *Plaintiffs Must Knowingly Waive Statutory Rights to Be Bound by Arbitration*

Even if courts generally uphold binding arbitration agreements, plaintiffs argue that arbitration clauses are unenforceable unless the employee knowingly waives his statutory rights.²⁰⁶ Although courts have interpreted *Gilmer* as allowing employees to waive the right to a judicial forum by signing an arbitration agreement in an employment contract, the Ninth Circuit adopted the plaintiffs' argument and recognized a narrow exception to *Gilmer*.²⁰⁷ In *Prudential Insurance Co. v. Lai*,²⁰⁸ the Ninth Circuit refused to uphold an arbitration agreement because the employer never gave the plaintiffs an opportunity to read the agreement before signing a U-4 form.²⁰⁹ The court concluded that employees may agree to arbitrate statutory employment claims, but it narrowed the issue to whether the plaintiffs had executed valid and knowing waivers²¹⁰ of Title VII reme-

203. See, e.g., *Lorillard v. Pons*, 434 U.S. 575 (1978) (explaining that Title VII and the ADEA are very similar statutes and are designed to accomplish the same goals); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544 (10th Cir. 1988) (finding the ADEA and Title VII statutorily similar, and thus, concluding that neither the ADEA nor Title VII arbitral awards preclude access to a judicial forum).

204. 956 F.2d at 935. See also *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994) (holding that, in light of *Gilmer*'s reasoning, it is clear that Title VII claims are subject to compulsory arbitration). But see *Gary v. Washington Metro. Area Transit Auth.*, 886 F. Supp. 78, 85-87 (1995) (concluding that Title VII claims cannot be subject to binding arbitration unless the claim involves a labor dispute subject to mandatory arbitration under terms of a collective bargaining agreement).

205. E.g., 956 F.2d at 935.

206. See, e.g., *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1304 (9th Cir. 1994).

207. See *id.*

208. 42 F.3d 1299 (9th Cir. 1994).

209. *Id.* at 1305.

210. The court did not define a "valid and knowing waiver." It simply based its decision on the fact that the arbitration agreement did not define the types of disputes subject to arbitration. *Id.* Because the agreement did not specifically refer to Title VII disputes, the court concluded that the employees did not knowingly forego their rights to a judicial forum. *Id.*

Unlike the court in *Lai*, the Third Circuit, in *Coventry v. United States Steel Corp.*, 856 F.2d 514, 522 (3d Cir. 1988), defined "voluntarily and knowingly" for purposes of allowing settlement of ADEA claims through private waivers of ADEA rights. The Third Circuit explained:

whether a waiver has been "knowingly and willfully" made has been predicated upon an

dies.²¹¹

In *Lai*, the employer directed employees to sign U-4 forms without allowing them to read the forms.²¹² Without mentioning arbitration or giving the plaintiffs a copy of the National Association of Securities Dealers ("NASD") Manual, which contained the actual terms of the arbitration agreement,²¹³ the employer told the employees that the forms were necessary to apply for a test required for employment.²¹⁴ The court held that the employees did not knowingly waive their statutory remedies in favor of arbitration because even had they read the forms, neither the U-4 form nor the NASD Manual described the types of disputes subject to

evaluation of several indicia arising from the circumstances and conditions under which the release was executed. Among those factors . . . are general principles of contract construction such as the clarity . . . of the language . . . and the absence of fraud or undue influence.

Id. at 522 (citations omitted). See also *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539, 541 (8th Cir.), cert. denied, 482 U.S. 928 (1987) (finding that an ADEA substantive waiver is valid so long as there is no "exploitation or overreaching"); *Moore v. McGraw Edison Co.*, 804 F.2d 1026, 1033 (8th Cir. 1986) (holding that an ADEA substantive waiver is valid "in the absence of fraud, deceit, or unconscionable overreaching"). In *Coventry*, the Third Circuit justified its heightened standard for evaluating waivers by explaining that the policy of eliminating employment discrimination required the court to evaluate the totality of the circumstances in addition to contract principles. 856 F.2d at 522-23.

