Arbitration of Employment Discrimination Claims: Can Arbitration Replace Traditional Adjudication of Cases?

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Synopsis

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1 The author wishes to acknowledge the substantial contribution of Andrea Naested, Esq. and Diana Schroeder in the preparation of this chapter.
§ 8.01. Introduction.

Alternative dispute resolution in the employment context refers to a variety of methods and procedures for resolving employee disputes. Programs such as open door policies, conciliation or in-house mediation are informal, voluntary types of alternative dispute resolution which allow parties to design their own solutions to employee disputes. Typically, these internal problem solving mechanisms resolve many disputes successfully and keep the employment relationship running smoothly.²

At the other end of the spectrum, alternative dispute resolution also refers to mandatory, binding arbitration. Arbitration is generally an adversarial process conducted in a more judicial type setting. In recent years, employers have increasingly implemented mandatory arbitration programs to deal with employee disputes, including federal employment discrimination claims. Requiring employees to submit statutory employment discrimination claims such as Title VII,³ Americans with Disabilities Act (ADA)⁴ and Age Discrimination in Employment Act (ADEA)⁵ claims to arbitration has resulted in controversy because, unlike voluntary, informal alternative dispute resolution policies, arbitration renders a final binding decision by a third party. Thus, arbitration imposes a decision on the parties rather than allowing the parties to devise their own solution.

In the traditional labor relations setting, the practice of arbitrating grievances arising under collective bargaining agreements is well established. This practice exists due to the national policy favoring collective bargaining and industrial self-government, thus promoting industrial peace.⁶ Even in the traditional labor relations context, however,

the Supreme Court has placed limits on the enforceability of arbitration provisions contained in collective bargaining agreements to the extent that they implicate individual employees’ statutory rights.\(^7\)

The arbitration of statutory employment discrimination claims has raised a number of practical and legal issues. The federal courts are addressing these issues in a host of cases as employers attempt to implement various alternative dispute resolution systems featuring arbitration. Because of the almost constant stream of federal court decisions in this still developing area, this chapter will address various issues that have arisen thus far and provide a basis for understanding and anticipating the types of concerns that are inherent in this dynamic area of the law.

Among the issues to be addressed is the timing of the agreement to arbitrate. Is the arbitration provision a pre-dispute waiver of rights contained in a collective bargaining agreement, an employee handbook, or an employment application? Or was arbitration agreed to after the claim arose, thus constituting a post-dispute waiver of the right to a judicial forum? Post-dispute voluntary arbitration agreements occur when the parties decide to use arbitration \textit{after a dispute arises}. Such agreements do not often result in litigation, because the parties’ decision to arbitrate is viewed as voluntary and informed. On the other hand, pre-dispute mandatory arbitration agreements occur when the parties waive their right to a judicial forum before the dispute arises; for example, the arbitration provision may be contained in an employee handbook. The pre-dispute versus post-dispute arbitration agreement debate often centers on whether employers should have the right to insist on an agreement to arbitrate statutory claims as a condition of employment. This chapter focuses primarily on issues raised with respect to pre-dispute arbitration agreements.\(^8\)


\(^8\) Other issues include whether the statutory claim is precluded from arbitration by the statute under which the claim arose, or by the policies underlying the statute; whether the arbitrator is authorized to award all remedies recoverable in a court of law and whether there are adequate procedural safeguards in place; procedural issues such as
§ 8.02. The Labor Arbitration Model.

Arbitration in the traditional labor relations setting arises from labor unions bargaining with management over terms and conditions of employment which are incorporated into a collective bargaining agreement. “The collective bargaining agreement states the rights and duties of the parties . . .; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.”9 Our national labor policy encourages industrial self-government and collective bargaining, thus minimizing industrial strife by improving the economic well-being of workers.10 The grievance and arbitration process under a collective bargaining agreement lies at the very heart of this system of industrial self-government. The Supreme Court approved the role of arbitration in the context of collective bargaining in the seminal Steelworkers Trilogy decisions.11

Arbitration is thus well established and is considered a fair and effective process in the labor relations setting. The labor arbitrator is confined to interpretation and application of the collective bargaining agreement and is viewed as bringing informed judgment to bear on the task of reaching a fair solution.12 Labor arbitration is generally regarded by both management and labor as a more efficient method of resolving many types of collective bargaining disputes.13

In Textile Workers Union of America v. Lincoln Mills of Alabama, the Supreme Court declared that there was a federal policy favoring enforcement of agreements to arbitrate grievances arising under collective

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10 Barrentine, 450 U.S. at 735.
12 Enterprise Wheel & Car, 363 U.S. at 597.
13 Id. at 596.
bargaining agreements. In *Lincoln Mills*, the Court stated that Section 301 of the Labor Management Relations Act of 1947, which grants jurisdiction to federal courts over suits for violations of collective bargaining agreements between employers and unions, was not merely jurisdictional, but authorized federal courts to fashion a body of federal law for enforcement of collective bargaining agreements, including specific performance of arbitration provisions contained in collective bargaining agreements. The enforcement of these arbitration agreements promotes industrial peace because the agreement to arbitrate disputes is considered the *quid pro quo* for the union’s agreement not to strike.

