

1999

## The High Cost of Efficiency: Mandatory Arbitration in the Securities Industry

Beth E. Sullivan  
*ULJ*

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Dispute Resolution and Arbitration Commons](#)

---

### Recommended Citation

Beth E. Sullivan, *The High Cost of Efficiency: Mandatory Arbitration in the Securities Industry*, 26 Fordham Urb. L.J. 311 (1999).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol26/iss2/5>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## The High Cost of Efficiency: Mandatory Arbitration in the Securities Industry

### Cover Page Footnote

J.D. Candidate, Fordham University School of Law, 1999. B.A., English, College of the Holy Cross, 1996. The author would like to thank Isaac Greaney for his insightful suggestions and critiques throughout the drafting of this Note. The author also wishes to extend her utmost gratitude to her parents, Jack and Maryann Sullivan, for their steadfast love, support and encouragement.

# THE HIGH COST OF EFFICIENCY: MANDATORY ARBITRATION IN THE SECURITIES INDUSTRY

Beth E. Sullivan\*

## Introduction

Linda Willis was an employee at Dean Witter for over six years.<sup>1</sup> During her last two years at the company, however, she found the work environment to be “hostile and demeaning to all female employees,” and contends that she “was discharged and/or forced by [Dean Witter] to resign her employment . . . because of her sex.”<sup>2</sup> Although Miss Willis’ situation appears characteristic of most sexual harassment and gender discrimination claims, she did not find herself in the shoes of a typical claimant. As a registered member of the securities industry, she signed a pre-dispute mandatory arbitration contract as a condition of her employment. As such, her claim was never presented to a jury of her peers, but rather to what was likely a homogenous panel of white males in their sixties.<sup>3</sup> Reportedly, and not surprisingly, “women have not fared well” before such panels.<sup>4</sup>

The above scenario reflects what has become standard practice in the securities industry. Anyone seeking a license to buy or sell securities must sign a Form U-4, formally known as the Uniform

---

\* J.D. Candidate, Fordham University School of Law, 1999. B.A., English, College of the Holy Cross, 1996. The author would like to thank Isaac Greaney for his insightful suggestions and critiques throughout the drafting of this Note. The author also wishes to extend her utmost gratitude to her parents, Jack and Maryann Sullivan, for their steadfast love, support and encouragement.

1. See *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991).

2. *Id.* at 306 (citing J. App. at 9-10).

3. See Judith P. Vladeck, *Validity of ADR for Job Disputes: ‘Yellow Dog Contracts’ Revisited*, N.Y. L.J., July 24, 1995, at 7, col. 2 (“The panels of the New York Stock Exchange or the NASD are composed, almost exclusively, of men who are older than sixty. In fact, almost ninety percent of the 3,000 arbitrators used by those agencies are male.”); see also Roland Jones, *To Arbitrate or Litigate? Employees May Fare Better in Court, But Arbitration May Prove to be the Better Forum As Panels Become More Diversified*, ON WALL ST., Oct. 1, 1997, available in 1997 WL 8814281 (“A 1994 U.S. General Accounting Office study of NASD and NYSE arbitrators showed that 89 percent of arbitration panel members are male, 97 percent are white, and a panelist’s average age is sixty . . .”). “If I were picking a jury for a federal court, not one person from these arbitration panels would be on that jury.” *Id.* (quoting New York securities lawyer, Jeffrey Liddle).

4. Vladeck, *supra* note 3.

Application for Securities Industry Registration or Transfer.<sup>5</sup> The Form U-4 includes an agreement mandating that all employment-related disputes, including federal statutory claims of sexual harassment and racial discrimination, be resolved through arbitration.<sup>6</sup> In signing the mandatory arbitration contract, employees within the industry are denied court-provided rights such as due process, trial by jury, the appeals process and full discovery.<sup>7</sup> "In essence, mandatory arbitration contracts reduce civil rights protections to the status of the company car: a perk which can be denied at will."<sup>8</sup>

Employers and their attorneys proclaim that because mandatory arbitration saves time and money by dispensing with the complexities and burdens of litigation, such as pretrial motions and discovery, it ultimately benefits both the employer and employee.<sup>9</sup> Other proponents of mandatory arbitration cite freedom of contract principles as a rationale,<sup>10</sup> while still others praise it for its ability to foster cooperation and maintain work relationships.<sup>11</sup> Critics, how-

---

5. The Form U-4 is used by the American Stock Exchange, the National Association of Securities Dealers ("NASD") and the New York Stock Exchange ("NYSE") for the registration of individuals dealing in securities. See *Willis*, 948 F.2d at 306; see also Patrick McGeehan & Deborah Lohse, *NASD May Vote Today to Halt Mandated Harassment Arbitration*, WALL ST. J., Aug. 7, 1997, at B2; Christopher E. Bush, *Supreme Court Tackles Sexual Harassment, A Big Settlement on Wall Street; Mandatory Arbitration at Issue*, CORP. LEGAL TIMES, Feb. 1998, at 1; Kenneth R. Davis, *The Arbitration Claws: Unconscionability in the Securities Industry*, 78 B.U. L. REV. 255, 291 (1998) [hereinafter Davis, *The Arbitration Claws*].

6. The arbitration clause in relevant part provides: "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register." *Willis*, 948 F.2d at 306 (quoting Securities Registration Form U-4 (in effect October 1982)); see also Deborah Lohse, *NASD Votes to End Arbitration Rule in Cases of Bias*, WALL ST. J., Aug. 8, 1997, at B14; *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190 (D. Mass. 1998).

7. See Statement by Rep. Edward J. Markey (D-Mass.) before the Senate Banking Committee on Mandatory Arbitration in the Securities Industry (July 31, 1998), *Mandatory Arbitration in Securities Industry* [hereinafter Markey]; see also Davis, *The Arbitration Claws*, *supra* note 5 (noting that "[t]he industry-wide use of Form U-4 makes it even more coercive than most contracts of adhesion, which, although offered on a take-it-or-leave-it basis, are not universally required").

8. Markey, *supra* note 7.

9. See David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 60 (1997).

10. See Miriam A. Cherry, *Not-So-Arbitrary Arbitration: Using Title VII Disparate Impact Analysis to Invalidate Employment Contracts That Discriminate*, 21 HARV. WOMEN'S L.J. 267, 278 (1998).

11. See Kenneth R. Davis, *A Model for Arbitration Law: Autonomy, Cooperation and Curtailment of State Power*, 26 FORDHAM URB. L.J. 168-69 (1999) [hereinafter Davis, *A Model for Arbitration*] (describing how "arbitration uniquely promotes two

ever, including the Equal Employment Opportunity Commission ("EEOC"), National Association for the Advancement of Colored People ("NAACP") and National Organization for Women ("NOW"), are deeply disturbed by the fact that arbitration statistically favors the employer and tends to result in outcomes that fall short of the remedies prescribed under federal civil rights law.<sup>12</sup> Opponents further contend that mandatory arbitration is intrinsically unfair and blatantly violates Title VII of the Civil Rights Act of 1964 ("Title VII") because of its disparate impact on women and people of color.<sup>13</sup>

Despite the onslaught of criticism and heated debate sparked by mandatory arbitration contracts and clauses, they remain boilerplate provisions of employment applications within the industry. In addition, they are rapidly becoming the norm in similar areas of the economy, such as Fortune 500 companies and financial services, as well as other areas such as health care, engineering and information technology.<sup>14</sup> The securities industry, however, is unique in its requirement that an employee commit to the arbitration of all employment-related disputes as a term and condition of employment.<sup>15</sup> Moreover, because this practice is nearly industry-wide, if one wishes to work in the securities industry, he or she has no choice but to acquiesce to mandatory arbitration.<sup>16</sup>

The U.S. Supreme Court's 1991 ruling in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>17</sup> likely accelerated the expansion of this practice. The Court held that a mandatory arbitration clause in a stockbroker's New York Stock Exchange ("NYSE") registration

---

seemingly incompatible values: individual autonomy and cooperation"); Christine Lepera, *What the Business Lawyer Needs to Know About ADR*, 578 PLI/LIT 709, 725-26 (Jan. 1998).

12. See Pete Bucci, *Pre-Employment Waivers Favored By Businesses, But Backlash May Be Brewing*, CAP. DIST. BUS. REV., Aug. 18, 1997, at 15.

13. See Cherry, *supra* note 10, at 299.

14. See *id.* at 269; see also Bucci, *supra* note 12, at 15 (noting that recent news reports have revealed that "last year 300 companies moved into mandatory arbitration, which breaks down to a rate of twelve to fifteen per month"); Markey, *supra* note 7; Rebecca Ganzel, *Second-class Justice? (binding arbitration agreements as alternative dispute resolution tools)*, TRAINING, Oct. 1, 1997, at 84 (noting that "[a] recent survey by the Society for Human Resource Management found that nearly one in seven respondents worked in companies that 'always' or 'sometimes' used ADR to resolve employment-related conflicts").

15. See Statement by Russell Feingold (D-Wis.) before the Committee on Banking, Housing and Urban Affairs (July 31, 1998), *Mandatory Arbitration in Securities Industry*, reprinted in 98 CONG. TEST. [hereinafter Feingold].

16. See *id.*

17. 500 U.S. 20 (1991).

application constituted an exclusive remedy with respect to age discrimination claims.<sup>18</sup> Additionally, despite the EEOC's adamant opposition to mandatory arbitration,<sup>19</sup> a majority of lower courts not only has followed *Gilmer* with respect to age discrimination claims, but also has extended *Gilmer* to statutory claims under Title VII and the Americans with Disabilities Act ("ADA").<sup>20</sup> Moreover, courts have applied the ruling to plaintiffs outside of the securities industry.<sup>21</sup> In fact, until very recently, courts have almost "universally" enforced mandatory arbitration contracts and clauses.<sup>22</sup>

Over the past year, a number of high profile cases within the industry have brought the inequities of mandatory arbitration to the nation's attention.<sup>23</sup> In response, members of the SEC and

---

18. See *id.*

19. See Josh Lubin, *The Legality of Mandatory Arbitration Clauses in Individual Employment Contracts*, 66 GEO. WASH. L. REV. 1031, 1037 (1996-97). The EEOC has raised four primary concerns regarding mandatory arbitration of statutory claims as a condition of employment: "(1) arbitration is not subject to the requirements of Title VII; (2) arbitrators have no training and possess no expertise in employment law; (3) arbitrators routinely deny plaintiffs punitive damages and attorney's fees; and (4) some plaintiffs have to pay large arbitration costs." *Id.*

20. See *infra* notes 93-94 and accompanying text.

21. See Leslie Kaufman & Anne Underwood, *Sign or Hit the Street: Want a Job? More and More Employers Require Workers to Agree Not to Take Them to Court*, NEWSWEEK, June 30, 1997, at 48 (reporting on the recent trend among companies such as JCPenny, Renaissance and ITT Hotels, Great Western Mortgage and Hooters of America to make pre-dispute arbitration agreements a condition of employment).

