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Alternative Dispute Resolution of Employment Discrimination Claims

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I. INTRODUCTION

Section 118¹ of the Civil Rights Act of 1991² states:

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Thus, in the same law that created a massive incentive for litigation by authorizing compensatory and punitive damages and jury trials for victims of employment discrimination,³ Congress explicitly endorsed a wide range of alternatives to litigation.

That a major civil rights statute should encourage the use of alternatives to litigation indicates a significant shift in congressional and public attitudes about the adequacy and effectiveness of alternative dispute resolution ("ADR").⁴ Originally rejected by civil rights activists as second-class justice for victims of discrimination and by employers as meaningless and lacking in finality, ADR has generated a great deal of positive interest in recent years. Faced with the ever-mounting costs and delays of litigation and mindful of the development of better ADR methods with improved procedural safeguards, both employers and employees are looking to the benefits of speedier, less costly, and less confronta-

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The views expressed herein are those of the authors and do not necessarily reflect official Commission policy.

1. 42 U.S.C. § 1981 note (Supp. IV 1992). The Americans with Disabilities Act of 1990 contains the same provision. See 42 U.S.C. § 12212 (Supp. IV 1992).

2. Pub. L. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

3. See 42 U.S.C. § 1981a (Supp. IV 1992).

4. "Alternative dispute resolution" generally means, in the employment context, "a method of resolving personnel and workplace disputes without traditional litigation and with the help of a trained neutral or a panel of neutrals. . . . [I]ts objective is to resolve disputes efficiently and satisfactorily before the litigation process is initiated so that the employee will not feel compelled to seek resolution through external means." Douglas S. McDowell, *Alternative Dispute Resolution Techniques* 7-8 (1993).

tional ADR mechanisms. Federal agencies, including the Equal Employment Opportunity Commission, are also using ADR to a greater degree as a result of the Civil Rights Act of 1991 and another recent congressional mandate, the 1990 Administrative Dispute Resolution Act.⁵

This essay begins with a brief history of the use of ADR in resolving employment discrimination disputes and then describes various ADR options, with their advantages and disadvantages. The next section looks at legal developments—particularly in the Supreme Court and Congress—relating to arbitration. The essay then addresses the interplay between an employer's ADR system and the EEOC's processes and, finally, describes the EEOC's use of ADR, including its pilot mediation project.

II. HISTORICAL DEVELOPMENT OF EMPLOYMENT ADR

The use of private mechanisms to resolve employment disputes had its origins in labor law. After World War I, collective bargaining agreements "introduced the notion of fair and impartial arbitration of differences" by an objective outsider.⁶ Grievance and arbitration procedures became the norm for industrial disputes, gaining support through judicial and legislative measures.⁷ Until recent years, however, this form of ADR was largely limited to the unionized sector.

In 1964, Title VII of the Civil Rights Act⁸ created the EEOC and federal employment discrimination law, using the National Labor Relations Board and federal labor law as its basic model. But, in a compromise reflecting the fear of a strong federal antidiscrimination machinery, Congress refused to confer either the NLRB's cease-and-desist powers⁹ or independent litigation authority on the EEOC. Instead, it required the fledgling agency to attempt to conciliate all investigated charges on which the agency found cause.¹⁰ Thus, at a time when private, informal dispute resolution systems were generally confined to the collective bargaining context (and indeed the term "ADR" had not yet been coined), the EEOC's administrative process was to utilize under public auspices a form of ADR for the speedy and mutually satisfactory resolution of complaints.

5. 5 U.S.C. §§ 571-583 (Supp. IV 1992).

6. David W. Ewing, *Justice on the Job* 104 (1989).

7. Linda Singer, *Settling Disputes* 6 (1990). See also Stephen A. Plass, *Arbitrating, Waiving and Deferring Title VII Claims*, 58 *Brook. L. Rev.* 779, 784-85 (1992) (labor arbitration has been a "reliable and effective vehicle for resolving industrial disputes" and has gained "unprecedented judicial recognition, support and deference").

8. Pub. L. No. 88-352, 78 Stat. 253 (1988) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. IV 1992)). Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (1988 and Supp. IV 1992).

9. See 29 U.S.C. § 160 (1988).

10. See *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 358-59, 97 S. Ct. 2447, 2450-51 (1977). See also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S. Ct. 1011, 1017 (1974). Private parties could bring suit under Title VII, and the EEOC could enter only as *amicus curiae*.

Unfortunately, the administrative process proved to be neither speedy nor mutually satisfactory. And the Commission's efforts at conciliation and early no-fault settlements came to be looked upon with disfavor from all sides, particularly plaintiffs and their lawyers who were concerned that these approaches did nothing to redress the patterns and practices of discrimination proscribed by the 1964 Civil Rights Act.

In 1972, Congress amended Title VII, again rejecting the cease-and-desist model but finally giving the EEOC prosecutorial power.¹¹ Thereafter, whenever conciliation failed, the Commission could sue in federal court to enforce Title VII.¹² Employees and the newly empowered EEOC increasingly turned to the courts as Congress expanded employees' rights (and EEOC's responsibilities). In 1967, Congress passed the Age Discrimination in Employment Act ("ADEA").¹³ In 1990, Congress prohibited discrimination on the basis of disability in the Americans With Disabilities Act ("ADA"),¹⁴ which incorporates Title VII's procedures. And the 1991 Civil Rights Act amended Title VII and the ADA to authorize jury trials as well as compensatory and punitive damages.¹⁵

This dramatic expansion of statutory rights and remedies¹⁶ has exacerbated and will undoubtedly continue to exacerbate the trend to make workplace disputes into federal cases (and state as well), thus fueling the litigation explosion that has generated new interest in the use of ADR.¹⁷ But other factors also have contributed to the growing interest in ADR.

In the early years of civil rights law enforcement, plaintiffs generally eschewed the use of ADR because such methods were perceived to be "an inferior system of justice,"¹⁸ inadequate to effectuate the broad remedial goals of Title VII.¹⁹ Early judicial decisions were inhospitable to ADR, at least in

11. Equal Employment Opportunity Act of 1972, § 4(a), 42 U.S.C. § 2000e-5(f)(1) (1988). Private parties retained their right to sue under the statute. *Id.*

12. Conciliation and informal methods of settlement continued to be the preferred means of enforcement, however. See 42 U.S.C. § 2000e-5(b) (1988). See discussion *infra* at 1554-57 of EEOC's struggle to balance its law enforcement function with its caseload management needs.

13. 29 U.S.C. §§ 621-34 (1988 & Supp. IV 1992).

14. 42 U.S.C. §§ 12101-12213 (Supp. IV 1992).

15. 42 U.S.C. § 1981a (Supp. IV 1992).

16. At the same time, state courts and legislatures also have given employees broader rights to sue for wrongful discharge, breach of contract, and discrimination.

17. See generally Evan J. Spelfogel, *Legal and Practical Implications of ADR and Arbitration in Employment Disputes*, 11 Hofstra Lab. L.J. 247, 248 (1993) ("Employment litigation has grown at a rate many times greater than litigation in general. Twenty times more employment discrimination cases were filed in 1990 than in 1970, almost one thousand percent greater than the increase in all other types of civil litigation combined." (citations omitted)).

18. See *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 751 n.12 (8th Cir. 1986) (describing commercial arbitration).

19. Enforcement of the civil rights laws through litigation and agency action furthers the statutes' purposes in a number of ways. For example, large and well-publicized back-pay awards have a significant deterrent effect. As the Supreme Court said in *Albemarle Paper Co. v. Moody*,

the form of arbitration.²⁰ Even now, some plaintiffs' advocates and some commentators continue to criticize ADR methods, particularly arbitration, as procedurally deficient and skewed toward employers.²¹ But as ADR procedures have improved and litigation grown more time-consuming and costly, doubts about whether ADR should play *any* role in civil rights enforcement have significantly diminished. With courts and Congress now encouraging ADR, including arbitration,²² the debate has shifted to the proper balance between the role of ADR and the role of enforcement agencies and the courts.²³

Employers increasingly are adopting internal ADR methods,²⁴ in part because of expanding statutory rights and remedies but also because of a growing trend to give employees greater participation in management and give human resource departments a more influential voice.²⁵ ADR is seen as one aspect of good management of human resources. In addition, mobility and diversity have increased in the workforce, and "so have conflicts in expectations and values among well-meaning employees," thus adding to the need for good internal dispute-resolution procedures.²⁶

Employees are better educated, more litigious, and more willing to challenge authority, and want a sense of participation with management and a fair hearing

422 U.S. 405, 417-18, 95 S. Ct. 2362, 2371-72 (1975). "It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices . . .'" (citation omitted). Moreover, the investigation of individual complaints can lead to the discovery of patterns and practices of unlawful discrimination, which can best be challenged through systemic or class litigation. And precedent-setting judicial decisions, whether in individual or class cases, cause more widespread changes as employers conform their practices to the law voluntarily.

