

1995

Employment Discrimination

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



Part of the [Law Commons](#)

Recommended Citation

Employment Discrimination, 63 Fordham L. Rev. 1613 (1995).

Available at: <https://ir.lawnet.fordham.edu/flr/vol63/iss5/12>

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 Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

EMPLOYMENT DISCRIMINATION

Introduction

PROF. KATSORIS: The next topic that we have is employment discrimination. As Jack Coffee mentioned, when the Uniform Code¹⁸⁰ was first adopted by the various SROs around 1980, employment discrimination cases were not the foremost thing the Securities Industry Conference on Arbitration (“SICA”) had in mind. What we had in mind basically were procedures for resolving disputes between the industry and customers, whereas employment discrimination involves the industry and its employees. Yet, the Supreme Court in *Gilmer*¹⁸¹ said that employment disputes belong in arbitration if there is an arbitration agreement.

Difficult issues have arisen. For example, are the present pools of arbitrators properly trained to handle these cases? Most of the SRO arbitrators have expertise in securities issues, but not discrimination issues. Indeed, there have been moves in Congress to excise this area from securities arbitration and move it back to the courtroom.¹⁸² These and other issues will be discussed by our panel.

On this panel we have Judith Vladeck, who is considered one of the leading advocates of employees in discrimination cases. She’s also an Adjunct Professor of Law at Fordham Law School.

On the opposite side is Theodore Rogers, who is with Sullivan & Cromwell. He is an outside counsel to member firms. He has successfully defended many cases involving employment discrimination. He has also participated as an instructor in the New York Stock Exchange training program for arbitrators on employment issues.

Have you decided which one of you would like to go first, or should I pick?

MS. VLADECK: I’m speaking first. It has been decided.

MR. ROGERS: Yes. I had assumed Ms. Vladeck would go first. She’s listed first on the agenda, in reverse alphabetical order.

MS. VLADECK: I do object, not to the order, but to the prior restraint. You told us that we had to keep it impersonal. This is not a subject that lends itself to dispassion.

Panelists

MS. VLADECK: I want to start by saying that I think the Exchange has gotten a bum rap in the way the press has dealt with its handling of discrimination cases, or employment cases generally. I’m

180. Uniform Code, *supra* note 14.

181. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

182. S. 2012, 103d Cong., 2d Sess. (1994); H.R. 4981, 103d Cong., 2d Sess. (1994).

among those who have been most vocal in criticizing, but nonetheless, I don't think it is fair.

I think there was imposed upon the Exchange a burden for which it simply was not prepared and probably still is not prepared, that is, to deal with public law issues for which it was not trained, had no background, no experience, and no philosophy. There was no policy that helped in shaping the way you dealt with these burdens that were imposed on you by the Supreme Court, that is, the arbitration of employee discrimination claims.

I must say that you rose magnificently to the responsibility, administratively. You got us into the process; you put us on computer; you got our cases scheduled. But I don't think you have yet come to grips with what you're trying to do and what you should be doing. You've been given a major responsibility for the implementation of what we've called an overriding public policy of the United States, that is, the elimination of invidious discrimination in the workplace.

You got some help. Time has taken care of some of it. You look around this room today and read some of the name tags and you will certainly see that this is a different group than would have been here thirty years ago. That is, the composition of the group is certainly a lot more diverse. You have people here of ethnic backgrounds who would not have been any more welcome than a woman would have been in earlier times. I still see a white-male-over-40 preponderance, but there is some progress being made, just by accident of time and influence from outside sources.

Nonetheless, you've been given the responsibility, in one of the largest industries, for policing a major statutory mandate, and I don't think any of the people who are given this responsibility or to whom it is delegated know what they're doing. And I don't blame them. This is not their area of competence. They haven't been trained for it. They're not educated for it. And I'm not sure that the member firms have yet addressed the way to deal with this huge burden that's been placed on them.

I strongly recommend that we look at, or that you look at, or somebody other than me look at, the history of successful arbitration in the United States. I don't know why I've limited it to the United States.

Arbitration can be the most wonderful dispute resolution device, going back into history when couples the world over came to their parish priest or their local rabbi and gave him the responsibility for deciding issues that they could not themselves resolve. We established, historically, the practice of going to a neutral third party that we trusted. The notion was simple: we would give that person, because of trust, the decision making that we ourselves could not achieve.

If you look at American history, you will see that the best and most useful, most successful arbitration procedures were introduced by in-

dustry. If you look at the Worth Street Rules,¹⁸³ you see how the textile industry, which learned that it was cutting its own throat, established rules for living together. The same history is found in the garment industry, construction industry, and others.

You get to World War II and you see where so much of what we're working with today emerged. People couldn't strike. There was imposed on them the obligation to work although they couldn't get wage increases. We had to keep the war material coming, and so the War Labor Board¹⁸⁴ was established and conducted tripartite arbitrations.

Have you ever thought about why we have three arbitrators when it is hard enough to live with one person's schedule? Why do we have these three guys? "Guys" is not carelessly said. They are almost inevitably three men. Why do we have them? Because the War Labor Board created a structure. There was a public member, there was a union side member, and there was a management member on the Board. Those were the three groups whose interests were being determined.

And the structure that they developed in the War Labor Board still informs the method by which labor-management arbitration is conducted today: What's the issue? What's the contract language? What does the union say? What does the employer say? Reasoning, and then opinion.

How much of this can be transferred or transported into the securities industry whole-cloth? Some of it? A little of it? None of it?

I'm not telling you what the answer is. I'm telling you that if you don't look at some of the history, you are cheating yourselves out of some direction that may be useful to you. But the essential part of it was the trust and confidence in the structure and the procedure.

I can't blame the participants in Exchange arbitrations for having their grave doubts about the arbitrators, even though they are all honorable men, and I have no question about the integrity or the decency of any of the people who do this. But these are not customer cases. These are not cases in which the arbitrators think they have a role in protecting the industry.

Professor Katsoris, I think you said it, that in customer cases, there is concern for the protection of the consumer. You come into the customer cases or the investor cases either with the notion of sophisticated investors, or of widows and orphans needing protection against some rogue doing something wrong, with the arbitrators having a concern about the institution, about the industry. But, who has told them

183. The Worth Street Rules were a series of regulations agreed to by representatives of buyers and sellers in the textile industry. The regulations set the ground rules for negotiations over sales.

184. 50 U.S.C.A. § 961 (1991), *repealed by* Aug. 10, 1956, ch. 1041, § 53, 70A Stat. 641.

that they have to have a concern about the institution or the industry in the way the member firms treat their employees?

Well, it wouldn't be wasteful to do that anyhow, because I think the leadership in the next years for the elimination of discrimination in the workplace is going to come from major, smart corporations that know that there is a terrible waste when you exclude from the workplace women, minorities, etc. There is a terrible, terrible waste when you do not deal promptly and efficiently with a harassment case, an abuse case, within the workplace.

Enough studies have been done, if you like to work with hard data, to show you that for every harassment case that is not resolved promptly and effectively, there is loss—loss to you, loss to the employer, loss to the member firms, loss of time, loss in production.

Someplace, somewhere along here, there has to be an announcement of what policy these people are supposed to be trying to deal with. When they deal with customer cases, they know that there's public law out there. When they get to the employment cases, they come in naked and ignorant.

I recommend that we go back to the basics, to what arbitration was supposed to have been. If you look at the label or the logo of the American Arbitration Association or some of the other leaders in dispute resolutions, the notion is that it's going to be fast, it's going to be cheap, and it's going to be fair.¹⁸⁵

I urge that in the period of development of these policies that will determine the future of arbitration in your industry, in dealing with employment cases, that you do not take your advice from lawyers for the member firms. To the extent that management lawyers are participating in these arbitrations, they are introducing all of the worst of the court processes that inflate the cost—large briefs, long records, big speeches—and certainly are eliminating any hope that it is going to be fast or cheap.

As to fair, I'm not sure you need three arbitrators. Maybe that's what people think looks fair; but, I certainly think you have to give the participants a little better shot at knowing who their arbitrator is and a little greater participation in the selection process. I am not sure we can afford in this area to permit your arbitrators the luxury of no opinion. If they are dealing with people's lives and their answer is zero, I don't know what sense of fairness any participant comes away with.

