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Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum

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I. INTRODUCTION

Can the statutory right to a federal or state court forum for a federal age-discrimination claim be waived by an employee's prior agreement—entered into as a condition of being employed—to arbitrate employment termination disputes in a forum unilaterally structured by his employer?\(^1\) *Gilmer v. Interstate/Johnson Lane Corp.*\(^2\), a 1991 United States Supreme Court decision, holds that the answer is yes.\(^3\)

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1. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). On May 26, 1981, eight days after he was hired by Interstate, Gilmer completed and signed a "Uniform Application for Securities Industries Registration Transfer" (Form U-4), paragraph five of which provided:

   I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person that is required to be arbitrated under the rules, constitutions or bylaws of the organizations with which I register, as indicated in Question 8.

   *Id.* at 23. The applicable "rule" for Gilmer was Rule 347 of the New York Stock Exchange [hereinafter NYSE], governing employment disputes:

   Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.


3. *Id.* at 35.
Interstate terminated Robert Gilmer, then sixty-two years old, and replaced him with a twenty-eight year old as Senior Vice President, Manager of Mutual Funds. Following the venue provisions of the federal Age Discrimination In Employment Act of 1967 ("ADEA"), Gilmer filed a federal district court complaint alleging a violation of the ADEA, seeking lost wages and benefits, reinstatement, and reasonable attorney's fees.

Interstate responded with a motion to compel arbitration and to dismiss Gilmer's complaint. It relied on Gilmer's securities registration application which contained, among other things, an agreement to arbitrate when required to do so by NYSE rules, and the enforceability of the arbitration agreement under the Federal Arbitration Act ("FAA"). Gilmer argued that his agreement to arbitrate was unenforceable, because the FAA does not cover employment contracts and, in any event, the ADEA itself implicitly prohibits waiver of its venue requirements.

The district court agreed with Gilmer. However, Interstate appealed to the U.S. Court of Appeals and won. Gilmer then appealed to the U.S. Supreme Court, which held that Gilmer was bound by his agreement to use the arbitration forum. Because an arbitrator in his case would be bound to follow the substantive law of the ADEA, the Court held that Gilmer would lose no substantive rights in the arbitration forum. It therefore follows, according to the Supreme Court, that the ADEA neither expressly nor impliedly precludes

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4. Id. at 23.
8. Id. at 24.
11. Id. at 24.
14. Id. at 35.
15. Id. at 29.
agreements to waive a judicial forum in favor of arbitration.\textsuperscript{16} Lower courts have applied the \textit{Gilmer} decision to the arbitration of statutory discrimination claims filed under Title VII of the Civil Rights Act of 1964,\textsuperscript{17} including sexual harassment cases.\textsuperscript{18}

Employers are responding to the decision by making agreements to arbitrate employment disputes a condition of employment.\textsuperscript{19} Not surprisingly, \textit{Gilmer} has spawned legitimate concerns about its effect on the enforcement of what has been described in different contexts as “a national policy against discrimination.”\textsuperscript{20} How might that policy be affected by the decision? Will it flourish in a sea of swiftly decided arbitration decisions, each one applying the law as would federal courts? Or will the policy wither away in a mishmash of unconnected, independently and privately decided “final and binding” arbitration decisions?

This article argues that the \textit{Gilmer} decision carries alternative dispute resolution to excess. It permits the relegation of public-law

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\item[a]\textsuperscript{16} Id.; see also Shearson/Amer. Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987) (adding to the criteria for deducing whether Congress intended to preclude the arbitration of statutory claims by stating that in addition to a statute’s text or legislative history, preclusion may be deduced from “an inherent conflict between arbitration and the statute’s underlying purposes.”). Before \textit{Gilmer} was decided, the Third Circuit, relying on the \textit{McMahon} “inherent conflict” test decided against the future \textit{Gilmer} outcome. Nicholson v. CPC Int’l, 877 F.2d 221, 227 (3d Cir. 1989). Among the dispositive factors are both the absence of power of the EEOC to affect the arbitration procedure and the inadequacy of arbitration to effectively enforce the ADEA. \textit{Id.} at 228. The decision created a conflict with the Fourth Circuit’s \textit{Gilmer} decision, prompting review by the Supreme Court.
\item[d]\textsuperscript{19} See, e.g., Mago v. Shearson Lehman Hutton, Inc. 956 F.2d 932, 934 (9th Cir. 1992).
\end{enumerate}
\end{footnotesize}
statutory discrimination issues to a forum in which the advantages of judicial review and the relative competence of judges presiding over public trials can be discarded in favor of a procedurally defective private forum like the one Gilmer was forced to accept in order to retain his job.21

Suppose the Supreme Court had determined that ADEA substantive rights could have been lost in the securities industry arbitration forum set up for Gilmer and other industry employees. The Court would then almost certainly have found an implied provision in the ADEA barring waiver of a federal court forum.22 But with an incomplete inquiry, the Supreme Court comfortably concluded that Gilmer's "challenges to the adequacy of arbitration procedures . . . [are] insufficient to preclude arbitration."23

As further developed here, the Court's statement that the arbitrators for Gilmer's age discrimination claim were qualified to decide statutory discrimination claims24 has since been refuted by competent empirical inquiry.25 The Court's finding in Gilmer that the same arbitrators had to write written opinions26 was based on a misreading of the applicable arbitration rules.27 Also its determination that the securities industry discovery rules were sufficient to allow Gilmer to prove his claim were at best questionable.28 Other substantive-rights defeating problems with the arbitration rules relevant to Gilmer's claim were not discussed. The Gilmer decision thus hinges weakly on the dubious assumption that the opportunity to vindicate statutory substantive rights can survive a change in forum when the change is accompanied by substantial changes in governing procedural rules and a change in the culture of the forum.

21. Excluded from the scope of this article is arbitration ordered by a judge who retains jurisdiction over the dispute, and where either party to the arbitration may seek a post-arbitration trial de novo. For a discussion of this topic see, Harry T. Edwards, Alternative Dispute Resolution: Panacea or Anathema?, 99 HARV. L. REV. 668 (1986).

22. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29 (1991); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614, 628 (1985) (where the Court found that it must "assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to judicial forum, that intention will be deductible from the text or legislative history.").


24. Id.


The general assumption that arbitration for Gilmer was nothing more than a transfer of forum is almost certainly invalid. His securities industry arbitration forum, as demonstrated here, would actually have provided him with fewer procedural rights than he would have enjoyed not only in federal district court but in a labor arbitration forum and a conventional commercial arbitration forum as well. The procedural deficiencies of Gilmer's intended securities industry arbitration forum had the potential to govern powerfully the substantive outcome of his age-discrimination claim. 29 The hidden motive behind the decision is a widely held desire by judges, including United States Supreme Court justices, to reduce judicial caseloads in the face of burgeoning employment claims of all kinds 30

II. THE SEMINAL CASES

Gilmer 31 was the second of two Supreme Court decisions to place in tension a national policy against discrimination and a national policy in favor of arbitration. 32 In 1974, Alexander v. Gardner-Denver 33 held that a union's loss of a discrimination claim taken to arbitration under the union's collective bargaining agreement did not operate as a waiver of the employee’s right to file later a parallel statutory discrimination claim in federal district court. 34 Barrentine v. Arkansas-Best Freight System 35 reached a similar conclusion in a case involving the arbitration of a Fair Labor Standards Act claim. 36 Both decisions relied in part on the inadequacy of labor arbitration as a forum for the resolution of statutory claims. 37 The inadequacy included lack of labor arbitrators’ expertise
to cope with the complexities of the involved federal statutes. As argued here, arbitration's procedural deficiencies and lack of arbitrator expertise to interpret statutes should logically support both the denial of a motion to dismiss judicial proceedings on prior arbitration grounds and the denial of a motion to dismiss judicial proceedings and compel arbitration on grounds of contractual waiver. Support for this conclusion requires as background a more detailed description of the two related pre-Gilmer United States Supreme Court decisions.

A. Alexander v. Gardner-Denver

In Alexander v. Gardner-Denver Co., a union-represented employee, Harrell Alexander, was fired by Gardner-Denver for "producing too many defective or unusable parts. . . ." Alexander then filed a grievance against Garner-Denver. His union took the case to arbitration for a "final and binding" decision under its collective bargaining agreement. The Union alleged that Alexander's discharge violated a clause in the agreement providing that "[n]o employee will be discharged . . . except for just cause." At the arbitration hearing, the Union for the first time argued that Alexander's discharge was motivated by racial discrimination. However, the arbitrator did what no federal district judge could have done without being reversed. He denied the grievance without addressing the racial-discrimination claim. Alexander then filed a federal district court complaint concerning the same alleged race-based termination, arguing that his termination

38. Barrentine, 450 U.S. at 743.
40. Id. at 38.
41. Id. at 39.
42. Id. at 42.
43. Id. at 39.
44. Id. at 42.
45. See id. at 43. The arbitrator simply agreed with the Company's argument that Alexander produced too many unusable parts (scrap). Id. He did not resolve the issue inherent in all discrimination claims: whether the Company's claim that Alexander produced too much scrap was a pretext for a discharge motivated by an unlawful intent to discriminate on grounds of race? Nor is it possible to conclude that the arbitrator's findings on Alexander's scrap-production rate was necessarily a decision that Alexander was not the victim of racial discrimination. The discrimination-context issue, properly considered by the arbitrator, would have been whether—if Alexander's scrap-production had been unsatisfactory—white employees with similar production records were disciplined at all and, even if so, were they disciplined as severely as Alexander?
violated Title VII of the Civil Rights Act of 1964.\textsuperscript{46} Gardner-Denver moved to dismiss the complaint on grounds of election of remedies and waiver.\textsuperscript{47} It argued that having elected arbitration, Alexander could not bring to federal district court a second proceeding on the same discrimination claim; that to decide otherwise would mean arbitration awards are final and binding only when the union wins.\textsuperscript{48} The district court agreed, granted Gardner-Denver’s motion for summary judgment and dismissed the complaint.\textsuperscript{49} The Court of Appeals affirmed.\textsuperscript{50}

In a unanimous opinion the Supreme Court reversed the Second Circuit Court of Appeals.\textsuperscript{51} First, the statutory rights conferred by Title VII are separate and distinct from the contractual rights created by a collective bargaining agreement; it follows that the exercise of one does not preclude the right to pursue the other.\textsuperscript{52} Second, the Court found that arbitration\textsuperscript{53} is not an adequate forum for statutory employment discrimination claims. The criticism of labor arbitration as a forum for Title VII claims cited faulty arbitration procedures and the relative incompetence of arbitrators to decide them.\textsuperscript{54} The Court emphasized that the Gardner-Denver arbitrator would have exceeded his authority under the collective bargaining agreement if he had based his decision on Title VII of the Civil Rights Act or any legislation.\textsuperscript{55} A third basis for the decision, union control of the arbitration process and the consequent possibilities of union-employer collusion, was also suggested.\textsuperscript{57}


\textsuperscript{47} Gardner-Denver, 346 F. Supp. at 1014.

\textsuperscript{48} Id.

\textsuperscript{49} Id. at 1019.

\textsuperscript{50} 466 F.2d 1209 (10th Cir. 1972).

\textsuperscript{51} 415 U.S. 36, 60 (1974).

\textsuperscript{52} Id. at 48-50.

\textsuperscript{53} In Gardner-Denver, the Supreme Court used the term “arbitration” and not “labor arbitration.” See generally Gardner-Denver 415 U.S. 36 (1974). Some of its comments on “arbitration” as an inadequate forum for statutory discrimination claims would apply only to labor arbitration. Other aspects of its analysis would apply to commercial arbitration as well.

\textsuperscript{54} Id. at 56-57.

\textsuperscript{55} Id. at 57. The Court noted that the “specialized competence of arbitrators pertains to the law of the shop, not the law of the land.” Id.

\textsuperscript{56} Id. at 53.

\textsuperscript{57} Id. at 58 n.19 (noting that another concern with arbitration of statutory matters is “the union’s exclusive control over the manner and extent to which an individual grievance is presented.”). The same footnote makes a single-sentence reference to possible union-employer collusion in a racial discrimination grievance. Id. A hypothetical case illustrates what the Court perhaps thought could follow from a grievance alleging, for example, sex discrimination:

A female employee, W, in a male-dominated and newly sex-integrated bargaining unit,
In assessing arbitration, the Supreme Court in Gardner-Denver appears to have had in mind two distinct arbitration forum contexts. In one, arbitration was viewed as adequate for the resolution of grievances over the meaning of collective bargaining agreements. That assessment was validly based on the history of labor arbitration as an important and effective component of collective bargaining. It is settled in American labor law that where there is an arbitration clause in a collective bargaining agreement, labor arbitrators, not judges or quasi-judicial agencies, exclusively interpret disputed collective-bargaining agreement terms.

It was arbitration's attribute of "informality", the Court observed, that enabled it to "function as an efficient, inexpensive, and expeditious

files a grievance alleging sex discrimination. The union, sympathetic to the work-place values of its predominantly male constituency, is reluctant to take her grievance to arbitration, but the union is also reluctant to face a breach of the duty of fair representation law suit, and it believes—with good reason—that W will file one if the union refuses to invoke arbitration for her. Faced with these conflicting considerations, the union does the one thing that will avoid the law suit and also satisfy its male constituents. It takes W's case to arbitration with insufficient vigor to win, but with enough apparent vigor to mask its intention to lose. The employer has reason to believe that the union is not determined to win the case and knows the reasons why. The arbitrator denies the grievance. The decision is "final and binding." Sexist male workers are satisfied. The Union is satisfied that its core constituency is satisfied. The employer is satisfied with the result. W is either unaware of the union's lack of a full effort in her behalf, or is aware of both it and the nearly insurmountable obstacles standing in the way of proving it. No breach of the duty of fair representation action is filed against the Union.

