

# IN DEFENSE OF MANDATORY ARBITRATION OF EMPLOYMENT DISPUTES: SAVING THE BABY, TOSSING OUT THE BATH WATER, AND CONSTRUCTING A NEW SINK IN THE PROCESS

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In its 1991 *Gilmer v. Interstate/Johnson Lane Corp.*<sup>1</sup> decision, the Supreme Court held that employers could require as a condition of employment that employees agree to arbitrate their Age Discrimination in Employment Act (“ADEA”)<sup>2</sup> claims unless the employees could prove that Congress had “evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”<sup>3</sup> Subsequently, lower courts

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1. 500 U.S. 20 (1991).

2. *See generally* Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1994 & Supp. I 1995).

3. 500 U.S. at 26. The Court noted that there are three places for plaintiffs to find evidence to satisfy their burden of proving congressional intent: (1) in the text of the ADEA, (2) its legislative history, or (3) an “inherent conflict” between arbitration and the ADEA’s underlying purposes. *See id.* The *Gilmer* decision was not the first time the Supreme Court held that federal statutory claims are arbitrable. *See, e.g.,* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) (enforcing arbitration of claims under the Securities Act of 1933, 15 U.S.C. § 771(2) (1994)); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987) (enforcing an arbitration agreement under the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1994), and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1994); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (holding that claims brought under the Sherman Act of July 2, 1890, 15 U.S.C. §§ 1-7 (1994)), and the Federal Automobile Dealers’ Suits Against Manufacturers Act of 1956, 15 U.S.C. §§ 1221-25 (1994), are arbitrable). Collectively, these three cases are sometimes referred to as the “Mitsubishi Trilogy.”

extended *Gilmer* to cover other discrimination claims, including those arising under Title VII of the Civil Rights Act of 1964<sup>4</sup> (“Title VII”) and the Americans with Disabilities Act<sup>5</sup> (“ADA”).<sup>6</sup> In its 1998 *Duffield v. Robertson Stephens & Co.*<sup>7</sup> decision, the Ninth Circuit held that the Civil Rights Act of 1991<sup>8</sup> (the “1991 Act”) prohibits mandatory<sup>9</sup> arbitration agreements.<sup>10</sup> Several district courts have also held that the 1991 Act and the ADA prohibit mandatory arbitration.<sup>11</sup> However, in *Seus v. John*

4. 42 U.S.C. §§ 2000e-2000e-17 (1994).

5. 42 U.S.C. §§ 12101-213 (1994).

6. *See, e.g.*, *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997) (requiring arbitration of New Jersey Law Against Discrimination); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997) (requiring arbitration of Title VII and state law discrimination claims); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994) (holding that plaintiff’s claim under the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1998), is arbitrable); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992) (holding that sexual harassment claims under Title VII are arbitrable); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992) (holding that a Title VII claim was subject to arbitration); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991) (holding that *Gilmer* controlled on the issue of the enforceability of a pre-dispute agreement to arbitrate a sexual discrimination claim under Title VII); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991) (holding that claims of sexual harassment and sexual discrimination under KY. REV. STAT. ANN. § 344.040 (Banks-Baldwin 1997) are arbitrable).

The ADA and Title VII both contain provisions encouraging resolution of disputes through alternate dispute resolution (“ADR”) mechanisms, including arbitration, “where appropriate and to the extent authorized by law.” Americans with Disabilities Act, 42 U.S.C. § 12212. Furthermore, the Supreme Court in *Gilmer* wrote that the party opposing arbitration bears the onerous burden of showing that “Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” *Gilmer*, 500 U.S. at 26 (citing *Mitsubishi*, 473 U.S. at 628). *But see supra* Part III.C; Patrick O. Gudridge, *Title VII Arbitration*, 16 BERKELEY J. EMP. & LAB. L. 209 (1995) (attempting to distinguish Title VII-based claims from ADEA-based claims for arbitrability purposes).

7. 144 F.3d 1182 (9th Cir. 1998).

8. Pub. L. No. 102-166, 105 Stat. 1071, 1071-1100 (1991) (codified in scattered sections of 2 U.S.C., 29 U.S.C., 42 U.S.C.).

9. Agreements requiring employers and employees to arbitrate any and all disputes resulting from the course of employment, typically introduced upon hiring, are generally referred to as “mandatory.” While this label carries with it some connotation of a coercive situation, we prefer it to the alternative label commonly used, “pre-dispute arbitration agreements.” “Pre-dispute” is both less offensive and less accurate than “mandatory.” Employers who have such policies make agreements a condition of employment. We believe the term mandatory better describes this take-it-or-leave-it “offer.” We do not believe, however, that something is inherently bad because it is mandatory. In fact, we are in favor of a number of mandatory employment regulations such as: cleanliness standards with which food service employees must comply, health and safety standards that employees must follow, and professional licensing requirements that medical employees must meet.

10. The court writes: “We hold that, under the Civil Rights Act of 1991, employers may not by such means compel individuals to waive their Title VII right to a judicial forum.” *Duffield*, 144 F.3d at 1185.

11. Four other district courts have held that the 1991 Act and/or the ADA prohibit mandatory arbitration. *See O’Hara v. Mt. Vernon Bd. of Educ.*, No. C2-95-554, 1998 U.S. Dist.

*Nuveen & Co.*,<sup>12</sup> the Third Circuit rejected *Duffield* and held that the 1991 Act does not prohibit and, in fact, endorses mandatory arbitration.<sup>13</sup> The Fifth Circuit has followed the *Seus* holding.<sup>14</sup>

In debating the 1991 Act and the ADA, Congress did not debate or directly address mandatory arbitration. Thus, if the Supreme Court grants certiorari and follows the *Gilmer* holding, it must consider a congressional intent that is ambiguous and debatable. Because a good part of this debate has its roots in the underlying controversy regarding mandatory arbitration's attributes and deficiencies, this Article focuses on the practical realities associated with mandatory arbitration in the hopes that, in addition to statutory interpretation, the Court's determination of congressional intent will be illuminated by discussion of sound public policy rationale. Therefore, in this Article we analyze mandatory arbitration from both legal and public policy perspectives.

Unlike the volumes of academic attention previously devoted to this subject, this Article does not view mandatory arbitration in a vacuum. Too often mandatory arbitration is rejected because of its alleged faults without comparing it to the alternatives.<sup>15</sup> By comparing arbitration to the current

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LEXIS 13289 (S.D. Ohio Aug. 26, 1998); *Martens v. Smith Barney, Inc.*, No. 96 Civ. 3779, 1998 U.S. Dist. LEXIS 9226 (S.D.N.Y. June 23, 1998); *Winkler v. Pacific Brokerage Servs., Inc.*, No. 97C7340, 1998 WL 341622 (N.D. Ill. June 19, 1998); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190 (D. Mass. 1998).

12. 146 F.3d 175 (3d Cir. 1998).

13. The *Seus* court explicitly states:

Thus, we respectfully disagree with the decision of the Court of Appeals for the Ninth Circuit in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998). As we understand the opinion in that case, the court reads the prefatory clause, "where appropriate and to the extent authorized by law," in light of the legislative history, as a codification of a particular view of the decisional law regarding Title VII arbitration as it existed prior to the Supreme Court's decision in *Gilmer*. To us, it seems most reasonable to read this clause as a reference to the FAA. Moreover, we find nothing in the legislative history suggesting that this hortatory provision was intended to codify, and thus freeze, any particular view of the case law. Finally, even if we were to accept "authorized by law" as intended to codify case law, we would find the text incompatible with the notion that the law codified was case law inconsistent with a Supreme Court case decided six months before the passage of the Act.

146 F.3d at 183.

14. See *Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453 (5th Cir. 1998); see also *24 Hour Fitness, Inc. v. Superior Court*, No. A079502, 1998 Cal. App. LEXIS 809 (Ct. App. Sept. 28, 1998).

15. For example, a ubiquitous complaint about mandatory arbitration, addressed more thoroughly below, is that employees are not given any free choice in selecting the forum for their discrimination case. As this Article demonstrates, such lack of freedom should be compared with the alternatives available to most employees seeking redress: filing a charge with the EEOC or hiring an attorney and filing a claim in state or federal court. If these options are not as viable in reality as they may seem from the view from an ivory tower, it may be unwise to

system of adjudicating disputes, this Article seeks to develop a more realistic and pragmatic perception of mandatory arbitration.

Almost immediately after the *Gilmer* decision, the Equal Employment Opportunity Commission ("EEOC"), academics, and various employee rights advocates argued that mandatory arbitration agreements were unfair and should be made unlawful.<sup>16</sup> In July 1997, the EEOC issued a policy statement on mandatory arbitration.<sup>17</sup> This statement, which includes a detailed basis for its conclusion, states that so-called "Gilmer agreements" are contrary to the fundamental principles evinced in the discrimination laws.<sup>18</sup> As such, the EEOC will contest such agreements. In contrast, we argue that mandatory arbitration is the best available procedure for serving the purposes of antidiscrimination legislation. To support this argument, we first examine the current system of adjudication that the EEOC and other critics wish to perpetuate. Second, we describe the current legal status of ADR. Third, we outline a Model Arbitration Act that provides a procedure for adjudicating disputes that is more efficient, fairer, and less susceptible to abuse than the current court system. Finally, we contend that the critics of mandatory arbitration ignore the reality of the current system and that their arguments are either meritless or resolvable.

## I. EVALUATING THE CURRENT SYSTEM

### A. *Employment Discrimination Adjudication Is a Growth Industry*

In 1996 alone, there were 141,828 discrimination cases filed, a 30% increase from the number of charges filed in 1989.<sup>19</sup> Between 1991 and

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dismiss mandatory arbitration simply based on a moral objection to anything *mandated* by employers.

16. See, e.g., Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 385-88; Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1, 29 (1996); Sharona Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 BERKELEY J. EMP. & LAB. L. 131 (1996); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); Judith P. Vladeck, "Yellow Dog Contracts" Revisited, N.Y. L.J., July 24, 1995, at 7; Heidi M. Hellekson, Note, *Taking the "Alternative" out of the Dispute Resolution of Title VII Claims: The Implications of a Mandatory Enforcement Scheme of Arbitration Agreements Arising out of Employment Contracts*, 70 N.D. L. REV. 435 (1994); Mark D. Klimek, Note, *Discrimination Claims Under Title VII: Where Mandatory Arbitration Goes Too Far*, 8 OHIO ST. J. ON DISP. RESOL. 425 (1993).

17. See EEOC Policy Statement on Mandatory Arbitration, Daily Lab. Rep. (BNA) No. 133, at E-4 (July 11, 1997).

18. See *id.*

19. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ENFORCEMENT STATISTICS FY 1986-1996 (May 1997) [hereinafter ENFORCEMENT STATISTICS]. In 1994, there were 158,582

1995, discrimination cases filed in federal court increased 109%.<sup>20</sup> Over the past twenty years, employment litigation has increased by 400%.<sup>21</sup> There are at least three major changes in the law that may be responsible for this increase.<sup>22</sup> The first change is the increase in the number of protected classes. Title VII prohibits discrimination on the basis of race, color, national origin, religion, and sex.<sup>23</sup> Congressional legislation has further expanded the protected classes to include age,<sup>24</sup> pregnancy,<sup>25</sup> and

cases filed; 154,609 were filed in 1995. *See id.*

20. *See* Peter Eisler, *Waiting for Justice*, USA TODAY, Aug. 15, 1995, at 1A.

21. *See* Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, LAB. LAW., Summer 1997, at 21, 21 (citing *Discharge Is Now Major Focus of Job Discrimination Suits*, Daily Lab. Rep. (BNA) No. 164, at A-3 (Aug. 23, 1991)).

22. There may be additional explanations for the continued burgeoning federal employment discrimination litigation caseloads. Professors John J. Donohue and Peter Siegelman present several explanations including: increased unemployment rates, general economic downturn, demographic growth in the protected workforce, the "better jobs effect"—the movement of minorities and women into better paying jobs, and the "integration effect"—an integrated workforce is more likely to produce litigation because minorities or women who work by themselves have no benchmarks against whom they can measure their treatment to determine whether it is discriminatory. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1001 (1991); *see also* Marjorie L. Baldwin & William G. Johnson, *The Employment Effects of Wage Discrimination Against Black Men*, 49 INDUS. & LAB. REL. REV. 302 (1996) (evaluating Donohue and Siegelman's article and proposing alternative explanations for discriminatory marketplace effects).

23. 42 U.S.C. §§ 2000e-§2000e-17 (1994).

24. The ADEA, 29 U.S.C. §§ 621-34 (1994 & Supp. I 1995), took effect in 1968. A study conducted by Donohue and Siegelman reveals that 15.1% of the 1,250 randomly selected employment civil rights cases filed in Atlanta, Chicago, Dallas, New Orleans, New York, Philadelphia, and San Francisco from 1972 to 1987 were based on age discrimination. *See* Donohue & Siegelman, *supra* note 22, at 996. They estimate that the ADEA alone increased litigation by 829 additional cases in 1989. *See id.* Christine Jolls reports that:

[a]ge discrimination claims accounted for 51% of the monetary damages obtained in employment discrimination cases brought by the Equal Opportunity Commission (EEOC) between 1984 and 1988 and for approximately 25% of the EEOC's caseload over that period. Likewise, ADEA claims filed with the EEOC grew 34% between 1989 and 1993 and nearly 200% over the 1980-1984 period.

Christine Jolls, *Hands-Tying and the Age Discrimination in Employment Act*, 74 TEX. L. REV. 1813, 1814 (1996). Moreover, she notes that the

EEOC itself brings only a modest fraction of all age discrimination cases, but it brings them in rough proportion to initial claims filed with the agency . . . and initial claims in turn reflect the overall body of employment discrimination cases (due to the requirement that the plaintiff exhaust administrative remedies).

*Id.* at 1814 n.5 (citation omitted); *see also* George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, 505 (1995).

25. *See* Pregnancy Discrimination Act ("PDA"), 42 U.S.C. § 2000e(k) (1994) (defining sexual discrimination terms: "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical

disability.<sup>26</sup> In 1994, disability claims accounted for 20.7% of the total number of charges filed with the EEOC.<sup>27</sup> Age cases accounted for 18.7%.<sup>28</sup> In addition, many states, cities, and counties protect other classifications such as marital status<sup>29</sup> and sexual orientation.<sup>30</sup>

The federal courts authored the second change in the law by increasing the number of causes of action available to plaintiffs. The courts

conditions.”). The PDA has been in effect since 1978. Pregnancy discrimination has not contributed greatly to increased employment discrimination litigation primarily because it did not create a new protected class as the ADA and the ADEA did. Before the PDA was passed, a pregnant woman was necessarily included in the already protected class of women, and the PDA merely expanded that sex/gender category. Pregnancy cases constituted a mere 2.8% of the cases in the ABF survey (from Jan. 1, 1985 to Mar. 21, 1987) discussed by Donohue and Siegelman, *supra* note 22, at 992-96. In addition, demographic changes in workforce composition have shown that more educated women are working in higher paying positions. *See id.* Higher paid and more educated plaintiffs are more likely to sue for discrimination because damages are based on back pay, and because more educated persons are more likely to be aware that they have federal rights protecting them from discrimination and that they can seek redress if these rights are violated.

26. The ADA requires that covered employers make reasonable accommodations for the known disability of any “otherwise qualified individual with a disability.” 42 U.S.C. § 12112(b)(5). A “qualified individual with a disability” is a person with a “disability,” defined as something that “substantially limits” at least one “major life activity,” who, with or without reasonable accommodation, can perform the “essential functions” of the job. 42 U.S.C. § 12111(8). The ADA continues by *defining* a disability as also including being *regarded* as having a disability. *See* 42 U.S.C. §12102(2)(c). The ADA became effective in July 1992 for employers with 25 or more employees. It did not go into effect for employers with 15 or more employees until July 1994.

27. *See* ENFORCEMENT STATISTICS, *supra* note 19.

28. *See id.* Note, however, that there exists the potential for claims to overlap and possibly inflate the significance of these percentages. For instance, some plaintiffs can and do bring claims alleging multiple types of discrimination, such as discrimination against race, sex, and age, if they can make out the requisite *prima facie* requirements. Donohue and Siegelman, *supra* note 22, filter out the overlap effect, but the EEOC statistics do not, U.S. Equal Employment Opportunity Comm’n, *Age Discrimination in Employment Act (ADEA), Charges FY 1992-FY 1998* (last modified Jan. 14, 1999) <<http://www.eeoc.gov/stats/adea.html>>.

29. *See* CAL. GOV’T CODE § 19572 (West 1995 & Supp. 1998); CONN. GEN. STAT. § 46a-60 (1995); D.C. CODE ANN. § 1-2512 (Supp. 1997); FLA. STAT. ANN. § 760.07 (West Supp. 1998); HAW. REV. STAT. ANN. § 368-1 (Michie 1994); 775 ILL. COMP. STAT. ANN. 5/1-102(a) (West Supp. 1997) (“[f]reedom from discrimination against any individual because of his or her race, color, religion, sex, national ancestry, age, marital status, physical or mental handicap”); 775 ILL. COMP. STAT. ANN. 5/2-102 (West 1993); MD. CODE ANN., HUMAN RELATIONS COMM’N § 16 (1994); MINN. STAT. ANN. § 363.03 (West 1991 & Supp. 1998); MONT. CODE ANN. § 49-2-304 (1997); N.J. STAT. ANN. § 10:5-12.5 (West Supp. 1997); VA. CODE ANN. § 2.1-716 (Michie Supp. 1997); WASH. REV. CODE ANN. § 49.60.180 (West Supp. 1998); WIS. STAT. ANN. § 111.31 (West 1997).

30. *See* CAL. LAB. CODE § 1102.1 (West 1989); CONN. GEN. STAT. § 46a-60 (1995); D.C. CODE ANN. § 1-2512 (Supp. 1997); HAW. REV. STAT. ANN. § 368-1 (Michie 1994); MASS. ANN. LAWS ch. 151B § 3A (Law. Co-op. Supp. 1997); MINN. STAT. ANN. § 363.03 (West 1991 & Supp. 1998); N.J. STAT. ANN. § 10.5-12.5 (West Supp. 1997); R.I. GEN. LAWS § 28-5-1 to -9 (1995 & Supp. 1997); VT. STAT. ANN. tit. 3, § 961 (1995); WASH. REV. CODE ANN. § 49.60.180 (West Supp. 1998); WIS. STAT. ANN. § 111.31 (West 1997).

developed the legal theories of sexual harassment<sup>31</sup> and disparate impact<sup>32</sup> and resurrected section 1981 of the Civil Rights Act of 1866, which protects employees and applicants from racial discrimination even if the employer is not covered by Title VII.<sup>33</sup> Finally, the 1991 Act made employment discrimination claims more attractive to plaintiffs and their attorneys by providing for punitive damages, compensatory damages, and jury trials.<sup>34</sup> In addition to increasing the number of claims filed, the new damages scheme increased the average full and nuisance settlements. When damages consisted of back pay exclusively, employees' damages were capped as soon as they found new employment that paid as much or more than they had earned previously. In such situations, an employer

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31. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64-66 (1986) (holding that a hostile environment caused by sexual conduct can create a cause of action under Title VII).

32. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (holding that an employment policy that is neutral on its face can constitute a Title VII violation if it creates an adverse impact). For example, the Duke Power Company required applicants for certain positions to be high school graduates. See *id.* at 425-27. The Court examined the 1960 North Carolina census and found that 34% of the state's white male residents were high school graduates while only 12% of the African-American males had diplomas. See *id.* at 430 n.6. This disparity, according to the Court, constituted a Title VII violation. See *id.* at 430-36. Some commentators, however, argue that Congress never intended to outlaw disparate impact. See Michael Evan Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 *INDUS. REL. L.J.* 429, 489-564 (1985). The 1991 Act ended the adverse impact debate, if there was one, by adopting the *Griggs* holding as the law. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75 (1991) (codified in scattered sections of 42 U.S.C.).

33. Section 1981 of the Civil Rights Act of 1866 prohibits discrimination against racial minorities in the making and enforcement of contracts. See *An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication*, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (1994)). Any employer, regardless of the number of employees it employs, can be subject to a section 1981 action. See *id.* In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), the Supreme Court held that section 1981 is a separate cause of action from Title VII and that the timely filing of a Title VII claim with the EEOC does not toll the running of the statute of limitations under section 1981. In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Supreme Court held that section 1981 protection extends only to hiring, and not to promotions, or on-the-job discrimination. The 1991 Act overturned *Patterson*. Section 1981 claims can now be brought regarding promotions or harassment and there is no cap on the amount of punitive damages. Also, unlike Title VII, which defines an employer as a company that has fifteen or more employees, 42 U.S.C. § 2000e (1994), section 1981 claims can be brought against any employer regardless of size, 42 U.S.C. § 1981 (1994). Section 1981 claims (without reference to Title VII) accounted for 4.4% of the ABF sample described by Donohue and Siegelman, *supra* note 22, at 996.

34. See 42 U.S.C. § 1981a (1994). Prior to the 1991 Act, damages consisted of reinstatement, back pay, and attorneys' fees, or equitable relief generally. See 42 U.S.C. § 2000e-5(g)(1) (1994); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-25 (1975). The 1991 Act provides for punitive and compensatory damages. See 42 U.S.C. § 1981a(a) (1994). Such damages, however, are "capped" based on the number of employees employed by the company. See 42 U.S.C. § 1981a(b)(3) (1994). Thus, for example, punitive and compensatory damages for an employer with less than 101 employees are capped at \$50,000. See *id.* Such damages for employers with 500 or more employees are capped at \$300,000. See *id.*

could almost always settle the case for back pay only.<sup>35</sup> Now, employees have an incentive to reject settlement offers of full back pay and instead pursue their lawsuits in the hope that a jury will try to teach the employer a lesson by awarding the employee damages far exceeding the true value of the case. Thus, plaintiffs and their attorneys may turn down what had once been full relief in the hopes of *winning the employment discrimination lottery*—an exorbitant jury award.<sup>36</sup>

The current system for adjudicating discrimination cases is so expensive and inefficient that it is unfair to both employers and employees. Below we describe the system and then explain why it is not beneficial for employers or for employees.

### *B. The EEOC's System for Adjudicating Discrimination Disputes Is Expensive and Inefficient*

To file a discrimination lawsuit against an employer, an employee must first file a charge of discrimination with either the EEOC or with a state or local agency that is authorized to investigate such claims.<sup>37</sup> The agency with which the employee files a charge will investigate the allegation and try to settle the matter by having the employer remunerate and/or reinstate the employee. If the employer and employee cannot agree on a settlement, the agency determines whether there is cause to believe that discrimination occurred. If the agency finds “no cause,” it issues a “right to sue letter” so that the employee can file an action in federal or state court, provided that the employee decides not to drop the case. If the agency finds cause, it may, depending on the agency, either: (1) issue a “right to sue letter,” (2) set the case for trial within its own administrative adjudication process, or (3) become the employee’s counsel and file an action in federal court on the claimant’s behalf.<sup>38</sup>

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35. Employees in such situations could pursue their claim to obtain reinstatement. In most situations, however, newly employed workers would have little, if any, incentive to return to work for employers that they sued.

36. See COMM’N ON THE FUTURE OF WORKER-MANAGER RELATIONS, DEP’T OF LABOR, FACT FINDING REPORT 110 (1994) (characterizing juries’ responses to employees’ claims of discrimination as “lottery-like”), *quoted in* Ellwood F. Oakley III & Donald O. Mayer, *Arbitration of Employment Discrimination Claims and the Challenge of Contemporary Federalism*, 47 S.C. L. REV. 475, 476 (1996).

37. See 29 U.S.C. § 626(d) (1994); 42 U.S.C. § 2000e-5 (1994). Employees can elect to file with the federal, state, or local agency. In most circumstances, the agencies have concurrent jurisdiction so that claims are cross-filed among each agency. In other circumstances, the local agency stands on its own so that employees can have their claims investigated more than once.

38. One commentator notes that instead of “issuing a no-cause finding, many EEOC offices inform the plaintiff . . . of its intent to do so and afford the plaintiff an opportunity to request a right-to-sue notice.” Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 9 n.35 (1996). Thus,



The administrative procedures should represent a system that combats employment discrimination by providing employees with an agency that investigates and resolves charges (regardless of potential damages) without exposing employees and employers to the high costs associated with litigation. The current system is not accomplishing these goals. Instead, employers accused of discrimination face outrageous costs, and employees' claims are not investigated in a thorough or timely manner.

### 1. The System Is Expensive for Employers

When a discrimination claim is filed, employers are required to complete a questionnaire and provide the investigating agency with a position statement. Responding to a charge costs an employer who does not have in-house counsel thousands of dollars in attorneys' fees.<sup>39</sup> If the case is not resolved at the agency level and, instead, is adjudicated in court, the employer's attorneys' fees will almost always be in excess of \$50,000 and could exceed \$500,000, *regardless of the merits of the case*.<sup>40</sup> Additional employer costs include the loss of productivity of other employees involved in the case, adverse publicity, and of course, liability. Because defending discrimination lawsuits in federal court can cost an employer hundreds of thousands or even over one million dollars,<sup>41</sup> employers are induced to settle a case *regardless of the worthiness of the plaintiffs' allegations*.