20. See *infra* section IV.

21. See Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1076-78, 1085 (1984) (questioning the justice of settlements through ADR, which may be distorted by inequalities in the parties' resources and bargaining power, and may undermine the duty of judges "to explicate and give force to the values embodied in . . . the Constitution and statutes"); James L. Guill & Edward A. Slavin, Jr., *Rush to Unfairness: The Downside of ADR*, *Judges J.*, Summer 1989, at 8; cf. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 Harv. L. Rev. 668, 679-81 (1986) (expressing concern that ADR not become "a tool for diminishing the judicial development of legal rights for the disadvantaged" and that inexpensive, expeditious, and informal adjudication "is not always synonymous with *fair* and *just* adjudication").

22. See *infra* section IV.

23. See, e.g., Edwards, *supra* note 21, at 680 (suggesting that ADR methods can be appropriately applied to those employment discrimination cases that are "highly fact-bound" and capable of being "resolved by applying established principles of law").

24. Ewing, *supra* note 6, at 3 (the number of nonunion employers having mechanisms for ensuring "employee justice" is "growing by leaps and bounds"). One authority estimates that more than one-third of all nonunionized employees in the United States now have at least one company-run dispute resolution procedure available to them for dealing with any type of complaint; others have procedures limited to certain types of complaints such as discrimination. Singer, *supra* note 7, at 100-01.

25. Ewing, *supra* note 6, at 23.

26. *Id.* at 19.

for their grievances.²⁷ But outlets for their complaints, other than the courts, have been limited. Often EEOC and state fair employment agencies afford the only readily available, relatively cost-free opportunity for independent, third-party investigation and conciliation of an employee's complaint short of litigation. Though all kinds of employment disputes are brought to them, the jurisdiction of these agencies is limited to claims of discrimination. And even when a complaint is cognizable under the antidiscrimination laws, burgeoning case loads at the EEOC and other agencies can cause long delays. Employees may, therefore, prefer alternatives that are less formal, expensive, and adversarial, and more flexible, private, and expeditious.

III. ADR METHODS AND CHOICES

The term "ADR" encompasses a wide range of problem-solving techniques intended to resolve disputes without resort to litigation. ADR can be classified into three types:²⁸ (1) mediation, in which a neutral third party helps the parties reach a mutually acceptable agreement in a confidential proceeding but does not impose a solution;²⁹ (2) arbitration, in which a neutral third party hears arguments, reviews evidence, and then issues a final and binding decision;³⁰ and (3) hybrid procedures, in which, for example, a mediator makes a recommendation to settle, an outside expert renders a nonbinding evaluation of the claim, or the claim goes to a binding decision if mediation does not resolve the dispute (mediation-arbitration). Arbitrators and mediators usually are outside, professional neutrals, but an ADR system also may employ in-house personnel as investigators or members of a "peer review" board.

While often used to avoid costly and time-consuming litigation, ADR processes have other important advantages for employees and employers. ADR contributes to employee morale by enabling managers and employees to develop mutual trust and respect,³¹ by allowing employees to take an active role in settling disputes while preserving ongoing relationships,³² and by giving employees a forum for their complaints before either side becomes too antagonistic or entrenched in a particular position.³³ An effective ADR program

27. *Id.* at 17-23.

28. See Singer, *supra* note 7, at 20-29.

29. For an example of mediation, see discussion of the EEOC's pilot project *infra* at 1554-57.

30. Arbitration is "a private adjudicatory process invoked as an alternative to filing a lawsuit." Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 Ohio St. J. on Disp. Resol. 157, 158-59 (1989).

31. Ewing, *supra* note 6, at 6-7.

32. Singer, *supra* note 7, at 11.

33. McDowell, *supra* note 4, at 20. The availability of an informal means of redress is valuable to both employer and employee in light of the alternatives. If the employee remains quiet and does nothing about the problem, he or she becomes disgruntled and less productive, and a possibly discriminatory or unfair situation goes uncorrected or worsens; if the employee quits, the employer may lose a productive worker; and if the employee seeks redress from external sources such as the

can ensure greater compliance with personnel policies by holding supervisors accountable to an internal review process, and by providing an incentive to deal with complaints at an earlier stage.³⁴ The process gives management better feedback on how its policies and practices affect employees.³⁵

The wide range of ADR methods enables a company to tailor a program to fit its particular needs. Employers have created ongoing, structured internal dispute resolution procedures, making one or more ADR techniques available to all employees or a subgroup such as nonunionized, nonmanagement employees.³⁶ In some companies, employees have the right to complain about any aspect of their employment; in others, the system is limited to such matters as discharge and discipline, or has special procedures for certain types of complaints such as harassment. The focus may be on unfair treatment and violations of company policy, or may include statutory discrimination claims. At many more companies, ADR is used on an ad hoc basis to deal with complaints as they arise or lawsuits after they have been filed. In designing an ADR system, employers should look to their own corporate goals and culture and consider the advantages and disadvantages, as well as the legal parameters, of each option.

Mediation raises few legal concerns because participation is voluntary at every stage of the process and any resolution must be by mutual agreement.³⁷ Mediation is considered particularly well-suited where confidentiality may be important to the complaining party, as in sexual harassment cases, or in situations where preserving the ongoing employment relationship is important.³⁸ Because mediation offers maximum flexibility and focuses on problem-solving, it can lead to innovative solutions that benefit both sides. But mediation lacks finality and therefore may only add another layer to the process without heading off litigation.³⁹ Thus, one variation is for a company to require arbitration by an outside neutral as a final step if mediation is unsuccessful.⁴⁰

In a *peer review system*, a board, typically consisting of three of the complaining employee's "peers" and two members of management, renders final

courts or EEOC, resolution of the problem is delayed and made more costly. *Id.* at 21.

34. Ewing, *supra* note 6, at 8-9.

35. *Id.* at 6-9.

36. See generally Ewing, *supra* note 6 (case studies of 15 companies); Alan F. Westin & Alfred G. Feliu, *Resolving Employment Disputes Without Litigation* (1988) (profiles of ADR programs of 12 organizations).

37. See Westin & Feliu, *supra* note 36, at 291-304 (Center for Public Resources, Inc., Model Procedure for Mediation of Termination and Other Employment Disputes).

38. See Singer, *supra* note 7, at 161.

39. *Id.* at 105 (While most employees opt first for private, nonconfrontational avenues, "[s]ome employees prefer procedures that adjudicate who was right and who was wrong over those that attempt to smooth over differences, particularly in what they consider serious cases of infringement of their rights.").

40. Ewing, *supra* note 6, at 86 (noting that the presence of outside arbitration as a final stage adds credibility to the process and puts pressure on the internal tribunal to render sound decisions, but many employers are reluctant to cede authority to arbitrators, and arbitration adds more time to the process).

or advisory decisions.⁴¹ The availability of such a system generates a high degree of satisfaction among employees, whether or not they actually use it, because it is perceived as fair and not intimidating, and promotes employee participation in management.⁴² The process is particularly quick and inexpensive. Peer review boards are especially competent to decide whether company policy has been consistently applied, as co-workers often are the best judge of whether standards such as absenteeism or productivity have been met. But because they are untrained in statutory rights, they are less qualified to decide issues of discrimination, and some employers exclude such claims from this type of process.⁴³ Though peer review board decisions on employment discrimination complaints cannot be legally preclusive because of the presence of management representatives on the board, employers have found such decisions are often final as a practical matter because employees who lose before a panel of their peers are more willing to accept the decision.

Arbitration has many of the advantages of litigation at a much lower cost.⁴⁴ The proceeding is before a fair and impartial professional arbitrator, mutually chosen by the parties, who has expertise in the law and fact-finding procedures.⁴⁵ Arbitrators can be given authority to provide the full panoply of legal remedies available in court. Employees benefit from access to a more efficient, expeditious, and inexpensive form of justice; employers save litigation costs and avoid the disruptive effects on management of protracted legal proceedings open to the public. Reinstatement may be a more realistic remedy for the employee after a swift arbitral proceeding, and back pay liability will not continue to mount.

But the advantages of arbitration may be its disadvantages too. Because it is a trial-like process, arbitration may exacerbate the adversarial aspects of the parties' relationship. Attorneys usually are involved. The more procedural safeguards that are added, such as discovery rights, the more costly the proceeding becomes. The generally private nature of arbitral proceedings and the

41. *Id.* at 85 (noting that if decisions are advisory in a peer review system, management retains more control, but the system has less credibility with employees).

42. *Id.* at 4 (Employees who use such a procedure "leave with the feeling that, win or lose, they had their day in court"; other employees benefit as well because they "know that an effective grievance procedure is available to be used if necessary.").

43. McDowell, *supra* note 4, at 54. See also Ewing, *supra* note 6, at 97 (A shortcoming of some peer review systems is that grievants cannot attack the validity of company policies.).