You might consider, and I offer this as a final observation, where there are statutory rules that are being considered in an arbitration process, what different approaches have been used. I know the Securities and Exchange Commission wouldn't consider delegating to an arbitrator any of its authority, not a fingernail, although some of the

185. The logo of the American Arbitration Association formerly included the words, "Economy," "Justice" and "Speed."

same issues arise before the SEC as will come up in your securities arbitrations. On the other hand, the National Labor Relations Board, which has similar statutory structure, deals very differently with arbitrations. Somebody's fired; he complains that he got fired because of union activity. There is a union contract. There is a charge filed with the NLRB. There is an arbitration demand filed by a union. Same issue, essentially. The NLRB will defer. It will, what they call, "Collyer" the case.¹⁸⁶ And they'll wait and see the outcome of the arbitration.

I'm not suggesting that this is what you are going to ask our legislators to consider, but all of these are areas that I suggest have gone unexplored in this rush to create a system to catch up with the Supreme Court's dumping on you a responsibility for which you were not prepared. To the extent that you have risen to try to adjust to the demand, I compliment you. To the extent you leave it where it is, I deplore it.

MR. ROGERS: Well, I am a management lawyer, and despite Judith Vladeck's warning, I hope you will hear my advice and possibly take some of it.

I do agree with Judith that the New York Stock Exchange has received a bum rap. I believe there has been a well-orchestrated public relations campaign over the course of the last nine or ten months against arbitration of employment discrimination claims. I think it has been unfair and I think the motives of many of the people who are behind it are quite suspect.

What I'd like to do today is address first the overriding question: Should the New York Stock Exchange and other self-regulatory organizations arbitrate employment disputes? I think you will guess my answer, but I will give it to you anyway: emphatically yes. And second, moving past that: How does the arbitration process currently work, and what about the criticisms that have been so bruited about?

The New York Stock Exchange arbitration facility in particular (and the same can certainly be said of the National Association of Securities Dealers ("NASD") and the other self-regulatory organization arbitration facilities) is well established, is sophisticated, and, I believe, provides a tremendous service to member firms and registered representatives in all fields.

I do not believe that the Exchange needs to worry about Judith Vladeck's assertion that it is charged with policing the statutory framework of employment discrimination law. That is not the Exchange's role and the Supreme Court never meant to dump anything like that on it.

186. The NLRB "Collyers" a case when it defers to the decision of an arbitrator or an arbitration panel. The Board may dismiss a complaint it is otherwise permitted to hear if it advances the policies of the National Labor Relations Act. See *Collyer Insulated Wire*, 192 N.L.R.B. 837, 839-41 (1971).

What the Exchange's arbitration facility does, and I believe does well, is consider and resolve individual claims—employment claims. It has considered employment claims for years. What's new, in light of the Supreme Court's decision in *Gilmer*¹⁸⁷ in 1991, is the consideration of employment discrimination claims. The General Accounting Office's March 1994 report on securities arbitration, about which I'm sure many here are familiar, noted, for example, that in 1991 and 1992 the New York Stock Exchange arbitrated 312 employment cases, and only sixteen of those were discrimination cases.¹⁸⁸

In other words, this arbitration facility is well versed in deciding claims of employees against their employers. In the past they may have been claims for bonuses that weren't paid or for unfair firing or for some other issue unrelated to discrimination. Now the Exchange is determining employment discrimination claims.

One of the reasons that I think it is so vital for the Exchange and the other self-regulatory organizations to continue their good work in arbitration, including arbitration of employment discrimination claims, is that the court system is broken.

Page one of today's New York Times reports on the U.S. Judicial Conference's recommendations that employment discrimination claims somehow be thrown out of the federal courts or at least be subject to some preliminary screening by the Equal Employment Opportunity Commission.¹⁸⁹

The federal judges realize that they cannot handle the tidal wave of employment discrimination claims. Their suggestion that the EEOC handle it is a difficult one to fathom because those of us with experience with the EEOC know that they're swamped and what they're doing is trying to shuttle cases over to the federal courts.

The Dunlop Commission, the commission formed by the current administration to consider worker-management relations, issued a fact-finding report in May of 1994.¹⁹⁰ In chapter four of that report, there was a very interesting and fair consideration of employment regulation, litigation, and dispute resolution.

A number of things that the Dunlop Commission found about litigation underscores how arbitration plays a vital role both for the member firms and for their employees and how it is in both their interests. A number of the Commission's findings that I think under-

187. *Gilmer v. Interstate/Johnson Lane, Corp.*, 500 U.S. 20 (1991).

188. General Accounting Office, Health, Education and Human Services Division, GAO/HEHS-94-17 *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes* (March 30, 1994) at 7 [hereinafter 1994 GAO Report].

189. Robert Pear, *Judges Proposing to Narrow Access to Federal Court*, N.Y. Times, Dec. 5, 1994, at 1.

190. U.S. Departments of Labor and Commerce, Commission on the Future of Worker-Management Relations, Fact Finding Report (May 1994) (on file with the *Fordham Law Review*).

score this fact are as follows: the report found that litigation is expensive and that complicated court processes make it difficult for employees to pursue claims;¹⁹¹ the report also found that from 1971 to 1991 the overall number of civil cases brought in federal court had risen by 110%, but the number of employment claims rose by 430%.¹⁹² And those figures are from before the Americans with Disabilities Act and the 1991 Civil Rights Act became effective, so by now, presumably, the increase in discrimination cases is much larger.

As for costs, the Commission found that substantially over one dollar in costs, attorneys' fees, and other just wasted money is spent for each one dollar that goes to a claimant in compensation for a court finding of discrimination.¹⁹³ The Commission found that the costs, the difficulty, and the complication of employment litigation ultimately restrict litigation to upper-level professionals, usually complaining of their termination.¹⁹⁴

Jury verdicts, the Commission noted, are often lottery-like in their results.¹⁹⁵ The problem of unpredictable jury decisions is one that everyone seems to be considering these days. Last night on the eleven o'clock news, I saw a report that the City of New York is going to propose some way whereby claims against the City could be determined in a forum without a jury.

In other words, the current litigation process is just broken. As Judith Vladeck noted, arbitrators can secure significant savings in time and significant savings in overall difficulty for everyone. I submit that there is no reason to treat employment discrimination arbitration differently from the other disputes the arbitration department handles. Arbitrators are well able to handle discrimination claims.

One issue that wasn't raised by Judith Vladeck, but is often raised by critics of arbitration, is that with the way that the U-4 form¹⁹⁶ is constructed, the employee must bring claims in arbitration. The Dunlop Commission itself, in its report, noted that fact and noted that other industries as well are implementing pre-dispute arbitration agreements requiring arbitration of disputes. It stated that voluntariness of arbitration was not that significant to it in considering whether arbitration is a worthwhile forum.¹⁹⁷ It noted that the courts aren't

191. *Id.* at 105.

192. *Id.* at 111-12.

193. *Id.* at 109-10.

194. *Id.* at 112-13.

195. *Id.* at 113.

196. Form U-4, Uniform Application for Securities Industry Registration or Transfer.

197. "The fact that employment arbitration is not a particularly voluntary procedure as far as individual employees are concerned is not a sufficient reason for rejecting this option. The alternative of litigation in court or before an administrative tribunal is hardly voluntary either." U.S. Departments of Labor and Commerce, Commission on the Future of Worker-Management Relations, Fact Finding Report 118 (May 1994). *But see* Peter F. Blackman, *Arbitration Suit Asserts Constitutional*

particularly voluntary either.¹⁹⁸ If you don't have an arbitration facility or agreement with your opponent then you are relegated to courts whether you like it or not.

Also, of course, one must keep in mind with respect to New York Stock Exchange arbitration, the structure of the rules is such that if it were any other way the employee would have an option that the employer does not. Member firms, by the rules, are obligated to arbitrate claims brought by employees whether they want to or not.¹⁹⁹

The fact is that employers will continue increasing their use of arbitration. Even if the Exchange were to decide to get out of employment discrimination arbitration, companies and industries that don't have an arbitration facility with this sophistication, with this ability, are entering into agreements requiring arbitration with their employees and will continue doing so. Arbitration is something that is the wave of the present and the future, and I think it would be extremely short-sighted for the Exchange to get out of that business.