58. See id. at 56.
59. See id. 52-54.
60. See FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS, 25-32 (4th ed. 1985) [hereinafter ELKOURI & ELKOURI]; see also Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) (holding that section 301 of the LMRA authorizes the federal courts to fashion a body of federal law for the enforcement of collective agreements to arbitrate). In 1960 the Supreme Court decided three cases which found that when the collective bargaining agreement contained an arbitration clause, the arbitrator, and not the courts, were to hear the dispute. See United Steelworkers v. American Mfg. Co., 363 U.S. 564, 565, 568 (1960) (where the collective bargaining agreement contained a clause providing for the arbitration of all disputes between the parties "as to the meaning, interpretation and application of the provisions of this agreement," the function of the court is limited to ascertaining whether the party seeking arbitration is making a claim which, on its face, is governed by the agreement, and the court has "no business weighing the merits of the grievance . . ."); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 585 (1960) (holding that since the parties had agreed that any dispute "as to the meaning . . . of this Agreement" would be determined by arbitration, it was for an arbitrator, not the courts, to decide whether the "contracting out" involved in this case violated the collective bargaining agreement.); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960) (stating that "the question of interpretation of collective bargaining agreement[s]," where there is an arbitration clause, "is a question for the arbitrator[.]", and "the courts have no business overruling his construction of the contract merely because the interpretation of it is different from . . . [the judge's].").
means for [labor] dispute resolution.\textsuperscript{61} The positive arbitration attributes become negative attributes for the resolution of statutory claims, according to the \textit{Gardner-Denver}'s decision.\textsuperscript{62}

The cited statutory-discrimination-case context deficiencies associated with labor arbitration's informality are mainly procedural: the inapplicability of rules of evidence,\textsuperscript{63} the unavailability or severe limitation of discovery,\textsuperscript{64} the sometimes absence or limitation of compulsory process, cross-examination and testimony under oath,\textsuperscript{65} and the absence of arbitrators' obligations to provide reasons for their awards.\textsuperscript{66} Labor arbitrators lacked competence to decide statutory discrimination claims because "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land.\textsuperscript{67}"

Union and employer parties who select arbitrators "trust . . . [the labor arbitrator's] knowledge and judgment concerning the demands and norms of industrial relations . . .\textsuperscript{68}"

"On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.\textsuperscript{69}\" The \textit{Gardner-Denver} opinion should not be read solely as a critique of the individual labor arbitrator who decided Harrell Alexander's grievance. The decision's comments on arbitrator competence addressed labor arbitrators as a class and the adequacy of Alexander's arbitration forum was discussed almost entirely in procedural context.

\textsuperscript{61} \textit{Gardner-Denver}, 415 U.S. at 58.
\textsuperscript{62} \textit{Id.}
\textsuperscript{63} \textit{Id.} at 57.
\textsuperscript{64} \textit{Id.} at 57-58.
\textsuperscript{65} \textit{Id.} Here, however, the Court overstated this factor. Rarely if ever would the right to cross-examination be denied in a labor arbitration proceeding and the failure to permit it would be grounds for vacating the award under most state arbitration statutes.
\textsuperscript{66} \textit{Id.} at 58.
\textsuperscript{67} \textit{Id.} at 57 (citing \textit{United Steelworkers v. Warrior & Gulf Navigation Co.,} 363 U.S. 574, 581-83 (1960)).
\textsuperscript{68} \textit{Id.}
\textsuperscript{69} \textit{Id.} The comments on arbitrator competence were made in the face of a discrimination clause in the union-Gardner-Denver collective bargaining agreement. \textit{See id.} at 57-58. Parties to the agreement had thus implicitly deemed the mutually-selected arbitrator competent to decide a discrimination claim based on a contractual standard paralleling the Title VII statutory standard. The \textit{Gardner-Denver} opinion, then, may fairly be read as finding in favor of the relative incompetence of arbitrators to decide discrimination claims, even though the parties to the agreement had at least implicitly reached a contrary conclusion.
The Court, however, did not discuss how the nature of a discrimination claim might make an arbitrator reluctant to decide a statutory discrimination case against an employer. Nor did it discuss differences between the remedies likely to be awarded by courts and by arbitrators, or the deterrent effect of arbitration results handed down in a private contractual proceeding.

Arguably, it was unnecessary for the court to delve so deeply into arbitration’s inadequacies in order to make the case that Alexander was entitled to proceed in federal court following his loss in a labor arbitration forum. Gilmer’s case, with no union involvement, was unencumbered by a need for the Court to make a Gardner-Denver-type analysis based on distinctions between contractual and statutory claims. Consequently, more so than in Gardner-Denver, Gilmer’s case was amenable to resolution on the basis of an inadequate-arbitration-forum analysis.

B. Barrentine

Almost eight years after Gardner-Denver, the Supreme Court decided a very similar case in Barrentine v. Arkansas-Best Freight Systems Inc.70 The main difference, however, was that in Barrentine, the object of the employee’s post-grievance-arbitration claim was an alleged violation of the minimum wage provisions of the Fair Labor Standards Act (“FLSA”).71 A joint grievance committee interpreted the collective bargaining agreement to deny a grievance over whether time taken to inspect a truck and travel to the truck for the inspection was “time worked” within the meaning of the collective bargaining agreement.72 In a post-arbitration action filed in federal district court, the district judge refused, on prior arbitration grounds, to consider plaintiffs’ FLSA claim.73 The Court of Appeals affirmed.74 Relying on Gardner-Denver, the Supreme Court reversed.75 Separate discussions

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72. Barrentine, 450 U.S. at 731. The joint grievance committee may be equated with “arbitrator” in that it had the power under the collective bargaining agreement to render a “final and binding” decision as the last step in the grievance-arbitration process. Id. at 731 n.5.
73. Id. at 731-33.
75. Barrentine, 450 U.S. at 745.
of forum adequacy, discrete claims—one contractual, one statutory—and waiver, as they appeared in the Gardner-Denver opinion, were merged as one in the Barrentine Court's summary description of Gardner-Denver:

[This] Court found that in enacting Title VII, Congress had granted individual employees a nonwaivable, public law right to equal employment opportunities that was separate and distinct from the rights created through the 'majoritarian processes' of collective bargaining. . . . Moreover, because Congress had granted aggrieved employees access to the courts, and because contractual grievance and arbitration procedures provided an inadequate forum for enforcement of Title VII rights, the Court [in Gardner-Denver] concluded that Title VII claims should be resolved by the courts de novo.76

The Barrentine decision extended Gardner-Denver's teachings on discrimination statutes to include all federal statutes “designed to provide minimum substantive guarantees to individual workers.”77

As in Gardner-Denver, but with greater precision, the Court in Barrentine identified “two reasons why an employee’s right to a minimum wage and overtime pay under the FLSA might be lost if submission of [a] wage claim to arbitration precluded [the employee] from later bringing an FLSA suit in federal court.”78 First, the Court noted that the main reason why a union might not fully present an employee’s wage claim to an arbitrator is that the FLSA is an individual rights statute and unions are interested in group rights.79 Then it concluded that “[t]hese statutory questions of the [FLSA] must be resolved in light of volumes of legislative history and over four decades

76. Id. at 737-38 (emphasis added). The second sentence in the quote is redundant. The “nonwaivable” character of a Title VII discrimination claim was described in the first sentence and implicitly restated in the second sentence. However, the second sentence would be best viewed as one providing the main reason for the “nonwaivable” nature of a Title VII claim: the inadequacy of arbitration as a forum for the enforcement of Title VII rights. See id.; see also United States Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 357-58 (1971) (seaman can assert wage claim in federal court under the Seamen’s Wage Act even though he had not previously pursued arbitral remedies provided by contract grievance procedures); McKinney v. Missouri-Kansas-Texas R.R. Co., 357 U.S. 265, 268 (1958) (employee returning from military service need not pursue grievance and arbitration procedure prior to asserting seniority rights in federal court under Universal Military Training and Service Act).

77. Barrentine, 450 U.S. at 737. See also McDonald v. City of W. Branch, 466 U.S. 284, 292 (1984) (neither res judicata nor collateral estoppel effect should be given a labor arbitrator’s award in a section 1983 action in federal district court).

78. Barrentine, 450 U.S. at 742-45.

79. Id. at 742.
of legal interpretation and administrative rulings . . . . [A]rbitrators may be competent to resolve preliminary factual questions” but are not competent to decide ultimate legal issues.80

The complexity of the ADEA was not discussed in Gilmer. It would have clarified the Supreme Court’s analysis if its decision had examined the statement of the Court of Appeals in Gilmer’s case that ADEA claims “involve in the main simple, factual inquiries.”81

III. POST GARDNER-DENVER/ BARENTINE

A. Arbitration’s Resurrection

1. The Search For Distinctions

In the interim period between the Gardner-Denver and Barrentine decisions and the Gilmer decision, what cured arbitration’s status as an inadequate forum for statutory discrimination claims? Certainly not that race and age discrimination cases present materially different kinds of statutory discrimination claims. For both age and race, Congress addressed discrimination based on immutable traits, two of which are permanent, one of which may be avoided only by death before the time at which the governing statute becomes applicable.82 A hearing on one kind of claim would generate complexities of roughly equal degree for the decision maker. To the extent that differences in complexity might exist, the age-discrimination dispute could offer greater difficulties for the decision maker. Age-discrimination claims generally present greater numbers of opportunities for justification defenses.83 Justification is not a valid defense in racial discrimination cases.84

80. Id. at 743.
83. See, e.g., Iervolino v. Delta Airlines, 796 F.2d 1408 (11th Cir. 1986) (holding that in an airline captain’s ADEA suit, the airline’s defense that 60 year age limitation for flight engineer position was justified because it was a bona fide occupational qualification reasonably necessary to transportation of passengers); Baker v. Delta Air Lines, Inc., 6 F.3d 632, 639 (9th Cir. 1993) (holding “[o]nce the plaintiff establishes a prima facie case that age was a determining factor in the employment decision, the defendant-employer can rebut the prima facie case and/or assert any number of affirmative defenses.”).
84. See BARBARA LINDEMA ET AL., EMPLOYMENT DISCRIMINATION LAW (BNA) 302 (2d ed. 1983). “The bona fide occupational qualification defense is not available to charges of race or color discrimination under Title VII,” although the business-necessity doctrine might be offered in its
Was Gilmer’s prior agreement to arbitrate a valid basis on which to distinguish *Gardner-Denver* and *Barrentine* from the *Gilmer* decision, as the Supreme Court suggested in *Gilmer*? Hardly so, it seems. A prior agreement to arbitrate a statutory claim, might, as a matter of contract interpretation, embrace arbitration in a procedurally defective forum. But the relative incompetence of arbitrators to resolve statutory claims, and other arbitration procedure’s deficiencies, bear not at all on the question of how the agreement to arbitrate ought to be interpreted. Rather, they go to the question of whether a statute, in Gilmer’s case the ADEA, impliedly disallows waiver of its statutory coverage in favor of relegation to an arbitration forum, no matter how efficient its processes and how process deficiencies might effectively derogate from substantive rights provided by the legislature.

The ADEA’s text contains nothing explicit on the enforceability of agreements to waive a federal court forum in favor of arbitration. However, the Supreme Court is sufficiently entranced with a federal policy favoring arbitration to have turned around the accepted standard that the burden of demonstrating waiver rests with the party alleging waiver.\(^8\)

Gilmer had the unequivocally expressed statutory right to have his ADEA age discrimination complaint filed “in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of [the ADEA].”\(^8\)

This would seem to obligate the Supreme Court to delve deeply into the question of whether arbitral procedural deficiencies and lack of arbitrator expertise in employment matters generally, and statutory discrimination claims in particular, made Gilmer’s right to a judicial forum nonwaivable. Surprisingly, though, the Court scarcely addressed the issue.

Gilmer’s intended arbitration forum became an abstract. What

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8. *Id.*; see also *Knight v. Nassau County Civil Serv. Comm’n*, 649 F.2d 157 (2d Cir.), cert. denied, 454 U.S. 818 (1981) (where the Court held in a Title VII claim that the facts underlying the defendant’s failure to promote the plaintiff, namely his lack of background in the field of psychometrics, the amount of time that he took at his work, and the significantly greater number of appeals and corrections he prepared as opposed to those prepared by others in the Test Center, warranted finding that the defendant’s failure to promote was nondiscriminatory); *Baker v. City of St. Petersburg*, 400 F.2d 294, 298 (5th Cir. 1968) (where the court held that racial classifications cannot be justified by a state on grounds that they were a “product of discretionary administrative determination made in good faith and not of a desire to circumvent the equal protection clause.”).

85. *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987) (holding that the burden is on the party opposing arbitration to show that Congress intended to preclude waiver of judicial remedies for statutory discrimination).

should have been an inadequate-forum analysis was replaced by a response to "generalized attacks on arbitration."\textsuperscript{87} The straw argument was easily toppled as one "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."\textsuperscript{88}

2. Out-of-Context Common Law

A reader of \textit{Gilmer} might easily surmise that the "current strong endorsement" of arbitration was a reference to post-\textit{Gardner-Denver} and \textit{Barrentine} decisions that weakened or at least modified the thrust of their teachings.\textsuperscript{89} But the statement was immediately followed by a citation to \textit{Rodriguez de Quijas v. Shearson/American Express, Inc.},\textsuperscript{90} where the unique question of arbitrator competence to decide statutory claims was not at issue.