Evaluating the *Coventry* decision, the *Nicholson* dissent rejected the Third Circuit's heightened standard. The dissent based its argument on the conclusion that arbitration satisfies the policy concern of eliminating discrimination. *Nicholson*, 877 F.2d at 242 n.14. Thus, the *Nicholson* dissent relied solely upon general contract principles to evaluate the employee's waiver of judicial forum. See *id.* at 242.

211. *Lai*, 42 F.3d at 1303. In *Lai*, the Ninth Circuit relied on a House Report that discussed the Civil Rights Act of 1991. The Report stated: "[T]he use of alternative dispute mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example . . . any agreement to submit disputed issues to arbitration . . . in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII." H.R. REP. NO. 40(I), 102nd Cong., 1st Sess., reprinted in 1991 U.S.C.C.A.N. 549, 635. The court also noted a statement made by Senator Dole during debates on the Civil Rights Act of 1991. *Lai*, 42 F.3d at 1305. Dole explained that the Civil Rights Act encourages arbitration only "where the parties knowingly and voluntarily elect to use these methods." 137 CONG. REC. S.15472-15478 (daily ed. October 30, 1991) (statement of Sen. Dole).

At least one court, when discussing the Ninth Circuit's decision in *Lai*, criticized *Lai's* reliance on this portion of the legislative history because it expressly contradicts the plain language of the text of the Civil Rights Act. See, e.g., *Maye v. Smith Barney, Inc.*, 892 F. Supp. 100, 107 (S.D.N.Y. 1995).

212. *Lai*, 42 F.3d at 1301.

213. *Id.* The arbitration agreement in the NASD Manual, which was not given to the plaintiffs before they signed the documents, provides: "Any dispute, claim or controversy eligible for submission under part I of this Code between or among members and/or associated persons . . . arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), shall be arbitrated under this Code. . . ." *Id.* at 1302. The plaintiffs also argued that even had they knowingly agreed to the arbitration clause, they could not be subject to binding arbitration because the language of the arbitration provision "does not cover employment disputes." *Id.* at 1303.

214. *Id.* at 1301.

arbitration.²¹⁵

Courts have narrowly construed the *Lai* exception. In *Gateson v. ASLK-Bank, N.V./CGER-Banque S.A.*,²¹⁶ the District Court for the Southern District of New York bound the plaintiff to an arbitration clause despite her argument that she had not executed a knowing waiver.²¹⁷ Unlike the plaintiffs in *Lai*, Gateson had read the arbitration agreement but argued that the language of the clause was too vague to put her on notice that it covered discrimination claims.²¹⁸ The court compared the plaintiff's arbitration clause, which mandated arbitration of controversies "arising out of or related to" the employment agreement, to the clause in *Lai*, which required arbitration of disputes "arising in connection with the business."²¹⁹ Even though the plaintiff's clause did not specifically mention employment discrimination claims, the court concluded that the clause was broad enough to encompass her discrimination claims.²²⁰

Just two months after its decision in *Gateson*, the District Court for the Southern District of New York further criticized the Ninth Circuit's decision in *Lai*. In *Maye v. Smith Barney, Inc.*,²²¹ the court applied ordinary contract principles and explained that, in the absence of fraud or wrongdoing on the part of the employer, an employee signing an employment contract is presumed to know and assent to its contents.²²² Because the plaintiffs had signed employment documents containing arbitration clauses, the court found that they knowingly agreed to submit employment disputes to arbitration.²²³ Because courts have narrowly construed the *Lai* decision, an employer can presumably ensure that employees execute "knowing waivers" simply by clarifying the language of the arbitration

215. 42 F.3d at 1305.

216. No. 94 Civ. 5849, 1995 WL 387720 (S.D.N.Y. June 29, 1995).

217. *Id.* at *3, *5.

