Legal and Practical Implications of ADR and Arbitration in Employment Disputes

Evan J. Spelfogel

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlelj

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlelj/vol11/iss1/6
LEGAL AND PRACTICAL IMPLICATIONS
OF ADR AND ARBITRATION
IN EMPLOYMENT DISPUTES

Evan J. Spelfogel

I. INTRODUCTION

A gross miscalculation by management, labor and employment lawyers thirty years ago has revealed itself in today's judicial backlog. During the debates leading up to enactment of Title VII of the Civil Rights Act of 1964 ("Title VII"), it was proposed that discrimination on account of race, sex, national origin and religion be added as unfair labor practices under the National Labor Relations Act ("NLRA"). Alternatively, it was proposed that the about to be created Equal Employment Opportunity Commission ("EEOC") be patterned after the National Labor Relations Board ("NLRB"), with exclusive jurisdiction over race, sex, national origin and religious discrimination, preempting all state and local human rights laws and much state common law wrongful discharge litigation, and that the EEOC General Counsel be given non-reviewable discretion over whether to issue complaints under the statute.

As under the NLRA, complaints alleging Title VII discrimination would be heard by administrative law judges, with appeals to the EEOC and then to the U.S. Circuit Courts of Appeals available. Management representatives in 1963, however, looked at the NLRB and its general counsel then in office and, fearing political "oppression," opted for a relatively powerless EEOC, leaving the parties to turn to

* B.A., Harvard College; J.D., Columbia Law School; Member of the New York law firm of Epstein, Becker & Green, P.C.

The author wishes to thank Christine Lombardi and Robyn K. Ruderman for their assistance in the preparation of this article.

Portions of this article appeared in the March 1993 issue of the Arbitration Journal, and are published herein with the permission of the American Arbitration Association. Other portions are based on a paper presented by the author at the New York University 46th National Conference on Labor on June 3, 1993, scheduled to be published in The Proceedings of The Conference, and are published herein with the permission of the NYU Conference.

the courts for their remedies.

The legal landscape has changed dramatically over the past twenty to thirty years. There are upwards of 800,000 lawyers in the United States and more than eighteen million new lawsuits filed each year. Our legal system is presently costing consumers three hundred billion dollars a year and significantly affects America's world-wide competitiveness.

Increasingly in the employment arena, employees are acting out of anger and frustration with their employers, filing discrimination proceedings with governmental agencies and going to court in search of large sums in damages.

Employment litigation has grown at a rate many times greater than litigation in general. Twenty times more employment discrimination cases were filed in 1990 than in 1970, almost one thousand percent greater than the increase in all other types of civil litigation combined. There is currently a backlog of over one hundred thousand employment discrimination cases at the EEOC, with new cases coming in at a rate which is 20% greater than that of last year alone. Discrimination claims under the Americans with Disabilities Act ("ADA") now account for 13% of the EEOC's overall case load and are increasing by geometric progression, averaging one thousand new cases per month. The 1200 charges filed under the ADA in February 1993 nearly doubled the number filed just a few months earlier, and was 30% higher than in January. The EEOC has been forced to seek a 15 to 20% percent increase in its 1993 budget to pay for the investigators and support staff needed to handle this avalanche.


http://scholarlycommons.law.hofstra.edu/hlelj/vol11/iss1/6
Currently, there are over 25,000 wrongful discharge cases pending in state and federal courts. Nearly all of these cases involve jury trials, with unpredictable results. Possible recovery of punitive damages in these cases makes settlements difficult. Studies indicate that plaintiffs win nearly 70% of these cases and that the average jury award for a wrongfully fired employee is now over $600,000.\textsuperscript{11} The amended Civil Rights Act of 1991\textsuperscript{12} expands the right to jury trials and dramatically broadens the remedies available to victims of intentional discrimination. The impact of these new statutory developments has yet to be felt, but will certainly lead to even more litigation, more delays in plaintiffs being able to obtain their day in court, and greater expense to American businesses.

Alternate dispute resolution ("ADR") — including final and binding arbitration — and judicial enforcement of such programs is, thus, an increasingly attractive and practical necessity.

II. FORMS OF ADR

A. Judicial ADR

Variations of ADR are becoming increasingly available as an ancillary part of judicial proceedings.\textsuperscript{13} These include, for example:

1. Early neutral evaluation presided over by a court appointed attorney who evaluates and attempts to reduce the scope of the dispute and assist the parties in settlement or pretrial procedures;
2. Judicial arbitration before an arbitrator, magistrate or master whose decision may or may not be binding, depending upon the agreement of parties;
3. Binding summary jury trials involving attorney summary presentation quoting from affidavits and depositions but without live witness testimony; and
4. Non-binding mini-trials presented before an attorney, clerk or other neutral third party moderator appointed by the

\textsuperscript{11} Layton et al., supra note 7.