\textit{Rodriguez de Quijas} involved the enforcement of an agreement to arbitrate disputes between stock brokers and their customers.\textsuperscript{91} The Court's favorable comments about arbitration were general: Arbitration was not so bad that courts would disfavor all kinds of arbitration — as the common law once did by holding unenforceable all agreements to arbitrate.\textsuperscript{92} The competence of securities industry arbitrators to interpret the Securities and Exchange Act of 1934 ("SEA"),\textsuperscript{93} a statute regulating the securities industry, was never questioned.

Putting aside their possible bias as individuals employed by the

\textsuperscript{88}  \textit{Id.}
\textsuperscript{89}  See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (the Supreme Court found that there is no reason to depart from the federal policy favoring arbitration where a party bound by an arbitration agreement raises claims founded on statutory rights).
\textsuperscript{90}  The liberal federal policy favoring arbitration agreements [citation omitted], manifested by [the Federal Arbitration] Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate. \textit{Id.} at 625 (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).
\textsuperscript{91}  \textit{Rodriguez de Quijas}, 490 U.S. at 477 (1989); \textit{Gilmer}, 500 U.S. at 30.
\textsuperscript{92}  \textit{Id.} at 480-81. In overruling \textit{Wilko v. Swan}, 346 U.S. 427 (1953), the Court interpreted section 14 of the Securities and Exchange Act not to bar any waiver of its provisions. \textit{Rodriguez de Quijas}, 490 U.S. at 481-82. In \textit{Rodriguez de Quijas}, the Court of Appeals had refused to follow \textit{Wilko} and was roundly criticized by the Supreme Court for taking the Court's exclusive prerogative of overruling its decisions. \textit{Id.} at 484.
securities industry, the arbitrators were competent to interpret the rules governing relations between brokers and their customers.\textsuperscript{94} The securities industry empowered the same arbitrators to decide employment termination cases, including those involving statutory discrimination claims—an area in which they were woefully lacking in expertise.\textsuperscript{95}

B. The Federal Arbitration Act

The Supreme Court in \textit{Gilmer} did not acknowledge important differences between the kinds of arbitration available to claimants in the cases it cited and Gilmer's intended arbitration.\textsuperscript{96} Rather, it relied on the FAA of 1925\textsuperscript{97} and its reversal of a "longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."\textsuperscript{98} That analysis, though, contains a flaw common to many discussions of arbitration's utility as a forum for statutory claims.\textsuperscript{99} It broadly treats arbitration as though all arbitration procedures, including methods of arbitrator selection, means of arbitrator compensation, and the nature of the parties using the process, are similar.\textsuperscript{100}

The Supreme Court in \textit{Gilmer}, not acknowledging that there is arbitration and there is arbitration, answered no more than the question whether Gilmer's action should have been dismissed on the basis of old common law, which is now abrogated by the FAA, on the

\begin{flushleft}
\textsuperscript{94} See \textit{Rodriguez de Quijas}, 490 U.S. at 481.
\textsuperscript{95} See \textit{G.A.O. REPORT}, supra note 25, at 12.
\textsuperscript{96} \textit{Gilmer}, 500 U.S. at 26.
\textsuperscript{98} \textit{Gilmer}, 500 U.S. at 24.
\textsuperscript{100} See \textit{Gilmer}, 500 U.S. at 26-27.
\end{flushleft}
unenforceability of all agreements to arbitrate.\textsuperscript{101} Contrary to what the Court’s Gilmer analysis suggests, it simply does not follow from the FAA-established proposition that arbitration agreements are no longer all unenforceable, that all agreements to arbitrate are enforceable.

IV. GILMER’S AND OTHER ARBITRATION FORUMS COMPARED

There are important differences between the securities industry arbitration forum required for Mr. Gilmer and the labor arbitration forum.\textsuperscript{102} There are still other important differences between conventional commercial arbitration and Gilmer’s required arbitration forum, even though, as a non-labor arbitration forum it could have been characterized as a commercial arbitration.\textsuperscript{103} Analysis of these differences generates a fair conclusion that for resolution of his statutory discrimination claim, Gilmer’s potential arbitration would have been close to the worst of all possible existing arbitration worlds.

A. The Mitsubishi and Gilmer Arbitration Forums

Also in support of its statements concerning a shift in judicial thinking in favor of arbitration, the Gilmer court cited its decision\textsuperscript{104} in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.\textsuperscript{105} There, the Court enforced an agreement to arbitrate a dispute arising under

\textsuperscript{101} Gilmer, 500 U.S. at 26-27. Justices Stevens and Marshall dissented from the majority’s conclusion in favor of the FAA’s applicability. Id. at 36 (Stevens, J., dissenting). They read the FAA as having excluded from its coverage arbitration agreements between employees and employers. Id. at 40. Gilmer failed to raise the issue in any of the courts below or in his petition for certiorari. Id. at 37-38. It was raised by several amici. Id. at 38. The majority nonetheless determined that the FAA’s exclusion clause was not applicable, because Gilmer’s securities registration application was not a contract with his employer, Interstate, but a contract with the securities exchanges. Id. at 25.


\textsuperscript{103} See Walter Gershenfeld, New Roles For Labor Arbitrators: Will Arbitrators’ Work Really Be Different?, in ARBITRATION 1994: CONTROVERSY AND CONTINUITY (BNA) 275, 280 (1994). “All [American Arbitration Association] programs other than labor (e.g., general commercial, securities, construction, textile) are labelled commercial.” Id.

\textsuperscript{104} Gilmer, 500 U.S. at 26.

\textsuperscript{105} 473 U.S. 614 (1985).
American antitrust law. 106

The arbitration forum covered by the agreement was set up and governed by the rules of the Japan Commercial Arbitration Association. 107 The Supreme Court heralded the decision as one manifesting the end of "judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals..." 108

The Gilmer court's reliance on Mitsubishi overlooked vital distinctions between different kinds of arbitration processes. In Mitsubishi, unlike Gilmer, two corporate entities were able to negotiate the terms of their arbitration agreement. 109 Gilmer had no such opportunity. He was an individual opposing a corporation. He signed a take-it-or-leave-it agreement in order to retain his job. 110

In the Mitsubishi case, both parties to the antitrust dispute were able to join in the selection of their arbitrator. 111 Securities industry arbitration procedures provided no such opportunity for Gilmer. In the arbitration to which he was relegated by the Supreme Court, Gilmer would be forced to accept the securities industry arbitrators appointed by the securities industry. 112 In Gardner-Denver and Barrentine, arbitrator competence, the grievant's standing as a non-party to the collective bargaining agreement, and inadequate labor arbitration procedures, were all factors in determining labor arbitration's inadequacy as a forum for statutory claims. 113 Only different bases for concluding in favor of arbitration's inadequacy existed in the Gilmer case. 114

106. Id. at 629.
107. Id. at 617.
108. Id. at 617-27. But see Leo Kanowitz, Alternative Dispute Resolution and the Public Interest: The Arbitration Experience, 38 HASTINGS L.J. 239, 264-65 (1987) (where the author criticizes the Mitsubishi decision).
109. Id. at 617.
110. Gilmer, 500 U.S. at 23.
111. COMMERCIAL ARBITRATION RULES OF THE JAPAN COMMERCIAL ARBITRATION ASSOCIATION, RULE 16. Other provisions in the rules permit the parties jointly to select the number of arbitrators who will hear their case (Rules 17, 19), the venue for the arbitration hearing (Rule 14), and allow a party to request that the arbitrator's neutrality be "neutral" (Rule 20).
112. See 2 N.Y.S.E. Guide (CCH) ¶¶ 2607-08, at 4314-15 (Rules 607 and 608) (1995). But see 2 N.Y.S.E. Guide (CCH) ¶ 2609, at 4315-16 (Rule 609) (1995) (Rule provides that each party "shall have the right to one peremptory challenge..."").
113. Barrentine, 450 U.S. at 742-45; Gardner-Denver, 415 U.S. at 56-60.
114. Gilmer, 500 U.S. at 33-35. Most analyses of Gilmer accept the Gilmer Court's reasoning that the Mitsubishi decision supports the Gilmer decision. Robert A. Gorman, The Gilmer Decision and the Private Arbitration of Public-Law Disputes, 1995 U. ILL. L. REV. 635, 649. Antitrust law is complex and the Court in Mitsubishi did not find its complexities a basis for refusing to enforce the agreement to arbitrate. Mitsubishi, 473 U.S. at 632-33. Like the Court, most commentators do not compare the kind of arbitration agreement involved in the Mitsubishi decision with the arbitration
Gilmer had been able to take his case to a labor arbitration forum.

B. A Gilmer Labor Arbitration

1. The Rise of Labor Arbitration

Labor arbitration is exclusively a forum for resolving disputes over the interpretation of collective bargaining agreements. Though arbitration was well established in a few industries before World War II, its institutionalized use for individual grievances began in the United States with the War Labor Board's ("WLB") efforts during World War II to minimize strikes that could interfere with the war effort.

The WLB's caseload was large enough to require that it devise some voluntary dispute-resolution mechanism for wage and other disputes in industries essential to the war effort. Grievance arbitration was an obvious solution. The WLB encouraged it by advocating for voluntary arbitration. It made Board staff members available as arbitrators. It ordered the inclusion of grievance-arbitration clauses in collective bargaining agreements.

As a result of successful War Labor Board experiences with arbitration, the resolution of employment grievances by arbitrators began to proliferate after World War II. Employers and unions found arbitration acceptable. Unions liked it because it avoided the


115. See EDWIN E. WITTE, HISTORICAL SURVEY OF LABOR ARBITRATION 1 (1952).
117. See Nolan & Abrams, supra note 116, at 567-68.
118. See Nolan & Abrams, supra note 116, at 567-68.
120. See Nolan & Abrams, supra note 116, at 570.
121. See, e.g., In re Walker Turner Co., Inc., 1 War Lab. Rep. 101 (1942) (where the Board held that in a dispute between a union and a company which have never had a mutually acceptable procedure for the settlement of grievances, the collective bargaining agreement should provide that grievances be submitted to a committee); In re Champlin Refining Co., 3 War Lab. Rep. 155 (1942) (the Board ordered an arbitration clause written into the collective bargaining agreement).
122. See WITTE, supra note 115, at 44-45.
judiciary and its then history of hostility towards union interests. In addition, employers tolerated it because the exchange for the grievance-arbitration clause was a no-strike clause.

In addition, the remedies awarded by labor arbitrators were relatively minor and remain so today. An employee who is discharged and whose union wins a termination grievance in arbitration obtains no more than reinstatement and a make-whole order, no matter what motivated the discharge. Back pay with interim earnings deducted and no punitive damages is the norm.

Punitive damages, however, were and remain today virtually unheard of in the labor arbitration forum. Among labor arbitrators, the question of whether an arbitrator may award interest on back pay is still controversial and thought by many arbitrators to be beyond what parties to collective bargaining agreements contemplated.

Early in its history, grievance-arbitration was swift, though that is no longer true. On average, a union-represented employee who files a grievance and takes it to arbitration will not receive a final decision from the arbitrator for about a year.

125. See id. at 1113.
126. See ELKOURI & ELKOURI, supra note 60, at 688.
127. See ELKOURI & ELKOURI, supra note 60, at 688.
129. See, e.g., GTE North, Inc and Communications Workers of America, 102 Lab. Arb. (BNA) 154, 160 (1993) (Kenis, Arb.) (absence of "contractual authorization"); Board of Trustees of Univ. of Ill., 100 Lab. Arb. (BNA) 728 (1992) (Goldstein, Arb.) (not even where there are several years of delay before a finding and a remedy order). Some labor arbitrators deny requests for interest on back pay on the somewhat dubious ground that interest on backpay is punitive and not remedial. See, e.g., Builders Plumbing Supply, 95 Lab. Arb. (BNA) 344 (1990) (Briggs, Arb.) (company did not maliciously and intentionally violate the collective bargaining agreement); City of Bridgeport, 94 Lab. Arb. (BNA) 975, 978 (1990) (Fitch, Arb.) ("arbitration is not a punitive proceeding ... it is restorative"). See generally David E. Feller, End of the Trilogy: The Declining State of Labor Arbitration, 48 ARB. J. 18 (Sept. 1993). Small numbers of arbitrators award interest, but only if it is requested as part of the remedy. The rationale is that the NLRB routinely awards interest on back pay, interest on back pay is a make-whole remedy, and that collective bargaining agreements are seldom specific on any aspect of an arbitrator's remedial authority. See, e.g., WJA Realty, Inc., 97 Lab. Arb. (BNA) 745 (1991) (Haemmle, Arb.); Kaiser Permanente Medical Care Program, 89 Lab. Arb. (BNA) 841 (1987) (Alleyne, Arb.); Dayco Products, Inc., 92 Lab. Arb. (BNA) 876, 882 (1989) (Fowler, Arb.) ("equitable" to award interest).
131. The average time between the filing of a grievance and a labor arbitrator's decision is 385 days. See Federal Mediation and Conciliation Service Arbitration Statistics, Fiscal Year 1994.
Processing the case to the arbitration step and setting up the hearing are what take up most of that time. Only a small portion of it is used for the hearing and for the arbitrator to write a decision. Most arbitrators selected through the procedures of arbitrator appointing agencies comply with the thirty to sixty day decision-writing recommendations of the appointing agency. Arbitrators are less inclined to delay decisions in cases involving an appointing agency like the AAA or FMCS. Each may remove from its roster of arbitrators, an arbitrator with an unsatisfactory decision-writing time record. Labor arbitrators who are selected directly by the parties can be less constrained to delay decisions.