218. *Id.* at *3.

219. *Id.* at *4.

220. *Id.* at *3. For similar conclusions with respect to clauses requiring arbitration of disputes "arising out of or relating to" the employment contract, see *Cherry v. Wertheim Schroder & Co.*, 868 F. Supp. 830 (D.S.C. 1994) (explaining that the arbitration clause put plaintiff on notice that her Title VII claims were subject to binding arbitration); *Hull v. NCR Corp.*, 826 F. Supp. 303 (E.D. Mo. 1993) (requiring plaintiff to submit to binding arbitration of Title VII and age discrimination claims because the arbitration clause was broad enough to encompass such claims).

221. 897 F. Supp. 100 (S.D.N.Y. 1995).

222. *Id.* at 108 (citing *Metzger v. Aetna Ins. Co.*, 125 N.E. 814, 816 (1920)).

223. *Id.*

clause in its employment contracts.²²⁴

V. IN SUPPORT OF *GILMER*: A PROPOSAL FOR ARBITRATION OF STATUTORY DISCRIMINATION CLAIMS

Arbitration constitutes a viable alternative to the judicial system for resolving disputes between employers and their employees. If arbitration mirrored litigation, parties would have no incentive to choose an alternative means of dispute resolution. Even though *Gilmer* expressly controls only the context of arbitration agreements in U-4 forms, its analysis is equally persuasive in individual employment contracts. An arbitration agreement in an employment contract should be just as effective as an arbitration agreement in a U-4 form. In fact, employers have an even stronger argument that courts should uphold arbitration agreements in employment contracts: Unlike the U-4 form, which only governs the employee's relationship with third parties, such as the NYSE, the employment contract directly governs the employer-employee relationship.

However, recognizing that arbitration procedures differ from judicial procedures, this Note addresses four areas of concern: employment contract arbitration, arbitration procedures, arbitrators' powers to award damages, and standards for judicial review. To encourage the use of alternative dispute resolution and to further protect the rights of the parties, this Note proposes a framework for arbitration of employment discrimination claims that satisfies the competing concerns of efficiency and fairness.

A. *Providing for Arbitration in the Employment Contract*

Although *Gilmer* holds that an arbitration agreement is not a contract of adhesion,²²⁵ courts continue to scrutinize the process by which employees agree to binding arbitration. The Ninth Circuit's decision in *Lai* indicates that a court may only force a Title VII plaintiff to forgo her statutory remedies and arbitrate her claims if she knowingly agrees to submit such disputes to arbitration.²²⁶

Although, in *Lai*, the Ninth Circuit did not specifically outline the elements of a "knowing waiver,"²²⁷ the court's opinion did identify

224. For a sample arbitration clause that would eliminate confusion over the scope of the arbitration agreement, see *infra* notes 231-32 and accompanying text.

225. See *supra* notes 169-73 and accompanying text.

226. *Prudential Insurance v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994). For a discussion of the Ninth Circuit's decision in *Lai*, see *supra* notes 208-15 and accompanying text.

227. *Lai*, 42 F.3d at 1305. See also *supra* note 210.

deficiencies in both the language of the contract and the signing procedures.²²⁸ First, the arbitration clause was vague.²²⁹ It simply required arbitration of disputes "arising in connection with the business."²³⁰ Understandably, an employee reading this provision might not realize that the employer intended the clause to encompass age discrimination claims as well as contract disputes. A better clause, which should occupy a bold and conspicuous place in the contract, would add this language:

This agreement to submit to arbitration includes, by way of example, any employment disputes involving unlawful discrimination, harassment, or wrongful discharge.²³¹ Employment disputes include, but are not limited to, all claims, demands, or actions under Title VII of the Civil Rights Act of 1964, Civil Rights Act of 1866, Civil Rights Act of 1991 . . . and all amendments to the aforementioned statutes, any other federal, state, or local statute or regulation regarding employment discrimination, or the termination of employment, and the common law of any state.²³²

This type of clause should eliminate ambiguities as to the scope of the arbitration clause. Furthermore, when employees sign the contract, the clause will inform them that discrimination claims are subject to binding arbitration.