\textsuperscript{13} The Southern District of New York has a pilot program in which certain cases are submitted to mandatory mediation. In the Eastern District of New York, cases involving claims of less than $100,000 are submitted to non-binding arbitration. There is authority for state court mandatory arbitration under N.Y. COMP. CODES. R. & REGS., tit. 22, §§ 28.1-16 (1986).
court.

B. Extra-Judicial ADR

Many employers already have in place one or more variation of informal alternate dispute resolution procedures. Examples of such procedures include:

1. Employee communications systems;
2. Employee participation programs ("Quality Circles");
3. Employee assistance programs ("EAP’s");
4. Employee counselling mechanisms;
5. Peer group committees; and

All of these are designed to enable employers to “listen” to employee “grievances,” or concerns, assist them with respect to both work-related and personal problems, improve individual and group working conditions and morale, and head off more serious problems at an early stage.

III. ARBITRATION

More frequently employers are installing one of two types of final and binding arbitration procedures: (i) voluntary arbitration on an \textit{ad hoc} basis, elected by an employee after a dispute has arisen, and after the exhaustion of other specified internal grievance procedures; or (ii) mandatory arbitration of all employment related disputes which is written into employment contracts, employee handbooks, manuals, job applications and other writings, and is binding upon the employer, employees and applicants for employment.

In either case, key questions include: (i) whether, and to what degree, an employer may hold employees or applicants to an arbitrator’s award — or to the obligation to submit disputes to arbitration — and bar litigation, particularly with respect to statutory discrimination claims, and (ii) whether an ADR procedure may require an employee to exhaust internal pre-arbitration step procedures, to adhere to time limitations as a pre-condition to requesting arbitration, or to preclude the employee from going directly to the courts.
IV. **ALEXANDER V. GARDNER-DENVER CO.**

In 1974, the United States Supreme Court held in *Alexander v. Gardner-Denver Co.* that arbitration did not preclude a federal court suit on statutory discrimination claims under Title VII of the Civil Rights Act of 1964. The Court noted, however, that federal district judges may accord great weight to decisions of arbitrators and indicated, without referring to them by name, that the NLRB’s *Collyer* and *Spielberg* tests might be appropriate standards for deferral. *Gardner-Denver* was later expanded to cover statutory employment related claims under the Fair Labor Standards Act, Sections 1981 and 1983 of the old Civil Rights Acts, ERISA, and the Age Discrimination in Employment Act ("ADEA").

More recently however, signalling a major change, the U.S. Supreme Court upheld final and binding arbitration of statutory issues in non-labor, commercial cases. These included statutory claims under the Sherman Act, securities laws and RICO. The Court also upheld arbitration under ERISA.

---

15. Id.
17. Spielberg Mfg., 112 N.L.R.B. 1080 (1955). See also United Technologies Corp., 268 N.L.R.B. 557 (1984); Olin Corp., 268 N.L.R.B. 573 (1984) (reflecting the policy that the NLRB will defer to arbitration proceedings which provide substantial due process and are not inconsistent with the NLRA).
V. GILMER V. INTERSTATE/JOHNSON LANE CORP.\textsuperscript{27}

Then, in 1991, in a seven to two decision, \textit{Gilmer v. Interstate/Johnson Lane Corp.}, the Supreme Court held that under the Federal Arbitration Act ("FAA"),\textsuperscript{28} the courts may compel arbitration and dismiss litigation of age discrimination claims under certain individual, non-union arbitration agreements.\textsuperscript{29} In so doing, the Court chose not to expressly overrule \textit{Gardner-Denver}, but rather distinguished it and its progeny away on the basis that those cases involved unions and collectively bargained arbitration provisions.\textsuperscript{30} A union, the court stated, might have an agenda of its own, in conflict with the interests of the individual employee.\textsuperscript{31}

The plaintiff in \textit{Gilmer} was a former senior executive of Interstate who had signed a registration statement filed with the New York Stock Exchange, commonly referred to as a "U-4" agreement.\textsuperscript{32} The U-4 agreement required arbitration of all disputes.\textsuperscript{33}

The Court rejected Gilmer’s arguments that arbitration would not provide an adequate forum to vindicate his rights, noting that applicable arbitration rules of the New York Stock Exchange provided sufficiently comprehensive procedures to safeguard Gilmer’s rights and resolve his claims.\textsuperscript{34} The Court also rejected Gilmer’s arguments pertaining to unequal bargaining power, lack of a voluntary agreement, and a failure of legal "consideration," notwithstanding Gilmer’s argument that he had no real choice: he either signed the exchange’s Registration Agreement, including the arbitration provision, or would be barred from working in the industry.\textsuperscript{35}

