

POINT OF VIEW

There is currently a backlog of over 50,000 employment discrimination cases at the EEOC and thousands more at state and local governmental agencies.

“Employers are urged to give serious consideration to promulgating pre-dispute mandatory arbitration programs.”

The Benefits of Employment Arbitration in Employment Law

by Evan J. Spelfogel

Employment litigation has grown at a rate many times greater than litigation in general. Twenty-five times more employment discrimination cases were filed last year than in 1970, an increase almost 100% greater than all other types of civil litigation combined. There is currently a backlog of over 50,000 employment discrimination cases at the United States Equal Employment Opportunity Commission (“EEOC”) and thousands more at state and local governmental agencies. New cases of discrimination are being filed at a rate 25% greater than last year alone. Discrimination claims under the Americans with Disabilities Act¹ and other protective workplace laws are only beginning to impact these statistics. The EEOC is under tremendous congressional pressure to reduce its budget and to cut back on investigators and support staff needed to handle the influx of new cases.

Currently, there are over 25,000 wrongful discharge and discrimination cases pending in state and federal courts nationwide. Nearly all of these cases involve jury trials with lengthy delays and unpredictable results. Studies indicate that plaintiffs win nearly 70% of these cases and that the average jury award for a wrongfully fired employee is now approximately \$700,000

¹ 42 U.S.C. §§ 12201-12213.

(with many in the millions of dollars), but that it takes three to five years before the case goes to a jury and many jury verdicts are reduced or set aside by the courts.

Class and Collective wage and overtime cases are inundating the courts. There are now even more such cases pending in the federal courts nationwide than discrimination cases.

Alternative dispute resolution presents the only proven alternative to litigation of employment and workplace cases. Voluntary arbitration, at the option of an employee after a dispute has arisen, is non-controversial and of some benefit. Unfortunately, many times after a dispute has arisen, the parties become less flexible, gird for battle, and are less inclined to step back from judicial confrontation. Employee-plaintiffs seek jury vindication; defendant-employers look to the technical rules of evidence, protracted discovery, and judicial scrutiny of technical legal arguments to win the day. The opportunity for the parties to agree to ADR and binding arbitration, available long before a dispute has arisen, has been squandered. Drafting an ADR policy that assures fundamental due process and has proper checks and balances will protect the rights of both parties on a speedy, cost-effective basis and will reduce the burden on our judicial system.

The Legal Framework

The issue of the enforceability of pre-dispute agreements to arbitrate statutory employment claims was addressed by the U.S. Supreme Court in two seminal cases: (i) *Alexander v. Gardner-Denver Co.*² and (ii) *Gilmer v. Interstate/Johnson Lane Corp.*³

In 1974, the Supreme Court held in *Alexander* that an employee could sue in federal court under Title VII for race discrimination notwithstanding an agreement to arbitrate contained in his

² 415 U.S. 36(1974).

³ 500 U.S. 20 (1991).

union's collective bargaining agreement. The union, the Court said, could not waive the employee's statutory rights.

In 1991, the Supreme Court held in *Gilmer* that courts may compel employees to honor pre-dispute arbitration agreements and to arbitrate age discrimination claims. The arbitration agreement in *Gilmer* was part of an industry-wide application that persons who wished to work as brokers or registered representatives in the securities industry were required to sign ("U-4" forms). In barring Gilmer from suing the company in court for age discrimination, the Supreme Court expressly held that the unequal bargaining power as between the employer and the employee was irrelevant;⁴ and the agreement to arbitrate could not be set aside unless the employee could (a) prove "fraud in the inducement," or (b) show that he was not aware of the existence of the arbitration language in the agreement and, therefore, did not "knowingly or voluntarily" enter into the arbitration agreement.⁵

During the 1990's, with the exception of the Ninth Circuit, *Gilmer* was applied by every U.S. Court of Appeals to have considered the issue, to require arbitration of all forms of statutory discrimination. Binding arbitration agreements could be contained in handbooks, manuals, and employers' personnel policies and practices. In addition, there were numerous lower federal and state court decisions across the country to the same effect, including the New York State Court of Appeals' decision in *Fletcher v. Kidder Peabody & Co.*⁶

In mid-1998, the Ninth Circuit ruled in *Duffield v. Robertson Stevens & Co.*,⁷ that the 1991 amendments to the Civil Rights Act of 1964 evidenced a congressional intention to bar arbitration of statutory discrimination disputes. A district court judge in Boston agreed with the

⁴ *Gilmer*, 500 U.S. at 32.

⁵ *Id.* at 33.

⁶ 81 N.Y.2d 623, 601 N.Y.S.2d 686 (1993).