In 1987 a National Academy of Arbitrators Special Committee On Professionalism, composed entirely of past NAA presidents, commented on long delays in arbitrator decision-writing:

_of that time precedes the arbitration hearing and is used by parties to implement the grievance-arbitration process up to but not including the time of the hearing. Labor arbitration proceedings are taking, on average, 76.87 days between the time the hearing is closed to the time of the arbitrator's award. _Id._ The time spans noted by the FMCS are the following:

<table>
<thead>
<tr>
<th>Average Days Duration (Based on Sampled Awards)</th>
<th>Days</th>
</tr>
</thead>
<tbody>
<tr>
<td>Between grievance filed/panel request</td>
<td>104.20</td>
</tr>
<tr>
<td>Between panel request/panel sent</td>
<td>3.44</td>
</tr>
<tr>
<td>Between panel sent/appointment</td>
<td>60.31</td>
</tr>
<tr>
<td>Between appointment/hearing</td>
<td>98.06</td>
</tr>
<tr>
<td>Between panel request/award</td>
<td>222.22</td>
</tr>
<tr>
<td>Between hearing/final brief</td>
<td>44.95</td>
</tr>
<tr>
<td>Between hearing/award</td>
<td>76.87</td>
</tr>
</tbody>
</table>

FMCS Rules encourage the completion of an arbitrator's decision within 60 days after the close of the hearing, "unless otherwise agreed upon by the parties or specified by law." 29 C.F.R. § 1404.15(e) (1995). For purposes of FMCS record keeping, close of the hearing is not the last day of hearing but the time when the record is closed, or in other words, when the briefs are filed. _Id._

Arbitration proceedings conducted through the offices of FMCS and the American Arbitration Association at least have the advantage of providing for the arbitrator an incentive to complete the award in a reasonable time rather than risk removal from their rosters of arbitrators. _Id._ § 1404.15(b). For what is known as the "ad hoc" selection of arbitrator—those made without an intervening appointing agency—the delay problem is a more serious one, not so much for average decision writing times, which tend to be indeterminate because of the absence of a record keeping appointing agency. Rather, it is the extraordinary length of time some arbitrators have taken to complete an opinion. See James L. Hill & Edward A. Slavin, Jr., _Rush to Unfairness: The Downside of ADR_, 28 Judges J. 8, 11 (1989) (citing a 1987 study by the Committee on Professionalism of the National Academy of Arbitrators noting decisions taking months, sometimes years to decide).

132. See _supra_ note 131.
133. See _supra_ note 131.
135. See generally _Elkouri & Elkouri_, _supra_ note 60, at 276-78.
Some arbitrators have been responsible for long delays in issuing awards. They keep the parties waiting many months, sometimes a year or more. They think nothing of asking helpless parties for extensions or simply holding pending cases without even requesting an extension. Worse still, some fail to adjust their own work schedules so that past-due awards and future awards will be rendered in a timely fashion. All of this is clearly inconsistent with professional responsibilities stated in the Code [of professional responsibility].

From the beginning, employers found labor arbitration agreements acceptable because of the reciprocal union promise not to strike during the life of the collective bargaining agreement. The mutually attractive qualities of labor arbitration were such that it survived the end of a war-time need for the uninterrupted production of goods.

At first the post-war arbitrators were mainly individuals who served only occasionally in that capacity. They were full time professors, clergymen, and lawyers, among other occupations, and as the number of workers covered by collective bargaining agreements began to rise, increasing numbers of individuals found arbitration opportunities sufficiently numerous to provide full-time arbitration work.

Inevitably, an organization of arbitrators, the National Academy of Arbitrators ("NAA") was founded in 1947, primarily in response to criticism that arbitration awards were being made by unethical persons on a "now-it's-your-turn-basis." The NAA had as its objective the education and training of arbitrators and the fostering of standards of professional responsibility.

Applicants for NAA membership are required to meet admissions standards based exclusively on acceptability as a labor arbitrator and

138. See McGruder, supra note 124, at 1113.
139. See Nolan & Abrams, supra note 116, at 629.
140. See Elkouri & Elkouri, supra note 60, at 138.
141. Elkouri & Elkouri, supra note 60, at 21.
144. The NAA "Statement of Policy Relative to Membership," contained in the NAA membership directory, notes "general acceptability by the parties" as the single substantive criterion
compliance with the NAA's Code of Professional responsibility.\textsuperscript{145} Mutual selection of the labor arbitrator has the key attribute of powerfully dictating who becomes a labor arbitrator, who remains a labor arbitrator, and where a labor arbitrator ranks on success scales.\textsuperscript{146} "Acceptability" is also a criterion for inclusion on American Arbitration Association\textsuperscript{147} and Federal Mediation and Conciliation Service rosters of arbitrators.\textsuperscript{148}

The "acceptability" requirement poses a classic Catch-22 dilemma for the prospective labor arbitrator who must find a way to become acceptable while lacking the experience to be acceptable. It creates a nearly equal Catch-22 dilemma for the threshold full-time labor arbitrator who has heard a small number of cases but an insufficient number to assure a full-time arbitration career. The nearly exclusive criterion of acceptability as the measure of a labor arbitrator's perceived value poses an ethical dilemma for the arbitrator. It is reflected in a provision of the Code of Professional Responsibility for labor arbitrators:

An arbitrator must be as ready to rule for one party as for the other on each issue, either in a single case or in a group of cases. Compromise for membership. The single remaining criterion for membership requires that the applicant "be of good moral character, as demonstrated by adherence to sound ethical standards in professional activities." \textit{Id.} The Academy's Membership Committee has interpreted the statement on membership to mean five years of arbitration experience and a minimum of 50 awards. \textit{See Report of the Special Committee to Review Membership and Related Policy Questions, Proceedings of the Twenty-Ninth Annual Meeting, National Academy of Arbitrators} 367, 370 (BNA 1976). \textit{See also} James J. Sherman, \textit{The NAA: Looking for a Few Good Arbitrators}, 50 Disp. Resol. J. 82 (Jan. 1995) (basic standard is "general acceptance of the parties"). The NAA's heavy focus on acceptability has been criticized by an NAA committee composed entirely of past NAA presidents. \textit{See Report of The Special Committee On Professionalism, Proceedings of the Fortieth Annual Meeting, National Academy of Arbitrators} 221, 224 (BNA 1988) ("competence as a criterion for admission is secondary to acceptability.").

\textsuperscript{145} \textit{See} NAA \textit{CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES} (1975) (amended 1985) (whose Preamble states that faithful adherence by an arbitrator to this Code is basic to professional responsibility. The National Academy of Arbitrators will expect its members to be governed in their professional conduct by this Code and stands ready, through its Committee on Ethics and Grievances, to advise its members as to the Code's interpretation).


\textsuperscript{147} \textit{See generally} COMMERCIAL ARBITRATION RULES, Rule 13 (Am. Arbitration Ass'n 1993).

\textsuperscript{148} 29 C.F.R. § 1404.4(f) (1995). The standards for appointment to the FMCS roster of arbitrators are "background and experience, availability, acceptability, geographical location and the expressed preferences of the parties." \textit{Id.} (emphasis added). Unacceptability may be based on the number of times the arbitrator's name has been proposed and the number of times he or she has been accepted. \textit{Id.} § 1404.5(a)(5) (1995).
by an arbitrator for the sake of attempting to achieve personal acceptability is unprofessional.\textsuperscript{149}

As a past president of the National Academy of Arbitrators has argued, and as the quoted Code provision warns against, labor arbitrator self-interest in becoming or remaining acceptable has the potential to influence the labor arbitrator’s case analysis.\textsuperscript{150}

The problem could easily be exacerbated in a forum for the resolution of statutory discrimination claims. There, the temptation to please the employer would likely be heightened for distinct reasons. As in \textit{Gilmer}, the employer alone will have sometimes created the arbitration panel. Even if the panel is the creation of a neutral agency like the American Arbitration Association, the employer would be the single party to use the arbitration process on an ongoing basis and, consequently, the only party to regularly track arbitration results. However, in labor arbitration, the arbitration parties are both entities. Both have institutionalized the process of tracking arbitration results and arbitrators.

Disputes heard by labor arbitrators cover a range of contract-interpretation issues. Overtime pay, seniority, discipline, and work assignments make up the bulk of the labor arbitrator’s caseload. In 1986 labor arbitrators heard about 65,000 employee grievances, with ten percent of the arbitrators having decided approximately fifty percent of those cases.\textsuperscript{151}

Apart from an occasional contract-interpretation dispute having a parallel in statutory law, the kinds of disputes heard by labor arbitrators in private sector cases are not those ordinarily decided by judges. Even

\textsuperscript{149} \textit{CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR MANAGEMENT DISPUTES}, art. I § A(2), at 315, \textit{reprinted in CODES OF PROFESSIONAL RESPONSIBILITY (BNA)} (Rena A. Gorlin ed., 2d ed. 1990) [hereinafter CODES OF PROFESSIONAL RESPONSIBILITY]. The National Academy of Arbitrators, the American Arbitration Association, the Federal Mediation and Conciliation Service, and the National Mediation Board are signatory to the Code. \textit{Id.} at 314. It was originally approved in 1951 and later substantially revised in 1974. \textit{Id.} at 313.

\textsuperscript{150} Richard Mittenthal, \textit{Self-Interest: Arbitration’s Unmentionable Consideration?}, 49 DISP. RESOL. J. 70, 70 (Mar. 1994). \textit{See also} Paul R. Hays, \textit{The Future of Labor Arbitration}, 74 YALE L.J. 1019 (1965) (where the author argues that a “system of adjudication in which the judge depends for his livelihood, or for a substantial part of his livelihood or even substantial supplements [to] his regular income, or pleasing those who hire him to judge, is per se a thoroughly undesirable system.”). \textit{But see} Saul Wallen, \textit{Arbitrators and Judges-Dispelling the Hays’ Haze}, in \textit{SOUTHERN LEGAL FOUNDATION, LABOR LAW DEVELOPMENTS, PROCEEDINGS OF THE TWELFTH ANNUAL INSTITUTE OF LABOR LAW} 159 (1962).

\textsuperscript{151} \textit{See generally} LABOR ARBITRATION IN AMERICA: THE PROFESSION AND PRACTICE 95-96 (Bognano and Coleman eds., 1992); \textit{see generally} ELKOUIR & ELKOUIR, \textit{supra} note 60, at 96 (noting that labor arbitration tends to be considered “an all purpose tool or panacea for the resolution of any and all disputes which the parties fail to settle privately.”).
without the nineteenth and early twentieth century judicial hostility toward unions, arbitration would have been an essential part of collective bargaining. Judges were and remain generally unfamiliar with the contents of collective bargaining agreements. They contain matters over which American courts have rarely exercised any kind of jurisdiction.

Labor arbitrators in private sector cases rarely interpret statutes of any kind. The Supreme Court has cautioned them that it would not be appropriate to do so in disputes over the meaning of collective bargaining agreements.\(^{152}\) A study commissioned by the Research Committee of the National Academy of Arbitrators and conducted by two academics with arbitration experience, found that, "[labor] arbitrators who were active in 1987 were elderly, white, non-hispanic men."\(^{153}\)

*Alexander v. Gardner-Denver Co.*\(^{154}\) was decided with an ostensibly odd mixture of praise and criticism of labor arbitration. All of its qualities, including that of speed and informality, were viewed negatively in the context of disputes over the meaning of a discrimination statute enacted by Congress.\(^{155}\) That is the only explanation for what might otherwise appear in the *Gardner-Denver* case to be conflicting assessments of labor arbitration. In addition, still other characteristics of the union-management relationship made Gilmer's securities industry arbitration forum and Alexander's labor arbitration forum quite different from each other.


\(^{155}\) *Id.* at 56-58.
2. The Fall of Labor Arbitration

The percentage of American private sector workers represented by unions had fallen from a high of about 35% percent in 1954 to 11.2% in 1993. Some economists predict a continuing union representation decline to around 5% by the year 2000. With this dramatic change in union fortunes, the number of grievances advancing to the final grievance-arbitration step of arbitration also began to decline. Work opportunities for full-time and regular part-time arbitrators fell as a result.

Partially in response to the decline in available labor arbitration work, many arbitrators who have worked exclusively as labor arbitrators have begun to expand their practices to include commercial arbitration and employment arbitration not involving unions. As labor arbitra-

156. Theodore J. St. Antoine, Divergent Strategies: Union Organizing and Alternative Dispute Resolution, 1994 LAB. L.J. 465, 465. The percentage of public sector unionized employees rose from zero to 49.8% between 1960 and 1976. Professor St. Antoine points out that there is little opposition to public sector union organizing drives, suggesting that employer coercion of private sector union organizing efforts explains in substantial part the differences between union representation rates in the two sectors. The implicit conclusion is that private sector representation rates would increase if coercive opposition to private sector union organizing drives could be halted. Id. at 465-66. The difference between private and public sector rates of opposition to union organizing drives can probably best be explained by the public sector’s absence of a private sector-type profit-motive base of operation. Id. at 468-70. With that, the prospects for a coercion-free union organizing environment in the private sector probably remain poor. Id. Consequently, it is doubtful that amount of labor arbitration work available will swing upward in the foreseeable future. Id. at 469-70.