The Court held that the FAA placed arbitration agreements on

\begin{footnotesize}
\item[27] 111 S. Ct. 1647 (1991).
\item[29] Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991) (expressly distinguishing \textit{Gardner-Denver, Barrentine and City of West Branch}).
\item[30] Id. at 1656.
\item[31] Id. (citing \textit{Gardner-Denver}, 415 U.S. at 58).
\item[32] Id. at 1650.
\item[33] Id. at 1651. The U-4 form “provided . . . that Gilmer ‘agree[d] to arbitrate any dispute, claim or controversy’ arising between him and Interstate ‘that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which [he] register.’” Since Gilmer was registered with the New York Stock Exchange, he was obligated by NYSE Rule 347 to submit to arbitration any controversy between himself and any member organization which arose out of his employment or the termination of his employment. \textit{Id.}
\item[34] Id. at 1654-55.
\item[35] Id. at 1655.
\end{footnotesize}
the same footing as other contracts and evidenced a "liberal federal policy favoring arbitration agreements." It noted that the same defenses that could be raised to rescind other contracts — fraud, duress and undue influence — would also be available in seeking rescission of arbitration agreements. Gilmer, however, had not presented any evidence that he was coerced or defrauded into signing the U-4 agreement, and continued employment itself, the Court inferred, was sufficient legal consideration.

VI. POST-GILMER DEVELOPMENTS

The federal courts of appeals have now extended the Supreme Court’s age discrimination decision in Gilmer to racial and sex-based discrimination claims arising under Title VII, and to statutory claims under the Employee Polygraph Protection Act. Indeed, there is no rational basis for distinguishing between the ADEA, the Equal Pay Act, Title VII (including race, sex, national origin and religion), and the Americans with Disabilities Act.

In addition, two courts have taken contrary positions with respect to the exclusivity of the Railway Labor Act’s arbitration provisions. The Second Circuit held in Bates v. Long Island R.R. that claims under the federal law prohibiting disability discrimination by public contractors are not preempted by the Railway Labor Act (“RLA”), and that the arbitration procedures mandated by the RLA are not exclusive. The Court cited as precedent Gardner-Denver and McDonnell v. City of West Branch. The employer contended that since the claims required interpretation of a collective bargaining agreement,

36. Id. at 1655-56.
37. Id. at 1656.
38. Id.
39. Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161 (5th Cir. 1992); Mago v. Shearson Lehman Hutton Inc., 956 F.2d 932 (9th Cir. 1992); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991); Scott v. Farm Family Life Ins., 827 F. Supp. 76 (D. Mass. 1993). All these cases involved U-4 agreements except Mago (employment application) and Scott (employment contract).
46. 997 F.2d 1028 (2d Cir. 1993).
they were "minor disputes" under the RLA that were required to be handled under the exclusive dispute resolution procedures outlined in the RLA.\footnote{47}

Conversely, a federal district court in California recently held that the procedures of the RLA are exclusive and barred a religious discrimination claim filed under Title VII.\footnote{48} This court stated that the outcome was the logical result of the decision in \textit{Gilmer}, and was in accord with a similar decision by a court in Texas.\footnote{49}

Several issues remain open in light of \textit{Gilmer}: (i) whether \textit{Gilmer} will be extended beyond Stock Exchange U-4 agreements, to cover arbitration provisions contained in employment agreements, personnel manuals and handbooks, and employment application forms, and (ii) the meaning of the provision in Section 1 of the Federal Arbitration Act which excepts from enforceable arbitration agreements, "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."\footnote{50}

In the first post-\textit{Gilmer} cases to focus on these issues, the First, Third and Ninth Circuits have ruled that the FAA exception relates narrowly to only those workers personally engaged in the actual transportation of goods across state lines and that mandatory arbitration clauses in employee handbooks and individual employment agreements are enforceable.\footnote{51} While we await further court clarification,\footnote{52} there have been several legislative and administrative developments.

VII. RECENT CONGRESSIONAL ACTION

Section 118 of the Civil Rights Act of 1991 provides for the use of ADR, including arbitration, to resolve disputes under that Act or under provisions of federal law amended by it (thus encompassing Title VII of the 1964 Act). Similarly, the miscellaneous provisions of Title V of the Americans with Disabilities Act specifically encourage the use of ADR, including arbitration.

A question has arisen under the Older Workers Benefit Protection Act whether an employee may waive a prospective right with respect to age discrimination claims. Whether this language will be construed as only pertaining to waivers of “substantive rights,” as opposed to “procedural rights” such as forum selection, is not presently clear. The U.S. Supreme Court has stated that “by agreeing to arbitrate a statutory claim, the party does not forego substantive rights afforded by these statutes; it only submits to their resolution in an arbitral, rather than in a judicial forum.”