22. Cherry, *supra* note 10, at 271.

23. See *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190 (D. Mass. 1998) (stockbroker sued her former employer and former supervisor for age and gender discrimination and sexual harassment under the ADEA and Title VII). The plaintiff, Rosenberg, "alleged that when she came looking for a document, one of her supervisors handed her a phallus-shaped vibrator. Six weeks later, the same supervisor told Rosenberg that her performance was below par and suggested she resign." Sheldon Goldfarb et al., *Securities Industry Must Prepare for Arbitration's End*, CORP. LEGAL TIMES, Sept. 1998, at 30; see also *infra* notes 198-204 and accompanying text (discussing outcome of the case at trial).

Salomon Smith Barney also gained notoriety when twenty-five former and current brokers sued the firm, alleging that they were routinely subjected to discrimination and sexual harassment by male co-workers. See Edward Iwata, *Huge Sexual Harassment Suit Hits Wall Street Firm — Pioneer Class Action Cites "Locker Room" Atmosphere Coast-to-Coast*, S.F. EXAMINER, Oct. 18, 1996, at A1; John Schmeltzer, *Smith Barney Settles with Female Brokers, 20,000 May Benefit From Uncapped Fund*, CHI. TRIB., Nov. 18, 1997, at 1 (noting how the women described a "fraternity-like atmosphere in most of Smith Barney's more than 390 offices around the country"). "Their complaints charged the company with allowing operation of 'Boom Boom Rooms' where male employees were served Bloody Marys while they joked about sexual harassment complaints; of managers offering women \$100 to strip; and of allowing managers to routinely eliminate jobs of women while they were on maternity leave." Schmeltzer, *supra*. The firm ultimately agreed to spend fifteen million dollars on di-

Congress have expressed doubts as to whether mandatory arbitration of statutory claims is appropriate in cases of employment discrimination,<sup>24</sup> and one circuit has taken steps to rectify what it perceives to be a gross injustice.<sup>25</sup> In addition, the SEC recently approved a proposed rule change by the National Association of Securities Dealers ("NASD"), which abandons mandatory arbitration of sexual harassment and racial discrimination claims, thereby granting employees in the securities industry the option of taking their complaints to court.<sup>26</sup> Nonetheless, brokerage houses across the country already have voiced their refusal to compromise.<sup>27</sup> In

---

iversity programs, fund a study of the recruitment and utilization of women in the securities industry and allow sexual harassment plaintiffs to use outside referees. *See* Andrew Fraser, *Smith Barney 'Boom-Boom Room' Settlement May Sink Mandatory Arbitration*, HARRISBURG PATRIOT & EVENING NEWS (PA.), Nov. 18, 1997, at B7. The brokerage house also promised to ensure that at least 33% of its broker training programs are comprised of women for the next three years, as well as fill 15% of its openings for assistant branch managers and 10% of its branch manager openings with women. *See id.* (noting that this move will reportedly double the number of women in these positions); *see also* *Smith Barney Breaks With Wall Street in Settling Harassment Case*, WASH. POST, Nov. 19, 1997, at C12; Patrick McGeehan, *Smith Barney Diversity Plan Represents a Major Leap for Women on Wall Street*, WALL ST. J., Nov. 19, 1997, at B2.

Despite making such concessions, however, the firm refuses to grant employees the choice of whether to take complaints to court or to a private forum. *See* *Salomon Smith Barney Updates Non-Compete, Arbitration Agreement*, REG. REP., April 30, 1998 (noting how Salomon Smith Barney was the first major firm to draft a private pre-dispute arbitration agreement in anticipation of the NASD's move to exclude civil rights claims from mandatory arbitration). Consequently, some industry experts have dismissed the settlement as "a public relations coup for Smith Barney because it would end an embarrassing chapter for the firm and could end up being less damaging — and costly — than a court fight." Fraser, *supra*. Other experts, however, have claimed that the decision to permit claims to be heard by an outside arbitrator could "undermine arguments by the industry that there is nothing wrong with the current system." *Id.* There certainly appears to be merit in this opinion, given that the settlement is coming from one of the largest brokerage firms on the Street.

24. *See* John C. Coffee, Jr., *Sex and the Securities Industry*, N.Y. L.J., May 29, 1997, at 5.

25. *See, e.g.,* *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998) (holding the Form U-4 to be unenforceable in the context of a Title VII claim on the grounds that it violated the 1991 Civil Rights Act); *see also infra* notes 178-93, 206-207 and accompanying text (describing the Ninth Circuit's recent rulings).

26. *See* *SEC Ends Forced Arbitration of Discrimination, Harassment Claims*, REG. REP., Aug. 30, 1998, available in 1998 WL 11871106 [hereinafter *SEC Ends Forced Arbitration*]; Rosalyn Retkwa, *Forced Arbitration Under Attack*, REG. REP., August 30, 1998, available in 1998 WL 11871100. *See also infra* notes 110-121 and accompanying text.

27. Smith Barney, in anticipation of the NASD's and NYSE's exclusion of statutory civil rights claims from mandatory arbitration, issued an employee handbook asking employees to sign an agreement to arbitrate all disputes. *See* *SEC Ends Forced Arbitration of Discrimination*, *supra* note 26; *Solomon Smith Barney Updates Non-Compete Arbitration Agreement*, REG. REP., Apr. 30, 1998; *see also supra* note 23. St.

fact, as soon as rumors of the rule change began to spread, broker-dealers adamantly proclaimed their intent to preserve mandatory arbitration agreements by instituting private pre-dispute contracts as conditions of employment.<sup>28</sup> It thus follows that with the Supreme Court remaining silent on the issue, and *Gilmer* the final word, the industry will continue to routinely engage in this practice that so many have characterized as unfair and prejudicial.

This Note focuses on mandatory arbitration within the securities industry and argues that the practice fails to comport with the current status of our nation's sexual harassment and civil rights laws by creating a disparate impact on and undermining the statutory rights of women and minorities. Part I traces the development of pre-dispute mandatory arbitration contracts and examines recent resistance to their application in the context of civil rights. Part II evaluates the pros and cons of mandatory arbitration, and reviews the current discrepancy in the circuit courts with respect to the enforcement of mandatory arbitration contracts in employment discrimination cases. Part III scrutinizes the enforcement of mandatory arbitration contracts and clauses for federal statutory claims of racial discrimination and sexual harassment in light of the Civil Rights Act of 1991 and provides a feminist perspective, contending that mandatory arbitration is detrimental to women and people of color. Part III ultimately argues that the efficiency arguments supporting mandatory arbitration are outweighed by the inequities and prejudice which result. This Note concludes by advocating the need for reform within the securities industry, which can best be achieved by instituting a voluntary system with better internal monitoring and quality control procedures.

## **I. The Legal Development of Pre-Dispute Mandatory Arbitration Contracts and Clauses in the Securities Industry**

### **A. The Federal Arbitration Act's Influential Role**

Prior to the 1990s, the majority of courts viewed pre-dispute mandatory arbitration contracts as unenforceable in the context of

---

Louis-based A.G. Edwards & Sons, Inc. also has expressed its intent to hold employees to previously signed agreements to arbitrate all job disputes. See Patrick McGeehan, *PaineWebber to Permit Suits on Harassment*, WALL ST. J., Dec. 4, 1998, at C1 (noting, however, that both Merrill Lynch and PaineWebber have agreed to adopt the rule change and allow employees the choice of taking their complaints to arbitration or suing in court).

28. See McGeehan & Lohse, *supra* note 5; Markey, *supra* note 7.



statutory employment claims.<sup>29</sup> In 1925, however, Congress paved the way for the institution and enforcement of mandatory arbitration contracts by enacting the United States Arbitration Act, known today as the Federal Arbitration Act ("FAA").<sup>30</sup> The purpose of the FAA, which provided for the enforcement of valid, written arbitration clauses involving commercial transactions,<sup>31</sup> was to "reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."<sup>32</sup> Section 2, the primary substantive portion of the Act, states:

A written provision in any maritime transaction or contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>33</sup>

The FAA allows for a stay of proceedings in federal district court "when an issue in the proceeding is referable to arbitration," as well as "for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement."<sup>34</sup>

Since its enactment, the FAA has been broadly interpreted as expressly favoring arbitration.<sup>35</sup> In fact, it seems to be the strongest legal argument for enforcing pre-dispute arbitration contracts and clauses. Additionally, in light of the FAA's enactment, the U.S. Supreme Court has held that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."<sup>36</sup> The Court has expansively read

29. See Cherry, *supra* note 10, at 271.

30. See 9 U.S.C. § 1 *et seq.* (1994); see also Bucci, *supra* note 12.

31. See generally 9 U.S.C. § 2 (1994).

32. *Gilmer*, 500 U.S. at 24 (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 and n.6 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974)).

33. *Gilmer*, 500 U.S. at 24-25 (citing 9 U.S.C. § 2).

34. *Id.* at 25 (citing 9 U.S.C. §§ 3-4).

35. See *id.* at 26 ("It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."); see also Michael Delikat, *The Siege Continues: Mandatory Arbitration of Employment Claims*, 86 PLI/LIT 483 (June 1998).

36. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

Section 2 of the FAA to "reach the limits of Congress' commerce clause power so that states may not apply anti-arbitration laws or policies."<sup>37</sup> Moreover, "[t]he Court has repeatedly held that any state anti-arbitration law will be preempted by the FAA and arbitration provisions will be put on the same footing as other contracts."<sup>38</sup>

## B. Case Law

### 1. *Gardner-Denver*

The enforceability of pre-dispute arbitration agreements was first addressed by the Supreme Court in *Alexander v. Gardner-Denver Co.*<sup>39</sup> The plaintiff alleged that he had been terminated on the basis of his race, in violation of Title VII.<sup>40</sup> His discrimination complaint was subject to arbitration pursuant to a collective-bargaining agreement ("CBA"), under which the company retained "the right to hire, suspend or discharge (employees) for proper cause."<sup>41</sup> The U.S. Supreme Court unanimously held that employees under a CBA are free to litigate statutory claims under the equal employment opportunity provisions of the Civil Rights Act in federal court.<sup>42</sup> The Court's rationale was that an employee's contractual rights under a CBA are distinct from the employee's statutory rights under the equal opportunity provisions of the Civil Rights Act.<sup>43</sup> The Court reasoned that by submitting a grievance to arbitration, an employee seeks to resolve a contractual right pro-

---

37. Peter Panken et al., *Avoiding Employment Litigation: Alternative Dispute Resolution of Employment Disputes in the 90s*, SC31 ALI-ABA, Dec. 4, 1997, at 1.