44. For a general discussion of the advantages and disadvantages of arbitration from the employer's perspective, see Stuart H. Bompey & Michael P. Pappas, *Is There a Better Way? Compulsory Arbitration of Employment Discrimination Claims after Gilmer*, 19 *Employee Rel. L.J.* 197, 210-12 (1993); James A. King, Jr. et al., *Agreeing to Disagree on EEO Disputes*, 9 *Lab. Lawyer* 97, 101-03 (1993); Thomas J. Piskorski & David B. Ross, *Private Arbitration as the Exclusive Means of Resolving Employment-Related Disputes*, 19 *Employee Rel. L.J.* 205, 209-10 (1993); McDowell, *supra* note 4, at 29-39.

45. See Westin & Feliu, *supra* note 36, at 304-19 (Center for Public Resources, Inc., Model Procedure for Employment Termination Dispute Adjudication).

lack of publicized decisions have made plaintiffs skeptical of the appropriateness of arbitration for public law claims such as discrimination. Moreover, arbitration is limited to resolving the particular dispute at hand, which contributes to the efficiency of the process but adds to the concerns about whether claims of discrimination can be adequately remedied.⁴⁶ Although some employers favor arbitration because of its finality, others are reluctant to give an outsider final authority to resolve disputes.⁴⁷ And, as discussed in the next section, arbitration raises the greatest number of legal concerns precisely because of its assertedly mandatory, binding nature.

IV. ARBITRATION FROM *GARDNER-DENVER* TO *GILMER*

The inclusion of arbitration among the forms of ADR "encouraged" in Section 118 of the Civil Rights Act is significant because arbitration raises unique legal issues. Unlike other forms of ADR, arbitration agreements generally make the process mandatory and the result final and binding. The civil rights laws, on the other hand, are premised on de novo federal court enforcement and contain no requirement that an internal dispute resolution system be utilized or given deference. This tension has been played out, although not definitively resolved, in two divergent lines of Supreme Court decisions and in the passage of Section 118.

A. *Alexander v. Gardner-Denver Co.*

In 1974, the Supreme Court held in *Alexander v. Gardner-Denver Co.*⁴⁸ that an employee who had unsuccessfully arbitrated his grievance under a collective bargaining agreement was not precluded from bringing a Title VII action over the same matter. The Court examined the legislative history, purposes, and procedures of Title VII and found that Congress intended federal courts to have "plenary powers to secure compliance with Title VII."⁴⁹ Therefore, the Court held, a prior arbitral decision does not foreclose an individual's right to sue or divest federal courts of jurisdiction.⁵⁰ Congress, considering the policy against discrimination to be of the "highest priority,"

46. For a discussion of reasons arbitration is unsuitable for discrimination claims, see Wendy S. Tien, Note, *Compulsory Arbitration of ADA Claims: Disabling the Disabled*, 77 Minn. L. Rev. 1443 (1993).

47. See Singer, *supra* note 7, at 101.

48. 415 U.S. 36, 94 S. Ct. 1011 (1974).

49. *Id.* at 45, 94 S. Ct. at 1018. The Court noted that Congress did not give EEOC direct powers of enforcement and gave individuals "a significant role in the enforcement process" via the private right of action. *Id.* "[T]he private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." *Id.*

50. *Id.* at 47, 94 S. Ct. at 1019.

intended to "accord parallel or overlapping remedies" and to provide for "consideration of employment discrimination claims in several forums."⁵¹

Focusing on the special circumstances presented by the collective bargaining context, the Court pronounced contractual and statutory rights "distinctly separate."⁵² Title VII confers *individual* rights that "can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII."⁵³

The Court voiced mistrust of arbitral procedures as "a comparatively inappropriate forum for the final resolution of rights created by Title VII."⁵⁴ The labor arbitrator's role is to interpret and apply the agreement of the parties, not enforce public laws. Arbitrators lack specialized competence in public law and the arbitral fact-finding process is not equivalent to the judicial.⁵⁵ The Court said, however, that the arbitral decision may be "admitted as evidence and accorded such weight as the court deems appropriate"⁵⁶ and, in an often-quoted footnote, added that a court may properly give "great weight" to an arbitral determination that fully considers an employee's Title VII rights, particularly in purely factual cases.⁵⁷ The Court cautioned, though, that "courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims."⁵⁸

The Court's broad pronouncements in *Gardner-Denver* led most courts and commentators to believe the holding applied to *any* employer-employee agreement to arbitrate discrimination claims, not just those in collective bargaining agreements. Neither an agreement to submit disputes to compulsory arbitration nor a final arbitral decision could foreclose a *de novo* federal court action; arbitration and litigation were considered supplementary rather than mutually exclusive.⁵⁹ Critics of *Gardner-Denver*, however, continued to press

51. *Id.*

52. *Id.* at 50, 94 S. Ct. at 1020.

53. *Id.* at 51, 94 S. Ct. at 1021.

54. *Id.* at 56, 94 S. Ct. at 1024.

55. *Id.* at 57-58, 94 S. Ct. at 1024.

56. *Id.* at 60, 94 S. Ct. at 1025.

57. *Id.* at 60 n.21, 94 S. Ct. at 1025 n.21.

58. *Id.* The Court applied the same principles in three subsequent decisions involving collective bargaining agreements. See *Atchison, T. & S.F. Ry. Co. v. Buell*, 480 U.S. 557, 107 S. Ct. 1410 (1987) (Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988)); *McDonald v. City of W. Branch*, 466 U.S. 284, 104 S. Ct. 1799 (1984) (Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988)); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 101 S. Ct. 1437 (1981) (Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1988 & Supp. IV 1992)).

59. See, e.g., Ralph H. Baxter, Jr. & Evelyn M. Hunt, *Alternative Dispute Resolution: Arbitration of Employment Claims*, 15 Employee Rel. L.J. 187, 195 (1989); Barbara L. Schlei & Paul Grossman, *Employment Discrimination Law* 1084 (2d ed. 1983); EEOC Policy Guidance: *The Processing of Charges Where There is a Collective Bargaining Agreement or an Individual Employment Contract Requiring the Arbitration of Age-Discrimination-Related Issues*, 3 EEOC Compl. Man. (BNA) N:1321 (Aug. 29, 1990). The *Gardner-Denver* Court said that "Title VII was

the argument that it was unfair to give the employee "two strings to his bow when the employer has only one" (in the words of the district court)⁶⁰ and that incentives to use the more efficient and expeditious process of arbitration would be greatly diminished, if not eliminated entirely, by the lack of binding effect on the employee.⁶¹

B. *Gilmer v. Interstate/Johnson Lane Corp.*

In the years after *Gardner-Denver*, parties became more interested in arbitrating their discrimination claims in order to avoid the expense and delay of ever-more crowded court dockets.⁶² Beginning in the late 1980s, a number of courts held that *individual* agreements to arbitrate discrimination claims could be enforced.⁶³ These courts recognized that procedural protections in arbitration had improved since *Gardner-Denver*.⁶⁴ But other courts continued to use *Gardner-Denver* to find discrimination claims per se not subject to compulsory arbitration.⁶⁵ This split in the circuits was resolved, albeit to a somewhat limited extent, by the Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*⁶⁶ Without overruling *Gardner-Denver*, the Court distinguished its 1974 decision as limited to the context of collective bargaining.

When Mr. Gilmer, a securities representative, was terminated at age sixty-two, he brought suit alleging a violation of the ADEA. His employer, Interstate, moved to compel arbitration because Mr. Gilmer had signed a registration

designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." 415 U.S. at 48-49, 94 S. Ct. at 1020.

60. *Alexander v. Gardner-Denver Co.*, 346 F. Supp. 1012, 1019 (D. Colo. 1971). To this, the Supreme Court replied that an employer does not have "two strings to his bow" "for the simple reason that Title VII does not provide employers with a cause of action against employees," whereas the employee is "asserting a statutory right independent of the arbitration process." *Gardner-Denver*, 415 U.S. at 54, 94 S. Ct. at 1022-23.

61. Schlei & Grossman, *supra* note 59, at 1085.

62. See Plass, *supra* note 7, at 788; Note, *Agreements to Arbitrate Claims Under the Age Discrimination in Employment Act*, 104 Harv. L. Rev. 568, 568 (1990).

63. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990); *Pierce v. Shearson Lehman Hutton, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 1882 (N.D. Ill. 1990); *Garfield v. Thomson McKinnon Sec., Inc.*, 731 F. Supp. 841 (N.D. Ill. 1988).

64. After *Gardner-Denver*, the American Arbitration Association revised its rules to enhance procedural protections. Plass, *supra* note 7, at 788 (quoting Robert Coulson, *Fair Treatment: Voluntary Arbitration of Employee Claims*, 33 Arb. J. No. 3, 23 (1978)).