Thus, the policy favoring labor arbitration of grievances arising under a collective bargaining agreement results from the rough equality of bargaining power between labor unions and management, the ability of both parties to bear the cost of arbitration, the limitation of arbitration in this setting to interpretation of the collective bargaining agreement, and the existence of a system for review and enforcement of decisions. Much of the current legal and policy debate discussed below centers on whether and to what extent the factors present in the labor relations model are applicable in the context of an agreement to arbitrate employment law disputes between an individual employee and his or her employer.

§ 8.03. Employment Civil Rights Statutes.

Title VII of the Civil Rights Act of 1964 was enacted by Congress to prevent discrimination and ensure equal opportunity in employment. Title VII prohibits discrimination in private employment because of race,

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16 *Id.* at 456-457.
17 *Id.*
color, religion, sex or national origin. Subsequent federal civil rights legislation has extended protection to additional groups; for example, the ADEA prohibits discrimination in employment because of age and the ADA prohibits an employer from discriminating against a qualified individual with a disability.


Congress amended Title VII and the ADA by passage of the 1991 Civil Rights Act. The 1991 Act created a right to a jury trial for plaintiffs and expanded relief recoverable under the statutes. In cases where the plaintiff proves that the employer engaged in intentional discrimination, the plaintiff may recover up to $300,000 in compensatory and punitive damages depending on the size of the employer. Section 118 of the 1991 Act encourages the use of alternative dispute resolution, including arbitration, to resolve disputes arising under Title VII or the ADA.

In 1990, Congress amended the ADEA by passage of the Older Workers Benefit Protection Act (OWBPA). The OWBPA provides that an individual may not waive any right or claim under the Act unless the waiving is “knowing and voluntary.” A waiver may not be considered knowing and voluntary under the Act unless, at a minimum, the individual does not waive rights or claims that may arise after the date of the waiver. Whether the OWBPA’s reference to “rights” applies to the right to proceed in court rather than in arbitration, or whether it simply ensures that plaintiffs are able to obtain legal relief whatever the forum, is an issue some courts have recently considered.


Title VII provides for consideration of employment discrimination claims in several forums. The Equal Employment Opportunity Commission (EEOC) is the federal agency charged with administering and enforcing not only Title VII, but also the ADEA and the ADA. An applicant or employee who believes his rights were violated must first contact and file a charge with the EEOC and/or the appropriate state agency (where the EEOC has recognized the state agency as enforcing “substantially equivalent” legislation). Once a charge has been filed, the EEOC conducts an investigation to determine whether there is “reasonable cause” to believe that discrimination has occurred. If there is a finding of reasonable cause, the EEOC is required to attempt to resolve the matter through conference, conciliation and persuasion.

Failing conciliation, the EEOC has the authority to file a civil lawsuit on behalf of the complainant. Alternatively, the complainant may request a right to sue letter from the EEOC and file his or her own civil lawsuit in court. The litigation of the claims in court is de novo, and the court does not simply review the EEOC’s findings, but hears the evidence and makes determinations as to both facts and law.25

§ 8.04. Is the Arbitration Agreement Valid?

In asserting that statutory employment discrimination claims are not subject to arbitration, plaintiffs have contended that the arbitration agreement itself was not a valid waiver of their right to a judicial forum for employment discrimination claims. This argument is based on the timing and form of the arbitration agreement and is usually made in the context of a pre-dispute mandatory arbitration clause, which is required by an employer as a condition of employment, where the employee later seeks to bring a statutory discrimination claim in a judicial forum and the employer seeks to compel arbitration.26 Thus, the arbitration clause

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25 The 1991 Civil Rights Act created the right to a jury trial for plaintiffs bringing claims under Title VII and the ADA. In these cases, a jury instead of the court may make findings of fact.
may be a general arbitration provision contained in an employee handbook or employment application, or the provision may be contained in a registration form (“Form U-4”) required of employees as a condition of employment in the securities industry. The invalid waiver of a right to a judicial forum argument has also been made in the context of a union negotiated arbitration clause in a collective bargaining agreement where the employer seeks to require that an employee use the arbitration procedure to pursue his or her statutory discrimination claim.