159. Id.

160. With this trend, some arbitrators who began and maintained their arbitration careers as labor arbitrators have begun to list themselves in various alternative dispute resolution directories under both the headings “Commercial” and “Employment” arbitration. Labor arbitrators widely perceive that they are not acceptable to employers for non-union employment termination cases because of an employer perception that they would use collective bargaining agreement “just-cause” standards to resolve them. As a counter, some labor arbitrators downplay their backgrounds as labor arbitrators. For example, a prominent labor arbitrator’s listing in both the “Commercial” and “Employment” sections of the ADR Southern California Source Book, published by the Los Angeles County Bar Association reads:

Full-time Neutral in ADR; Adj Prof of Law..teach ADR; Lawyer, Solo Practice since 1976; Acted as neutral in more than 4,000 matters since 1969; Commercial, Employment, Education, Entertainment, International & Transportation . . .

Fees: $250/hr + expenses; per diem in some cases.

The perception that employers in non-union wrongful termination cases are reluctant to select
tion opportunities decline, employment arbitration opportunities, namely, those not involving unions, are on the rise. As a result of these trends, it is at least likely that the arbitrators for significant numbers of arbitration cases heard under compelled agreements to arbitrate will be those from labor arbitrator ranks. This would include both labor arbitrators on panels unilaterally appointed by employers and the selection of labor arbitrators from employment and commercial arbitration panels maintained by arbitrator appointing agencies.

C. Controlling The Arbitration Process

Unlike Gardner-Denver, the Gilmer case involved no union, no collective bargaining agreement and no preceding use of arbitration of any kind. In a Gilmer hypothetical labor arbitration, collusion possibilities of the kind hinted at in the Supreme Court's Gardner-Denver decision could be discounted as a basis for deeming Gilmer's securities industry arbitration forum inadequate for his age discrimination claim. The kinds of workplace racial and sex-based divisions that might set the stage for union-employer collusion would not likely be present. For an age-discrimination grievance, the entire workforce can muse: "There but for the grace of God go I", or "There but for the grace of God and the passage of time go I." The employer-union collusion possibility in statutory discrimination case contexts is why the Supreme Court's Gardner-Denver decision survives its Gilmer decision. Gilmer distinguishes but does not overrule Gardner-Denver.163

In Gardner-Denver, grievant Alexander could not have taken his case to the final arbitration step of the governing grievance-arbitration

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arbitrators with labor arbitration experience is countered by the views of at least two American Arbitration Association officials. Richard M. Reilly, Senior Vice President, Education and Training, and David Weinberg, Labor Case Administrator, San Francisco Regional Office, both told this author that about half the non-union case employers they encounter avoid labor arbitrators because of their experience with just cause standards; that half seek the services of labor arbitrators for such cases because labor arbitrators are unlikely to award punitive damages. Punitive damages in labor arbitration are almost nonexistent. Interest on backpay is usually denied. It may be that the one-half of employers willing or perhaps eager to engage labor arbitrators for wrongful termination cases is offset by the reluctance of plaintiffs' attorneys in non-union employment termination cases to select a labor arbitrator from a class of arbitrators still arguing over the propriety of awarding interest on back pay.

163. Gilmer, 500 U.S. at 35.
process because that right was reserved to his union—subject to its obligation not to be invidiously arbitrary or discriminatory in making that decision.\textsuperscript{164} Gilmer, as an individual claimant, would have had no such concern had he used the securities industry arbitration processes.\textsuperscript{165} Nor could Alexander alone, unlike Gilmer in his hypothetical securities industry arbitration, have sought to vacate an adverse arbitration award.

As is common in labor arbitration, the proceedings before, during, and after the hearing, are structured by the union and employer parties. For example, they strategize\textsuperscript{166}, choose counsel,\textsuperscript{167} and decide whether the hearing proceedings will be transcribed.\textsuperscript{168} A civil or criminal case litigant who is dissatisfied with retained counsel can discharge counsel, but a labor-arbitration grievant may not discharge the union's attorney and would have enormous difficulties using individual counsel for the arbitration proceedings without the union's consent.\textsuperscript{169} Gilmer, in contrast, could have retained counsel of choice for his securities industry arbitration and maintained control over strategy and tactics, albeit within the limited confines of the securities industry arbitration rules.\textsuperscript{170}

1. Distinct Arbitrator Pools

Most of the arbitrators available to Gilmer, like the demographic characteristics of their labor arbitrator counterparts,\textsuperscript{171} were "white males averaging sixty years of age."\textsuperscript{172} Unlike labor arbitrators, they

\textsuperscript{164} See Gardner-Denver, 415 U.S. at 39-42; see also Steele v. Louisville & N. R.R., 323 U.S. 192 (1944) (agreement discriminating against black members of bargaining unit violates the union's duty of fair representation); Miranda Fuel Co., 140 N.L.R.B. 181 (1962), enf. denied, 326 F.2d 172 (2d Cir. 1963) (union instigation of employer action against an employee is unlawful); Vaca v. Sipes, 386 U.S. 171 (1967) (union breaches duty where its conduct toward members is "arbitrary, discriminatory, or in bad faith."). See generally THE DUTY OF FAIR REPRESENTATION (Jean T. McKelvey ed., 1977).

\textsuperscript{165} See N.Y.S.E. Guide (CCH) ¶¶ 2600-2638, at 4311-30 (1995).

\textsuperscript{166} See ELKOURI & ELKOURI, supra note 60, at 237-40.

\textsuperscript{167} See ELKOURI & ELKOURI, supra note 60, at 241-42.

\textsuperscript{168} See ELKOURI & ELKOURI, supra note 60, at 258-62.

\textsuperscript{169} See Garcia v. Zenith Electronics Corp., 58 F.3d 1171 (7th Cir. 1995) (union may bar employee from consulting with attorney other than union attorneys).

\textsuperscript{170} See N.Y.S.E. Guide (CCH) ¶¶ 2600-2638, at 4311-30 (1995).


\textsuperscript{172} See G.A.O. REPORT, supra note 25, at 8. Using 48% of the NYSE pool, or 349 arbitrators, 97% were found to be white, 0.9% black, 0.6% Asian, and 1% other. G.A.O. REPORT, supra note 25, at 8. The average age for men was 60, for women 49 (age information represented 85% of the NYSE pool). G.A.O. REPORT, supra note 25, at 8. The characteristics of the National Association of Securities Dealers pool generally resembled those of the NYSE pool. G.A.O. REPORT, supra note
had little or no experience with employment law problems generally, and were particularly lacking in experience with statutory discrimination cases. For Gilmer, they would have had the daunting task of interpreting the often not easily applied substantive provisions of the ADEA. Labor arbitrators were noted in Gardner-Denver and Barrentine to lack statutory-discrimination expertise and Fair Labor Standards expertise, respectively. However, labor arbitrators work regularly with employment termination grievances over the meaning of clauses limiting discharge to those with "just cause." Formally, securities industry arbitrators available to Gilmer should have been "knowledgeable in the area of controversy," but in practice the selection standard was not whether the arbitrator had "expertise appropriate to the type of dispute being decided." Rather, it was whether the arbitrator could determine the facts of a dispute.

2. Distinct Arbitrator Selection Processes And Costs

In a collective bargaining setting, Gilmer’s union and his former
employer would mutually have selected the arbitrator for his age discrimination grievance.\(^{180}\) Mutual arbitrator selection provides for each arbitration party what amounts to a veto power over the other’s choice of arbitrator.\(^{181}\)

Gilmer would have had no opportunity to veto the industry's choice of any arbitrator. The industry unilaterally selected all arbitrators for its pool of arbitrators,\(^ {182}\) and decided unilaterally which arbitrators from the arbitration pool would hear individual cases.\(^ {183}\) The claimant receives a copy of the arbitrators’ profiles, and both sides were entitled to exercise one peremptory challenge.\(^ {184}\)

The GAO report, however, makes no recommendation for changing the unilateral securities industry arbitrator selection process. Had Gilmer possessed mutual arbitrator pool and individual case selection authority with the industry, he could have then considered, in determining how to exercise it, potential arbitrators’ expertise or lack of it in the substantive law of age discrimination. Additionally, Gilmer would have been able

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180. See Elkouri & Elkouri, supra note 60, at 135-36. Labor arbitrators are selected from either a list of about seven arbitrators provided by the American Arbitration Association [hereinafter AAA], the Federal Mediation and Conciliation Service [hereinafter FMCS], or other sources, depending upon language in the grievance-arbitration clause of the collective bargaining agreement. Or, the arbitrator’s selection might be the result of negotiations between Gilmer’s employer and his union, without the use of a provided list of arbitrators. Still another frequent but less common labor arbitrator selection procedure is for the employer and union to negotiate into the agreement the names of several arbitrators who would hear cases on a rotating basis. See Frank Elkouri & Edna A. Elkouri, How Arbitration Works (BNA) 68-69 (3d ed. 1973).

181. See Elkouri & Elkouri, supra note 60, at 135-36.

182. See G.A.O. REPORT, supra note 25, at 8. Responding to the G.A.O. Report, the U.S. Securities and Exchange Commission only comments on the report’s statements concerning arbitrator selection was that “[t]he staff agrees with the draft [GAO] report that distinct procedures for appointing arbitrators in discrimination cases and expanded arbitrator training in discrimination law merit serious consideration.” See G.A.O. REPORT, supra note 25, at 25, 28 (providing the text of a December 30, 1993 letter from Robert L.D. Colby, Deputy Director, SEC). The letter concedes barely, that “[i]t may be, however, that the employment law issues raised in discrimination cases are sufficiently different from the SROs to develop additional training in discrimination law issues.” G.A.O. REPORT, supra note 25, at 28.

183. See G.A.O. REPORT, supra note 25, at 5. Industry officials decide informally on a case-by-case basis whether an applicant is qualified for the arbitration panel, using as criteria whether the applicant has the required educational background, work experience, knowledge and relation to the securities industry. G.A.O. REPORT, supra note 25, at 5. Two letters of recommendation are required. G.A.O. REPORT, supra note 25, at 5. Individuals unilaterally selected for the securities industry arbitration pool are classified as “industry” or “public” arbitrators. G.A.O. REPORT, supra note 25, at 5. Industry arbitrators are those affiliated with a securities firm or are retirees from the industry or “attorneys, accountants, or other professionals who have devoted 20% or more of their professional work to securities industry clients within the last two years.” G.A.O. REPORT, supra note 25, at 5-6.

to consider possible arbitrator bias and general arbitrator competence.

In this hypothetical labor arbitration, Gilmer's union, not Gilmer himself, would have paid a share of the arbitrator's fee. In a securities industry arbitration for Gilmer, he might have paid substantial arbitration forum fees in addition to paying his attorney's fees. Labor arbitrators and conventional commercial arbitrators are ordinarily paid by parties who share the arbitrators' fees. In employment arbitration outside the union sector, employers sometimes pay all of the arbitrator's fees. Conventional commercial arbitrators and rent-a-judge judges all charge much higher per diem fees than do labor arbitrators, who must be sensitive to the abilities of unions to afford labor arbitration.

In nonunion employment arbitration, employees face Hobson-like consequences. Either the claimant adds to already incurred lawyer fees the payment of a share of the arbitrator's fee, or the claimant must suffer the disheartening possibility of taking a claim to an arbitrator who is compensated by the employer against whom the claim has been filed. Both scenarios present profound difficulties for the integrity of the arbitration proceedings. An arbitrator compensated wholly or mainly by the employer will convey the appearance of possible bias in favor of the party who pays the arbitrator's fees or wages. An arbitrator who is scheduled to be paid in part by the individual claimant may not be paid.

To avoid that possibility, in cases with an individual, as distinguished from a corporate party claimant, arbitrators may demand fees in

186. See New York Stock Exchange arbitration decision in Barbara A. Wolfe v. Charles R. Schwab, NYSE Arbitration Docket No. 1993-003197 (Aug. 19, 1994), where claimant pursued an unsuccessful sex discrimination allegation and was assessed one-half of $82,800 in “forum fees” for 55 hearing sessions and one discovery conference.
188. See, e.g., In re Board of Trustees of Univ. of Ill., 100 Lab. Arb. (BNA) 728 (1992) (Goldstein, Arb.).
189. The almost uniform fees received by judges employed by Judicial Arbitration and Mediation Services [hereinafter JAMS] for private rent-a-judging is $400 per hour. See Kathleen Sampson, Exploring The Issues In Private Judging, 77 J. AMER. JUDICATURE SOC'Y 203, 205 (Jan.-Feb. 1993). Average labor arbitration fees are $500.00 per day. Commercial arbitration fees vary widely, but under the rules of the American Arbitration Association, arbitrators hearing commercial cases are not paid for the first day of hearing and are not paid for decision-writing time if hearing time is not more than one day. COMMERCIAL ARBITRATION RULES, Rule 50 (Am. Arbitration Ass'n 1993). See also Richard C. Reuben, The Dark Side of Alternative Dispute Resolution, CALIF. L.AW., Feb. 1994, at 53. “Justman cites one recent arbitration that produced a $15,000 award and $6,000 in attorneys fees for a homebuyer, but was more than offset by a $30,000 legal bill and $9,000 for the arbitrator's services.” Id. at 56. “How can this be cheaper?” Justman asks, “When you go to trial, you don't have to pay for the judge.”’ Id.
advance of the arbitration. This is not only to assure that the arbitrator will receive the claimant's share of the arbitration fee from a disgruntled claimant who has lost and is unwilling to pay. An up-front payment requirement also assures that the arbitrator will be fully compensated if the claimant, as a result of losing the arbitration is unable to pay from funds the claimant anticipated receiving as part of a winning award. The *Gilmer* decision permits this unseemly scenario.