⁷ 144 F.3d 1182 (9th Cir. 1998).

Ninth Circuit, but the First Circuit rejected the district judge's rationale criticizing the Ninth Circuit's *Duffield* decision.⁸ In *Sens v. John Nuveen Co., Inc.*,⁹ the Third Circuit rejected the *Duffield* view, stating that analysis of the legislative history of the 1991 Civil Rights Act amendments not only did not show a congressional intention to bar arbitration, but, rather, clearly indicated a congressional favoring of arbitration. A California intermediate appeals court ruled that the Ninth Circuit's *Duffield* decision applied only to federal discrimination claims within the Circuit, and not to California state law claims of discrimination.¹⁰

Arguably, *Duffield* could be distinguished on the basis that it concerned only a "captive" securities industry arbitration panel and not an extra-industry private panel such as the American Arbitration Association or JAMS/Endispute. As described below, *Duffield* was ultimately overruled by the Ninth Circuit in its 2003 decision in *EEOC v. Luce Forward, Hamilton & Scripps*,¹¹ and was superceded by a clarifying decision of the U.S. Supreme Court.

In 1998 the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE) modified their rules, effective Jan. 1, 1999, so that registered employees were no longer required to submit statutory employment discrimination claims to arbitration based solely on U-4 Agreements. However, individual securities industry companies were allowed to develop their own ADR programs, including pre-dispute mandatory arbitration agreements. An unresolved question was whether these individual member employer arbitration programs

⁸ *Rosenberg v. Merrill Lynch*, 995 F. Supp. 190 (D. Mass. 1998); *affirmed on other grounds*, 167 F.3d 361 (1st Cir. 1998).

⁹ 146 F.3d 175 (3d Cir. 1998). *See, in accord Koveleskie v. SVC Capital Markets*, 199 WL 50226, (7th Cir. Feb. 4, 1999); *Cole v. Bums Int'l Soc. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997); *Paladino v. Avnet Computer Techs., Inc.* 134 F.3d 1054, 1062 (11th Cir. 1998); *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); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 882 (4th Cir. 1996); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487 (10th Cir. 1994); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 308, 312 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 340 (5th Cir. 1991).

¹⁰ *24 Hour Fitness, Inc. v. Superior Court of Sonoma Cty.*, 66 Cal. App. 4th 1199 (1998).

¹¹ 345 F.3d 742 (9th Cir. 2003).

required both statutory and nonstatutory related disputes to be submitted to a single private arbitration tribunal so that the parties would not be faced with bifurcation of such issues.

While the overwhelming majority of courts to have considered the issue during the ten years since *Gilmer* upheld and enforced pre-dispute agreements to submit statutory employment discrimination claims to mandatory arbitration, there were a handful of “backlash” decisions across the country that were instructive and presaged the need for further Supreme Court clarification. Several courts refused to enforce “opinionless” arbitration awards.¹² The Michigan Supreme Court refused to enforce an arbitration provision in a handbook because the employee never signed anything indicating an intent to be bound, and the employer reserved to itself the right not to be bound.¹³

Even before *Duffield*, the Ninth Circuit had held in *Prudential Ins. of Am. v. Lai*¹⁴ that an employee did not “knowingly and voluntarily” enter into an arbitration agreement where the relevant language was “buried” in a lengthy legal document, was not called to the employee’s attention during the negotiations for the agreement, and was never mentioned at any time before the dispute arose months later.¹⁵ Several courts refused to enforce arbitration clauses because they were not precise enough and did not expressly reference statutory claims.¹⁶

The conflict between *Duffield* in the Ninth Circuit and cases like *Rosenberg*, *Cole*, and *Seus* in the First, D.C., and Third circuits respectively, one would think, suggested early

¹² See, for example, *Halligan v. Piper Jaffrey*, 148 F.3d 197 (2d Cir. 1998); *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456 (11th Cir. 1997).

¹³ *Heurtebise v. Reliable Business Computers, Inc.*, 452 Mich. 405, 550 N.W.2d 243 (1996).

¹⁴ 42 F.3d 1299 (9th Cir. 1994).

¹⁵ *Id.* at 1305.