In *Lai*, the court also criticized the employee's deficient signing procedures.²³³ The employer never provided the employees with a copy of the agreement to read and also falsely identified the employment forms as registration forms for mandatory exams. Thus, the employees were completely unaware of the rights they were waiving.²³⁴

To ensure that employees understand arbitration agreements, some commentators have suggested that employers separate arbitration agreements from employment contracts.²³⁵ After an employee is hired and

228. See *Lai*, 42 F.3d at 1305.

229. See *id.* at 1302.

230. *Id.*

231. AMERICAN ARBITRATION ASS'N, RESOLVING EMPLOYMENT DISPUTES: A MANUAL ON DRAFTING PROCEDURES 6 (May 1993).

232. *Maye v. Smith Barney Inc.*, 897 F. Supp. 100, 103 (S.D.N.Y. 1995) (reviewing the language of the employment contract, which included the stated provision). For further explanation of why the employer should specifically mention the statutory rights included in the agreement to arbitrate, see Note, *supra* note 23, at 586.

233. *Lai*, 42 F.3d at 1301.

234. *Id.*

235. See Joseph E. Herman, *Arbitrate, Don't Litigate, at Work*, N.Y. TIMES, Apr. 14, 1991, at C1. Under this proposal, Herman explains:

[Employees] could not be dismissed or disadvantaged for not choosing an alternative to

signs an employment contract, the parties can discuss an arbitration agreement and the employee can make an independent decision whether to sign the arbitration agreement.²³⁶ This approach would presumably reduce pressure to sign arbitration agreements, because agreeing to arbitrate would no longer be a condition of employment.²³⁷

However, an employer-employee relationship always involves some degree of unequal bargaining power. Simply because an employer presents an employee with an arbitration agreement on her second day of work rather than the first day does not mean that she is in a dramatically different position. It is unlikely that most employees would refuse to sign the agreement immediately after accepting their jobs. If the employer used an arbitration clause similar to the suggested provision, it should be sufficient that the employer encourages the employee to read the terms of the contract and provides the employee with ample opportunity to read the document before asking her to sign it. Such a procedure would presumably meet the standard set forth in *Lai*.

B. Arbitration Procedures

Although an arbitration proceeding is a quasi-judicial procedure, arbitrators are generally not bound by the rules of practice in the courts.²³⁸ Unless the arbitration agreement specifies the procedures to be followed, the arbitrator is granted broad discretion in determining the procedures so long as the proceedings are conducted honestly and fairly.²³⁹ Arbitrators should be allowed more flexibility because if arbitration procedures mirror civil litigation, arbitral forums would in effect constitute a parallel court system and parties would have no incentive to

litigation. Once made, the choice would be binding for the duration of the person's employment, unless both parties agreed to a change. Neither employers nor employees would be forced to agree to arbitration, but both would be able to establish a binding alternative.

Id.

236. *See id.*

237. *See Coral Kingdom v. Harter*, 649 P.2d 1159, 1161 (Haw. 1982).

238. *See Drinane v. State Farm Mut. Auto. Ins. Co.*, 606 N.E.2d 1181, 1183 (Ill. 1992). Arbitration represents a trade-off between elaborate fact-finding, and cost and time savings and informality. *See* Thomas H. Stewart, *Arbitrating Claims Under the Age Discrimination in Employment Act of 1967*, 59 CIN. L. REV. 1415, 1436-37 (1991). Stewart argues that parties who agree in advance to arbitrate claims cannot claim the defense that arbitration procedures are inadequate to resolve their claims. *Id.*

239. *See, e.g., U.S. Turney Exploration, Inc. v. PSI, Inc.*, 577 So. 2d 1131, 1135 (La. Ct. App. 1991) (holding that absent an agreement between the parties, arbitrators are not bound by formal rules of procedure and evidence and need only ensure that the parties are granted a "fundamentally fair hearing").

choose an alternative means of dispute resolution.