Not only do strong incentives exist for employers to settle discrimination charges levied against them, but the administrative procedures themselves also motivate investigators to settle cases. For many years, the EEOC and numerous state agencies evaluated their

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when the employee needs to obtain counsel or when his case is tried, a no-cause finding does not prejudice the plaintiff's case. *See id.* This alternative, if it is prevalently exercised, reveals two things: (1) a "no-cause" finding is concededly not equivalent to saying that the plaintiff's case has "no merit," and (2) the EEOC lacks confidence in its own procedures.

39. Two management-side attorneys, David Ritter and Peter Albrecht, estimate that responding to an EEOC charge of discrimination will likely cost anywhere between \$2,500 and \$10,000. Telephone Interview with David Ritter, chair of the Labor and Employment Department at Altheimer & Grey in Chicago, Ill., and Peter Albrecht, partner at Godfrey & Kahn in Madison, Wis. (Mar. 12, 1998).

40. *See id.*

41. *See* Michael Barrier & David Warner, *Lawsuits Gone Wild*, NATION'S BUS., Feb. 1, 1998, at 12 (citing several cases where employers were made to pay significant amounts after losing discrimination lawsuits). One jury award for \$89.5 million dollars, which covered economic harm, emotional distress, and punitive damages, was one of the largest awards ever in a state or federal employment discrimination case. *See id.* The appellate court reduced the damages to \$7.8 million. *See* Lane v. Hughes Aircraft Co., 65 Cal. Rptr. 2d 889, 912-13 (Ct. App. 1997).

investigators by examining how many cases they closed per quarter.<sup>42</sup> From the time they are assigned to cases, investigators push employers and employees to settle.<sup>43</sup> In fact, it was standard procedure for some state investigators to attempt to settle cases without even discussing the cases' merits or reviewing the files.<sup>44</sup> In the 1980s and early 1990s, the EEOC accepted and investigated all charges.<sup>45</sup> In addition, the EEOC actually helped employees "fit" their facts into the prima facie criteria.<sup>46</sup> This policy produced a backlog of cases, created cynicism about the enforcement of the discrimination laws, and originated what we refer to as the discrimination "de facto severance system." We define the de facto severance system as a process whereby employees file baseless discrimination charges because they know that their former employers are willing to pay a nominal amount of money<sup>47</sup> in order to avoid the aggravation, costs, and losses of time, resources, and productivity that inevitably arise in defending such allegations. Smaller companies that do not have in-house counsel or sophisticated human resource departments are especially vulnerable to this

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42. In 1993, Linda G. Morra, the General Accounting Office's director of education and employment issues, reported that of 68,000 cases closed in 1992, the EEOC found no cause in 61% and reasonable cause in 2.4%. *See EEOC's Performance in Handling Caseload Criticized by Witness at House Hearing*, Daily Lab. Rep. (BNA) No. 143, at D-3 (July 28, 1993) [hereinafter *EEOC Performance Criticized*]. She stated that this disparity could be explained, in part, by the fact that EEOC investigators have quarterly quotas for case closings, and those who do not meet this quota are given lower performance ratings. *See id.*

43. Under its old policy, the EEOC did not encourage investigators' involvement in settlement discussions until after a case was investigated. As explained below, this policy has been changed; the EEOC now resembles state agencies in this regard. "Charges under investigation that do not fall within the national or local enforcement plans and that are in Categories A or B may be settled at any time by the enforcement staff, with or without consultation with legal staff, as appropriate." EQUAL EMPLOYMENT OPPORTUNITY COMM'N, PRIORITY CHARGE HANDLING PROCEDURES 11 (1995) [hereinafter PRIORITY CHARGE HANDLING PROCEDURES].

44. As an example, the Illinois Department of Human Rights used to assign "interim investigators" for this purpose. Such investigators were assigned to the case for several weeks. If the case did not settle, it was taken away from the interim investigator. The case would then sit for approximately two years before it was assigned to an investigator who would examine the merits.

45. The EEOC's charge processing task force headed by Paul M. Igasaki recommended that the Commission rescind the "full investigation" policy that had been inferred from a Commission resolution of December 6, 1983. *See PRIORITY CHARGE HANDLING PROCEDURES, supra* note 43, at 2. This recommendation was adopted and incorporated into the EEOC's national enforcement plan. *See id.* at 1-2.

46. The nature of the investigation system encourages this behavior. The federal government bases the amount of funding it will provide to a state agency on the number of claims that are resolved. *See EQUAL EMPLOYMENT OPPORTUNITY COMM'N, FAIR EMPLOYMENT PRACTICE AGENCIES ("FEPAS") 1* (1994). Consequently, state agencies have an incentive to help create charges, even if they believe the law has not been violated.

47. We define nominal as an amount that is the equivalent of between two weeks' and six months' pay.

practice.

De facto severance is a natural outgrowth of the practical realities associated with the system presently in place to enforce antidiscrimination laws. It exists because it is simple for employees to file charges of discrimination, yet costly for employers to defend against such charges. In order to file a charge of discrimination, employees must first establish a *prima facie* case.<sup>48</sup> This is an easy task. Employees need only prove that: (1) they are members of a protected class; (2) they were qualified for the position; (3) they were “mistreated” by their employer or potential employer; and (4) employees who do not belong to that protected class were not mistreated.<sup>49</sup> To establish a *prima facie* case, employees are not required to provide any evidence of discrimination. They do not need an attorney, and they need not pay any filing fees.

Given such easy to satisfy criteria, it is not surprising that the EEOC has not been able to keep up with the claims generated. Between 1989 and 1992, the number of charges that the EEOC received increased by 26% while EEOC staffing decreased by 6%.<sup>50</sup> The combination of increased claims and fewer investigators has yielded extensive delays. On average, the EEOC takes over a year to investigate a claim.<sup>51</sup> However, this number is likely misleadingly low. The EEOC data include cases that are immediately rejected, withdrawn, settled, or closed because the plaintiff’s attorney requests an immediate right to sue. These quickly disposed of charges are therefore factored into the calculation to produce a number that underestimates the amount of time the EEOC spends on the cases that it actually investigates. In fact, once an investigator is assigned, it can take several additional years before the case is resolved. In 1995, the EEOC had over 193,000 open cases.<sup>52</sup>

### C. *The EEOC Implemented a New System That Compromises Employee Claims*

In 1995, the EEOC sought to eliminate its system’s inefficiencies by creating new procedures to reduce the backlog of cases and to weed out frivolous claims. These procedures included: (1) encouraging settlement at all steps of the process, (2) priority charge handling, and (3) rescission of the full investigation policy.<sup>53</sup> These changes do not, however, resolve the

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48. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

49. See *id.*

50. See *EEOC Performance Criticized*, *supra* note 42, at D-3.

51. See 1994 EEOC ANN. REP. 11-12.

52. See *Eisler*, *supra* note 20, at 1A.

53. See PRIORITY CHARGE HANDLING PRODECURES, *supra* note 43, at 2-3. This report indicates that:

system's inefficiencies. Instead, they perpetuate and exacerbate some of the problems identified above. Moreover, they effectively make it impossible for some employees to have their cases heard.

Encouraging settlement at all phases of the investigation further institutionalizes the practice of providing de facto severance for employees with baseless claims and only nuisance payments for employees with meritorious claims. Instead of attempting to discover if the employer violated the law, investigators simply try to "make the case go away." Pushing settlements before discovering any facts results in attaining efficiency at the expense of attaining justice.<sup>54</sup> Such a result frustrates parties on both sides of the issue and negatively affects the law's credibility. Encouraging settlement, however, is not nearly as dangerous as the policies of priority charge handling and rescission of the investigation of all cases.

The new priority charge-handling policy requires investigators to place each case into one of three categories before they have discovered any facts.<sup>55</sup> Cases placed in the "A" or highest priority classification fall within the national or local enforcement plan.<sup>56</sup> The national and local enforcement plans focus on class actions and new areas of law. An example of an "A" case is the class action filed by the EEOC against

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The Commission unanimously approved the following motion:

That settlement efforts be encouraged at all stages of the administrative process and that the Commission may accept settlements providing "substantial relief" [as opposed to *full relief*] when the evidence of record indicates a violation or "appropriate relief" at an earlier stage in the investigation.

*Id.* at 3.

Furthermore, a General Accounting Office ("GAO") study illustrates how, in an attempt to reduce burgeoning backlogs which have existed almost since the EEOC's inception, the EEOC took two distinct measures that ultimately adversely affected plaintiffs' abilities to recover even with meritorious claims. See Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219 (1995). The "Rapid Charge System," which narrowed charges and investigations and encouraged settlement at the earliest stages, is the first of these measures. See *id.* at 262. The second is the EEOC's raising of the standard for a finding of cause. See *id.* at 261-64. It did this in 1977 and again in 1984, each time followed by a dramatic increase in the ratio of no-cause to cause findings. See *id.* at 274. By 1989, no-cause findings were found 17 times more often than cause findings. See *id.*

54. See Ritter & Albrecht, *supra* note 39 (reporting that this problem occurred when the Illinois Department of Human Rights assigned interim investigators who were charged with attempting to settle cases before they investigated).

55. See PRIORITY CHARGE HANDLING PROCEDURES, *supra* note 43, at 1.

56. See *id.* Category "A" also includes "other charges where further investigation will probably result in a cause finding. Cases should also be classified as Category A if irreparable harm will result unless processing is expedited." *Id.* at 4.

Mitsubishi.<sup>57</sup> In this suit, several hundred women complained that company officials sexually harassed them.<sup>58</sup> In contrast, a garden variety discrimination case will never be classified as an “A.” By “garden variety” we mean a discrimination case involving only one or two employees who allege that they were not hired or terminated based on their protected characteristic(s), and the employer denies that any unlawful motive played a role in the decision making. It is not a class action. There are no new or important issues of law present. Instead, the case turns on factual disputes. Such a case will never be labeled an “A” regardless of the strength of the evidence. Instead, such cases are labeled “B” priority.<sup>59</sup>

“B” cases are investigated in due time, meaning that the EEOC will eventually make a determination. However, these cases will not receive a priority classification and will likely take approximately one year or more before the investigation is complete. Once completed, claimants who do not settle must begin the litigation process to adjudicate their claims. As explained more fully below, litigation can take anywhere from two to eight years.

Cases placed in the “C” category are, for all intents and purposes, dead. The EEOC labels a case a “C” when it determines that the case is either frivolous or that the agency lacks jurisdiction.<sup>60</sup> Such a determination may seem appropriate because it conserves scarce resources and reduces de facto severance by discouraging potential plaintiffs who wish to capitalize on the employer’s known incentives to settle. In

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57. See *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 960 F. Supp. 164 (C.D. Ill. 1997).

58. See *id.* at 165.

59. See PRIORITY CHARGE HANDLING PROCEDURES, *supra* note 43, at 6. The EEOC notes that:

[m]any charges will initially appear to have some merit but will require additional evidence to determine whether continued investigation is likely to result in a cause finding. In addition, in other cases it will simply not be possible to make a judgment regarding the merit of the charge at charge receipt. In these cases, additional investigation will be needed, as resources permit, to determine whether these charges should be moved into Category A and given priority status or moved into Category C and dismissed.

*Id.* at 4.

60. See *id.* at 5 (“A charge may be placed in Category “C” and dismissed when the office has sufficient information from which to conclude that it is not likely that further investigation will result in a cause finding.”). The Priority Charge Handling Procedures list several examples of appropriate “C” labeling: (1) where the EEOC lacks jurisdiction over an employer without 15 or more employees because employers with less than 15 employees are not covered by Title VII or the ADA, see Employee Responsibilities and Conduct, 29 C.F.R. § 1601.18 (1997); (2) charges where the allegations are not credible, including cases filed by repetitive charge filers, in which, based on the large number of charges, the charging party is not credible; (3) charges unsupported by any direct or circumstantial evidence of discrimination, and the charging party was in a position to have access to such evidence, see 29 C.F.R. § 1601.19 (1997); and (4) ADEA charges filed more than 180-300 days after the date of violation.

practice, however, the policy has resulted in the EEOC unjustly dismissing claims. For example, in *Reboh v. Citizens Committee for Children*,<sup>61</sup> the employer answered a charge of sexual and religious harassment by stating that it had less than fifteen employees.<sup>62</sup> In response, the employee identified nineteen employees, yet the EEOC failed to investigate.<sup>63</sup> Instead, it immediately placed the case in its "C" category and dismissed it for lack of jurisdiction.<sup>64</sup> The Southern District of New York, in a terse opinion, found that there were at least fifteen employees.<sup>65</sup> In order to defeat the defendant's motion to dismiss, the claimant's lawyers had to spend over \$10,000 of billable time, and the claimant spent more than \$3,000 in court costs. If *Reboh* did not have the resources to litigate this issue, she would have had no opportunity for justice. The *Reboh* case is but one example of the likely result of the EEOC's policies and procedures—the new system is harming plaintiffs with legitimate claims.

*D. Statistical Analysis of the EEOC's Case Handling Reveals That Employee Rights Are Not Being Adequately Safeguarded*

In 1980, the EEOC found no cause in 28.5% of the 49,225 cases it closed.<sup>66</sup> In 1992, the agency found no cause in 61% of the 68,366 cases it closed.<sup>67</sup> Employers argued that the increase in the number of no-cause findings reflects an increase in the number of frivolous claims filed. This may be true because the proliferation of de facto severance encourages employees, who know that their employers will settle baseless cases when the settlement proposal is less than the costs of defense, to file frivolous charges. There may be, however, another explanation for the increase in the number of no-cause findings. A GAO study explained that the large number of no-cause findings were due to the EEOC's failure to adequately investigate between 41% and 82% of the cases.<sup>68</sup> If the GAO conclusion is

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61. No. 96802 (S.D.N.Y. Mar. 14, 1997) (unpublished case) (on file with the authors).

62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.*

66. *See Eisler, supra* note 20, at 1A.

67. *See ENFORCEMENT STATISTICS, supra* note 19; *EEOC Performance Criticized, supra* note 42, at D-3.

68. *See GAO Report Charges EEOC with Failure to Fully Investigate Majority of Complaints*, Daily Lab. Rep. (BNA) No. 198, at A-7 (Oct. 13, 1998) [hereinafter *GAO Report*]. This is not surprising since investigators are encouraged to, and are rewarded for, closing cases. Agencies are also reluctant to find cause because such findings may necessitate the allocation of increasingly scarce resources. An example of an agency that discourages cause findings is the Pennsylvania Human Rights Office in Pittsburgh. *See* Interview with an investigator with the Pennsylvania Human Rights Office, Pittsburgh, Pa. (1994). The Pennsylvania Human Rights Office has an adjudication branch that tries cases that are found to have cause. *See id.* Such

accurate, then employee rights advocates should be outraged about the new priority system that compromises employees' cases.

The 1995 changes have made the numbers identified by the GAO even more striking. From 1986 to 1990, the EEOC closed between 70,749 and 53,482 cases each year.<sup>69</sup> During this time, the percentage of merit resolutions<sup>70</sup> ranged from a high of 19% in 1990 to a low of 15% in 1986.<sup>71</sup> All other cases were dismissed because of a no-cause finding or an administrative resolution.<sup>72</sup> After the EEOC's new policy went into effect, the number of resolutions increased to 91,774 in 1995 and to 103,467 in 1996.<sup>73</sup> In 1994, the average investigator resolved 97.8 cases.<sup>74</sup> In 1996, the average was 139.<sup>75</sup> What appears to be a tremendous increase in productivity is merely a dismissal of a higher percentage of cases. In 1995, merit resolutions dropped to a new low of 11.9%.<sup>76</sup> In 1996, the number dropped to 9.1%.<sup>77</sup> Thus, of the 103,467 cases resolved, the EEOC closed 94,037 (90.8%) without the employee receiving a benefit or a finding of cause.<sup>78</sup>

Classification as a merit resolution does not mean that the case has merit or that it has been resolved. De facto severance cases in which employers settle for nuisance amounts are classified as merit resolutions

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trials are expensive for the Agency. *See id.* It must pay for court costs, the judge, and other expenses. *See id.* To avoid such trials, the investigators are encouraged to try to settle cases regardless of merit and discouraged from ever finding cause. *See id.* The legal department must approve findings of cause. *See id.* According to the investigators, their recommendations to find cause are rejected unless the employee's case is considered impossible to lose. *See id.*

69. *See* ENFORCEMENT STATISTICS, *supra* note 19.

70. Merit resolutions consist of the following: (1) settlements—cases that are settled prior to a determination and the EEOC is a party to the agreement; (2) successful conciliations—cases settled after a finding of cause; (3) unsuccessful conciliations—unsettled cases where there was a finding of cause; or (4) withdrawal with benefits—the case was settled, but the EEOC was not a party to the settlement agreement. *See id.*

71. *See id.*

72. Administrative resolutions are cases in which: (1) the agency could not find the claimant, (2) the claimant failed to respond to the agency's communications, (3) the claimant did not accept full relief, (4) new litigation precedent makes the case moot, (5) the claimant withdrew the case without relief, and (6) the agency determined that it does not have jurisdiction. *See* Equal Employment Opportunity Comm'n, *Definitions of Terms* (last modified Aug. 11, 1998) <<http://eeoc.gov/stats/define.html>>. Cases in which the employee retains an attorney and requests a right to sue letter to begin litigation fall under (5) when the claimant withdraws without relief.

73. *See* ENFORCEMENT STATISTICS, *supra* note 19.

74. *See* EQUAL EMPLOYMENT COMM'N, SUMMARY OF ENFORCEMENT DATA AND BUDGET AND STAFFING INFORMATION FY 1991 THROUGH FY 1998 (1999) [hereinafter BUDGET AND STAFFING INFORMATION].

75. *See id.*

76. *See* ENFORCEMENT STATISTICS, *supra* note 19.

77. *See id.*

78. *See id.*

even when such cases are frivolous. Likewise, the merit resolution classification also encompasses worthy claims that are settled for nuisance amounts. In 1996, 84% of the merit resolutions (8% of the total cases resolved that year) were settled.<sup>79</sup> A majority of those cases were likely settled for nuisance amounts. Without an in-depth analysis of these cases, it is impossible to determine whether there were instances of de facto severance or legitimate claims being compromised. In fact, in 1996 the EEOC found "cause" in only 2.2% of the cases resolved.<sup>80</sup> Of those claimants whose charges were labeled "with cause," 33% (0.7% of the total number of cases resolved that year) received damages in the form of a settlement.<sup>81</sup> Plaintiffs in the remaining 67% (1.5% of the total) had to litigate if they wanted to obtain any relief.<sup>82</sup>

Three conclusions can be drawn from these statistics. First, it is possible that numerous cases are "slipping through the cracks" at the EEOC and being dismissed without receiving proper attention. This applies to the cases resolved by either a finding of no-cause or an administrative closing. Regarding the cases labeled no-cause, a GAO study found that the EEOC is failing to fully investigate at least 41% of the cases in which it finds no merit.<sup>83</sup> The fact that 30% of the resolved cases are classified as administrative closings may also result from the EEOC's procedures. In 1996, it took the EEOC an average of 379 days to resolve a case.<sup>84</sup> In that time, employees often give up due to frustration or find new jobs, which cuts off back pay and significantly limits their potential recovery so that pursuing the case would be pointless. Cases in which employees give up because of frustration with the system are administratively closed and classified as without merit.<sup>85</sup> This classification is made regardless of the

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79. *See id.*

80. *See* Equal Opportunity Comm'n, *All Statutes* (last modified Jan. 14, 1999) <<http://www.eeoc.gov/stats/all.html>>. Note that in 1997, reasonable cause was found in 3.8% of all charges; in 1998, reasonable cause was found in 4.6%. *See id.*

81. *See id.*

82. *See* ENFORCEMENT STATISTICS, *supra* note 19.

83. *See* GAO Report, *supra* note 68, at A-7.

84. *See* BUDGET AND STAFFING INFORMATION, *supra* note 74.

85. Michael Selmi discusses the high percentage of plaintiffs' cases that fail due solely to some procedural defect. *See* Selmi, *supra* note 38, at 10-11. These defects arise because of the EEOC's internal case-processing structure and its problems handling backlog and delay in investigations. The EEOC has 180 days from the time of filing of a complaint to investigate. *See* 42 U.S.C. § 2000e-5(e)(1) (1994). Because in almost all cases, the Agency takes longer than that to complete its investigation, the plaintiff has a statutory right to request a "notice of a right to sue," and the Agency must comply with this request. *See* Employee Responsibilities and Conduct, 29 C.F.R. § 1601.28 (1997). The right to sue letter functions as the plaintiff's ticket into court. Selmi compares this administrative hurdle with requiring a driver to apply for a bridge token in advance and points out that the EEOC serves the sole function of issuing a right to sue notice for approximately 25% of the claims filed. *See* Selmi, *supra* note 38, at 8-9. Because a large number of the cases that are heard in federal court fail due to some



facts. To paraphrase Roscoe Pound, instead of being labeled without merit, such cases could be labeled “without justice.”<sup>86</sup>

The second possible conclusion arises from the cases where an employee requests a right to sue and begins litigation. If these cases represent a high percentage of the administrative closings, then the EEOC is simply an irrelevant procedural hoop through which claimants and their attorneys must jump.<sup>87</sup>

The third possible conclusion to be drawn from observing the outrageously small number of meritorious cases is, as employers would argue, that the overwhelming majority of the cases filed are frivolous. If this is the case, then the focus of discrimination legislation reform should not be on finding ways of making the filing of claims easier and more attractive. Instead, the concern should be employers’ rights and costs. Regardless of whether the EEOC is allowing meritorious cases to slip through the cracks due to procedural inadequacies, whether plaintiffs view the EEOC as irrelevant, or whether there are just too many frivolous cases that congest the system, the result is clear—the EEOC is not serving the parties well. This means that employee and employer rights are not being safeguarded adequately. In fact, the EEOC is not resolving claims. Instead, the job of making sure that discrimination laws are enforced at the workplace is left to the courts, or more realistically, to the plaintiffs’ lawyers who decide which plaintiffs’ cases to accept and which to turn away.<sup>88</sup> However, the federal courts and plaintiffs’ lawyers are not providing justice either.

#### *E. A Federal Court Is Not a Viable Avenue for Most Plaintiffs*

In order to file a claim in federal court, an employee must, for all intents and purposes, retain competent counsel. Because few employees can afford an attorney’s hourly rate, most plaintiffs seek lawyers who work on a contingency basis. No scholarly work examines how plaintiffs’ lawyers decide to take and manage employment discrimination cases. There are, however, studies on how personal injury lawyers operate contingency practices. Below we discuss the principles by which personal

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administrative defect, it can be inferred that the EEOC is essentially harming plaintiffs with otherwise actionable claims.

86. See, e.g., *Martel v. County of Los Angeles*, 56 F.3d 993, 1003 (9th Cir. 1995).

87. Peter Albrecht referred to the EEOC as a “procedural hoop that plaintiffs have to jump through to adjudicate their claims.” Ritter & Albrecht, *supra* note 39. According to Albrecht, the EEOC provides little or no benefit for plaintiffs with “B” cases. See *id.* Instead, the agency simply increases the amount of time it takes to get relief. See *id.*

88. See Herbert M. Kritzer, *Contingency Fee Lawyers As Gatekeepers in the American Civil Justice System*, JUDICATURE, July-Aug. 1997, at 22, 22-29 [hereinafter Kritzer, *Gatekeepers*].

injury attorneys operate and explain why some of these principles apply to discrimination lawyers and why some do not.

Contingency attorneys manage a caseload as if it were a portfolio.<sup>89</sup> Lawyers minimize exposure to risk by carefully selecting the cases they take, accepting cases with amenable facts even if the potential return is low, taking a mix of cases, or limiting the amount of time devoted to a given case.<sup>90</sup> Lawyers often develop reputations for the way they opt to manage caseloads. Selective plaintiffs' lawyers will signal employers that their clients' cases have merit and that they are prepared to litigate.<sup>91</sup> Nonselective attorneys signal that they are looking for settlement.<sup>92</sup> Regardless of which approach is taken, one thing remains clear—attorneys are rational actors who will not take cases unless they believe in their ultimate profitability.<sup>93</sup>

In theory, the EEOC's resolution of a charge should signal plaintiffs' lawyers whether a case would be profitable. A no-cause finding should mean that the case has no merit. A cause finding should imply that the case is worth pursuing. Because the statute provides attorneys' fees for the prevailing plaintiff, an attorney has an incentive to take a "cause case" even if there are low damages. Conversely, attorneys should not pursue cases in which there has been a no-cause finding, regardless of the amount of potential damages. This theory is quite appropriate. The EEOC determines the merits of the claim, and attorneys file lawsuits only if the case is meritorious. By dismissing the overwhelming majority of cases *without regard to the merits of these cases*, the EEOC has created a perception among plaintiffs' lawyers that the results of the investigations are meaningless. Consequently, a no-cause finding is not a signal to plaintiffs' lawyers because the EEOC does not provide relevant information.<sup>94</sup> Attorneys, therefore, base their determinations on profitability, and thus their ultimate decision to take a given plaintiff's case, on the limited information available to them.