The Federal Arbitration Act (FAA) was enacted in 1925. Its purpose was to make private agreements to arbitrate enforceable to the same extent as other contracts. The FAA provides that arbitration contracts are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contracts.”

The employment contracts of seamen, railroad employees and workers in interstate commerce are excluded from the scope of the Act. This “contract of employment” exception, however, has generally been read narrowly, limited by the courts to the contracts of employees who are engaged directly in the movement of goods in interstate commerce.

27 In 1998 the New York Stock Exchange and the National Association of Securities Dealers abandoned the policy of requiring employees to agree to arbitrate employment discrimination claims.
28 Alexander v. Gardner-Denver Co., supra; Wright, supra.
30 Id. at § 2.
31 Id.
32 See, e.g., Great Western Mortgage Corp. v. Peacock, 110 F.3d 222, 227 & nn.20-21 (3d Cir.), cert. denied, 118 S. Ct. 299 (1997); Cole v. Burns Int’l Security Services, 105 F.3d 1465, 1470-71 (D.C. Cir. 1997); Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1162 (7th Cir. 1984), cert. denied, 469 U.S. 1160(1985); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972); Rojas v. TK Communications, Inc., 87 F.3d 745, 747-78 (5th Cir. 1996); Dickstein v. DuPont, 443 F.2d 783, 785 (1st Cir. 1971); McWilliams v. Logicon, Inc., 143 F.3d 573 (10th Cir. 1998); O’Neil v. Hilton Head Hospital, 115 F.3d 272, 274 (4th Cir. 1997).
If a party to a binding arbitration agreement is sued in federal court on a claim that the parties have agreed to arbitrate, the defendant is entitled to an order compelling arbitration pursuant to the FAA.\(^{33}\)

[2] — Arbitration of Statutory Claims Pursuant to the FAA.

Although the FAA entitles a party to an order compelling arbitration on claims the parties have agreed to arbitrate, it is not clear that statutory claims are always subject to the FAA and that a person can be compelled to forego his or her statutory right to a judicial forum for such claims.

The Supreme Court has approved the mandatory arbitration of non-employment related statutory claims, holding that such agreements are enforceable pursuant to the FAA.\(^{34}\)

In 1991 the Court ruled that statutory employment discrimination claims are subject to arbitration and that these arbitration agreements are enforceable pursuant to the FAA.\(^{35}\)


The Supreme Court has been reluctant to interpret arbitration provisions contained in collective bargaining agreements as valid waivers of employees’ rights to pursue their statutory employment discrimination claims in a judicial forum.\(^{36}\) In 1974, the Supreme Court held that an employee does not forfeit his right to a judicial forum for a


\(^{35}\) Gilmer, 500 U.S. at 26. In Gilmer the agreement to arbitrate was not contained in a “contract of employment.”

\(^{36}\) Gardner-Denver, 415 U.S. 36; Wright, 119 S. Ct. 391.
Title VII discrimination claim if he first pursues his claim to final arbitration under the nondiscrimination clause of a collective bargaining agreement. In *Gardner-Denver*, the employee filed a Title VII claim against his employer in federal court alleging race discrimination. An arbitrator had previously ruled for the employer on the employee’s discrimination claim under the nondiscrimination clause of the collective bargaining agreement. In permitting the plaintiff to pursue his Title VII claim, the Court reasoned that a grievance is designed to vindicate a contractual right under a collective bargaining agreement, while a lawsuit under Title VII asserts independent statutory rights accorded by Congress. The statutory cause of action was not waived by the union’s agreement to the arbitration provision of the collective bargaining agreement, the Court said, since there can be “no prospective waiver of an employee’s rights under Title VII.”

In 1998, the Supreme Court held that a general arbitration clause in a collective bargaining agreement does not require an employee to use the arbitration procedure for federal claims of employment discrimination. In *Wright*, the plaintiff filed an ADA claim when the employer refused to hire the plaintiff after learning he had previously settled a claim for permanent disability. The collective bargaining agreement in *Wright* contained a very general clause providing for arbitration of “[m]atters under dispute,” but the Court declined to infer from that general provision that the parties intended to waive a statutory right to a judicial forum. The Court refused to interpret the clause as encompassing statutory discrimination claims because the provision did not “clearly and unmistakably” waive the right to statutory procedures for resolving claims. The Court did not, however, reach the question