Now, I want to address a few of the specific criticisms that have been raised against arbitration of employment discrimination claims. First, it is often claimed that arbitrators have no training in employment law. That's wrong. The NYSE does train arbitrators in the law. The NASD, I know, does an excellent job in its training efforts. This is a point of personal interest to me. Pearl Zuchlewski, a plaintiff's lawyer who is here today, and I, with Jay Waks, who's also here, under the auspices of the Association of the Bar of the City of New York, offered a training program for hundreds of arbitrators last year. The result was, in the words of the Securities Arbitration Commentator, "commendably objective."²⁰⁰

But let's go beyond the fact that training is offered and try to understand how significant the issue of training is.²⁰¹ Although it is against my interests to say this, because I do a lot of work in employment discrimination, employment discrimination law is not rocket science. It is an area of law that smart people can understand.

Those who criticize the supposed lack of legal training by arbitrators ignore the fact that juries have no training in discrimination law, and there is no reason to suppose that a judge's instruction to a jury concerning the law leaves the jury any more informed on these issues than arbitrators who have received some training and have the benefit of the competing arguments and evidence submitted by counsel. In

Arguments, Nat'l L.J., Feb. 27, 1995, at B1 (discussing a suit, filed in federal court in San Francisco, which alleges that compulsory arbitration forces employees to give up their due process and jury trial rights).

198. *Id.*

199. NYSE Rules, *supra* note 14, Rule 600(a), ¶ 2600.

200. *Arbitrator Training: Employment Law Seminar*, Sec. Arb. Commentator, June 1993, at 8.

201. For a full discussion of arbitrator training, see *infra* pp. 1679-94.

short, I don't believe that discrimination law presents any more complications than other legal claims that have been handled here in arbitration successfully for years.

The second criticism that's been raised in this ongoing P.R. campaign against arbitration is that arbitration rules are unfair to employees. That's wrong again. The New York Stock Exchange bends over backwards to afford employees an opportunity to present their case. Except for depositions, which are only rarely used in this forum, the full panoply of document discovery and of interrogatories, so-called questions to the other side, is used. In my personal experience dealing with discovery disputes,²⁰² when one side claims that the other side's requests are too broad or out of bounds, the Exchange has been, if anything, erring on the side of giving the claimant more information than reasonably could be considered useful.

Other arbitration rules that operate, I believe, to create an effective mechanism for resolving these disputes, include the rule that the strict rules of evidence used by the courts do not apply.²⁰³ I believe that this ultimately works more to the benefit of the employee than the employer because it allows the employees to put before the arbitrators all manner of evidence that would never see the light of day in court.

Perhaps most important for employees, arbitrators only very rarely dismiss cases before the hearing. In court, employers can more readily obtain pretrial dismissal of meritless claims. In arbitration, employees get to have their "day in court," and sometimes prevail, in cases that likely never would have survived in court.

Another criticism that has been leveled is that the arbitrators are from the securities industry and biased against employees. Now, this has been one of the most oft-repeated criticisms, but I think, probably, this is one that the people in this room know is most incorrect. The fact is that ordinarily, of the three persons on an arbitration panel, two are public, having no connection to the industry or obviously, to the parties. The third arbitrator, who is from the industry, cannot come from the firm involved in the case, and, like all arbitrators, must disclose any circumstances that might preclude the arbitrator from rendering an objective and impartial determination.

The fact that one impartial arbitrator knows something about how the securities industry works actually benefits all parties, because these cases brought by securities industry employees often deal with the intricacies of how individuals do very complex jobs, and the fact that one person may know something about how those jobs are done, I think works to the benefit of all concerned.

202. For a full discussion of discovery, see *supra* pp. 1551-70.

203. Uniform Code, *supra* note 14, § 21, at 18; NYSE Rules, *supra* note 14, Rule 620, ¶ 2620.

Finally, of course, each party has the unlimited right to challenge the selection of any arbitrator for cause, as well as the right to make one peremptory challenge, removing an arbitrator without having to give a reason.

Another criticism constantly raised is the notion that the arbitrators are all older, white men. In my experience, that's not true. I think the concept of "demographic incorrectness" is one that is often thrown out without any real substantive or legitimate explanation as to its importance. I believe that it is just "bean counting," plain and simple. But most importantly, in my personal experience with the Exchange and with the NASD, I see that it's not true.

Finally, another subtext that underlies all of the criticism of arbitration is the claim that employees cannot win. Mr. Clemente may have more accurate or more updated statistics, but the ones I have prove this is just not right. The GAO report from March of 1994 studied eighteen cases that went to a decision, and of those the claimant won in ten of them.²⁰⁴ A fifty-five percent success rate for claimants is not evidence of a biased forum. Now, some may try to minimize that substantial success by claimants by stating that a number of the winning employees may have wanted more than they even got. But I don't think that's anything that distinguishes arbitration from any other litigation forum.

The short of it is that the criticisms of arbitration are readily rebutted. I can speak from current and personal experience. At the moment I'm involved in a very lengthy employment discrimination hearing, although it is no more lengthy than it would be in court. The hearing started this fall, approximately a year after the statement of claim was filed, which is substantially quicker than it could ever have gotten done in court. The prehearing discovery process was extremely fair and well run by the chair of the arbitration panel, who is a woman, I might note. I can attest to you that there is nothing about this process that is pro-employer. I've had my frustrations in this current hearing as well as others.

Professor Katsoris, very kindly, when he first identified me early on, said I've successfully represented management in this forum. Unfortunately, sometimes I have unsuccessfully represented management in this forum. It is not one that's just one-sided.

As to advice to improve the process, I believe, that there is some use in considering, or encouraging arbitrators to consider, the possibility of some prehearing motions and possibly the use of directed verdicts. There are claims that are meritless—the claimant has put on his or her case and it clearly has no merit, it does not seem particularly productive to go forward. I know that sometimes the arbitrators have

204. See 1994 GAO Report, *supra* note 188, at 2.

decided cases at that point, but in my personal experience, sometimes they have decided not to.

I think that it very much merits your serious consideration as to whether you encourage arbitrators to make written decisions. Judith Vladeck used the example of someone getting a zero dollar result, and discussed whether that person should be entitled to get a statement of reasons. From my own perspective on the management side, I think there's some merit to written decisions for another reason.

If I represent a company that has been charged with nothing but discrimination—in other words, there aren't some tag-along claims of breach of contract or something unrelated to discrimination—and if the arbitrators at the end of the day decide, as sometimes they do, that although they don't really see that there was any discrimination, they think that overall the claimant is entitled to some amount of money, and if the arbitrators give that claimant one dollar, and I don't have a statement of why they gave that one dollar, then there is substantial damage to my client because it might be assumed, incorrectly, that the arbitrators found discrimination existed.

I have personal experience of how seriously committed many of the companies who are members of this Exchange are to equal employment opportunity. It is very personal and hurtful to be charged with discrimination. And it is certainly a black mark on your record if you are found liable for it. So, in other words, I do concur with Judith Vladeck that there is something to be said for encouraging arbitrators to write opinions.

In sum, the trend these days is toward arbitration throughout the country for all the right reasons. Congress has endorsed arbitration. In the 1991 Civil Rights Act it included a provision encouraging the use of arbitration.²⁰⁵ The Dunlop Commission is very seriously considering arbitration. Its findings in that regard are quite interesting. And throughout the United States, industries are trying to implement it. Here, you've got it, and I believe you ought to nurture it and protect it.

One other bill that's of interest is worth noting. There was a mention by Professor Coffee of the Republican bill, the Common Sense Legal Reform Act.²⁰⁶ There was another bill introduced by Senator Danforth at the end of this past term—obviously he won't be reintroducing it since he has retired, but I believe it will be introduced—that would amend Title VII of the federal Civil Rights Act, and the Americans with Disabilities Act, to require that before a case goes to a law-

205. Civil Rights Act of 1991 § 118, Pub. L. No. 102-166, 105 Stat. 1071, 1081 (1991) (amending several sections of the Civil Rights Act of 1964, 42 U.S.C. § 1981 (1988 & Supp. V 1993)).