65. See, e.g., *Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104 (5th Cir. 1990); *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989), *cert. denied*, 493 U.S. 1045, 110 S. Ct. 842 (1990); *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221 (3d Cir. 1989); *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, 493 U.S. 848, 110 S. Ct. 143 (1989); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544 (10th Cir. 1988); *Johnson v. University of Wisconsin-Milwaukee*, 783 F.2d 59 (7th Cir. 1986); *Jones v. Baskin, Flaherty, Elliot & Mannino, P.C.*, 670 F. Supp. 597 (W.D. Pa. 1987); *Steck v. Smith Barney, Harris Upham & Co.*, 661 F. Supp. 543 (D.N.J. 1987).

66. 111 S. Ct. 1647 (1991).

application with the New York Stock Exchange (NYSE) containing an agreement to arbitrate with his employer any dispute that might arise concerning his employment.⁶⁷ The district court denied the motion based on *Gardner-Denver*, concluding that "Congress intended to protect ADEA claimants from the waiver of a judicial forum,"⁶⁸ but the Fourth Circuit reversed, finding that the ADEA did not preclude enforcement of arbitration agreements. The Supreme Court affirmed in a 7-2 decision, holding Mr. Gilmer had to arbitrate his ADEA claim.

The centerpiece of the Court's opinion is the Federal Arbitration Act,⁶⁹ which was enacted in 1925 but not addressed in *Gardner-Denver*. The FAA declares arbitration agreements generally "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."⁷⁰ The Act's "purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."⁷¹

Starting in the mid-1980s, the Court had begun to interpret the 1925 Act "as a broad mandate to enforce agreements to arbitrate not only contractual but also statutory claims" involving rights of importance not only to the litigants but also to the public at large.⁷² After issuing several decisions upholding compulsory arbitration of statutory claims in the commercial context,⁷³ the Court in *Gilmer* for the first time extended the FAA mandate to statutory civil rights claims. The *Gilmer* Court distinguished the *Gardner-Denver* line of cases as involving not the enforceability of an arbitration agreement but "the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims."⁷⁴ Those cases were based on the tension

67. Mr. Gilmer had been required for his employment to register as a securities representative with the NYSE. The NYSE application stated that he agreed to arbitrate with his employer "any dispute, claim or controversy" required to be arbitrated under NYSE rules. One such rule provided for arbitration of disputes arising out of his employment or termination of employment. *Id.* at 1650-51.

68. *Id.* at 1651 (quoting district court opinion).

69. 9 U.S.C. §§ 1-15 (1988 & Supp. IV 1992).

70. 9 U.S.C. § 2 (1988). The Act provides for court orders compelling arbitration and stays of court proceedings pending arbitration. 9 U.S.C. §§ 3-4 (1988).

71. *Gilmer*, 111 S. Ct. at 1651 (citations omitted).

72. Note, *supra* note 62, at 568, 570.

73. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917 (1989) (Securities Act of 1933, 15 U.S.C. §§ 77a-77bbb (1988 & Supp. IV 1992)); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332 (1987) (alleging violations of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78l (1988 & Supp. IV 1992), and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1988 & Supp. IV 1992)); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346 (1985) (antitrust claim under the Sherman Act, 15 U.S.C. §§ 1-7 (1988 & Supp. IV 1992)).

74. *Gilmer*, 111 S. Ct. at 1657.

between collective representation by a union and individual statutory rights, and were not decided under the FAA.⁷⁵

In *Gilmer*, the Court underscored the FAA's "liberal federal policy favoring arbitration agreements."⁷⁶ This policy "guarantee[s] the enforcement of private contractual arrangements"⁷⁷ and applies equally when statutory rights are at issue, since, the Court reasoned, "[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."⁷⁸

The Court said, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue,"⁷⁹ either in the statute's text or legislative history or in an "inherent conflict" between arbitration and the statute's underlying purposes.⁸⁰ The Court saw no conflict between arbitration, which focuses solely on individual grievances, and the important social policies of the ADEA: "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."⁸¹ Nor would arbitration impair EEOC's enforcement role, the Court said. EEOC has independent authority to investigate age discrimination, and an individual subject to an arbitration agreement is still free to file a charge, although not a lawsuit.⁸² To Mr. Gilmer's argument that compulsory arbitration improperly deprives claimants of the judicial forum provided for by the ADEA, the Court pointed out that Congress did not "explicitly preclude arbitration or other nonjudicial resolution of claims, even in its recent amendments to the ADEA."⁸³

The Court also rejected Mr. Gilmer's attack on the adequacy of arbitral procedures as "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."⁸⁴ The more limited

75. *Id.*

76. *Id.* at 1651 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983)).

77. *Mitsubishi*, 473 U.S. at 625, 105 S. Ct. at 3353.

78. *Gilmer*, 111 S. Ct. at 1652 (quoting *Mitsubishi*, 473 U.S. at 628, 105 S. Ct. at 3354).

79. *Id.* at 1652 (quoting *Mitsubishi*, 473 U.S. at 628, 105 S. Ct. at 3354-55). The burden of showing such congressional intent is on the party seeking to avoid the arbitration agreement. *Id.*

80. *Id.* (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227, 107 S. Ct. 2332, 2337 (1987)).

81. *Id.* at 1653 (quoting *Mitsubishi*, 473 U.S. at 637, 105 S. Ct. at 3359).

82. *Id.*

83. *Id.* at 1653-54. The Court was referring to the Older Workers Benefit Protection Act of 1990, Pub. L. 101-433, 104 Stat. 978 (codified at 29 U.S.C. §§ 621 note, 623, 626, 630 (Supp. IV 1992)), which sets forth the terms under which individuals may waive their ADEA rights. The Court noted that the ADEA provides a "flexible approach to resolution of claims" through out-of-court methods such as conciliation by EEOC and through concurrent state court jurisdiction. *Gilmer*, 111 S. Ct. at 1654. The Court also noted that Congress did not intend that EEOC be involved in all employment disputes, which can be settled without EEOC involvement. *Id.* at 1653.

84. *Id.* at 1654 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477,

discovery available under the NYSE rules would not deprive claimants of "a fair opportunity" to prove discrimination, the Court said, particularly since arbitrators are not bound by the rules of evidence.⁸⁵ Although arbitral discovery procedures "might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'"⁸⁶

Mr. Gilmer had maintained that since arbitrators often will not issue written decisions, arbitration will result "in a lack of public knowledge of employers' discriminatory policies, an inability to obtain effective appellate review, and a stifling of the development of the law."⁸⁷ But the Court noted that the NYSE rules required written arbitration awards, available to the public, and that judicial development of ADEA law would continue because "it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements."⁸⁸ Furthermore, arbitrators under the NYSE rules have the power to award equitable relief and conduct collective actions.⁸⁹ Mr. Gilmer's contention that the unequal bargaining power between employers and employees should render arbitration agreements unenforceable also was unavailing, since there was no indication Mr. Gilmer had been coerced or defrauded into agreeing to the arbitration clause.⁹⁰

C. Unresolved Issues

Gilmer left many questions unanswered. The majority had declined to address the scope of the FAA's Section 1 exemption for "contracts of employment."⁹¹ The dissent argued that Section 1 exempted Mr. Gilmer's NYSE

481, 109 S. Ct. 1917, 1920 (1989)).

85. *Id.* at 1655.

86. *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 3354 (1985)).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 1655-56. Although "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context," the Court said, "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" *Id.* (quoting *Mitsubishi*, 473 U.S. at 627, 105 S. Ct. at 3354).

91. *Id.* at 1651 n.2. Section 1 of the FAA provides: "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1988). The majority declined to address this issue because Mr. Gilmer had not raised section 1 in the lower courts and, in any case, the arbitration clause was contained not in a contract of employment but rather in Mr. Gilmer's securities registration application, a contract with the securities exchange. Lower courts following *Gilmer* have unanimously held that an arbitration agreement contained in a securities registration application is not a contract of employment and thus is not excluded by section 1. *See, e.g., Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229,

registration application from mandatory arbitration because the section covers "any agreements by the employee to arbitrate disputes with the employer arising out of the employment relationship, particularly where such agreements to arbitrate are conditions of employment."⁹² The lower courts are divided on the meaning of Section 1's ambiguous language. Some have interpreted it narrowly to exclude only employees actually engaged in the physical movement of goods in interstate commerce, i.e., in the transportation industries,⁹³ but others have read it as broadly as the dissent in *Gilmer* did.⁹⁴ No doubt the Supreme Court or Congress will revisit this issue since no sound rationale is apparent for varying the rules on arbitration of civil rights claims depending on the industry in which the plaintiff works.

Does *Gilmer* apply to civil rights statutes other than the ADEA? Lower courts consistently have extended *Gilmer* to claims under Title VII and other employment statutes, although most such cases so far have involved securities industry registration agreements as in *Gilmer*.⁹⁵ Because the ADEA and Title

230 n.1 (5th Cir. 1991); *Lockhart v. A.G. Edwards & Sons, Inc.*, Civ. A. No. 93-2418-GTV, 1994 WL 34870 (D. Kan. Jan. 25, 1994); *Scott v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 89 Civ. 3749 (MJL), 1992 WL 245506 (S.D.N.Y. Sept. 14, 1992).