38. *Id.*

39. 415 U.S. 36 (1974).

40. Following his discharge, Alexander, an African-American, filed a grievance pursuant to an arbitration clause contained in the union's collective bargaining agreement ("CBA"). The grievance stated: "I feel I have been unjustly discharged and ask that I be reinstated with full seniority and pay." *Id.* at 39. After the company rejected Alexander's claim of discrimination, the grievance proceeded to arbitration, where the arbitrator found in favor of the employer. *See id.* at 42-43. Alexander then filed suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1994) ("Title VII"). *See id.* at 43. The district court granted summary judgment for the company, holding that Alexander, "having voluntarily elected to pursue his grievance to final arbitration under the nondiscrimination clause of the collective bargaining agreement, was bound by the arbitral decision and thereby precluded from suing his employer under Title VII." *Id.* at 43. The Court of Appeals for the Tenth Circuit affirmed. *See* 346 F. Supp. 1012 (D. Colo. 1971); 466 F.2d 1209 (10th Cir. 1972).

41. *Id.*

42. *See id.* at 59-60.

43. *See id.* at 51.

vided by the CBA.<sup>44</sup> However, in filing a lawsuit under Title VII, the employee is asserting "independent statutory rights accorded by Congress."<sup>45</sup> As such, "no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums."<sup>46</sup>

In response to the argument that allowing an employee to institute a Title VII lawsuit subsequent to arbitration would be unfair to the employer, the Court reasoned that "[a]n employer does not have 'two strings to his bow' with respect to an arbitral decision for the simple reason that Title VII does not provide employers with a cause of action against employees."<sup>47</sup> Accordingly, the Court concluded that "the federal policy favoring arbitration disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a CBA and his cause of action under Title VII."<sup>48</sup>

Perhaps more significantly, the Court maintained that although Congress created the EEOC to procure and promote the Act's purposes, "final responsibility for the enforcement of Title VII is vested with federal courts."<sup>49</sup> The Court reasoned that courts retain "broad remedial powers" regardless of "a Commission finding of no reasonable cause to believe that the Act has been violated."<sup>50</sup> The Court further held that private individuals have been granted a significant role in the process of enforcing Title VII as well.<sup>51</sup> Additionally, the Court construed the Act's legislative history to indi-

44. *See id.* at 49.

45. *Id.* at 49-50.

46. *Id.* at 50 (noting that "[t]he distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence").

47. *Id.* at 54.

48. *Id.* at 59. "Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII." *Id.* at 56. The Court supported this contention on the following grounds: (1) the role of the arbitrator is to "effectuate the intent of the parties rather than the requirements of enacted legislation"; (2) "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land"; and (3) "the factfinding process in arbitration is not equivalent to judicial factfinding." *Id.* at 56-58.

49. *Id.* at 44 ("The Act authorizes courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effects of unlawful employment practices." (citing 42 U.S.C. §§ 2000e-5(f), (g) (1970 ed., Supp. II))).

50. *Id.*

51. *See id.* at 45 ("Individual grievants usually initiate the Commission's investigatory and conciliatory procedures. And although the 1972 amendment to Title VII empowers the Commission to bring its own actions, the private right of action remains

cate "a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes."<sup>52</sup> In support of this interpretation the Court noted:

The clear inference is that Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination. In sum, Title VII's purposes and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievances to final arbitration under the non-discrimination clause of a CBA.<sup>53</sup>

Overall, *Gardner-Denver* manifests a strong aversion to compelling mandatory arbitration of Title VII claims. The Court reiterated this notion in later cases when finding that no agreement to arbitrate could bar a civil rights plaintiff from going to court.<sup>54</sup> In fact, for nearly twenty years, courts continued to interpret *Gardner-Denver* as permitting employees with valid arbitration agreements to bring independent statutory claims against their employers both with respect to CBAs and individual employment disputes.<sup>55</sup>

---

an essential means of obtaining judicial enforcement of Title VII." (citing 42 U.S.C. § 2000e-5(f)(1) (1970 ed., Supp. II)).

52. *Id.* at 48 (citing further support in the Civil Rights Act of 1964 and Title VII, which "have long evinced a general intent to accord parallel or overlapping remedies against discrimination").

53. *Id.* at 48-49.

54. *See, e.g.,* *Barrantine v. Arkansas-Best Freight Sys.*, 450 U.S. 728 (1981) (extending the *Gardner-Denver* analysis to a claim under the Fair Labor Standards Act); *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (applying *Gardner-Denver* to a police officer's federal civil rights action, despite the fact that he had already arbitrated the claim pursuant to the terms of a CBA).

55. *See, e.g.,* *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988) (holding that an employee's discrimination claims against her employer under Title VII and the Minnesota Human Rights Act were not subject to compulsory arbitration). "The court pointed out that cases where the FAA preempted state and federal remedies did not involve employment discrimination claims." Justin M. Dean, Note, *Going, Going, Almost Gone: The Loss of Employees' Rights to Bring Statutory Discrimination Claims in Court*, 63 MO. L. REV. 801, 809 (1998). Moreover, the court reasoned that the involvement of a CBA in *Gardner-Denver* was not a dispositive factor and the holding instead rested upon "the unique nature of Title VII" and the fact that "Congress indicated that it considered the policy against discrimination to be of the highest priority." *Id.* at 809-10 (quoting *Swenson*, 858 F.2d at 1306 (citing *Gardner-Denver*, 415 U.S. at 47)); *see also* *Rosenfeld v. Dep't. of Army*, 769 F.2d 237 (4th Cir. 1985); *Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104 (5th Cir. 1990); *EEOC v. Children's Hosp. Medical Ctr.*, 719 F.2d 1426 (9th Cir. 1983).

## 2. *The Mitsubishi Trilogy*

Only a decade after *Gardner-Denver*, however, the Court rendered a series of decisions that stand in striking contrast to the presumption against the enforcement of mandatory arbitration contracts with respect to business-related statutory claims arising in non-civil rights contexts.<sup>56</sup> In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>57</sup> the Court held that an antitrust dispute was subject to arbitration pursuant to the FAA's "liberal federal policy favoring arbitration agreements."<sup>58</sup> Recognizing its departure from "judicial suspicion" of arbitration,<sup>59</sup> the Court enunciated a new standard for addressing agreements to arbitrate statutory claims: "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."<sup>60</sup>

In *Shearson/American Express, Inc. v. McMahon*,<sup>61</sup> the Court extended its holding to complaints under the Racketeer Influenced and Corrupt Organizations Act ("RICO").<sup>62</sup> In addition, the Court articulated that in order to circumvent an agreement to arbitrate the party opposing arbitration has the burden of showing "that Congress intended to preclude a waiver."<sup>63</sup> Finally, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,<sup>64</sup> the final case in this "trilogy," the Court enforced an agreement to arbitrate a statutory claim under the Securities Exchange Act of 1933.<sup>65</sup>

---

56. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (collectively "the *Mitsubishi Trilogy*").

57. 473 U.S. 614 (1985) (concerning dispute between Japanese automobile manufacturer and a distributorship in Puerto Rico under the Sherman Act).

58. *Id.* at 625. The Court noted that absent fraud or other extreme grounds for revocation of a contract to arbitrate, "the Act itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitration." *Id.* at 627.

59. *Id.* at 627.

60. *Id.* at 628.

61. 482 U.S. 220 (1987).

62. *Id.*

63. *Id.* at 227.

64. 490 U.S. 477 (1989).

65. See *id.* at 485. By handing down such a ruling the Court effectively overruled *Wilko v. Swan*, 346 U.S. 427 (1953) (finding an agreement to arbitrate future controversies, made prior to the existence of the controversy, void under Section 14 of the Securities Act). See *id.*

Accordingly, the *Mitsubishi* trilogy established that statutory claims were arbitrable where the parties had entered into an agreement mandating arbitration, and thus stands as a reversal of *Gardner-Denver's* stance against the enforcement of pre-dispute mandatory arbitration contracts and clauses.

### 3. *The Gilmer Decision*

In 1991, the Supreme Court took the next logical step in the mandatory arbitration analysis and allowed for the arbitration of statutory employment-related complaints in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>66</sup> *Gilmer* involved a discrimination claim under the Age Discrimination in Employment Act ("ADEA").<sup>67</sup> The plaintiff, a registered securities representative, had signed, as a condition of his employment, a pre-dispute arbitration clause which contained an agreement to arbitrate "any dispute, claim or controversy" in accordance with NYSE rules.<sup>68</sup>

Upholding the arbitration clause, the Court stated that "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."<sup>69</sup> The Court explained that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."<sup>70</sup> In addition, the Court noted that while all statutory claims may not be appropriate for arbitration, the ADEA should be subjected to the analysis set forth in *Mitsubishi*: compel arbitration unless the plaintiff can show a Congressional intent "to preclude a waiver of a judicial forum for ADEA claims."<sup>71</sup> Should such Congressional intent exist, the Court observed that "it will be discoverable in the text of the ADEA, its legislative history, or an 'inherent conflict' between arbitration and the ADEA's underlying purposes."<sup>72</sup>

---

66. 500 U.S. 20 (1991). *Gilmer* claimed that his termination, at the age of sixty-two, was in violation of the ADEA.

67. *Id.* at 23.

68. *Id.* "Of relevance to this case, NYSE Rule 347 provides for arbitration of '[a]ny controversy between a registered representative and any member or member organization rising out of employment of such registered representative.'" *Id.* (quoting App. To Brief for Respondent 1).

69. *Id.* at 26.

70. *Id.* (quoting *Mitsubishi*, 473 U.S. at 628).

71. *Id.*

72. *Id.*

Gilmer, conceding that nothing in the text or legislative history of the ADEA “explicitly precludes arbitration,”<sup>73</sup> resorted to the general argument that compulsory arbitration of ADEA claims was inconsistent with the Act’s “statutory framework and purposes.”<sup>74</sup> Gilmer couched support for this contention on four grounds, which mirror much of the Court’s own analysis in *Gardner-Denver*. First, Gilmer claimed that arbitration panels would be biased.<sup>75</sup> The Court responded that the danger was minimal in light of the fact that the applicable NYSE arbitration rules already offer protections against potentially biased arbitrators.<sup>76</sup> Next, Gilmer argued that arbitration’s limited discovery would thwart a successful showing of discrimination.<sup>77</sup> The Court, however, found the discovery provisions contained in the agreement to be more than adequate when compared to other claims the Court had rendered arbitrable, such as RICO and antitrust claims.<sup>78</sup> In response to Gilmer’s third concern that public awareness of an employer’s practices would be compromised by an arbitrators’ option not to reduce their decisions to writing, the Court simply noted that the applicable rules required a written arbitration award and public disclosure of award decisions.<sup>79</sup> Finally, the Court rejected Gilmer’s argument that arbitration precluded broad equitable relief and class action suits on the grounds that all forms of relief were provided for under the arbitration agreement.<sup>80</sup>

The Court likewise found no merit in Gilmer’s additional argument that mandatory arbitration undermined the role of the EEOC.<sup>81</sup> The Court asserted that “[a]n individual ADEA claim-

---

73. *Id.*

74. *Id.* at 27.