Arbitration offers advantages to each party involved. Parties settle disputes in a less antagonistic and more private forum,²⁴⁰ which generally saves each party time²⁴¹ and money.²⁴² Efficiency allows both employer and employee to return to work much sooner. In addition, the lower cost of arbitration should actually increase access to the legal system for parties with limited financial resources.²⁴³

However, recognizing that employment disputes raise different issues than commercial disputes, the American Arbitration Association ("AAA")²⁴⁴ promulgated the *Employment Dispute Resolution Rules* ("*EDR Rules*").²⁴⁵ Because the AAA specifically tailored these rules to govern employment disputes, employers should explicitly state in arbitration agreements that the *EDR Rules* shall apply to all disputes. Furthermore, a presumption of binding arbitration should attach to parties

240. Arbitration proceedings, unlike judicial proceedings, are not a matter of public record. *See generally*, SUSAN M. LEESON & BRYAN M. JOHNSTON, ENDING IT: DISPUTE RESOLUTION IN AMERICA 47 (1988). Both parties benefit from the relative privacy of arbitration proceedings. Arbitration will not limit employees' opportunities to find other employment because the public will not have access to the employee's dispute with her employer. Similarly, employers will not suffer from a negative public perception of their hiring and employment practices.

241. One study indicates that litigated cases generally take 3 to 8 years to reach final resolution while arbitration generally resolves disputes in less than 10 months. Garry G. Mathiason & Pavneet S. Uppal, *Evaluating and Using Employer-Initiated Arbitration Policies and Agreements: Preparing the Workplace for the Twenty-First Century*, in EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN FEDERAL AND STATE COURTS 875, 894 (ALI-ABI Course of Study Materials No. C902, 1994).

ADEA plaintiffs, in particular, benefit from the time savings in arbitration. *See Note, supra* note 23, at 582. Because older employees may encounter more difficulty in obtaining other employment, they may have no source of income with which to fund a protracted lawsuit. *Id.*

242. *See Mathiason & Uppal, supra* note 241, at 894 (noting that arbitration of employment disputes may reduce costs as much as 50%). The lower cost of arbitration may even increase access to the legal system for plaintiffs with limited financial resources. *See Note, supra* note 23, at 581.

243. *See Note, supra* note 23, at 581. The Note's author argues that plaintiffs' attorneys may be reluctant to accept judicial cases of discrimination claims on a contingency basis because of the cost and uncertainty involved. *Id.* (citing Sharon Walsh, *The Vanishing Job-Bias Lawyers; Attorneys, Law Firms Say They Can't Afford to Try Cases*, WASH. POST, July 6, 1990, at C1). Thus, arbitration benefits plaintiff-employees as well as their employers.

244. The AAA "is a public service, not-for-profit organization offering a broad range of dispute resolution services through offices located in major cities across the United States." *See EDR RULES, supra* note 18, at 3. Furthermore, through its main office in New York, the "AAA provides consulting services, education and training, specialized publications, and research on all forms of dispute settlement." *Id.*

245. *Id.* The AAA developed the *EDR Rules* as a guide for employers to follow when employers and employees agree to arbitrate their employment-related disputes. *Id.* Although the rules are not mandatory, this Note suggests that employers should state in their arbitration agreements that the *EDR Rules* apply in all disputes.

whose disputes adhere to the *EDR Rules*. The AAA should also adopt several additional rules governing the parties' selection of an arbitrator, evidence and discovery before and during arbitration, and arbitration opinions.