VIII. FEDERAL AND STATE REGULATORY/ADMINISTRATIVE ACTION

On November 15, 1990, Congress enacted the little-known Administrative Dispute Resolution Act. This Act, which terminates in 1995, states that any administrative agency of the United States “may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding.” Forms of dispute resolution allowed for use by an administrative agency are “any procedure that is used . . . to resolve issues in controversy, including, but not limited to, settlement negotiations, conciliation, facilitation, mediation, factfinding, mini-trials and arbitration.”

Thereafter President Bush promulgated Executive Order 12778 encouraging the utilization of voluntary dispute resolutions by federal
agencies. The President suggested that claims should be resolved through procedures other than formal ADR or court proceedings such as "informal discussions, negotiations, and settlements."61 One motivation for the drafting of this order was to establish a model for similar reform in the private sector and at the state level.62

Pursuant thereto, the EEOC has initiated a pilot ADR program in Houston, Philadelphia, New Orleans and Washington, D.C.63 This voluntary program (which is currently being reviewed and evaluated) utilizes outside mediators (not EEOC employees) to handle disputes.64 The EEOC reserves jurisdiction and the right to resume proceedings if the parties are unable to reach an agreement.65 Similarly, the U.S. Department of Labor has initiated a regional pilot program in Philadelphia for civil and criminal litigation cases within the DOL's jurisdiction.66

IX. ARBITRATION UNDER THE NEW YORK STATE HUMAN RIGHTS LAW

The New York State Human Rights Law67 was amended in 1991 to provide for voluntary arbitration of complaints. The program, which is still in the developmental stage, has been strongly supported by the Labor and Employment Law Section of the New York State Bar Association. Under the program's procedures, parties to a complaint filed with the State Human Rights Division ("Division") may, at any time prior to the taking of testimony at a public hearing, mutually agree in writing to submit the complaint to binding arbitration before the American Arbitration Association ("AAA").68 After a seven day rescission period, the Division will issue an Order dismissing the complaint for administrative convenience. At that time, the

61. Id. at 55,196
62. Id. at 55,195.
64. Id. This program handles only "charges brought under Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, in issues of discharge, discipline and terms and conditions of employment. Reasonable accommodation, class action, and equal pay charges are not eligible for mediation." Id.
68. Id.
Division's jurisdiction over the complaint will terminate and an arbitrator designated by the AAA will be solely responsible for hearing and deciding the complaint.69

A "blue ribbon" panel of eighteen arbitrators has been assembled from the fields of academia, government and private practice, from the AAA's National Panel of Labor Arbitrators.70 If the parties cannot reach an agreement concerning the selection of an arbitrator, the AAA will appoint one.71 In late April 1993, the first case was submitted to one of the panel members, Margery Gootnick. Under the Division program, the parties may write whatever language they wish into their submission agreement, including limitations on the scope and nature of remedies. A model submission agreement has been prepared by the Division.72

X. MANDATORY ARBITRATION UNDER STATE HUMAN RIGHTS LAWS

In Fletcher v. Kidder, Peabody & Co.,73 the New York Court of Appeals applied Gilmer to a sexual harassment claim under the New York State Human Rights Law, overruling Wertheim & Co. v. Halpert74 as it applied to cases governed by the FAA. The court held that "the arbitrability of statutory discrimination claims is henceforth to be determined by reference to Congress' intent with regard to alternative dispute resolution of that class of claims."75 The court ordered arbitration under a U-4 agreement, notwithstanding the plaintiff's contentions that (i) the congressional intent of Title VII was to make anticipatory arbitration agreement unenforceable76 and (ii) the U-4 form is an employment agreement and is therefore excluded from regulation under the FAA.77

69. Id.
71. Id.
72. In addition to the Division's program, voluntary arbitration and mediation programs have been initiated by the New York City Human Rights Commission to "expedite the resolution of discrimination actions and substantially reduce process costs." Today's News Update, N.Y.L.J., Feb. 4, 1993, at 1.
73. 619 N.E.2d 998 (N.Y. 1993).
74. 397 N.E.2d 386 (N.Y. 1979).
75. Fletcher, 619 N.E.2d at 1000.
76. Id. at 1002.
77. Id. at 1005.
In *Fregara v. Jet Aviation Business Jets*, a federal district court applying New Jersey's wrongful discharge law held that an employee suing for breach of substantive portions of an employer's handbook must exhaust the arbitration procedure imposed unilaterally by the handbook in employment-related disputes. The court reasoned that even if the handbook constituted an employment contract, the plaintiff's failure to exhaust the handbook's procedural remedies precluded his claims.

XI. EXTENSION OF GILMER TO NASD ARBITRATION

Two courts have now ruled on whether the arbitration rules and procedures of the National Association of Securities Dealers ("NASD") require arbitration of race discrimination claims. In *Spellman v. Securities, Annuities and Insurance Services, Inc.*, a California court ruled that the Gilmer decision required arbitration and dismissal of the litigation. In *Farrand v. Lutheran Brotherhood*, the Seventh Circuit ruled that the NASD rules differed significantly from the New York Stock Exchange rules which had been at issue in Gilmer and did not on their face require arbitration of employment-related, as contrasted with "business-related," disputes.