92. *Gilmer*, 111 S. Ct. at 1659 (Stevens, J., dissenting).

93. See, e.g., *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159 (7th Cir. 1984), cert. denied, 469 U.S. 1160, 105 S. Ct. 912 (1985); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972); *Dickstein v. duPont*, 443 F.2d 783 (1st Cir. 1971); *Tenney Eng'g, Inc. v. United Elec., Radio & Mach. Workers*, 207 F.2d 450 (3d Cir. 1953) (en banc).

For post-*Gilmer* cases involving employment, see *Scott v. Farm Family Life Ins. Co.*, 827 F. Supp. 76 (D. Mass. 1993) (Section 1 does not exempt a Title VII plaintiff's contract as an insurance sales agent with defendant, since the plaintiff was not engaged in the transportation industry); *Hull v. NCR Corp.*, 826 F. Supp. 303, 306 (E.D. Mo. 1993) (plaintiff's employment contract held not within the scope of the Section 1 exemption because the plaintiff was not a seaman, railroad worker, or employee actually engaged in the movement of interstate commerce); *Williams v. Katten, Muchen & Zavis*, 63 Fair Empl. Prac. Cas. (BNA) 792 (N.D. Ill. 1993) (law firm partnership agreement, although an employment contract, is not excluded by Section 1 because the plaintiff was not in the transportation industry).

94. See, e.g., *United Food & Commercial Workers v. Safeway Stores, Inc.*, 889 F.2d 940 (10th Cir. 1989); *Herring v. Delta Air Lines, Inc.*, 894 F.2d 1020 (9th Cir.), cert. denied, 494 U.S. 1016, 110 S. Ct. 1319 (1990); *United Elec., Radio, & Mach. Workers v. Miller Metal Prods., Inc.*, 215 F.2d 221 (4th Cir. 1954).

In *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991), the EEOC argued as amicus curiae for this broad interpretation of the Section 1 exemption. The Sixth Circuit agreed in dicta but held the contract at issue was a securities registration agreement like in *Gilmer*, not an employment contract. *Id.* at 311-12.

95. See, e.g., *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992) (Title VII claim; arbitration agreement contained in a securities registration application); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 n.1 (5th Cir. 1991) (same); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991) (same); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992) (Title VII claim; arbitration agreement contained in an employment application); *Saari v. Smith Barney, Harris Upham & Co.*, 968 F.2d 877 (9th Cir.), cert. denied, 113 S. Ct. 494 (1992) (claim under Employee Polygraph Protection Act, 29 U.S.C. §§ 2001-09 (1988), subject to mandatory arbitration pursuant to a securities registration application); *Williams v. Katten, Muchen & Zavis*, 63

VII are similar statutes, both enforced by the EEOC, these courts have found in Title VII no evidence of congressional intent to preclude arbitration.⁹⁶

What standards must be met to ensure the fairness and adequacy of the arbitral process? *Gilmer* makes clear that an agreement to arbitrate must be entered into knowingly and voluntarily, without fraud or coercion, as judged on a case-by-case basis. The Court, however, did not set forth standards for determining whether an agreement to arbitrate is entered into knowingly and voluntarily.⁹⁷ It did not discuss whether an arbitration agreement that is a mandatory condition of employment can be considered voluntary, or what consideration for an agreement is adequate.⁹⁸ The Court did refer to the Older Workers Benefit Protection Act of 1990, which establishes standards for determining whether a waiver of ADEA rights is knowing and voluntary.⁹⁹ Because the OWBPA went into effect after Mr. Gilmer's claim, the Court did not address its impact on arbitration agreements. Thus, it is an open question whether the OWBPA standards, which were enacted due to concerns over

Fair Empl. Prac. Cas. (BNA) 792 (N.D. Ill. 1993) (claims under Title VII and 42 U.S.C. § 1981 (1988 & Supp. IV 1992) arbitrable pursuant to a law firm partnership agreement); *Hull v. NCR Corp.*, 826 F. Supp. 303, 306 (E.D. Mo. 1993) (Title VII and ADEA claims; arbitration agreement in employment contract); *Scott v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 89 Civ. 3749 (MJL), 1992 WL 245506 (S.D.N.Y. Sept. 14, 1992) (claims under Title VII and 42 U.S.C. § 1981 subject to arbitration under a securities registration application); *Lockhart v. A.G. Edwards & Sons, Inc.*, Civ. A. No. 93-2418-GTV, 1994 WL 34870 (D. Kan. Jan. 25, 1994) (Title VII and state law claims; securities registration agreement).

A number of commentators, however, have argued against applying *Gilmer* to other statutes. See Tien, *supra* note 46 (arguing compulsory arbitration of ADA claims is inconsistent with the ADA's policies); Mark D. Klimek, Note, *Discrimination Claims Under Title VII: Where Mandatory Arbitration Goes Too Far*, 8 Ohio St. J. on Disp. Resol. 425 (1993) (Title VII claims should not be precluded by arbitration); Jenifer A. Magyar, Note, *Statutory Civil Rights Claims in Arbitration: Analysis of Gilmer v. Interstate/Johnson Lane Corp.*, 72 B.U. L. Rev. 641, 655 (1992) (civil rights cases should not be subject to compulsory arbitration).

96. Some courts also have relied on Section 118 of the Civil Rights Act of 1991. See *infra* text accompanying notes 113-118.

97. Some commentators maintain that the Court's language suggests it intended that a common-law standard should apply. See *King et al.*, *supra* note 44, at 119-20. Accordingly, they argue, arbitration agreements should be binding except in cases of fraud or unlawful coercion. *Id.* at 120.

98. Compare *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992) (remanding Title VII claim for determination if arbitration contract should be voided as a contract of adhesion) with *Lockhart v. A.G. Edwards & Sons, Inc.*, Civ. A. No. 93-2418-GTV, 1994 WL 34870 (D. Kan. Jan. 25, 1994) (securities registration agreement containing an arbitration clause is neither unconscionable nor a contract of adhesion, even though the plaintiff argued she had no choice but to sign the agreement in order to be registered with the NYSE). See *Spelfogel*, *supra* note 17, at 262-63 (maintaining that as to newly hired employees, requiring mandatory arbitration as a condition of employment would clearly be supported by consideration; as to current employees, consideration for a newly instituted arbitration requirement may be a promotion, raise, or benefit increase, or the benefits to the employee of arbitral procedures combined with the employer's waiver of the right to a jury trial).

99. *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1653 n.3 (1991). See 29 U.S.C. § 626 (Supp. IV 1992) (OWBPA standards). See also *supra* note 83.

waivers of substantive ADEA rights, apply to waivers of procedural ADEA rights, in particular the right to a judicial forum.¹⁰⁰

The extent of discovery that must be provided to give claimants "a fair opportunity to present their claims"¹⁰¹ was not specified in *Gilmer*. The Court approved of the NYSE procedures, which provided for protections against biased arbitrators, discovery (including document production, information requests, depositions, and subpoenas), and written opinions available to the public.¹⁰² Plaintiffs traditionally have considered broad discovery critical to proving a discrimination claim. By examining the employer's treatment of similarly situated employees, discovery may enable the plaintiff to show pretext or uncover a broader pattern of discrimination. But the more extensive the discovery, the more arbitration becomes indistinguishable from litigation.

Gilmer also left important relief questions unanswered. The Court rejected Mr. Gilmer's argument that arbitration procedures cannot adequately further the ADEA's purposes because they do not provide for broad equitable relief and class actions. Arbitrators "do have the power to fashion equitable relief," the Court said, noting that the NYSE rules "do not restrict the types of relief an arbitrator may award."¹⁰³ As the Fourth Circuit had found, the arbitrator had authority to award essentially the same individual relief obtainable through court enforcement under the ADEA, including equitable relief such as reinstatement or promotion.¹⁰⁴

The *Gilmer* decision thus appears premised on the availability in the arbitral process of the same substantive rights and remedies—at least on an individual basis—that are available in court.¹⁰⁵ The Court intimated, however, that the inability to provide class relief would not necessarily invalidate the arbitral

100. With respect to the OWBPA standards, an argument can be made based on the legislative history that they encompass the "totality of the circumstances" test employed by some courts for evaluating waivers pre-OWBPA. S. Rep. No. 263, 101st Cong., 2d Sess. 31-34 (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1537-40. Under this test, the courts look at the complete circumstances surrounding the execution of a waiver, such as the plaintiff's education and business experience, the amount of time for deliberation before signing, and whether the plaintiff knew or should have known of his or her rights, had the opportunity to negotiate the terms of the waiver, and had benefit of counsel. *Cirillo v. Arco Chem. Co.*, 862 F.2d 448, 451 (3d Cir. 1988). Some commentators have asserted that if courts applied the "totality of the circumstances" test to ADEA waivers of the right to a judicial forum, the courts would invalidate a greater number of arbitration agreements, and employers would be less willing to use such agreements due to the unpredictability of their application. King et al., *supra* note 44, at 119. Moreover, they argue, *Gilmer* favored the common-law test rather than the "totality of the circumstances" test, regardless of the statute at issue. See *supra* note 97.