3. Discovery Procedures

A labor arbitrator is usually authorized to issue court-enforceable subpoenas for the production of documents and to compel the appearance of witnesses. Beyond the issuance of subpoenas, labor arbitration discovery is almost nonexistent. Depositions, for example, are rarely taken. Securities industry rule 637(c) provides that “Pre-Arbitration discovery is generally more limited than and different from court proceedings.” The arbitrator may direct the appearance of anyone employed by or associated with any “member or member organization of the New York Stock Exchange . . .,” but must do so “without resort to the subpoena process. . .,” thus placing the judicial enforcement of a subpoena outside the rule’s coverage. The rules are silent on the authority of an arbitration party to take depositions.

4. Opinion Writing

*Gilmer*’s securities industry arbitrator would have been under no obligation to write an opinion explaining the basis for a written award. Labor arbitrators are under no legal obligation to write opinions. Collective bargaining agreements almost never mention

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190. See COMMERCIAL ARBITRATION RULES, Rule 51 (Am. Arbitration Ass’n 1993).
191. See generally Timothy J. Heinz et al., *The Subpoena Power of Labor Arbitrators*, 1979 UTAH L. REV. 29, 48-55. However, it is generally accepted that unless authorized by statute or by the agreement, the arbitrator has no subpoena power. ELKOURI & ELKOURI, supra note 60, at 305-06.
194. 2 N.Y.S.E. Guide (CCH) ¶ 2619, at 4321 (Rule 619(g)) (1995).
196. Id. The Court supported narrow review of labor arbitration awards on the ground, among others, that “to require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions.” Id.
a requirement that arbitrators write opinions. But Gilmer’s hypothetical labor arbitrator would have written an opinion describing the arbitrator’s reasons for granting or denying his age-discrimination claim. Opinion-writing is part of labor arbitration’s culture, its accepted unwritten rules. It is a long-standing practice, sustained in large part by expectations of parties.

A well-reasoned opinion, the Supreme Court has stated, “tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement.” Labor arbitration parties willingly compensate the labor arbitrator for “opinion-writing” time, which most often exceeds the time required to hear the case. They would tend to find unacceptable a labor arbitrator who failed to write an opinion explaining the basis for the arbitrator’s conclusions.

Written labor arbitration opinions provide guidance to parties in their future and ongoing relationships. The opinions are often very helpful and are sought out as clues in attempting to determine whom to select as arbitrator for a dispute. They may be found in commercial publication services. They are often cited in post-hearing labor arbitration briefs and, in turn, by labor arbitrators in their opinions. Labor arbitrators’ opinions are also examined by judges when actions are brought to vacate an arbitrator’s award.

197. See id.
198. See generally ELKOURI & ELKOURI, supra note 60, at 280-82.
199. See ELKOURI & ELKOURI, supra note 60, at 280-82. “Attitudes vary as to the desirability of reasoned opinions, but a large majority of parties and of arbitrators favor their use . . . .” ELKOURI & ELKOURI, supra note 60, at 281. “A well-reasoned opinion can contribute greatly to the acceptance of the award by the parties by persuading them that the arbitrator understands the case and that his award is basically sound.” ELKOURI & ELKOURI, supra note 60, at 281. See also Roger I. Abrams et al., Arbitral Therapy, 46 RUTGERS L. REV. 1751 (1994) (“a well-written opinion can convince [the parties] that the arbitrator at least heard and understood their position.”); Susan A. Fitzgibbon, The Judicial Itch, 34 ST. LOUIS U. L.J. 485 (1990) (therapeutic value of written arbitrator’s opinion).
201. See supra notes 133-36.
203. See Southern Bell Tel. & Tel. Co., 16 Lab. Arb. (BNA) 1, 9 (1951) (McCoy, Arb.).
204. The Bureau of National Affairs [hereinafter BNA] and the Commerce Clearing House [hereinafter CCH] provide reports of Arbitration decisions in Labor Arbitration Reports and Arbitration Reports, respectively.
205. See, e.g., Bi-State Development Agency, 104 Lab. Arb. (BNA) 460 (1995) (Bailey, Arb.) (wherein the arbitrator cites as many as three prior arbitration opinions in the case of a discharge for violation of a company rule against weapons possession).
206. See ELKOURI & ELKOURI, supra note 60, at 29 (noting that Labor Arbitrators’ decisions are seldom overturned on appeal). See, e.g., United Paperworkers v. Misco, Inc., 484 U.S. 29 (1987) (arbitrator decisions are usually sustained by the courts even where they incorrectly find facts or
Judges attempting to review an arbitrator's award in Gilmer's case would have found no opinion to review. The arbitrator's award, already insulated from full judicial review because it is "final and binding" under the industry rules, is further insulated from effective judicial review because of the absence of an arbitrator's opinion. The Securities rules governing a Gilmer-type arbitration require that "awards shall be in writing and signed by a majority of the arbitrators or in such manner as is required by law."\(^7\) Close examination of the rule reveals that it departs only in form from the general commercial arbitration practice found, for example, in the rules of the American Arbitration Association\(^8\) that the commercial arbitrator need not write an opinion unless the parties jointly request one.\(^9\)

Consistent with settled commercial arbitration practice, the American Arbitration Association rules provide that the arbitrator's "award shall be in writing and signed by a majority of the arbitrators."\(^2\) The AAA rules make a clear distinction between "award"-writing and "opinion"-writing.\(^2\) Nowhere do the rules require that the arbitrator write an

\(^{207}\) See, e.g., Newsday, Inc. v. Long Island Typographical Union, 915 F.2d 840 (2d Cir. 1990), cert. denied, 499 U.S. 922 (1991) (where the court examined the arbitrator's opinion and found his award to be contrary to public policy); Stroehmann Bakeries, Inc. v. Local 776, International Bhd. of Teamsters, 969 F.2d 1436 (3d Cir. 1992) (where the court examined the arbitrator's opinion and found a predisposition to favor one of the parties involved). Judicial review could be made wholly ineffective by the absence of both an arbitrator's opinion and an adequate record of the proceedings.

\(^{208}\) See supra note 209 and accompanying text. One reason for the rule is that commercial arbitrators, unlike labor arbitrators, are generally not paid for the first hearing day in a commercial arbitration case. COMMERCIAL ARBITRATION RULES, Rule 50 (Am. Arbitration Ass'n 1993). Nor are commercial arbitrators, unlike labor arbitrators, paid for any opinion-writing days if the hearing does not exceed one day. See id. (making no mention of compensation for opinion writing). There is thus no incentive for the arbitrator to write an opinion that might take one or two days to write—for a total of two or three working days devoted to a case—without compensation. The rule makes an exception for the payless day if "the parties otherwise agree . . . ." Id. But the parties to a one-day commercial arbitration proceeding have little incentive to make the exception.

\(^{209}\) See supra note 209 and accompanying text. One reason for the rule is that commercial arbitrators, unlike labor arbitrators, are generally not paid for the first hearing day in a commercial arbitration case.

\(^{210}\) COMMERCIAL ARBITRATION RULES, Rule 42 (Am. Arbitration Ass'n 1993).
opinion unless the parties jointly request one.

Oddly, the U.S. Supreme Court in *Gilmer* interpreted the then applicable NYSE rule to require an opinion by the arbitrator. But the rule applicable to *Gilmer* actually required no more than the names of the parties, a summary of the issues, a summary of the relief awarded, and a statement of any other issues resolved. It did not require that the arbitrator explain the basis for the award. *Gilmer* could have lost a securities industry arbitration case with no more than a conclusory sentence by the arbitrator.

The securities industry arbitration rules require a verbatim record of the hearing before the industry arbitrator. That led Interstate to conclude in its Supreme Court brief on the merits that “[t]he ability of a district court to review such an award is commensurate with its ability to review a jury verdict . . . .”

The analogy, however, is flawed. A judge in a jury trial, unlike a judge reviewing an arbitrator's award, is able to take into account the court's observations of the trial as well as the trial transcript in determining whether to set aside a jury's verdict. For example, an arbitrator


213. 2 N.Y.S.E. Guide (CCH) ¶ 2627, at 4322-23 (Rule 627(e)) (1995).

214. *See id.* Proposals to require an opinion by the arbitrator were considered by the Securities and Exchange Commission and rejected. "After careful consideration of whether awards ought to include reasons for arbitrators' awards . . . we have concluded that it would not be appropriate at this time to require the inclusion of written opinions in awards." *See Self-Regulatory Organization: Order Approving Proposed Rule Changes by the New York Stock Exchange, Inc., National Association of Securities Dealers, Inc., and the American Stock Exchange, Inc., Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses*, 54 FED. REG. 21144, 21151 (1989). Interstate’s United States Supreme Court Brief, filed in the *Gilmer* case, possibly confused the Supreme Court by arguing that the arbitration rules applicable to *Gilmer* “require that the arbitrators issue their award in writing.” Respondent’s Brief at 24, *Gilmer* v. Interstate/Johnson Lane Corp., 1990 WL 514441 (No. 90-18). This of course obliterates the distinction between an award—which is entirely conclusory—and an opinion setting out the rationale in support of the award. An award could read: "The claim is denied."

215. The Supreme Court adopted the view expressed in Interstate’s Brief on the Merits that a written award would provide an adequate basis for review of the arbitrator’s decision. *Gilmer*, 500 U.S. at 31.


Rights "Waived" and Lost in the Arbitration Forum

operating under the securities industry arbitration rules could have ignored testimony in favor of Gilmer's age-discrimination claim. The reviewing judge would possibly not be aware of the omission's impact on the arbitrator's decision. A judge presiding over a jury trial could appropriately weigh the testimony against a jury's verdict. For example, an arbitrator could make credibility resolutions in favor of Interstate's witnesses that were entirely in conflict with credible documentary evidence. The conflict would less likely escape a judge who observed the witnesses. It would very likely escape the judge who reviewed the arbitrator's decision. The problems emanating from the opinionless arbitration forum are compounded by the industry rule providing for final and binding effect of the arbitrator's decision. 218

In sum, even with all of its Supreme Court-noted deficiencies for the resolution of statutory discrimination claims, labor arbitration for Gilmer would have been a forum procedurally superior to his intended securities industry arbitration forum. Nonetheless, the two forums are compared here for the limited purpose of highlighting the unsatisfactory nature of the arbitration forum to which the United States Supreme Court shunted Gilmer's ADEA claim. 219 This is not an argument in favor of labor arbitration as an appropriate forum for statutory discrimination claims.

C. Labor Arbitrators and Discrimination Grievances

Apart from labor arbitration's procedural advantages relative to the securities industry arbitration procedures available to Gilmer, and its procedural deficiencies relative to federal trial court procedures, labor arbitration decisions favoring the grievant in a race, sex, religion or age discrimination case are surprisingly rare. 220 They are almost nonexistent in published reports of labor arbitration decisions and labor arbitration texts. 221

218. 2 N.Y.S.E. Guide (CCH) ¶ 2636, at 4328 (Rule 636(a)(1)) (1995). Rule 636 constrains both the arbitrators fact-finding authority and the right to appeal an arbitrator's decision: "The arbitrator's award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited." 2 N.Y.S.E. Guide (CCH) ¶ 2636, at 4328 (Rule 636(a)(4)). The FAA contains grounds for setting aside a commercial arbitration award, but they are narrowly confined to arbitrator misconduct. See 9 U.S.C. § 10 (1988 & Supp. V 1994).

219. See Gilmer, 500 U.S. at 35.


221. Id.
Statutory discrimination grievances are on the rise. However, they are still a relatively small portion of the approximately 5,000 grievances resolved annually by labor arbitrators. They are of two kinds: those alleging breach of a just-cause clause and those alleging breach of a clause prohibiting discrimination on specified grounds. It can scarcely be doubted that a termination on grounds that would violate a discrimination statute would also constitute a termination without just cause. Just-cause for discipline embraces much more than the employment-related conduct made unlawful by a discrimination statute. By definition, a just-cause clause eliminates an essential element of proof required in a discrimination case: evidence of a specific kind of employer motivation, the absence of which is fatal to a judicial-forum statutory discrimination claim.

Labor arbitrators have sometimes found discharges to be without just cause after rejecting a contention that the discharge was motivated by racial animus, but quite rarely. Even less often do they find breaches of collective-bargaining agreement clauses prohibiting

223. See id.
225. Id.
226. See, e.g., American Fuel Cell and Coated Fabrics Co., 97 Lab. Arb. (BNA) 1045 (1991) (Nicholas, Arb.). The arbitrator found that the grievant had been “dealt with in a manner different from that of... other similarly situated employees.” Id. at 1049. Additionally, “other employees have been permitted to transfer into a senior employee’s job before being permanently removed.” Id. The arbitrator found no racial discrimination. Id. However, he also found no just cause for the termination. Id. In Denver Post Corp., the arbitrator found no just cause for the discharge of an employee who had been hired as a part-time mailer, then went through a four-year pressman apprenticeship upon completion of which he was terminated for poor attendance and tardiness, both as a mailer and an apprentice. 103 Lab. Arb. (BNA) 417, 423-24 (1994) (DiFalco, Arb.). He had received short-term suspensions in both positions. Id. at 423. The Union argued that the termination was based on the grievant’s race, as a union “eyewitness” testified that the foreman who made the decision to terminate him had referred to him as a “lazy nigger.” Id. at 421. The foreman denied making the statement. Id. at 419. Without making findings on the issue of the foreman’s credibility, the arbitrator sustained the grievance and reduced the termination to a 14-day suspension on the ground that termination was too severe a penalty. Id. at 424. He concluded that “although the Company has not demonstrated just cause for termination, the Union has conversely not demonstrated that race discrimination was the reason for [it].” Id. at 423-24. Given the earlier suspensions of the grievant for excessive absenteeism and tardiness, it appears that the grievance should have been denied, unless the decision was motivated by racial animus, in which case it should have been sustained on that ground.
discrimination banned by law.\textsuperscript{227} When a finding of racial discrimination is made, the case will likely be one in which evidence of discrimination reached the "smoking-gun" level.\textsuperscript{228}

Leading texts on labor arbitration rarely provide examples of decisions favoring a grievant on racial discrimination grounds.\textsuperscript{229} Only a small portion of labor arbitrator decisions are published, mainly because permission from both parties must be obtained before publication is permitted.\textsuperscript{230} It is therefore likely that some arbitration decisions favoring grievants in discrimination cases have not been reported.\textsuperscript{231} To that extent, another attribute of labor arbitration is demonstrated: the privacy of the process and the absence of the kind of public scrutiny that follows public judicial proceedings.\textsuperscript{232}

Future selection as an arbitrator is also a factor here. It is one matter for a labor arbitrator to find in favor of a grievant in an exclusively contractual grievance, that is, one not implicating in any way a statutory claim. For long term union-employer relationships in particular, unions and employers are accustomed to losing their share of labor arbitrators’ decisions over close-call grievances which would not have reached the arbitration level but for the difficult work-place issues they presented.\textsuperscript{233}

\textsuperscript{227} In the most recent published 100 labor arbitration decisions published in Labor Arbitration reports, an arbitrator found racial discrimination in one. The one case was International Ass’n of Machinists and Aerospace Workers, 100 Lab. Arb. (BNA) 933 (1993) (Cohen, Arb.).