1. Choice of Arbitrator

Under the *EDR Rules*, arbitrators must be neutral²⁴⁶ and familiar with the employment field.²⁴⁷ When a party submits a dispute to the AAA, it sends each party a list of potential arbitrators.²⁴⁸ Similar to the NYSE rules applicable in *Gilmer*,²⁴⁹ the AAA rules should require arbitrators to disclose their employment histories and any circumstances that would preclude them from rendering impartial opinions.²⁵⁰ The AAA should send this information to the parties when it provides a potential list of arbitrators. Furthermore, when the AAA sends a list to disputing parties, it should allow each party to strike three names from the list and number the

246. *Id.* at 14, 15 (rules 8(b) and 8(c)). A court may set aside any award rendered by an arbitrator if he fails to make adequate disclosure of facts relevant to assessing his impartiality. *Andros Compania Maritima v. Marc Rich & Co.*, A.G., 579 F.2d 691, 699 (2d Cir. 1978).

Plaintiffs argue that hearings can be biased when one party is a "repeat player" who brings numerous cases before the same arbitrators each year. Richard C. Reuben, *The Dark Side of ADR*, CAL. LAW., Feb. 1994, at 53. In 1994, the United States General Accounting Office completed a study on arbitration panels. Beth Healy, *Ex-Broker Wins Gender-Bias Case*, BOSTON BUS. J., Aug. 26, 1994, at 1. The report called for reforms in the selection of arbitrators and for improved oversight of the system. *Id.* In addition, the study found that most NASD arbitrators were white men over the age of 60. *Id.*

While this study points out potential imperfections in the arbitral system, the same arguments could be made about the civil court system. Attorneys for large local firms who routinely appear before local judges could be termed "repeat players." Does this mean that local judges are inherently biased? In addition, selection of judges for the civil courts, whether completed by appointment or election, does not always ensure that the most neutral candidates are chosen. Finally, even if arbitrators are disproportionately white males, how is this worse than the judicial system?

247. See EDR RULES, *supra* note 18, at 14 (rule 8(a)). Requiring arbitrators to be familiar with employment law may often make an arbitrator more informed on the issues and the law, and thus more competent to evaluate an employee's claims, than a judge. See ELKOURI & ELKOURI, *supra* note 15, at 376 (stating that "[c]ourts aren't right more often than arbitrators and the parties because they are wiser. They are 'right' because they have the final say.") (quoting James E. Westbrook, *The End of an Era in Arbitration: Where Can You Go If You Can't Go Home Again* (unpublished manuscript, 1980)).

248. See EDR RULES, *supra* note 18, at 15 (rule 9).

249. For a discussion of the NYSE rules, see *supra* note 158 and accompanying text.

250. For example, assume the arbitrator, A, is a former attorney for law firm X, one of whose clients is XYZ Corp. Further, assume that A defended XYZ Corp. in a tort suit while working for firm X. B, an employee of XYZ Corp., is terminated and files an age discrimination claim against XYZ Corp. A should be required to disclose his affiliation with firm X and should not be allowed to sit as the arbitrator of B's dispute with XYZ Corp.

remaining names in preferential order. The AAA would then appoint an arbitrator from this list.

2. Evidence and Discovery

Although the judicial rules of evidence and discovery do not apply to arbitration proceedings, an arbitrator should have the power to subpoena witnesses or documents, either independently or at the request of a party.²⁵¹ If parties agree to follow the *EDR Rules*, the arbitrator would have these broad powers.²⁵² In addition, although the arbitrator's decision to order production of documents should be discretionary, arbitrators should always require employers to give employees access to all documents in their individual employment file. Binding arbitrators to more rigid evidentiary rules would make arbitration no different than a judicial proceeding and take away the benefits of arbitration.²⁵³

3. The Opinion

Unlike judges, arbitrators generally do not issue lengthy opinions explaining their decisions.²⁵⁴ In part, this results from the fact that an arbitrator's decision only binds the disputing parties. However, the law permits arbitrators to look at relevant judicial precedent to analyze the legal issues.²⁵⁵

251. See Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 483 (1988). Stipanowich proposed that the AAA Rules be amended to allow arbitrators to order discovery as they deem it appropriate. *Id.* The *EDR Rules* promulgated by the AAA in 1993 grant powers to the arbitrator similar to those outlined in the proposal. See *EDR RULES*, *supra* note 18, at 20 (rule 29(c)).