38 *Id.*
39 *Id.* at 43.
40 *Id.* at 49-50.
41 *Id.* at 51.
42 *Wright*, 119 S. Ct. 391.
43 *Id.*
whether a “clear and unmistakable” waiver of statutory rights in a collective bargaining agreement would be enforceable.44


Although the Supreme Court has shown reluctance in requiring employees to arbitrate statutory employment discrimination claims pursuant to arbitration provisions contained in collective bargaining agreements, in 1991 the Court approved a pre-dispute arbitration provision in the context of an arbitration agreement between an employer and an individual employee, ruling that it constituted a valid waiver of the employee’s right to a judicial forum in which to pursue his statutory employment discrimination claim.45 A stockbroker in Gilmer was required to sign a standardized registration agreement — Form U-4 — with the New York Stock Exchange, a procedure generally required of employees in the securities industry.46 The Form U-4 stated that the plaintiff consented to the arbitration of any dispute arising out of his employment by a member of the exchange.47 After he was discharged, the plaintiff filed a claim in federal court alleging age discrimination in violation of the ADEA.48 His employer responded by seeking to compel arbitration under the FAA.49

The Court ruled that the FAA allowed mandatory arbitration of statutory claims, unless Congress evidenced an intent to preclude such a waiver.50 Should such Congressional intent exist, it would be found

44 Id.
46 Id. at 23.
47 Id.
48 Id.
49 Id. at 24.
50 The Court did not resolve the question of the FAA exclusion for contracts of employment because the Form U-4 that contained the arbitration provision was a registration form and not an employment contract, and the parties did not raise the issue in the court below. Id. at 24, 26 n.2.
in the text or legislative history of the statute, or in an “inherent conflict” between arbitration and the statute’s underlying purposes.\footnote{Id. at 26.}

The Court rejected an argument that agreements to arbitrate ADEA claims should not be enforced because of the disparity in bargaining power between an employee and his employer.\footnote{Id. at 32-33.} According to the Court, “mere disparity in inequality power [...] is not sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”\footnote{Id.} A claim of unequal bargaining power was best left for resolution in specific cases, according to the Court.\footnote{Id.}

The Court distinguished \textit{Gardner-Denver} from \textit{Gilmer} on the ground that the arbitration provision in \textit{Gardner-Denver} was contained in a collective bargaining agreement. In \textit{Gardner-Denver}, the employee was represented by the union, which represented the interests of a group — the bargaining unit. The interests of a group may or may not coincide with the interests of an individual in a given case, thus potentially creating a “tension between collective representation and individual statutory rights.”\footnote{Id. at 35.} A second ground for distinguishing the \textit{Gilmer} holding was that the employee in \textit{Gardner-Denver} agreed to arbitrate contractual rights, whereas the employee in \textit{Gilmer} agreed to arbitrate statutory rights.\footnote{Id.}

The courts have since extended \textit{Gilmer}, ruling that other statutory employment discrimination claims are also subject to arbitration pursuant to the FAA.\footnote{E.g., Miller v. Public Storage Mgmt., Inc., 121 F.3d 215 (5th Cir. 1997)(enforcing agreement to arbitrate ADA claim finding language of ADA advocates use of alternative dispute resolution); McWilliams v. Logicon, Inc., 143 F.3d 573 (10th Cir. 1998)(compelling arbitration of ADA claim finding Act encourages arbitration of disputes); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 935 (9th Cir. 1992)(holding Title VII claims may be subject to arbitration); Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465, 1481-82 (D.C. Cir. 1997)(upholding agreement to arbitrate...
of agreements to arbitrate statutory discrimination claims was inconsistent with the statutory framework and purposes of the civil rights statutes. In enforcing these arbitration agreements, however, the courts applied the *Gilmer* standard and examined the text and legislative history of the statutes, considered whether there were any inherent conflicts between arbitration and the statutes’ underlying purposes, and concluded that Congress evinced no intent to preclude a waiver of a judicial forum.


The Civil Rights Act of 1991 increased the procedural rights and remedies available to Title VII plaintiffs, providing for trial by jury and providing for compensatory and punitive damages up to $300,000 in cases of intentional discrimination. Section 118 encourages the use of arbitration to resolve Title VII and ADA disputes. 58

In the wake of the 1991 Act, courts split on the issue of Congressional intent to preclude pre-dispute waivers of a judicial forum for Title VII claims. Some courts that have addressed the validity of pre-dispute waivers of the right to bring Title VII claims in court did not consider the effect of the 1991 Act. 59

On the other hand, one court — in deciding that an arbitration clause in an employee handbook was a valid and enforceable contract — concluded that the arbitrability of Title VII claims found support in the Civil Rights Act of 1991, which states in Section 118 that “the use of alternative means of dispute resolution, including arbitration, is encouraged to resolve disputes arising under the Act.” 60 In contrast,

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another court examined the text, legislative history and purposes of the 1991 Act and determined that Congress intended to preclude mandatory arbitration of Title VII claims. In *Duffield v. Robertson Stephens & Co.*., the court held that as a condition of employment, employers could not require employees to waive their right to bring Title VII claims in court.