¹⁶ See, for example, *Renteria v. Prudential Ins. Co.*, 113 F.3d 1104 (9th Cir. 1997) (arbitration clause that did not list, specifically, the statutes covered could not constitute a “knowing waiver”).

resolution of the split in the circuits by the U.S. Supreme Court. The Court, however, declined the opportunity when it denied certiorari in *Duffield*.¹⁷

Similarly, the Supreme Court avoided an opportunity to clarify the reach of *Gilmer*, the continued viability of *Alexander*, and the application of the 1991 Civil Rights Act amendments in its 1998 decision in *Wright v. Universal Maritime Service Corp.*¹⁸ There, the Court ruled, an agreement to arbitrate found in a union collective bargaining agreement could not bar a federal court Title VII suit, absent a “clear and unmistakable” waiver. Writing for a unanimous bench, Justice Antonin Scalia stated that the Court did not have to reach the more significant questions as to whether *Alexander* had been overturned by *Gilmer* and whether a union could waive an individual member’s right to go to court on a statutory Title VII claim, because the agreement at issue did not expressly reference the statute or its substantive coverage.

In the meantime, the National Labor Relations Board and the EEOC continued to oppose any mandatory arbitration policy that barred an employee from filing administrative complaints with those agencies. The Second Circuit in *EEOC v. Kidder Peabody & Co.*,¹⁹ and a Michigan District Court in *EEOC v. Frank’s Nursery & Crafts, Inc.*,²⁰ ruled, however, that while the EEOC might have authority to investigate discrimination charges brought by an individual employee and to seek injunctive relief with respect thereto, the EEOC may not seek individual relief, including monetary compensation of any kind, for an individual who had signed an arbitration agreement. Both courts reasoned that the Federal Arbitration Act (“FAA”)²¹ expressed strong congressional preference in favor of enforcing valid arbitration agreements freely entered into by contracting parties. Moreover, they noted, the Supreme Court had held that

¹⁷ 525 U.S. 982 (1998).

¹⁸ 119 S. Ct. 391 (1998).

¹⁹ 156 F.3d 298 (2d Cir. 1998). Arguably overturned by *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002).

²⁰ 966 F. Sup. 500 (E.D. Mich. 1997), Reversed, 177 F. 3d 448 (6th Cir. 1999)

²¹ 9 U.S.C. Sections 1-16 (1994)

precluding individual suits based on arbitration agreements was not inconsistent with the remedial purposes underlying the ADEA. The EEOC may continue to investigate and remedy pattern, practice, and collective claims against the employer, but that as to individual employees who have signed arbitration agreements, the EEOC stands in the shoes of the affected employee.²² On the other hand, the Ninth Circuit held in *Kraft v. Campbell Soup Co.*,²³ that agreements to arbitrate employment disputes fell within an exception in Section 1 of the FAA and, thus, could not be enforced under that statute.

The "backlash" cases referenced above, generally, taught that carefully structured arbitration programs that merely substituted an arbitral forum for a judicial forum and that carefully protected all of an employee's substantive rights and remedies, should not be objectionable.

In *Circuit City Stores v. Adams*,²⁴ a landmark 5-4 decision, the United States Supreme Court ended the debate and ruled that employers could require most employees to resolve their employment related disputes, including statutory discrimination claims, through arbitration. As a result of *Circuit City*, the vast majority of employees and employers are free to enter into binding arbitration agreement pursuant to the FAA.

Left unresolved by the Supreme Court in its decisions in *Gilmer*, *Wright* and *Circuit City* was the continued viability of *Alexander* and whether an employer and a union might agree in a collective bargaining agreement that employee discrimination claims (as contrasted with contract interpretation issues) would be subject to binding arbitration.

²² *Supra*, note 4.

²³ 161 F.3d 1199 (9th Cir. 1998).

²⁴ 532 U.S. 105 (2001).

In mid-2009, the Supreme Court resolved this issue in the affirmative in *14 Penn Plaza LLC v. Steven Pyett*.²⁵ In its split decision, the Supreme Court held enforceable a provision in a collective bargaining agreement that clearly and unmistakably required covered employees to arbitrate federal age discrimination claims.

In view of *14 Penn Plaza*, *Circuit City* and *Gilmer*, it is now clear that as a legal matter, properly and carefully crafted and administered pre-dispute mandatory arbitration policies will be upheld and will bar employees from suing in court and obtaining jury verdicts on statutory discrimination claims – provided that the policies are fair, afford due process and merely substitute an arbitral forum for a judicial forum, while preserving to employees all the rights and remedies they would have been entitled to in a court.

Drafting the Arbitration Program

In view of the current legal landscape, an employer may now draft and implement a carefully worded mandatory arbitration program that at a minimum provides for the following:

- (i) the neutral be an experienced labor/employment arbitrator familiar with discrimination laws;
- (ii) there be a fair, simple discovery method for employees to obtain information necessary to prepare for the arbitration hearing and protect their claims;
- (iii) the employer pay the entire arbitrator and arbitration tribunal fees (although the employee may be required to pay the equivalent of a federal court filing fee);
- (iv) the employee have the right to be represented by counsel;
- (v) the arbitrator have the same authority to award the same range of remedies available in court under applicable law;
- (vi) the arbitrator issue a written opinion explaining the award in detail; and
- (vii) the arbitrator's opinion and award be subject to review under the FAA or similar state law.