\textsuperscript{228} \textit{Id.} The arbitrator determined that a discharge for excessive health-related absences was without just cause. \textit{Id.} at 936. He found that the grievant’s health had been adversely affected by a hostile racial atmosphere at work. \textit{Id.} It included constant racial epithets from co-employees, a white employee throwing toilet paper on him as he used a restroom toilet, a white employee throwing water on him on a separate occasion as he used a restroom toilet. \textit{Id.} at 935. In finding a discharge attributable to a hostile racial atmosphere, the arbitrator volunteered, “I am not one to accept a charge of racism easily.” \textit{Id.} One could search reported labor arbitration decisions in vain for a similar statement concerning a just-cause clause, i.e., “I am not one to accept easily a charge of discharge without just-cause.” It is axiomatic that unions would regard as wholly unacceptable in a discharge or discipline case an arbitrator who had made such a statement.

\textsuperscript{229} See \textit{ELKOURI & ELKOURI, supra} note 60, 98 (noting that “[s]ome doubt exists as to the suitability of labor-management arbitration for resolving racial discrimination grievances, but proposals have been made to adapt it to the needs of such grievances.”).

\textsuperscript{230} \textsc{Codes of Professional Responsibility, supra} note 149, at 317 (text of article II, section C(1)(c) of the arbitrators’ code, making it a “violation of professional responsibility for an arbitrator to make public an award without consent of the parties.”). The National Academy of Arbitrators, American Arbitration Association, the Federal Mediation and Conciliation Service, and the National Mediation Board are parties to the Code.

\textsuperscript{231} \textsc{Codes of Professional Responsibility, supra} note 149, at 317.

\textsuperscript{232} See \textsc{Codes of Professional Responsibility, supra} note 149, at 317.

It is quite another matter for a labor arbitrator to find that an employer engaged in conduct in violation of a state or federal statute. The scarcity of decisions favoring grievants in contractual discrimination cases may be attributable in part to a widespread intuition among arbitrators that to so find against an employer would have mutual-selection ramifications going beyond those ordinarily associated with employer or union losses in contract-interpretation cases.

D. A Gilmer Commercial Arbitration

Gardner-Denver and Barrentine comments on arbitrator competence to decide statutory discrimination claims were necessarily limited to labor arbitrators. What of non-labor arbitrators like Gilmer’s intended arbitrators, those not mutually selected by a labor union and an employer to resolve disputes over the meaning of a collective bargaining agreement? Are they commercial arbitrators, governed by commercial arbitration law and commercial arbitration procedural standards, or arbitrators of a new class?

For many years, a broad definition of “commercial arbitration” was arbitration that is not labor arbitration. Commercial arbitration was formerly limited, as its name connotes, almost exclusively to disputes between business entities. The subjects of “commercial arbitration”, as earlier defined, have expanded to include medical malpractice, landlord-tenant, and various kinds of domestic disputes, among others. They embrace the new and growing category of disputes between employers and unrepresented employees, and those between employers and union-represented employees when their claims are outside the coverage of their collective bargaining agreements. As a result of this trend, the American Arbitration Association has now transferred non-labor employment cases from its roster of commercial arbitrators to a new panel of “employment arbitrators.” They are available to employers and employees who jointly agree to use them, as provided in the AAA governing rules.

235. See generally Hayford & Peeples, supra note 192, at 343.
236. See ELKOURI & ELKOURI, supra note 60, at 1.
238. See EMPLOYMENT DISPUTE RESOLUTION RULES (Am. Arbitration Ass’n 1991).
239. See AMER. ARBITRATION ASS’N COMMERCIAL ARBITRATION RULES (1993).

http://scholarlycommons.law.hofstra.edu/hlelj/vol13/iss2/3
If Gilmer's age-discrimination claim had been heard under American Arbitration Association employment arbitration rules, he would have joined in the selection of an arbitrator from a panel of arbitrators established and maintained by the American Arbitration Association, a neutral private entity. The hearing, as in most labor arbitration proceedings, and in all of them conducted under AAA labor arbitration rules, would have been conducted without application of formal rules of evidence. Gilmer would have paid a one-half share of the arbitrator's fee.

Unlike labor arbitration, no cadre of full-time conventional commercial arbitrators ever developed. There is no national organization of conventional commercial arbitrators paralleling, for example, the National Academy of Arbitrators. The typical conventional commercial arbitrator is a part-time lawyer, a businessperson, or a university professor. For conventional commercial arbitration there is very little in the way of a counterpart to the "permanent" labor arbitrator who serves during the life of a collective bargaining agreement and is often reappointed indefinitely.

Gilmer's arbitration would not have been a conventional commercial arbitration case. It would have fallen within the newly developing subclass of employment arbitration. As work for labor arbitrators declines, consistent with the shrinking size of the union movement in the United States, many labor arbitrators are seeking to become members of panels like those created by the American Arbitration Association for employment cases—those not involving unions.

Some members of those panels are lawyers or academics. Others, usually operating independently and apart from the AAA, are retired judges who include employment disputes among a wide range of disputes they hear for substantial fees. The important quality of mutual arbitrator selection, long the hallmark of "arbitration", is what places the new employment arbitration panels apart from the unilaterally
appointed panel of industry arbitrators who decide disputes concerning employment and other matters in their industry or place of employment.\textsuperscript{248}

Gilmer's securities industry was in that tier. It would not have fit any employment arbitration category established, for example, by the American Arbitration Association, if for no other reason than the securities industry's creation of its own pool of arbitrators and Gilmer's inability to select mutually with his former employer the arbitrator for his ADEA claim.

The non-union character of Gilmer's securities industry arbitration made it ostensibly identifiable as a commercial arbitration. But conventional commercial arbitration rules, unlike Gilmer's securities industry arbitration rules, are always designed to foster arbitrator neutrality.\textsuperscript{249} Conventional commercial arbitration is always unconditionally consensual, a product of a mutual agreement to arbitrate as an alternative to judicial litigation which both parties want to avoid.\textsuperscript{250} For the sub class of unilaterally promulgated industry arbitration, imposed as a condition of employment, only one party, the employer, wants to avoid litigation.\textsuperscript{251} As a potential party to a conventional commercial arbitration over his discharge, Gilmer could have avoided arbitration at his option and proceeded, unencumbered by it, to federal court with his ADEA allegations.

IV. GILMER AS A POST-ARBITRATION PLAINTIFF IN COURT

"Final and binding" under the NYSE rules applicable to Gilmer had a two-pronged effect on Mr. Gilmer: it would have made it very difficult, as calculated by the securities industry, for him to obtain judicial review of an arbitrator's award on his age discrimination claim.\textsuperscript{252} At the same time, the "final and binding" aspect of an award would have been a formidable barrier in the path of Gilmer's effort to seek a post-arbitration trial de novo.\textsuperscript{253}

\begin{itemize}
  \item \textsuperscript{249} Hayford & Peeples, supra note 192, at 364-66.
  \item \textsuperscript{250} See Hayford & Peeples, supra note 192, at 351.
  \item \textsuperscript{252} See 2 N.Y.S.E. Guide (CCH) ¶ 2627, at 4322 (Rule 627(b)) (1995).
  \item \textsuperscript{253} See id.
\end{itemize}
A. Judicial Review of a Gilmer Arbitration Award

For an age-discrimination arbitration filed by Gilmer, lost and appealed in an effort to vacate the award, Interstate would have pointed to the NYSE rule providing that "[u]nless the law directs otherwise, all awards rendered pursuant to this Code shall be deemed final and not subject to review or appeal." The language goes further than the finality clauses almost always found in collective bargaining agreements. They use the words "final and binding" without the additional text found in the securities industry rule, "... not subject to review or appeal." Consequently, in opposing an attempt to vacate an award adverse to Gilmer, Interstate could have argued that the securities industry's finality rules deserve even more respect than the finality rules associated with collective bargaining agreements. Because labor arbitrators are upheld, even when they incorrectly find facts and incorrectly interpret collective bargaining agreements, the securities industry arbitration-finality rule would be subject to the same standard, at least.

Courts generally overturn labor arbitration awards with greater frequency than they do awards in conventional commercial arbitration cases. In Gilmer, involvement of a statutory claim, perhaps warranting closer judicial scrutiny, would have been offset by the explicit preclusion of judicial review in the securities industry agreements to arbitrate.

In the Gilmer case, the Supreme Court skirted this issue with a reference to statutory standards for setting aside arbitration awards. Using an analysis commonly employed by promoters of arbitration who seek to promote judicial review as one of arbitration's positive qualities, the Court cited Federal Arbitration Act grounds for vacating an arbitrator's award: "corruption, fraud, or undue means... misconduct..."
These are special and narrow grounds for vacating an arbitrator’s award. They have virtually no bearing on the question whether the award was wrong as a matter of law or fact. Those are the issues treated by the Supreme Court’s standards on limited judicial review of labor arbitration decisions.²⁶² If an agreement to arbitrate statutory discrimination claims and waive the venue provisions of federal statutes is enforceable in the Gilmer context, an explicit finality clause, cutting off judicial review of arbitrators’ awards, will likely be regarded as enforceable.

Even if review is granted, most arbitration decisions in nonunion employment disputes will be concluded on factual grounds.²⁶³ The arbitrator’s findings of fact will probably be given great weight to the limited extent that they might be discernible in the absence of an arbitrator’s opinion.²⁶⁴

B. Finality-Affected De Novo Judicial Proceedings

Suppose Mr. Gilmer, like Mr. Alexander, had taken his age-discrimination claim to arbitration after his Supreme Court loss. Then suppose he lost the arbitration. Would a court have heard his ADEA case, as courts heard Alexander’s Title VII case and Barrentine’s FLSA case, after their arbitration losses? Or would the absence of a Gilmer-Interstate collective-bargaining relationship and the presence of his prior agreement to arbitrate, prompt a different result?

Using the “final and binding” language in Gilmer’s agreement to arbitrate, Interstate would have argued for Gilmer’s dismissal from any post-arbitration ADEA judicial proceeding, in that the Gardner-Denver-Barrentine cases are distinguishable. These would not have been easy arguments to refute. “Final and binding” in this post-arbitration context would mean more than it did in Gardner-Denver and Barrentine, where the Court was appropriately able to draw sharp lines of distinction between contractual and statutory claims.

Gilmer, unlike the plaintiffs in Gardner-Denver and Barrentine, would not have been in a position to argue that the arbitrator resolved a

contract claim in his case. Nor could he have argued that he was now pressing a distinct statutory claim. Preclusion of a trial de novo would have been consistent with Interstate's intent to keep claims like Gilmer's out of court in both pre-arbitration and post-arbitration contexts.

It would also have been consistent with what the judiciary finds most attractive about ADR: a reduction in judicial caseloads. Judges also tend to dislike discrimination cases. The trial judge in Gilmer's case, for example, observed in open court, "There's no form of litigation I would more gladly forgo than employment discrimination suits." Other differences between Gilmer as a post-arbitration plaintiff and the status of Alexander and Barrentine as post-arbitration plaintiffs would likely have supported Interstate's arguments in favor of motions to dismiss a Gilmer post-arbitration judicial complaint.

First, in his securities industry arbitration, Gilmer could have controlled his case in a manner not available to Alexander or Barrentine in their labor arbitration forums. Second, Gilmer was not a third-party beneficiary of a collective bargaining agreement, in that he, not a union or any other entity, would have been the moving party in his securities industry arbitration.

No one but Gilmer could have waived his right to use the ADEA forum provided by Congress. Gilmer himself "waived" it—under compulsion of course—but the inequality of bargaining power argument he might have presented to the Supreme Court in support of his adhesion-contract claim would already have been rejected in the earlier phase of his case.

For all of these reasons, Gilmer, it appears would not have been entitled to a judicial trial following his arbitration loss. Consequently, it is not possible to view the arbitration required by Gilmer's agreement as merely a procedural step he had to exhaust before moving on to federal court. Suppose he had not been dismissed from federal court.