75. *See id.* at 30.

76. *See id.* (“The rules require, for example, that the parties be informed of the employment histories of the arbitrators, and that they be allowed to make further inquiries into the arbitrator’s backgrounds. In addition, each party is allowed one peremptory challenge and unlimited challenges for cause.”).

77. *See id.* at 31.

78. *See id.*

79. *See id.* at 31-32 (“The NYSE rules . . . require that all arbitration awards be in writing, and that the awards contain the names of the parties, a summary of the issues in controversy, and a description of the award issued.”).

80. *See id.* at 32 (noting that “arbitrators do have the power to fashion equitable relief”). The Court also pointed out that “even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.” *Id.* (quoting *Nicholson v. CPC Int’l Inc.*, 877 F.2d 221, 241 (3rd Cir. 1989) (Becker, J., dissenting)).

81. *See id.* at 28 (“Indeed, Gilmer files a charge with the EEOC in this case.”).

ant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action.”<sup>82</sup> The Court further maintained that “nothing in the ADEA indicated that Congress intended that the EEOC be involved in all employment disputes,” contending that such disputes have the potential to be settled fully and competently without EEOC involvement.<sup>83</sup> Moreover, the Court deemed the fact that an administrative agency, such as the EEOC, was involved in the enforcement an insufficient ground for precluding arbitration.<sup>84</sup>

Notably, however, the Court did not expressly overrule the *Gardner-Denver* decision, but rather distinguished it from *Gilmer* on three specific grounds.<sup>85</sup> First, in response to *Gilmer*’s vigorous contention that the Court’s decision in *Gardner-Denver* precludes arbitration of employment discrimination claims, the Court noted that the *Gardner-Denver* decision and its progeny did not involve the question of whether to enforce agreements to arbitrate statutory claims.<sup>86</sup> Instead, “they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims.”<sup>87</sup> Second, the Court argued that the *Gardner-Denver* line of cases occurred in the context of CBAs, where the individual statutory rights of claimants were jeopardized by the fact that they were represented by their unions in the arbitration proceedings.<sup>88</sup> The Court noted that this tension between collective representation and individual statutory rights, which is inevitable in the case of a CBA, was irrelevant in *Gilmer*.<sup>89</sup> Finally, the Court explained that the *Gardner-Denver* line of cases was not decided under the FAA, which has since been interpreted to reflect a “liberal federal policy favoring arbitration agreements.”<sup>90</sup>

---

82. *Id.* (stating that “the EEOC’s role in combating age discrimination is not dependent on the filing of a charge” and it has independent authority to institute its own investigation (citing 29 CFR §§ 1626.4, 1626.13 (1990))).

83. *Id.*

84. *See id.* at 28-29 (arguing that “the Securities Exchange Commission is heavily involved in the enforcement of the Securities Exchange Act of 1934 and the Securities Act of 1933, but we have held that claims under both of these statutes may be subject to compulsory arbitration”).

85. *See id.* at 35.

86. *See id.*

87. *Id.*

88. *See id.*

89. *See id.*

90. *Id.* (quoting *Mitsubishi*, 473 U.S. at 625).



Concluding that *Gilmer* had failed to show that Congress intended to preclude arbitration of claims under the ADEA,<sup>91</sup> the Court established precedent for the enforcement of mandatory arbitration contracts concerning age discrimination claims. In opening this door, however, the Court failed to indicate exactly where the line was to be drawn. For instance, the Court failed to address whether *Gilmer*'s holding was limited to the securities industry and the ADEA, or whether it could be extended to other federal statutory claims and licensing agreements in other industries.<sup>92</sup> Furthermore, by distinguishing *Gardner-Denver*, as opposed to overruling it, the Court left open the question of whether arbitration agreements made through CBAs can prevent an employee from litigating a statutory claim. As such, the lower courts have been left with little guidance with respect to the mandatory arbitration of sexual harassment or racial discrimination complaints. Consequently, the *Gilmer* decision has resulted in a great deal of confusion regarding the scope of enforcement of mandatory arbitration contracts within the securities industry and beyond.

### C. The Growing Backlash Against a Broad Application of Mandatory Arbitration

Despite the fact that *Gilmer* left issues unresolved, hundreds of cases involving a wide range of discrimination claims, such as Title VII,<sup>93</sup> the ADA,<sup>94</sup> the Age Discrimination in Employment Act ("ADEA")<sup>95</sup> and the Family and Medical Leave Act ("FMLA"), have followed its holding.<sup>96</sup> *Gilmer* even has been extended to cases outside the realm of the securities industry,<sup>97</sup> including em-

---

91. *See id.*

92. *See* Dean, *supra* note 55.

93. *See, e.g.,* Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 305 (6th Cir. 1991); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991); Pitter v. Prudential Life Ins. Co., 906 F. Supp. 130 (E.D.N.Y. 1995) (Title VII & Section 1981).

94. *See, e.g.,* Satarino v. A.G. Edwards & Sons, Inc., 941 F. Supp. 609 (N.D. Tex. 1996) (ADA & FMLA).

95. *See, e.g.,* Ahing v. Lehman Bros. Inc., No. 94 Civ. 9027, 1997 WL 634290 (S.D.N.Y. Oct. 25, 1997); Matthews v. Rollins Hudig Hall Co., 72 F.3d 50 (7th Cir. 1995).

96. *See, e.g.,* O'Neil v. Hilton Head Hospital, 115 F.3d 272 (4th Cir. 1997) (holding that FMLA claims were arbitrable under an arbitration clause in an employee handbook where employee had signed acknowledgment and agreement to submit disputes to arbitration).

97. *See supra* notes 14, 21.

ployment contracts, employee handbooks and employment applications.<sup>98</sup>

More recently, however, there has been a "minority backlash" against *Gilmer*, prompted by a growing concern "about the fairness of requiring employees to waive certain statutory rights to judicial review and jury verdicts."<sup>99</sup> Some courts have taken steps to narrow *Gilmer*'s holding,<sup>100</sup> while still others have rendered it entirely void on the grounds that it undermines statutory rights and violates the Civil Rights Act of 1991.<sup>101</sup> Moreover, members of Congress, the EEOC and SEC commissioners have publicly criticized the practice.<sup>102</sup> In fact, legislation to preclude the mandatory arbitration of employment disputes already has been introduced.<sup>103</sup> The proposed Civil Rights Procedures Protection Act "would amend civil rights statutes and the Federal Arbitration Act expressly to prevent pre-dispute arbitration agreements from being enforced."<sup>104</sup>

---

98. See generally Dean, *supra* note 55 (citing *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992)).

99. Lepera, *supra* note 11, at 724.

100. See, e.g., *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995) (holding that an employee cannot be forced to arbitrate discrimination claims unless he or she knowingly agreed to submit such disputes to arbitration); *Nelson v. Cyprus Bagdad Copper*, 119 F.3d 756, 761 (9th Cir. 1997) (extending *Lai*'s knowing requirement for Title VII claims to claims under the ADA); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1484-87 (D.C. Cir. 1997) (enunciating the need for several protections against the risk of arbitrators systematically favoring employers because employers are the source of future business, including: subjecting arbitration to the scrutiny of plaintiff's lawyers or agencies such as the AAA in order to ensure neutral arbitrators; greater discovery; increased judicial review of arbitral judgments; following precedent; adhering to professional and ethical standards; and requiring the employer to bear the cost of the arbitrator's fee); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 203-204 (2d Cir. 1998) (emphasizing the necessity of employing procedural safeguards to the arbitration of discrimination cases, in holding an arbitrator's decision in favor of the employer, despite overwhelming evidence to the contrary, to be in "manifest disregard" of the law).

101. See, e.g., *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998) (refusing to enforce the Securities Registration Form U-4 in the context of a Title VII claim on the grounds that it violated the 1991 Civil Rights Act); see *infra* notes 176-208 (discussing the discrepancy among federal circuit courts with respect to the interpretation and application of *Gilmer*).

102. See Coffee, *supra* note 24 ("The issue in their minds is not whether pre-dispute mandatory arbitration agreements can cover discrimination cases . . . , but whether an industry is entitled to impose acceptance of arbitration as a condition of employment, and, most importantly, to do so by governmental action.").

103. See Joshua M. Javits & Francis T. Coleman, *High Court to Revisit Issue of Mandatory Arbitration*, NAT'L L.J., Oct. 5, 1998, at B5.

104. *Id.* (noting that the EEOC has also "adopted a policy supporting voluntary arbitration of employment disputes but opposing mandatory arbitration of employment disputes as a condition of initial or continued employment").

### 1. *Congressional Intent Adverse to Broad Application*

In 1991, the same year *Gilmer* was decided, Congress expressly created a right to a trial by jury for all employees when it voted by an overwhelming majority to amend Title VII of the Civil Rights Act of 1964.<sup>105</sup> The goals of the Civil Rights and Women's Equity in Employment Act of 1991 ("1991 CRA")<sup>106</sup> were twofold: (1) to increase the remedies available to plaintiffs under Title VII so as to ensure full compensation for all injuries caused by discrimination; and (2) to make enforcement of the Act more effective through substantive and procedural amendments that would make it easier to bring, as well as prove, discrimination suits.<sup>107</sup> Moreover, there was an underlying belief that the enforcement of civil rights would benefit the entire nation.<sup>108</sup> "And that public goal of eradicating discrimination was primarily to be achieved through private litigation."<sup>109</sup> In addition to express Congressional goals, the text and legislative history of the 1991 CRA reveal an intent to preclude mandatory arbitration contracts under Title VII.