The employee in *Duffield* was required as condition of employment in the securities industry to waive her right to a judicial forum to resolve all “employment related” disputes and agree instead to arbitrate any such disputes. Employees satisfied this condition by signing the industry’s Form U-4, the same form at issue in the *Gilmer* case which the Supreme Court found to be a valid waiver of the right to a judicial forum for an ADEA claim.

Unlike the court in *Patterson*, the *Duffield* court construed Section 118 of the 1991 Act — which encouraged alternative dispute resolution — as being merely a “polite bow to the popularity of alternative dispute resolution.” The Court found that the purpose of the 1991 Act was to expand employees’ rights and increase the possible remedies available to civil rights plaintiffs; thus, it would be “at least a mild paradox” to conclude that Congress encouraged the use of a process whereby employers condition employment on their employees’ surrendering their rights to a judicial forum for resolution of future Title VII claims.

The *Duffield* court stated that it seemed more plausible that Congress meant to encourage voluntary agreements to arbitrate, since it directed that Title VII be read broadly so as to best effectuate its remedial

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62 *Id.* at 1190.
63 *Id.* at 1186.
64 *Id.*
65 *Id.* at 1191 (*quoting* *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997) *cert. denied*, 118 S. Ct. 294 (1998)).
66 *Id.*, (*quoting* *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997) *cert. denied*, 118 S. Ct. 294 (1998)).
purposes. The court found that the Congressional intent of the 1991 Act served to distinguish post-1991 Title VII claims from the ADEA claim that the Supreme Court found arbitrable in *Gilmer*.

In a footnote, the *Duffield* court noted that after the Supreme Court granted *certiorari* in *Gilmer*, Congress amended the ADEA by the passage of OWBPA, which provides that all waivers of rights under the ADEA must be “knowing and voluntary.” A waiver is not considered “knowing and voluntary,” the Court stated, if the individual waives claims or rights that may arise after the date the waiver is executed and, since the Supreme Court did not consider this new statutory language in *Gilmer*, current ADEA claims may require different treatment.

In contrast to the *dicta* in *Duffield* regarding the effect of the OWBPA, another court recently ruled that, as a matter of law, application of pre-dispute arbitration agreements to Title VII and ADEA claims was not precluded by the OWBPA amendments to the ADEA, or by Title VII as amended by the 1991 Civil Rights Act. The plaintiff in *Rosenberg* was required to sign the same standardized registration form for securities brokers — the Form U-4 that was at issue in *Duffield* and *Gilmer*, whereby she agreed to arbitrate any future disputes with her employer.

Applying the *Gilmer* standard, the *Rosenberg* court found no conflict between the language or purposes of Title VII, as amended, and arbitration. Unlike the Ninth Circuit in *Duffield*, the court in *Rosenberg* construed the language of Section 118 of the 1991 Act, which encourages arbitration “where appropriate and to the extent authorized by law,” as

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67 *Id.*
68 *Id.*
69 *Id.* at 1190 n. 5.
70 *Id.*
72 *Id.*
73 *Id.*
74 *Id.*
favoring arbitration. The Rosenberg court relied on a previous decision in which it construed identical language in the ADA and held that a plaintiff could be compelled to arbitrate an ADA claim where the plaintiff voluntarily signed an agreement requiring arbitration.

In ruling that Congress did not intend to preclude mandatory arbitration agreements, the Rosenberg court pointed out that Congress had repeatedly rejected legislation that would explicitly bar mandatory agreements to arbitrate employment discrimination claims. The court also looked to the legislative history of the 1991 Act and ruled that it was insufficient to overcome the presumption in favor of arbitration which Gilmer established. The court stated that neither the language of the statute nor the legislative history demonstrated an intent in the 1991 Act to preclude pre-dispute arbitration agreements.


Arbitration provisions contained in employee handbooks are often challenged as invalid waivers of the right to a judicial forum for claims under the employment discrimination statutes. In deciding whether parties have agreed to arbitrate certain matters, the Supreme Court has instructed courts to apply ordinary state law principles that govern the formation of contracts.