206. See *supra* note 167 and accompanying text.

suit, if the defendant demands mediation (and mediation is in a sense regulated settlement talks), then some mediation should take place.²⁰⁷

I don't know what will happen with that bill, but it again is evidence of the fact that people understand that the court process is broken and that when you have a good facility for resolving these things, you should use it.

The standard stated a few minutes ago by Judith Vladeck was that you should have a process that's fast, cheap, and fair. In my experience, this forum has very substantially met those goals. Obviously nothing's perfect and obviously improvements can be considered. Thank you.

Discussion

PROF. KATSORIS: Thank you, Ted. Before throwing it open for comments, I'd like to ask Judith a couple of questions, playing my role of devil's advocate.

The mistrust of arbitration was, to some extent, an underlying basis of why the *Wilko*²⁰⁸ Court felt that '33 Act²⁰⁹ cases should not be forced into arbitration. We've come a long way since then. You mentioned that these discrimination claims don't belong in arbitration. Is your basic criticism that they don't belong in self-regulatory organization arbitration specifically, or in arbitration generally? In other words, do you have the same apprehension as to the AAA as you do with SRO arbitration of these discrimination claims?

The second question is, if they do stay in SRO arbitration, how could we improve the system to satisfy you more?

Better training of arbitrators is obviously one improvement. Maybe written opinions or decisions would be another thing. How about the method of selection of arbitrators?

I have no objection to the way the SROs are presently selecting arbitrators in securities cases,²¹⁰ but there are different ways of selecting panels. For example, at the AAA each party gets a list of arbitrators that they pick from.²¹¹ Would that make you more comfortable in SRO employment cases? We could possibly experiment with that, as a pilot program, as a means of improving your image of fairness in such cases.

207. Employment Dispute Resolution Act of 1994, S. 2327, 103d Cong., 2d Sess. (1994) (introduced by Sen. Danforth). A companion bill, H.R. 2016, 103d Cong., 2d Sess (1994), was introduced in the House by Rep. Gunderson. Rep. Gunderson's staff has indicated that he intends to reintroduce the measure in the 104th Congress.

208. *Wilko v. Swan*, 346 U.S. 427 (1953).

209. Securities Exchange Act of 1933, 15 U.S.C. § 77 (1933).

210. See NYSE Rules, *supra* note 14, Rules 607-11, ¶¶ 2607-11.

211. See, e.g., American Arbitration Association, *Securities Arbitration Rules* § 14, AAA164-20M-4/93, available in WESTLAW, 1993 WL 495385, at *7 (giving each party to a dispute 20 days in which to strike from a list of arbitrators any names objected to and to number the remaining names in order of preference).

MS. VLADECK: I didn't say, and I would not say, that discrimination issues should never be submitted to arbitration. In the first place, I totally approve, support, and for years have worked for the adoption of consensual arbitration, where parties say this is what they want. They have a certain level of equality in making a selection of a process. I am talking about mandatory arbitration, and I'm talking about employment and one's life, where people should not be required to abandon all hope, ye who enter. Forgive me if I have mangled that.

But do you realize what you've heard today? You've heard a management lawyer saying rah, rah, rah, this is good. Why is it so good? Because employees who submit to this process don't know what they're getting, if anything. If they win and it is determined that something wrong has been done, they don't get their attorneys' fees, they don't get the kinds of damages that the law says they're entitled to. Why?

If I take a woman into the federal court who has a legitimate, meritorious case of discrimination, she is entitled to certain protection, she is entitled to a fair hearing, entitled to due process. If she wins, she gets whatever money she's lost in back wages,²¹² she gets enough in attorneys' fees so that she nets whatever it is of the damages provided,²¹³ and if she has suffered emotional distress, under the Act she can get damages for that.²¹⁴ Go into arbitration, even if you win they give you, say, twenty dollars with no explanation, no attorneys' fees, no compensation for emotional distress.

Why are the people in this industry deprived of statutory benefits? Because they have chosen to work here in this industry? You're giving them so much? Well, come on, give them something more. If you're asking them to give up statutory rights for the privilege of working for you, then give them something as a quid pro quo. What are you offering them? Some add-on to their pay? So, the answer is, I think, arbitration of discrimination cases today, as it is handled by the SROs, is unfortunate and deprives workers in this industry of fair treatment.

Let me ask you all: How ready are you to let all of your IRS matters be arbitrated? The IRS doesn't like some filing that you've done. It gives it to an arbitrator. You don't get to pick. You don't get to choose. The arbitrator doesn't have to be bound by the law. He thinks you earn too damn much money anyway. Not only don't you get a refund, but you get a penalty imposed with no explanation and no right to appeal. What are we doing with our public rights, giving them to untrained arbitrators? Do you really want to do that with

212. 42 U.S.C. § 2000e-5(g) (1988 & Supp. V 1993).

213. 42 U.S.C. § 2000e-5(k) (1988 & Supp. V 1993).

214. Congress amended Title VII with the Civil Rights Act of 1991 to provide for actual damages beyond backpay and restoration of position. 42 U.S.C. § 2000e(g) (1988 & Supp. V 1993).

major pieces of your life? You know, you could be there some day. This is not simply for women who complain of sexual harassment. It's for executives, too, who have been cheated.

Once upon a time, your industry was one where a handshake was enough or where a word was enough, where you could trust totally your counterpart in another one of the houses, or if you came to work and you were told you're going to get a guaranteed bonus next year of X, you didn't need it in writing.

You know what you've got? You've got arbitrators who have gone nuts. Now they are hearing statute of frauds issues and getting all smart about having things in writing, but they won't get smart about the discrimination law. Why? I think they have not heard anybody tell them that the member firms really care, that this is the law, that the firms care about it, and that they are protecting the industry by putting an end to any discrimination that's going to create workplace problems.

PROF. KATSORIS: Before you leave the first question and get to the second one I merely wish to point out that the Supreme Court has recently, I think last week, granted *certiorari* on the issue of taxability of these awards.²¹⁵ If they become tax free, won't that magnify their value?

MS. VLADECK: That's correct.

PROF. KATSORIS: Perhaps my next question is out of pure ignorance, because I'm not an expert in this area. Indeed, the only time I was put on a panel in a discrimination case—an age discrimination case—for some reason I was challenged peremptorily. I don't know why.

Here's my question: Suppose another industry—for example, telecommunications—puts into their employment agreements that any disputes would be arbitrated before the AAA. Would you have similar objections?

MS. VLADECK: I would have a problem if that were made a condition for hire, that we won't give you a job unless you sign away your public rights. I have trouble with that. I don't think any citizen should have to give up or waive his/her constitutional rights if he/she goes to work in government, or waive his/her statutory protection if he/she goes into private employment. I hope we're not there yet.

PROF. KATSORIS: Let's move on to my next question. Assuming discrimination cases in the securities industry are going to stay here at the SRO level, how can we improve the process—particularly in the method of selection of arbitrators? Would you experiment with that,

215. *Schleier v. Commissioner*, 26 F.3d 1119, (5th Cir.) *cert. granted*, 115 S. Ct. 507 (1994). For a detailed consideration of the taxability of damages for personal injury, see Douglas A. Kahn, *Compensatory and Punitive Damages for a Personal Injury: To Tax or Not To Tax*, 2 Fla. Tax Rev. 327 (1995).

at least in these cases? Would that satisfy you a little bit? Would you be willing to look into an alternative way of selecting arbitrators in discrimination cases?

MS. VLADECK: Absolutely. You know, it really is a perception of fairness as well as the actual fairness. It is very hard to judge fairness. But you are going to feel better if you have an arbitrator who is prepared to listen to your legal arguments, who is prepared to hear them, who is prepared to act as if he's heard this stuff before. It would go a long way to making you feel, well, "Maybe I'm not in the wrong place after all."

PROF. KATSORIS: So, you would prefer the system of choosing from a list?

MS. VLADECK: I would prefer a system of choosing from a list of people who have had some association with this subject before or who have had a training course and gotten some certification. It doesn't have to be long.

The one point I agree on with Ted is that you don't have to be a rocket scientist to understand this. He and I engage in this on a regular basis and neither of us claims that kind of scientific expertise.

