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# The Use of Non-Judicial Procedures to Resolve Employment Discrimination Claims

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## I. INTRODUCTION

Over the past decade, the number of employment discrimination complaints filed in federal district courts has almost tripled from 8,413 in 1990 to 22,412 in 1999.[1] These civil rights cases now account for 8.6 percent of the 261,651 civil actions filed in federal courts in 1999.[2] Plaintiffs prevail in less than one-third of the employment discrimination cases culminating in verdicts, generating median awards of $137,000 in 1998.[3] It is thus apparent that employment discrimination cases consume a significant amount of federal court resources, despite the relatively low monetary value of such cases.

Two factors have contributed significantly to the increase in employment discrimination litigation over the past ten years. The first is the Americans With Disabilities Act of 1990 (ADA)[4] which extends civil rights protection to individuals with mental and physical disabilities. The second is the Civil Rights Act of 1991[5] which authorizes the awarding of compensatory and punitive damages in discriminatory treatment cases.[6]

Congress was understandably aware of the increased litigation that would be generated by the enactment of the ADA and the new compensatory and punitive damages provision. In an effort to ameliorate the impact of these developments on federal district court case loads, Congress included Section 118 in the Civil Rights Act of 1991:

> Where appropriate and to the extent authorized by law, the use of alternative 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.[7]

The use of voluntary dispute resolution techniques has contributed to the non-judicial resolution of many employment discrimination claims. Nonetheless, the number of employment discrimination complaints filed in federal district courts continues to rise. Federal judges often complain informally about the increasing amount of judicial time spent on such relatively low value cases. They wish Congress would find a way to resolve these employment claims without resort to protracted and expensive federal court adjudications.

This article will explore non-judicial dispute resolution procedures that could be used to handle employment discrimination cases. The starting point must be more thorough and more expeditious investigations by Equal Employment Opportunity Commission (EEOC) personnel to provide claimants and respondents with more definitive information regarding the merits of discrimination allegations. As part of the investigative process, EEOC employees or outside neutrals should be required to encourage settlement discussions between charging parties and respondents, and should be empowered to provide mediation assistance when parties encounter settlement difficulties.

When voluntary settlements are not achieved through inter-party negotiations and mediator assisted discussions, resort to binding arbitration might be appropriate. Should arbitral procedures be voluntary or compulsory? Should a distinction be made between arbitrations conducted under collective bargaining agreement provisions negotiated by labor and management representatives where labor organizations represent grieving workers and arbitral procedures established unilaterally by nonunion employers who determine the basic procedural rules and may select and compensate the arbitrators? If arbitral adjudications are authorized, what

degree of judicial deference should be given by courts asked to review those awards?

When arbitral procedures are not available, should Congress amend the civil rights statutes to authorize the EEOC to resolve discrimination claims through administrative adjudications? The EEOC could be given power similar to that currently possessed by the National Labor Relations Board (NLRB). Should final administrative adjudications be self-enforcing or subject to judicial confirmation? What judicial deference should be given to EEOC factual and legal conclusions? Would mandated administrative adjudications deprive litigants of their Seventh Amendment right to jury trials?

## II. THOROUGH AND EXPEDITIOUS EEOC CHARGE INVESTIGATIONS

Approximately 80,000 charges of employment discrimination are filed with the EEOC each year.[8] Under Title VII, the ADEA, and the ADA, the EEOC is given 180 days to investigate each charge and to seek the amicable resolution of meritorious claims. Because of limited financial resources, the EEOC is unable to complete meaningful investigations within the 180 day time frame of more than two-thirds of charges filed.[9] As a result, the agency frequently fails to make formal "cause" determinations in which it finds "cause" or "no cause" to believe violations have occurred. After passage of the 180 day statutory period, charging parties or their attorneys may request "right-to-sue" letters authorizing the initiation of law suits.

It is interesting to note that the vast majority of investigations carried out by EEOC personnel result in no-cause determinations. Agency representatives make "cause" findings with respect to only 5 percent of charges that are investigated.[10] These data suggest that thousands of discrimination charges are filed by suspicious employees who were most likely not the victims of unlawful discrimination. Many involve individuals who have been laid off and who are hoping to

obtain severance benefits from employers who are under no contractual duty to provide such payments. In the 5 percent of cases in which "cause" is found, respondents feel pressure to seek amicable resolutions through the negotiation process, so they can avoid costly and protracted federal litigation.

It is noteworthy that employment discrimination plaintiffs prevail in fewer than one-third of federal court adjudications.[11] Many of the cases resulting in verdicts for defendants are cases in which no EEOC cause determinations were ever made. If the EEOC were financed sufficiently to permit thorough investigations of all charges, the federal government would actually save money. Most discrimination claimants are not sure why they were denied initial employment or were terminated. Individuals from groups that have historically suffered from discrimination often suspect discriminatory treatment even when the decisions were based on non-discriminatory considerations. Due to a lack of definitive information, the adversely affected individuals file discrimination charges with the EEOC in an effort to determine the real reasons for the negative actions taken against them.

Charging parties who believe that EEOC personnel have professionally and fairly investigated discrimination claims and found no cause to believe violations have occurred might accept those advisory opinions and abstain from further legal action. Some claimants who are not completely satisfied with negative EEOC determinations might also be forced to forego judicial action, because of their inability to retain legal counsel. Most plaintiff attorneys take civil rights cases on contingent fee bases. It they thought that negative EEOC conclusions were fair and accurate, they would be unlikely to accept cases they would find difficult to win. The additional funding needed to enable the EEOC to conduct thorough investigations of all charges would be

substantially less than the savings that would result from the reduction in federal court employment discrimination adjudications.

The lack of thorough EEOC investigations also affects respondents. Most employers and labor organizations accused of discriminatory behavior conduct internal investigations. Since most of their information comes from the individuals who made the employment determinations being challenged, they are often told that the decisions were based on non-discriminatory considerations. The EEOC has access to more relevant information – especially from charging parties and their witnesses. If the EEOC were to conduct more thorough investigations and found cause to believe violations had occurred, respondents would be likely to treat these findings seriously. In the vast majority of cases in which no-cause findings resulted, many charging parties would accept those determinations. This would decrease the pressure on respondents to offer charging parties thousands of dollars to avoid the high costs of litigation.

Thorough EEOC investigations provide EEOC personnel with additional authority. Once they have interviewed the relevant individuals and determined that violations may have occurred, they are in optimal positions to facilitate settlement discussions. Without such information, they lack the persuasive authority needed to induce respondents to consider seriously the need to settle claims they may eventually lose if those cases are taken to federal courts.

## III. NEGOTIATION, MEDIATION/CONCILIATION, AND ADVISORY MINITRIALS

The vast majority of legal disputes are resolved through settlement negotiations. The disputing parties – or their representatives – get together and attempt to achieve mutually acceptable resolutions. These discussions may take place before formal discrimination claims

have been filed, or after charges have been filed with state fair employment practice agencies or the EEOC. In some cases, however, neither side is willing to initiate settlement discussions because they fear that such actions would exude weakness.

A. INTERNAL FIRM CONCILIATION

Most business firms have adopted anti-discrimination policies that forbid discrimination that would contravene federal, state, or local employment discrimination enactments. These companies conduct regular training programs to apprise supervisors and employees of the applicable nondiscrimination rules. These policies usually include procedures to be used in case of alleged violations. EEO officers are appointed who possess the authority to receive and investigate claims of discrimination. When allegations are raised, these individuals meet with the relepant parties to determine whether discrimination may have occurred.

When EEO officers decide that discrimination may have taken place, they usually endeavor to generate mutually acceptable resolutions. In some cases, they may encourage the aggrieved persons to meet directly with the alleged offenders. In controlled environments, the EEO officers let the participants express their feelings and attempt to facilitate settlement discussions. The EEO officers maintain order and assist the parties to explore different settlement possibilities. When face-to-face meetings would not be appropriate, EEO officers meet separately with the relevant parties and carry messages back and forth.

If informal settlement efforts do not produce acceptable results, more formal discussions may take place. Employee relations specialists may schedule meetings between the aggrieved persons and the alleged offenders. Because of the more formal atmosphere surrounding these discussions, the parties may feel greater pressure to work together – and through the firm

intermediaries – to resolve their differences.

Some business firms have formal mediation programs which employ company-trained facilitators or outside neutrals. These mediators may conduct joint meetings with the disputing parties or use separate caucus sessions to explore settlement possibilities. These settlement facilitators have usually received special training with respect to both substantive employment discrimination laws and the mediation process. When internal business mediation procedures function effectively, they generate settlement agreements that avoid the need for further proceedings.

B. EEOC CONCILIATION/MEDIATION

Aggrieved individuals who are not satisfied with internal firm resolution procedures generally file charges with state anti-discrimination agencies or the EEOC. At this point, the respondent employers are notified of the claimant allegations. Whenever possible, state agency or EEOC personnel investigate the charge allegations. They contact pertinent witnesses or participants and try to determine if unlawful discrimination may have taken place.

1. *Informal EEOC Conciliation*

When state agency or EEOC investigators meet with respondent representatives, they often facilitate settlement discussions. If the investigators think that discrimination may have occurred, they share the relevant information with firm officials and encourage settlement talks. If respondents think that "cause" determination will result, they often move quickly to achieve amicable resolutions to avoid the need for attorney involvement. At this stage, most charging parties are not represented by legal counsel, with most claimants only seeking legal assistance after they have received their right-to-sue letters from the EEOC.

2. *Formal EEOC Mediation*

In recent years, the EEOC has recognized that informal facilitation efforts by agency investigators do not always produce the desired outcomes. As a result, the EEOC began to experiment with more formal mediation programs. Such procedures were initially established at district offices. When these programs proved successful, the agency decided to create a national mediation system. Under the new system adopted in early 1999, Intake Investigators preliminarily evaluate discrimination claims and try to determine whether these charges appear to have merit. Apparently meritorious charges are assigned an "A" status.[12] If additional information is required before reasonable "cause" determination could be made, a "B" status is assigned. Charges that preliminarily appear to lack merit are given a "C" status.

Charges assigned an "A" or "B" status by Intake Investigators fall within the EEOC's voluntary mediation program. Charging parties and respondents are encouraged to submit to agency mediation. This usually occurs within sixty days following the filing of the charges and prior to thorough EEOC investigations.[13] EEOC staff members and outside mediators have been used to conduct the conciliation sessions. Even though the agency's expedited mediation system causes both charging parties and respondents to engage in mediator-assisted settlement discussions before they have had the opportunity to conduct thorough investigations, the preliminary data indicate that the EEOC's new mediation program has been functioning well.