One court has ruled that under Missouri law, employee handbooks are not considered contracts because they normally lack the traditional prerequisites of a contract. In Patterson, the court stated that an employer’s unilateral act of publishing a handbook was not a contractual offer to the employee; a contract was only formed with the traditional

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74 Id. (citing Bercovitch v. Baldwin School, Inc., 133 F.3d 141, 143 (1st Cir. 1998)).
76 Id.
77 Id.
78 Id.
80 Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997).
81 Id.
elements of offer, acceptance and consideration. The court concluded, however, that because the arbitration clause was separate and distinct from other provisions in the handbook, it constituted an enforceable contract. The arbitration clause was set forth on a separate page of the handbook and introduced by the heading, “IMPORTANT! Acknowledgment Form.” This page was removed from the handbook, signed by the employee and stored in a file. As such, the arbitration clause stood alone from the handbook and was an enforceable contract. In another case, the same court applying Minnesota law held that written employment policies could create a contractual delegation. The employer’s disclaimer of intent to form a contract with the handbook, however, prevented it from being construed as an offer.

Another court addressed the validity of an arbitration agreement contained in an employee handbook by looking not to contract law, but instead to purported Congressional intent to forbid such a waiver. The court looked to the text and legislative history of the ADA and stated that Congress required at least a knowing agreement to arbitrate employment disputes before an employee could be deemed to have waived the right to a judicial forum. The “unilateral promulgation by an employer of arbitration provisions in an Employee Handbook does not constitute a ‘knowing agreement’ on the part of an employee to waive a statutory remedy provided by a civil rights law.” The court held that “any bargain to waive the right to a judicial forum for civil rights claims [...] in exchange for employment must at least be express:

82 Id.
83 Id.
84 Id.
86 Id.
88 Id. at 762.
89 Id.
the choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question.”

§ 8.05. Procedural Safeguards, Remedies and Review.

Arbitration of statutory claims raises the question of whether employees can effectively vindicate their statutory cause of action. The arbitral forum may not offer the equivalent of traditional adjudication of discrimination claims in courts with established procedures and statutory safeguards.

Critics also argue that private arbitration of statutory claims inhibits development of public law. Arbitrators may not always be knowledgeable of the issues and the statutory requirements involved in the dispute, and because arbitrators’ decisions are generally not published, they do not add to the jurisprudence of federal statutory claims.


The American Arbitration Association (AAA) conducts arbitrations in accordance with its National Rules for the Resolution of Employment Disputes (“AAA Rules”). About four million workers are covered by alternative dispute resolution plans administered by the AAA.

The AAA Rules provide the arbitrator with authority to order necessary discovery, require the arbitrator to be experienced in employment law, and mandate that the arbitration award be in writing. The AAA Rules also permit the arbitrator to grant any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in a court. Finally, the AAA Rules authorize the arbitrator to

91 Id.
92 Id.
93 Id.
94 Id.
assess fees, expenses and compensation in favor of any party. The AAA Rules do not, however, specify which party will bear the cost of the necessary fees and expenses.


The Supreme Court initially questioned arbitrators’ competence to decide legal issues, and questioned whether arbitration could substitute for a judicial forum in resolving statutory employment discrimination claims, because discovery was limited, records were incomplete, and arbitrators need not give their reasons for an award.

The Court has since made clear, however, that statutory discrimination claims are subject to arbitration, and disavowed the idea that the arbitral process was inferior to the judicial process. In *Gilmer*, the Court rejected generalized attacks on arbitration of statutory claims and emphasized that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.” Dismissing the argument that the arbitral process was less suited than litigation to the effective enforcement of an ADEA claim, the Court stressed that “[s]o long as the prospective litigant effectively may vindicate his statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”

The Supreme Court rejected the plaintiff’s argument in *Gilmer* that arbitration under the New York Stock Exchange Rules (“NYSE Rules”) diminished his ability to vindicate his statutory rights. Specifically, the Court rejected the claim of arbitrator partiality, finding that the NYSE Rules provided protection against biased arbitrators. The Court also rejected the plaintiff’s objections to restricted discovery, the unavailability of equitable relief, and the plaintiff’s claim that arbitrators

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95 *Gardner-Denver*, 415 U.S. at 57-58.
98 *Id.* at 28.
99 *Id.* at 30.
100 *Id.* at 30-31.
101 In both *Gilmer* and *Cole*, objections to lack of discovery (which can affect substantive rights) were rejected because the courts looked to the applicable arbitration
did not always issue written opinions. The Court found that the NYSE Rules provided for sufficient discovery, did not restrict relief, and required that arbitration awards be in writing.