XII. THE PRECLUSIVE EFFECT OF PRE-ARBITRATION PROCEDURES

There is no U.S. Supreme Court authority directly addressing the precise issue of whether an employer may require an unrepresented (non-union) employee to exhaust an internal pre-arbitration grievance procedure as a precondition to the institution of a governmental agency or court proceeding. However, the Supreme Court has historically required employees to exhaust grievance procedures before initiating lawsuits on claims under a variety of federal statutes. These include employee suits against employers and unions for breach of collective bargaining agreements or breach of the union's duty of fair representation, and suits brought by union members against their unions.

79. Id. at 950.
80. 10 Cal. Rptr. 2d 427 (Ct. App. 1992).
81. 993 F.2d 1253 (7th Cir. 1993).
82. See, e.g., Labor-Management Relations (Taft-Hartley Act) Act of 1947 § 301(a), 29 U.S.C. § 185(a) (1988); Clayton v. UAW, 451 U.S. 679 (1981) (stating that employer and union should be given the opportunity to investigate and resolve the employee's claims under the established procedure without judicial interference so that the parties might either reach a
under the Landrum-Griffin Act.\textsuperscript{83}

Existing case law and the emerging trend clearly favor an exhaustion requirement. Historically, even before \textit{Gilmer}, the courts and Congress have recognized the benefits of requiring exhaustion. Such benefits include an early and full investigation of the facts giving rise to the employee’s complaint, remedying or showing the lack of merit in the complaint to the employee’s satisfaction, and negotiating a compromise solution. The courts and Congress have recognized that any or all of these may eliminate the necessity to bring the dispute to an already overburdened judicial system.\textsuperscript{84}

XIII. THE VALIDITY OF AGREEMENTS SHORTENING TIME PERIODS

Contractual agreements that shorten a statutory time period in which an individual may file a claim have been upheld under common law principles of contract law.\textsuperscript{85} All courts considering the question have held that contract provisions which shorten the statute of limitations are valid between the parties provided that the time agreed upon is not so short as to be unreasonable in light of the circumstances.\textsuperscript{86}

Agreements to reduce the statute of limitations further the purposes behind the application of statutes of limitations by hastening the institution of an action:

---


\textsuperscript{84}. See, e.g., Clayton v. UAW, 451 U.S. 679 (1981).


Statutes of limitations, . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.97

The only grounds on which such an agreement could be held invalid would be where its terms are unconscionable.88 "The fundamental principle of law that courts will not enforce a bargain where one party has unconscionably taken advantage of the necessities and distress of the other has found expression in an almost infinite variety of cases."89

In Myers v. Western-Southern Life Insurance Co.,90 for example, the Sixth Circuit upheld an employment agreement in which the employee agreed not to commence any action or proceeding related to his employment more than six months after the termination of employment. Thus, the employee's age and handicap discrimination claims, timely under Michigan state law, were dismissed.91 The court pointed out that the agreement was knowingly and voluntarily entered into and that the time period was long enough to investigate and initiate proceedings.92 Moreover, the court said there was nothing inherently unreasonable in shortening a statute of limitations to six months.93

In Bryn Mawr Hospital v. Coatesville Electric Supply Co.,94 a federal court in Pennsylvania, citing Third Circuit95 and U.S. Supreme Court96 precedent, upheld a private agreement to shorten the time period in which an ERISA claim could be initiated, from six

90. 849 F.2d 259 (6th Cir. 1988).
91. Id. at 262.
92. Id.
93. Id.
years to two years, and barred the employee's suit. In *Roney & Co. v. Goren*, the Sixth Circuit upheld a stock exchange arbitration provision that shortened an otherwise applicable three-year limitations period to bring a Section 10(b) fraud claim to one year citing *Myers* as precedent. Similarly, in *Inman v. Clyde Hall Drilling Co.*, the Alaska Supreme Court held that an employment contract which provided that a notice of claim must be served on the employee within thirty days of its inception and that a lawsuit may be instituted no sooner than six months and no later than twelve months after the filing of the notice of claim was valid and not unconscionable as against public policy.

Under these principles an employer may conservatively reduce the time in which its employees are able to file any court action against it, to no more than the six month limitation periods already applicable to Title VII, the NLRA, and Section 301 of Taft-Hartley.