In 1998, the year before the agency's nation-wide mediation program was established, only 1631 charges were resolved through conciliation. During 1999, however, 4833 charges were successfully mediated.[14] In fact, the settlement success rate during 1999 for mediator-assisted claims was an impressive 65 percent of submitted claims.[15] Ninety-one percent of charging

parties who participated in EEOC mediation would use that mechanism again, as would 96 percent of respondent-employers.[16]

Many EEOC mediation sessions took place before attorneys were retained by claimants. Only 41 percent of charging parties had already retained legal counsel, compared with 58 percent of employers.[17] This fact would indicate the substantial amount of legal fees saved through the EEOC's mediation program. The conciliation efforts during 1999 also avoided the possible litigation of almost 5000 additional cases in federal courts.

Mediation provides significant benefits over arbitral or judicial litigation. Adjudications produce "win"-"lose" results. Although prevailing parties may initially appreciate their victories, winning plaintiffs who are ordered hired or reinstated by discriminating employers may find far less hospitable employment environments than they would have found if their new employment status had resulted from mediator-assisted settlement agreements reached by both parties.

Negotiated and mediator-assisted settlement agreements usually result in "win"-"win" resolutions. The parties control their own destinies and only have to effectuate the terms they find acceptable. They may agree to arrangements courts could not order. For example, employers may apologize to charging parties for any discrimination that may have occurred, and this can have a salutary impact. Employers can explain to newly hired or reinstated claimants their concern about adequate employee performance. This may let those claimants understand what is expected of them after they are at work.

Despite the obvious success of the EEOC's mediation program, it has already been endangered by Congressional budget reductions. The agency initially received $13 million to implement the new program, but lost that funding the following year.[18] Although the EEOC has

tried to absorb the $8 million cost of continued mediation, it has had to rely more on staff mediators than outside facilitators. This has made it difficult for the agency to continue to offer mediation assistance to all appropriate parties.

Congress should provide increased funding to support the EEOC's mediation program. Every dollar expended in mediation will save several dollars in judicial costs if the cases now being resolved through mediation were to end up in federal court. The EEOC should also be encouraged to expand its program. All federal district courts now have local rules requiring civil litigants to participate in judicial settlement conferences. The EEOC should adopt rules requiring all charging parties and respondents in cases given an "A" or "B" status by Intake Investigators to participate in mediation sessions. EEOC staff members may function effectively as mediators, but outside neutrals must also be provided to parties that may fear that agency mediators may philosophically favor claimants.

Mediators should initially conduct joint sessions during which both sides can explain their respective positions.[19] This can have a cathartic impact, and insure that both sides appreciate each other's perspectives. This is especially important for individual claimants who feel that employers have failed to appreciate the emotional distress they have experienced because of unlawful discrimination. If meaningful inter-party negotiations are generated, their direct interaction should be encouraged. When joint sessions begin to deteriorate, separate caucus sessions may be used to permit the neutral facilitators to look for mutually beneficial tradeoffs.[20] When parties have strong factual disagreements, mini-trials may be employed to educate the disputants.[21] The presiding neutral can require employer officials to be present with the charging party. Both sides can summarize their evidence. The mediator can then discuss the strengths and

weaknesses of the evidence in an effort to regenerate stalled negotiations. While some mediators may decline to offer their opinion of the likely outcome if the case were to be adjudicated, other neutrals may be willing to provide the parties with a general evaluation of the probable result if the case were to be tried.

In some cases, the neutral facilitator may offer to conduct an advisory summary jury trial.[22] They could ask five or six individuals from the local community to act as jurors, and have the charging party and the respondent present their evidence in an abbreviated manner. Once the evidence has been heard, the jury panel is asked to indicate how they think the case should be resolved. Once the disputants appreciate how disinterested jurors view the situation, they can engage in more enlightened settlement discussions.

Litigators often underestimate the benefits that may be derived from proficient mediation assistance. On many occasions, these advocates conclude that negotiated resolutions are no longer possible, even when they are. Professors Stephen Goldberg and Jeanne Brett demonstrated that pre-arbitration mediation can be used to successfully resolve approximately 85 percent of grievance disputes that were otherwise destined for arbitral adjudication under applicable collective bargaining agreements.[23] These findings would indicate that a substantial percentage of employment discrimination claims that are headed toward judicial resolution may be mutually settled with effective mediator assistance.

3. *Mediator Styles*

Proficient mediators tend to possess common characteristics no matter what styles they employ. They are objective individuals who have excellent communication skills. They are good active listeners and assertive speakers. They have good interpersonal skills that enable them to

interact well with people from diverse backgrounds. They understand the negotiation process and the way in which conciliators can enhance that process.

Mediators tend to employ one of three diverse styles. Some focus primarily on the substantive terms being discussed.[24] They try to determine what provisions the parties would be willing to accept, and work to induce the disputants to agree to those terms. The substance-oriented neutrals function as "deal makers." They often meet separately with the parties and try to ascertain the optimal terms they think would be mutually acceptable. Once they reach this point, they work to convince the parties to accept these provisions. If one or both parties ask about other possibilities, substance-oriented mediators inform them that these are the only terms that would work for both sides. This approach is most beneficial for inexperienced negotiators who do not know how to reach their own agreement.

The substance-oriented approach is usually unsatisfactory for employment discrimination disputes, because this style deprives the disputants of the benefits to be derived from face-to-face negotiations. Emotionally distraught claimants are deprived of the catharsis that can be an important part of the healing process. Both claimants and respondents are denied the chance to fully appreciate each other's positions, with all communication being controlled by the mediator.

Most mediators employ a process-oriented style.[25] They seek to reopen clogged communication channels and encourage direct inter-party negotiations. These neutrals function as "orchestra leaders." They bring the disputing parties together and work to regenerate stalled settlement discussions. They prefer joint sessions, and only resort to separate caucus meetings when absolutely necessary. They let the parties determine what is best for themselves. Process-oriented mediators are appreciated by skilled negotiators who want minimal bargaining

assistance and who want to control their own bargaining outcomes.

An innovative group of neutral facilitators have recently begun to use a relationship-oriented approach.[26] They reject substance-oriented and process-oriented intervention in facor of a style that is designed to transform disputants into relatively self-sufficient problem solvers. They believe that mediators should strive to empower weaker parties by demonstrating the rights and options available to the participants. They also work to generate mutual respect ("recognition") between the parties by inducing each to appreciate the perspective of the other. They think that empowered participants who truly appreciate the viewpoints of their opponents can optimally work to achieve their own mutually acceptable solutions. This style is appreciated by claimants who are often unable to see beneficial ways out of their predicaments. Relationship-oriented facilitators do not consider final settlements critical. They are more interested in teaching disputants how to resolve their own future controversies. This can be a problem for employment discrimination claimants and respondents who are primarily seeking mutually beneficial resolutions of their underlying conflicts.

4. *Mediator Qualifications and Compensation*

If the EEOC wishes to create a nation-wide mediation program that can assist all charging parties and respondents to resolve colorable employment discrimination claims, it must use both internal and outside neutrals. It would be virtually impossible for the agency to use only agency-employed facilitators, because of budget limitations. A wholly internal mediation system would also create problems with respect to those respondents that would be suspicious about the neutrality of individuals working for an agency dedicated to the eradication of discrimination. It would thus be appropriate to employ outside neutrals who would not be considered

philosophically biased in favor of charging parties.

Individuals who want to become EEOC approved mediators should be required to demonstrate three things: (1) absence of any apparent bias in favor of charging parties or respondents; (2) possession of a basic knowledge of employment discrimination law prohibitions and of proof constructs; and (3) an understanding of the mediation process. The EEOC should seek process-oriented and relationship-oriented neutrals who respect party autonomy and try to avoid the imposition of final terms. Substance-oriented mediators should be avoided, because they would be likely to deprive claimants of real catharsis and appear to impose final terms that might not be truly acceptable to both sides.

In 1998, a consortium of prominent universities created the Alliance for Education in Dispute Resolution.[27] This group of educators is dedicated to the training of qualified civil rights neutrals. They would require a minimum of forty hours of formal training, with half the time devoted to substantive law and the other half to mediation principles.

The EEOC should establish a group of trained agency-employed mediators and a list of qualified outside neutrals. Both groups should be required to have a minimum of forty hours of special training through Alliance members or other appropriate educational programs designed to provide conciliators with adequate substantive knowledge and basic dispute resolution skills. It would be beneficial if these applicants already had some experience in the dispute resolution field.

Whenever EEOC-employed conciliators are overloaded or the disputants request the assistance of an outside neutral, the EEOC should appoint a qualified external facilitator. At the conclusion of all mediations, the EEOC should ask the disputing parties to evaluate the work of

the neutral intervenors. Did they appear to be knowledgeable about the substantive and procedural doctrines? Did they function in a professional and unbiased manner? Did they appear to possess good dispute resolution skills? Would the parties be willing to use these neutrals to assist them with the resolution of future controversies? The EEOC should review all mediator evaluations to be sure to retain only the names of proficient and impartial neutrals.

Who should pay the costs of outside mediators? If the parties were asked to split the costs of such neutrals, the financial impact on charging parties might be excessive. On the other hand, if respondents were asked to assume the full costs of such neutrals, the apparent impartiality of those facilitators might be questioned. The optimal course would be to have the EEOC cover the cost of external mediators. This would preserve the critical appearance of mediator impartiality, and the increased agency cost would be more than offset by the avoidance of protracted judicial adjudications with respect to amicably resolved claims.

## IV. RESORT TO BINDING ARBITRATION

Throughout the nineteenth century and the first part of the twentieth century, the federal government had a laissez faire policy toward private sector employer-employee relations. Business firms could hire – or not hire – anyone they wished. Under the prevailing "employment-at-will" doctrine, companies had the right to terminate most workers at any time for good cause, bad cause, or no cause at all.[28] As a result, employees who did not have employment contracts for definite terms could be legally terminated because of their race, color, religion, gender, national origin, age, disability, or other similar consideration.

During the early part of the twentieth century, skilled workers represented by craft unions affiliated with the American Federation of Labor were generally protected by "just cause"

provisions in collective bargaining agreements that precluded worker discipline except for valid reasons. These contractual restrictions on managerial discretion were usually enforced through grievance-arbitration procedures that ultimately authorized external neutrals to review challenged employer actions.