#### F. *How Lawyers Select Plaintiffs' Claims*

When working on a contingency basis, lawyers desire to earn more for

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89. See HERBERT M. KRITZER, *RHETORIC AND REALITY... USES AND ABUSES... CONTINGENCIES AND CERTAINITIES: THE AMERICAN CONTINGENT FEE IN OPERATION* 89 (Inst. for Legal Studies, Working Paper No. DPRP 12-2, 1996) [hereinafter KRITZER, *RHETORIC AND REALITY*].

90. See *id.* at 91.

91. See *id.* at 90.

92. See *id.*

93. See Herbert M. Kritzer, *Investing in Cases: Can You Profit from Contingency Fee Work?*, WIS. LAW., Aug. 1997, at 10 [hereinafter Kritzer, *Investing in Cases*].

94. See Kritzer, *Gatekeepers*, *supra* note 88, at 22-29.

their time than they would if they were charging by the hour for their services.<sup>95</sup> Contingency lawyers need to exceed their hourly rates in cases in which they are successful in order to make up for the lost time in the cases that yield little or no reward. The most effective way for lawyers to profit from a contingency practice is to avoid trial and settle the vast majority of cases.<sup>96</sup> In fact, in some circumstances, it makes sense for lawyers to push clients to settle even if the client would receive a greater return at trial.<sup>97</sup> A marginal increase in the attorney's fee is not worth the exponential increase in the amount of time it will take to bring a case to trial.<sup>98</sup>

For our discussion, it is important to note the differences in personal injury and discrimination law. Personal injury lawyers often sue insurance companies. The cases typically involve unlimited damages but do not permit judges to order defendants to pay the prevailing plaintiff's attorneys' fees—an arrangement referred to as “fee shifting.” The insurance companies operate like plaintiffs' lawyers; they have portfolios of cases and manage risk.<sup>99</sup> Simply put, insurance companies are in the business of defending lawsuits. Employers are not in the business of defending discrimination cases. Moreover, employers forced to defend against charges such as racism, sexism, or worse, may feel the need for moral vindication or exculpation. In addition, employers, unlike insurance companies, fear the bad publicity of a trial. The damages in discrimination cases are capped under federal law, but there *is* fee shifting.<sup>100</sup> These critical differences make it difficult to model how plaintiffs' lawyers select discrimination cases based on research of personal injury lawyers' decision making.

Because of the differences between personal injury and discrimination cases, we propose that discrimination attorneys may bring a different set of questions into the case-screening process. We recognize that there is no empirical support for this theory, but it is useful when addressing the question of whether arbitration will increase or decrease the chances of a discrimination plaintiff obtaining representation. Inherent in this discussion is the issue of whether legislators should consider the economics of the contingency practice in determining who can and who cannot work free from discrimination and harassment.

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95. See Kritzer, *Investing in Cases*, *supra* note 93, at 10.

96. See Herbert M. Kritzer, *Contingent Fee Lawyers and Their Clients: Settlement Expectations and Settlement Realities* (visited Feb. 26, 1999) <<http://www.polisci.wisc.edu/~kritzer/contfee/settle.htm>> [hereinafter Kritzer, *Settlement Expectations*].

97. See *id.*

98. See *id.*

99. See KRITZER, *RHETORIC AND REALITY*, *supra* note 89, at 92.

100. See 42 U.S.C. § 1981a (1998).

We propose that there are three questions that a lawyer should consider in deciding whether to take or reject a plaintiff's case. The questions are as follows: (1) Are the merits of the case so strong or so weak that the claim can be accepted or rejected without further inquiry? (2) Is the case one that is easily *settle-able*? (3) Is the case one that is winnable in court?

In cases in which there is solid evidence that an employee has been the victim of discrimination, plaintiffs' lawyers should base their decisions to take cases on their merits. In contrast, the merits of some cases are so tenuous that the plaintiff would be unable to make a *prima facie* case.<sup>101</sup> Such weak-merit cases, like the strong-merit cases, provide easy decisions for attorneys. In most situations, however, the facts are less clear, and a finding of liability is not a forgone conclusion. In these instances, plaintiffs' attorneys should determine the profitability of the case by examining potential damages, potential costs, and the defendant's ability and willingness to pay. Juries award large damages only when the employee is a high wage earner, the former employee has been unemployed for an extended duration, or the employer's conduct was so egregious as to warrant punitive damages.<sup>102</sup> Ability to pay is obviously based on the financial condition of the employer. Willingness to pay is generally determined on an employer-by-employer basis. Large employers may be less likely to settle than smaller employers for two reasons. First, large employers have the resources to hold out longer than smaller employers do. As such, a large employer is unlikely to equate the threat of litigation with the threat of bankruptcy. Second, larger employers, who are

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101. Such cases include instances when the plaintiff is not in a protected class, or when the plaintiff is in a protected class but the workforce is so homogenous that discrimination is improbable (for example, a Mexican worker wanting to sue for discrimination when he was fired from a workplace where every other worker was Mexican as well), or when the alleged defendant is clearly not an "employer" under the statute. *See generally* 42 U.S.C. § 2000e (1994).

102. The fact that back pay awards are equal to wages ("W") multiplied by the time unemployed subject to a reasonable duty to mitigate such loses ("D"), or (W)(D), reveals an underlying problem with discrimination litigation that has long been recognized and was one of the motivating factors in Congress's decision to create the EEOC. Absent some intervention, governmental or otherwise, when lawyers decide which plaintiffs' cases to accept, low wage earners tend to be turned down more frequently because they are less likely to be profitable as back pay is almost always the substantial part of the award. The EEOC was created so that Title VII would not be a right reserved for the well off.

David Rose explains that since its creation, the EEOC has brought a disproportionately high percentage of age discrimination cases primarily because older plaintiffs tend to have significantly higher incomes, holding all else constant. *See* David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1159 (1989); *see also* Selmi, *supra* note 38, at 17 n.71 (noting that "[b]etween 1972 and 1987, 10.3% of all employment discrimination cases filed in federal court were filed under the ADEA").

susceptible to multiple claims, may have policies against settling in order to avoid the de facto severance problem. Alternatively, any employer, large or small, that fears the bad publicity inherently associated with a discrimination trial may be litigation averse. A *rational* plaintiff's lawyer will therefore take a case with dubious or questionable merit only when the potential damages (as measured in part by the depth of the defendant's pockets) are greater than the potential costs associated with the case.<sup>103</sup>

Potential costs come in two forms. The first cost is monetary. The attorney must advance the client the costs associated with litigation, including filing fees, deposition transcripts, photocopies, and experts. The attorney is often unable, or unwilling, to cover these costs with the knowledge that remuneration will occur only in the case of a victory in court. It is one thing to work for free; paying to work is another matter.

The second cost, based on our experiences before federal court judges, is lost credibility before the federal bench. Some judges have little or no patience for lawyers who bring fees cases into court. A fees case is a lawsuit in which the recoverable damages are so low that the attorneys' fees become the driving force in the case. Such a case often results when the plaintiff is a low wage earner. An attorney may logically refrain from taking these cases due to the hostility that judges have toward those who litigate instead of settling low damage cases. A plaintiff's attorney does not want to get a reputation as one who litigates fees cases.<sup>104</sup> Additionally, plaintiffs' lawyers will not exceed their normal hourly rates by taking fees cases to trial, and as discussed above, this is the goal for lawyers working on a contingency basis.<sup>105</sup>

These actual and potential costs should convince plaintiffs' lawyers either to refuse to take or not actively pursue cases involving low wage earners unless the employer's liability is so clear to the lawyer, the defense, and the court that punitive and compensatory damages are available.<sup>106</sup>

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103. In evaluating attorneys' decision making with regard to accepting or rejecting settlement offers, Korobkin and Guthrie found that lawyers were just as likely as clients to act based on irrational factors. See Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 79-81 (1997). Thus, while models of lawyers' decision making based on strictly rational and objectively mathematical terms such as the one presented *infra* note 108 are quite useful for assisting attorneys in determining how they *should* decide which cases to accept or reject (indeed, such models may prove exceptionally useful given the human proclivity to short cut such decision making with instinct and gut reaction), it would be misleading and presumptuous to purport that such a model explains how attorneys actually do decide which cases to accept or reject without any empirical evidence in support of such claims.

104. See Ritter & Albrecht, *supra* note 39.

105. See discussion *supra* Part I.E.

106. There is a conceivable exception to the general trend of fees cases being shunned by federal court judges. Attorneys' fees can be potentially exorbitant and thereby carry great deterrent effect. In some instances, judges will permit and even encourage fees cases in order to

This harsh reality results in the unlikelihood of low wage earners ever seeing the inside of a courtroom. The only justice they receive comes in the form of a cash award designed to make them disappear silently. We emphasize the word silently because the majority of cases settle without creating precedent or publicity.<sup>107</sup> The right to a trial in federal court is, in reality, limited to high wage earners and those who have strong evidence of clear violations of the law.<sup>108</sup>

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send a deterrent message to other employers or to penalize a particular employer when its conduct may have been reprehensible, egregious, or willful. See, for example, *Hard Rock Café Licensing Corp. v. Concession Services, Inc.*, 955 F.2d 1143 (7th Cir. 1992), in which the court awarded Hard Rock a mere \$120 in damages and nearly 20 times that amount in attorneys' fees due to a flea market owner's willful trademark infringement of Hard Rock's licensed trademark. The Lanham Act provides for such damages because, otherwise, small but willful trademark infringements would go unpunished. Similarly, in employment discrimination suits, courts may be apt to permit fees cases in certain limited contexts where willfully discriminatory employers would otherwise go unpunished.

107. As explained *infra*, this reality must be remembered when addressing the argument that mandatory arbitration retards the development of legal precedent as compared to its development in the federal courts.

108. In an attempt to reduce a plaintiffs' attorney's decision making process to a coherent and sound model à la Learned Hand's famous  $B > PL$  formula, see generally *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947), we quickly discovered that a simple expectancy-based model would be inaccurate and unrealistic.

There has been at least one other attempt to algebraically model an employment discrimination lawyer's decision making. Michael Selmi has attempted to do so with two equations. See Selmi, *supra* note 38, at 30. One indicates that a lawyer will choose to take a case if the expected return of winning is greater than the expected loss associated with failed litigation, (" $p(wD) + p \text{ sub1}(x) > (1-p)Cp$ "). See *id.* Selmi measures expected return as the probability of winning multiplied by the expected compensation of back pay and other damages. See *id.* The second formula indicates that attorneys take cases when the expected recoverable legal fees are greater than the expected costs incurred by taking the case (" $p(F) > (1-p)Cp$ "). See *id.* Selmi writes that "the ability to obtain fees from the defendant suggests that the most attractive case for an attorney may have little to do with damages." *Id.* at 31. The formulae and the conclusion drawn from them are flawed for five reasons. First, Selmi neglects to consider attorneys' reluctance to take fees cases. See *id.*; see also *supra* notes 104-06 and accompanying text. Second, Selmi's model represents a long-run probabilistic representation of how attorneys *should* think if they wanted to maximize profits and were able to avoid the inescapable and myopic view of potential clients that attorneys generally possess. The model, however, does not represent the way that attorneys *actually* decide to take cases. For example, according to Selmi's model, an attorney will take a case where the chances of losing are 80%, the costs of litigating are only \$1,000, the chance of winning is 20%, and the potential damages are \$30,000! The short-run opportunity costs involved are not factored in so that even if, in the long-run, the lawyer maximizes his profits by this model, in the short run, he would never take a case with an 80% chance of losing because the opportunity costs of taking such a case are likely to be great. Third, Selmi's model does not account for the fact that a lawyer working on a contingency basis weighs not the *total* damages awardable to the plaintiff against the potential costs associated with taking the case, but rather, the contingency based *percentage* of potential damages. In the above scenario, for example, the attorney is not concerned with the amount  $0.20 \times \$30,000$ , but rather  $0.20 \times \$30,000 \times 0.33$  (when his contingent rate is

33%). Fourth, breaking up the equations into an attorney's concern with recovering damages and her ability to recover her fees is unrealistic. These considerations are intertwined. Finally, Selmi's model does not account for the distinction between a lawyer who takes quick, settle-able cases with possibly little chance of winning on the merits or going to court, and a lawyer who takes cases and pursues them vigorously to the bitter end.

A pathway model with some expectancy theory built in is more suitable to this type of decision making. The following is a five-step model of how a *rational* plaintiff's attorney would decide to take a plaintiff's case or not:

Step 1:

Are the merits of the case very strong, very weak, or somewhere in the middle? As mentioned above, this threshold assessment of the merits of a plaintiff's case can sway an attorney to accept or reject a plaintiff regardless of the amount of potential damages. Attorneys are relatively accurate assessors of the merits of cases. See Kevin M. Clermont & John D. Currihan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 561-62 (1978). But see Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 L. & SOC. INQUIRY 1, 48 (1994).

Step 2:

For cases whose merits are somewhere in the middle, is the case easily *settle-able*? (For example, does the plaintiff's case offer a sufficiently strong threat of litigation?) A lawyer's decision to take a case based on *settle-ability* can be modeled as follows:

$$Ps(C)(dam) > W(OC) + (CS)$$

"Ps" is the probability of settlement. Step 3 describes how lawyers determine "Ps." "C" is the lawyer's contingency percentage.

"dam" represents the damages the plaintiff is justified in claiming. This variable at its most basic form is simply back pay, which is easily calculated. See *supra* note 102. In addition to back pay, "dam" may include punitive damages and other compensatory damages. One survey of 321 NELA member lawyers and 330 ABA member attorneys "regularly representing employees in discrimination disputes" (80% to 100% of the firm's practice consisting of employment law issues) revealed that lawyers required minimum provable damages of \$60,000 to \$65,000 in order to accept a plaintiff's case. See William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, DISP. RESOL. J., Oct.-Dec. 1995, at 40, 43-44.

"W(OC)" is the weighted consideration of opportunity costs involved in taking this particular plaintiff's case. This is essentially a variable expressing the value of the lawyer's time. Because individual assessments of opportunity costs vary across many variables, different lawyers will afford such costs different weights. For instance, a large plaintiffs' firm would weigh its opportunity cost of taking any given case differently than a solo practitioner struggling to stay out of the red.

"CS" is the out-of-pocket cost of settling. This includes wages paid to associates and support staff, the cost of office supplies, photocopies, traveling, and other related expenses. The right side of this equation is purposely void of any "1-Ps" type variable because even if the case is not *settle-able*, it may still be litigation-worthy. It should also be noted that "CS" does *not* include costs incurred by the lawyer in initially determining whether the case has any merit because such costs are incurred regardless of whether the lawyer takes the case.

Step 3:

The probability of settlement ("Ps") can be expressed as a function of the probability of winning at trial ("Pw"), the amount of the potential damages ("dam") (the greater the amount of potential damages, the more likely the defendant will settle), the strength of the merits ("M") (the stronger the merits, the more likely the defendant will settle), and the

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defendant's ability and willingness to pay ("D"). Algebraically represented:

$$P_s = f(P_w, \text{dam}, M, D)$$

Step 4:

Is the case winnable through litigation itself? If so, the case is attractive to plaintiffs' lawyers willing to pursue cases vigorously even if they are not quickly *settle-able*. This question can be expressed by the following equation:

$$P_w(C_m)(\text{dam}) + P_w(\text{fee}) > (1 - P_w)(CL) + W(OC)$$

"P<sub>w</sub>" is the probability of winning at trial—this is generally a function of the strengths of the merits, the credibility of the witnesses, the lawyers' confidence in their litigation skills relative to those of the defendant's attorneys, knowledge of the judge, and other factors.

"C<sub>m</sub>" is the modified contingency percentage of the potential winnings, which is generally less than the contingency percentage for settled cases. For instance, it is common for attorneys to offer clients a contingency rate of 30% if the case settles and only 20% if the case is won at trial.

"fee" is the legal fees recoverable if the plaintiff wins. "dam" is the same as "dam" in the above equations. "CL" is the cost of litigation including costs incurred in preparation for litigation. "W(OC)" is the weighted opportunity cost of taking the case, as noted above. "CL" and "W(OC)" have the potential of being exceptionally large. In firms where associates and paralegals do most of the trial-preparation, hourly wages, or CL, is probably the large part of the right side of the equation. Solo practitioners probably have larger W(OC)s.

Step 5:

Due to the potential concern of losing credibility before the bench by bringing numerous fees cases, lawyers calculate the ratio of their hourly wage-based assessment of their fees to the awardable damages to determine whether to take the case. This is one area where the distinction between lawyers looking for quickly *settle-able* cases and lawyers willing to vigorously pursue every case is highly relevant. Attorneys tend to take cases in which this ratio is less than some constant ("K") that varies across jurisdictions and attorneys:

$$\text{Fee} < \frac{K}{\text{dam}}$$

To illustrate how these five steps may be used to guide a lawyer's decision to take or turn down a discrimination plaintiff, assume the following hypothetical facts. (The hypothetical situation involves a discharged plaintiff because the overwhelming majority of cases filed in the past five years have been discharge cases. The model, however, functions for any type of case.)

The employer manufactures component parts for several large automobile companies. The plaintiff, a riveter who earned \$500 per week for two years, is a member of a protected class. She left work without giving any notice of her intention to return and was replaced after four days. She alleges that she was constructively discharged due to unlawful discrimination. She further claims that her supervisor had been looking for an excuse to fire her for some time and grasped the opportunity created by her unexplained disappearance. The plaintiff claims to have overheard the supervisor making racist and sexist comments, specifically mentioning her by name. Some preliminary investigation reveals that the employer, a large company with deep pockets and vast legal resources at its disposal, stands firmly behind the plaintiff's supervisor who claims that the employee was a poor worker and had been known to skip work frequently in the past. Unfortunately for the employer, the plaintiff was never warned or disciplined for her past infractions. In fact, she received



When plaintiffs' lawyers act as *gatekeepers* for employment discrimination claims (and, as illustrated above, the EEOC has been passing the job of gatekeeper to the plaintiffs' bar due to its ineffective signaling), low wage-earning plaintiffs with potentially viable, but not egregious, claims may remain without a remedy. Moreover, large employers are able to pay minimum sums that allow them to continue practicing discrimination. Even plaintiffs who do see the inside of a courtroom are not really well off. Federal litigation is a heart-wrenching

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strong performance evaluations. She has been unemployed for 20 weeks.

Assuming the case survives step 1, and the case has *some* merit, the lawyer will then apply step 2 to determine if the case will be quickly profitable due to its *settle-ability*. The case probably has a low probability of settlement ("Ps") according to step 3. The probability of winning at trial is low (assume for the moment 50%), the damages are relatively small (\$10,000), the merits are in the middle, and the determinative factor is the employer's recalcitrance to settle. The employer has vast legal resources specifically for the purpose of fighting vigorously to avoid the de facto severance problem so the employer is highly adverse to settlement. Because the defendant is a component parts manufacturer, the fear of bad publicity does not increase the "Ps." With a low "Ps," a typical contingency rate of 33%, and damages of \$10,000, a lawyer only looking at steps 1-3 (the type of lawyer looking only for a quick settlement) will find that the chances of settling are not good and that the \$3300 is not an attractive amount of damages. A firm looking for settlement money would be unlikely to take this case due to the costs of further investigation, including interviewing witnesses and negotiating with the employer. Furthermore, the case compares poorly with other potentially profit-making endeavors. Thus, this plaintiff would not be able to obtain representation from a large percentage of plaintiffs' law firms.

The next question is whether the firm would be willing to pursue this claim in court even if it is not *settle-able*. With an assumed probability of winning in court of 50%, a modified contingency rate of 20%, the same potential damage award, and a fee amount equal to \$100,000, the left side of the equation for step 4 would look like this:  $(0.5)(0.20)(\$10,000) + (0.5)(\$100,000)$  or \$51,000. This number is compared with the right side of the equation which would look like this:  $(0.5)(\$10,000 \text{ out-of-pocket expenses}) + (\$82,500 \text{ opportunity costs})$  or \$87,500. Because the costs (\$87,500) outweigh the potential benefits (\$51,000), the firm should not take this case.

We base our estimates of cost on a number of factors. The \$100,000 in fees and the \$10,000 in out-of-pocket expenses is based on an approximation of the costs and fees the plaintiffs' attorneys accrued in *Austin v. Cornell University*, 891 F. Supp. 740 (N.D.N.Y. 1995), a garden variety age discrimination case. The \$82,500 in opportunity cost is estimated by multiplying 550 hours by \$150, an estimated amount at which other clients could have been billed. As attorneys' fees were estimated at \$100,000, and the billable rate is \$150, the law firm is putting in approximately 666 hours on the case. We chose \$150 per hour because this is the default amount that the Northern District of New York awards in attorneys' fees absent a showing that the firm commands a higher billable rate. In determining the estimated amount at which other clients could have been billed, we intentionally reduced the number of replaceable billable hours from 666 to 550 because it is possible that not every hour of work time needed to be devoted to the plaintiff's claim would be usable towards alternative projects. Note that punitive damages were not factored into the equation because the conduct in the hypothetical was not egregious enough to merit such an award. Additionally, the fee/dam ratio of 10-to-1 might be larger than some "K" so that step 5 would further discourage lawyers from taking the case before the federal bench.

marathon that no one enjoys and many people simply cannot tolerate.<sup>109</sup> Litigation, which on the average takes two-and-a-half years to resolve, can last for more than ten years.<sup>110</sup>

The public aspect of litigation is potentially detrimental to employees and employers alike. Employer-defendants tear voraciously at the character and integrity of employee-plaintiffs during long, arduous trials. Litigation leaves ample public record not only of the employee's accusations but also of the employer's. Following the trial, employees may be blacklisted, disrespected, and distrusted when they attempt to return to work.<sup>111</sup> Employers face the possibility of baseless accusations shattering their reputations that may have taken years to develop.

Because of the time, money, and other problems associated with the EEOC and federal litigation of discrimination claims, when discussing the current enforcement system, Judge James Moran, the chief judge for the Northern District of Illinois, the federal district court that hears more discrimination claims than any other district in the country, stated, "It's a bad system for the employer, it's a bad system for the employee."<sup>112</sup> In practice, however, we propose that the current system of resolving cases through the EEOC and federal litigation is not bad for all employers and employees. Instead, it hurts only the good actors: employees with legitimate claims and employers falsely accused of discrimination. At the same time, the system benefits the bad actors: employers who discriminate and employees who file frivolous claims. Bad actor employers and employees use the costs and delays of the system to their benefit. Bad actor employers use litigation to wear down employees with delays and discovery costs. Bad actor employees use the threat of the cost of defense to extort employers into paying de facto severance. Investigators and lawyers facilitate the bad actors' actions by pushing settlements. They encourage: (1) innocent employers to settle frivolous cases by threatening them with the costs of investigation and litigation; and (2) employees with meritorious cases to settle by threatening them with delays, the probability of a no-cause finding, and the financial and emotional costs of litigation.

Therefore, under the current system, innocent employers are forced to

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109. See Amy Saltzman, *Life After the Lawsuit*, U.S. NEWS & WORLD REP., Aug. 19, 1996, at 57 (reporting on the negative post-trial experiences of plaintiff victors in Title VII lawsuits, including Ann Hopkins of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

110. While the average time frame varies slightly across jurisdictions, the average remains close to two or three years. See Lois A. Baar & Michael A. Zody, *Resolution Conferences Conducted by the Utah Anti-Discrimination Division: The Elements of a Successful Administrative Mediation Program*, 21 J. CONTEMP. L. 21, 28 (1995); Richard D. Wilkins, *Arbitrate or Out!*, CENT. N.Y. BUS. J., Feb. 5, 1996, at 1 (noting that the median time between the date a lawsuit is filed and the commencement of a civil trial is 2.5 years).

111. See Saltzman, *supra* note 109, at 57.

112. Eisler, *supra* note 20, at 1A.

pay damages, however small, to former employees who slandered them by calling them discriminators, whereas employees with legitimate claims do not receive redress or even their day in court. Conversely, guilty employers get off for a fraction of the potential damages, and employees who filed frivolous claims receive de facto severance. Because employers are exposed to high defense costs, and employees' claims are often neither timely nor fairly investigated, the current system is failing in its mission. Thus, both employees and employers would be better served by an alternative to the federal courts.