Needless to say, the employee should be allowed to participate in the arbitrator selection process; time limits should be comparable to applicable statutes of limitations; there

²⁵ 129 S. Ct. 1456 (2009)

should be no retaliation for an employee's using the ADR program; and there should be fundamental due process.

Clearly, the arbitration policy should be bilateral, i.e., the employer should be equally bound to arbitrate any claims it might have against the employee.²⁶ Moreover, references to the arbitration policy should be highlighted in bold, oversized print on job applications, in employee handbooks, and in periodic reminders and distributions to employees. Further, the policy or program should expressly list, either by statute or by description of its substantive coverage, the statutory claims that must be submitted to arbitration.

The arbitration policy should be republished at least annually (and preferably semi-annually), and should be discussed frequently at employee meetings. Employees should sign a separate page agreeing to be bound by the arbitration policy and should sign attendance sheets at discussion meetings as evidence they were aware of and knew of the policy. Finally, the program should be carefully prepared, announced, marketed, and implemented as the benefit to employees that it is, rather than suggesting any limitation on employee rights.

Other Advantages and Disadvantages of Arbitration

In recent years, many well-known employers have set up mandatory arbitration programs covering millions of employees. These include J.C. Penney, LensCrafters, Phillip Morris, Chrysler Corporation, Credit Suisse Bank, Bear Stearns, and Salomon Smith Barney. The benefits of an arbitration program are clear. A survey of employee attitudes with respect to the use of arbitration in employment disputes shows that 83% of American workers favor the use of

²⁶ Typically, employers exclude from arbitration their claims for injunctive relief to prevent breaches of covenants not to compete and confidentiality agreements. Typically, employee claims under state workers' compensation and unemployment compensation statutes are also excluded from arbitration. We do not see such exclusions as indicating a lack of mutuality or one-sidedness, as suggested by one court in *Gonzalez v. Hughes Aircraft Federal Credit Union*, 1999 Cal. App. Lexis 151 (Ct. App. Cal. 2nd App. Div. Feb. 23, 1999).

arbitration instead of courts to settle disputes with management.²⁷ Most employees surveyed felt that arbitration would make it easier for ordinary workers to obtain a speedy and fair hearing, that it would be far less costly than hiring a lawyer and going into court, and that it was a meaningful substitute under federal civil rights laws.

From management's point of view, a mandatory arbitration program speeds up the dispute resolution process, minimizes the expense of discovery, reduces internal and legal costs, ensures the preservation of confidentiality (thereby minimizing the risks of adverse publicity), and avoids the possibility of runaway jury verdicts. Disadvantages include the fact that arbitrators are not as inclined as courts to preserve the technical rules of evidence, and that the parties mutually give up their right to judicial review and appeal.

The U.S. Supreme Court's decisions in *Burlington Industries, Inc. v. Ellerth*,²⁸ and *Farragher v. City of Boca Raton*²⁹ provide even more incentive for an employer to initiate an ADR program. These decisions indicate that an employee's claims of sexual harassment and hostile work environment may be defeated by the employee's failure to take advantage of an available and effective employer provided grievance/arbitration program.

Moreover, aside from mandatory pre-dispute agreements to arbitrate statutory discrimination claims, many other nonstatutory forms of employment disputes may also be required to be arbitrated. These include, for example, contract and tort claims such as wrongful discharge, assault and battery, defamation, negligent hiring, retention or supervision, and intentional infliction of emotional distress. These are all claims that plaintiffs' lawyers typically

²⁷ See PRINCETON SURVEY RESEARCH ASSOCIATES, WORKER REPRESENTATION AND PARTICIPATION SURVEY Focus GROUP REPORT (April 1994).

²⁸ 118 S. Ct. 2257 (1998).

²⁹ 118 S. Ct. 2275 (1998).

join with statutory claims to avoid the 1991 Civil Rights Act's \$300,000 cap on compensatory and punitive damages in certain discrimination cases.

Conclusion

In conclusion, compulsory arbitration of statutory employment disputes offers many advantages over litigation. These include speed, efficiency, informality, reduced costs, confidentiality and the potential for preserving an amicable relationship between the parties, not to mention the unclogging of court and administrative agency backlogs. Considering all of the alternatives, employers are urged to give serious consideration to promulgating pre-dispute mandatory arbitration programs. While active opposition and unanswered questions remain, the advantages of arbitration substantially outweigh any countervailing considerations.

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