After the enactment of the National Labor Relations Act in 1935,[29] and the creation of the industrial unions affiliated with the Congress of Industrial Organizations, union membership grew rapidly.[30] By the mid-1950s, union membership exceeded 17,000,000 and constituted 35 percent of nonagricultural workforce participants. Union representation thus provided millions of employees with basic just cause protection against unjust terminations.

Non-union workers and many union workers continued to be subject to invidious forms of employment discrimination. While some labor organizations sought to prohibit basic forms of discrimination, most not only failed to seek anti-discrimination contractual provisions but also engaged in discriminatory practices with respect to membership policies and collective bargaining rights.[31] The pervasive discrimination practiced by many employers and labor organizations induced Congress to enact Title VII of the Civil Rights Act of 1964,[32] which proscribes employment discrimination based on race, color, religion, gender, or national origin. Although the Supreme Court had held as early as 1944 that representative labor organizations had a statutory obligation to represent all bargaining unit workers fairly and without invidious discrimination,[33] a number of unions did not cease their overtly discriminatory practices until the enactment of Title VII.

## A. ARBITRAL ENFORCEMENT OF ANTI-DISCRIMINATION PROVISIONS UNDER *GARDNER-DENVER* AND *GILMER*

By the 1970s, most labor organizations had obtained bargaining agreement provisions banning discrimination based on race, color, religion, gender, and national origin. These contractual protections were usually enforced through private grievance-arbitration procedures set forth in the applicable collective agreements. Individuals who thought they had been subjected to impermissible discrimination filed grievances through their representative labor organizations. Union and employer representatives sought to resolve these claims through various steps of their grievance procedures. When negotiated settlements could not be achieved, labor organizations had the right to invoke arbitration provisions. Private arbitrators heard these disputes and rendered binding awards.

In *Alexander v. Gardner-Denver Co.*,[34] the Supreme Court had to determine the relationship, if any, between private arbitral determinations and public law suits filed in federal courts under Title VII. Harrell Alexander, Sr., an African-American employee of the Gardner-Denver Company, had been discharged for allegedly producing an excessive number of defective parts. He challenged his dismissal under the just cause provision of the applicable bargaining agreement, but made no explicit claim of racial discrimination even though the contract specifically prohibited discrimination based on race or color. When Mr. Alexander's case was presented to an arbitrator, the union argued that his discharge was due to race discrimination. Evidence was presented indicating that white workers with similar performance problems had been transferred to other jobs and not been terminated. Despite these claims, the arbitrator found just cause for Mr. Alexander's discharge. The arbitral award, however, contained no reference to

his claim of discriminatory treatment.

Mr. Alexander subsequently filed a law suit in federal district court under Title VII challenging the legality of his dismissal. The district court dismissed his Title VII suit, on the ground Mr. Alexander was bound by the prior arbitral award. The court of appeals affirmed. The Supreme Court emphasized two critical factors not adequately considered by the lower courts. Congress enacted Title VII to protect individual employee rights and created the EEOC and specific statutory enforcement procedures. The Court noted that labor arbitrators are only empowered to enforce private contract rights, while the EEOC and federal courts are authorized to enforce public anti-discrimination protections. The court then rejected the district court's reliance on both estoppel and election of remedies concepts, holding that Mr. Alexander did not waive his right to judicial consideration of his Title VII claim by virtue of his decision to participate in the contractual arbitration proceeding.

The *Alexander* Court rejected the contention that it would be unfair to employers to hold them bound by arbitral determinations while allowing grievants to relitigate discrimination claims lost before arbitrators in subsequent Title VII actions in federal courts. The Court further noted that both employees and employers may continue to benefit from the availability of arbitral procedures:

> Where the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee. An employer thus has an incentive to make available the conciliatory and therapeutic process of arbitration which may satisfy an employee's perceived need to resort to the judicial forum, thus saving the employer the expense and aggravation associated with a lawsuit. For similar reasons, the employee also has a strong

> incentive to arbitrate grievances . . .[35]

The *Alexander* Court refused to adopt a policy that would require federal courts to defer to prior arbitral determinations where the proceedings were fair and the arbitrator was authorized under the applicable contract to resolve the underlying discrimination issues.[36] The Court said that Congress intended for federal courts to assume final responsibility for the enforcement of Title VII claims, and it concluded that deferral to arbitral decisions would be inconsistent with that objective. The Court emphasized the informal nature of arbitral proceedings, with formal evidentiary and discovery rules rarely being followed.

Although the *Alexander* Court held that civil rights plaintiffs have the right to de novo court determinations of their Title VII claims despite previous arbitral awards rejecting their discrimination claims under anti-discrimination provisions contained in bargaining agreements, it did not entirely suggest that courts should ignore prior arbitral awards.

> Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record.[37]

Since the vast majority of Title VII claims involve alleged discriminatory treatment – rather than disparate impact[38] – in which the claimant must factually establish that the employer was motivated by impermissible considerations, lower courts may continue to respect previous arbitral decisions that have fairly and carefully considered the underlying factual contentions.

In *Gilmer v. Interstate/Johnson Lane Corp.*,[39] the Supreme Court was again asked to evaluate the relationship between arbitral procedures and employment discrimination law enforcement. Robert Gilmer was hired by a securities firm. He was required to register as a

securities representative with the New York Stock Exchange (NYSE). His registration application included a provision under which he agreed to arbitrate any claim arising between him and his employer. After he was terminated at age 62, he filed an age discrimination charge with the EEOC and subsequently initiated a law suit in federal district court. Interstate/Johnson Lane filed a motion to compel Mr. Gilmer to arbitrate his Age Discrimination in Employment Act (ADEA) claim, based on the arbitration clause in Gilmer's NYSE registration application form. The district court denied the employer's motion, based upon its interpretation of the Supreme Court's earlier *Alexander v. Gardner-Denver Co.* decision. It concluded that Congress intended to protect civil rights claimants from the arbitral waiver of access to judicial forums. The court of appeals reversed, because it found nothing in the ADEA to preclude enforcement of such arbitral undertakings.

The Supreme Court noted that the Federal Arbitration Act (FAA)[40] was enacted to reverse the historical judicial hostility toward arbitration agreements. It indicated that the FAA provides for stays of federal district court proceedings when the underlying issues are subject to arbitral resolution, and it held that these factors evidenced a "liberal federal policy favoring arbitration agreements."[41] The Court indicated that before the EEOC may initiate legal action on behalf of charging parties, it must endeavor to eliminate the alleged discriminatory practices through informal methods of conciliation. The Court thus found that resort to voluntary arbitration procedures would be consistent with the statutory policy favoring resort to non-judicial dispute resolution procedures.

The *Gilmer* Court carefully distinguished its prior *Gardner-Denver* holding by noting that the arbitrator in *Gardner-Denver* was only empowered to enforce contractual – not statutory –

rights. Under the NYSE arbitration rules, however, arbitrators were expressly authorized to enforce the statutory rights of complaining employees. In addition, Mr. Alexander was required under the applicable bargaining agreement provision to have his case presented to the arbitrator by a union representative. The NYSE rules, on the other hand, allowed Mr. Gilmer to be represented by an advocate of his own choosing. The Court thus decided to order Mr. Gilmer to resort to NYSE arbitration before he could file any judicial action. The Court unfortunately failed to indicate clearly what rights Mr. Gilmer would have to judicial redress if he ultimately lost his arbitral case.

B. INCREASED JUDICIAL DEFERENCE TO THE ARBITRAL RESOLUTION OF STATUTORY CLAIMS

The Supreme Court's *Gilmer* decision reflected a profound change in judicial philosophy that had taken place over the prior forty years. In *Wilko v. Swan*,[42] the Court had declined to enforce an agreement requiring a securities purchaser to arbitrate any Securities Act claims that might arise between the share purchaser and the brokerage firm. It concluded that the purchaser's right to invoke judicial procedures to enforce his statutory rights could not be negated by an outstanding arbitration agreement. In 1974, the *Gardner-Denver* Court continued this policy when it decided to permit Mr. Alexander to seek judicial redress for his Title VII claim despite the prior arbitral award rejecting his discrimination allegations.

During the 1980s, the Supreme Court significantly modified its position with respect to the relationship between arbitration agreements and access to federal courts when federal statutory rights were being enforced. In *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.*,[43] the Court held that nothing in the federal antitrust laws precludes parties from agreeing to

arbitrate antitrust claims arising from their international commercial transactions. In *Shearson/American Express. Inc. v. McMahon*,[44] the Court held that brokerage firm customers could be required to honor arbitration agreements requiring them to arbitrate claims under Section 10(b) of the Securities Exchange Act of 1934 and under the Racketeer Influenced and Corrupt Organizations Act (RICO). The Court emphasized the strong federal policy favoring the enforcement of voluntary arbitration agreements, and it found nothing in the Securities Exchange Act or RICO precluding arbitral resolution of statutory claims.

Although the *McMahon* Court distinguished *Wilko v. Swan*, it ultimately recognized that the antipathy of *Wilko* toward arbitral undertakings could no longer be harmonized with the decisions in *Mitsubishi Motors* and *McMahon*. In *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[45] the Court formally overruled *Wilko* as it sustained the use of arbitral procedures to resolve different Securities Act claims. "To the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."[46]

In *Green Tree Financial Corp.-Alabama v. Randolph*,[47] the Supreme Court reaffirmed its support for the arbitral resolution of statutory claims. When Larketta Randolph purchased a moblie home, she obtained the necessary financing from Green Tree Financial. The financing agreement required Ms. Randolph to obtain insurance protecting Green Tree Financial from any default by her, and it included a provision stating that all disputes between her and Green Tree Financial would be resolved through binding arbitration. When Ms. Randolph subsequently sued Green Tree Financial under the Truth in Lending Act (TILA) for failing to disclose the insurance

requirement as a finance charge and under the Equal Credit Opportunity Act for requiring her to arbitrate her statutory claims, Green Tree Financial moved to compel arbitration of her dispute.

The district court directed Ms. Randolph to arbitrate her claims, but the court of appeals reversed, because it found that the arbitration agreement failed to provide Ms. Randolph with the minimum procedural guarantees she needed to enforce her TILA rights. The arbitration agreement failed to specify which party had to pay for the costs of that procedure, and the risk that Ms. Randolph would have to assume these costs undermined her ability to vindicate her TILA claim.

The Supreme Court reiterated its support for *Gilmer* and *Rodriguez de Quijas*, holding that federal statutory claims may be appropriately resolved through arbitration procedures. The Court found that the lack of clarity regarding the party that would have to bear the costs of arbitration insufficient to negate the historical federal policy in favor of arbitration. The Court indicated that Ms. Randolph bore the burden of demonstrating that she would probably have to bear the significant costs of arbitration and it found that she had failed to carry her burden in this regard.