### G. Arbitration

Because it is faster and less expensive, arbitration is arguably more accessible to employees. Arbitration takes an average of 264 days from filing to disposition.<sup>113</sup> Lawyers do not need to commit nearly as much time to arbitration as they must to the same set of facts raised in federal court. This reduction in time should have a drastic effect on the decision of a plaintiffs' lawyer to take a case. The reduced costs associated with preparing and arbitrating a dispute exponentially deflate the right side of the equation expressed in step four in Note 108.<sup>114</sup> Holding all else constant (the merits, plaintiff, defendant, and most importantly, damages), lawyers should be more likely to accept a Title VII arbitration-bound plaintiff than a litigation-bound plaintiff. Furthermore, lawyers can take a chance on a fees case because arbitration is a relatively quick process, arbitrators are not hostile to hearing such a case (unlike federal court justices) and arbitrators have no overcrowded docket to worry about.<sup>115</sup>

Most plaintiffs' lawyers, however, oppose arbitration. While the reasons cited usually focus on the perceived lack of fairness and lack of choice,<sup>116</sup> there is a more practical reason for this opposition. Plaintiffs'

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113. See *Employers Reluctant to Embrace Mandatory Arbitration, Survey Finds*, Daily Lab. Rep. (BNA) No. 84, at A-14 (Apr. 30, 1992) (this figure is based on AAA's handling of 562 cases between employers and individual employees in 1991); see also Beth A. Rowe, *Binding Arbitration of Employment Disputes: Opposing Pre-Dispute Agreements*, 27 U. TOL. L. REV. 921, 934 (1996) (citing a finding by the Civil Justice Institute of the Rand Corporation that the average arbitration decision is reached in approximately 8.6 months (262 days)); *Perspective: ADR Techniques Gaining Favor in Non-Traditional Settings*, Daily Lab. Rep. (BNA) No. 48, at C-1 (Mar. 15, 1993) (Stephen Hirschfeld of McKenna & Cuneo, a San Francisco-based law firm, stated that the "arbitration process takes, on average, one or two days and can be complete within about six months from the time of the incident. . . . This is in contrast to the average wrongful discharge case, which may last from two to five years—or longer.").

114. The variable "CL" would be much less on the average for arbitratable cases as opposed to non-arbitratable ones. See discussion *supra* note 108.

115. Therefore, the constant, "K", in step five of a lawyer's decision to take a plaintiff's case, is lowered. See *id.*

116. See Vladeck, *supra* note 16, at 7.

lawyers maximize their earnings when they settle cases for high damages with little time invested.<sup>117</sup> By reducing the likelihood of settling, arbitration makes cases less attractive to profit-maximizing plaintiffs' lawyers. A lawyer who takes an arbitration case knows that it is likely that the case will be adjudicated. This increases the time it takes to obtain payment and, as a result, reduces the lawyer's hourly rate.

For employers, the reduced cost, increased speed, private nature, and elimination of juries make arbitration an attractive option. Employers who are litigation-averse (because of fears of costs, bad publicity, or both) utilize arbitration to avoid de facto severance. This does not mean, however, that arbitration is perfect. Indeed, it is not. As discussed below, it is not entirely clear what criteria should be used to determine the fairness of an arbitration policy. However, despite this and other concerns, arbitration offers a marked improvement over the existing adjudication process.

## II. THE CURRENT LEGAL STATUS OF ARBITRATION

### A. *In Most Jurisdictions, Employers Can Require Employees to Arbitrate Discrimination Claims*

The law regarding whether an arbitration clause precludes the judicial adjudication of statutorily created rights (for example, discrimination, wage, and hour claims) is both unsettled and rapidly evolving. In most jurisdictions, a compulsory arbitration policy prevents employees from bringing a discrimination lawsuit into federal court.<sup>118</sup> In the Ninth Circuit, however, Title VII and ADA cases cannot be subject to mandatory arbitration agreements.<sup>119</sup> In order to explain the specifics of the law, it is necessary to examine the two leading Supreme Court decisions and two leading circuit court opinions.

In *Alexander v. Gardner-Denver Co.*,<sup>120</sup> the United States Supreme Court held that an adverse arbitration decision does *not* bar an employee covered by a collective bargaining agreement with an arbitration clause from litigating a Title VII discrimination case in federal court.<sup>121</sup> The lower courts extended this holding to the nonunion setting, and thus, until the *Gilmer v. Interstate-Johnson Lane Corp.*<sup>122</sup> decision, compulsory arbitration

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117. See Kritzer, *Investing in Cases*, *supra* note 93, at 10.

118. See cases cited *supra* note 6.

119. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998).

120. 415 U.S. 36 (1974).

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

122. 500 U.S. 20 (1991).

clauses could not prevent employees from litigating any right created by discrimination statutes.

In *Gilmer*, the Supreme Court distinguished its *Gardner-Denver* decision and held that a compulsory arbitration clause could prevent nonunion employees from filing age discrimination claims in federal court.<sup>123</sup> The plaintiff in the case, Robert Gilmer (a registered securities representative), signed the New York Stock Exchange's securities registration application in order to gain employment.<sup>124</sup> The application contained a compulsory arbitration clause.<sup>125</sup> When he was subsequently terminated from his position with his employer, the plaintiff filed an ADEA lawsuit in federal court.<sup>126</sup> The *Gilmer* Court held that the arbitration clause was enforceable and thus barred the plaintiff from pursuing his federal court claim.<sup>127</sup> Following the *Gilmer* decision, lower courts extended the holding to other alleged violations of Title VII.<sup>128</sup>

The *Gilmer* Court distinguished the *Gardner-Denver* holding on three grounds. First, because a labor arbitrator's role is limited to enforcing the parties' collective bargaining agreement, the arbitrator in *Gardner-Denver* did not have the authority to determine whether the ADEA had been violated.<sup>129</sup> Second, the *Gardner-Denver* arbitrator's "task is to effectuate the intent of the parties" even if these interests conflict with the employee's statutory rights.<sup>130</sup> Finally, the arbitration clause in *Gilmer*, unlike that in *Gardner-Denver*, was enforceable under the Federal Arbitration Act ("FAA"),<sup>131</sup> a statute passed in 1925. Interpretation of the scope and

123. *See id.* at 35.

124. *See id.* at 23.

125. The application provides that the potential employee agrees to "arbitrate any dispute, claim or controversy" arising between the applicant and the employer "that is required to be arbitrated under the rules, constitutions or by-laws of the organizations" with which the applicant registers. *Id.* Gilmer had registered with the New York Stock Exchange, which has a rule providing for arbitration of "any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative." *Id.*

126. *See id.* at 23-24.

127. *See id.* at 35.

128. *See cases cited supra* note 6.

129. According to the Court, the *Gardner-Denver* line of cases is distinguishable from *Gilmer* for several reasons:

First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims [, meaning that] the arbitration in those cases understandably was not held to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, unions represented the claimants in the arbitration proceedings. . . . Finally, those cases were not decided under the FAA.

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

130. 415 U.S. at 53.

131. *See* 9 U.S.C. §§ 1-16 (1994). Originally called the United States Arbitration Act, the

applicability of both the FAA and the 1991 Act represents the core of the debate over the legality of mandatory arbitration.

### B. *The Civil Rights Act of 1991*

The current split in the circuits over the lawfulness of mandatory arbitration focuses on language set forth in the 1991 Act. Specifically, section 118 of the 1991 Act provides that, “[w]here appropriate and to the extent authorized by law, the use of alternative dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under [Title VII and the ADA].”<sup>132</sup> In *Duffield*, the Ninth Circuit held that this language embodies a congressional intent to prohibit the use of pre-dispute agreements by employers to mandate that employees arbitrate statutory claims,<sup>133</sup> while in *Seus*, the Third Circuit reached the opposite conclusion.<sup>134</sup> Below we examine the reasoning of both courts.

### C. *Duffield v. Robertson Stephens & Co.*

The Ninth Circuit recognized that *Duffield*, as plaintiff, bore the burden of proving Congress’s intent to preclude judicial forum waivers for Title VII claims.<sup>135</sup> Such intention, according to the court, will be discoverable in the text of the act at issue, its legislative history, or by the fact that there is an inherent conflict between arbitration and the act’s underlying purposes.<sup>136</sup> The court explained the burden on the plaintiff to

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FAA was modeled after New York State’s Arbitration Act of 1920. See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 181 n.2 (1992). President Coolidge signed the federal act into law on February 12, 1925. See *id.* at 101. For an account of the history of federal arbitration law, see Barbara Ann Atwood, *Issues in Federal-State Relations Under the Federal Arbitration Act*, 37 U. FLA. L. REV. 61, 73-79 (1985); Henry C. Strickland, *The Federal Arbitration Act’s Interstate Commerce Requirement: What’s Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 388-89 (1992).

132. Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991) (codified in scattered sections of 2 U.S.C., 29 U.S.C., 42 U.S.C.).

133. See 144 F.3d 1182, 1185 (9th Cir. 1998).

134. See 146 F.3d 175, 183 (3d Cir. 1998).

135. The *Duffield* court writes:

As Gilmer pointed out, the standard governing the enforceability of arbitration agreements under the FAA is well established. “Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” The burden, therefore, is on *Duffield* to demonstrate that “Congress intended to preclude a waiver of a judicial forum for [Title VII] claims” in the manner mandated by Form U-4.

144 F.3d at 1190; see also cases cited *supra* note 3.

136. The court cites *Gilmer*: “If such an intention exists, it will be discoverable in the text of

prove congressional intent as follows: "In the post-Gilmer era, if courts are to hold that an act precludes arbitration of claims to which it gives rise, *a more concrete showing* is required, including a scrupulous examination of Congress' actions and intent."<sup>137</sup>

The implication ostensibly created by the "concrete showing" requirement is that proving congressional intent must not be based on ambiguous, nebulous, *non-concrete* information. This conforms with the treatment at least one other court has given to plaintiffs yoked with the heavy evidentiary burden of proving congressional intent.<sup>138</sup>

With this as a starting point, the *Duffield* court first implied that section 118 was irrelevant by quoting Chief Judge Posner who referred to section 118 as a "polite bow to the popularity of 'alternative dispute resolution.'"<sup>139</sup> Next, the court acknowledged that the meaning of the statute was far from clear when it stated, "[u]pon a careful reading of § 118 in context, moreover, it is difficult to escape the conclusion that the text of the section is, at a minimum, ambiguous—and that, at a maximum, it stands for a proposition that differs significantly from the one advanced by [the defendant]."<sup>140</sup> The fact that the *Duffield* court initially found section 118 ambiguous is not surprising. The Supreme Court<sup>141</sup> and several commentators have remarked on the purposely ambiguous nature of several parts of the 1991 Act.<sup>142</sup> Professor Rebecca White commented that "Congress was often purposefully ambiguous, essentially choosing not to decide certain polarizing issues in order to pass a bill the President would sign."<sup>143</sup> According to Professor White, Congress chose to use language it

[the act at issue], its legislative history, or an 'inherent conflict' between arbitration and the [Act's] underlying purposes." *Duffield*, 144 F.3d at 1190 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984)). "[A]ll presumptions used in interpreting statutes . . . may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent." *Block*, 467 U.S. at 349.

137. 144 F.3d at 1189 (emphasis added).

138. See *West Virginia Univ. Hosps., Inc. v. Casey*, 885 F.2d 11, 18 (3d Cir. 1989) (writing that the burden of proving congressional intent is "not easily satisfied").

139. *Duffield*, 144 F.3d at 1191 (citing *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997)).

140. *Id.* at 1193 (emphasis added). The defendant argued that section 118 permitted mandatory arbitration. See *id.* at 1191.

141. See discussion *infra* notes 159-64 and accompanying text regarding *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

142. See, e.g., Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921, 924-25 (1993); Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1, 238 (1993).

143. Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV.

knew was susceptible to different interpretations because “[t]hese ambiguities, as Congress necessarily recognized, essentially shifted the responsibility for making employment discrimination policy from Congress to either the judiciary or the EEOC.”<sup>144</sup> Considering the need for a “concrete showing” of congressional intent, it is a mystery of textual interpretation how the Ninth Circuit convinced itself that the admittedly irrelevant and ambiguous “encouragement of arbitration” language used in section 118 could be translated to mean “prohibit mandatory arbitration.”<sup>145</sup>

The *Duffield* court supports its conclusion by focusing on the phrases “where appropriate” and “to the extent authorized by law.”<sup>146</sup> The court presumes that the two qualifying terms “appropriate” and “to the extent authorized by law” mean “separate and distinct limitations on the conditions and circumstances under which the arbitration process may be invoked to resolve Title VII claims.”<sup>147</sup>

The court defines “where appropriate” as “where arbitration furthers the purpose and objective of the Act—by affording victims of discrimination an opportunity to present their claims in an alternative forum, a forum that they find desirable—not by forcing an unwanted forum upon them.”<sup>148</sup> There are three major flaws with this interpretation. First is the obvious discrepancy between Congress’s and the court’s descriptions of the objective of the Act. According to Congress, the Act has twin goals:

- (1) to “restore . . . civil rights laws” by “overruling” a series of 1989 Supreme Court decisions that Congress thought represented an unduly narrow and restrictive reading of Title VII, and (2) to “strengthen” Title VII by making it easier to bring and to prove law suits, and by increasing the available judicial remedies so that plaintiffs could be fully compensated for injuries resulting from discrimination.<sup>149</sup>

The court fails to explain how it arrives at the conclusion that strengthening Title VII so that it is easier to bring and prove lawsuits and increasing

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51, 52 (1995).

144. *Id.* at 70; *see also* Belton, *supra* note 142, at 925 (“[T]he 1991 Act contains numerous ambiguities and unresolved issues that have important consequences for determining the future contours of the unfinished civil rights agenda for economic justice in the workplace.”); Govan, *supra* note 142, at 238 (“Congress purposely chose not to resolve or clarify some policy issues and did not realize its use of language on other issues created latent ambiguities. Many interpretive issues are to be resolved in the courts.”).

145. *See Duffield*, 144 F.3d at 1185.

146. *Id.* at 1193. This argument is mirrored by district courts that follow *Duffield*. *See, e.g.,* Martens v. Smith Barney Inc., No. 96-Civ.-3779, 1998 U.S. Dist. LEXIS 9226, at \*30 (S.D.N.Y. June 24, 1998).

147. *Duffield*, 144 F.3d at 1193.

148. *Id.* at 1194.

149. *Id.* at 1191 (internal citations omitted) (citing H.R. REP. NO. 40(I), at 30 (1991); H.R. REP. NO. 40(II), at 1-4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694-96).



judicial remedies so that plaintiffs will be fully compensated: (1) conflicts with mandatory arbitration, a system that reduces the barriers to adjudication and provides the statutes new remedies, or (2) equals “affording victims of discrimination an opportunity to present their claims in an alternative forum, a forum that they find desirable—not by forcing an unwanted forum upon them.”<sup>150</sup>

The second flaw in the court’s argument is the lack of both logical and empirical bases for the presumption that when arbitration is compulsory, it is necessarily *undesirable* for plaintiffs. The argument that simply because something is mandatory, it is therefore necessarily undesirable, is in and of itself logically incorrect. An analogous argument would be to say that because wearing seat belts is mandatory, it follows that all drivers and passengers in moving vehicles wish to be unbuckled. This is simply not the case. Furthermore, the court gives not even a hint of empirical evidence that arbitration is undesirable to a majority of employee-plaintiffs. Instead, the court apparently relies on conjecture and the views of plaintiffs, plaintiffs’ lawyers, the EEOC, and other groups who have a vested interest in perpetuating the status quo, regardless of its shortcomings.

The third flaw with the court’s argument centers around its distinguishing of the different types of arbitration. Assuming arguendo that arbitration is less desirable than litigation (a conclusion that we dispute but is the basis for the court’s decision), there is no logical reason for arguing that certain types of arbitration are endorsed by Congress while others are prohibited. Voluntary arbitration, which the *Duffield* court considers “appropriate,” and the other forms of ADR mentioned in section 118,<sup>151</sup> are no more harmonious with the twin goals of the 1991 Act than mandatory arbitration. Voluntary arbitration and the other forms of ADR listed in section 118 certainly do not make it any easier to bring and prove lawsuits than mandatory arbitration does. In addition, plaintiffs are no more likely to be fully compensated under voluntary arbitration than they are under a mandatory arbitration system. Both mandatory and voluntary arbitration provide the parties with an inexpensive, confidential, and fast resolution. In exchange for these “benefits,” both types of arbitration suffer from the same procedural shortcomings. Accordingly, there is no basis to argue that mandatory arbitration violates the goals of the 1991 Act while voluntary arbitration conforms to them.

The aforementioned arguments and their flaws present persuasive reasons to discount the Ninth Circuit’s interpretation of section 118. Once congressional intent could not be evinced from the actual text of the statute,

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150. *Id.* at 1194.

151. These include mediation, fact-finding, and mini-trials, all of which, in general, have fewer due process requirements than arbitration.

the inquiry normally would stop there. Assuming arguendo, however, that the naked language used in section 118 lends itself to the *possibility* of the Ninth Circuit's creative reading, the plaintiff would have to use one of two methods to prove that the statute, stating that it encourages arbitration, actually evinces a clear congressional intent to prohibit mandatory arbitration. The two methods for proving congressional intent are: (1) examining legislative history, and (2) finding inherent conflict between arbitration and the 1991 Act itself. The *Duffield* court does not address the inherent conflict issue but, instead, relies on legislative history.

*Duffield* sets forth two legislative history arguments. First, the court examined committee report statements in order to define section 118's other qualifier, "to the extent authorized by law."<sup>152</sup> The court concluded that this phrase refers to *Gardner-Denver* and not *Gilmer* because the phrase "most likely codifies the 'law' as Congress understood it at the time it either drafted or passed the provision."<sup>153</sup> The court points to the following excerpt from the House Committee on Education and Labor's report on H.R. 1, the bill that became the 1991 Act, to prove "dispositively" that "encouraging arbitration" means "prohibiting mandatory arbitration":

The Committee emphasizes . . . that the use of alternative dispute mechanisms is . . . intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the committee believes that any agreement to submit disputed issues to arbitration, whether in the context of collective bargaining or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner Denver Co.* The committee does not intend this section to be used to preclude rights and remedies that would otherwise be available.<sup>154</sup>

Second, the court points to the fact that Congress rejected a proposal called "the Republican substitute," which encourages the use of ADR mechanisms "in place of judicial resolution."<sup>155</sup> The court states that "[s]uch a rule [encouraging mandatory arbitration] would fly in the face of Supreme Court decisions holding that workers have the right to go to court, rather than being forced into compulsory arbitration, to resolve important statutory and constitutional rights, including equal opportunity rights."<sup>156</sup> The congressional committee references *Gardner-Denver* for this last

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152. *Duffield*, 144 F.3d at 1193.

153. *Id.* at 1194.

154. *Id.* at 1195-96 (citing H.R. REP. NO. 102-40(I), at 97 (1991)) (internal citations omitted).

155. *Id.* at 1196 (citing H.R. REP. NO. 102-40(I), at 104 (1991)).

156. *Id.*

statement.<sup>157</sup> From this, the *Duffield* court concludes that congressional intent, frozen at the time that this statement was made, embodies the holding in *Gardner-Denver* in spite of the fact that the 1991 Act was passed six months after *Gilmer* was decided.<sup>158</sup>

The Ninth Circuit's complete reliance on these two statements is inappropriate because during the debates on the 1991 Act, members of Congress made statements that may have expressed their personal opinions but not necessarily the opinion of Congress collectively. In interpreting section 102 of the 1991 Act, which addresses retroactive application, the Supreme Court in *Landgraf v. USI Film Products*<sup>159</sup> noted that statements made on the floor of Congress and rejected drafts do not explain ambiguous statutory language and are not definitive evidence of congressional intent.<sup>160</sup> Instead, the Court explained that Congress left certain parts of the 1991 Act intentionally vague, presumably to avoid additional partisan conflicts and to get the bill passed.<sup>161</sup> The Court writes:

The 1991 bill as originally introduced in the House contained explicit retroactivity provisions similar to those found in the 1990 bill. However, the Senate substitute that was agreed upon omitted those explicit retroactivity provisions. *The legislative history discloses some frankly partisan statements about the meaning of the final effective date language, but those statements cannot plausibly be read as reflecting any general agreement.* The history reveals no evidence that Members believed that an agreement had been tacitly struck on the controversial retroactivity issue, and little to suggest that Congress understood or intended the interplay of §§ 402(a), 402(b), and 109(c) to have the decisive effect petitioner assigns them. Instead, the history of the 1991 Act conveys the impression that legislators agreed to disagree about whether and to what extent the Act would apply to preenactment conduct.<sup>162</sup>

The circumstances the Supreme Court discusses in *Landgraf* regarding Congress' drafting of section 102 are remarkably parallel to the circumstances surrounding the present debate over congressional intent embodied in section 118. In *Landgraf*, alternative proposed language for section 102 was rejected, just like the "Republican substitute" discussed above regarding section 118. However, the Court recognized that:

The omission of the elaborate retroactivity provision of the 1990

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157. See *id.* (citing *Gardner-Denver*, 415 U.S. at 36).

158. See *id.* at 1196-97.

159. 511 U.S. 244 (1994).

160. See *id.* at 261-65.

161. See *id.*

162. *Id.* at 262 (emphasis added).

bill—which was by no means the only source of political controversy over that legislation—is not dispositive because *it does not tell us precisely where the compromise was struck in the 1991 Act*. The Legislature might, for example, have settled in 1991 on a less expansive form of retroactivity that, unlike the 1990 bill, did not reach cases already finally decided.<sup>163</sup>

As with the issue of retroactivity, it would be unwise to presume congressional intent regarding arbitration from statements made about the rejection of the “Republican substitute.” The relevance of these statements is overstated when they are viewed in a vacuum—without reference to the political circumstances surrounding the passage of the 1991 Act.

Additionally, the *Landgraf* Court recognized the “frankly partisan statements” included in the legislative history, but discounted their significance because “the history of the 1991 Act conveys the impression that legislators agreed to disagree about whether and to what extent the Act would apply to preenactment conduct.”<sup>164</sup> So too, here, the statements quoted by the Ninth Circuit do not necessarily convey any “concrete showing” of congressional intent to preclude mandatory arbitration when viewed in the context of Congress’s desire to pass the 1991 Act into law and avoid partisan controversy.

#### D. *Seus v. John Nuveen & Co.*

The Third Circuit in *Seus v. John Nuveen & Co.*<sup>165</sup> rejected the *Duffield* court’s analysis for two reasons: (1) the statute’s plain language, and (2) the timing of the enactment of the law.<sup>166</sup> The *Seus* court held that there is nothing in the plain language of the statute from which one can infer congressional intent to prohibit mandatory arbitration.<sup>167</sup> Moreover, the Third Circuit explained that the term “to the extent authorized by law” refers to the FAA, the statute which directly addresses arbitration,<sup>168</sup> and not to either *Gilmer* or *Gardner-Denver*. If, however, the language does codify any case law, *Seus* posited that Congress could not have intended to codify *Gardner-Denver*.<sup>169</sup>

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163. *Id.* at 256 (emphasis added).

164. *Id.* at 262.

165. 146 F.3d 175 (3d Cir. 1998).

166. *See id.* at 182-83.

167. The court writes: “no amount of commentary from individual legislators or committees would justify a court in reaching the result the EEOC would have us reach.” *Id.* at 182.

168. The view that the term “authorized by law” is a clear reference to the FAA is shared by other academics. *See, e.g.*, Belton, *supra* note 142, at 959-60 (stating that “[t]he most appropriate source of authorization for arbitration, aside from collective bargaining sanctioned by the National Labor Relations Act, is the Federal Arbitration Act (FAA)”).

169. *See Seus*, 146 F.3d at 183.

As stated above, Congress passed the 1991 Act six months after the Supreme Court decided *Gilmer*.<sup>170</sup> According to the *Seus* Court, if section 118 were meant to codify any case law, it would refer to a case that the Supreme Court had passed six months prior to enactment and not the case law that had been rejected.<sup>171</sup> If Congress was referring either to the FAA or to the *Gilmer* holding, which relies, in part, on the FAA, it is necessary to examine the FAA.

### E. *The FAA Favors Arbitration*

The FAA reflects a “liberal federal policy of favoring arbitration agreements.”<sup>172</sup> At the time of its enactment, the courts generally distrusted the arbitration process and thus, refused to enforce arbitration agreements.<sup>173</sup> In response, the FAA provides procedures for issuing subpoenas to witnesses,<sup>174</sup> and for the selection of arbitrators,<sup>175</sup> as well as procedures and grounds for judicial enforcement,<sup>176</sup> modification,<sup>177</sup> and vacation<sup>178</sup> of arbitration awards. Section 2 states that the FAA applies to all “written provision[s] in any maritime transaction or a contract

170. *See id.* at 182.