**XIV. THE VALIDITY OF AGREEMENTS WAIVING JURY TRIALS**

It is well settled that although the right to trial by jury is constitutionally guaranteed under the Seventh Amendment, an individual may knowingly and intentionally waive this right in civil cases. Each case is fact specific; the language of waiver must be easily visible and, preferably, either the subject of discussion or of past practice between the parties. In *National Equipment Rental, Ltd. v. Hendrix*, for example, the Second Circuit refused to enforce a waiver of the right to a jury trial because the waiver was buried in a lengthy legal document and the facts and circumstances showed that the waiv-

---

97. 875 F.2d 1218 (6th Cir. 1989).
99. See supra text accompanying notes 90-93.
er was neither knowing nor voluntary.\textsuperscript{104}

The *Northwest Airlines* case is particularly relevant in that it involved a union-employer agreement to submit certain types of disputes to a Systems Board, and expressly provided for a waiver of any constitutional right to a jury trial.\textsuperscript{105} The Eighth Circuit, citing the *Steelworkers Trilogy*,\textsuperscript{106} noted a congressional and judicial policy favoring compulsory arbitration in employment disputes.\textsuperscript{107} Indeed, the holdings of *Gilmer* and its progeny (that agreements to arbitrate are enforceable and block court litigation) validate the enforceability of a waiver of the right to a jury trial by inference.\textsuperscript{108}

**XV. THE CONSENSUAL NATURE OF ARBITRATION**

Private sector arbitration in the United States is essentially a voluntary consensual matter.\textsuperscript{109} The parties must agree between themselves to arbitrate and on the procedures they will utilize. As with any contract, an employee’s “agreement” to arbitrate may not be enforceable if the agreement is not voluntary and has not been given in exchange for valuable “consideration.”\textsuperscript{110} Attorneys for employees seeking to void mandatory arbitration agreements, entered into at either the time of hiring or a subsequent point in their employment, have argued that the agreement was the product of unequal bargaining power, was not truly voluntary, and was lacking in legal “consideration.”\textsuperscript{111}

As stated above, the Supreme Court in *Gilmer* rejected an argu-

\begin{thebibliography}{111}
\bibitem{104} 565 F.2d 255 (2d Cir. 1977).
\bibitem{105} Northwest Airlines, Inc. v. Airline Pilots Ass'n Int'l, 373 F.2d 136 (8th Cir. 1967).
\bibitem{107} Northwest Airlines, 373 F.2d at 142.
\bibitem{108} Gilmer, 111 S. Ct. 1647. \textit{See also} Smiga v. Dean Witter Reynolds, Inc., 766 F.2d 698 (2d Cir. 1985) (enforcing a U-4 arbitration agreement in a pre-*Gilmer* decision by stating that “[i]n our view the district court found that Smiga had entered into an agreement to arbitrate. We therefore conclude that she had no right to a jury trial . . . .”).
\end{thebibliography}
ment of unequal bargaining power. Requiring mandatory ADR as a term and condition of new employment would be no different than application of a starting wage, a vacation or sick leave policy or requiring the signing of a confidentiality agreement and, thus, would clearly be supported by legal consideration.

A more difficult question arises with respect to current employees. Legal consideration could be established by tying in the implementation of ADR and mandatory arbitration with a job promotion, wage increase, or a new profit sharing or other benefit plan. On the other hand, providing a less formal, speedier and less expensive adjudication of a dispute by a neutral third party, and an employer waiving the right to trial and its attendant procedural advantages may be sufficient consideration.

An argument could be made that continued employment under changed terms and conditions constitutes consideration, or waiver or estoppel of the right to complain. This view has been adopted by the New York Appellate Division in Zellner v. Conrad, holding that forbearance of the employer’s right to terminate a contract or employment at-will is, by itself, sufficient legal detriment which may stand as consideration for a covenant entered into during an ongoing relationship.

**XVI. ADR AND ARBITRATION PROCEDURES**

The goals and advantages of any ADR or arbitration mechanism are to reduce the risks, costs and often lengthy delays associated with an over-burdened legal system that in the opinion of many is out of control; to preserve workplace unity; to foster and improve internal communication and employee morale; to provide employees with an outside option where they do not believe internal processes are fair; and to diminish legal expenses. These advantages include pretrial discovery, formal rules of evidence and the possibility of appeal. Plaintiffs' attorneys also emphasize management's concern with avoiding the uncertainty of unduly high, sympathy laden jury verdicts. Union officials also view ADR
and arbitration as yet another management way to perpetuate a union-
free environment.\textsuperscript{17}

Whatever the motivation, comprehensive dispute resolution/ 
avoidance programs should be designed first to investigate, conciliate 
and resolve potential problems as they arise, and thereafter, when 
internal "venting" has failed, to adjudicate through more formal ADR 
processes. A mandatory series of pre-arbitration steps directed toward 
the extra-judicial resolution of grievances is a valuable safeguard. 
Pursuant to this process (similar to grievance procedures under union 
contracts) employees would (i) communicate and review problems and 
concerns with immediate supervisors; (ii) submit unresolved problems 
to higher levels of management; and (iii) participate in peer review 
and/or mediation. Thereafter the parties would be required to submit 
remaining unresolved disputes to final and binding arbitration before a 
neutral agency.\textsuperscript{18}

Under the arbitration procedure, the parties would merely substi-
tute the arbitral forum for a court, with all available substantive rights 
and remedies which might be available in a court of relevant jurisdic-
tion available before the arbitrator.\textsuperscript{19} This would best ensure a 
court’s giving preclusive effect to the arbitrator’s award, and to an 
employee’s failure to exhaust available internal pre-arbitration dispute 
resolution processes.