### C. THE IMPACT OF *CIRCUIT CITY STORES*

In *Circuit City Stores, Inc. v. Adams*,[48] the Supreme Court was asked to decide whether a federal court could order arbitration of state civil rights claims. When Saint Clair Adams sought employment with Circuit City Stores, he filled out an application form that contained a clause stating that he would resolve all employment-related disputes through binding arbitration. Two years after he was hired at the Santa Rosa, California, store, Mr. Adams filed claims in state court under the California Fair Employment and Housing Act and common law tort theories alleging

unlawful employment discrimination. Circuit City Stores filed suit in federal district court seeking an injunction against the state court proceedings and an order directing Mr. Adams to submit his state law claims to arbitration. The district court granted Circuit City Stores' request, but the Ninth Circuit Court reversed because it found that Section 1 of the Federal Arbitration Act (FAA)[49] excluded from coverage all contracts of employment.

The district court had acted pursuant to the authority set forth in Sections 2-4 of the FAA[50] which provide that arbitration agreements are enforceable in federal courts. Although Section 1 excludes from coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,"[51] the district court held that this exclusion only covered individuals employed directly in interstate transportation. The Ninth Circuit Court, however, rejected this interpretation, and held that the Section 1 exclusion extended to all employment contracts.[52]

A closely-divided Supreme Court repudiated the Ninth Circuit Court's interpretation of Section 1. The five-Justice majority initially decided that employment application forms constitute "contracts of employment" within the meaning of the FAA. The majority then concluded that Congress only intended in Section 1 of the FAA to exclude employment contracts pertaining to transportation workers. The *Circuit City Stores* Court thus held that Mr. Adams was obliged to arbitrate his state law claims, and it sustained the authority of the federal district court to enjoin the inconsistent state court proceedings.

D. PREREQUISITES TO JUDICIAL SUBMISSION OF EMPLOYMENT DISCRIMINATION CLAIMS TO ARBITRAL PROCEDURES

In *Wright v. Universal Maritime Service Corp.*,[53] the Supreme Court had the opportunity

to clarify the circumstances in which contracting parties would be required to arbitrate their statutory claims. Ceasar Wright was a longshore worker covered by a collective bargaining agreement containing an arbitration clause. When his employer refused to continue to employ him after his settlement of a workers compensation claim for permanent disability benefits, Mr. Wright filed suit under the Americans with Disabilities Act (ADA). The district court dismissed his ADA claim, because of his failure to pursue arbitration. The court of appeals affirmed, but the Supreme Court reversed. It found that the grievance-arbitration provision did not clearly require Mr. Wright to arbitrate his ADA claim.

The *Wright* Court recognized the apparent tension between its prior *Gardner-Denver* and *Gilmer* decisions. "Whereas *Gardner-Denver* stated that 'an employee's rights under Title VII are not susceptible of prospective waiver,' ... *Gilmer* held that the right to a federal judicial forum for an ADEA claim could be waived."[54] It found no need to resolve this paradox, however, because it decided the case on a different ground. The Court noted that the arbitral provision did not expressly authorize arbitrators to interpret and apply external law.

> "[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable."[55]

Since the arbitral clause did not "clearly and unmistakably" waive Mr. Wright's access to judicial procedures with respect to his ADA claim, the Supreme Court refused to require him to resort to that private forum.

Given the Supreme Court's recent cases directing parties to arbitrate various statutory claims ranging from securities act and antitrust suits to civil rights actions, it is unlikely the Court

will soon reverse course. Although some individuals might argue that the enforcement of employment discrimination laws should not be subject to private arbitral adjudications due to the important public policies involved,[56] it is clear from *Gilmer* and the reaffirmation of that decision in *Wright* that this position is unlikely to prevail.[57] As a result, the critical question concerns the prerequisites that must be satisfied before courts direct litigants raising employment discrimination claims to resolve their disputes through arbitral proceedings.

The minimal pre-litigation deferral standard was set forth in *Wright* – the party requesting arbitration of statutory disputes must demonstrate a "clear and unmistakable" intention by the contracting parties to resolve the statutory rights in question through arbitration. Application of this standard will frequently preclude arbitral deferral in cases covered by bargaining agreement grievance-arbitration provisions. Such clauses have historically empowered arbitrators to interpret and apply only the express terms of the bargaining agreement.[58] The neutral adjudicators are usually not authorized to enforce external law. Even general nondiscrimination provisions in collective contracts should not be equated with Title VII and other civil rights enactments. These contractual prohibitions may not incorporate the same substantive rules, proof constructs, and remedial doctrines applicable under the different employment discrimination laws.

If a bargaining agreement arbitration clause specifically empowers presiding neutrals to interpret and apply employment discrimination laws, courts must decide whether to defer civil rights claims to arbitration.[59] Courts should only defer to arbitration if the arbitrators are not only authorized to interpret and apply the relevant statutes, but also to issue remedial awards consistent with those available under those laws. If only back pay were available for discriminatory treatment actions, deferral should be denied, because this procedure would

deprive claimants of the compensatory and punitive damages that could be awarded under Section 1981A.

Following the *Gilmer* decision, many nonunion companies unilaterally created arbitration programs designed to prevent employees from litigating employment discrimination claims in federal courts.[60] These can be problematic, because the employers usually established these systems without meaningful consultation with their employees. The firms have prescribed the rules, they often select and compensate the arbitrators, and impose these arbitral provisions on all present and future workers. If these arbitration plans are to be accepted by courts, judges should require "clear and unmistakable" employee acceptance of the arbitral undertakings. Large, bold, or italicized language should apprise individuals of the specific types of legal claims subject to arbitration, and the neutral adjudicators should be expressly empowered to apply the relevant substantive and remedial standards associated with the pertinent enactments.[61]

Enlightened employers also include the fundamental procedural rights set forth in the "Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship" developed by a Task Force consisting of representatives from the National Academy of Arbitrators, the American Arbitration Association, the Society of Professionals in Dispute Resolution, and the Labor and Employment Law Section of the ABA.[62] These standards recognize the right of claimants to be represented by individuals of their own choosing, the possibility of employer reimbursement for at least some of claimant attorney fees, especially for lower wage workers, adequate claimant access to "all information reasonably relevant to mediation and/or arbitration of their claims," and the right to hearings before qualified and impartial arbitrators drawn from lists of diversified neutrals.[63] The Protocol also encourages

the development of special training programs to educate presiding neutrals with respect to the substantive and procedural issues pertinent to employment discrimination cases. Similar due process concerns were expressed by the Dunlop Commission on the Future of Worker-Management Relations.[64]

Some people may be concerned that private arbitration agreements will not protect worker statutory rights as effectively as judicial proceedings. If basic due process rights are not guaranteed, this would probably be true. On the other hand, protracted and expensive judicial proceedings may cause many claimants to give up or accept minimal settlements, because of their inability to afford the costs of discovery and the delays associated with backlogged civil dockets. This factor clearly favors defendants that have the financial resources to litigate these cases thoroughly.[65] Fair arbitral procedures can provide a more expeditious and less expensive alternative that may benefit workers more than judicial proceedings.[66] The availability of arbitral procedures can also decrease the pressure on employers to settle questionable claims in an effort to avoid the extreme costs of litigation.[67]

Lower courts asked to enforce arbitration agreements set forth in individual employment contracts or applicable personnel policies – as opposed to labor-management bargaining agreements governed by Section 301 of the Labor-Management Relations Act[68] – act pursuant to the authority granted courts in Sections 2-4 of the FAA.[69] Section 2 provides that arbitration agreements are enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract."[70] Section 4 grants federal courts jurisdiction over suits to enforce arbitration agreements, and Section 3 authorizes federal courts to enjoin other judicial proceedings involving claims that are subject to arbitral resolution. When the FAA is applicable

to private arbitration agreements, state arbitration doctrines are preempted, and both federal and state courts are obliged to apply uniform federal enforcement standards.[71]

Although the FAA grants courts expansive authority to enforce private arbitration agreements, courts should recognize the unique nature of employment discrimination claims. In *Gardner-Denver*, the Supreme Court acknowledged the important public policies embodied in federal civil rights legislation, and indicated that courts should not give undue deference to private dispute resolution procedures. To balance the policies set forth in both the FAA and the relevant employment discrimination enactments, courts should establish arbitral deferral standards that require adherence to strict prerequisites before individuals with discrimination claims are required to submit their disputes to arbitral procedures.

Given the controversial nature of arbitral deferral under *Gilmer*, it would be beneficial for the EEOC to issue guidelines – or for Congress to amend the civil rights statutes – to prescribe a set of minimal deferral standards. This approach would be similar to the one taken by Congress in the Older Workers Benefit Protection Act[72] amendment to Section 626(f) of the ADEA[73] requiring the satisfaction of various safeguards as a prerequisite to valid employee waivers of ADEA rights.

The arbitration provisions in employment applications and letters of employment should be delineated in large, bold, or italicized print to call attention to their inclusion. The language should clearly indicate the types of employment discrimination claims subject to arbitral resolution. Arbitrators should be expressly empowered to apply the relevant substantive standards and applicable remedial doctrines pertaining to the different employment discrimination enactments.

The EEOC, the American Arbitration Association, and the Federal Mediation and Conciliation Service should maintain lists of neutral adjudicators who possess the minimal qualifications expected of individuals authorized to preside over such cases. These persons should have a minimum of forty hours of training with respect to both substantive and procedural employment discrimination law and arbitral rules of procedure.[74] They should be generally acceptable in the labor/management community.

Courts are divided with respect to the enforceability of employer-created arbitration systems that require claimants to share the arbitral costs. While employment discrimination claimants must assume the costs of their own legal representatives, subject to court-ordered reimbursement to prevailing plaintiffs, they do not have to share the costs of the judges who preside over their trials. As a result, several courts have refused to enforce private arbitration agreements that require claimants to help defray arbitrator costs. They reasonably believe that this practice may deter claimants with limited financial resources from vindicating their statutory rights.[75] Other courts, however, have not been willing to accept such a blanket policy against the enforcement of arbitral agreements requiring claimants to assume some arbitrator costs. When it appears that claimants can afford the costs involved, they enforce the underlying arbitration provisions.[76]

In labor-management grievance-arbitration, the arbitral costs are generally shared by the employers and the representative labor organizations. When civil rights plaintiffs file suit in federal courts, the government assumes responsibility for the judicial costs involved. If employers decide to establish their own arbitration systems to prevent their employees from litigating employment discrimination claims in federal courts, I believe those employers should

bear the costs of the arbitral proceedings. If claimants were required to share responsibility for those costs, they would not be accorded proceedings comparable to those they would receive in federal court.