### 2. *NASD's Proposed Rule Change*

The backlash against a broad use of mandatory arbitration also surfaced in the securities industry. The NASD proposed a rule change in August of 1997 that would eliminate the mandatory arbitration clause from its licensing agreement.<sup>110</sup> The proposed rule grants employees the choice between entering into an individual agreement with their employer or filing a statutory discrimination claim with the courts.<sup>111</sup> In advancing the change, the NASD promised that "enhanced disclosure would be made to industry employees to make it clear to them that they have a choice as to whether to give up their rights to go to court."<sup>112</sup> The proposal provoked a hostile response from the Securities Industry Association ("SIA").<sup>113</sup> For instance, Stuart Kaswell, the SIA's senior vice

---

105. See *Rosenberg*, 995 F. Supp. at 200.

106. Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991) (codified at 42 U.S.C. § 1981 (1998)).

107. See *Rosenberg*, 995 F. Supp. at 200.

108. See *id.*

109. *Id.*

110. See Lohse, *supra* note 6.

111. See generally *id.*; see also *NASD Proposes More Changes to Arbitrate Discrimination Rules*, SEC. WK., Oct. 12, 1998, at 1 [hereinafter *NASD Proposes*].

112. *SEC Ends Forced Arbitration*, *supra* note 26 (noting that "[t]he wording of those disclosures has yet to be released").

113. See Jones, *supra* note 3.

president and general counsel, proclaimed that the SIA considers arbitration to be "the best mechanism for resolving disputes relating to the business of the securities industry," and added that employees who allege workplace discrimination "fare better before arbitration panels than before juries."<sup>114</sup> Kaswell further noted that discrimination claims are not only more quickly resolved by arbitration, but arbitration ensures that claims will actually be heard and not dismissed on pre-trial motions.<sup>115</sup>

Despite the SIA's outcries, negative publicity emanating from discrimination suits against Merrill Lynch & Co. and Travelers Group Inc.'s Smith Barney, the two largest brokerage firms in the United States, fueled the urgent need to reform arbitration in the industry.<sup>116</sup> Consequently, the SEC approved the NASD's proposed rule change on June 23, 1998, which exempted discrimination and sexual harassment complaints from the NASD's mandatory arbitration requirement of the U-4 statement.<sup>117</sup> At a September board meeting, the NYSE joined in the movement to drop the mandatory arbitration of discrimination claims.<sup>118</sup> The new rule took effect January 1, 1999.<sup>119</sup> The rule allows all persons registered with the NASD under the U-4 to assert their right to have any claims of sexual harassment or racial discrimination presented to a court of law.<sup>120</sup> All other types of claims, however, remain subject to mandatory arbitration.<sup>121</sup>

---

114. *Id.* (quoting Stuart Kaswell, SIA senior vice president).

115. See Panken et al., *supra* note 37.

116. See *supra* note 23; see also Lohse, *supra* note 6.

117. *SEC Ends Forced Arbitration*, *supra* note 26.

118. See *Corporate Update*, N.Y. L.J., Sept. 17, 1998, at 1; see also *NYSE Plan to Ban Mandatory Arbitration May Still Leave the Door Open*, WALL ST. LETTER, Sept. 14, 1998 (noting that the NYSE made headlines in refusing to honor any form of mandatory arbitration, including private firm contracts). Under pressure from the Congress, civil rights groups and various feminist organizations, the SEC persuaded the NASD to follow in the NYSE's footsteps and cease serving as a forum for the mandatory arbitration of discrimination claims. See *National Association of Securities Dealers*, WALL ST. LETTER, Jan. 4, 1998; Richard Karp, *Dueling for Dollars: If the Bear Returns, Wall Street's Arbitration Wars Will Escalate*, BARRON'S, Nov. 16, 1998, at 24 (noting that the NASD's move "sets a precedent that the members of the claimants' bar might use in trying to end the mandatory securities arbitration rules").

119. See *NASD Proposes*, *supra* note 111.

120. See Feingold, *supra* note 15.

121. See *SEC Ends Forced Arbitration*, *supra* note 26; *NASD Proposes*, *supra* note 111.

## II. Does Mandatory Arbitration Have a Place in Civil Rights Disputes?

### A. Pros and Cons of Mandatory Arbitration

#### 1. Efficiency

One of the most compelling arguments justifying the mandatory arbitration of statutory claims is arbitration's efficiency. Primarily, advocates contend that arbitration dramatically reduces the costs of litigation. In fact, it has been estimated that the use of arbitration in the industry has saved firms approximately two-thirds of the cost of litigation.<sup>122</sup> Employers also argue that arbitration is far quicker than seeking the assistance of the already overburdened federal courts.<sup>123</sup> Moreover, arbitration allows for a quicker resolution "without having to provide the retainer that many plaintiff's employment lawyers require to take on a case," thereby benefiting the employee and the employer.<sup>124</sup>

The efficiency of arbitration is further supported on the grounds that "[u]nlike arbitrators who can cut to the heart of the matter, judges are bound by vexing evidentiary and jury instruction problems."<sup>125</sup> In terms of the employer, this efficiency argument can be extended to arbitration's lower defense costs and damage awards. Finally, limited discovery and the informal nature of arbitration reduce the time that the employer spends preparing for the hearings and the presentation of its case.

Some critics have argued that despite the time and money that arbitration saves, it fails to be truly "efficient" because it does not "really reach the most efficient outcome overall" — deterring sexual harassment and racial discrimination in the workplace.<sup>126</sup> "If arbitration fails to adequately deter workplace discrimination, the net result will be an inefficient allocation of human capital."<sup>127</sup> In other words, an extremely talented employee might be deterred

---

122. See Jones, *supra* note 3.

123. See Ganzel, *supra* note 14 ("Employment-related litigation has increased exponentially over the past twenty years, to the extent that everyone agrees there are far more cases than the traditional courts can handle."). This efficiency argument is furthered by the reality that the federal courts are already clogged with criminal cases, namely drug case, which demand expediency, as well as complex litigation, which is "overwhelming the remaining resources of the sitting judges." Panken et al., *supra* note 37, at 7.

124. Cherry, *supra* note 10, at 277.

125. Panken et al., *supra* note 37, at 7.

126. Cherry, *supra* note 10, at 278.

127. *Id.*

from advancing solely on the grounds of race or gender.<sup>128</sup> In addition, praising arbitration for its cost-effectiveness ignores the reality that individuals are harmed, both physically and emotionally, by illegal discrimination in the workplace.<sup>129</sup>

## 2. Fairness

Advocates also have advanced arguments of arbitration's inherent "fairness."<sup>130</sup> For instance, many contend that "arbitrators are more reasoned, predictable decisionmakers than most jurors" primarily because of the arbitrator's alleged expertise in the claimant's field of employment.<sup>131</sup> This "expert knowledge" possessed by the arbitrator arguably saves the employer from having to face the "inherent difficulty of explaining to judge or jury the business reason for the employment action."<sup>132</sup> The arbitrator's role in determining awards has been viewed as enhancing the fairness of arbitration because juries are unpredictable and often return awards that are deemed unreasonable.<sup>133</sup> Whether there is any truth in this notion seems irrelevant. Apparently, the mere threat that a jury could award millions of dollars assists employment plaintiffs in negotiating higher settlements. This argument, however, ignores the reality that there is no real possibility of taking the claim to a jury under mandatory arbitration contracts.

Unfairness is perhaps the most popular argument advanced by opponents of mandatory arbitration. It is repeatedly argued that arbitrators favor employers.<sup>134</sup> This premise generally is supported in terms of the disparate power evident in a negotiation between an employer and an employee.<sup>135</sup> This imbalance is only heightened when the plaintiff is a woman or person of color, especially in

---

128. *See id.*

129. *See id.*

130. *See id.* at 279.

131. *Id.*

132. Panken et al., *supra* note 37, at 7 (noting that employing a decisionmaker who is also an expert benefits the employee as well).

133. *See* Cherry, *supra* note 10, at 279-80.

134. *See* Bucci, *supra* note 12.

135. *See* Schwartz, *supra* note 9, at 62-63 (noting that the behavior of the parties exemplifies this notion, given that it is at the employer's insistence that a pre-dispute mandatory arbitration contract is signed by the employee); Leona Green, *Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 173 (1998).

Herein lies the problem: at the moment of hire the new employee lacks almost all bargaining power because of the need for employment. It is the need for employment which leads the new employee to sign the arbitration agreement even though the employee may not wish to. More often than not,

the securities industry where "the existence of the 'glass ceiling' and other forms of gender discrimination continue to prevent women from attaining positions of power."<sup>136</sup> More specifically, "empirical evidence raises a serious concern that arbitration of employment disputes systematically favors employers."<sup>137</sup> For instance, a survey of sixty-two arbitration awards in employment disputes conducted by the NASD and the NYSE between 1989-1994 revealed that the average award granted in a case where the plaintiff prevailed on at least one claim was \$125,000, compared to \$703,600 in jury verdicts during the same time period.<sup>138</sup> Statistics also reveal that the median arbitration award is a mere \$49,400, compared to \$264,700 in cases involving juries.<sup>139</sup> Additionally, with respect to arbitration within the securities industry, "surveys have shown punitive damages awards in 0.4% to 2.1% of the cases."<sup>140</sup>

Opponents further contend that mandatory arbitration is unfair because it fails to provide parties with adequate due process. Not only are written opinions explaining the bases of opinions rare, but judicial review is extremely limited.<sup>141</sup> In fact, even "if the arbitrator has misapplied the law, the losing party is most likely out of luck."<sup>142</sup> Under most plans, the time for filing claims for arbitration is shorter than the statute of limitations under Title VII,<sup>143</sup> punitive damages are typically prohibited and confidentiality clauses are almost always imposed.<sup>144</sup> Moreover, with arbitration filing and administration fees totaling thousands of dollars per case, and hourly rates ranging from \$200-\$700, arbitration can be extremely expensive for plaintiffs, especially in more complex cases, and particularly in light of the fact that plaintiffs are almost always re-

---

the employee signs the contract without the ability to consult an attorney prior to signing.

*Id.* at 200.

136. Cherry, *supra* note 10, at 299; *see also* Green, *supra* note 135, at 200-201 (noting that "[b]ecause of historical patterns of discrimination, including prejudicial stereotypes and unequal bargaining power, these employees who are already on unequal footing with the employer, will have the 'civil rights rug of justice' snatched further from beneath them").

137. Schwartz, *supra* note 9, at 64.

138. *See id.*

139. *See id.*

140. *Id.* at 65.

141. *See* Cherry, *supra* note 10, at 280.

142. *Id.*

143. *See* JOHN T. DUNLOP & ARNOLD M. ZACK, PROTOCOLS FOR EMPLOYMENT DISPUTES 84-85 (1997).