\textbf{XVII. PRACTICAL PROBLEMS}

In establishing an arbitration mechanism, there are a number of 
practical issues to consider. Opponents of ADR often cite one or 
more of these to justify advising clients against giving up rights to 
judicial adjudication. These include whom to select as arbitrator, the 
scheduling of hearings, pre-hearing discovery, rules of evidence, the

\textsuperscript{17} The Antiunion Grievance Ploy, \textit{Bus. Wk.}, Feb. 12, 1979, at 117.

\textsuperscript{18} The Antiunion Grievance Ploy, \textit{Bus. Wk.}, Feb. 12, 1979, at 117.


"By 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 judi-
cial, forum. It trades the procedures and opportunity for review of the courtroom for the 
simplicity, informality, and expedition of arbitration." \textit{Id.} at 628.
applicability of traditional concepts of attorney-work product and attorney-client privilege, and the nature of the remedy.

A. The Selection of Arbitrators

The best answer is often the most obvious — seek out experienced attorneys, knowledgeable with respect to discrimination laws, who will be impartial and fair.¹²⁰ Some labor arbitrators believe they should not decide statutory issues, while others are not trained or qualified to do so. Available sources of qualified arbitrators include the American Arbitration Association’s National Panel of Labor Arbitrators, Judicial Arbitration and Mediation Services, Inc. (JAMS), the Center for Public Resources, Inc. (CPR), Dispute Management, Inc. (Rent-a-Judge), Endispute, and similar organizations. Whatever the source, potential arbitrators must be carefully screened as to their qualifications, backgrounds and proclivities.

B. Discovery

Generally, unless the parties provide otherwise in their arbitration mechanism, prehearing discovery is not available in conventional labor arbitration, although it may be available in commercial arbitration.¹²¹ Experience shows, however, that employees’ counsel often press in arbitration for the same type of discovery available in court proceedings, including interrogatories, requests to produce documents, requests to admit and even depositions.¹²² Thus, either the employer’s arbitration procedure should be specific on this point, or care must be taken to incorporate by reference the rules of the preferred arbitration agency.

Normally, a party is entitled to subpoena for production at the hearing relevant documents and records and the presence of witness-

¹²² Depositions are rarely allowed; however, an arbitrator may be flexible if essential witnesses are unavailable. Id. See Koch Fuel Int’l Inc. v. M/V South Star, 118 F.R.D. 318 (E.D.N.Y. 1987) (allowing depositions, where the parties have agreed to arbitrate their dispute and where the testimony sought is that of crew members preparing to depart the country who will thus most likely be unavailable to provide testimony in this dispute in the future, in addition to permitting a physical inspection of the ship and appropriate access to its records pursuant to a limited discovery agreement between the parties).
The granting of a continuance to review material produced at a hearing or for subpoena enforcement would be at the arbitrator's discretion.

C. Scheduling

Most arbitrators are unable to schedule consecutive days for a particular hearing, without advance notice. To avoid the parties having to prepare again after each delay, with attendant loss of continuity and increased expense, parties should request an initial scheduling conference and set aside enough consecutive days to complete the case at one sitting. Indeed, the availability of the arbitrator to hear and deign the case promptly should be one of the considerations in the selection process.

D. Rules of Evidence and Privilege

Rules of evidence do not typically apply in arbitration. Arbitration is generally less formal and some arbitrators are apt to receive into evidence almost anything "for what it's worth." Some arbitrators do not give proper deference to the attorney-client and work-product privileges generally applicable in courts. To minimize problems, the parties should attempt in the selection process to identify potential arbitrators who are attorneys and who are known from past experience and reported decisions to keep a tighter reign on the conduct of the hearing and to exclude irrelevancies and privileged matter.

123. Sochynsky, supra note 120, at 8.
124. According to statistical data provided by the American Arbitration Association Department of Case Administration, the median processing time for labor arbitration cases from filing to award in 1992 was 219 days. Without proper planning, cases which require multiple hearing days will result in further delays.
E. Remedies

Unless the parties expressly provide otherwise in the arbitration mechanism, arbitrators are generally empowered with the same remedial authority as judges. This would include, for example, the authority to award back pay, reinstatement, front pay and other make whole orders (including related fringe benefits), and compensatory damages.