In reviewing the validity of an arbitration agreement and applying the Gilmer standard, one court stated that the Supreme Court’s decision in Gilmer could not be read as holding that an arbitration agreement was enforceable no matter what rights were waived or what burdens were imposed. The court stated that beneficiaries of public statutes were entitled to the rights and protections provided by the law and that, at a minimum, those include both a substantive protection (right to be free from discrimination) and access to a neutral forum in which to enforce those protections.

In Cole, the court reviewed the arbitration agreement and found that the factors required under Gilmer (more than minimal discovery, arbitrator neutrality, a written award, and relief recoverable that would be available in a court of law) were present. The court noted, however, that had the arbitration agreement required the plaintiff to pay all or part of the arbitrator’s fees and expenses, it would have been invalid. And though parties in federal court were required to pay a filing fee, the court added, they were not required to pay for the services of the judge who hears the case. Employees wishing to arbitrate a claim might be required to pay arbitrator fees ranging from $500 to $1,000 per day or

rules which authorized the arbitrators to award any discovery necessary. This suggests that in order for an arbitration provision to be enforceable, it must allow for reasonable discovery.

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100 Id.
101 Id.
103 Id.
104 Id.
105 Id.
106 Id. at 1484.
107 Id.
108 Id.
109 Id. at 1484.
more in addition to administrative fees. \textsuperscript{107} Requiring the payment of such fees was unacceptable. \textsuperscript{108}

In \textit{Cole}, the arbitration agreement was governed by the AAA Rules, which do not specify which party will bear the cost of arbitration. \textsuperscript{109} The court ruled that the employee could not be required to agree to arbitrate his claim as a condition of employment if the arbitration agreement required him to pay all or part of the arbitrator’s fees and expenses. \textsuperscript{110} In finding the arbitration agreement valid, the court in \textit{Cole} applied the legal principle that where a contract was unclear on a point, an interpretation that made the contract lawful was preferred to one that rendered it unlawful, and interpreted the agreement as requiring that the employer pay the necessary arbitrator’s fees. \textsuperscript{111}

Relying principally on \textit{Cole}, another court recently held unenforceable a mandatory arbitration agreement entered into as a condition of employment which required an employee to pay a portion of the arbitrator’s fees. \textsuperscript{112} The arbitration agreement in \textit{Shankle} expressly required the plaintiff to pay for one-half of the arbitrator’s fees. \textsuperscript{113} The court estimated that had the arbitration lasted the average duration, the employee would have had to pay the arbitrator between $1,875 and $5,000 to resolve his discrimination claims. \textsuperscript{114} The court found that the prohibitive cost substantially limited the use of the arbitral forum, and as such clearly undermined the remedial and deterrent functions of the federal anti-discrimination laws. \textsuperscript{115}

\textbf{[4] — Remedies and Attorney’s Fees.}

Arbitration agreements may not be enforceable unless the arbitrator has the authority to award plaintiffs all relief which would have been available in a court of law. Remedies available in a judicial forum

\begin{itemize}
\item \textsuperscript{110} \textit{Id.} at 1485.
\item \textsuperscript{111} \textit{Id.}
\item \textsuperscript{113} \textit{Id.}
\item \textsuperscript{114} \textit{Id.}
\item \textsuperscript{115} \textit{Shankle} at 6.
\end{itemize}
pursuant to Title VII and the ADA include compensatory and punitive damages in an amount up to $300,000 depending on the size of the employer and the attorneys’ fees. If an arbitration agreement places limits on the types or amount of remedies which are inconsistent with employment laws under which the claims arise, then they may not be enforced. 116

Two cases which addressed the issue of an award of attorney’s fees have reached different, though not necessarily inconsistent, results. In DeGaetano v. Smith Barney, the court modified an arbitration award in a Title VII sexual harassment case to allow attorney’s fees. 117 The parties’ arbitration agreement provided that each side would pay its own legal fees. 118 During the course of the arbitration the employee formally applied for recovery of her attorney fees and, in support of the application, filed a memorandum of law informing the arbitrator of the requirement that prevailing parties be awarded attorney’s fees under Section 2000e-5(k) of Title VII.

The employer argued that the arbitrator had no authority to award attorney’s fees, because the arbitration agreement expressly precluded such an award. The arbitrator awarded the plaintiff $90,000 in damages but declined her request for attorney fees because the arbitrator stated that the defendant’s conduct did not rise to the level of conduct contemplated by Title VII.