144. *See id.* at 88.

quired to pay at least half of the costs.<sup>145</sup> As such, "an out-of-work plaintiff facing a 'deep pocket' employer" may be severely disadvantaged.<sup>146</sup>

The plaintiff's ability to obtain a fair hearing with adequate representation may be frustrated by the fact that attorneys generally view arbitration as an unfavorable forum, and are thus less likely to take on a case involving arbitration.<sup>147</sup> Moreover, there is a mindset that arbitrators give smaller awards to plaintiffs than juries.<sup>148</sup> In fact, in light of the fact that arbitrators typically are selected from the industry itself, "[c]orporate defendants, with some empirical justification, may believe that they are likely to get more sympathy from arbitrators, if not downright bias in their favor."<sup>149</sup> Even where the individual arbitrators are not selected from within that particular industry, they still have "an economic stake in being selected again, and their judgment may well be shaded by a desire to build a 'track record' of decisions that corporate repeat users will view approvingly."<sup>150</sup> Independent arbitration companies likewise have an obvious interest in being viewed favorably by corporations.<sup>151</sup>

Severe restrictions imposed on discovery also have evoked an outpouring of criticism with respect to fairness. "Limited discovery usually works to disadvantage employment discrimination plaintiffs because these plaintiffs bear the burden of persuasion while at the same time are usually the party with less information."<sup>152</sup> These discovery limitations "deprive plaintiffs of the opportunity to make their own choice of how much time and money to spend on the discovery process, within the limits sanctioned by the courts."<sup>153</sup> Moreover, "the ethical prohibition against lawyers' 'ex parte' contacts with opposing parties (i.e., informal, and without opposing counsel present) extends to many current, and possibly some former, employees of a corporate defendant," thereby frustrating the plaintiff's ability to collect evidence even further.<sup>154</sup>

---

145. See Schwartz, *supra* note 9, at 61.

146. Lepera, *supra* note 11, at 726.

147. See Schwartz, *supra* note 9, at 61.

148. See *id.* at 60 ("Arbitrators may be more jaded, and hence make lower awards, particularly in more egregious cases where punitive damages are available.")

149. *Id.* at 61.

150. *Id.*

151. See *id.*

152. Cherry, *supra* note 10, at 282; see also Green, *supra* note 135, at 220.

153. Cherry, *supra* note 10, at 282.

154. Schwartz, *supra* note 9, at 61.



Also, with respect to Title VII complaints, mandatory arbitration deprives plaintiffs of the legal protections furnished by Federal Rule of Evidence 412, which limits the admissibility of evidence of an alleged victim's past sexual behavior in a civil lawsuit for sexual misconduct.<sup>155</sup> "This legislation, similar to state 'rape shield' laws, was the product of feminist lobbying and is especially important because of the sensitive nature of potentially relevant evidence in a sexual harassment lawsuit."<sup>156</sup> Despite contentions that arbitration is a more private forum than the courtroom, the reality that a victim of sexual harassment may not be granted the procedural protections of Rule 412 is extremely troubling.<sup>157</sup>

The fact that the industry itself, and not an independent group, such as the American Arbitration Association ("AAA"), oversees mandatory arbitration has sparked yet further controversy.<sup>158</sup> Despite the contention that the various self-regulating organizations ("SROs") overseeing arbitrations have instituted procedures and policies to temper impartiality and prejudice, there is absolutely no assurance that the arbitrators correctly apply the law.<sup>159</sup> In fact, there is absolutely no assurance that the arbitrators even will have knowledge of the substantive law on which the claim is based.<sup>160</sup> This danger "that arbitrators will misapply or even ignore the law" arises every time a statutory claim is alleged, and multiplies exponentially when an employee asserts a violation of civil rights<sup>161</sup>—an inequity only heightened by the fact that arbitrators are appointed for their expertise in the respective field of employment. The fact that an arbitrator may be a renowned expert in the field of securities certainly does not render him an expert in matters of racial or sexual discrimination. It is in respect to the foregoing arguments that critics have accused the industry of preserving "a locker-room

---

155. See Cherry, *supra* note 10, at 282-83. Federal Rule of Evidence 412(b)(2) provides: "In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." *Id.* at n.79.

156. Cherry, *supra* note 10, at 283.

157. See generally *id.*

158. See Vladeck, *supra* note 3, at 7; see also Davis, *The Arbitration Claws*, *supra* note 5, at 291 (noting that self-regulatory organizations ("SROs") such as the New York Stock Exchange ("NYSE") or National Association of Securities Dealers ("NASD") typically provide the forum for most securities arbitration).

159. See Vladeck, *supra* note 3, at 7.

160. See *id.*

161. *Id.*

culture that can seem bizarrely out of step with the rest of the business world."<sup>162</sup>

Finally, the homogenous nature of arbitration panels within the industry is another notable source of unfairness that has frustrated many dissenters.<sup>163</sup> A 1994 United States General Accounting Office study revealed that 89% of the NYSE arbitrators were men and only 11% women.<sup>164</sup> Moreover, the report indicated that only a very small percentage of the arbitrator pool was comprised of people of color.<sup>165</sup> "Of the 349 arbitrators whose race was identifiable, 97% were white, .09% were black, .06% percent were Asian and 1% were 'other.'"<sup>166</sup> Accordingly, women and people of color are unable to face a jury of their peers and are instead subjected to "a lack of procedural protections and an arbitrator pool that is demographically unrepresentative in terms of gender and race."<sup>167</sup>

### 3. *Freedom of Contract*

Another common ground for extolling the benefits of arbitration is the notion of freedom of contract. Proponents advocate for enforcement so long as "the contract was not signed under 'duress' — conceived of narrowly so as not to encompass economic compulsion."<sup>168</sup>

Critics, however, have attacked this "freedom of contract" notion on the grounds that mandatory arbitration is nothing more than a contract of adhesion.<sup>169</sup> They contend that "all contracting takes place within a set of background legal norms and assumptions."<sup>170</sup> Coinciding with this background is the notion that certain "mandatory terms" exist which cannot be waived under any circumstances, even if the parties agree.<sup>171</sup> In other words, with mandatory arbitration, there is no freedom to shop for terms or room to bargain. This is especially true in the securities industry, where the practice is industry-wide. The problem is heightened by the fact that there is an imbalance of power between the employee and employer. Moreover, "when one views an arbitration clause as

---

162. *Id.*

163. *See generally* Cherry, *supra* note 10, at 281, 299.

164. *See id.* at 281.

165. *See id.*

166. *Id.* at 299.

167. *Id.* at 269.

168. *Id.* at 278.

169. *See id.*; *see also* Schwartz, *supra* note 9, at 114.

170. Cherry, *supra* note 10, at 278.

171. *Id.*

the waiver of the most important right of access to the courts," the mandatory nature of arbitration contracts becomes an even greater injustice.<sup>172</sup>

#### 4. *Maintaining Relations*

Because of arbitration's tendency to be less adversarial, it also has been praised for more readily allowing the employment relationship to continue after the resolution of the dispute.<sup>173</sup> Supporters of arbitration note that the emotional nature of most employment disputes can be controlled and contained more easily given that parties are extended the opportunity to express themselves before a neutral party "trained to move the parties from expressing anger to problem-solving and engagement in molding a satisfactory resolution."<sup>174</sup> The private and confidential nature of arbitration likewise lends itself to the maintenance of employment relations; for "most employees want to protect their reputations and careers, while employers are concerned about business repercussions, workplace disruptions and precedent setting awards triggering 'me too' claims."<sup>175</sup>

Confidentiality, however, is not without its faults. In silencing the contents of the arbitration, public scrutiny of company practices is likewise stifled. Without fear of criticism from the media, or sanctions from a court of law, companies have little incentive to implement systems to curtail the source of the disputes. Consequently, in many companies, sexual and racial harassment and discrimination will continue unchecked.

#### B. *Discrepancy Since Gilmer*

Confusion remains as to whether *Gilmer* should apply to the mandatory arbitration of statutory claims, especially in light of the fact that *Gilmer* did not expressly or impliedly overrule *Gardner-Denver*.<sup>176</sup> The Ninth Circuit, in particular, has made headlines in

---

172. *Id.*; see also Schwartz, *supra* note 9, at 114 (noting that the take-it-or-leave-it nature of mandatory arbitration clauses undermines the argument of employers and courts that arbitration is a matter of consent).

173. See Lepera, *supra* note 11, at 725 (noting that this may be especially true in situations where an employee is seeking accommodation under the ADA).

174. *Id.*

175. *Id.* at 725-26.

176. Compare *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998) (finding the securities exchange registration mandating arbitration of statutory claims to be unenforceable in the context of a Title VII claim on the grounds that it violated the Civil Rights Act of 1991) with *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175 (3rd Cir. 1998) (finding that an employee's statutory claims can be subject to mandatory

narrowing the scope of *Gilmer*.<sup>177</sup> For instance, in *Prudential Ins. Co. v. Lai*,<sup>178</sup> the court refused to enforce the same type of arbitration provisions approved by the Supreme Court in *Gilmer* on the grounds that the plaintiff did not "knowingly" waive her right to bring a civil action over sexual harassment and discrimination.<sup>179</sup> The court reasoned that "Congress intended there to be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies and procedural protections prescribed in Title VII and related statutes," citing support in the text and legislative history of Title VII, as well as the enactment of the Civil Rights Act of 1991.<sup>180</sup> The court stressed that in the context of sexual harassment claims, the procedural protections contemplated by the legislature "may be particularly significant."<sup>181</sup> Accordingly, the court concluded that "a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration."<sup>182</sup>

The Ninth Circuit extended the *Lai* holding in *Nelson v. Cyprus Bagdad Copper Corp.*,<sup>183</sup> finding that the employee did not enter into a "knowing agreement" to arbitrate his ADA claims.<sup>184</sup> In *Nelson*, the Court noted that the form signed by the employee, acknowledging the receipt of a revised employee handbook, did not suffice as a waiver under *Lai*.<sup>185</sup> Not only did the acknowledgment fail to notify Nelson of the arbitration clause, it also failed to inform him that his acceptance of the handbook constituted a waiver of his right to a judicial forum.<sup>186</sup> Moreover, the fact that Nelson continued employment subsequent to receiving the handbook, and after supposedly having read its contents, likewise fell short of a "knowing" waiver under *Lai*.<sup>187</sup> Despite such decisions,

---

arbitration, provided that principles of fairness, voluntariness and due process are not violated).

177. See *infra* notes 178-193, 206-207 and accompanying text.

178. 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995).

179. *Id.* at 1305.

180. *Id.* at 1304.

181. *Id.* at 1305.

182. *Id.* ("In this case, even assuming that appellants were aware of the nature of the U-4 form, they could not have understood that in signing it, they were agreeing to arbitrate sexual discrimination suits. The U-4 form did not purport to describe the types of disputes that were to be subject to arbitration.").

183. 119 F.3d 756 (1997).

184. *Id.*

185. *Id.* at 761.