171. The court writes:

Moreover, we find nothing in the legislative history suggesting that this hortatory provision was intended to codify, and thus *freeze*, any particular view of the case law. Finally, even if we were to accept “authorized by law” as intended to codify case law, we would find the text incompatible with the notion that the law codified was case law inconsistent with a Supreme Court case decided six months before the passage of the Act.

*Id.* at 183. (emphasis added).

172. *Gilmer v. Interstate-Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

173. *See Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982-85 (2d Cir. 1942) (offering an account of the history of judicial attitudes towards arbitration enforceability).

174. *See* 9 U.S.C. § 7 (1994).

175. *See* 9 U.S.C. § 5 (1994).

176. *See* 9 U.S.C. §§ 3-4, 9 (1994).

177. *See* 9 U.S.C. § 11 (1994). Section 11 allows for modification or correction of an arbitrator's award “[w]here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.”

*Id.*

178. *See* 9 U.S.C. § 10 (1994). This section allows for a

United States court in and for the district wherein the award was made [to vacate an arbitrator's award] where the award was produced by corruption, fraud, or undue means, [w]here there was evident partiality or corruption in the arbitrators, or either of them, [w]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

*Id.*

evidencing a transaction involving commerce.”<sup>179</sup> Section 1 of the FAA, however, excludes from coverage all “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>180</sup>

In *Gilmer*, the arbitration clause in question was enforceable under the FAA because the contract was not between the employee and his employer, but rather between the employee and the New York Stock Exchange.<sup>181</sup> This seemingly irrelevant distinction allowed the Court to justify the enforcement of the arbitration clause as required by the FAA, and to pass on two questions that would have provided a definitive answer to whether *Gilmer* agreements are lawful: (1) Does the FAA exclude all employment contracts from its jurisdiction? (Or, to put this another way, what is the

179. 9 U.S.C. § 2 (1994) (emphasis added). The full section reads as follows:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

*Id.* The two verbs “evidencing” and “involving” have received much attention from both courts and academics. See *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265 (1995) (interpreting the two verbs broadly); Strickland, *supra* note 131, at 410-422.

180. 9 U.S.C. § 1 (1994). The statute provides:

“Maritime transactions”, as herein defined, means charter parties, bills of lading of water carriers, agreements relating to warfare, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; “commerce”, as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

*Id.*

181. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991). The Court indicated that:

[t]he record before us does not show, and the parties do not contend, that *Gilmer*’s employment agreement with Interstate contained a written arbitration clause. Rather, the arbitration clause at issue is in *Gilmer*’s securities registration application, which is a contract with the securities exchanges, not with Interstate. The lower courts addressing the issue uniformly have concluded that the exclusionary clause of § 1 of the FAA is inapplicable to arbitration clauses contained in such registration applications.

*Id.* But see *id.* at 36 (Stevens, J., dissenting) (arguing that section 1 excludes all employment contracts).

scope of section 1's exclusionary language?); and (2) Does exclusion from the FAA's coverage prevent a compulsory arbitration clause from being enforceable? The Court's failure to answer these questions creates confusion as to whether compulsory arbitration policies as conditions of employment are enforceable in all jurisdictions.<sup>182</sup> Several circuit courts have clarified these issues in the last several years.<sup>183</sup>

The first question centers on the interpretation of the term "any other class of worker engaged in foreign or interstate commerce" that is contained in section 1 of the FAA.<sup>184</sup> Initially, some courts either expressly held, or in dicta implied, that this clause excludes contracts between *any and all* employers and *any and all* employees from the FAA's coverage.<sup>185</sup> This is clearly the minority opinion; only the Ninth Circuit currently follows this position.<sup>186</sup> Alternatively, the First,<sup>187</sup> Second,<sup>188</sup> Third,<sup>189</sup> Fourth,<sup>190</sup> Fifth,<sup>191</sup> Sixth,<sup>192</sup> Seventh,<sup>193</sup> Eighth,<sup>194</sup> Tenth,<sup>195</sup> and D.C.<sup>196</sup> Circuits narrowly interpret the exemption and hold that the term refers only to those employees in the transportation industry. Under this interpretation, the FAA applies to all other employees, and therefore, an arbitration clause estops all but a small class of employees from litigating their claims in federal court. The Eleventh and Twelfth Circuits have not ruled on the

182. The distinction seems even more irrelevant when one examines the arbitration agreement. The agreement addresses disputes between the employee and the employer. *See id.* at 23. Thus, the fact that the contract is with the Stock Exchange and not the employer really did not affect the context of the agreement.

183. *See* cases cited *infra* notes 186-197.

184. 9 U.S.C. § 1.

185. *See, e.g.,* Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991); Foster v. Turley, 808 F.2d 38 (10th Cir. 1986); United Elec., Radio & Mach. Workers v. Miller Metal Prods., Inc., 215 F.2d 221, 224 (4th Cir. 1954) (declining to adopt a narrow construction of section 1 because the inclusionary language in section 2 was intended to exercise the full extent of the commerce power and reading the exclusionary clause using similar language narrowly would be inconsistent). *But see infra* note 215; Austin v. Owens-Brockway Glass Container, 78 F.3d 875 (4th Cir. 1996).

186. *See* Craft v. Campbell Soup Co., 161 F.3d 1199 (9th Cir. 1998); *see also* Matthew W. Finkin, *Employment Contracts Under the FAA—Reconsidered*, 48 LAB. L.J. 329 (1997); Matthew W. Finkin, "Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification, 17 BERKELEY J. EMP. & LAB. L. 282 (1996).

187. *See* Dickstein v. DuPont, 443 F.2d 783 (1st Cir. 1971).

188. *See* Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (2d Cir. 1972).

189. *See* Great W. Mortgage Corp. v. Peacock, 110 F.3d 222 (3d Cir. 1997); Tenney Eng'g, Inc. v. United Elec. Workers, Local 437, 207 F.2d 450 (3d Cir. 1953).

190. *See* O'Neil v. Hilton Head Hosp., 115 F.3d 272, 274 (4th Cir. 1997).

191. *See* Rojas v. TK Communications, Inc., 87 F.3d 745 (5th Cir. 1996).

192. *See* Cosgrove v. Shearson Lehman Bros., No. 95-3432, 1997 U.S. App. LEXIS, at \*392 (6th Cir. Jan. 6, 1997).

193. *See* Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997).

194. *See* Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997).

195. *See* McWilliams v. Logicon, Inc., 143 F.3d 573 (10th Cir. 1998).

196. *See* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997).

issue.

A leading case supporting the majority position is *Erving v. Virginia Squires Basketball Club*.<sup>197</sup> In 1971, Erving ("Dr. J") left the University of Massachusetts and signed a contract to play basketball for the Virginia Squires of the American Basketball Association ("ABA").<sup>198</sup> Erving's contract provided that any dispute would be settled by arbitration.<sup>199</sup> In April of 1972, Erving signed a contract to play with the National Basketball Association's ("NBA") Atlanta Hawks.<sup>200</sup> The Squires sought to enforce Erving's contract through arbitration. Erving sought to avoid arbitration and have the court set aside his original contract. In his attempt to avoid arbitration, Erving argued that his contract fell under the FAA's section 1 exclusion.<sup>201</sup> In rejecting this argument, the court set forth in definitive terms the limits of the exclusion: "[T]he exclusionary clause in [s]ection 1 applied only to those actually in the transportation industry. Erving clearly is not involved in the transportation industry."<sup>202</sup> Thus, the court deferred the case to arbitration.

The trend following the *Erving* holding is exemplified by the Sixth Circuit's changing position on the subject. In *Willis v. Dean Witter Reynolds, Inc.*,<sup>203</sup> the Sixth Circuit rejected the *Erving* holding and stated that "all employment contracts with employers subject to regulation under Title VII . . . fall within the [FAA's] exclusion . . ."<sup>204</sup> However, this

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197. 468 F.2d 1064 (2d Cir. 1972).

198. *See id.* at 1066.

199. *See id.* at 1066 n.1. The contract's arbitration clause read as follows:

Arbitration. In the event of any dispute arising between the PLAYER and the CLUB relating to any matter or thing whatever, whether or not arising under this Contract, or concerning the performance or interpretation thereof, such dispute shall be determined by arbitration before the Commissioner of the American Basketball Association, or a person designated by such Commissioner in writing for such purpose, acting as Arbitrator. The Arbitrator shall determine by whom and in what proportion the cost of arbitration shall be paid. The PLAYER and the CLUB hereby grant such Arbitrator full power to determine such dispute in such manner as he shall direct, and under such rules of procedure as he shall in his sole discretion adopt, and his decision shall be final, binding and conclusive and may be enforced in any court, state or Federal, having competent jurisdiction. Demand for arbitration hereunder shall be made by notice in writing given to the other party and to the Commissioner of the ASSOCIATION. Notwithstanding the foregoing, the CLUB shall have the right in its sole discretion to institute judicial proceedings for the purpose of obtaining an injunction or other equitable relief pursuant to paragraph 5 hereof.

*Id.*

200. *See id.* at 1066.

201. *See id.* at 1068.

202. *Id.* at 1069.

203. 948 F.2d 305 (6th Cir. 1991).

204. *Id.* at 311.



statement was dicta. In *Willis*, the plaintiff, like the plaintiff in *Gilmer*, was a stockbroker who signed an arbitration agreement with the applicable stock exchange and not with her employer.<sup>205</sup> The court's sweeping view of the section 1 exclusion was not relevant to the decision because: (1) the contract was covered by FAA; and (2) the court did compel arbitration of the plaintiff's sex discrimination case.<sup>206</sup> In *Asplundh Tree Expert Co. v. Bates*,<sup>207</sup> the Sixth Circuit rejected the *Willis* dicta and held that the FAA's section 1 exclusion should be interpreted narrowly and that the statute should be applied to all employment contracts except those in the transportation industry.<sup>208</sup> Ten of the thirteen circuits have narrowly interpreted the FAA; therefore, it is unlikely that the Supreme Court will have to address the issue. However, two larger issues remain. First, is the FAA relevant? Second, should it be relevant? We propose that it *may* not and definitely *should* not be relevant.

*F. The Enforceability of the FAA May Not and Should Not be Relevant*

The second question left unanswered by *Gilmer* and its progeny is: Does exclusion from the FAA's coverage prevent a compulsory arbitration clause from being enforceable? Implicit in this question is the ubiquitous lurking issue of federal preemption of state law and, specifically, the preemptive extent of the FAA, because almost every state has adopted some form of arbitration agreement legislation that may or may not extend beyond the parameters set by section 1.<sup>209</sup> Despite the fact that *Gilmer* and its progeny may lead one to infer (and some cases do strongly imply) that enforceability under the FAA is vital to the enforcement of these arbitration clauses, we have found no authority expressly holding that an arbitration clause *will be unenforceable* if the employment contract in question is excluded by the FAA. However, the FAA's legislative history and relevant case law supports the position that an arbitration clause should preclude

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205. *See id.* at 310.

206. *See id.*

207. 71 F.3d 592 (6th Cir. 1995).

208. *See id.* at 600-01.

209. The issue of the preemptive effect of the FAA and the role of state arbitration statutes has been raised in several Supreme Court decisions as well as numerous law review articles. *See, e.g.,* *Southland Corp. v. Keating*, 465 U.S. 1, 11-13 (1984) (establishing that the FAA creates a body of federal substantive law based on Congress's power to regulate interstate commerce and recognizing that the FAA preempts conflicting state law even for actions brought in state courts); Thomas A. Diamond, *Choice of Law Clauses and Their Preemptive Effect upon the Federal Arbitration Act: Reconciling the Supreme Court with Itself*, 39 ARIZ. L. REV. 35 (1997); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1347 (1997); Strickland, *supra* note 131, at 400-09 (discussing potential direct and indirect conflicts that arise between the FAA and state arbitration legislation).

litigation regardless of whether the applicable contract falls within the purview of the FAA.<sup>210</sup>

When Congress passed the FAA in 1925, the Seamen's Union, fearing the effect of federal courts ordering arbitration, strongly opposed the legislation.<sup>211</sup> At the behest of the Union, Congress included the section 1 exclusion of employment contracts.<sup>212</sup> Thus, the exclusion did not represent a strong congressional policy, but instead constituted a political favor.<sup>213</sup> From a policy perspective, legislation extended as a political favor in 1925 should not determine whether arbitration agreements should preclude an employee from bringing an action into federal court pursuant to statutes passed since 1964. In addition, legal authority supports the argument that the FAA is irrelevant to the enforceability of an arbitration agreement in employment.

In *Austin v. Owens-Brockway Glass Container, Inc.*,<sup>214</sup> the Fourth Circuit did not consider the applicability of the FAA in determining whether an arbitration clause precluded an employee from filing a lawsuit in federal court.<sup>215</sup> The arbitration clause in *Austin* was located in a collective bargaining agreement.<sup>216</sup> The court stated that "in this circuit, the FAA is not applicable to labor disputes arising from collective bargaining agreements."<sup>217</sup> The court held, however: "In deciding whether to enforce

210. See *infra* discussion in text accompanying notes 211-227.

211. See *American Postal Workers Union v. United States Postal Serv.*, 823 F.2d 466, 470 (11th Cir. 1987); see also *Estreicher, supra* note 209, at 1368 n.84 (citing *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am.*, 207 F.2d 450, 452-53 (3d Cir. 1953)). The *Tenney* court noted that:

Seamen constitute a class of workers as to whom Congress had long provided machinery for arbitration. In exempting them the draftsmen excluded also railroad employees, another class of workers as to whom special procedure for the adjustment of disputes had previously been provided. Both these classes of workers were engaged directly in interstate or foreign commerce. To these draftsmen of the Act added "any other class of workers engaged in foreign or interstate commerce." We think that the intent of the latter language was, under the rule of *ejusdem generis*, to include only those other classes of workers who are likewise engaged directly in commerce, that is, only those other classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto . . . as to which special arbitration legislation already existed and they rounded out the exclusionary clause by excluding other similar classes of workers.

207 F.2d at 452-53.

212. See *Estreicher, supra* note 209, at 1368.

213. See *United Elec., Radio & Mach. Workers of Am. v. Miller Metal Prods.*, 215 F.2d 221, 224 (4th Cir. 1954) ("It appears that the exclusion clause of the Arbitration Act was introduced into the statute to meet an objection of the Seafarers International Union . . .").

214. 78 F.3d 875 (4th Cir. 1996).

215. See *id.* at 885.

216. See *id.* at 877.

217. *Id.* at 879.

the arbitration provision in the collective bargaining agreement, we start with and rely upon the 'well-recognized policy of federal labor law favoring the arbitration of labor disputes.'"<sup>218</sup> The court then compelled arbitration.

The argument that enforceability under the FAA is not determinative has been supported by cases from the Northern District of Illinois and the District of Oregon. In *Central States, Southeast and Southwest Areas Pension Fund v. Tank Transport, Inc.*,<sup>219</sup> a multiemployer pension fund brought an action to collect contributions allegedly owed by the employer.<sup>220</sup> The plaintiff sought to avoid arbitration by arguing that the FAA excluded the employment contracts from its coverage.<sup>221</sup> Because the contracts covered truck drivers, the court held that the section 1 exclusion did apply.<sup>222</sup> The court then stated, however, that the applicability of the exclusion was not determinative of arbitrability.<sup>223</sup> Thus, while the FAA "establishes a federal policy favoring arbitration," the fact that the FAA is not immediately applicable to the issues in the instant case does not eliminate arbitration as an acceptable dispute resolution mechanism, nor does it evidence a presumption of nonarbitrability.<sup>224</sup> "A requirement to arbitrate may still be valid regardless of whether the FAA is clearly applicable."<sup>225</sup>

Similarly, in *Central States, Southeast and Southwest Areas Pension*

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218. *Id.* (quoting *Adkins v. Times-World Corp.*, 771 F.2d 829, 831 (4th Cir. 1985)). In *Wright v. Universal Maritime Service Corp.*, 119 S. Ct. 391 (1998), the Supreme Court had an opportunity to decide if an arbitration clause in a collective bargaining agreement could prevent an employee from proceeding in federal court. Such a holding would have overruled *Gardner-Denver*. However, the Court held that the clause in question was not specific enough to prevent litigation and declined to rule on whether or not an arbitration clause could preclude an employee from pursuing a claim in federal court. *See id.* at 396.

219. 779 F. Supp. 947 (N.D. Ill. 1991).

220. *See id.* at 948.

221. *See id.* at 949.

222. *See id.* at 949-50.

223. *See id.* at 949.

224. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The *McMahon* court stated that:

This duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights. As we observed in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals" should inhibit enforcement of the Act "in controversies based on statutes."

*Id.* (citation omitted).

225. *Central States, Southeast and Southwest Areas Pension Fund v. Tank Transp., Inc.*, 779 F. Supp. 947, 949-50 n.3. (N.D. Ill. 1991).

*Fund v. Goggin Truck Line, Inc.*,<sup>226</sup> the court, citing *Tank Transport*, stated: "The fact that the Federal Arbitration Act's presumption in favor of arbitration is inapplicable here does not, however, give rise to a presumption against arbitration . . ."<sup>227</sup> Finally, the *Pauly v. Biotronik, GmbH*<sup>228</sup> court enforced an employment contract's arbitration clause without even addressing the section 1 exclusion.<sup>229</sup>

While it has not been determined that the lack of the FAA's applicability will not prevent an arbitration clause from being enforced, one circuit and several district courts already recognize the irrelevance of the FAA. It is therefore possible that absent legislation to the contrary, arbitration could, in the future, be formally extended to *all* employment contracts without regard to the FAA.

### G. *Employees Can Still File Charges with the EEOC*

While the *Gilmer* Court held that an arbitration clause can prevent *employees* from exercising their right to sue, it also stated, in dicta, that arbitration agreements will not prevent employees from filing a charge with the EEOC or "preclude the EEOC from bringing actions seeking classwide and equitable relief."<sup>230</sup> Therefore, an employee who has signed an arbitration agreement can file a claim with the EEOC, and if the EEOC wishes to do so it may bring the case to federal court.<sup>231</sup> According to the one opinion that has addressed the issue, however, this is not the case.

In *EEOC v. Kidder, Peabody & Co.*,<sup>232</sup> the EEOC filed an ADEA action on behalf of seventeen employees who were terminated by their employer.<sup>233</sup> After the action was filed, but before the case was heard, the defendant went out of business and eight of the seventeen plaintiffs withdrew from the lawsuit.<sup>234</sup> Because the employer was out of business, the EEOC could not seek equitable relief.<sup>235</sup> It did, however, continue with the lawsuit in order to obtain monetary damages.<sup>236</sup> The court, focusing on the fact that the EEOC was seeking exclusively monetary relief, narrowly interpreted the language in *Gilmer* and dismissed the case.<sup>237</sup> The court

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226. 140 F.R.D. 362 (N.D. Ill. 1991).

227. *Id.* at 364 n.3.

228. 738 F. Supp. 1332 (D. Or. 1990).

229. *See id.*

230. 500 U.S. 20, 32 (1991).

231. *See, e.g.*, *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987) (allowing the EEOC to bring suit in federal court); *Estreicher, supra* note 209, at 1373-74.

232. 979 F. Supp. 245 (S.D.N.Y. 1997).

233. *See id.* at 245.

234. *See id.* at 246.

235. *See id.*

236. *See id.*

237. *See id.* at 247.

held that the EEOC may litigate a federal lawsuit on behalf of employees who have signed arbitration agreements only “where the EEOC seeks broad-based relief designed to have [an] effect beyond the litigants involved in a particular controversy.”<sup>238</sup>

Because of the specific facts of the case, the effect of the *Kidder, Peabody* holding is not clear. One possible reading is that the EEOC may pursue claims as long as equitable relief is available. Alternatively, perhaps the EEOC may not seek money damages for plaintiffs if they have signed arbitration agreements. Either way, *Kidder, Peabody* is incorrect from both a legal and a policy standpoint.

From a legal standpoint, the *Kidder, Peabody* interpretation of *Gilmer* is erroneous because it ignores the clear meaning and practical implications of the Supreme Court’s language. As discussed above, *Gilmer* states that: (1) employees may still file claims with the EEOC; and (2) “arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief.”<sup>239</sup> The *Kidder, Peabody* holding is in error because it: (1) ignores the first statement; and (2) holds, without any basis, that the second statement represents the *exclusive occasion* upon which the EEOC may bring an action.

*Gilmer* does not hold that the EEOC may bring a lawsuit only when seeking class-wide and equitable relief. Instead, that is simply *one instance* in which the Agency may file a lawsuit. This interpretation is based on the fact that the Court’s language is a response to one of *Gilmer*’s arguments against arbitration. Plaintiff *Gilmer* argued that arbitration procedures were an improper forum for discrimination litigation because they did not provide for broad equitable relief and class actions.<sup>240</sup> In response, the Court stated that “arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief.”<sup>241</sup> It is spurious to assume that a class-wide action seeking equitable relief represents the sole occasion upon which the EEOC may pursue a lawsuit on behalf of employees who have signed an arbitration agreement. Such an analysis goes beyond the Court’s plain language and is inconsistent with the Court’s statement that an employee may still file charges with the EEOC.

The *Gilmer* Court’s statement that employees may file claims with the EEOC is also a response to an argument by *Gilmer*. Plaintiff *Gilmer* argued that arbitration would undermine the EEOC in enforcing the ADEA.<sup>242</sup> The Court was unpersuaded because employees could still file

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238. *Id.*

239. 500 U.S. 20, 32 (1991) (emphasis omitted).

240. *See id.*

241. *Id.* (emphasis omitted).

242. *See id.* at 31.

charges with the EEOC.<sup>243</sup> This must mean that the EEOC may bring an action for both monetary and equitable relief on behalf of the plaintiffs, despite an arbitration agreement. If not, there is no point to allowing an employee to file a claim with the EEOC, for the EEOC's power would be undermined severely. The EEOC's only power is the threat of a lawsuit. If a lawsuit is not possible, there is no incentive for an employer to cooperate with the EEOC in its investigations and conciliation processes. The employer can provide a minimal amount of information, have the EEOC find cause, and then laugh as the EEOC is powerless to go any further. By allowing the employee to file with the EEOC, the *Gilmer* Court clearly understood the practical realities of the system and permitted the EEOC the right to pursue claims in its own discretion. Accordingly, from a legal standpoint, *Kidder, Peabody* is incorrect.

*Kidder, Peabody* is also incorrect as a matter of policy. A private arbitration agreement should not prevent the EEOC from bringing a case to court or from obtaining relief. Arbitration is necessary because the problems associated with EEOC investigations and private litigation (e.g., barriers to entry, costs, delays, perverse incentives, etc.)<sup>244</sup> encourage undesirable behavior by bad actors and hurt good actors. In order to have any relevance, the Agency needs to be able to pursue claims in federal court. We believe the EEOC can be relevant.

Interpreted correctly, *Gilmer* establishes an excellent compromise. It allows the EEOC to pursue claims that fit into its national enforcement plan.<sup>245</sup> If the EEOC does not classify the case as such, arbitration allows the good actor employees and employers to avoid the costs, delays, and other problems associated with private litigation and the understaffed, overworked EEOC investigation process. Some employers argue that the EEOC abuses its power and discretion.<sup>246</sup> Such complaints, we hope, are without merit. However, if they are true, arbitration should not be the solution to the EEOC's abuse of its litigation power. Such abuse, if it exists, can be addressed by the courts in the form of fee shifting, and by Congress and the President in the form of limiting the EEOC's power or changing its director. We do not believe that private parties should be able to contract away the EEOC's or any other federal agency's relevance.

An employee's right to file cases with the EEOC and other federal agencies, irrespective of the existence of an arbitration clause, is at the

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243. See *id.* at 35.

244. See *supra* text accompanying notes 36, 41-82, 83-88.

245. The EEOC litigates only one half of 1% of the charges filed. See *supra* note 19.

246. One such employer, Stephen Sawitz, owner of Joe's Stone Crabs restaurant, came to this conclusion after five years of interacting with the EEOC. See Stephen Sawitz, Lecture at Stafler School of Hotel Administration, Cornell University (Mar. 2, 1998); see also *EEOC v. Joe's Stone Crabs*, 969 F. Supp. 727 (S.D. Fla. 1997).

heart of a case filed with the National Labor Relations Board (“NLRB”).<sup>247</sup> Bentley’s Luggage Corporation, a Florida employer, required all of its employees to sign an agreement under which they agreed to arbitrate any employment dispute.<sup>248</sup> The plaintiff alleged that, in addition to containing general waiver language, the policy prevented employees from filing charges with any federal or state agency.<sup>249</sup> As noted above, such a provision violates *Gilmer*, which expressly states that claims may be filed with the EEOC.<sup>250</sup> In addition, and not surprisingly, the NLRB issued a complaint that the provision undermined the general purpose of this and other agencies (e.g., Occupational Safety and Health Administration (“OSHA”)).<sup>251</sup> The parties settled with the employer, altering the agreement so that it complied with *Gilmer* and allowed employees to file charges with the NLRB regardless of the arbitration requirement.<sup>252</sup>

#### H. Arbitration Agreements Must Satisfy Certain Minimal Requirements

Courts will only enforce arbitration policies that provide a fair process for the adjudication of employees’ statutory rights. However, neither the Supreme Court nor Congress has defined criteria that, if met, would constitute a fair policy. This does not mean that there is a dearth of authority delineating what constitutes a fair policy. In fact, guidance from several academic sources is available on the subject.<sup>253</sup> In arguing that particular arbitration systems are not fair, some employee-plaintiffs have focused on a number of different procedures that are inherent to every policy. In response to these attacks, courts’ holdings provide a basis for establishing the criteria of what an enforceable policy must contain. Because the courts are reacting to attacks, as opposed to establishing criteria, the holdings are not always definitive and may not provide absolute guidance. Still, enough authority exists to provide the guidance

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247. See 96 Daily Lab. Rep. (BNA) at D-15 (May 17, 1996) (describing the outcome of *In re Bentley’s Luggage Corp.*, No. 12-CA-16658, 1995 WL 912536 (N.L.R.B.G.C. 1995)).