I think we could, with a week of concentrated time, convey to the arbitrators the fundamental principles. And then we would tell them, don't do this unless you are willing to accept from the parties some summary of the law that will guide you when you listen to the evidence and when you come to your decision.

MS. ZUCHLEWSKI: I was a participant in the training program that Ted Rogers referred to; we did it under the auspices of the Association of the Bar of the City of New York with Jay Waks, and I would like to comment on two issues.

First, having represented individuals, I would like to talk to you about what those people say to me when they come in, because I think you might want to hear it. And second, I want to tell you my impressions of having done that arbitrator training program.

First, as to the individuals who are seeking representation, they are angry and they are frightened. They are angry because they feel that they have been closed out of the opportunity to go to a judicial proceeding. Not necessarily, as Mrs. Vladeck was saying, because they don't want to consider mediation, arbitration, or other alternate dispute resolution processes. But when they are in my office and they say they have signed a U-4, and I reply then you can forget about that jury trial, that is something that just hits them in the gut.

They also are afraid. They've just had something very adverse happen in this industry, or they believe something very adverse has happened, and then they learn that the arbitrators who are going to decide their claims are coming from that industry. That does not give them a feeling of confidence.

Ted and I, I think, are commendably objective when we do our programs, but I want to respond to his comment about "bean counting" and about the arbitrators being well-versed. If the individuals who have to go before those arbitrators don't feel that the arbitrators are well-versed, I think it's something that the Exchange should be concerned about, because I think the perception of fairness in many ways is as important as the actual fairness itself.

Those are the comments I wanted to make about the claimants.

The comments I want to make about the arbitrators are as follows. I think Mrs. Vladeck is absolutely right, that these arbitrators were at sea when *Gilmer*²¹⁶ came down, and I find, after having done the training programs both at the NASD and the New York Stock Exchange with Ted and Jay, that the arbitrators appreciate that.

When we started the programs at the NASD, I believe everyone was surprised at the turnout and the interest in the programs. I think the arbitrators well appreciate that they don't know these areas and that they're very concerned about it, and as thorough as Ted and Jay and I try to be, we had two hours to do all of employment law.

Now, it might not take a rocket scientist to decide these issues, but I have spent a considerable number of years and amount of effort trying to learn this field. I don't think any of us can fairly say that as thorough and objective as we may have been, we even scratched the surface in two hours.

As a matter of fact, what we spent a lot of our time doing was telling the arbitrators when to ask for briefs on legal issues. That is not going to contribute to arbitration being fast or cheap if we are spending a lot of our time briefing and rebriefing issues for arbitrators.

So, what I was hoping to convey today is that there is a real concern among the individuals who are employed in your industry about these mandatory procedures. There is a perception that they are suspect. And I really urge you to consider policies or procedures to address those perceptions and also to address the questions your own arbitrators have, because I think that your arbitrators are very concerned about their ability and their capacity to deal with these issues that most of them didn't have any inkling they'd even have to address when they became arbitrators.

PROF. KATSORIS: I am proud to say, Pearl, that I was one of your's and Ted's students at one of these discrimination training sessions. I think it was an excellent presentation. But once again, it just did begin the discussion. Regardless of all that excellent training, however, I was still challenged peremptorily when appointed as an arbitrator in my one and only age discrimination case. I guess I need more training.

216. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

MR. CELLA: For seventeen years, we at SICA have grappled with this problem vis-a-vis public securities customers. *McMahon*,²¹⁷ which was merely a device for the Supreme Court to clean out the federal system of public customer claims, was the harbinger of what's happening now and what will continue to happen. The explosion of cases added arbitrators with intelligence and education and background to the panels who knew very little, if anything, about securities issues.

Now you have issues that have exploded, that are brought to arbitration, for example, RICO.²¹⁸ Lawyers who practice criminal law in many cases are not entirely clear about how RICO should be applied. I include myself.

You have matters arcane in nature—derivatives. You have matters far beyond the competence of many lawyers that are thrown on the table in front of arbitrators, and the answer generally is, well, we must train them better. Well, arbitration is not going to be fast, cheap, and fair, if it is now, and I doubt even that. It won't be in the future. Check your legal costs pre-*McMahon* and look at them now vis-a-vis your costs in arbitration.

Labor law, for those who don't do it, is complicated. You may not have to be a rocket scientist, but you have to spend time. Where are our securities industry arbitrators drawn from across the United States? They are generally of professional background and they're working full time to earn a living.

Now, that creates a problem in scheduling alone, but more significantly, how much time do they have to devote to training in issues relating to securities arbitration, much less labor law employment problems? This is very difficult.

A few sessions where highly experienced labor law attorneys provide a lecture that is extremely limited perforce and may narrow down to a lesson on when to ask for briefs, which are about the only helpful tool in arcane issues that arbitrators have, is not going to produce a body of arbitrators that are skilled in labor law matters.

Moreover, as more and more is dumped into arbitration or, as Professor Coffee suggested or indicated where the trend is going—the subparts (mediation, conciliation, settlement discussions)—you are going to find this system more stressed.

And the cost of the system to the major SROs, the New York Stock Exchange and the National Association of Securities Dealers, which is hardly cheap at the moment, will continue to grow. And the cost of competent arbitrators and their training will continue to grow. And the problem of training is a very difficult one, as I say, considering from where you draw your vast numbers of arbitrators.

217. *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987).

218. *Racketeer Influenced and Corrupt Organizations Act*, 18 U.S.C. § 1961 (1988 & Supp. IV 1992).

You can't make this a system of retired persons getting a day's work. And I'm not knocking retired senior citizens because regrettably I am almost there. But the real fact to be faced is that there are people who would like to have a lunch with two other nice people and honestly try to decide issues that have grown so far out of hand compared to the pre-*McMahon* issues that have to be addressed in customer arbitration, and I'm afraid it exceeds their competence or indeed their good will.

This may lead to consideration of perhaps a separate arbitrator section devoted to labor matters. That might require selecting a group from the list of active employed persons that make up the panels of arbitrators, having them submit to an intensive week of training, *at the expense of the exchanges*, perhaps at a location away from their employment, away from the city, where volunteers, highly skilled, will provide materials and lecture.

Now, that's not going to be easy, but short of that you are throwing another layer of complex issues on securities issues that are already complex, and the mix leads to results that are not fair. The playing field is not only not level; it is skewed with boulders. And this is a problem that you aptly perceive, but I tell you the system now is stressed. I question the rationale of decisions that I see coming out of the system. And I speak at the moment not as pro-claimant or pro-industry. I am from the private sector.

I see arbitration becoming another failed court system. And you cannot fight the federal courts and the federal government. If the trend is to wipe out of the system all those matters which we deem not to be appropriate for the dignity of our federal courts, and that might include torts as well, then it will make this industry arbitration system a failure—a failure at great expense to operate and a failure in the results it produces for both claimants and respondents. This is a very serious matter.

MR. ROGERS: Just briefly. I've spoken enough, but I can't help myself. I think it is important to get back to what the goal is here. This arbitration department, this process that you put together, as Mr. Cella noted, early on dealt with customer and firm disputes. It provided a way for fast and effective resolution of those disputes, rather than having both customers and firms bogged down in litigation.

Now, employer-employee disputes present another area where a real service is provided to all parties by providing for resolution of disputes effectively. And again, the great majority of these employer-employee disputes to date have been things having nothing to do with discrimination. I would be interested if there are any statistics from either the NASD or the New York Stock Exchange as to what has happened since *Gilmer*, because I think, in one sense, the problem should not be overstated.

There are many discrimination claims nationwide, but in the securities industry, in arbitration, I don't know what rise there has been in the numbers. As I mentioned with that GAO report, as of 1992, only eighteen have gone to decision.²¹⁹

If you have an effective mechanism for both the member firms and their personnel to resolve disputes, employment matters fit hand-in-glove with the customer-firm issues as things that really should be addressed and should be taken care of by that mechanism, rather than relegating people to the courts.

MR. WAKS: Just by way of background, I'm currently, in my spare time, chairing the Employment Disputes Committee of the Center for Public Resources Institute for Dispute Resolution, where we're drafting and updating private models or models produced for corporations of pre-dispute mediation arbitration procedures. Our committee is working on the assumption that we are at the crossroads in dispute resolution and alternative dispute resolution.