In modifying the award and granting the plaintiff attorney’s fees, the DeGaetano court stated that there was no question that the claimant was a prevailing party given that she won an award equivalent to more than a year’s back pay. The award was based on a finding of liability under Title VII which entitled her to an award of attorney fees, and the arbitrator acted in manifest disregard of the law in failing to award the fees. The arbitrator was unequivocally notified by the parties of the

118 Id.
governing legal principles granting attorney fees to prevailing plaintiffs, pursuant to the employment discrimination statute.

The court addressed the argument that the award of attorney fees was barred by the arbitration agreement and stated that to the extent the agreement prevented prevailing plaintiffs from obtaining an award of attorney fees in employment discrimination cases, it was void as a matter of public policy. The court’s conclusion was based on general principles of well established federal policy. The fee shifting provision of Title VII was a critical component of Congress’ comprehensive statutory scheme for enforcing, redressing and deterring unlawful employment discrimination. The court noted that the Supreme Court had emphasized that an individual plaintiff pursuing claims under the civil rights laws was cast in the role of a private attorney general, vindicating a policy that Congress considered of highest priority.119 The court stated that an employee should not be forced to arbitrate an important statutory claim under an agreement that affords her less than the full measure of rights granted by the statute.

By contrast, another court refused to modify an arbitration award in an ADEA case to include attorney fees, because the court stated that the arbitrators did not manifestly disregard the law.120 In DiRussa, the arbitrators did not state their reasons for denying the plaintiff attorney fees, nor were they required to do so.121 As such, the court found that there was no persuasive evidence that the arbitrators actually knew of and intentionally disregarded the mandatory aspect of the ADEA’s fee provisions.122 The plaintiff had informed the arbitrators that he was entitled to attorney fees under the ADEA, but because he failed to inform the arbitrators of the relevant legal standard — that the ADEA mandated such an award to a prevailing party — the reviewing court would not

119 Degaetano (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416 (1978)).
120 DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 822 (2d Cir. 1997).
121 Id.
122 Id.
123 Id. at 823.
infer that the arbitration panel consciously disregarded the ADEA’s fee provisions.123


Historically, judicial review of arbitration awards in the labor context has been among the narrowest known in the law. A court will not vacate or modify a labor arbitration award unless it does not “draw its essence” from the collective bargaining agreement.124 This standard allows courts to vacate labor arbitration awards only where they are directly contrary to the plain language of the collective bargaining agreement,125 or where the award itself is illegal or violates a clearly defined and dominant public policy.126 A federal court will not disturb a labor arbitrator’s decision simply because it disagrees with the arbitrator’s decision, or because it would have decided the case differently.

It is doubtful that so narrow a standard of judicial review need or should be applied to arbitrator’s awards in employment law cases. The FAA, as applied in non-labor arbitration cases, recognizes a number of grounds upon which an arbitration award may be overturned, including fraud, corruption, partiality, and failure to make a final and definite award.127 In the non-labor arbitration setting, the federal courts have indicated that arbitration awards may be disregarded for “manifest disregard of the law.”128

125 E.g., Keebler Co. v. Milk Drivers & Dairy Employees Union, 80 F.3d 284 (8th Cir. 1996); Houston Lighting & Power Co. v. IBEW, 71 F.3d 179 (5th Cir. 1995).
126 E.g., United Paperworkers v. Misco, Inc., 484 U.S. 29 (1987); Marrowbone Development Co. v. District 17, UMW A, 147 F.3d 296 (4th Cir. 1998); Exxon Corp. v. Esso Workers’ Union, 118 F.3d 841 (1st Cir. 1997).
129 Burns, 105 F.3d at 1487, quoting Gilmer, 500 U.S. at 26.
In *Cole v. Burns International*, the court suggested that the “manifest disregard of the law” standard, interpreted and applied in light of the Supreme Court’s decision in *Gilmer*, was the proper standard for review. In *Burns*, the court held that judicial review under the “manifest disregard of the law” standard must be sufficiently broad to ensure that “a party does not forego the substantive rights afforded by the statute”\(^\text{129}\) and that “arbitrators comply with the requirements of the statute at issue.”\(^\text{130}\) Application of the standard advocated in *Burns* would have avoided the result in *DiRussa*, where the arbitrator’s failure to award attorney’s fees was upheld because the law was not sufficiently explained to the arbitrator; in the court’s view, the arbitrator did not manifestly disregard the law.

§ 8.06. Conclusion.

The role of arbitration and other ADR techniques is being constantly defined and refined through statues and decisional law, and by the actions of individual companies, ADR providers and professional associations. There can be little doubt that in the employment law area, ADR, including arbitration, is here to stay. Its format and substantive requirements, however, are still a work in progress.

\(^{130}\) *Burns, id.*, quoting *Gilmer*, 500 U.S. at 32.