101. *Gilmer*, 111 S. Ct. at 1655.

102. *Id.* at 1654-55.

103. *Id.*

104. *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 199 (4th Cir. 1990).

105. *Gilmer*, 111 S. Ct. at 1652 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute.") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 3354 (1985)).

process.¹⁰⁶ The Civil Rights Act of 1991 added compensatory and punitive damages to the remedies available in Title VII and ADA cases. (It did not amend the ADEA with respect to relief.) Most commentators and employer representatives have agreed that, to enhance the likelihood an arbitral award will be given preclusive effect, arbitrators should have authority to award full individual relief, including compensatory and punitive damages.¹⁰⁷

What is the extent of judicial review available for arbitral decisions? *Gilmer* technically involved only the issue of whether an arbitration agreement could be enforced to require a party to go through the arbitral process; the Court did not directly hold the ensuing arbitral decision to be final and preclusive.¹⁰⁸ But many statements in the Court's opinion indicate the Court assumed it was final.¹⁰⁹ If so, the grounds for judicial review of arbitral awards are limited.¹¹⁰

106. *Id.* at 1655 (Even if class relief could not be granted by the arbitrator, "the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.") (quoting *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting)).

107. See *Bompey & Pappas*, *supra* note 44, at 209; *Piskorski & Ross*, *supra* note 44, at 216; *King et al.*, *supra* note 44, at 124; *Spelfogel*, *supra* note 17, at 264.

108. See *Piskorski & Ross*, *supra* note 44, at 216 & n.25. In *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161 (5th Cir. 1992), the court, after having earlier found the plaintiff's Title VII claims subject to mandatory arbitration pursuant to a securities registration application (see *supra* note 91), upheld the district court's dismissal of the claims with prejudice. The court reasoned that since all of the issues in the case must be submitted to arbitration, it would serve no purpose to retain jurisdiction when any post-arbitration relief sought by the parties would not entail adjudication of the merits of the controversy. *Id.* at 1164. See also Note, *supra* note 62, at 579 (Although the issues of enforceability and preclusion are formally distinct, "they are fundamentally the same; to enforce an agreement to arbitrate *ex ante* but deny it preclusive effect *ex post* would 'run counter to the historical preference for finality manifested in the FAA.'") (quoting *Speidel*, *supra* note 30, at 203-04).

109. See, e.g., 111 S. Ct. at 1652 ("[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") (quoting *Mitsubishi*, 473 U.S. at 628, 105 S. Ct. at 2354).

110. Section 10 of the FAA provides that a district court may vacate an arbitrator's award on grounds of corruption, fraud, partiality, or misconduct, or if the arbitrator exceeded his powers. 9 U.S.C. § 10 (Supp. IV 1992). Errors of fact or law are not grounds for reversal. The *Gilmer* Court noted that although judicial review of arbitration awards is limited, "'such review is sufficient to ensure that arbitrators comply with the requirements of the statute' at issue." *Gilmer*, 111 S. Ct. at 1655 n.4 (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232, 107 S. Ct. 2332, 2340 (1987)). Similarly, labor arbitration awards are subject to very limited judicial review. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 108 S. Ct. 364 (1987). However, a court may refuse to enforce an arbitrator's award under a collective bargaining agreement if the award is contrary to well-defined, dominant public policy. *Id.* at 42-43, 108 S. Ct. at 373-74. Accordingly, courts have vacated arbitration awards that order the reinstatement of individuals discharged for sexual harassment, since there is an explicit public policy against sexual harassment. See, e.g., *Stroehmann Bakeries, Inc. v. Local 776, Int'l Brotherhood of Teamsters*, 969 F.2d 1436 (3d Cir. 1992); *Newsday, Inc. v. Long Island Typographical Union*, No. 915, 915 F.2d 840 (2d Cir. 1990). But see *Chrysler Motors Corp. v. Int'l Union, Allied Indus. Workers of America*, 959 F.2d 685 (7th Cir.), *cert. denied*, 113 S. Ct. 304 (1992); *Communication Workers of America v. Southeastern Elec.*

Finally, the Court made clear that an individual subject to an arbitration agreement is still free to file an EEOC charge, and that arbitration agreements "will not preclude the EEOC from bringing actions seeking class-wide and equitable relief."¹¹¹ Thus, EEOC has authority to investigate and conciliate the charge and file suit if conciliation fails. *Gilmer* was, however, silent on the scope of relief EEOC may seek. Based on the well-established principle that EEOC enforcement actions vindicate the broader public interest in eradicating employment discrimination, the EEOC has long maintained that preclusion doctrines generally do not bar Commission litigation for injunctive relief or other relief necessary to vindicate the public interest.¹¹²

D. Section 118 of the Civil Rights Act of 1991

The Civil Rights Act of 1991,¹¹³ although enacted shortly after *Gilmer*, did not resolve any of these questions. The legislation lists "arbitration" among the forms of ADR "encouraged" in Section 118, all qualified by the proviso, "where appropriate and to the extent authorized by law."¹¹⁴ As with other difficult issues in this bill on which consensus could not be reached, Congress has handed the issue to the courts. Not surprisingly, the inconclusive legislative history offers something to both sides.¹¹⁵ A number of lower courts have relied on the language of Section 118, which "expressly approves and encourages arbitration as a method of enforcing rights under Title VII,"¹¹⁶ as further evidence of congressional intent not to preclude arbitration of Title VII claims.¹¹⁷ Thus,

Cooperative, 882 F.2d 467 (10th Cir. 1989).

Even if an arbitral award is not deemed preclusive, it would certainly be entitled to "appropriate weight" under *Gardner-Denver*. See *supra* at 1541 and *infra* at 1552 & note 133.

111. *Gilmer*, 111 S. Ct. at 1655.

112. In a post-*Gilmer* case, the EEOC has filed an ADEA suit on behalf of a class of employees, some of whom had signed securities industry arbitration agreements and proceeded through arbitration. EEOC v. Kidder, Peabody & Co., No. 92 Civ. 9243 (S.D.N.Y., filed Dec. 23, 1992).

113. Pub. L. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

114. 42 U.S.C. § 1981 note (Supp. IV 1992).

115. Compare H.R. Rep. No. 40, 102d Cong., 1st Sess. 97 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 635 (ADR is intended to supplement, not supplant, the remedies provided by Title VII; thus, arbitration would have no preclusive effect "whether in the context of a collective bargaining agreement or in an employment contract.") with 137 Cong. Rec. S15478 (daily ed. Oct. 30, 1991) ("In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums.") (citing *Gilmer*) (statement of Sen. Dole and Rep. Hyde).

116. *Williams v. Katten, Muchen & Zavis*, 63 Fair Empl. Prac. Cas. (BNA) 792, 797 (N.D. Ill. 1993).

117. *Williams*, 63 Fair Empl. Prac. Cas. (BNA) at 797; *Scott v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 89 Civ. 3749 (MJL), 1992 WL 245506 (S.D.N.Y. Sept. 14, 1992); *Lockhart v. A.G. Edwards & Sons, Inc.*, Civ. A. No. 93-2418-GTV, 1994 WL 34870 (D. Kan. Jan. 25, 1994) (rejecting plaintiff's reliance on the legislative history since the plain language of the statute specifically endorses arbitration); *Fletcher v. Kidder, Peabody & Co., Inc.*, 619 N.E.2d 998 (N.Y.),

neither the Civil Rights Act of 1991 nor *Gilmer* resolved the serious questions with respect to the use of arbitration in employment discrimination disputes. But the more the lower courts expand the *Gilmer* decision, the more likely Congress will revisit the arbitration question.¹¹⁸

E. Arbitration Alternatives

The ongoing debate over the appropriateness of arbitration reflects important competing concerns. The clear trend in the Supreme Court has been to stress the benefits of arbitration and the value of giving disputants freedom to choose the forum they believe best suited for their claims. In tension with this are concepts long deemed fundamental by many in the civil rights arena, that the resolution of discrimination claims is a matter of public importance to be reserved for a public forum, and that employees with unequal bargaining power should be protected from overreaching employers, who are perceived as having the upper hand in arbitration. Questions have been raised whether it is possible for an individual to waive a procedural right "knowingly" before any substantive dispute has occurred, or to agree to arbitration "voluntarily" as a condition of employment or promotion.

Until Congress or the Court speaks again, employers seeking to avoid legal challenge while still realizing many of arbitration's benefits might consider voluntary or non-binding forms of arbitration. For example, an agreement to arbitrate a particular dispute, entered into after the dispute has arisen, would be more likely to be enforced than an agreement required as a condition of employment.¹¹⁹ Alternatively, agreements to arbitrate as a condition of employment

cert. denied, 114 S. Ct. 554 (1993). Nonetheless, in a case pending on appeal to the Ninth Circuit, plaintiffs contend that Section 118 and its legislative history establish congressional intent to overturn the *Gilmer* holding. *Lai v. Prudential Ins., Inc.*, No. 92-55902 (C.D. Cal. filed June, 1992) (discussed in McDowell, *supra* note 4, at 89-90).