A small but growing number of corporations of all sizes are adopting these mechanisms internally for the resolution of disputes, be they of employment discrimination variety or other types relating to the employment setting.

Further, by way of background, surprisingly, despite my advocacy exclusively on behalf of corporate clients, I have been chosen as an arbitrator and mediator in employment disputes, both through the AAA as well as the District of New Jersey. It is an interesting experience. I do believe my experience, while not as considerable as Judith's, did serve the parties well in resolving both of those disputes.

The critical issue, and I think Judy put her finger on it, is the acceptability of both the procedures and those who are chosen as arbitrators. I think that we must not lose sight of that in deciding what improvements, if any, the Exchange or the NASD should take into account. And I have some suggestions in that regard having listened to you this morning.

First, I think that the Exchange should consider adopting procedures addressed exclusively to employment disputes. Part of the reason is that there is some confusion when you are dealing with procedures that have been adopted for other types of disputes, customer disputes by and large, or interfirm disputes, and part of the reason is for the reason that Pearl Zuchlewski mentioned earlier, the reason of acceptability and concern of clients, on both sides of the table, about what they are getting into.

As part of that, I think there should be a formalization of a mediation alternative offered by the Exchange. It is not extraordinary. As I

219. See 1994 GAO Report, *supra* note 188, at 2. This figure represents disputes decided at the NASD's New York City office and at the NYSE between August 1990 and December 1992. *Id.*

said, corporations are now considering adopting formal policies on mediation. The major advantage is to avoid what I call the win factor. Certainly, both management and plaintiffs' counsel are loathe to even propose mediation, figuring that it might signal some weakness in their position. And I think it serves, perhaps more than arbitration, the opportunity to resolve disputes in a fair and equitable way to both sides that will lessen the case load, both in the courts and before the EEOC, as well as the stock exchanges.

Secondly, with respect to arbitration, I happen to agree with Judy vigorously that there should be an opinion written in employment disputes, particularly if issues of law are being debated. I think—Judy, correct me if I am wrong—but in your eloquence, the one reference you did not make is to the acceptability of labor arbitration and the role it's played throughout the dispute. You mentioned it, but I just wanted to emphasize it, I guess, that labor arbitrators who by and large were not governed by a lot of law except the law of the workplace—the euphemistic law of the workplace—got acceptability for their awards by writing an opinion that explained the positions of both sides and why they were awarding the way they did.

I think it is extremely important in the employment law setting that this be carried over to the nonunion aspect of working life—especially where employment law is at issue, as well as what's fair and just in the workplace.

Third, I think the training of arbitrators is essential, and the certification of arbitrators trained in employment law is essential. I'm not sure how practical it will be to expect arbitrators who wish to function in this area to take on a day, two-day, or even a week's course in employment law training. Maybe it is. I haven't reflected on that sufficiently, but I would like to suggest that the Exchange maintain a select panel comprised, at least in part, of attorneys with considerable experience in employment law.

I also agree with Judy that there should be a different methodology for choosing an arbitrator. One that gives more appearance, at least appearance, if not in actuality, to the prospect of having the parties, through their representatives or on their own, have an actual choice—the way the American Arbitration Association does it, with a list of arbitrators from which you can strike.

In terms of the demographics, while I'm talking about the choice of arbitrators, I think one need only refer to, and I guess I'm falling into the trap of looking at but one example, Judge Wood's decision in the case that Ted so ably litigated last year, *Flynn v. Goldman Sachs, Co.*,²²⁰ to see that a woman is most capable of adjudicating a sex dis-

220. 836 F. Supp. 152 (S.D.N.Y. 1993).

crimination claim brought on behalf of a woman, one where a jury disagreed with the judge vigorously.²²¹

I happen to agree with Ted, that I really see no reason to believe that a male judge cannot adjudicate a claim of discrimination by a woman and why a white cannot adjudicate a claim raised by an African-American, and so on. It is not part of our judicial system to assign judges on the base of ethnicity, race, or gender. I see no reason to assume that it has to be done in the arbitration forum either.

I believe that the arbitrators should ultimately, and this should be spelled out in the rules, have the authority and the responsibility to adhere to points of substantive law, of substantive employment law, that are raised during the course of a proceeding before the Exchange, similar to that of a judge in court addressing the same claim. That means that if the judge does not believe that the law is fair, the judge nevertheless will enforce the law as written. And so, too, an arbitrator should be expected to adhere to that principle.

Similarly, an arbitrator should maintain a knowledge of the law and should administer the law in the same way that a judge would with respect to discrimination claims. So, regardless of what he may feel or she may feel about the work of a particular claimant, if that claimant is entitled to an award of damages under the law, be it compensatory or punitive damages, then that award should be rendered.

I have one other point that is sort of a pet peeve. It goes to something Ted said earlier, which is that perhaps the biggest miscarriage of justice—and I think this is true not just in terms of my role as corporate counsel—is the inability to get cases in the securities arbitration forum considered for dismissal on the law, based in the nature of a motion for summary judgment or directed verdict, as you would in court.

While Ted mentioned it in terms of pointing to the fairness of the process, I mention it in terms of giving counsel an opportunity to discuss with claimant, at the beginning, the commencement of that process, as to whether that process should take place.

I think that some of the publicity that has been given to the securities industry arbitration handling of employment disputes, particularly discrimination disputes, results from an impression that securities industry firms seem to win. Ted, I think, through his use of statistics, dispels that notion. But without regard to statistics, I think in many cases it results from a careful culling of cases to be taken to arbitration as one would in court.

You just don't take every case to court. And if you can see that on the law you are not going to prevail, you are not going to be able to present that case to either a jury in court or to the arbitrators on the

221. Judge Kimba M. Wood reversed the jury's decision in favor of the plaintiff as being unsupported by the evidence. *Id.* at 158-64.

merits, you just figure out some other way to resolve that claim, short of wasting everyone's time, everyone's money, and the operations and resources of the New York Stock Exchange.

I would like to point out a fact, which someone said earlier, that the EEOC, which is looking to foist its case load on the courts while the courts are looking to do similarly to the EEOC, currently has an estimated 97,000 cases backlogged at the end of this year.²²² The new Chairman of the EEOC, as you may have seen in the news report last week, has called for greater reliance on mediation and arbitration to resolve these disputes. And I think it's just one more expert opinion that demonstrates the importance of arbitration and, hopefully, mediation in the securities industry.²²³

PROF. KATSORIS: Before we continue with comments, the issue of numbers has come up, and I would like to ask Rick Ryder, Debbie Masucci, and Bob Clemente what their experience is with the number of cases they have seen, and in reporting on or administering these cases, do they have any particular comments?

MR. RYDER: Well, we see the cases that come out of the system, so we're looking on the other end of the process, and, so far, there have been relatively few awards that have come out. There have been some notable awards recently, and I'm not sure what that says about arbitrators getting more acclimated to this kind of claim, but still the numbers are fairly small. On the filings, it may be much larger. I don't know.

MS. MASUCCI: Our case load in terms of these types of cases, which are categorized primarily as wrongful discharge and discrimination, are under two hundred cases. We have seen an increase in those cases, but they are still relatively low as compared to the remainder of our docket.

We have already segregated specific arbitrators with background in these issues to select when these cases arise. So, we're really not using the same pool of arbitrators who decide the regular securities case to decide these types of cases.

I want to take the liberty of just raising a concern I have about what I've heard around the table. It concerns the arbitrator education requirements.

222. See Peter T. Kilborn, *Backlog of Cases Is Overwhelming Jobs-Bias Agency*, N.Y. Times, Nov. 26, 1994, at 1; see also Peter T. Kilborn, *A Family Spirals Downward In Waiting for Agency to Act*, N.Y. Times, Feb. 11, 1995, at 1 (noting that the General Accounting Office raised questions about the EEOC's procedure, competence, and insufficient budget).

223. Confidentiality in mediation is currently receiving attention. See Margaret A. Jacobs, *Case to Test Confidentiality of Mediations*, Wall St. J., Mar. 3, 1995, at B16 (reporting about a case in which Virginia's highest court ordered a woman to accept a settlement and forgo a trial, "in part because of something she said in mediation").