248. See *id.*

249. See *id.*

250. See 500 U.S. 20, 28 (1991).

251. See 96 Daily Lab. Rep. (BNA) at D-15 (May 17, 1996).

252. See *id.*

253. See Jennifer N. Manuszak, *Pre-Dispute Civil Rights Arbitration in the Nonunion Sector: The Need for a Tandem Reform Effort at the Contracting, Procedural and Judicial Review Stages*, 12 OHIO ST. J. ON DISP. RESOL. 387, 415 (1997); JAMS/*Endispute Issues Minimum Standards for Employment Arbitration*, 6 WORLD ARB. & MEDIATION REP., Mar. 1995, at 50, 50; see also TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1995); Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591 (1995).

necessary to explain what types of policies will, and will not be, upheld.

In examining fairness, *Gilmer* and its progeny focus on five different issues: (1) the method of delivering opinions; (2) the procedures for selecting arbitrators; (3) discovery; (4) available damages; and (5) voluntariness and knowledge in entering into the agreement.<sup>254</sup> In addressing the first of the three issues, courts have set forth standards that are easily understood and followed. The fourth and fifth issues are not as clear.

The first issue concerns written opinions. In *Gilmer*, the employee argued that arbitration was an unacceptable form of discrimination adjudication because in some circumstances decisions are not written.<sup>255</sup> In rejecting this argument the Court noted that the New York Stock Exchange's ("NYSE") procedures required written opinions.<sup>256</sup> While the Court did not hold that written opinions were a requirement, it did imply that a policy should provide for such.<sup>257</sup> Written opinions should be required because they enable arbitration participants, the EEOC, and Congress to study the opinions of past decisions. Such study is vital when choosing an arbitrator, deciding whether to settle a case, and determining if the law is being applied correctly.<sup>258</sup> Such a requirement should not, however, reduce or eliminate confidentiality. The parties' names could be deleted from the reported case. The only relevant name is that of the arbitrator.<sup>259</sup>

The courts have uniformly held that the employee must be able to participate in the selection of the arbitrator. In *Gilmer*, the NYSE procedures allowed parties (as members of the NYSE) to access information about the arbitrators' backgrounds and employment histories.<sup>260</sup> Employee advocates criticized this policy because parties that were not members of the NYSE had no say in arbitrator selection.<sup>261</sup> Furthermore,

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254. The *Gilmer* Court reiterates the savings clause of section 2 of the FAA ([A]rbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."). See 9 U.S.C. § 2 (1994). The Court also states that "[t]here is no indication in this case, however, that *Gilmer*, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application." *Gilmer*, 500 U.S. at 33.

255. See *id.* at 31-32.

256. See *id.* at 32.

257. See *id.*

258. Such decisions would still lack *res judicata* and precedentially binding effect on future parties.

259. The Labor Arbitration Reports currently include the names of the arbitrators in their opinions, but substitute "Grievant," "P\_" or "C\_" for plaintiffs' names.

260. See 500 U.S. at 30. See also *infra* note 263.

261. See *Leason v. Merrill Lynch, Pierce, Fenner & Smith*, 9 DEL. J. CORP. L. 776, 782 (1985); Kenneth R. Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 56 (1997); H. David Kelly, Jr., *An Argument for*



the pool of arbitrators was almost always comprised of white males who were over sixty years of age, and the arbitrators were not trained in discrimination law.<sup>262</sup> Despite these objections, the *Gilmer* Court accepted this system because in choosing the arbitrator, each side was allowed one peremptory challenge and unlimited challenges for cause.<sup>263</sup> It should also be noted that the courts will not enforce a policy that does not allow for a fair and impartial third party to decide a case. For example, in *Cheng-Canindin v. Renaissance Hotel Associates*,<sup>264</sup> the employer's arbitration policy allowed management to select a committee to hear complaints. The committee included two employees, two managers, and the general manager, who would serve as a tie-breaker if needed.<sup>265</sup> Because the adjudicators were selected by management, the court held that the policy was unfair, thus enabling the employee to file her claim in court.<sup>266</sup>

Regarding discovery, the NYSE's rules provided for document

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*Retaining the Well Established Distinction Between Contractual and Statutory Claims in Labor Arbitration*, 75 U. DET. MERCY L. REV. 1, 52 (1997).

262. See Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 450-51 n.7 (citing Margaret A. Jacobs, *Employers' Required Arbitration of Job-Bias Claims Stirs Criticism*, WALL ST. J., June 22, 1994, at B5). The General Accounting Office ("GAO") reported that "the majority of arbitrators who hear discrimination claims are white, male and over the age of 60." *Id.* Additionally, "89% of the 3000 arbitrators used by the New York Stock Exchange and the National Association of Securities Dealers are men. According to the GAO study, arbitrators are usually retired or semi-retired executives or professionals. They are not trained to understand the intricacies of discrimination law and frequently lack subject matter expertise." *Id.* (citation omitted). See also Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343, 364-65 n.88 (1995); Dorissa Bolinski & David Singer, *Why Are So Few Women in the ADR Field?*, ARB. J., Sept. 1993, at 61.

263. See 500 U.S. at 30. The Court wrote:

[W]e note that the NYSE arbitration rules, which are applicable to the dispute in this case, provide protections against biased panels. The rules require, for example, that the parties be informed of the employment histories of the arbitrators, and that they be allowed to make further inquiries into the arbitrators' backgrounds. In addition, each party is allowed one peremptory challenge and unlimited challenges for cause. Moreover, the arbitrators are required to disclose "any circumstances which might preclude [them] from rendering an objective and impartial determination."

*Id.* (alteration in original) (citations omitted). See also *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190, 206-12 (D. Mass. 1998) (appeal pending) (discussing the possibility of institutional bias due to industry influence over arbitration before self-regulating organizations and, in particular, under the rules of the NYSE).

264. 50 Cal. App. 4th 676 (1996).

265. See *id.* at 680.

266. See *id.* at 687-88. The court also relied on the fact that the employee was discouraged from using counsel, could not confront adverse witnesses, and that the parties did not intend the agreement to be binding. See *id.* at 690-91.

production, information requests, depositions, and subpoenas.<sup>267</sup> While not as formal or expensive as discovery in federal court, the discovery in *Gilmer* could have been extensive. A policy providing for a less exhaustive form of discovery is, however, most likely unenforceable. According to *Gilmer*, arbitration involves trading off the procedures of federal court for the “simplicity, informality, and expedition of arbitration.”<sup>268</sup> Indeed, lower courts have reasonably upheld limited discovery. For example, in *Williams v. Katten, Muchin, & Zavis*,<sup>269</sup> the Seventh Circuit upheld the American Arbitration Association’s (“AAA”) discovery rules. Under the AAA’s rules, the arbitrator may “subpoena witnesses and documents either independently or upon the request of the parties.”<sup>270</sup> This level of discovery, which is minimal when compared to that of federal court, was acceptable to the Seventh Circuit.

The issue of damages is somewhat nebulous. The *Gilmer* Court noted that arbitrators have authority to award full damages available under the relevant statutes.<sup>271</sup> The Court stated that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”<sup>272</sup> One can infer from this language that *Gilmer* supports the proposition that the damages set forth by a statute constitute substantive rights.<sup>273</sup> Thus, an arbitration policy cannot limit these rights. This is exactly the conclusion that the Ninth Circuit reached in *Graham Oil Co. v. Arco Products Co.*<sup>274</sup> In *Graham Oil*, the arbitration policy in a franchise agreement did not allow for exemplary damages, costs, or attorneys’ fees.<sup>275</sup> The parties’ franchise agreement was covered however, by the Petroleum Marketing Practices Act (“PMPA”).<sup>276</sup> The PMPA expressly stated that successful plaintiffs alleging a violation of the statute could recover exemplary damages, costs, and fees.<sup>277</sup> In denying enforcement of the

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267. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991); NYSE Inc., *The Exchange Constitution and Rules* (visited Feb. 20, 1999) <<http://www.nyse.com/public/search/07ix.htm>>.

268. 500 U.S. at 31.

269. 1996 U.S. Dist. LEXIS 18301 (N.D. Ill. 1996)

270. *Id.* at \*13.

271. See 500 U.S. at 32.

272. *Id.* at 26 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)) (alteration in original).

273. See *Estreicher*, *supra* note 209, at 1353 (“When a contract provides for arbitration of statutory claims, the arbitrator must be empowered to apply statutory standards and, if a violation is found, to award statutory remedies.”).

274. 43 F.3d 1244 (9th Cir. 1994).

275. See *id.* at 1247-48.

276. See *id.* at 1246; see also Petroleum Marketing Practices Act, Pub. L. No. 95-297, 92 Stat. 322 (1978) (codified as amended at 15 U.S.C. §§ 2801-2806) (1994).

277. See *id.* at § 2805(b).

arbitration agreement, the court defined the damages as “statutorily-mandated rights” and then stated: “[b]ecause the arbitration clause employed by ARCO compels Graham Oil to surrender important statutorily-mandated rights afforded franchisees by the PMPA, we hold that the clause contravenes the Act.”<sup>278</sup>

Some courts that uphold arbitration clauses limiting damages still allow plaintiffs to obtain full relief. In *Kinnebrew v. Gulf Insurance Co.*,<sup>279</sup> the Northern District of Texas enforced an arbitration agreement that limited damages after holding that remedies are procedural, not substantive rights.<sup>280</sup> The *Kinnebrew* court, however, retained jurisdiction over the case to allow the plaintiff, if she prevailed, an opportunity to bring the case back to federal court and obtain the full relief set forth under the statutes at issue.<sup>281</sup> Accordingly, some jurisdictions that allow employers to limit arbitrators’ ability to provide damages do not prevent plaintiffs from being awarded the damages set forth in the statute.<sup>282</sup>

The last requirement of a lawful arbitration policy is that the process constitutes a knowing and voluntary waiver of the right to file a federal court action.<sup>283</sup> “Knowing” and “voluntary” can be bifurcated into two distinct criteria. Plaintiff Gilmer argued that his contract was not voluntarily entered into because it was a take-it-or-leave-it offer.<sup>284</sup> In response, the *Gilmer* Court stated that “[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”<sup>285</sup>

This issue of what constitutes a knowing waiver has been addressed in a number of cases. In both *Prudential Insurance Co. of America v. Lai*<sup>286</sup>

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278. *Graham Oil*, 43 F.3d at 1248.

279. 67 Fair Empl. Prac. Cas. (BNA) 189 (N.D. Tex. Nov. 28, 1994).

280. *See id.* at 190.

281. *See id.* The relevant statutes in question in *Kinnebrew* were the Texas Commission on Human Rights Act and the Equal Pay Act of 1963. *See id.* “The Court retains jurisdiction over this action to consider any statutory remedies to which Plaintiff is entitled after arbitration is completed.” *Id.* at 191.

282. *But see* *Degaetano v. Smith Barney Inc.*, 70 Fair Empl. Prac. Cas. (BNA) 401, 405 (S.D.N.Y. Feb. 5, 1996) (holding that “[t]he mere fact that these statutory remedies [referring to attorneys’ fees, punitive damages, and injunctive relief] may be unavailable in the arbitral forum does not itself establish that Title VII claims must be resolved in a court of law”). But the court went on to note, in accordance with *Gilmer*, that the plaintiff may still file a charge with the EEOC. *See id.*

283. *See Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1304-05 (9th Cir. 1994) (holding that waivers of a judicial forum for statutory employment discrimination claims must be knowing and voluntary); *see also* *Chisolm v. Kidder, Peabody Asset Management, Inc.*, 966 F. Supp. 218, 226 (S.D.N.Y. 1997) (appeal pending) (stating that arbitration agreements not entered into knowingly and voluntarily are unenforceable).

284. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-33 (1991).

285. *Id.* at 33.

286. 42 F.3d 1299 (9th Cir. 1994).

and *Farrand v. Lutheran Brotherhood*,<sup>287</sup> the Ninth and Seventh Circuits, respectively, held that generic arbitration clauses that did not explicitly state that they covered employment disputes were not specific enough to provide employees with notice that they were bound to arbitrate Title VII claims and ADEA claims.<sup>288</sup>

In *Nelson v. Cyprus Bagdad Copper Corp.*,<sup>289</sup> the Ninth Circuit held that an arbitration clause in an employee handbook, which clearly stated that it applied to federal and state statutes, still did not constitute a knowing waiver. The Court refused to enforce the handbook's policy for three reasons. First, the acknowledgment that the plaintiff signed upon receipt of the handbook did not state that the plaintiff agreed to abide by the handbook's terms.<sup>290</sup> Instead, it simply stated that the plaintiff agreed to "read and understand" the document.<sup>291</sup> Second, the acknowledgment did not notify the plaintiff that, "the Handbook contained an arbitration clause or that his acceptance of the Handbook constituted a waiver of this right to a judicial forum in which to resolve claims covered by the ADA."<sup>292</sup> Finally, the acknowledgment referred to the Handbook as a "guideline" to the company's policies, not as a contract.<sup>293</sup> In dissent, Judge Rymer argued that the handbook was a contract and had the employer breached the terms set forth in the handbook the employee would have had a viable

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287. 993 F.2d 1253 (7th Cir. 1993).

288. In refusing to compel arbitration, the *Farrand* court examined the language of the arbitration clause in the National Association of Securities Dealers' rules and stated that while the rules could be "stretched" to cover discrimination cases, "this was not the most natural reading." *Id.* at 1255. In *Lai*, the court focused on the fact that the clause did not mention discrimination lawsuits. *See id.* at 1302-04.

289. 119 F.3d 756 (9th Cir. 1997).

290. The handbook stated, "I have received a copy of the Cyprus Bagdad Copper Corporation Handbook that is effective July 1, 1993 and understand that the Handbook is a guideline to the Company's policies and procedures. I agree to read it and understand its contents. If I have any questions regarding its contents I will contact my supervisor or Human Resources Representative." *Id.* at 758. The *Nelson* court concluded as follows:

Nelson agreed only to "read and understand" the Handbook. He did not agree to be bound by its provisions. Certainly, nothing in the acknowledgment form notified him that by agreeing to "read and understand," he was additionally agreeing to waive any rights or remedies afforded him by civil rights statutes that might be inconsistent with the terms set out in the Handbook. Indeed, the acknowledgment form itself suggests quite the opposite by characterizing the Handbook as a "guideline" to the company's unilaterally promulgated policies and procedures. Merely signing the form did not in any way constitute a "knowing agreement to arbitrate," and thereby to surrender his statutory right to a judicial forum.

*Id.* at 761.

291. *Id.*

292. *Id.* at 761.

293. *Id.*

cause of action.<sup>294</sup> A contract enforceable against an employer must also be enforceable against an employee.<sup>295</sup>

*i. Legislative Developments*

Since *Gilmer*, legislation pending in both the House of Representatives and the Senate would ban mandatory arbitration agreements.<sup>296</sup> These bills, sponsored by Senator Russell Feingold (D) of Wisconsin and Representative Edward Markey (D) of Massachusetts, have never come close to being enacted. The most recent Senate bill in this area, the Civil Rights Procedures Protection Act of 1997, would prohibit arbitration unless agreed to by both parties at the time the case ripened.<sup>297</sup> Senator Feingold and former Representative Patricia Schroeder drafted similar legislation in 1993, 1994, and 1995.<sup>298</sup> These bills lacked support and seem ill-conceived. According to a Markey staffer, the Congressman's objection to arbitration is based, in large part, on the findings of a study of the age, gender, and ethnicity of arbitrators in the securities industry.<sup>299</sup> Representative Markey believed the process was unfair because 89% of the arbitrators were white males who were over fifty-five years of age and were not trained in discrimination law.<sup>300</sup> We believe it unwise to propose legislation banning an entire system because of one aspect that could be corrected so easily. Rather, Congress should focus on ensuring the fairness of arbitration in the legislation it drafts. To this end, we have devised what we call the Model Arbitration Act ("MAA").

### III. THE MODEL ARBITRATION ACT

We drafted the Model Arbitration Act for employment discrimination claims after studying *Gilmer*, the conclusions of the Dunlop Commission on the Future of Worker-Management Relations,<sup>301</sup> and the arguments made by the EEOC<sup>302</sup> and other numerous critics of mandatory arbitration.<sup>303</sup> Additionally, we consulted both the American Arbitration Association's

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294. *See id.* at 764.

295. *See* Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83 (1996) (proposing a system to ensure that all employment contract arbitration provisions are voluntarily agreed to by employees).

296. *See* Civil Rights Protection Act, S. 63, 105th Cong. (1997).

297. *See id.*

298. Telephone Interview with Tamara Fucile, Assistant to Rep. Markey (Mar. 18, 1998).

299. *See id.*

300. *See id.*

301. *See* Commission on the Future of Worker-Management Relations, *Final Report* (visited Feb. 20, 1999) <[http://www.ilr.cornell.edu/library/e\\_archive/Dunlop/dunlop.contents.html](http://www.ilr.cornell.edu/library/e_archive/Dunlop/dunlop.contents.html)>.

302. *See* EEOC Policy Statement on Mandatory Arbitration, *supra* note 17.

303. *See supra* note 16.

Rules for the Resolution of Employment Disputes,<sup>304</sup> and the CPR Institute for Dispute Resolution's model rules for arbitrations.<sup>305</sup> Accordingly, the MAA specifically addresses many of the problems identified by the Court, commission, and critics. If adopted, the MAA would provide employers with a statutorily enforceable arbitration policy. While parties would always be free to contract out of the MAA's provisions, such agreements would be unenforceable if contested. Below are the key elements of the MAA:

1. Filing of Claims

All employers with arbitration policies must submit copies of such policies to the EEOC within fifteen days of their enactment. Prior to submitting their cases to arbitration, employees may file their claims with the EEOC. The EEOC will have thirty days to determine if the case fits within its national enforcement plan. If so, and if the employee wishes the Agency to be involved in the case, the EEOC may litigate on behalf of the plaintiff(s) or class. If the employee does not wish the EEOC to be involved, or if the case does not fit into the EEOC's national enforcement plan, the case will be deferred to arbitration.<sup>306</sup>

2. The Law and Damages

The arbitrators must follow the applicable federal and state substantive law. Arbitrators must comply with the statutorily prescribed damage provisions.

3. Establishment of a Body to License, Select, and Monitor Arbitrators

Congress shall create or empower an agency that serves three functions: licensing, selecting, and monitoring arbitrators.

- a. *Licensing*

Unlike labor arbitrators, employment discrimination arbitrators need to be trained in the law of the land, not the law of the shop. The agency

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304. See American Arbitration Association, *National Rules for the Resolution of Employment Disputes* (visited Feb. 4, 1998) <[http://www.adr.org/rules/employment\\_rules.html](http://www.adr.org/rules/employment_rules.html)>.

305. See CPR Institute for Dispute Resolution, *CPR Non Administered Arbitration Rules and Commentary* (visited Feb. 4, 1998) <<http://www.cpradr.org/arbrules.htm>>.

306. See Estreicher, *supra* note 209, at 1350.

will establish criteria that all discrimination arbitrators must meet. These criteria will include education and practical experience in the field. A mandatory licensing exam will ensure that the arbitrators are knowledgeable in the applicable law.<sup>307</sup> From those that are licensed, the agency will establish a panel of a limited number of arbitrators for each geographic area.<sup>308</sup>

*b. Selection*

When a case is set for arbitration the agency will randomly select seven arbitrators from its panel. The arbitrators will be submitted to the parties. Each party will have one preemptory challenge and unlimited challenges for cause. An arbitrator will be randomly selected from those who are not disqualified.

*c. Monitoring Arbitrators*

Arbitrators will be required to file written opinions with the agency and the EEOC. The arbitrators will delete the names of the employer and the employee from the opinion. These opinions must describe: (1) the facts of the case; (2) the applicable legal standards; and (3) the application of the law to the facts so that the conclusion drawn can be understood. The agency will continually employ experts in the field to review the cases of the arbitrators to ensure that they are qualified to remain on the panel. The EEOC can use these opinions to ensure that arbitrators are applying the law correctly. If not, the EEOC can draft new regulations, propose new legislation to Congress, or make the issue part of its national enforcement plan.

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307. While the MAA as outlined herein does not establish specific criteria in this regard, accompanying regulations could do so. The regulations could, for example, set criteria for course work, years of experience in the field, an exam, etc. Rule 11(a)(i) of the AAA 1998 Rules requires that arbitrators "shall be experienced in the field of employment law." American Arbitration Association, *supra* note 304.

308. Based on numerous conversations the authors held with arbitrators, practitioners, and academics, there is a huge demand to be on this panel. Some may question why we would not allow the AAA or another private agency to establish its own criteria. Two of the goals of the MAA are to improve the quality of adjudication and to assure the parties that the adjudicator is qualified. We believe that the exam is a simple way of ensuring quality and reducing distrust in the system.

#### 4. Arbitration Procedures

##### *a. Discovery*

The parties will be allowed document requests as well as a limited number of interrogatories and depositions. The parties can depose the plaintiffs, defendants, and the defendants' decision makers. The parties must submit a witness list one month prior to arbitration. All discovery must be completed within three months of the case being deferred to arbitration.

##### *b. Burden of Proof*

The burden of proof will be in accordance with federal law.

##### *c. Damages.*

All damages provided by the Title VII, the ADA, and the ADEA, including attorney's fees, will be available.

##### *d. Rules of Evidence*

Arbitrators are permitted discretion in rendering appropriate, yet simplified, rules of evidence and procedure.

##### *e. Costs*

The employer will be liable for the cost of the arbitration. Each party will bear all of its own other costs.

#### 5. Arbitration Agreements

Arbitration agreements cannot be part of an employee handbook. Instead, they must be embodied in the form of a separate document that clearly states the parameters of the agreement.<sup>309</sup> For example, the document must state if employment is at will or not. It must also inform employees that they are free to hire counsel and file claims with appropriate government agencies.

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309. This assures that the waiver will be knowing.



## IV. THE CRITICS' ARGUMENTS AGAINST ADR

While there are numerous critics of mandatory arbitration,<sup>310</sup> few arguments have been set forth against the process. Below we examine the arguments set forth by the EEOC's July 11, 1997 policy statement against mandatory arbitration and a law review article by Professor Katherine Stone.<sup>311</sup> We chose the EEOC's statement because it is the most relevant position on the matter.<sup>312</sup> We analyze Professor Stone's article because of its high quality and the challenges involved in contesting her conclusions.

It must be noted that the EEOC, Professor Stone, and other critics of mandatory arbitration categorically do not oppose alternative dispute resolution. While these critics are against agreements in which the parties prospectively exchange their rights to a jury trial for adjudication in arbitration, so-called voluntary arbitration is almost universally endorsed.<sup>313</sup> Under voluntary arbitration policies, a claim is submitted to an arbitrator only if both parties choose arbitration after the case has ripened.

Voluntary arbitration is an appealing concept, but it is unlikely to mend a broken system. In the vast majority of cases, one of the parties will not agree to arbitrate because it can utilize the threat of litigation as a strategic tool. Such strategic behavior will manifest itself in the following ways: employers who have violated the law, or believe the merits of the case to be unfavorable to them, will not submit a claim to arbitration.<sup>314</sup> Such actors do not want a relatively quick assessment of damages against them. Instead, these employers will utilize the delay and discovery tactics that are part and parcel of federal court litigation in order to force a plaintiff to compromise and accept a reduced settlement amount. Employees who file frivolous cases will also not be encouraged to arbitrate. They would be better off extorting the employer with the high costs of litigation. The economics of discrimination litigation is to blame for these seemingly perverse incentives. Thus, the only situation in which both parties will agree to arbitrate is where they both truly believe that they can prove their

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310. See *supra* note 15.

311. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

312. The National Academy of Arbitrators has adopted a position similar to that of the EEOC. See *National Academy of Arbitrators' Statement and Guidelines Adopted May 21, 1997*, Daily Lab. Rep. (BNA) No. 103, at E-1 (May 29, 1997).