The optimal situation would require the EEOC to pay the costs of arbitral proceedings, to avoid the appearance of partiality associated with systems in which employers pay such costs.[77] If the EEOC lacked the funds to cover these costs, employers should be required to do so.[78] This practice would recognize the reality that most claimants lack the financial resources to assume even a partial share of arbitral costs – and the fact that these employer-created arbitral systems are designed to preclude employee access to more protracted and more expensive judicial proceedings.

Although I believe that employers should be obliged to pay for the costs of arbitration, to avoid unconscionable burdens on individual claimants, this practice should not enable those firms to control arbitrator selection. Workers should have the right to participate equally in the selection process and be entitled to challenge any arbitrator candidate they think might not be entirely impartial.[79] Claimants should have the right to know which arbitrators have heard prior cases involving their employer and be provided with confidential access to the previous awards issued by those neutrals. The availability of this information would diminish the "repeat player" benefit that may accrue to employers that regularly select arbitrators who might feel that pro-employer decisions in close cases would be likely to generate more frequent future selections.[80] An alternative procedure could authorize the EEOC either to name the arbitrators who will decide employment discrimination cases or to provide a list of five qualified neutrals from which the employer and the claimant would choose the most acceptable adjudicator.[81]

Minimal discovery rules should be included in applicable arbitral procedures to allow claimants to prepare adequately for trial. Under Section 7 of the FAA,[82] arbitrators possess the authority to compel the attendance of relevant witnesses. Claimants should have the right to be represented throughout this process by legal counsel of their own choosing. Full and fair hearings should also be guaranteed.

Should private arbitration agreements restrict the right of the EEOC to litigate employment discrimination claims on behalf of charging parties? In *EEOC v. Kidder, Peabody & Co.*,[83] the court ruled that the EEOC could seek injunctive relief on behalf of claimants covered by arbitral agreements, but not monetary relief. The court decided that monetary relief would circumvent the obligation of claimants to seek such personal redress through arbitral procedures.[84] Some might argue that private arbitration provisions should not constrain the right of the EEOC to sue on behalf of individual claimants.[85] This would allow the EEOC to pursue cases raising critical legal issues despite the availability to the claimants of arbitral procedures. Since the overwhelming majority of employment discrimination cases are fact-based discriminatory treatment claims in which the plaintiffs must prove that their respective employers discriminated against them *because of* impermissible factors, rarely are significant legal issues involved. It would thus not be inappropriate to deny the EEOC the right to litigate individual claims covered by private arbitration agreements in federal court, whether the agency is seeking legal damages or equitable injunctive relief. The EEOC should, however, be empowered to participate in the resulting arbitral hearings on behalf of the claimants, and have the right to challenge the propriety of any awards it believes are contrary to applicable legal doctrines. So long as reviewing courts engage in sufficiently searching analyses of legal conclusions reached

by private arbitrators, uniform national standards could be preserved.

The one exception to this preclusion rule should pertain to class action claims. Whenever plaintiff representatives are able to obtain Rule 23 class certification or the EEOC decides to prosecute pattern or practice claims, neither suit should be constrained by private arbitration agreements that are designed to resolve individual disputes. The overarching group interests associated with class and pattern or practice cases should not be subject to private resolution. They should instead be handled through traditional judicial procedures under the supervision of persons with the expertise required to conduct such expansive proceedings.

E. STANDARDS FOR JUDICIAL DEFERENCE TO PRIOR ARBITRALAWARDS ENFORCING STATUTORY RIGHTS

After arbitral awards have been issued with respect to cases involving the application of federal employment discrimination enactments, losing parties may challenge or refuse to comply with those decisions. How much deference should reviewing courts give to those arbitral determinations? In conventional grievance-arbitration cases arising from collective bargaining agreement disputes, the Supreme Court has been unusually deferential. Grievance arbitration awards are to be enforced so long as they draw their essence from the applicable contract and are not contrary to law or public policy.[86] This generous deferral standard is based on the fact that arbitrators who interpret and apply bargaining agreement provisions are part of the collective bargaining process and are acting as the designated readers of the collective contracts reached by the negotiating parties.[87] Even when judges disagree with arbitral determinations, they may not reject them unless they contravene "well defined and dominant" public policies.[88]

When arbitration awards arise from non-bargaining agreement provisions, the FAA

requires courts to enforce those arbitral determinations except where the decisions were procured by corruption, fraud, or undue means, there was evident partiality or corruption in the arbitrators, the arbitrators were guilty of serious procedural misconduct, or the presiding neutrals exceeded their powers or imperfectly executed their authority.[89] These standards are entirely appropriate in cases involving the arbitral resolution of disputes arising under private contracts. The parties have defined their own rights and have designated arbitration as the means to enforce those rights. On the other hand, where private employment contracts authorize private arbitrators to determine external public rights set forth in federal employment discrimination statutes, different considerations arise.[90]

Arbitrators interpreting and applying external statutes are no longer functioning as extensions of the negotiating parties. They are not merely interpreting private contractual provisions. They are acting as substitutes for the federal judges who would otherwise hear those public rights disputes. As a result, stricter standards of judicial deference should be applied, with distinctions being drawn between factual findings and legal conclusions. As the Supreme Court recognized in *Gardner-Denver*, lower courts should give substantial deference to the factual determinations of arbitrators, so long as the proceedings have been fair and regular. Judges should be certain that fundamental principles of due process have been observed. It would also be beneficial to require written transcripts of the arbitral hearings and arbitrator awards that clearly summarize and address the pertinent factual questions. Since most civil rights claims involve discriminatory treatment claims in which findings of employer motivations are crucial, most judicial review cases will merely have to evaluate the basic propriety of arbitrator factual conclusions.

When legal interpretations are involved, stricter judicial scrutiny should be required. District courts should apply the same standards that would be applied by appellate courts asked to review the legal conclusions of trial judges.[91] Courts should be certain that arbitrators have issued decisions consistent with: (1) the pertinent substantive standards; (2) the relevant proof constructs and procedural rules; and (3) the applicable remedial doctrines. Such review principles would prevent the uneven application of federal employment discrimination laws by private arbitrators,[92] and guarantee a system of relatively uniform national standards.

## V. USE OF ADMINISTRATIVE PROCEEDINGS TO RESOLVE EMPLOYMENT DISCRIMINATION CLAIMS

As a result of the expansion of employment discrimination protection through the enactment of the ADEA, the ADA, and the Civil Rights Act of 1991, the number of charges filed with the EEOC has risen to approximately 80,000 per year.[93] The number of discrimination complaints filed in federal district courts now exceeds 22,000 annually.[94] These cases are rapidly approaching 10 percent of all federal court civil adjudications.

Two-thirds of employment discrimination judgments result in verdicts for defendants, and the verdicts won by plaintiffs tend to be under $150,000 per case.[95] If Congress decided to reduce the civil dockets of federonsider amendments to the various employment discrimination enactments that would require most discrimination claims to be resolved through administrative proceedings before the EEOC. Any statutory changes in this regard should consider an adjudication system similar to the one currently employed to enforce the mandates of the National Labor Relations Act (NLRA).[96]

A. NLRB ENFORCEMENT PROCEDURES

Section 8 of the NLRA[97] proscribes various unfair labor practices by employers and labor organizations. Section 10[98] describes the administrative procedures to be followed when unfair labor practices are alleged to have occurred. A party adversely affected by allegedly unlawful conduct must file an unfair labor practice charge with the appropriate regional office of the NLRB within six months from the date of the conduct in question. A Board agent investigates the allegations to ascertain the facts and to determine whether it appears that a statutory violation has occurred. Appropriate witnesses are interviewed, and written accounts of the information they provide are prepared. If the Board agent concludes that no improper conduct has taken place, he or she recommends dismissal of the charge. On the other hand, if the agent decides that a violation has probably occurred, he or she recommends the issuance of a formal complaint.

Parties dissatisfied by the regional office's refusal to issue a complaint may appeal that determination to the General Counsel's office in Washington, D.C. Attorneys in that office review the regional office fact findings and legal analysis to determine whether their refusal to issue a complaint was correct. If so, the charge is dismissed, and that decision is final. No party may seek judicial review of the General Counsel's refusal to issue a complaint.[99] On the other hand, if the regional office or the General Counsel's office decides to issue a complaint, the charged party is given a copy of the complaint and asked to file an answer.

During their investigation of unfair labor practice charges, regional office agents frequently act as settlement facilitators. They meet with representatives of the charging parties and the respondents and encourage settlement discussions. These often result in non-Board settlements that directly involve the specific parties involved. Other cases are settled through

informal Board settlements in which the alleged violator agrees to rectify any violation and post an official NLRB notice advising employees of their rights under the NLRA.[100] Many unfair labor practice claims are amicably resolved through non-Board and informal Board settlements.

If a complaint cannot be settled, a hearing is scheduled before an administrative law judge (ALJ). The charging party is represented at no cost by an NLRB attorney acting on behalf of the General Counsel.[101] Minimal discovery procedures are available to litigants. A formal hearing is conducted by an ALJ. A Board attorney presents the evidence on behalf of the charging party. If General Counsel witnesses have provided regional office investigators with fact statements, the respondent is entitled to copies of those statements after their direct examination. After the Board lawyer has presented the case in chief, the respondent makes its presentation. If the ALJ determines that no violation has occurred, he or she recommends dismissal of the complaint. On the other hand, if a violation is found, the ALJ issues a recommended order designed to remedy the unfair labor practice.

Many parties accept ALJ determinations and comply with those awards voluntarily. Others appeal the ALJ conclusions to the NLRB which reviews the ALJ findings and the briefs filed by the parties. Oral arguments are rarely conducted by the NLRB. The Labor Board then decides whether to affirm, reverse, or modify the ALJ findings.

Even though Labor Board decisions are not self-enforcing, numerous litigants recognize the propriety of those determinations and voluntarily comply. Losing parties may alternatively petition courts of appeal for judicial review. If losing parties do not seek judicial review but refuse to comply with recommended Board orders, the NLRB must petition appropriate courts of appeals for enforcement orders. In both judicial review and NLRB-initiated enforcement

proceedings, NLRB factual findings are entitled to judicial acceptance so long as they are "supported by substantial evidence on the record considered as a whole."[102] While NLRB legal conclusions are not accorded such conclusive judicial respect, appellate courts frequently defer to the legal determinations made by the expert administrative agency created by Congress to interpret and enforce the NLRA. Parties that fail to comply with judicially enforced Board remedial orders are subject to contempt sanctions.