Once you impose higher requirements, higher requirements than we currently have on arbitrators to attend specific series of training courses, as well as to have certain backgrounds, there's a concurrent obligation to use those individuals more. You end up creating a special cadre of arbitrators, something that we have been criticized for doing in the past.

Although a lot of the commentators today said they want arbitrators to have experience or expertise in this area, whatever word you want to use, my staff is regularly faced with arguments that are directly opposite. A plaintiff's attorney desires individual arbitrators that have no experience in this area. They want to teach the arbitrators the law.

So, when administering these cases we're faced with the dilemma of which way to jump: Do we use a small cadre of arbitrators or do we use them once every five years? Do we have highly experienced arbitrators or do we have inexperienced arbitrators?

That's just to give you an overview of what the administrators have to deal with on a day-to-day basis.

MR. CLEMENTE: I would like to touch on the issue that Ted raised earlier: we have been handling employment-related cases for many years prior to *Gilmer*.²²⁴ Those cases were, however, primarily in the realm of contract, compensation, and bonus disputes.

We have not experienced any major increase in the number of claims alleging employment discrimination since *Gilmer*. In 1990 we had two claims; eighteen in 1991; in 1992—the first full year after *Gilmer*—again only eighteen claims; twenty-one in 1993; and, to date, sixteen claims in 1994.

If you look at the year 1993, for which I have complete statistics, post-*Gilmer*, you will note that out of 244 cases involving employment-related disputes filed (the majority of which were filed *against* registered representatives), only twenty-one of them alleged any type of harassment, discrimination, or civil rights claim. And the majority of those cases also contained other claims such as breach of contract.

During the period January 1990 through November 28, 1994, a total of seventy-five employment disputes with claims alleging discrimination were filed at the Exchange. Of those seventy-five disputes, the most frequently alleged claims were for age discrimination (thirty), and gender discrimination (twenty-eight), plus seven claims that alleged both.

To date, forty-eight of the seventy-five claims have been resolved—thirty by decision of the arbitrators and eighteen through settlements. Of those cases resolved, sixty-seven percent resulted in a monetary

224. NYSE Rule 347, which requires that disputes arising out of employment or termination of employment be submitted to arbitration, was adopted in 1958. NYSE Rules, *supra* note 14, Rule 347, § 2347.

award or settlement for the employee. Of those decided by arbitrators, fifty percent were decided in favor of the employee.

In the four years that I've tracked them, less than one-half of one percent of our total case volume has involved claims alleging discrimination or any other civil rights type claim. At present we have only twenty-five of these cases pending.

MR. SMITH: I have a two-part question for Mrs. Vladeck.

The first question is, are you opposed to all employment disputes being arbitrated under the current system at the SROs? And if not, and you are only opposed to employment discrimination cases being arbitrated, are you opposed to all discrimination cases being arbitrated or just certain cases?

The reason I ask that is, you today, in your remarks, as all commentators, have only focused on the arbitration of sex discrimination or sex harassment cases. Nobody seems to be commenting on whether disability cases or age discrimination cases belong in arbitration.

MS. VLADECK: I don't know why we seem to be concentrating on sex discrimination cases, except I believe the attack to which I was responding on the Exchange's behalf, on the inadequacy of the process, had focused on awards in sexual harassment cases. And so I think maybe I've been talking about sex discrimination as if it were a unique piece of the problem. I don't think so. I think discrimination—whether it is discrimination against women or African-Americans or other minority groups, or people who suffer from disabilities as defined under the statute—I think that whole body of law, discrimination law, is what I have been referring to as mysterious to the arbitrators to whom we must turn these cases over for decision.

And so, it was not intentional that I was speaking of only one piece or one kind of discrimination. I think the word that I would like to substitute is "invidious" discrimination.

MR. SMITH: Are you opposed to all employment disputes being arbitrated?

MS. VLADECK: I have no opposition to any employment dispute being arbitrated. My concern is that I don't like the imposition of this as the only avenue of relief for people who work in your industry, and I wish we could modify that somewhat.

And secondly, I don't like the statutory issues being presented to people who by and large have no training in how to sort them out, how to look at them.

MR. SMITH: So, you are opposed to all imposition of arbitration of employment disputes, not just discrimination cases?

MS. VLADECK: I would oppose any mandatory arbitration generically, but that's not for this room. I don't think I am going to get anybody to reverse *Gilmer* for a while. I think that's in the far future.

MR. DUBOW: I just have two comments. The first is, I just want to address the issue that there is no redress for employees in arbitration, that the results are very small. The reason I say that is that if in fact there were a stacked deck, and that, therefore, the employers could do fairly well in an employment arbitration, it would be a rare case that was settled by an employer. I know that all member firms have settled employment disputes before they ever went to arbitration. In many cases it was for significant amounts of money, even though they knew they would have to go to arbitration if they did not settle it.

So, the fact is that they must realize that they cannot win these cases that are bad cases, in arbitration—that's why they settle them. So, I think that the argument that the employee fares poorly is not as strong as indicated.

I've also seen arbitrators follow the statutes. For example, there was a statement made by Ms. Vladeck that arbitrators don't award attorneys' fees in these cases, and I know that they have done so. Perhaps they have not done so in all cases, but I have seen cases where arbitrators have awarded attorneys' fees to successful employees after arbitrations are concluded.

The last point I want to make, as far as arbitrator training is concerned, I think everybody agrees that there should be more training of arbitrators in the area of employment, and there are arbitrators out there who do this. I happen to be a member of the advisory council to the northern California offices of the American Arbitration Association. I'm from San Francisco. And the American Arbitration Association has asked their San Francisco office to enter into an experiment, which is not complete, but it's interesting.

First, a council was appointed consisting of attorneys who practice employment law in San Francisco or the San Francisco area, both plaintiff lawyers and defense lawyers, and I was one of the ones who was appointed to that council.

We, in turn, have now developed a group of arbitrators. Anybody who wanted to do an employment arbitration as an arbitrator in the Bay Area through the AAA has to be approved by this employment council, and applications are made, resumes are provided. As a consequence, even though we are equally divided between plaintiff and defense lawyers, we've had very little difficulty determining who are qualified arbitrators and who are not. And so we've developed in San Francisco from practitioners or experts in the area of arbitration a select panel of over one hundred people.

Where it will lead, I don't know, because we've just done this and we are just beginning the arbitration process, but presumably if that could be done in San Francisco, it could be done elsewhere.

And perhaps one thing that the SROs might be interested in doing is to combine with the AAA and have a panel, assuming the AAA

does this elsewhere, as well as San Francisco. Perhaps in that way a panel could be developed that would be already trained from their other lives. There would be no need to spend the money, to spend a week or so training.

MR. MATTEA: I've heard a lot around this table about improving the training of arbitrators and about having written decisions, and I assume that would mean findings of fact and conclusions of law, and even dismissing cases, before a hearing, based on the law.

That suggests to me that we should consider what the role of the court ought to be in reviewing the arbitrators' findings as to what the law says. Should the court have some role in saying, are the arbitrators getting the law right?

MS. VLADECK: If you are going to impose an appellate system on the process, then you will destroy it. I don't think anybody is recommending having an arbitrator's award track a court decision, but I do think there should be some kind of a checklist where, if there are statutory issues about damages and attorneys' fees and so on, that it should show that at least that was considered.

As to the reasoning, in New York certainly, and I think this is the general law throughout the United States, arbitrators are permitted to make mistakes of law or fact, but you're not going to let them do it too damn many times. And if they have to publish their reasoning and they look like the damn fools that you've thought they were, then they're through.

I mean, the market will take over and we will get rid of those people. And the word will be out. And they won't do it to another employee. I think it's the only way we can control them. Also, they will have to pay attention if they have to write, and some of them I think will find that very onerous, but I think it would be good education for them to have to write. It would also keep them honest.

MR. ROGERS: Just in further response, there is a well-established body of law concerning the appealability of arbitrators' decisions, and I think it is adequate. The general watchword here in New York, and I think in the federal courts as well, is if the arbitrators have acted in manifest disregard of the law, then the decision can be reviewed and possibly overturned.

Similarly, of course, there's always an opportunity to review proceedings for bias, corruption, etc. It seems to me that if you go any further than you are to what Judith is saying, you're destroying the process.