313. See Estreicher, *supra* note 209, at 1375 n.10; Hoffman, *supra* note 16; Ware, *supra* note 295, at 108; Note, *Taking the "Alternative" Out of the Dispute Resolution of Title VII Claims: The Implications of a Mandatory Enforcement Scheme of Arbitration Agreements Arising Out of Employment Contracts*, 70 N.D. L. REV. 435 (1994).

314. Attorneys advising employers in such situations would be likely to advise their clients not to agree to arbitrate a claim voluntarily when there is a high likelihood that the employee will prevail on the merits. A better litigation strategy would be to hold out for the greater probability that the employee will settle out his claim to avoid litigation.

respective cases. This represents an insignificant number of claims.<sup>315</sup> Accordingly, the relevant debate centers not on voluntary versus mandatory arbitration but rather on mandatory arbitration versus EEOC investigations and federal court litigation. The critics do not, however, set forth the debate in this context. Instead, critics attack arbitration and imply, or at least lead the readers to infer, that the current system rectifies the imbalance of power between employees and employers, is free from other identifiable problems, and safeguards employees against unlawful discrimination. For example, in its July 11, 1997 policy statement on mandatory arbitration, the EEOC began by stating:

We are confronted primarily with a moral issue. It is old as the scriptures and as clear as the American Constitution. The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated.<sup>316</sup>

The EEOC then concludes that mandatory arbitration is inherently unfair. The implication, which is expressed in the Agency's arguments, is that the current system balances power and is an open, effective avenue for employees to pursue their rights. As explained above, this is not the case.

Below, we examine the EEOC and Professor Stone's arguments in light of the MAA and the litigation alternative. We divide the arguments into two categories. The first category may be labeled, "complaints that are easily addressed by the MAA." The fact that these so-called problems are simple to correct does not mean that they are legitimate criticisms. We contest those arguments that are without basis. The second group of complaints are those that attack inherent components of mandatory arbitration. While the MAA may resolve some of these concerns, they are impossible to "correct" completely. We address each issue by arguing that they are either: (1) invalid; or (2) acceptable in light of the alternative—the present system.

## V. CORRECTABLE COMPLAINTS

As stated above, this section identifies the arguments that are easily

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315. Michael F. Hoellering, the general counsel of the AAA, said that 95% of the arbitrations handled by the AAA are submitted by parties that have agreed on arbitration *before* a dispute arose. He predicted that it will be hard to obtain an agreement to arbitrate if that decision must be made after a dispute has begun. See *Arbitration: AAA General Counsel Discusses Nonunion Employment Disputes*, Daily Lab. Rep. (BNA) No. 32, at D-13 (Feb. 16, 1995); see also Ware, *supra* note 295, at 160.

316. EEOC Policy Statement on Mandatory Arbitration, *supra* note 17, at II (citing President John F. Kennedy's address to the nation regarding his intention to introduce a comprehensive civil rights bill).

addressed by the MAA. First we address such arguments made by the EEOC followed by those set forth by Professor Stone.

A. *Arbitration Does Not Allow for the Development of the Law*<sup>317</sup>

One of the EEOC's complaints about arbitration is that it "affords no opportunity to build a jurisprudence through precedent."<sup>318</sup> What the EEOC means is that arbitration will greatly reduce the number of cases that are litigated so that law will not develop through case law. This argument is overstated, ignores reality, and is correctable. It is overstated because it assumes that the vast majority of employers will implement mandatory arbitration policies. No evidence exists to support this argument. Employers who implement such policies need both the resources to administrate them and the ability to ensure that they will not subject themselves to numerous adverse verdicts that will result without the delays and barriers of litigation. The argument ignores reality because the vast majority of cases settle.<sup>319</sup> Cases that settle have no precedential value, yet the EEOC not only allows settlement, it attempts to "resolve" all claims that are filed by pushing settlement as early as possible.<sup>320</sup> Finally, not only is this argument correctable, but also arbitration would correct the current situation. The so-called "A cases" involve new issues of law. If the EEOC believes judicial review is necessary, these issues will be litigated. Moreover, under the MAA, all decisions, which must contain full opinions, are filed with the EEOC. If arbitrators are misinterpreting the law, or if an A case is not litigated, the EEOC can: (1) establish clear regulations; (2) lobby Congress to change or clarify the law; or (3) litigate the next case in which the issue arises. Because of mandatory arbitration, an *adjudicatory process* with written opinions will replace *settlements* based on the costs of defense. Thus, there will be more cases from which a body of law can develop.<sup>321</sup>

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317. *See id.* at V-A-2.

318. *Id.*

319. *See* Theodore Eisenberg & Kevin M. Clermont, *Judicial Statistical Inquiry Form*, (visited Feb. 8, 1999) <<http://teddy.law.cornell.edu:8090/questcv2.htm>>.

320. *See* PRIORITY CHARGE HANDLING PROCEDURES, *supra* note 43; *see also* text accompanying note 53.

321. *See* Lyons v. Legal Aid Soc'y, 68 F.3d 1512 (2d Cir. 1995). In *Lyons*, the court overturned the district court's granting of summary judgment in favor of a defendant. *See id.* at 1517. The defendant had argued that the ADA did not require it to provide a parking spot in lower Manhattan for an employee whose disability prevented her from using mass transit. *See id.* at 1513-14. No rational employer who has to pay counsel would litigate this issue. Assume a parking spot cost in the neighborhood of \$500 per month, or \$6,000 per year. Unless the employer believed that it was setting a precedent, it would make little sense to litigate. This case was litigated only because the defendant had pro bono representation. Because the court ruled that a parking spot could be a reasonable accommodation, rational employers will settle

B. *Mandatory Arbitration Agreements Will Adversely Affect the Commission's Ability to Enforce the Civil Rights Law*<sup>322</sup>

Underlying this complaint is the assumption that the EEOC is currently doing an adequate job at enforcing civil rights laws. This is a questionable proposition.<sup>323</sup> Regardless of the EEOC's current efficacy, arbitration under the MAA will enable the EEOC to enforce the law more effectively. The EEOC's policy statement alleges that employees will not file claims with the EEOC because they will not know that they can, or will see it as useless.<sup>324</sup> The EEOC will therefore be deprived access to potential A cases. Under the MAA, however, the EEOC has access to all claims prior to arbitration, and therefore has the choice to litigate. Thus, the EEOC will not lose access, but will conserve scarce resources. Under the MAA, the Agency will be able to defer numerous B and C cases to arbitration. Thus, the existing resources can be used to litigate A cases and better investigate the B and C cases that are not deferred.<sup>325</sup>

This position is similar to that argued by Professor Maurice E.R. Munroe in *The EEOC: Pattern and Practice Imperfect*.<sup>326</sup> Munroe argues that the EEOC is ineffective because it spends too much of its resources investigating and not enough litigating.<sup>327</sup> He further contends that the EEOC should no longer investigate claims it does not intend to litigate.<sup>328</sup> We agree. Instead of pursuing investigation and conciliation, the Agency should defer B and C cases to arbitration where applicable.

C. *Arbitration Is Too Expensive for Employees*

Professor Stone argues that some arbitration agreements require employees to pay their own legal fees and one-half of the arbitrator's fees, "a sum that could easily exceed \$1,000."<sup>329</sup> This is true. But to what is the \$1,000 being compared? In both arbitration and private litigation employees must pay for all of their own legal fees. The costs associated with arbitration, even if the employee had to pay one half of the arbitrator's fee, are almost always far less than the costs associated with the litigation process, which include filing fees, full discovery, motions, and other

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rather than litigate. The same employers would, however, arbitrate the case because the costs are greatly reduced.

322. See EEOC Policy Statement on Mandatory Arbitration, *supra* note 17, at V-C.

323. See *supra* text accompanying note 37-88.

324. See EEOC Policy Statement on Mandatory Arbitration, *supra* note 17, at V-C.

325. See Estreicher, *supra* note 209, at 1374-75.

326. See Munroe, *supra* note 53.

327. See *id.* at 270-74.

328. See *id.* at 274-78.

329. Stone, *supra* note 311, at 1037.

costs.<sup>330</sup> A survey of 321 NELA member lawyers and 330 ABA member attorneys “regularly representing employees in discrimination disputes” revealed that the average requirements for plaintiff lawyers included a required retainer of \$3,000 to \$3,600.<sup>331</sup> The only other available alternative for an employee wishing to vindicate her statutory rights is to file a claim with the EEOC.

Filing a claim with the EEOC is free. But there is a cost far greater than \$1,000 or even \$10,000 for employees with legitimate but not eye-catching claims to merit focused attention from the Agency. As stated above, the EEOC litigates on behalf of only 0.05% of the employees who file claims.<sup>332</sup> Moreover, 90.8% of employees who file EEOC charges have their cases dismissed without receiving any benefits, and only 7.7% of these employees receive *any* relief.<sup>333</sup> Munroe explains that plaintiffs suffer greatly at the hands of the EEOC: most parties fail to receive the expected benefits, and the settlements that are made undercompensate plaintiffs on the average.<sup>334</sup> The question then becomes whether the EEOC is doing an adequate job when it finds merit in a mere 9.2% of its cases. Although Professor Stone does not expressly state her position on the subject, it is reasonable to infer that she believes that most employee claims have merit, or at least more than 9.2% of the those inclined to file charges. If this is true, filing a claim with the EEOC, although free from economic cost, is not a viable avenue for a wronged employee seeking redress.

Under the MAA, employers pay the full costs of arbitration. The employee must pay only for his or her own legal fees and costs. Also, the EEOC has the opportunity to decide if it wishes to take the case to court and relieve the employee of any costs. Thus, employees incur costs only if they have B or C cases. We believe this is equivalent to the situation now, except for the fact that the costs are reduced, and access to adjudication is greatly augmented.

#### D. *Gilmer Agreements Reduce the Amount of Damages Available*

Professor Stone argues that courts “almost always uphold” *Gilmer* agreements, even when such agreements bar employees from recovering punitive damages, consequential damages, and other remedies potentially available to these employees in court.<sup>335</sup> Professor Stone cites two cases to

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330. See Ritter & Albrecht, *supra* note 39.

331. See Howard, *supra* note 108.

332. See *supra* note 19 and accompanying text.

333. See *id.*

334. See Munroe, *supra* note 53, at 271.

335. Stone, *supra* note 311, at 1039.

support her contention—*Kinnebrew v. Gulf Insurance Co.*<sup>336</sup> and *Degaetano v. Smith Barney, Inc.*<sup>337</sup> *Degaetano*, which is the only case we have found that can be read to support Professor Stone's position, upheld an arbitration agreement that prevented the arbitrator from awarding punitive damages or injunctive relief of any kind.<sup>338</sup> It is possible, however, that the plaintiff in *Degaetano* could have filed an action in court seeking punitive damages.<sup>339</sup> The court did not address this issue.<sup>340</sup>

Because the *Degaetano* court relies on *Mitsubishi Motors*,<sup>341</sup> it is logical to interpret *Degaetano* as allowing a plaintiff to seek full statutorily available remedies in federal court after prevailing at an arbitration that adjudicated the merits but limited the arbitrator's ability to award full relief. The *Mitsubishi* court enforced an agreement to arbitrate two federal statutorily based claims, but stated that it would "have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of antitrust laws has been addressed."<sup>342</sup> One can infer from this language that the court held that it had the right to award the full statutory damages if the arbitrator found for the plaintiffs, but either did not or could not fully compensate them. This is exactly *Kinnebrew's* holding. In *Kinnebrew* the court upheld an arbitration agreement that limited damages, but retained jurisdiction so that plaintiffs would have an opportunity to obtain full relief.<sup>343</sup>

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336. 67 Fair Empl. Prac. Cas. (BNA) 189 (N.D. Tex. Nov. 28, 1994).

337. 70 Fair Empl. Prac. Cas. (BNA) 401 (S.D.N.Y. Feb. 5, 1996).

338. See *id.* at 405 n.4.

339. See *Kinnebrew*, 67 Fair Empl. Prac. Cas. (BNA) at 189.

340. The court is concerned with squaring section 118 of the 1991 amendments to Title VII (which states that, "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." Pub. L. No. 102-166, 105 Stat. 107 (codified as amended at 42 U.S.C. § 1981a (1994))) with the rest of Title VII and the 1991 amendments which made punitive damages available. See *Degaetano*, 70 Fair Empl. Prac. Cas. (BNA) at 405. But the main concern of the court is that the statute "'continue to serve both its remedial and deterrent function.'" *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 637 (1985)).

341. 473 U.S. at 637.

342. *Id.* at 638.

343. See 67 Fair Empl. Prac. Cas. (BNA) at 189. Professor Stone also relies on *Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817 (Tex. App. 1996) to support her contention that courts *almost always* allow arbitration clauses that curtail damages to less than what is statutorily mandated. *Pony Express* does not, however, enforce an arbitration agreement that limits damages. Instead, it remands the case so that the court's award is consistent with *Graham Oil Co. v. Arco Prods. Co.*, 43 F.3d 1244 (9th Cir. 1994), and *Kinnebrew*. See *Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817, 822 (Tex. App. 1996). As explained above, *Graham Oil* holds that damages set forth in a statute are substantive rights that cannot be reduced. See 43 F.3d 1244, 1248 (9th Cir. 1994). *Kinnebrew* holds that a damages provision in an arbitration clause is not a matter of "substantive rights," but the court retains jurisdiction so that the employee can obtain full relief. 67 Fair Empl. Prac. Cas. (BNA) at 190-91. On remand, the

While this two-step process of going to arbitration and filing with the EEOC lacks efficiency and increases the time and expenses of the arbitration process, it does not, as Professor Stone contends, limit the available relief. However, even if courts upheld such agreements without retaining jurisdiction, the MAA addresses this concern by requiring arbitration agreements to provide the damages provisions set forth in the statutes.<sup>344</sup>

#### *E. The Public Plays No Role in Selecting Arbitrators*

The critics argue that the public plays no role in selecting arbitrators and that the arbitrators selected may not be qualified.<sup>345</sup> We agree. Under the current system, the arbitrators need not be trained, knowledgeable, or fair. They simply must be acceptable to both sides. We believe that this criterion is unsatisfactory. The MAA eliminates this problem by setting criteria for becoming an arbitrator and proposing a system to ensure and maintain competence.<sup>346</sup>

#### *F. Procedural Deficiencies of Arbitration*

Professor Stone describes four additional procedural deficiencies of arbitration that the MAA addresses. She argues that some arbitration policies: (1) prevent government agencies like OSHA from enforcing their laws; (2) reduce the statute of limitations; (3) alter the burden of proof; and (4) allow for untrained arbitrators.<sup>347</sup> These complaints are all addressed by the MAA. The MAA allows employees to file claims with government

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court in following either of these two cases should award damages consistent with the federal statute.

344. Additionally, the AAA has already adopted the *Guide for Employment Arbitrators*, (visited Feb. 20, 1999) <[http://www.adr.org/guides/employment\\_guide.html](http://www.adr.org/guides/employment_guide.html)>, which was approved by the American Bar Association, an organization which similarly maintains provisions for requiring arbitrators to award damages consistent with federal law. The AAA states that:

In accordance with the *National Rules for the Resolution of Employment Disputes*, the arbitrator may grant any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would be available to the parties had the matter been heard in court. This authority includes the right to award compensatory and exemplary (or punitive) damages and other remedies to the extent those remedies would be available under applicable law in court.

*Id.* at 11. This language is ambiguous regarding the ability of the arbitrator to deny participants relief that would otherwise be available under applicable law in court. It is also unclear whether arbitrators should heed the "law" created only by statute, or additionally by past judicial rulings.

345. See EEOC Policy Statement on Mandatory Arbitration, *supra* note 17.

346. See *supra* text accompanying notes 307-09.

347. See Stone, *supra* note 311, at 1042.

agencies, maintains the statute of limitations set forth by the law, requires that arbitrators follow the established burden of proof, and sets forth standards for licensing requirements for arbitrators. In fact, arbitrators will be at least as qualified, and maybe more qualified, than most judges. Arbitrators will certainly be more qualified than juries.

Besides being easily addressed by the MAA, Professor Stone's arguments are based on questionable grounds. For example, Professor Stone criticizes the 180-day statute of limitations in the Center for Public Resource's ("CPR") model arbitration agreement because "[i]n contrast, under Title VII of the 1964 Civil Rights Act, in some circumstances employees have 300 days to file suit."<sup>348</sup> The statute of limitations in Title VII cases is 180 days.<sup>349</sup> The time period is increased to 300 days in states where a local or state agency shares jurisdiction with the EEOC.<sup>350</sup> The increase is probably to account for the confusion and administrative problems that occur when agencies have concurrent jurisdiction. Employees may need 300 days to learn where, how, and why they can file their claims. The CPR follows the statutes and uses the 180-day period.<sup>351</sup> This makes sense. Although there is no need to increase the statute of limitations when all claims are filed with the employer, the MAA adopts the 300-day limit for such claims.

Professor Stone also contends that the CPR's burden of proof limits employee rights.<sup>352</sup> The CPR states that employees must prove that their terminations were not based on legitimate business reasons.<sup>353</sup> Professor Stone maintains that this is unfair because it is more onerous than "the usual burden in labor arbitrations, in which the employer typically has the burden of proving just cause for dismissal."<sup>354</sup> This is the wrong comparison. The burden of proof in the arbitration of discrimination claims should be compared with that of the forum that it is replacing, federal court discrimination litigation. There is no basis for comparing it to the burden allocated to employers in discharge and discipline cases arising out of just cause provisions in collective bargaining agreements.<sup>355</sup> In

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348. *Id.* at 1039-42.

349. *See* Title VII, 42 U.S.C. § 2000e (1994).

350. *See id.*

351. *See* Stone, *supra* note 311, at 1040.

352. *See id.* at 1041.

353. *See id.* at 1040.

354. Stone, *supra* note 311, at 1040.

355. Professor Stone's comparison of the burden of proof utilized in arbitrations involving union contracts' just cause provisions with the burden of proof in discrimination arbitrations is inappropriate. Equally inappropriate is her comparison of the *damages* typically awarded at just cause arbitrations with those awarded in jury verdicts. Stone states that that in arbitration an unjustly dismissed employee may only be awarded reinstatement with no back pay while jury awards for unjustly dismissed employees receive six-figure awards. *See id.* at 1047 n.197. This comparison is misleading because the damages arising out of just cause provisions in union



litigation, employees bear the burden of proving that the company discriminated.<sup>356</sup> Professor Stone also states that the CPR does not account for “mixed motive” cases.<sup>357</sup> The MAA expressly states that the burden of proof in arbitration claims will be the same as that in federal court. Thus, plaintiffs will have the same burden of proof in arbitration as they would in court even if the case would have been tried under a “mixed motive” approach.

## VI. ARGUMENTS AGAINST FUNDAMENTAL ELEMENTS OF MANDATORY ARBITRATION

In this section we address arguments that attack the core concept of arbitration. It is our position that these arguments are either invalid because they rest on unproven and contestable assumptions, or are acceptable when compared to the problems that are endemic to the current system.

### A. *The Arbitral Process Is Private in Nature and Thus Allows for Little Public Accountability*<sup>358</sup>

Under this heading, the EEOC argues that a necessary component of enforcing discrimination law is that all cases be public.<sup>359</sup> This argument is erroneous because it rests on a questionable premise and ignores the reality of the current system.

Despite the EEOC’s premise, it is not clear that society is better off if all cases are placed in the public domain. If the results of the EEOC’s investigation process are correct, more than 90% of the cases filed lack merit.<sup>360</sup> Despite this assessment, plaintiffs’ lawyers know that employers

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contracts are always limited to back pay and reinstatement. Moreover, the arbitrator is deciding the nebulous subject of just cause, not the existence of reprehensible discrimination. Such are simply not comparable with tort-based lawsuits that do not have such damage caps. *See id.*

356. *See* McDonnell-Douglas v. Green, 411 U.S. 792 (1973).

357. *See* Stone, *supra* note 311, at 1041. A mixed motive case occurs where the plaintiff proves that discrimination was a motivating factor in the employer’s decision. If the plaintiff meets this burden, the employer can prevail only if it proves that it would have made the decision regardless of the unlawful motivation. *See* Hopkins v. Price Waterhouse, 490 U.S. 228 (1989). Under the Civil Rights Act of 1991 the court can award attorneys’ fees, costs, and a declaratory judgment to plaintiffs who meet their initial burden, but do not prevail. Stone’s argument is misleading because it fails to mention that only a small minority of cases are classified as mixed motive cases. Instead, in the vast majority of cases the burden of proof always remains with the plaintiff. *See* Tyler v. Bethlehem Steel Corp., 958 F.2d 1176 (2d Cir. 1992).

358. *See* EEOC Policy Statement on Mandatory Arbitration, *supra* note 17, at V-A-1.

359. *See id.*

360. *See supra* text accompanying note 77.

in certain industries cannot afford the publicity of even a baseless lawsuit. The public nature of cases affords the opportunity for claimants to extort settlements from innocent employers who fear negative publicity. Even in public trials where employers are vindicated of any wrongdoing, or when no adjudication process takes place because of early resolution, employers can be harmed by injurious publicity associated with the perception that “where there’s smoke, there’s fire”—the belief that employees’ claims must have *some* merit.<sup>361</sup> In addition to hurting employers, there is evidence that plaintiffs who win at trial are also harmed by the publicity of their trials.<sup>362</sup>

Although the critics imply that the current system provides public adjudication, this ignores reality. The vast majority of cases are either dismissed by the EEOC or privately settled.<sup>363</sup>

Despite the problems with public adjudication, there are some cases that should not be settled in private. For example, some cases allow courts to clarify contested issues, develop novel theories of law, or deter future reprehensible behavior by awarding high damages for egregious conduct.<sup>364</sup> At this time, it is still unclear whether, under *Gilmer*, the EEOC may pursue cases in federal court. However, under the MAA, the EEOC does have such a right. Cases falling under the national enforcement plan would therefore be publicized. The cases that would be adjudicated privately are the B and C cases that, if not arbitrated, would likely be settled privately or dropped. In either case, the resolution is nonpublic. Given the high

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361. One example of this is embodied by a statement made by the Chairman and CEO of Flagstar Companies, Inc. in reference to the resolution of the Denny’s racial discrimination claims which severely injured the restaurant chain’s national reputation: “We decided to attempt to resolve the claims because it became clear to us that the costs of litigating all of them would be unacceptably high, not only in terms of attorneys’ fees but also in terms of continuing public perception of an adverse relationship between Denny’s and its African-American customers.” The closing remark in this statement was a plea to “customers and potential customers who still doubt us” to “please give us another chance to serve you.” *Statement from Jerome J. Richardson, Chairman and CEO Flagstar Companies, Inc.*, BUS. WIRE, May 24, 1994, at 1.

362. See Saltzman, *supra* note 109.

363. Furthermore, under the current system, only about 20% of employment discrimination cases are actually published. A study done by Donohue and Siegelman indicate that the 20% of cases that is published tends not to be representative of the rest of the employment discrimination litigation caseload. See Peter Siegelman & John J. Donohue, III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC’Y REV. 1133, 1155 (1990) (indicating that published opinions tend to be more complex and to involve higher dollar awards than unpublished opinions). Even if every mandatory agreement were declared void, only one out of every five employment discrimination cases would be publicly accountable. Thus, even if *Gilmer* agreements were declared illegal, employers trying to avoid public accountability would have as easy a time as they would under the current law.

364. See, e.g., *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 960 F. Supp. 164 (C.D. Ill. 1997).

number of meritless cases,<sup>365</sup> it is appropriate to allow A cases to be public and the B and C cases to be private. The MAA operationalizes this approach by allowing the EEOC to pursue A cases publicly and for arbitrators to privately hear B and C cases.

*B. Mandatory Arbitration Systems Include Procedural and Structural Biases Against Discrimination Plaintiffs*<sup>366</sup>

Both the EEOC and Professor Stone argue that arbitration is unfair because of what some refer to as arbitration's "systematic pro-employer effect on the outcomes of disputes."<sup>367</sup> To support this assumption, which attacks the credibility of the entire profession,<sup>368</sup> the EEOC and Professor Stone rely on flawed data and negative assumptions. Both rely on a study that surveyed employment discrimination arbitration awards in the securities industry.<sup>369</sup> This study found that "employers stand a greater chance of success in arbitration than in court before a jury and are subjected to 'smaller' damage awards."<sup>370</sup> They then make the common, but arguably erroneous, leap that such results mean that arbitrators are biased against employees.

In fact, even if employers fare better at arbitration than in federal court, and employees who win at arbitration tend to receive smaller awards than those in federal court, there is no evidence of anything *systematic* or *implicitly unfair* with arbitration as a process for resolving employment-related disputes. Assuming *arguendo* that both statements are provable (i.e., that employers tend to win arbitrations more often than in federal court, and that employee-plaintiffs receive lower awards at arbitration than they do in court victories), there are several factors that are likely to account for these distinctions.