In *Williams v. Katten, Muchin & Zavis*, 837 F. Supp. 1430 (N.D. Ill. 1992), an Illinois District Court dismissed the plaintiff's concern over inadequate discovery provisions. *Id.* at 1439. The court noted that because the *EDR Rules* "authorize an arbitrator to subpoena witnesses and documents either independently or upon request of either party," arbitration procedures are sufficient. *Id.*

252. See *EDR RULES*, *supra* note 18, at 20 (rule 29(c)).

253. For a discussion of the benefits of arbitration, see *supra* note 240-43 and accompanying text.

254. Both the California Arbitration Act and the NYSE require written decisions. Michele M. Buse, Comment, *Contracting Employment Disputes Out of the Jury System: An Analysis of the Implementation of Binding Arbitration in the Non-Union Workplace and Proposals to Reduce the Harsh Effects of a Non-Appealable Award*, 22 PEPP. L. REV. 1485, 1537 n.385 (1995).

255. Critics assert that employment discrimination law will fail to develop if parties agree to arbitrate discrimination claims because arbitrators do not issue opinions explaining their decisions. See *supra* note 163. However, nothing prevents arbitrators from applying judicial precedent when deciding cases. Further, arbitrating cases involving individual employment contracts would not remove all cases from the courts because at-will employees and all employees bound by collective bargaining agreements would continue to sue in judicial forums. See *Gilmer*, 500 U.S. at 32 (arguing that arbitration will not hinder development of the law because most cases will still be decided in judicial forums).

Even though an arbitrator's decision only binds the parties to the suit, the arbitrator should be required to issue a detailed written opinion giving the reasons for the decision. The *EDR Rules* require an award to be in writing and signed by a majority of arbitrators resolving the dispute, but the opinion may be given in summary form.²⁵⁶ However, the employee's interest in obtaining a detailed written opinion far outweighs the burden such a requirement would impose on arbitrators. An opinion may be necessary for courts to evaluate the merits of an appeal or determine damages based on the arbitrator's resolution of the dispute.²⁵⁷

C. *The Arbitrator's Power to Award Damages*

Generally, an arbitrator can award "any remedy or relief" he deems "just and equitable" within the scope of the parties' agreement.²⁵⁸ In making an award, an arbitrator also assesses fees and costs.²⁵⁹ Thus, in most cases, arbitrators and judges enjoy equivalent powers to award damages. In fact, studies demonstrate that arbitral awards are at least as great as judicial awards, and arbitrators often award punitive damages.²⁶⁰ Many empirical studies conclude that arbitral awards in discrimination suits closely resemble judicial decisions in similar disputes.²⁶¹ These studies refute concerns over plaintiffs' inability to recover damages in arbitration.

However, some state laws limit an arbitrator's ability to award some forms of damages.²⁶² A New York law, for example, prohibits arbitrators

256. *EDR RULES*, *supra* note 18, at 20 (rule 29(c)).

257. In some states, arbitrators do not have the power to award damages. For a proposal on how to handle damage awards under such restrictions, see *infra* notes 262-63 and accompanying text.

258. *EDR RULES*, *supra* note 18, at 20 (rule 29(c)). Section 29(c) provides that "[t]he arbitrator may grant any remedy or relief that [he] deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of the contract." *Id.*

259. *Id.* Section 29(c) also provides that "[t]he arbitrator . . . shall, in the award, assess arbitration fees, expenses, and compensation . . . in favor of any party and, in the event any administrative fees or expenses are due the AAA, in favor of the AAA." *Id.*

260. See Michael Siconolfi, *Blow to Brokers: Stock Investors Win More Punitive Awards in Arbitration Cases*, WALL ST. J., June 11, 1990, at A1.