The courts are divided on whether arbitrators may award punitive damages, with both federal and state courts holding that under New York law, arbitrators generally do not have authority to award punitive damages. Moreover, in Thoreson v. Penthouse International Ltd., the New York Court of Appeals held in 1992 that punitive damages are not awardable under the State Human Rights Law, whether before the courts or in administrative proceedings before the New York State Division of Human Rights.

In view of the existence of conflicting decisions and contradictory commentary, drafters of arbitration procedures may be tempted to include language expressly prohibiting the awarding of punitive damages. Such a restriction, however, creates a greater risk that an arbitration procedure will not be given preclusive effect because it does not allow, even on its face, for the same range of remedies available in a court of the relevant jurisdiction.

XVIII. Recent New Uses of ADR and Arbitration

A. Payment of Agency Fee "Dues"

On April 16, 1993, in Abrams v. Communications Workers, the U.S. District Court for the District of Columbia rejected mandatory arbitration of disputes under union procedures for handling agency fee objections under the Supreme Court’s 1988 Beck decision. The district court held that the Communication Workers’ unilaterally established procedures for mandatory arbitration of disputes over the

127. See Fahnestock Co., v. Waltman, 935 F.2d 512 (2d Cir. 1991); Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793 (N.Y. 1976) (holding arbitrators do not have the authority to award punitive damages even in cases where the parties have agreed that such damages are awardable). Contra Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1387 (11th Cir. 1988).
allocation of expenses violated the union’s duty of fair representation. The court further elaborated that the arbitration policy in the union constitution could not be extended to force non-members to accept the union’s choice of dispute resolution.

B. Industry-Wide Arbitration

In the aftermath of *Gilmer*, employers in a number of industries have been exploring the establishment of industry-wide arbitration panels, and the negotiation of multi-employer agreements to arbitrate disputes over restrictive covenants, and non-compete and confidentiality agreements. Parties to such industry ADR mechanisms would create panels of neutrals with expertise in the industry, and establish safeguards, rights and remedies similar to those established by the New York Stock Exchange and enforced by the Supreme Court in *Gilmer*. They would thereby avoid the question left open by the *Gilmer* decision concerning the meaning of the exclusion in Section 1 of the FAA.

XIX. SUMMARY AND CONCLUSION

ADR, including arbitration, works in cases of pure contract interpretation and under those employment related statutes where the courts have allowed it. Given proper safeguards, checks and balances, there is no reason why it would not work in cases involving statutory discrimination under the civil rights laws.

The Supreme Court’s *Gilmer* decision and its progeny signal a growing acceptance of arbitration of statutory employment claims. Whether the courts ultimately grant preclusive, or at least “exhaustion,” effect to pre-arbitration grievance procedures or prospective agreements to arbitrate discrimination and other statutory employment disputes, need not be the determining factor in deciding to utilize ADR. Clearly, decisions of arbitrators in such cases will be upheld with respect to basic contract, tort and other nonstatutory work-related claims. Even if nonbinding, arbitration awards may be given “signif-

132. Id.
significant weight," be deemed persuasive and collaterally estop relitigation of covered statutory issues.

Often an employee wishes merely to be heard by an impartial ear at an early stage in the dispute. Litigation is not yet within contemplation at this point. In addition, ADR generally improves the quality of supervision and employee morale, forcing supervisors to act more reasonably, consistently and in accordance with established company policies and practices.

AAA survey results show that companies are using ADR mechanisms more frequently since *Gilmer*. Twenty-five percent of survey respondents reported installing an arbitration provision. These employers recognize not only the benefits from a speedier and less expensive process, but the often overlooked benefit of relieving pressures building up from unresolved festering grievances.

The flood of cases into the courts across the United States has reached epidemic proportions. Civil caseloads have increased by over 30% in the past five years and are escalating geometrically. ADR presents the only proven alternative. The American Arbitration Association, the American Bar Association, the Federal Mediation and Conciliation Service, the New York State Human Rights Division and other state and local organizations and universities have all embarked on an expedited program of arbitrator development, particularly aimed at identifying and enlisting persons from minority backgrounds as potential arbitrators.

Employers are urged to modify and improve existing ADR procedures and establish them where they are lacking. They are additionally urged to give serious consideration to adopting mandatory pre-arbitration grievance step procedures, shortened time limitation periods, waivers of the right to jury trials and either voluntary ad hoc, or mandatory final and binding arbitration for all employment related disputes.

Employees/plaintiffs and their attorneys would be well advised to give serious consideration to submitting disputes to ADR and arbitration.

Finally, arbitrators must educate themselves with respect to the

---

136. Id.
137. See *supra* part I.
statutory issues they will be asked to consider, and better equip themselves with the tools needed to serve in this essential role.

Unless all of us work together in support of ADR and, particularly, final and binding arbitration, our adversarial system of dispute resolution will surely breakdown.