PROF. KATSORIS: Would you like to define manifest disregard?

MR. ROGERS: Really, really bad disregard.

MR. MATTEA: I mean, you basically can't do it. That's the point.

MR. ROGERS: I think you can. I think if arbitrators get it right, saying the law requires X, it provides that the plaintiff must bear the

burden of proving discrimination, and we find that based on these facts the plaintiff has shown discrimination, the arbitrators will not be reversed. They may be damn fools, because there can be damn fools deciding both sides of the case. It is not only the damn fools who are deciding in favor of the employer.

MR. MATTEA: The reason I raise it is, it goes to this element of compulsion. You know, if you're compelled to go to arbitration and the arbitrator gets the law wrong, you are finished.

MR. ROGERS: Well, you're not finished.

MR. MATTEA: You've got nowhere to go.

MR. ROGERS: Look, a lot of the issue on compulsion, I'll even use the term although I think there is a pejorative element to it, is overstated. The idea is not that anybody's giving up any rights. They are having them adjudicated in a different forum in a different way. One of those different ways, admittedly, is that appeals are limited more strictly than they would be in the courts. The flip side of that is that everyone gets to a result quicker and sooner, and, I think, fairer.

MR. MATTEA: I guess I'll just follow up one last time, which is that it is well to encourage the use of a low-cost, quicker process. It is another thing to compel it. I mean, and I do think it goes to the issue of fairness.

MR. ROGERS: Well, that's something on which reasonable people can differ.

MS. VLADECK: That's what divides us right here.

MR. CELLA: It is a very interesting point. The Supreme Court in *McMahon* never directly addressed the question of contractual adhesion, though it was argued by the plaintiffs in that case.²²⁵ And indeed they had other reasons to do what they did.

I don't know if there's been any clear judicial decision vis-a-vis an employee who has to sign a document in order to work in the industry that compels him to arbitrate under a very broad arbitration clause all of his or her disputes.

That raises an interesting question that I don't think is yet resolved, which is why you can't have motions for summary judgment, because arbitration first, whether correct or not, does smack of some equity. And since you have arbitrators sitting in labor law matters who are not experts by definition at this time, with possible minor exceptions, to bring to them a motion for summary judgment to knock out a claimant's claim in a nonjudicial forum is not going to work, until maybe you have highly professional, full-time labor law arbitrators in a securities system, and I don't think you are going to see that soon, if ever.

225. *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 223-24 (1987).

MR. EPPENSTEIN: On the issue of compulsory arbitration, for those of you who were here on November 21st, I was one of the speakers on the pre-dispute arbitration clause issue.²²⁶

My recollection, having argued *McMahon*, was that Chief Justice Rehnquist, when I tried to get into this area of contract of adhesion, did not want to get into it and led me down a different road, which I took.

But it was my recollection in preparing for that case, there was the *Alexander v. Gardner*²²⁷ case, which was a 1974 United States Supreme Court case where Justice Powell spoke about the distrust of arbitration in this area.²²⁸

And then there was the *Barrentine*²²⁹ case, which was a 1981 case, and that was followed by the *McDonald v. City of West Branch*²³⁰ case, which was a 1984 case, all speaking about the distrust of arbitration in the employment dispute area and under Title VII.

The issue of contract of adhesion, I think, was covered last time, and I think it will become more and more prominent in this area as we go along, because we do see these, as Justice O'Connor mentioned, bargained-for contracts, becoming compulsory, more and more.

MR. ROGERS: You are quite correct that there were statements of distrust of arbitration, but those cases all predated what's happened in the ensuing twenty years, and *Gilmer* specifically addressed and rejected them.

There were other reasons to distinguish *Gardner-Denver*. For example, the labor arbitration in *Gardner-Denver* was one where the union was representing the employee's interests and the court said that's different from arbitration where the employee's representing his or her interests and won't have a possible conflict or problem with fair representation. A short answer is the courts, and you can question their motives if you want, but the courts have clearly said—and the Supreme Court in *Gilmer* then wrapped it up—that the old judicial distrust of arbitration is a thing of the past.

MS. VLADECK: Fair is fair, though. *Barrentine* didn't say judicial distrust. It said that there is statutory esteem, that there are public policy issues that are so important. We're not going to trust them to anybody other than the federal courts and that's what they said. And that's what *Barrentine* said.

But here we're taking what was declared to be the most compelling public policy of the United States thirty years ago. Nobody has the guts to say it's not a compelling public policy anymore or we don't give a damn about it anymore or forget eliminating job discrimination.

226. See *supra* pp. 1511-32.

227. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

228. *Id.* at 56.

229. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981).

230. 466 U.S. 284 (1984).

We've killed unions. Let's kill the statutory protection for workers. Let's wait for a revolution. I mean, maybe this is really the thinking, but let's not bury it.

The statutory purpose that the Supreme Court said in *Barrentine* was not going to be just turned over. They always have to be coming back to the courts that were going to protect this public policy.

If they have abandoned it, it has been a very cynical thing, and we have to say you can't try to reconcile them. It is a cynical decision, saying workers are not going to be protected.

MR. ROGERS: I just need to respond on the public policy point. You can't lose sight of the fact that the EEOC is still there. The State Division of Human Rights is still there.

The U-4 is not barring anybody from filing a claim with the EEOC saying my former employer did the rottenest thing to me or to other people just based on my sex, and if there really is some violation of public policy and the way they've done it, the administrative agency can run with it.

Gilmer did not give the New York Stock Exchange that role. That role is still where it always has been. All *Gilmer* said is that arbitration is a very effective forum for the resolution of individuals' claims. The New York Court of Appeals, in a follow-up to *Gilmer*, based on New York State law, in a case that I argued and in which Mr. Liftin's firm was a co-party with my client, affirmed the same and followed *Gilmer*.²³¹

MS. ZUCHLEWSKI: I have two very brief comments that I wanted to do as wrap-up; I don't want to engage in a debate about *Gilmer*. First, I want to comment about Jay Waks' proposal for mandatory mediation. I don't have a strong feeling on this, but I think it has to be looked at very carefully. My belief is that voluntary mediation where both parties are committed to the process can be a very useful device.

Mandatory mediation that layers on another procedural level that leads to delay when both parties aren't committed to the process is just going to increase the expense and time. Therefore, if the Exchange is considering mandatory mediation, it should do so very, very carefully, looking at both the positive aspects of it as well as the negative aspects.

Second, there have been some remarks during the course of these discussions about motions to dismiss, motions for summary judgment, and other procedural devices. My personal opinion is that such practices graft some of the worst parts of the judicial process onto arbitration without achieving the gains in expediency and economy that we are supposed to be getting in arbitration. I suggest that such proce-

231. *Fletcher v. Kidder, Peabody & Co.*, 619 N.E.2d 998 (N.Y. 1993).

dural devices be reviewed very carefully before they are permitted to become part of the procedure.

MR. CLEMENTE: I would like to raise an issue regarding the so-called compulsory nature of arbitration that was raised at the November 21st Symposium in the area of customer agreements; that is, the acceptability of a window, of say, forty-five days, where either side could object to arbitration, as opposed to the process we have now.²³²

MR. WAKS: I think you have to choose a procedure that member firms and those who are registered with the Exchange are bound to, and that's that. To permit one side or the other to opt out, in effect, mandatorily opting out for the other as well, seems a bit unfair to me. It is tantamount to permitting one side or the other to opt in.

Getting back to my comment on mediation, if I did say mandatory mediation, I apologize. I didn't intend that my suggestion be that there be mandatory mediation, but only that there be a procedure that is available should the parties wish to mediate. And by the Exchange proposing it, it takes the onus off of the parties to impose it on each other.

With respect to summary judgment, you can call it whatever you wish. You can call it a motion to narrow the issues, but that's exactly what it would serve. It would narrow the issues in arbitration, which so many times involves a multitude of state and federal issues that don't have a hint of success, but nevertheless are arbitrated to the fullest, by both sides, simply because the arbitrators may find some justice served by ultimately adjudicating in favor of one side or the other at the end of the case. So, I think it does serve the interests of expedition.

PROF. KATSORIS: Okay. I think our comments on this subject are exhausted.

232. *See supra* pp. 1522-26.