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365. As explained earlier, the EEOC finds that 92% of the cases are without merit. See *supra* note 77 and accompanying text. While we do argue that this number is inflated because of the EEOC's policies and procedures, we do believe that many cases are without merit.

366. See EEOC Policy Statement, *supra* note 17, at V-B.

367. Stone, *supra* note 311, at 1040.

368. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997) ("[I]f the arbitrators who are assigned to hear and decide statutory claims adhere to the professional and ethical standards set by arbitrators in the context of collective bargaining, there is little reason for concern.").

369. See EEOC Policy Statement on Mandatory Arbitration, *supra* note 15, at V-B & n.14 (citing Stuart H. Bompey & Andrea H. Stempel, *Four Years Later: A Look at Compulsory Arbitration of Employment Discrimination Claims After Gilmer v. Interstate/Johnson Lane Corp.*, 21 EMP. REL. L.J. 21 (1995)).

370. *Id.* at 43.

## 1. Why Are Employers More Successful in Arbitration than in Litigation?

There is evidence of strong jury predisposition to side with employees and against employers.<sup>371</sup> A five-year poll (from 1993 to 1998) of six to ten thousand persons in juror pools from jurisdictions across the country indicated that juries favor employees in employment discrimination cases.<sup>372</sup> This survey reveals several germane results. Sixty-nine percent of the respondents agreed that “many company decision-makers’ promotion decisions are influenced by an employee’s age, sex, or race.”<sup>373</sup> Eighty-one percent agreed that “discrimination is still a major problem in the workplace,” and 62% felt that “employee rights are not well protected in our society.”<sup>374</sup> Sixty-seven percent agreed that “too many workers are treated unfairly by the company they work for.”<sup>375</sup> Fifty-three percent agreed that “executives of companies will lie to increase their profits,” while 75% said that they “would tend to believe a woman who says she has been sexually harassed at work.”<sup>376</sup> It is no wonder then that Robert Coulson of the AAA reported that the driving force behind employers wanting to use ADR techniques generally is to avoid facing juries.<sup>377</sup>

An argument that juries may be biased is supported by a study, conducted on statistical records compiled by the Federal Judicial Center for employment cases litigated in federal court and terminated during the period from June 1, 1992 to May 31, 1994 that compared the outcomes of

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371. In addition to the statistics cited below, there are several studies on jury predispositions and attitudes in the employment law setting that confirm the general results contained below. See, e.g., JEFFREY T. FREDERICK, *THE PSYCHOLOGY OF THE AMERICAN JURY* § 7-108 (1987); Michael Fried et al., *Juror Selection: An Analysis of Voir Dire in THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW* 47, 52-53 (Rita James Simon ed., 1975); Valerie P. Hans, *The Jury's Response to Business and Corporate Wrongdoing*, *LAW & CONTEMP. PROBS.*, Autumn 1989, at 177, 197.

372. See *Dispute Dynamics, Inc. (“DDI”), Presentation on Workplace Statistics* (on file with authors). DDI is a reputable consultation firm that conducted the survey set forth here.

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

377. See *Employers Reluctant to Embrace Mandatory Arbitration, Survey Finds*, *supra* note 113, at A-14. Employers’ fear of juries makes them more susceptible to settle a case to avoid litigation. This would affect the equations described in note 108 by increasing the probability of settlement (“Ps”), and hence will make plaintiff cases more attractive to attorneys. But at what cost? Cases will settle without adjudication. Employers will be extorted into paying for de facto severance and nuisance settlements. If there is a mandatory arbitration provision in place, attorneys might be less apt to take cases because they are readily settled, but instead will place greater emphasis on the second equation—the probability of winning (“Pw”). This is desirable because fewer cases will be settled without adjudication and extortion would be traded off for justice.

cases in jury trials to those where a judge decided the outcome of the case.<sup>378</sup> Two significant findings are worth noting. First, employees won *twice as frequently* before juries than they did before judges.<sup>379</sup> Second, in cases litigated without a jury in which the employee prevailed, the verdicts ranged from \$1,000 to \$5 million with a mean of \$167,450 and a median of \$40,000.<sup>380</sup> The results in jury trials were significantly higher: awards ranged from \$1,000 to \$8 million with the mean of \$417,178, and a median of \$106,500.<sup>381</sup> In addition, the average of the five highest jury awards exceeded the average of the highest five court verdicts by *more than 350%*.<sup>382</sup> It would certainly be spurious to conclude from these statistics that *judges* are biased against employees. And yet, critics of mandatory arbitration are quick to accept the argument that *arbitrators* are biased against employees based on a tenuous, and preliminary, showing analogous to this one; just because employees win less often and are awarded less money in front of arbitrators does not prove that arbitrators are biased against them. We believe that judges and arbitrators—trained professionals whose livelihood and personal and professional credibility is based on being fair and impartial—are less likely to be biased than the six, eight, or twelve men and women comprising jury panels—some of whom may not perceive their civic responsibilities as graciously as others.

More favorable employer success rates before arbitrators, compared to before juries, may also be attributed to arbitration-critics' disregard of a procedural distinction between the two forums. Litigation is a three-step process, whereas arbitration is a one-step process. In litigation, the employer may prevail by filing dispositive motions prior to trial. There are no motions to dismiss or summary judgment motions in arbitration. In the study cited by Professor Stone, cases where employers prevail in motions to dismiss or in summary judgment are not included in plaintiffs' litigation success rate.<sup>383</sup> The only litigation cases that the study accounts for are those that survive dispositive motions and are heard by a jury. It is obvious that plaintiffs' winning percentages increase dramatically when numerous losses are not counted in the equation. The inflated rate is then compared

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378. See Howard, *supra* note 108, at 42.

379. See *id.* Employees won 19% of the trials without juries, and 38% of the trials with juries.

380. See *id.* If the highest 10% of the verdicts were eliminated, the range is reduced to \$1,000-\$250,000, the mean to \$58,060, and the median to \$35,060.

381. See *id.* Howard notes that the fact that the mean is about four times larger than the median indicates an inordinate influence of extremely high verdicts. Eliminating the highest 10% of verdicts decreases the range to \$1,000-\$850,000.

382. See *id.*

383. See Stuart Bompey & Michael Pappas, *Compulsory Arbitration in Employment Discrimination Claims: The Impact of Gilmer v. Interstate/Johnson Lane Corp.*, 1993 ABA SEC. ON EMP. & LAB. LAW EO COMM. PAPERS.

to the plaintiffs' success rate in the *one-step* arbitration process. These factors lead to the unsupported conclusion that juries are more favorable to plaintiffs than arbitrators.

A third reason for the skewed results of the study is the probability that lawyers are more likely to arbitrate than to litigate marginally meritorious claims. Arbitration is less risky for a lawyer because the out-of-pocket expenses and opportunity costs are significantly less than those in litigation, and there is no disincentive to taking a "fees" case.<sup>384</sup> This argument is tempered, however, by the fact that the probability of success and recovery are lower in arbitration than litigation.

The final reason for the employers' success rate in arbitration is that employers with *Gilmer* agreements are less likely to settle meritless cases because of the high costs of defense.<sup>385</sup> This means that when plaintiffs' lawyers are wrong about their case selection they will lose at arbitration. Such losses are another example of pro-employer bias in arbitration. Where there is no arbitration provision, and the law firm makes a bad decision to take a case, the firm may still settle the case before going to litigation because employers will be motivated by the defense costs.

## 2. Damage Awards Are Lower when Arbitration Is the Forum

The major reason why damages are lower in arbitration than in litigation may be explained by mathematics. In discrimination lawsuits, back pay is the major component of the potential award. Back pay is generally calculated from the time of the adverse action to the disposition of the case. In federal court, it takes an average of 2.5 years, and as long as eight years, to litigate a case.<sup>386</sup> In arbitration, however, the entire adjudication process takes an average of 8.6 months to complete.<sup>387</sup> Because of the differences in time for when back pay is calculated, it makes perfect sense that plaintiffs' damage awards will be greater in court than in arbitration.

A 1993 survey of 4,000 AAA arbitrations conducted in 1992 also countered the charge that arbitration awards generally fall in the middle of the request sought by the claimant.<sup>388</sup> In only 11% of the cases did the award fall between 40% to 59% of the claim.<sup>389</sup> In 26% of the cases, the

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384. See *supra* notes 104-05, 113-15 and accompanying text.

385. See *supra* note 101. Lawyers will focus less on the probability of settling ("Ps") and more on the probability of winning ("Pw").

386. See *supra* note 83.

387. See *supra* note 113.

388. See Bompey et al., *supra* note 21, at 25, (citing *Arbitrators Do Not "Split the Baby" in Rendering Awards*, WORLD ARB. & MEDIATION REP., Oct. 1993, at 241).

389. See *id.*

award *exceeded* 80% of the claim.<sup>390</sup>

Another reason for the skewed damage awards may be explained by jury predisposition. Sixty-one percent of those polled in the Dispute Dynamics study said that “an important function of juries in America is to send messages to corporations to improve their behavior.”<sup>391</sup> Sixty-eight percent agreed that “if a company was found guilty of causing injury to someone, I would want to award punitive damages.”<sup>392</sup> One may argue that the preconceived antiemployer sentiment of juries result in inflated court awards for plaintiffs, and that the lower arbitration awards are really the more fair assessments of redress.

### 3. The So-Called Repeat Player Effect

The EEOC also relies on research conducted by Professor Lisa Bingham of Indiana University to support its contention that arbitrators favor employers because it is more likely that an arbitrator will be rehired by a large employer than by any one plaintiff.<sup>393</sup> This alleged bias is the so-called “repeat player” effect. Before discussing this research, we must note that the concept of repeat player bias is tenuous. The argument is that arbitrators will rule in favor of employers because they are more likely than plaintiffs to hire the arbitrator again. Such an argument makes no sense. No rational plaintiff would select an arbitrator who does not have a well-established reputation for integrity; arbitrators with skewed track records find themselves jobless.<sup>394</sup> Because of this fact, the repeat player effect would exist only if: (1) arbitrators are able to hide their past relationships from the plaintiffs and the agencies in charge of arbitrator selection; or (2) plaintiffs and their attorneys are so unsophisticated that they do not do any research before exercising their right to help select the person who will decide their case.

Despite the fact that the concept is illogical, Professor Bingham’s research supports the hypothesis that the repeat player bias does have an effect on arbitration results. Professor Bingham found that employees lost in twenty-six out of thirty-one cases where the defendant-employer was a

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390. *See id.*

391. DDL, *supra* note 372.

392. *Id.*

393. *See* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL’Y J. 189 (1997).

394. *See* Norman S. Poser, *When ADR Eclipses Litigation: The Brave New World of Securities Arbitration*, 59 BROOK. L. REV. 1095, 1108 (1993) (reporting that a GAO Report found no indication of pro-industry bias in arbitrator decisions in “industry-sponsored arbitration forums”). Although these arbitrations deal primarily with investor-brokerage disputes, the implication that arbitrators would be expected to be biased in favor of their employers is refuted by empirical evidence to the contrary.

“repeat-player.”<sup>395</sup> When the employer was not a repeat-player, employees lost in fifty-nine out of 201 cases.<sup>396</sup>

In analyzing Bingham’s results, it is critical to point out the exceptionally small sample size used in Bingham’s study—a mere 232 cases, all taken from 1993.<sup>397</sup> Also relevant is the fact that Bingham used only thirty-one repeat player cases as compared to 201 non-repeat player cases.<sup>398</sup> This severely limits the reliability of the study. However, due to the heavy reliance of both the EEOC and Professor Stone on the results, this Article will assume, *arguendo*, that the results of the article are reliable.

It is unlikely that arbitrator bias is the underlying reason for Bingham’s results because she did not demonstrate that arbitration success rates improved if a company was a repeat player. Bingham’s research merely compares win rates for repeat players with those of single players. Moreover, according to Bingham, *repeat players fared as well in their first cases as they did in subsequent cases*. The flaw in this study is best explained with an example. Suppose that Companies A and B are large employers similar to those in Bingham’s study,<sup>399</sup> and both conduct arbitrations on January 15. Company A wins and Company B loses. Three months later Company A has another arbitration and prevails again. Employing Bingham’s logic and methodology, one would conclude that repeat players (A) win 100% of the time, single players (B) lose 100% of the time, and therefore arbitrators favor repeat players. However, there is no evidence that the arbitrators who heard A’s first case, and B’s only case, knew that Company A would be a repeat player and that Company B would not be. Both were large employers who could potentially be sources of future business. Without evidence that the arbitrators could identify future repeat players, it is impossible to make inferences about arbitrator bias. Therefore, it is not possible to conclude that the repeat players won more arbitrations because of arbitrator bias.

One could argue that arbitrators may be able to identify potential repeat players in initial arbitrations because their arbitration agreements are company-wide policies, not clauses in individual contracts. However, as Bingham notes, bias may not explain why employers with company-wide policies are so successful. Company-wide policies generally affirm that all employees are employed at will. Thus, employees could only prevail by pigeonholing their cases into the limited range of legally accepted at will exceptions. This is a difficult task. Moreover, an employer with a company-wide policy will have the task of identifying which cases it

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395. See Bingham, *supra* note 393, at 210.

396. See *id.*

397. See *id.* at 209.

398. See *id.* at 210.

399. Telephone Interviews with Professor Lisa Bingham, Indiana University (July 1997).



cannot win. The company will likely settle such cases. Alternatively, the single-player employers were likely those that had contracts limiting the employers' ability to fire employees to instances where doing so constituted just or reasonable cause, with a small number of high level employees. In such cases, employers had to prove that they had cause to terminate, a much more difficult standard. These employers were not experienced, and therefore may not have known when to settle.

If there is an underlying bias, the MAA corrects it. Under the MAA, arbitrators' opinions are reviewed every two years to ensure that the opinions are sound. In addition, an arbitrator cannot hear a case before any given employer twice in a two-year period. Most importantly, arbitrators are selected by the designated agency, not the parties.

If bias does exist, and the MAA does not resolve the issue, we believe that plaintiffs' attorneys will mitigate any concerns. The state and federal agencies will continue to provide employees with a list of attorneys who specialize in such cases. Eventually, these attorneys will be in the same position as the management attorney to accept or reject an arbitrator. Thus, arbitrators will have the same incentive to please the repeat player plaintiffs' attorneys as they do the repeat player employers.<sup>400</sup> Employees who have decent cases, and conduct limited due diligence, will come to understand this fact and will therefore utilize these qualified attorneys.

Professor Bingham argues that plaintiffs' lawyers will not serve this function. She explains that lower wage employees need their attorneys to take cases on a contingency basis.<sup>401</sup> Because empirical evidence indicates that jury awards in discharge cases are greater than arbitration awards, attorneys will be less likely to take arbitration-bound cases on contingency.<sup>402</sup> Professor Bingham does note, however, that the cost of arbitrating is significantly less than that of litigating.<sup>403</sup> Since these lower costs allow employees access to adjudication—the ultimate benefit and goal of litigation—without forcing an attorney to become a “partner” in the case, we believe that plaintiffs' lawyers will be more likely to arbitrate than litigate a discrimination case. As Donohue notes, absent clear and outrageous liability, it is economically infeasible to take a case to court if the plaintiff earns less than \$450 per week.<sup>404</sup> This is not the case in arbitration. Thus, it is perhaps more likely that a class of lawyers will specialize in plaintiffs' arbitration and counterbalance the alleged employers' repeat player benefit.<sup>405</sup>

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400. See Estreicher, *supra* note 209, at 1355.

401. See Bingham, *supra* note 393, at 199.

402. See *id.* at 199-200.

403. See *id.*

404. See Donohue & Siegelman, *supra* note 22, at 1006.

405. See Estreicher, *supra* note 209, at 210. He argues that:

Professor Bingham also notes that the high costs of litigation allow plaintiffs with weak cases to find counsel who are not willing to litigate the case, but are willing to use the cost of defense to obtain a nuisance settlement.<sup>406</sup> According to Bingham, such settlements can exceed \$10,000.<sup>407</sup> This theory is supported by the model described above which determines how plaintiffs' lawyers decide to take cases.<sup>408</sup> A case may be easily "settle-able," and hence very attractive to an attorney because the defendant's proclivity and willingness to settle is inherently greater when the risk the defendant is avoiding—litigation—is costlier. Professor Bingham argues that arbitration may put an end to this practice. If so, she has conceived of another positive aspect of arbitration: it reduces the opportunities for extortion.

### C. *Contracts of Adhesion*

Professor Stone argues that *Gilmer* agreements are inherently unfair because they are offered on a take-it-or-leave-it basis.<sup>409</sup> She is correct in that employees have little bargaining power. They can either accept the terms and conditions of employment or not accept the job. However, this is not unique in employee-management relations. Employees who join a company with a union contract immediately give up their right to negotiate any term and condition of employment in exchange for union representation. In many cases, the terms of a union contract, which frequently include provisions that base layoffs and promotions on seniority, are contrary to the interests of newly hired employees. In some cases, unions can and do negotiate away rights imposed by employment statutes.<sup>410</sup> Regardless of their opinions on these subjects, new employees are left with a take-it-or-leave-it scenario. Finally, except in right to work states, employees are told that if they do not pay union dues they will be fired.

In addition to the union setting, there are numerous other terms and

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[A]rbitrators chosen on prior occasions are unlikely to be deemed acceptable by claimant representatives. Moreover, the real repeat players will be the lawyers for both defense and plaintiff bars in the area—such as members of the National Employment Lawyers Association, a plaintiff group—who can be counted on to share information within their group about the track records of proposed arbitrators.

*Id.*

406. See Bingham, *supra* note 393, at 200.

407. See *id.*

408. See *supra* note 108.

409. See Stone, *supra* note 311, at 1036.

410. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *New York Tel. Co.*, 1989-1990 NLRB Dec. (CCH) ¶ 16,173 (July 31, 1990).

conditions of employment that are offered to employees on a take-it-or-leave-it basis. For instance, health insurance, life insurance, pension plans, and various ERISA provisions (e.g., vesting policies), as well as noncompetition agreements, vacation pay, sick time, and holiday pay are conditions of employment that employers almost always offer to employees on a take-it-or-leave-it basis. If mandatory arbitration as a condition of employment represents such an intolerable failure, union shops, benefit plans, and other conditions of employment that are part and parcel of basic freedom of contract should also be abolished.

#### D. *Arbitration Limits Discovery*<sup>411</sup>

In this section, the EEOC complains that arbitration limits discovery, and is generally unsuitable as a forum for class actions.<sup>412</sup> Again, class actions will be litigated, not arbitrated.<sup>413</sup> As for discovery, the MAA provides for depositions and document requests. It just places time and volume limits that prevent employers from “big firming”<sup>414</sup> employees and driving up the costs of defense. Such limits on discovery can be socially beneficial because reducing the costs of adjudicating—by having arbitration replace litigation<sup>415</sup>—should result in lawyers accepting plaintiffs’ cases that would have otherwise been rejected.

### VII. CONCLUSION

We acknowledge that mandatory arbitration is not perfect. It is, however, a viable alternative offering favorable trade-offs for the ills endemic to the current system. Thirty years ago Congress attempted to develop a system that would eliminate discrimination in the workplace, and provide fairness to litigants. Two major components of this system were that it: (1) provided access to a fair adjudicatory process for all employees regardless of pay rate; and (2) would not force employers to spend excessive amounts of time and money defending baseless claims. As this

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411. See EEOC Policy Statement on Mandatory Arbitration, *supra* note 17, at V-A-3.

412. See *id.*

413. The EEOC can and does file class actions against employers where such actions are appropriate. Indeed, the EEOC is more likely to file a class action since the procedural constraints of Federal Rule of Civil Procedure 23 do not apply to the EEOC. See FED. R. CIV. P. 23. While the EEOC does not bring many class action suits each year, it would be specious to reason that mandatory arbitration agreements are preventing it from doing so.

414. “Big firming” means utilizing the resources of the employer and its large law firm to coerce plaintiff’s counsel to respond to an excessive number of discovery requests so that the plaintiff will either withdraw, accept an undervalued settlement, or continue to pursue the case without being adequately prepared.

415. This is “CL” in step 4 of the decision making process outlined *supra* note 108.

Article demonstrates, the EEOC and the federal courts have failed to answer this charge. Instead, the current system benefits the employers and employees who are bad actors and hurts the good actors. This system, which leaves plaintiffs without remedy in the overwhelming majority of cases, forces de facto severance settlement of claims without regard to the merits, and eliminates access to fair adjudication for the vast majority of parties—actually perpetuating discrimination. Despite the government's best intentions, it cannot "fix" the system by fine-tuning the current process or increasing funding. The costs associated with investigation and federal litigation are simply too high. A system that revolves around such high cost adjudication mechanisms can never fairly and feasibly address and eliminate discrimination in the workplace.

There are two fundamental flaws with the arguments against mandatory arbitration. First, so-called employee advocates perpetuate a myth of government protection when it does not exist. Second, in their haste to run to the aide of the "little guy," or the "have-nots," the employee-rights advocates overlook the fact that employees whose statutory rights are not violated should not receive relief. A system that perpetuates de facto severance and allows delay tactics and the ominous threat of litigation costs and negative publicity to determine who gets relief and who does not is not a fair and just system. The little guy may triumph in the short run, but society is harmed in the long run.

Mandatory agreements to arbitrate level the playing field by providing an adjudicatory process for those who would otherwise be either forced to settle for an unjust amount or receive no relief at all. This Article classifies three types of problems with mandatory arbitration. The first are the faults that are easily corrected by the MAA. The second are those problems that are identified, but may not exist and this paper explains why. The third are the inherent drawbacks to arbitration. We argue that they are acceptable in light of the alternatives.

There are three possible ways that the law regarding mandatory arbitration can develop. First, Congress can succumb to the wishes of the EEOC and the employee rights advocates by outlawing mandatory arbitration. Such an outright legislative ban would further institutionalize an unfair system under the guise of government protection for employees. The only protection that such a ban would provide would come in the form of job security for EEOC employees and for the large jury verdicts about which plaintiffs' lawyers dream.

The second option is to leave the issue to the courts. Courts will, in response to plaintiffs' arguments, continue to decide the enforceability of arbitration agreements. This is undesirable because it would take years to develop any uniform interpretation. Moreover, millions of dollars will have to be spent in order for each circuit to decide what represents a fair

and just alternative to the current “mess.” Employers that wish to avoid such costs will be left with the status quo—de facto severance and the settlement of meritless cases due to fear of defense costs. Employees who do not have the good fortune of working for an employer with a fair and just arbitration policy will either have to deal with the current system of delays and barriers to adjudication or accept an unfair arbitration policy. The third option is for Congress to enact legislation that will establish a uniform system of mandatory arbitration provisions. The MAA is but one example of the type of legislation that could be passed. The MAA is not perfect. Nor does it cure all ills endemic to the system. But this was not our intention in devising the MAA. Instead, we created it to prove that it is possible to address completely many of the issues that the critics imply are insurmountable problems. Those issues that are not “correctable” are, as we have shown, not really problems, or acceptable when compared to what has been allowed to develop over the past thirty years.

To paraphrase Professor James Henderson, “just because one person, or even one hundred people, are injured by paring knives, this does not make the paring knife a *defective product* per se in the eyes of the law.”<sup>416</sup> It is easy to lose sight of one’s ultimate goals when debating the nitty-gritty of mandatory arbitration—even the term “mandatory” is debated.<sup>417</sup> It is also easy to spin hypothetical situations in which an employee is almost coerced into signing a one-sided employment contract with an arbitration provision buried on page 977 and is then badly harmed by not being able to reach a jury. Such hypothetical situations, even the plausible ones, do not make agreements to arbitrate per se *defective* (read: unlawful). Much like paring knives, arbitration can potentially cut parties unfairly. And the most natural reaction when critics hear of such incidences is to declare the whole system defective, while losing sight of the countless number of individuals who benefit from it. But this would be like throwing the baby out with the bath water. This paper therefore stands for the proposition that the law should recognize the positive aspects of contractual agreements to arbitrate employment disputes and continually design safeguards to ensure its proper handling—save the baby—and construct a new sink. If this course is not adopted, we will only be perpetuating the myth of government protection

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416. Professor James Henderson, Lecture at the Cornell Law School (Nov. 12, 1997). Professor Henderson is one of the authors of the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) as well as the author of several casebooks on torts and products liability and a countless number of academic articles.

417. See Ware, *supra* note 315, at 104 nn.102-03. “This term [‘mandatory’] is sometimes used to describe arbitration resulting from agreements to arbitrate future disputes, since once an enforceable agreement has been made, arbitration is ‘mandatory.’ This is extremely confusing language because it ignores altogether the consensual element in contracts.” *Id.* at 108 (quoting 1 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 2.5, at 2:36 n.5 (1994) (citation omitted)).

of employee rights that permits discrimination to continue in the workplace and encourages plaintiffs to extort innocent employers.