The vast majority of unfair labor practice cases are resolved at the regional office level, most without the need for formal ALJ hearings. Of the 33,439 unfair labor practice cases closed in 1997, 30.5 percent were withdrawn by the charging parties before complaints were issued, 29.4 percent were administratively dismissed prior to the issuance of complaints, and 35.9 percent were settled or adjusted before ALJ decisions were issued.[103] Only 1.8 percent of the cases closed were decided by the NLRB in contested cases, and fewer than 1 percent reached courts of appeals via petitions for review or enforcement.

It is interesting to note that the NLRB has arbitral deferral rules that are similar to those followed by the Supreme Court in employment discrimination cases. When unfair labor practice charges are filed that involve issues subject to resolution through arbitration procedures set forth in bargaining agreements, the Labor Board will direct the disputing parties to use those private adjudication procedures.[104] Once arbitral decisions have been issued, if losing parties seek Board intervention, NLRB involvement will be denied so long as "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision . . . is not clearly repugnant to the purposes and policies of the Act."[105]

## B. USE OF NLRB-TYPE PROCEDURES TO RESOLVE EMPLOYMENT DISCRIMINATION CLAIMS

The use of NLRB-type administrative procedures by the EEOC could greatly expedite the resolution of employment discrimination cases. Victims of unlawful discrimination would usually be able to obtain faster and less expensive redress, and defendants with meritorious defenses would not feel the pressure to offer claimants sizable settlements simply to avoid costly judicial litigation.

Since many district judges are understandably reluctant to grant defendant summary judgment motions in even questionable cases, defendants are obliged to incur substantial legal costs when defending unmeritorious claims. The discovery process is extensive, and judicial proceedings are often protracted. Furthermore, since courts rarely award attorney fees to prevailing defendants, winning defendants must absorb their own legal costs. The use of administrative enforcement procedures could greatly reduce litigation costs and expedite the resolution of contested cases.

If NLRB-type procedures were to be adopted for employment discrimination cases governed by the EEOC, certain procedural modifications would be required. Congress would have to greatly expand the EEOC's budget, recognizing that the money committed to the administrative process would be far less than the money saved by having these claims removed from federal courts. Additional EEOC regional offices would have to be created to provide national coverage. The regional offices would have to be staffed by sufficient numbers of people to permit the thorough and prompt investigation of all employment discrimination charges. Regional attorneys would then be authorized to prepare reports indicating whether they believe

that statutory violations have occurred. Negative conclusions could be appealed to the General Counsel's office in Washington, D.C.

When the General Counsel's office finds no cause to believe that violations have occurred, charging parties could be denied the right to use EEOC administrative procedures or judicial forums to litigate their cases. This approach would significantly reduce the number of unmeritorious cases taken to trial. It would also decrease the economic pressure on defendants to settle unfounded claims.

Congress may not wish to make General Counsel office no-cause findings conclusive, believing that claimants with no-cause findings should still be able to litigate their cases before appropriate forums. To discourage clearly meritless suits, Congress could amend the employment discrimination statutes to authorize – or even mandate – the awarding of attorney fees to defendants who successfully defend suits prosecuted by plaintiffs whose claims were found meritless by agents of the General Counsel's office. In recognition of the fact that many plaintiffs may lack the financial resources to satisfy such attorney fee awards, Congress could authorize judges to impose attorney fee obligations on both losing plaintiffs *and* their attorneys, to discourage lawyers from filing frivolous claims in an effort to extort undeserved settlement offers from defendants.

Congress should decide whether it believes that private arbitration proceedings should be used to resolve employment discrimination claims. If it agrees with the Supreme Court's *Gilmer* approach and the *Collyer Insulated Wire* practice by the NLRB, it should amend the different employment discrimination statutes to authorize pre-adjudication deferral to arbitration by the EEOC of all cases subject to resolution by labor-management or employer-established arbitration

procedures. As noted earlier, such deferral should only be mandated where the applicable arbitral programs expressly authorize arbitrators to apply the relevant federal enactments, to follow the relevant substantive principles and proof constructs, and to issue remedial orders consistent with those available before the EEOC. Claims not subject to arbitral resolution, would be subject to EEOC administrative determinations.

When EEOC attorneys find cause to believe that violations have occurred, the EEOC could use General Counsel agents to represent the charging parties during the adjudication process. Given the substantial number of civil rights claims filed with the EEOC each year, this practice would be costly. Hundreds of EEOC attorneys would be required to represent all of the parties with seemingly valid discrimination claims. The EEOC budget would have to be increased in a manner that might not be politically acceptable given existing budget constraints.

An alternative system could be used that would be more cost efficient. Free EEOC representation could be provided in important cases, as may currently be done under the 1972 amendments to Title VII which empower EEOC lawyers to bring judicial actions on behalf of charging parties. In less significant cases, however, EEOC attorneys would not be available. The charging parties would have to obtain their own lawyers to prosecute their claims. Most claimants would be able to retain attorneys on contingent fee bases, with their lawyers charging a share of any settlements agreed upon. Attorneys who successfully litigate cases on behalf of claimants would be able to request attorney fee awards as they may presently do under the different statutes.

If Congress were to decide to authorize the administrative resolution of contested employment discrimination claims, it would have to appropriate sufficient funds to enable the

EEOC to employ a sufficient number of ALJs to hear the volume of cases that would be involved. If an insufficient number of ALJs were available, case backlogs would develop and the principal advantage of administrative proceedings would be lost. The cost of these ALJs would be more than offset by the caseload reduction that would be experienced by district court judges who would no longer have to preside over these cases.

If administrative procedures are to work efficiently with respect to the adjudication of employment discrimination cases, it would be necessary to guarantee a group of qualified administrative law judges. It would not be appropriate to use generic ALJs for this purpose. A group of trial experts with special knowledge of the pertinent substantive doctrines and applicable employment discrimination proof constructs would be crucial. It would thus be beneficial for Congress to direct the creation of a separate group of ALJs with the requisite knowledge of equal employment opportunity law.

Extremely limited discovery procedures are currently available in proceedings conducted in NLRB proceedings. While this approach may be appropriate with respect to NLRA cases, it would not be efficient or fair regarding employment discrimination cases. Plaintiffs rarely possess the information they need to determine initially if they have been the victims of impermissible discrimination. They are either given no information concerning the actions they plan to challenge or they are provided with nondiscriminatory explanations. If Congress were to provide the EEOC with administrative enforcement authority, it should amend the applicable civil rights statutes to provide claimants and respondents with adequate discovery rights.

Both claimants and respondents should be given copies of interview statements obtained by EEOC agents while they are investigating discrimination charges. They should also have the

right to file motions to produce relevant documents, to seek answers to appropriate interrogatories, and to depose pertinent parties. ALJs assigned to specific cases would supervise the discovery process to guarantee parties adequate trial preparation and to ensure that unnecessarily burdensome tactics are not being employed.

The EEOC should designate certain trained ALJs as settlement judges who would be required to conduct settlement conferences in all pending cases. All relevant parties would be required to participate in these formal conferences, and these settlement ALJs would have the right to conduct mediation sessions designed to avoid the need for formal adjudications. Despite the fact that EEOC agents may have previously engaged in conciliation efforts during the invesitgative process, it is the immediacy of trial that often induces recalcitrant litigants to contemplate more seriously the benefits that may be achieved through additional pre-trial mediation.

Claims that cannot be resolved through settlement discussions would be scheduled for trial before ALJs. Would the use of such administrative resolution procedures unconstitutionally deprive claimants or respondents of their Seventh Amendment right to jury trials? In the relatively small number of disparate impact cases brought by claimants adversely affected by facially neutral job requirements that disqualify greater percentages of different groups protected by the different civil rights enactments, this would not be a problem. Such plaintiffs are not entitled to seek compensatory or punitive damages under Section 1981A, thus no constitutional right to a jury trial would be available. They would only be entitled to equitable injunctive relief and back pay that has been traditionally awarded in equity proceedings and can clearly be resolved through administrative proceedings.[106]

The jury trial issue is most significant for plaintiffs prosecuting discriminatory treatment claims who request compensatory and punitive damages. When Congress added Section 1981A, as part of the Civil Rights Act of 1991, to authorize the awarding of limited compensatory and punitive damages in such cases, it explicitly authorized resort to jury trials by either party.[107] This was based upon the belief that claimants seeking such traditional legal damages had a right to jury determinations. Congress might endeavor to circumvent this problem by authorizing the use of administrative juries. It could authorize ALJs to conduct discriminatory treatment trials before six, nine, or twelve member administrative juries. Since such jury trials would still be presided over by Article I administrative judges, rather than Article III life-tenure judges, such a procedure might still contravene the Seventh Amendment.[108] In addition, the use of administrative juries would greatly diminish the benefits to be derived from streamlined administrative procedures. If the EEOC were required to conduct regular jury trials in all discriminatory treatment cases, the advantages of having claims disposed of through administrative adjudications would be greatly diminished.

In *Atlas Roofing Company, Inc. v. Occupational Safety & Health Review Commission*,[109] the Supreme Court sustained the right of Congress to establish an administrative agency to enforce newly-created federal health and safety standards. "Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred. These statutory schemes have been sustained by this Court."[110] The critical factor is not simply the form of relief involved, but the "public" or "private" nature of the rights being enforced. "[W]hen Congress creates new statutory 'public rights,' it may assign their adjudication to an

administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'"[111]

The various employment discrimination statutes involve both "private" and "public" rights. The specific individuals who file claims under those enactments may believe that they are asserting wholly "private" rights, but the strong government interest in the elimination of pernicious discrimination renders the rights created by these laws "public." The "public" nature of employment discrimination claims was expressly recognized by the Supreme Court in *Gardner-Denver*.[112] Under these circumstances, Congress would probably have the right to assign the adjudication of employment discrimination claims to Article I administrative procedures rather than to Article III judicial forums.[113]

If Congress wished to minimize Seventh Amendment questions, it could amend Section 1981A to eliminate the availability of punitive damages. If only back pay and compensatory damages were available, ALJs would probably be able to resolve the claims without the need for jury trials. The elimination of punitive damages would have a minimal impact on claimants. Exemplary relief is awarded in relatively few cases, since it is limited to situations in which defendants behavior evidenced a "reckless indifference to the federally protected" rights involved.[114] In addition, the statutory limits imposed by Section 1981A of between $50,000 and $300,000 per claimant for compensatory and punitive damages, based upon the number of employees involved, would frequently preclude any punitive award above the compensatory damages that would otherwise be included.