186. See *id.*

187. See *id.* at 762.

*Lai* nevertheless remains a limited holding in so far as it concerns a “knowing” waiver.<sup>188</sup>

The Ninth Circuit specifically examined the legality of the securities industry’s licensing agreement in *Duffield v. Robertson Stephens & Co.*,<sup>189</sup> and ultimately found it to be in violation of the Civil Rights Act of 1991.<sup>190</sup> The three judge panel held that plaintiff could not be denied her right to pursue her claim in court under Title VII by virtue of having signed a U-4, stating that Form U-4 compels precisely what Congress intended to prohibit in the 1991 Act — mandatory requirements under which prospective employees agree as a condition of employment to surrender their rights to litigate future Title VII claims in a judicial forum and accept arbitration instead.<sup>191</sup> The court grounded support for this contention in the context, language and legislative history of the Civil Rights Act of 1991.<sup>192</sup> In addition, the court noted that the “take-it-or-leave-it” nature of the U-4 form is “fundamentally at odds with a provision of the Civil Rights Act of 1991, Section 118, that was intended to help deter employment discrimination by increasing claimants’ choice of fora.”<sup>193</sup>

Any hope, however, that *Duffield* would bring an end to the enforcement of pre-dispute arbitration agreements in the securities industry was misplaced. In fact, exactly one month later, the Third Circuit directly opposed the *Duffield* holding in the case of *Seus v. John Nuveen & Co., Inc.*<sup>194</sup> The *Seus* court found that employees’ statutory claims can be subject to arbitration as a condition of employment, except where “fraud, duress, mistake or some other

---

188. See, e.g., *Seus*, 146 F.3d at 183-84 & n.2. (rejecting any type of heightened standard); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 838 (8th Cir. 1997) (same).

189. 144 F.3d 1182 (9th Cir. 1998).

190. See *id.* at 1192 (noting that the underlying purpose of the 1991 Civil Rights Act was to “expand employees’ rights and ‘to increase the possible remedies available to civil rights plaintiffs’” (quoting *Lai*, 42 F.3d at 1304)).

191. See *id.* at 1199.

192. See *id.*

193. *Id.*

194. 146 F.3d 175 (3rd Cir. 1998) (finding that the arbitration agreement which had been signed by the employee as part of the U-4 Form was valid and enforceable under the FAA). The court agreed with the majority of other courts “that the Form U-4 compliance clause obligates a registrant to comply with the NASD Arbitration Code as it existed at the time she filed suit.” *Id.* at 187 (noting that *Seus* “clearly bound herself to comply with amendments to the NASD’s rules, including those governing arbitration”).

ground recognized by the law applicable to contracts"<sup>195</sup> is present. More recently, the Fourth Circuit ruled that an applicant who signs an arbitration agreement as part of an application process is required to arbitrate his race discrimination claim.<sup>196</sup> A number of other circuit courts similarly have found pre-dispute agreements to arbitrate Title VII claims permissible under *Gilmer*.<sup>197</sup>

Meanwhile, a Massachusetts district court's decision in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,<sup>198</sup> which had found the mandatory arbitration of Title VII claims unenforceable four months prior to *Duffield*,<sup>199</sup> was recently overruled by the First Circuit.<sup>200</sup> The First Circuit held that "neither the language of the statute nor the legislative history demonstrates an intent in the 1991 CRA to preclude pre-dispute arbitration agreements."<sup>201</sup> Moreover, the court found the NYSE arbitration procedures sufficiently adequate to resolve Rosenberg's Title VII claims.<sup>202</sup> Nevertheless, despite expressly rejecting the district court's reasoning,

195. *Id.* at 184 (noting that "[u]nequal bargaining power is not alone enough to make an agreement to arbitrate a contract of adhesion," and even if a contract of adhesion arguably could be proven, it would still only be rendered invalid "where its terms unreasonably favor the other party").

196. *See Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373 (4th Cir. 1998).

197. *See, e.g., Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 308, 312 (6th Cir. 1991); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir. 1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1467-68 (D.C. Cir. 1997).

198. 995 F. Supp. 190 (D. Mass. 1998).

199. *See id.* The district court found *Gilmer* inapplicable to Rosenberg's Title VII claim, on the grounds that *Gilmer*, which was decided under the ADEA, did not consider Title VII's text, legislative history or purpose. *See id.* at 200. The district court further distinguished *Gilmer* on the grounds that the system employed by the NYSE, and at issue in the case, was inadequate to protect Susan Rosenberg's rights. *See id.* at 206. Citing to possible structural bias in the NYSE's arbitration system, the district court concluded that the former Merrill Lynch employee could have her harassment case heard in court. *See id.* at 207-209.

Specifically, the district court noted that plaintiff signed the standard U-4 Form, subjecting her to mandatory arbitration of all claims in accordance with the rules of the NYSE and other SROs; however, "[n]o one pointed out to her that she was in fact agreeing to arbitrate all future disputes with her employer, including discrimination claims, should they arise." *Id.* at 193. Moreover, the district court reasoned that while *Gilmer* upheld the enforceability of U-4 mandatory arbitration contracts with respect to age discrimination claims, the Supreme Court "left open the possibility of evaluating the adequacy of the arbitral forum in specific cases [including those where an ADEA claim is brought]." *Id.* at 206.

200. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 98-1246, 1998 WL 880910, at \*1 (1st Cir. Dec. 22, 1998).

201. 1998 WL 880910, at \*8.

202. *See id.* at \*14-15.

the *Rosenberg* court concluded that the arbitration agreement was unenforceable.<sup>203</sup> The Court explained that "compelling arbitration would not be 'appropriate' under the 1991 CRA" in light of the arbitration agreement's failure "to define the range of claims subject to arbitration."<sup>204</sup>

The Ninth Circuit is presently the only Circuit Court of Appeals to hold that pre-dispute arbitration agreements are prohibited by Title VII, as amended by the 1991 Civil Rights Act.<sup>205</sup> The Circuit will most likely continue to stand its ground, however, especially in light of its most recent ruling in *Craft v. Campbell Soup Co.*<sup>206</sup> that the FAA does not apply to labor or employment contracts. The *Craft* court cited support for this bold premise in the wording of Section 2, the legislative history of the FAA, the pre-New Deal understanding of the Commerce Clause, and the implications of a number of Supreme Court cases, including *Gilmer*.<sup>207</sup> Given that the FAA has long been interpreted as being the most persuasive legal support for mandatory arbitration, the Ninth Circuit's holding can be viewed as a giant step backwards for alternative dispute resolution ("ADR") proponents.

Although the Ninth Circuit stands alone, there is no doubt that uncertainty still exists in the wake of *Gilmer*. As such, all circuits undoubtedly anticipated a definitive decision from the Supreme Court this term. The Court's recent denial of *certiorari* in the *Duffield* case,<sup>208</sup> however, will only perpetuate the inconsistency, contradiction and debate which has reigned since *Gilmer*. Accordingly, a broker in the New York branch of PaineWebber will continue to fall prey to the mandatory arbitration of sexual harassment and discrimination claims, while a broker in the firm's San Francisco office, in the very same position, will have the option of taking her claim to court.

---

203. See *id.* at \*21.

204. *Id.* at \*19, \*21 (noting that "some minimal level of notice to the employee that statutory claims are subject to arbitration" is required).

205. See Michael Delikat & Rene Kathawala, *Pre-Dispute Arbitration Agreements Survive Yet Another Challenge*, N.Y. L.J., Jan. 21, 1999, at 1.

206. 1998 U.S. App. LEXIS 30580, \*1 (9th Cir. Dec. 2, 1998).

207. 1998 U.S. App. LEXIS 30580, at \*22.

208. See generally *Rims Expands Membership to Industry Professionals*, BUS. INS., Nov. 16, 1998, at 1.

### III. The Inability of Mandatory Arbitration to Protect Civil Rights Plaintiffs

The numerous advantages of arbitration make its mandatory nature highly attractive to corporate employers. However, the inequities grossly outweigh any benefits derived. Arbitration's informality creates a type of "second-class" justice, with little regard for the rules of evidence and little room for discovery. This notion is only bolstered by the reality that arbitrators are not required to correctly apply the law. Moreover, confidentiality agreements and the lack of written opinions prevent public monitoring of arbitration decisions, removing a critical check on impartiality and bias. In addition, the fact that contracts are entered into without equal knowledge and bargaining power, coupled with the fact that arbitrators statistically favor employers, creates an inherent imbalance of power. Finally, the homogenous nature of arbitration panels stands in sharp contrast to the composition of those asserting the claims.

#### A. Congressional Intent & Legislative History

Mandatory arbitration also fails to comport with the purpose and history of the 1991 Civil Rights Act ("1991 CRA"). Most obviously, the plain meaning of Section 118 of the 1991 CRA does not support the notion of mandatory arbitration. Section 118 merely "encourages" the use of arbitration "[w]here appropriate and to the extent authorized by law."<sup>209</sup> This latter limitation is critical to the interpretation of congressional intent. While there is no doubt that Congress recognized the efficiency of arbitration and encouraged its use, it clearly supported arbitration only in circumstances where it would be both appropriate and legally permissible to do so. The mandatory nature of arbitration in an undesirable forum does not fall under such a definition. Furthermore, in listing the various forms of ADR, including "settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration," the words "mandatory" or "pre-dispute" are never used.<sup>210</sup> In fact, all of the forms of ADR listed prior to arbitration "are voluntary and do not prospectively bar either party from access to a jury trial."<sup>211</sup>

---

209. Cherry, *supra* note 10, at 287 (quoting 42 U.S.C. § 2000e *et seq.*).

210. *Id.* (citing Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991)).

211. *Id.* at 287-88.



A closer look at other portions of the text reveals that Congress did not intend to support pre-dispute contracts in enacting the 1991 CRA, especially in light of the sections providing for jury trials and punitive damages.<sup>212</sup> It would seem "inconsistent for Congress to pass a bill to strengthen the rights available to employment discrimination plaintiffs and then, in the very same bill, contrive to deny these plaintiffs redress in court for employment discrimination claims."<sup>213</sup>

Congressional intent to preclude mandatory arbitration under Title VII is likewise evinced by the 1991 CRA's legislative history. "The legislative history of § 118 unambiguously confirms that Congress sought to codify the law as it stood at the time the section was drafted, and eliminates any possibility that Congress intended to write *Gilmer* into Title VII law or leave the question of which forms of arbitration were permissible to the whims and presumptions of future court decisions."<sup>214</sup> Moreover, the legislative history of the ADA and the Civil Rights Act of 1990 ("1990 CRA"), each passed one year earlier, support precluding mandatory arbitration in the context of Title VII.<sup>215</sup> For instance, during the adoption of the ADA, the House Judiciary Report stated:

This amendment was adopted to encourage alternative means of dispute resolution that are already authorized by law. The Committee wishes to emphasize, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by this Act. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a CBA or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of this Act.<sup>216</sup>

The 1990 CRA's language concerning arbitration was derived from the ADA, and the statements responding to and interpreting the legislation mirrored each other.<sup>217</sup> Despite the fact that the 1990 CRA was ultimately vetoed, its language pertaining to ADR was

---

212. *See id.* at 287.