261. See Deborah R. Willig, *Arbitration of Discrimination Grievances: Arbitral and Judicial Competence Compared*, in *ARBITRATION 1986: CURRENT AND EXPANDING ROLES, PROCEEDINGS OF THE THIRTY-NINTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 101 (Walter J. Gershenfeld ed., 1987).

262. See, e.g., *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793, 794-97 (N.Y. 1976) (vacating an arbitrator's award of punitive damages because enforcing such an award as a purely private remedy would violate public policy); *In re Dreyfus Serv. Corp.*, 584 N.Y.S.2d 483, 484 (N.Y. App. Div. 1992) (holding that arbitrators have no power to award punitive damages, even if agreed upon by the parties); *Kennewick Educ. Ass'n v. Kennewick Sch. Dist.* No. 17, 666 P.2d 928, 930 (Wash. Ct. App. 1983)

from awarding exemplary damages.²⁶³ In states with such restrictions, arbitrators should bifurcate the employee's claim. Once the arbitrator resolves the liability issue, the arbitrator should send the case to a judicial forum to determine damages.

D. *Standards for Judicial Review*

When parties agree to arbitrate their disputes, they also agree that the arbitrator's resolution shall be binding.²⁶⁴ To allow the parties to seek judicial review of an arbitrator's decision would frustrate the goals of arbitration and establish the arbitral forum as tantamount to a lower court. Although the employment dispute resolution rules do not address the issue, the FAA adopts a strict standard for vacating an arbitrator's award.²⁶⁵ For example, a court may vacate an arbitral award if there is evidence of fraud, corruption, misconduct, or if the arbitrator exceeds her power.²⁶⁶ This standard is sufficiently strict to uphold the parties' intent to be bound by the arbitrator's decision, yet it allows for judicial review when the arbitrator blatantly disregards the law. Thus, Congress should not amend the FAA to adopt a more lenient standard for judicial review.

(concluding that "recovery of punitive damages is contrary to public policy . . . unless expressly authorized by statute"); *School City of E. Chicago, Indiana v. East Chicago Fed'n of Teachers, Local # 511*, 422 N.E.2d 656, 663 (Ind. Ct. App. 1981) (vacating arbitrators award of punitive damages as contrary to public policy).

263. *See Fahnestock & Co. v. Waltman*, 935 F.2d 512, 517 (2d Cir. 1991) (vacating the punitive damages award as beyond the authority of arbitrators under New York law and citing *Garrity*, 353 N.E.2d at 795); *see also Dreyfus Serv. Corp.*, 584 N.Y.S.2d at 484.

264. *See supra* note 18 and accompanying text.

265. *See* 9 U.S.C. § 10 (1994). The FAA provides the following standards for the vacation of an arbitration award:

- (1) Where the award was procured by corruption, fraud, or undue means.
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
- (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Id.

One commentator argues that courts have imputed a stringent "manifest disregard" standard into § 10 of the FAA. *See* Christine Godsil Cooper, *Where Are We Going With Gilmer?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. L. U. PUB. L. REV. 203, 216-17 (1992). This standard goes beyond "mere error, misinterpretation, misunderstanding, or misapplication of the law." *Id.*

266. 9 U.S.C. § 10 (1994).

VI. CONCLUSION

The *Gilmer* extension parallels an increasing willingness on the part of courts and Congress to allow parties to execute private agreements to arbitrate their disputes. While *Gilmer* did not expressly condone the use of arbitration agreements in individual employment contracts, both the Supreme Court's strong presumption of arbitrability and the proposed changes to rules governing the arbitration of employment disputes suggest that the *Gilmer* extension is warranted.

Binding arbitration is an attractive alternative to litigation for resolving employment discrimination claims. The proposed changes to arbitration procedures allow parties to enjoy the benefits of arbitration and overcome the perceived weaknesses in arbitration procedures.

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