Parties who are dissatisfied with ALJ determinations should have the right to petition the EEOC for review. Given the thousands of cases that would be involved, the EEOC should

probably follow the review procedures used by the NLRB. Petitioners and respondents would be asked to file briefs. The EEOC would review these briefs, the transcripts, exhibits, and ALJ decisions. Oral arguments should rarely be necessary, with the written submissions being sufficient in most instances to determine whether the ALJs had acted properly. Factual findings should be accorded substantial deference so long as they are supported by the evidence in the record. Legal analysis should be subjected to more thorough evaluation to guarantee both fidelity to the applicable statutes and national consistency.

There is no reason for all five EEOC members to examine each petition for review. The Commission could use panels of three members to review most cases. Only where significant legal questions are presented or previous Commission decisions are in conflict should full Commission participation be required. To assist the EEOC with the increased work load, Congress might wish to expand the Commission to seven or perhaps even nine members. This would be in recognition of the fact they would be performing much of the work currently being performed by both district court and court of appeals judges. In most cases, parties that fail to prevail before ALJs and the EEOC would accept those decisions and seek no further review.

Parties aggrieved by final EEOC decisions should have the right to judicial review. Congress might authorize federal district courts to carry out this function, but it would be more efficient to assign this task to courts of appeals. Trial courts are not usually employed to review adjudications conducted by others, and they are terribly busy with their own trial dockets. Congress should thus consider the current NLRA system in which final Labor Board unfair labor practice determinations are subject to court of appeals review.

If administrative procedures were adopted for the resolution of employment

discrimination claims, I would suggest one critical modification of NLRA practice. I would have EEOC decisions self-enforcing, subject to the right of aggrieved parties to request judicial review. Parties that failed to comply voluntarily and did not request appellate court stays of EEOC mandates should be subject to contempt sanctions in federal district court proceedings. This would eliminate the need for EEOC attorneys to petition courts of appeals for enforcement orders in cases in which losing parties did not comply. Facing the possibility of contempt sanctions, most losing respondents would undoubtedly comply, with truly aggrieved parties seeking judicial review.

What standards should be applied by appellate courts when they reviewed EEOC decisions? It would be proper for Congress to indicate that EEOC factual determination are conclusive when they are supported by substantial evidence on the record considered as a whole. Reasonable judicial deference should be extended to legal interpretations made by the expert administrative agency established by Congress to apply the different employment discrimination enactments. Only when reviewing courts decide that agency interpretations are inconsistent with statutory mandates or conflict with prior appellate court decisions interpreting the same provisions should EEOC statutory constructions be reversed. The adoption of these two factual and legal review standards would discourage frivolous appeals. If parties realized that courts of appeals would be unlikely to overturn the decisions they had lost before the EEOC, few would undertake the expense of further litigation.

If Congress were to contemplate the substitution of administrative proceedings for judicial adjudications with respect to employment discrimination claims, proponents and opponents would undoubtedly voice strong opinions. I do not have a strong personal opinion

concerning this issue. Federal judges are dissatisfied with the number of relatively low value discrimination claims that continue to be tried in district courts. On the other hand, civil rights leaders might consider a shift to administrative proceedings an indication that employment discrimination cases are no longer high priority items. As one who specializes in labor and employment law, I do not share this concern. I think that the NLRB treats unfair labor practice cases as seriously as federal district judges would. In fact, one might suspect that specialized agencies like the NLRB and the EEOC are even more concerned about the claims that come before them. The individuals appointed to those agencies are usually specialists in their fields, and are normally committed to the enforcement of the underlying statutory schemes. In the employment discrimination area, claimant advocates recognize the number of unmeritorious charges filed by individuals who are unaware of the actual facts and defense lawyers realize that employment discrimination continues to occur and must be eradicated.

If effective administrative procedures were established and Congress provided the EEOC with the funds it would require to administer such a program efficiently, most claims would be processed fairly and expeditiously. Individuals with valid claims would be likely to obtain prompt redress, because respondents facing ALJ trial dates within the coming months would act swiftly to resolve the cases they would be likely to lose at trial. Respondents would benefit from the reduced costs of litigation, the faster rejection of frivolous claims, and the prompt adjudication of close cases.

If Congress were to move toward the use of administrative procedures to resolve employment discrimination cases, one group of claims should be exempted. Class actions brought by private parties and pattern or practice cases prosecuted by EEOC or Justice

Department attorneys[115] should continue fall within the jurisdiction of federal district courts. The amounts of money involved are usually significant, and the legal questions affecting large numbers of people can be momentous. Once a district court judge certifies a class action under Rule 23 or the EEOC decides to prosecute a pattern or practice suit against private parties or the Justice Department initiates such an action against state or local government employers, EEOC adjudication authority should be supplanted by district court jurisdiction. If class status is denied, however, the claims should be returned to the EEOC for further administrative proceedings.

## VI. CONCLUSION

There has been a significant increase in the number of employment discrimination claims filed each year with the EEOC and prosecuted in federal courts. Most of the charges investigated by EEOC personnel are found to lack merit. The charges found meritorious tend to involve relatively small monetary sums, yet occupy almost ten percent of federal court civil dockets. If EEOC representatives had the resources to thoroughly investigate all charges, they would be able to resolve many by convincing parties filing apparently unmeritorious claims to forego further action and by inducing respondents to settle seemingly valid claims. The use of formal mediation procedures with respect to all realistic claims would further contribute to amicable resolutions.

Most collective bargaining agreements contain non-discrimination provisions enforceable through binding arbitration procedures, and many non-union firms have adopted arbitral systems designed to resolve employment discrimination disputes. The Supreme Court has been willing to require the exhaustion of such arbitral procedures before federal court adjudications may occur. The EEOC and the courts should establish guidelines that will ensure that the rights of both

claimants and respondents will be preserved in those arbitral forums.

If Congress really wants to diminish the use of federal courts to adjudicate employment discrimination claims, it may decide to adopt procedures similar to those presently used by the NLRB to resolve unfair labor practice claims. Administrative law judges could hear such cases, with ALJ determinations being subject to EEOC review. Final EEOC decisions could be reviewed by courts of appeals. Since these administrative procedures would be used to enforce "public" rights, the absence of jury trials would probably not contravene Seventh Amendment principles, especially if punitive damages were no longer available to claimants.

# ENDNOTES



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1. *See* Nancy Montwieler, *EEO Case Filings Said "Leveling Off," But Still a Large Share of Caseload*, Daily Lab. Rep. (BNA) No. 58, at A-1 (Mar. 24, 2000).

2. *See id.*

3. *See Employment Bias Cases in Federal Courts Almost Tripled in Previous Decade, DOJ Says*, Daily Labor Report (BNA) No. 13, at E-5 (Jan. 20, 2000).

4. Pub. L. 101-336, 104 Stat. 327 (1990), amended by Pub. L. 102-166, 105 Stat. 1071 (1991), and Pub. L. 104-1, 109 Stat. 8, 16, 41 (1995), codified at 42 U.S.C. § 12,101 et seq. (1994).

5. Pub. L. 102-166, 105 Stat. 1071 (1991) (codified at scattered sections of 42 U.S.C.).

6. *See* 42 U.S.C. § 1981A (1994), which authorizes awards of compensatory and punitive damages with a limit of from $50,000 to $300,000 per claimant depending upon the total number of individuals employed by defendant employers.

7. Pub. L. 102-166, 105 Stat. 1071 (1991). The Civil Rights Act of 1991 amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1994) (prohibiting discrimination based upon race, color, religion, sex, or national origin), the American's With Disabilities Act, 42 U.S.C. § 12,101 et seq. (1994) (prohibiting discrimination against individuals with mental or physical disabilities), the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (1994) (prohibiting discrimination based upon age with respect to individuals forty or older), and the Reconstruction Era Civil Rights Act, 42 U.S.C. § 1981 (1994) (guaranteeing to all persons the same right to make and enforce contracts, including employment contracts, as is enjoyed by white citizens).

8. *See* Nancy Montwieler, *EEOC Reaped Record Benefits, Continued Culling Inventory Last Year*, Daily Labor Report (BNA) No. 20, at C-1 (Jan. 31, 2000).

9. *See* Michael Selmi, *The Use of Mediation in Employment Discrimination Cases*, 1999 J. DISP. RES. 153, 159 (1999); Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 12-13 (1996). *See also* David Sherwyn, J. Bruce Tracey & Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 86-87 (1999).

10. *See* Matt A. Mayer, *The Use of Mediation in Employment Discrimination Cases*, 1999 J. DISP. RES. 153, 159 (1999). *See also* Selmi, *supra* note 9, 57 OHIO ST. L.J. at 13.

11. *See supra* note 3 and accompanying text.

12. *See* Mayer, *supra* note 10, at 157.

13. *See id.* at 160.

14. *See* Julie Harders, *Too Good To Last?* ABA JOURNAL, at 30 (April 2000).

15. *Id.*

16. *See* Michael Triplett, *Study Shows High Satisfaction Levels With EEOC's Voluntary Mediation Procedure*, Daily Labor Report (BNA) No. 189, at A-6 (Sept. 28, 2000).

17. *Id.*

18. *See* Harders, *supra* note 14, at 30.

19. *See* CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 482-87 (4th ed. 2001).

20. *See id.* at 496-507.

21. *See id.* at 510-11.

22. *See id.* at 512-13.

23. *See* Stephen Goldberg & Jeanne Brett, *An Experiment in the Mediation of Grievances*, 106 MONTHLY LAB. REV. No. 3 (Mar. 1983) at 23.

24. *See* CRAVER, *supra* note 19, at 458-61.

25. *See id.* at 461-63.

26. *See id.* at 463-66. *See generally* ROBERT BARUCH BUSH & JOSEPH FOLGER, THE PROMISE OF MEDIATION (1994) (explaining transformative mediation).

27. *See* Arnold M. Zack, *The Alliance for Education in Dispute Resolution: Leveling the Playing Field in Employment Mediation*, 2 J. ALTERNATIVE DISP. RESOL. IN EMPL. 31 (Issue 2, Summer 2000).

28. *See* MARK A. ROTHSTEIN, et al., EMPLOYMENT LAW TREATISE 226-27 (2d ed. 1999).

29. 49 Stat. 449 (1935), codified, as amended, at 29 U.S.C. § 151 et seq.

30. *See* CHARLES B. CRAVER, CAN UNIONS SURVIVE? 26-27, 34-35 (1993).