213. *Id.*

214. *Duffield*, 144 F.3d at 1195.

215. *See Cherry, supra* note 10, at 288.

216. *Id.* at 288-89 (quoting H.R. REP. NO. 101-485, pt. 3, at 76 (1990)) (emphasis added).

217. *See* 42 U.S.C. § 12212. The section provides: "where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter." *Id.*

incorporated into the 1991 Act,<sup>218</sup> thereby reflecting the mentality that while arbitration was to be encouraged, its application should be knowing and voluntary. This interpretation is borne out in the remarks made by President Bush upon signing the 1991 CRA:

Section 118 of the Act encourages voluntary agreements between employers and employees to rely on alternative mechanisms such as mediation and arbitration. This provision is among the most valuable in the Act because of the important contribution that voluntary private arrangements can make in the effort to conserve the scarce resources of the Federal judiciary for those matters as to which no alternative forum would be appropriate.<sup>219</sup>

President Bush's reiteration of the word "voluntary" certainly rebuts the notion that arbitration should be mandatory or a condition of employment.

Finally, the ideals that motivated enactment of the 1991 CRA are undermined by the notion of mandatory arbitration. For instance, Congress enacted the 1991 CRA to increase the procedural rights and remedies afforded to Title VII plaintiffs. "The Supreme Court has long recognized that in enacting Title VII Congress envisioned that decisions and remedies from the federal courts would play a unique and indispensable role in advancing the social policy of deterring workplace discrimination on the basis of race, sex, and origin."<sup>220</sup> In placing the ultimate responsibility for enforcing Title VII with the federal courts, the Court was implicitly stating that such claims should not be deferred to arbitration. It therefore would be rather disingenuous to conclude that Congress supported mandatory arbitration irrespective of the rights provided by both the 1991 CRA and Title VII.

### **B. Women and Minorities Are Disadvantaged by Mandatory Arbitration**

ADR, in its abstract form, would seem to be a welcoming option for disgruntled women in the workplace, especially in fields traditionally dominated by men. For example, consider a mid-level female employee in a large Manhattan brokerage house whose boss hangs photos of swimsuit models all over his office. Because she

---

218. See Cherry, *supra* note 10, at 288.

219. *Id.* at 290 (quoting Pub. L. No. 102-166, Civil Rights Act of 1991, 1991 U.S.C.C.A.N. 768 (emphasis added)).

220. *Duffield*, 144 F.3d at 1187 (citing *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 353, 358 (1995)).

routinely works within the confines of his office, these photos quite naturally make her uncomfortable. Nevertheless, she appreciates the work opportunities that this particular senior-level manager offers and is fully aware of his power to promote her. Moreover, because the industry is dominated by men and her position is easily dispensable, she believes that going to his boss would be out of the question. As such, she resolves to endure the posters, until this subtle type of harassment elevates into obnoxious asides and pats on her behind. Ultimately, she concludes that a lawsuit is the only option, but one that will cost a great deal of money and perhaps even her job.

It is with respect to situations such as the foregoing that advocates of arbitration extol its virtues. Not only would arbitration have allowed the employee to resolve her dispute in complete confidentiality, but she also could have terminated the harassment at a far earlier stage. Perhaps even a single phone call to the person in charge of company arbitration may have been enough.

Praising arbitration for its confidentiality and swiftness, however, ignores the reality that public scrutiny is sometimes essential. Even if the above scenario could have been resolved by way of arbitration, the inappropriateness of her boss' behavior would have been silenced by the confidential nature of the arbitration. And, with other women in the firm and industry ignorant of such practices, the firm has little incentive to make changes. In this respect, the securities industry, more than any other, insulates defendants from responsibility. The potential for such behavior to continue unchecked is more than enough to warrant concern, but when coupled with the grave risk that arbitrators will grossly favor the employer, the inequity of mandatory arbitration is obvious. The reality of this problem is only further heightened by the fact that fewer than 15% of brokers are women. With arbitration panels remaining representative of this disparity, women are placed at a disadvantage from the outset.

Not long ago, the Wall Street Journal conducted a report on several cases of blatant sexual harassment in the securities industry.<sup>221</sup> Every single case analyzed was one of obvious liability; however, despite such clear-cut facts, the awards were minimal at best. In fact, the report noted that one woman who had prevailed in a sexual harassment arbitration against a securities firm recovered only \$300.<sup>222</sup> The article reported: "So grim are the prospects for most

---

221. See Vladeck, *supra* note 3 (citing WALL ST. J., June 9, 1994, at A1).

222. See *id.*

women who go through the securities-industry arbitration process that lawyers say they now often advise their client not to bother with arbitration at all. Instead, they urge women to take modest settlements and walk away."<sup>223</sup>

Given the reality that the primary targets and victims of sexual harassment and discrimination in the workplace are women,<sup>224</sup> the foregoing study is especially disturbing. Of equal concern is the fact that most discrimination and harassment plaintiffs are people of color, "reflecting historical racial patterns and hierarchies."<sup>225</sup> In fact, according to a survey of the percentages of people bringing racial discrimination claims to the EEOC in 1996, 84% were black, 9% were white, 2% were Asian, 1% were American Indian and 3% were other.<sup>226</sup> In light of such statistics, women of color are especially disadvantaged by mandatory arbitration in the workplace; for they are forced to face discrimination based on both sex and race.<sup>227</sup> Consequently, the likelihood that a woman of color will find herself in front of an arbitrator rather than a representative jury is high.<sup>228</sup> "Thus, women, and especially women of color, who are working in 'nontraditional' industries formerly dominated by men will find yet another potential roadblock to equality in the workplace."<sup>229</sup>

The reality that arbitrators do not represent the parties that most often come before them is not the only drawback to arbitration for women. Arbitration also gives securities firms little incentive to take action against the sexual harassment and discrimination that permeates the industry. According to feminists, mandatory arbitration in the face of growing numbers of discrimination claims can be interpreted as "an attempt by employers to reduce their liability for gender and race discrimination without correspondingly reducing the amount of discrimination in their workplace."<sup>230</sup> In other words, because employers know that court is never a possibility, mandatory arbitration permits them to tactfully avoid taking any active steps to temper the inequities and discrimination that so ob-

---

223. *Id.*

224. Cherry, *supra* note 10, at 299 (noting that women simply are generally not "socialized to harass men, let alone be sexually assertive").

225. *Id.*

226. *See id.* (citing EEOC National Database, EEOC and FEPA Receipts, FY 90-96) (original data on file with the *Harvard Women's Law Journal*).

227. *Id.* at 300.

228. *See id.*

229. *See id.*

230. *Id.* at 268.

vously exist. This argument is especially credible given the reality that punitive damages are so rarely, if ever, awarded in arbitration forums. It is in this respect that mandatory arbitration contracts blatantly undermine Title VII.

#### **D. Proposed Reforms**

With the Supreme Court remaining curiously silent on mandatory arbitration, firms may continue to employ mandatory arbitration employment contracts as they see fit. However, with the NASD and NYSE refusing to honor all contracts of mandatory arbitration with respect to sexual discrimination and harassment claims, firms must prepare for the changes that inevitably lie ahead. First and foremost, employers should establish written policies regarding sexual harassment and racial discrimination, using the EEOC guidelines as a model. Procedures should be implemented within each department to control the degree of sexual harassment and discrimination in the workplace. These procedures should include, at a minimum, training sessions for *all* employees and internal mechanisms that can resolve disputes as they arise.

Even in the face of the movement toward a voluntary system, employers will continue to enjoy the benefits of arbitration. Arbitration resolves disputes quickly, cheaply and confidentially and will therefore remain a popular choice for many employees. As such, it is crucial that arbitrations are conducted in a manner that ensures due process.

An arbitration system that benefits both employers and employees is not beyond reach. Such a system could take many shapes. For example, using non-industry panels in harassment and discrimination cases would not only boost the validity and accuracy of the rulings, but also alleviate many of the employee's concerns. Providing panels composed of a greater percentage of minorities and women would achieve similar results. The establishment of higher standards and qualifications for arbitrators would better control the risk of bias and disregard for the law. In addition, an educational system that would keep arbitrators apprised of the substantive law on which statutory claims are based should be developed. Finally, a review of all awards for errors of law, as well as a requirement that all decisions be written and made public, will enhance

the ability to monitor and oversee arbitrators and provide a crucial check on impartiality.<sup>231</sup>

It is important to add, however, that none of these changes are required in a voluntary system. Allowing employees the option of taking their claims to court will provide employers with an incentive to find the best mixture of efficiency and fairness. In a voluntary system, the employer will be competing against the federal courts as well as other employers for the best system of dispute resolution. This free competition will lead to a resolution system that is both fair and efficient, as opposed to the current system of second-class justice.

### Conclusion

The overall efficiency of arbitration is irrefutable. In fact, studies reveal that ADR techniques such as arbitration and mediation are now being used routinely and with a significant degree of success in the resolution of various disputes. This trend is not at all surprising given the statistics — employers win more and pay less. However, swift justice is not always fair. The time and money that arbitration saves employers comes at a very high cost to the employee. Legal fees cannot be reduced without lower damages and higher threshold costs to plaintiffs. Quicker resolutions are dependent upon limitations on evidence and discovery. Privacy goes hand in hand with a lack of public scrutiny.

Arbitration certainly has benefits, but those benefits are undermined when the procedure becomes one of force rather than choice. There is absolutely no correlation between the claimed benefits of arbitration and the mandatory nature of arbitration within the industry. The two issues simply are not related. Giving people a choice, especially with respect to civil rights complaints would be the best way to ensure fairness, and, at the same time, preserve the integrity of the court; for to allow mandatory arbitration contracts to continue unchecked ultimately could render the courts' ability to enforce anti-discrimination laws moot. In light of its efficiency, arbitration is sure to remain an advantageous option for employers whether it is voluntary or mandatory. Accordingly, eliminating mandatory arbitration clauses is the logical and essential first step in achieving the best dispute resolution system for all parties involved.

---

231. Davis, *A Model for Arbitration*, *supra* note 11, at 188 ("By reviewing awards for errors of law, the courts would meet party expectation and preserve guaranteed rights.").