118. Indeed, opposition to the *Gilmer* decision and binding arbitration in general already has arisen in Congress. In March, 1994, Sen. Feingold introduced legislation entitled the "Protection from Coercive Employment Agreements Act," S. 2012, 103d Cong., 2d Sess. § 2 (1994), that would make it an unlawful employment practice under Title VII to: "(1) fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because the individual refuses to submit any claim under this title to mandatory arbitration; or (2) make the submission of such claim to mandatory arbitration a condition of the hiring, continued employment, or compensation, or a term, condition, or privilege of employment, of the individual." The bill would similarly amend the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, and 42 U.S.C. 1981.

119. The legislative history of Section 118 of the 1991 Civil Rights Act includes a statement by Rep. Edwards that, while expressing disapproval of *Gilmer*, endorses post-dispute arbitration. 137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991) ("This section contemplates the use of voluntary arbitration to resolve specific disputes after they have arisen, not coercive attempts to force employees in advance to forego statutory rights."). The legislative history is unclear, however, as to whether such "voluntary arbitration" agreements could preclude the right to go to court. See also Tien, *supra* note 46, at 1472-73 (advocating post-dispute agreements, either to submit a claim to final and binding

can make the process optional as to discrimination claims. Or, if submission of a claim to arbitration is mandatory (as in *Gilmer*),¹²⁰ the result can be made non-binding on the employee as to discrimination claims, so that the employee retains the right to go to court (as in *Gardner-Denver*).¹²¹

These variations, although a departure from traditional arbitration as favored by employers, still offer many of its advantages.¹²² As with other forms of ADR, voluntary or non-binding arbitration may still achieve finality as a practical if not legal matter. It will resolve a certain percentage of complaints to the parties' mutual satisfaction, and even when it does not preclude resort to the courts, a well-founded arbitral decision will be given "great weight" under *Gardner-Denver*.¹²³

V. ADR AND THE EEOC'S PROCESSES

Section 118 of the Civil Rights Act encourages a wide range of types of ADR in addition to arbitration, such as settlement negotiations, conciliation, facilitation, mediation, factfinding, and minitrials. In exploring all of these options, companies should keep in mind the legal limits affecting ADR processes. While employers might prefer that ADR processes be exclusive and final, federal employment discrimination statutes protect individuals' access to the EEOC.¹²⁴ Despite these restraints, ADR techniques can bring considerable benefits to employers and employees.

The EEOC in *EEOC v. Board of Governors of State Colleges and Universities of Illinois*¹²⁵ challenged the legality of a collective bargaining agreement provision that denied employees their right to a grievance proceeding whenever the employee filed a charge or lawsuit. The EEOC contended that the provision violated Section 4(d) of the ADEA, which forbids discrimination against employees who have filed a charge, complaint, or lawsuit. The Seventh Circuit first noted that in determining whether a retaliatory policy violates the

arbitration, with a waiver of judicial resolution no matter what the outcome; or to submit to non-binding arbitration producing an award to which the employee has the option to consent, thus settling the claim and waiving the right to go to court); Coulson, *supra* note 64, at 26-27 (model agreement for submission of an existing dispute to arbitration under the rules of the American Arbitration Association).

120. 111 S. Ct. 1647 (1991).

121. 415 U.S. 36, 94 S. Ct. 1011 (1974).

122. See Tien, *supra* note 46, at 1474-75.

123. See *supra* text accompanying note 57.

124. See the antiretaliation provisions in Title VII, 42 U.S.C. § 2000e-3(a) (1988); ADEA, 29 U.S.C. § 623(d) (1988); ADA, 42 U.S.C. § 12203 (Supp. IV 1992). See also *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1653 (1991) ("An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC . . ."); OWBPA, 29 U.S.C. § 629(f)(4) (Supp. IV 1992) ("No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.").

125. 957 F.2d 424 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 299 (1993).

ADEA, it is "immaterial that an employee might have overlapping contractual and legal remedies" and "irrelevant" that the employer was acting in good faith.¹²⁶ It concluded that a retaliatory policy constitutes a per se violation of Section 4(d).¹²⁷ The court next looked at whether this particular collective bargaining agreement was retaliatory. The court found that it was, stating that a "collective bargaining agreement may not provide that grievances will proceed to arbitration only if the employee refrains from participating in protected activity under the ADEA."¹²⁸

In a subsequent case, *EEOC v. General Motors Corp.*,¹²⁹ the company deferred the access of nonunion, salaried employees to an internal complaint resolution procedure once the employees filed discrimination charges with the EEOC. The company argued that, unlike *Board of Governors*, its denial of the proceeding was not stripping an employee of a benefit because it retained control over whether and to what extent the complaint should be remedied, regardless of whether or not the employee complained to the EEOC.¹³⁰ The court disagreed, finding that the "open door" policy was a privilege, and that under *Board of Governors*, stripping an employee of that privilege was a per se violation of Title VII and the ADEA.¹³¹

These cases pose a problem for companies who argue that there is less incentive for them to institute their own ADR procedures when the employee can proceed simultaneously with the EEOC.¹³² But even if the use of ADR does not preclude filing with the EEOC, the use of an internal procedure can, as a practical matter, enhance the company's position before the Commission and the courts,¹³³ as well as with its employees.¹³⁴

Language in the Supreme Court's landmark sexual harassment case of *Meritor Savings Bank, FSB v. Vinson*¹³⁵ supports the view that companies with effective internal grievance procedures will have a stronger position in court. The Court noted that the facts involving the company's grievance procedure and policy against discrimination, although "not necessarily dispositive," were "plainly relevant" in determining the employer's liability for sexual harassment.¹³⁶

126. *Id.* at 428.

127. *Id.* at 429.

128. *Id.* at 431.

129. 61 Fair Empl. Prac. Cas. (BNA) 1657, 1658 (N.D. Ill. 1993).

130. *Id.* at 1659-60.

131. *Id.* at 1660.

132. See McDowell, *supra* note 4, at 85. See also *supra* note 125.

133. See *Alexander v. Gardner-Denver*, 415 U.S. 36, 60 n.21, 94 S. Ct. 1011, 1025 n.21 (1974) ("Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight."). See also Westin & Feliu, *supra* note 36, at 267-68.

134. See Westin & Feliu, *supra* note 36, at 224.

135. 477 U.S. 71, 106 S. Ct. 2399 (1986).

136. *Id.* at 72, 106 S. Ct. at 2406. In a concurring opinion, Justice Marshall noted that an effective internal complaint procedure would not affect the employer's liability, but could affect the

At the administrative level as well, the employer's internal complaint resolution procedure is relevant. Thus, for example, following *Meritor*, the EEOC issued a "Policy Guidance on Current Issues of Sexual Harassment," stating that an employer should have a procedure for resolving sexual harassment complaints, and in fact "can divest its supervisors of [their] apparent authority [to engage in sexual harassment] by implementing a strong policy against sexual harassment and maintaining an effective complaint procedure."¹³⁷ Moreover,

[w]hen an employer asserts it has taken remedial action, the Commission will investigate to determine whether the action was appropriate and, more important, effective. . . . If the Commission finds that the harassment has been eliminated, all victims made whole, and preventative measures instituted, the Commission normally will administratively close the charge because of the employer's prompt remedial action.¹³⁸

Thus, even if ADR is not legally binding or compulsory, if the process is attractive to employees and effective, the decision reached in the internal procedures could be final as a practical matter. A procedure that adequately remedies the violation will result in a high degree of user satisfaction, and satisfied employees are less likely to pursue their claims in court or at the EEOC. If employees do go to court or the EEOC, the employer's use of a fair and effective dispute resolution procedure should weigh in its favor.

VI. EEOC'S USE OF ADR

As a result of the passage of the 1991 Civil Rights Act and the Americans with Disabilities Act, the EEOC's ever-burgeoning caseload has increased significantly,¹³⁹ and the Commission is searching for ways to perform its role more effectively.

For the EEOC, certainly, the use of ADR is not new. Indeed, in order to pass Title VII, Congress struck a compromise that the Commission would not have enforcement authority over private sector suits.¹⁴⁰ Since many in Congress considered employment disputes as private, individual interest disputes

relief to which the employee was entitled, including injunctive relief. *Id.* at 77-78, 106 S. Ct. at 2410-2411. See also Westin & Feliu, *supra* note 36, at 268-69.

137. 3 EEOC Compl. Man. (BNA) N:4031, N:4056 (Mar. 19, 1990).

138. *Id.* at N:4061.