31. *See id.* at 22-24.

32. Pub. L. 88-352, 78 Stat. 253 (1964), codified, as amended, at 42 U.S.C. § 2000e et seq. (1994).

33. *See* Steele v. Louisville & Nashville R.R., 323 U.S. 192, 204 (1944).

34. 415 U.S. 36 (1974).

35. *Id.* at 55.

36. *See* 415 U.S. at 55-56.

37. 415 U.S. at 60 n.21.

38. *See* 42 U.S.C. § 2000e-2(k) (1994). The disparate impact theory applies to facially neutral employment factors that disqualify a greater percentage of minority or female individuals and are not shown to be related to successful job performance.

39. 500 U.S. 20 (1991).

40. 43 Stat. 883 (1925).

41. 500 U.S. at 25 (quoting Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

42. 346 U.S. 427 (1953).

43. 473 U.S. 614 (1985).

44. 482 U.S. 220, *reh'g. denied*, 483 U.S. 1056 (1987).

45. 490 U.S. 477 (1989).

46. 490 U.S. at 481.

47. 121 S. Ct. 513 (2000).

48. 121 S. Ct. ___ (2001).

49. 9 U.S.C. § 1 (1994).

50. 9 U.S.C. §§ 2-4 (1994).

51. 9 U.S.C. § 1 (1994).

52. The court merely followed the interpretation it had previously announced in Craft v. Campbell Soup Co., 161 F.3d 1199 (9th Cir.), *reh'g. denied*, 177 F.3d 1083 (9th Cir. 1998).

53. 525 U.S. 70 (1998).

54. 525 U.S. at 76-77.

55. 525 U.S. at 80 (quoting Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983)).

56. *See* Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir.), *cert. denied*, 525 U.S. 982 (1998) (declaring mandatory, pre-dispute arbitration agreements contrary to the intent of the Civil Rights Act of 1991 and thus unenforceable in the employment setting). The proposed Civil Rights Procedures Protection Act would amend federal employment discrimination statutes to prevent civil rights claimants from being required by employers to substitute involuntarily arbitral procedures for judicial redress). *See* Scott M. Nelson, *The Proposed Civil Rights Procedures Protection Act: An Unlikely End to Mandatory Employee Arbitration Agreements?* 2 J. ALTERNATIVE DISP. RESOL. IN EMPL. 19 (Summer 2000).

57. It is important to note that a majority of workers have indicated that they would prefer to have their employment disputes resolved through fair arbitral procedures rather than through judicial proceedings. *See* RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 132-35 (1999).

58. *See* MARLIN M. VOLZ & EDWARD P. GOGGIN, HOW ARBITRATION WORKS 142-43 (5th ed. 1997).

59. Enforcement of arbitration obligations set forth in collective bargaining agreements is under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 (1994), which grants federal courts jurisdiction over suits to enforce contracts between employers and labor organizations.

60. *See* David E. Feller, *Putting Gilmer Where It Belongs: The FAA's Labor Exemption*, 18 HOFSTRA LAB. & EMPL. L.J. 253 (2000); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENVER U. L. REV. 1017, 1036-37 (1996).

61. *See* Sherwyn, Tracey & Eigen, *supra* note 9, at 122.

62. *See* MICHAEL PICHER, RONALD L. SEEBER & DAVID B. LIPSKY, THE ARBITRATION PROFESSION IN TRANSITION 8-9 (2000).

63. The California Supreme Court recently indicated that such minimal safeguards must be provided if employees are going to be required to submit their statutory claims to employer-

created arbitration. *See* Armendariz v. Foundation Health Psychcare Servs. Inc., 24 Cal.4th 83, 6 P.2d 669 (2000).

64. *See* Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 IND. L.J. 83, 88-90 (2001).

65. *See* Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 J. DISP. RES. 19, 27-28 (1999).

66. *See* Sherwyn, Tracey & Eigen, *supra* note 9, at 99-100.

67. *See id.* at 80-82.

68. 29 U.S.C. § 185 (1994) (granting federal district courts jurisdiction over suits to enforce collective bargaining agreements). *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

69. 9 U.S.C. §§ 2-4 (1994).

70. 9 U.S.C. § 2 (1994).

71. *See* Southland Corp. v. Keating, 465 U.S. 1, 10-11 (1984); *see also* Perry v. Thomas, 482 U.S. 483, 490-92 (1987) (FAA preempts state law designed to provide workers with access to judicial forums to enforce wage claims despite the existence of private arbitration agreements).

72. Pub. L. 101-433, 104 Stat. 978 (1990).

73. 29 U.S.C. § 626(f) (1994).

74. *See* Zack, *supra* note 27.

75. *See, e.g.*, Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054 (11th Cir. 1998); Cole v. Burns Int'l Security Servs., 105 F.3d 1465 (D.C. Cir. 1997).

76. *See, e.g.*, Bradford v.Rockwell Semiconductor, 238 F.3d 549 (4th Cir. 2001); Williams v. Cigna Financial Advisors, Inc., 197 F.3d 752 (5th Cir. 1999), *cert. denied*, 529 U.S. 1099 (2000).

77. Employees reasonably fear that if employers are entirely responsible for the payment of arbitrator fees, some neutral adjudicators may lean toward company positions in close cases. *See* FREEMAN & ROGERS, *supra* note 57, at 135.

78. *See* Cole v. Burns Int'l Security Servs., 105 F.3d 1465, 1485 (D.C. Cir. 1997). *But cf.* David M. Kinnecome, *Note: Where Procedure Meets Substance: Are Arbitral Procedures a Method of Weakening the Substantive Protections Afforded by Employment Rights Statutes?* 79 B.U. L. REV. 745, 774 (1999) (arguing that employers and claimants should be required to share the costs of arbitration).

79. *See* Sherwyn, Tracey & Eigen, *supra* note 9, at 120-21.

80. *See* Menkel-Meadow, *supra* note 65, at 35-36.

81. *See* Lewis Maltby, *Paradise Lost – How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1, 21 (1994).

82. 9 U.S.C. § 7 (1994). *See* Sherwyn, Tracey & Eigen, *supra* note 9, at 121-22.

83. 156 F.3d 298 (2d Cir. 1998).

84. *Accord*, EEOC v. Waffle House, Inc., 193 F.3d 805 (4th Cir. 1999). *But see* EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448 (6th Cir. 1999). *See also* Sarah Baxter, *Note: Employees Beware: Signing Arbitration Agreements May Limit Your Remedies in Suits Filed by the EEOC*, 2000 J. DISP. RES. 413 (2000).

85. *See* Sherwyn, Tracey & Eigen, *supra* note 9, at 117-18.

86. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960); W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766 (1983). *See generally* Charles B. Craver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 CHI.-KENT L. REV. 571, 591-99 (1990).

87. *See* Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1138 (1977).

88. *See* Paperworkers v. Misco, Inc., 484 U.S. 29, 43 (1987); *see also* Eastern Associated Coal Corp. v. United Mine Workers of America, 121 S. Ct. 462, 466-67 (2000).

89. *See* 9 U.S.C. § 10(a) (1994).

90. *See* Cole, 105 F.3d 1465, 1487 (D.C. Cir. 1997).

91. *See* Kinnecome, *supra* note 78, at 770-71; Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 96-97 (1997).

92. *Compare* Smith v. PSI Servs. II, Inc., ___ F. Supp. ___, 84 F.E.P. Cas. 1409 (E.D. Pa. 2001) (sustaining arbitral determination despite fact arbitrator misapplied sexual harassment legal doctrines).

93. *See supra* note 8 and accompanying text.

94. *See supra* note 1 and accompanying text.

95. *See supra* note 3 and accompanying text.

96. 49 Stat. 449 (1935). Codified, as amended, at 29 U.S.C. § 151 et seq. (1994).

97. 29 U.S.C. § 158 (1994).

98. 29 U.S.C. § 160 (1994); *see also* 29 C.F.R. § 101 (2000) (setting forth NLRB rules applicable to unfair labor practice proceedings).

99. *See, e.g.*, Beverly Health Servs. v. Feinstein, 103 F.3d 151 (D.C. Cir. 1996), *cert. denied*, 522 U.S. 816 (1997); Lincourt v. NLRB, 170 F.2d 306 (1st Cir. 1948). The nonreviewability of General Counsel decisions also applies to determinations to withdraw previously issued complaints. *See* Intl Assn of Machinists v. Lubbers, 681 F.2d 598 (9th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983).

100. In cases involving flagrant and pervasive unfair labor practices, the Board occasionally requires a formal Board settlement in which the respondent stipulates to the entry of a formal Board remedial order and an enforcement decree by the appropriate court of appeals.

101. Representatives of charging parties may also participate in the ALJ hearings.

102. 29 U.S.C. § 160(e) (1994).

103. *See* 62 NLRB, ANN. REP 5-7 (1998).

104. *See* United Technologies Corp., 268 N.L.R.B. 557 (1984); Collyer Insulated Wire, 192 N.L.R.B. 837 (1971).

105. Spielberg Mfgr. Co., 112 N.L.R.B. 1080, 1082 (1955). In Olin Corp., 268 N.L.R.B. 573 (1984), the Board indicated that when applying the "clearly repugnant" standard, deferral to previous arbitral determinations would only be denied where those awards are not susceptible to an interpretation consistent with the NLRA.

106. *See* Curtis v. Loether, 415 U.S. 189, 194-95 (1974) (indicating that there is no Seventh Amendment right to a jury trial in Title VII cases in which only equitable relief, including back pay, is being sought); *see also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937) (sustaining constitutionality of NLRB administrative procedures to enforce NLRA rights).

107. *See* 42 U.S.C. § 1981A(c) (1994).

108. *Cf.* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 63-69 (1982) (striking down use of Article I bankruptcy judges to perform functions generally performed by life-tenure Article III judges).

109. 430 U.S. 442 (1977).

110. 430 U.S. at 450.

111. 430 U.S. at 455; *see also* Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 589-92 (1985); Crowell v. Benson, 285 U.S. 22, 50-57 (1932).

112. *See* 415 U.S. at 45-47.

113. *See* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 923-29 (1988).

114. 42 U.S.C. § 1981A(b)(1) (1994); *see* Kolstad v. American Dental Assn, 527 U.S. 526, 533-38 (1999).

115. *See* 42 U.S.C. 2000e-6 (1994) (authorizing pattern or practice suits by the EEOC against private parties and 2000e-6(f)(1) (1994) (requiring pattern or practice suits against state or local government entities to be prosecuted by the Attorney General).