139. The number of charges filed with the EEOC has increased from 59,411 in fiscal year 1989 to 87,942 in fiscal year 1993, the largest number filed during any fiscal year in the agency's history. Office of Program Operations, EEOC, Fourth Quarter Report for Fiscal Year 1993, at 1, 6 (unpublished document) [hereinafter "Program Operations Report"]. Yet the EEOC has 100 fewer investigators than it had in 1989. *Id.* at 5.

140. Private parties could bring suit under Title VII, and the EEOC could enter only as *amicus curiae*. The Attorney General was authorized to file pattern-or-practice suits against private employers.

ideally suited to conciliation, the Commission's role was limited to investigating charges and attempting to conciliate them.¹⁴¹ Thus, ADR has been an important part of the EEOC's mandate from the beginning. Ultimately, Congress in 1972 amended Title VII to give the Commission the authority to go to court to enforce Title VII—but even then only when conciliation efforts failed.¹⁴²

Since its inception, the Commission has struggled with its duty to deal with the large number of discrimination charges brought by individuals, as well as its role in defining employment discrimination policy. With always limited resources, the Commission has used alternative approaches to accomplishing its mission, at times emphasizing settlement and at times emphasizing litigation. For example, in 1979, the EEOC instituted "rapid charge processing" in all of its district offices, which consisted of early, negotiated "no-fault" settlements based on limited or no investigations. During the Reagan Administration, the EEOC shifted its focus from settlement to litigation in order to better establish EEOC's role as a law enforcement agency.¹⁴³

In the 1990s, the EEOC is looking again to ADR, while still maintaining the strong law enforcement program established in the 1980s. In addition to the Civil Rights Act, Congress has encouraged ADR through other legislation. On November 15, 1990, it enacted the Administrative Dispute Resolution Act,¹⁴⁴ further authorizing and encouraging federal agencies to use alternative means of resolving disputes.¹⁴⁵ As a result of the ADRA, the Commission is developing a policy statement on the use of alternative dispute resolution in Commission processes. A number of other recent actions also encourage ADR. The Negotiated Rulemaking Act provides for the use of negotiated rulemaking for

141. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 358-59, 97 S. Ct. 2447, 2450-51 (1977). See also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S. Ct. 1011, 1017 (1974) ("Cooperation and voluntary compliance were selected as the preferred means for achieving [the EEOC's] goal" of assuring equality of employment opportunities.)

142. Equal Employment Opportunity Act of 1972, § 4(a), 42 U.S.C. § 2000e-5(f)(1) (1988). Once the Commission finds reasonable cause, it "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b) (1988). If "the Commission [is] unable to secure . . . a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge." 42 U.S.C. § 2000e-5(f)(1) (1988). The Commission may also issue a notice of right to sue to the charging party who may then bring a private action. *Id.*

143. See R. Gaull Silberman, 1 *Admin. L.J.* 527, 533-36 (1987); Statement of Enforcement Policy, 2 *EEOC Compl. Man.* (BNA) GC:1403 (Sept. 11, 1984); Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination, 2 *EEOC Compl. Man.* (BNA) GC:1406 (Feb. 5, 1985); Investigative Compliance Policy Statement, 2 *EEOC Compl. Man.* (BNA) GC:1413 (July 14, 1986). See also *supra* note 19.

144. 5 U.S.C. §§ 571-583 (Supp. IV 1992).

145. The legislative history notes that agencies were currently able to use ADR methods, but "[t]he purpose of S. 971 is to place government-wide emphasis on the use of innovative ADR procedures by agencies and to put in place a statutory framework to foster the effective and sound use of these flexible alternatives to litigation." S. Rep. No. 543, 101st Cong., 2d Sess. 2 (1990), reprinted in 1990 U.S.C.C.A.N. 3931, 3932.

federal agencies.¹⁴⁶ Executive Order No. 12,778 instructs federal litigators to use ADR processes where they "will contribute to the prompt, fair, and efficient resolution of claims."¹⁴⁷ Executive Order No. 12,871 instructs agency heads to train agency employees "in consensual methods of dispute resolution,"¹⁴⁸ and Executive Order No. 12,866 directs agencies "to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking."¹⁴⁹

The EEOC conducted a pilot mediation program in its Houston, New Orleans, Philadelphia, and Washington field offices. The Commission's goal was to resolve charges of discrimination more quickly and less expensively, while ensuring fairness to all parties.¹⁵⁰ The Center for Dispute Settlement, a nonprofit organization, administered the pilot program for EEOC.¹⁵¹ The pilot ran from April 1, 1993 through March 31, 1994. Eligible charges were those involving discharge, discipline, and terms and conditions of employment under Title VII, the ADA and the ADEA.¹⁵² The program did not include class claims, harassment claims, and Equal Pay Act claims.

Participation in mediation was voluntary for all of the parties. If both parties agreed to mediate, the EEOC suspended its investigation for up to sixty days to allow for mediation. Under the pilot, mediators were not EEOC investigators or employees, but were outsiders specially trained for this project. As part of the experiment, in half of the cases the EEOC paid for the mediator; in a quarter of the cases the mediator was a volunteer; and in a quarter of the cases the employer paid for the mediator. The mediation was conducted face-to-face or by telephone. The parties had the right to stop mediation at any point, and the charging party could return to the regular complaint process. The parties could use counsel, but it was not required. All discussions were confidential, and the EEOC will not have access to this information. If the parties were able to resolve their dispute, they signed a Settlement Agreement Form, and the charging

146. 5 U.S.C. §§ 561-70 (Supp. IV 1992).

147. 3 C.F.R. 359 (1992).

148. Section 2(c), 58 Fed. Reg. 52,201, 52,202-03 (1993).

149. Section 6(a)(1), 58 Fed. Reg. 51,735, 51,740 (1993).

150. The threshold criteria for the program were as follows:

1. the rights of all parties accorded by the statutes the Commission enforces must be fully protected;
2. participation in the ADR process can only involve persons who have filed complaints with the EEOC or with the state or local agencies with which EEOC has worksharing agreements;
3. participation in the ADR process is voluntary for both parties to the matter; and
4. consistency with the standards and requirements of the Dispute Resolution Act of 1990 must be prevalent.

EEOC Intake Staff Pilot Mediation Program Training Manual 3 (unpublished document).

151. Established in 1971, the Center for Dispute Resolution provides mediation, facilitation, training, and the design of systems for resolving disputes.

152. Approximately 50% of the EEOC's caseload in the 1993 fiscal year was attributable to discharge claims. Program Operations Report, *supra* note 139, at 2.

party agreed to withdraw his or her charge. The agreement is enforceable by the EEOC.

Of the 920 charging parties offered mediation, 796 or 87% of them accepted mediation. In comparison, approximately 39% of respondents agreed to try mediation. Agreements were reached in 52% of the approximately 267 mediations that have been completed. In 17 cases, parties agreed to mediate, and then settled prior to mediation. Preliminary evaluations indicate that 92% of both charging parties and respondents who participated in the program were satisfied, and 80% said they would try mediation again.

An outside professional evaluator is evaluating the program, examining such issues as whether charging parties and respondents were satisfied with the mediation process and outcome, whether the parties would use mediation again, reasons for differences in settlement rates among the four district offices participating, and the results of agreements.

Based on the results of this pilot, the EEOC will consider incorporating ADR methods into the field offices' charge resolution repertoire. As it has throughout its history, the agency must balance its duty to provide prompt relief to individual victims of discrimination with its duty to act in the public's interest in vitiating illegal discrimination.

VII. CONCLUSION

Alternative dispute resolution methods will play an important role in the post-Civil Rights Act of 1991 era of employment discrimination law. In a time of expanded rights and remedies, ADR offers benefits to employers and employees by resolving claims expeditiously and inexpensively, as well as to the public by relieving crowded court and agency dockets.

For ADR to continue to receive judicial, legislative, and public endorsement, it must be consistent with the important public policies of our nation's civil rights laws. ADR furthers the civil rights laws' remedial and compensatory purposes by resolving particular claims brought by individual complainants. Unlike judicial resolution, however, ADR does not set precedents, contribute to the development of clear, consistent legal standards to govern future conduct, or reach beyond the particular dispute to identify or eradicate class-based discrimination. The paradox of private versus public dispute resolution was well-stated by Linda Singer in *Settling Disputes*:

Fears that settlements will pacify legitimate complaints, thus hiding them from public scrutiny, battle against the recognition that perhaps the majority of these complaints cannot be resolved at all if they are not settled promptly. Yet the few test cases provide the impetus to settle the thousands of others. . . . [Complainants] often prefer getting faster, less expensive, and private relief to becoming test cases.¹⁵³

153. Singer, *supra* note 7, at 161.

The reality is that a more informal, simpler, and less confrontational system like ADR will encourage more valid complaints of discrimination to come forward. For many individuals, ADR *expands* access to the legal system.

Employers should remember that a high degree of user satisfaction is the best measure of success of ADR. A good internal system which quickly responds to employee concerns, effectively identifies and remedies violations, and preserves employees' statutory rights is the cornerstone of good human resource policy.