265. See Feller, supra note 256, at 19.
267. Id.
268. The Supreme Court noted in Gilmer that "[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." 500 U.S. at 33. The inequality of bargaining claim "is best left for resolution in specific cases." Id. See also Allied-Bruce Terminix Co. v. Dobson, 115 S. Ct. 834, 843 (1995).
V. GILMER AT TRIAL IN FEDERAL DISTRICT COURT

As an ADEA plaintiff, Gilmer could have had a jury trial in federal district court. The substantive law of his age discrimination case would have been defined by the ADEA, unencumbered by substantive-law affecting procedural irregularities.

The trial judge would have instructed the jury on the elements of ADEA substantive law, arguably making the jury itself more expert on the ADEA than the securities industry arbitrators who would have heard Gilmer’s claim. The Federal Rules of Civil Procedure (“FRCP”) and the Federal Rules of Evidence, authorized by Act of Congress and created by the United States Supreme Court, would have governed, meaning the availability of full-scale discovery: depositions, interrogatories, and requests for admission.

The jury is chosen from a randomly selected pool, not a pool selected by one of the parties, as was true for Gilmer. The judge or the attorneys for both sides may examine all prospective jurors in federal court civil proceedings. A judge chosen by neither party, paid by taxpayers, presides.

The jury’s interest in the case would terminate with its verdict and discharge. Whether in assessing liability or damages, compensatory or punitive, jurors are not affected by an obligation, real or fancied, to please anyone in any industry. Their future employment and earning power would not be influenced in any way by their verdicts. Patent violations of the ADEA, matched by appropriate jury verdicts, would be well publicized, with deterrent effect. An incorrect verdict, not set aside by the trial judge, or the trial judge’s misapplication of the law, could be overturned by appellate judges having the benefit of a verbatim transcript, findings of fact, and perhaps an opinion by the trial judge. None of these attributes of the trial process would have been duplicated in the securities industry arbitration set up for Gilmer and others similarly situated.

271. See generally id. §§ 621-634.
273. See supra notes 111-12 and accompanying text.
VI. IMPLICATIONS BEYOND GILMER

A. Employer-Favored Outcomes

Under Gilmer, an employee's inability realistically to bargain out of an agreement to waive judicial-forum rights as a condition of employment, is not a factor in determining whether the employee's contractual waiver is enforceable. Possibilities of "market forces" permitting employment applicants to pick a job on the basis of an employer's disinclination to require a Gilmer-type agreement to arbitrate will decline as more employers require them. All such agreements may be crafted to provide for opinionless arbitrator decisions, limited or no discovery, a panel of arbitrators unilaterally selected by the employer, and a "final and binding" decision by the arbitrator.

They can be made broad enough to cover all statutory discrimination claims: race, sex, religion, national origin, handicap status. Of course some unilaterally-created employment arbitrations will be structured with procedures that are decidedly more equitable than those the securities industry afforded Gilmer. Nonetheless, some attributes...
common to non-union, private contractual arbitration processes make all of them less effective than courts for the vindication of statutory discrimination claims. Once again comparisons among different kinds of arbitration are illustrative.

Labor arbitration is between two institutional interests, employer and union. In Gilmer-type arbitration, one party, the employer, will have an institutional character. Employers, and far less likely, individual employees, will track the records of arbitrators through networking and internal record keeping. Arbitrators will likely receive successive arbitration assignments from the same employer with far greater frequency than they will arbitrate for the same individual employee claimant.

Consequently, in the Gilmer-type arbitration setting, employers will naturally dominate the arbitrator selection process, as individual employees will generally lack the resources to participate effectively in it. Even if a "plaintiff's bar" operates at maximum effectiveness for individual employment claimants, by its nature it could not be the equal of institutional union interests in the arbitrator selection process. In the Gilmer-type non-union setting, arbitrators could well yield to the temptation to favor institutional employer interests.

The beguiling problem of how to compensate the arbitrator in a manner free of conveying the appearance of bias, or of making the claimant first pay the arbitrator as a condition of receiving the arbitrator's decision-making services, seems impossible to overcome with "due process" procedures. The ability of arbitrators to remain free of being influenced by considerations of future acceptability will be stretched to the limit in cases where (a) the employee should prevail on the question whether the employer violated a discrimination statute, (b) the employee should receive punitive damages, (c) the employer should bear all or most of the arbitrator's fee, (d) the employee should receive attorney's fees, and (e) the arbitrator's decision is, as it will be in almost all of these cases, subject to very limited judicial review. Even in the best procedural setting, statutory discrimination claims are peculiarly

to provide an equal share of fees. Id. Signatories to the agreement are lawyers from one management-side and one union-side labor law firm, the president of the National Academy of Arbitrators, the management co-chair, union co-chair, and neutral co-chairs of the Arbitration Committee of the Labor and Employment Section of the American Bar Association, general counsel of the American Arbitration Association, general counsel of the International Ladies Garment Workers Union. On the critical Gilmer issue of whether an employee can be compelled to waive a judicial forum in favor of the prescribed arbitration, the Task Force was unable to reach agreement. 279. See supra notes 165-69 and accompanying text.
amenable to the claimant-oriented disadvantages ordinarily associated with the informalities of ADR.

Non-union arbitrations conducted with business entities on both sides will generally have fewer bargaining-power inequities and greater possibilities for procedural fairness than non-union arbitrations with a business entity on one side and an individual on the other. Even the better arbitration procedures that employees or applicants for employment are compelled to accept as a condition of working, those with elements sometimes described as providing "due process," will fall short of the procedural safeguards available in federal courts. Few, if any of them, for example, will provide for judicial appeals as of right from an adverse arbitration award.

This is acceptable for labor arbitration grievances over the meaning of collective bargaining agreements containing subject matter peculiar to the collective-bargaining environment and largely foreign to the experience of judges. Except for waiver of the right to appeal, made in a position of relatively equal bargaining strength, this is not acceptable for decision making on the meaning of statutes enacted by a legislature. The best of these individual-employer contractual arbitration procedures would permit an arbitrator to hand down a "final and binding" decision that no federal trial judge could emulate without suffering reversal by a higher court.

The problem is not of similar magnitude in the labor arbitration forum, where the consequences of limited judicial review fall with a rough equality on union and employer parties who have generally equal numbers of arbitration wins and losses. For about every labor arbitration a union or employer should have won but lost, there is a case in which its opposition suffered similarly. For every labor arbitration that should have been won, and was, and might have been over-

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280. See supra note 151 and accompanying text.

281. See supra notes 207-10 and accompanying text. The best arbitration procedures would include those recommended by the ADR Task Force on Alternative Dispute Resolution in Employment. See PROTOTYPE AGREEMENT, supra note 278, at d34. One of its recommendations is that the "award should be final and binding and the scope of review should be limited." PROTOTYPE AGREEMENT, supra note 278, at d34. To the extent that they are adopted, the ADR Task Force recommendations, without a recommendation against waiver of the right to pursue a judicial remedy, would provide an ostensibly fair forum for employees.

282. See ELKOURI & ELKOURI, supra note 180, at 611 (discussing arbitrators' different opinions regarding the implications of a "just cause" limitation on management's right to discharge in collective bargaining agreements).

283. See ELKOURI & ELKOURI, supra note 180, at 613 (discussing various arbitrators' views regarding management's right to discharge probationary employees).
turned on appeal if an appeal had been available, the arbitration winner’s opposition will have a parallel experience.

In contrast, statutory discrimination grievances relegated to Gilmer-type arbitration forums are virtually assured employer-favored outcomes for the reasons noted in this article: the manner of selecting, controlling, and compensating arbitrators, the privacy of the process and how it catalytically arouses an arbitrator’s desire to be acceptable to one side. There, limited judicial review heavily favors the dominant arbitration winner.

B. Prejudice and ADR

Both legal and behaviorist scholars have addressed the question whether any ADR decisionmaker’s racial and other minority-based bias is less likely to be ameliorated in informal dispute resolution settings.284 The few empirical studies on the question conclude in the affirmative on the general basis that procedural safeguards of formal dispute resolution settings will more likely check the natural human tendency to “prejudge and make irrational categorizations.”285

The antipodes considered in these writings are adversary and nonadversarial procedures,286 comparing for example, judicial proceedings with informal efforts to mediate disputes or resolve them in neighborhood justice centers. It is thus questionable whether the scholars who have studied the issue of decision-maker bias in dispute resolution considered the various degrees of formality associated with different kinds of arbitration proceedings.

In the broadest use of the term, arbitration can be almost as adversarial as the most formal judicial proceedings. It can also be so informal as to be entirely nonadversarial.287 Different classes of arbitration have different degrees of formality. Labor arbitration, for

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284. Lawrence Bobo, Prejudice and Alternative Dispute Resolution, in 12 STUDIES IN LAW, POLITICS, AND SOC’Y 147, 149 (Susan S. Silbey & Austin Sarat eds., 1992).
286. See, e.g., Thibaut et al., supra note 285, at 1273-75.
287. See ELKOURI & ELKOURI, supra note 180, at 182.
example, is generally less formal than conventional commercial arbitration.\textsuperscript{288}

What is apparent in Gilmer-type arbitration proceedings is excessive informality of a kind that brings them within the zone of unchecked decision-maker bias. The combination of forum privacy, the opinionless decision (as distinguished from a conclusory award), limited discovery and limited judicial review is what makes Gilmer-type forums peculiarly amenable to the dangers of unrestrained decision-maker bias.\textsuperscript{289} “[P]rejudiced persons are least likely to act on their beliefs if the immediate environment confronts them with the discrepancy between their professed ideals and their personal hostilities against out-groups.”\textsuperscript{290}

The Gilmer-type forum insulates the arbitrator from any such confrontation. Its unilateral selection of the arbitrator seriously compounds the problem of possible bias-influenced outcomes.

C. Deterrence

Can a model employment arbitration serve as a deterrent to would-be violators of discrimination statutes?\textsuperscript{291} The answer seems plain. The two-fold purpose of the ADEA, like that of any social policy statute, is to provide a remedy for individual complainants and deter conduct the statute forbids.

For related reasons, private contractual arbitration can scarcely serve either purpose. Its contractually private nature, combined with other of

\textsuperscript{288} See Elkouri & Elkouri, supra note 180, at 3-4.

\textsuperscript{289} Compare Catchpole v. Brannon, 42 Cal. Rptr.2d 440 (Ct. App. 1995) (judgment for employer reversed because trial judge used sexual stereotypes to evaluate female plaintiff’s behavior and credibility) with Stroehmann Bakeries, Inc. v. Local 776, International Bhd. of Teamsters, 969 F.2d 1436 (3d Cir. 1992) (arbitrator’s award vacated on ground of statements by arbitrator indicating sexual bias). Decisionmaker bias in the judicial proceeding was remedied by the kind of judicial review ordinarily available to litigants in federal court proceedings, including the availability of the judge’s findings of fact and a trial transcript. Catchpole, 42 Cal. Rptr.2d at 443-45. In the labor arbitration proceeding, judicial review was unusual because of the “final and binding” nature of the labor arbitrator’s award. Stroehman Bakeries, 969 F.2d at 1441. The reviewing court relied exclusively on the record in the case and the statements made in the arbitrator’s opinion. Id. at 1444-45. No comparable opinion would have been available to a court reviewing Gilmer’s arbitration had he used the arbitration forum before or after his attempt to proceed in federal court.

\textsuperscript{290} Delgado et al., supra note 285, at 1387.

\textsuperscript{291} “Model” is defined here to mean the kind of arbitration process recommended by the ADR Protocol. The Protocol does not recommend a public forum or a voluntary choice of arbitration for employment disputes. CODES OF PROFESSIONAL RESPONSIBILITY, supra note 149, at 317 (noting article II, section C(I)(a) of the Labor Arbitrator’s Code).
its attributes providing an incentive for the arbitrator to reach employer-favored outcomes, strips the process of the deterrence quality ordinarily associated with a remedial statute. The public can be excluded and effectively kept insulated from knowledge of the arbitration proceedings and its outcome.²⁹²

Quite unresponsively, it seems, the Court agreed with Gilmer that the ADEA addresses individual complaints and also furthers “important social policies” of deterring age discrimination.²⁹³ It concluded, though, that the deterrent effect of the statute will hold so long as “the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum.”²⁹⁴

This single-sentence response avoids the issue, surveyed here, of the adequacy of Gilmer’s intended arbitration forum and, as well, the question whether statutory discrimination decisions reached in a contractually private forum can in any way deter potential violators. In Los Angeles, a racial harassment case was tried before a jury. Plaintiff won a verdict and was awarded $1,250,000.²⁹⁵ The case was given full coverage in the Los Angeles Times.²⁹⁶

A strikingly similar case was decided by a labor arbitrator.²⁹⁷ The grievant employee was awarded reinstatement with back pay in the amount of what he would have earned had he not been discharged, less any income he earned in the interim period.²⁹⁸ No interest was awarded on the amount of back pay due.²⁹⁹ The case is reported in the Labor Arbitration Reports,³⁰⁰ a publication with few readers who are not engaged in labor and employment relations work of some kind.

Apart from the disparate remedies awarded the two discrimination complainants, the two cases also illustrate differences in deterrence value. The proceedings in the labor arbitration case were private.³⁰¹ The arbitrator had to solicit permission from both parties to publish his

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²⁹². CODES OF PROFESSIONAL RESPONSIBILITY, supra note 149, at 317 (article II, section C(I)(a)).
²⁹⁴. Id. at 28.
²⁹⁶. Id.
²⁹⁹. Id.
³⁰⁰. The Labor Arbitration Reporter series is a publication of the Bureau of National Affairs, Inc.
decision in Labor Arbitration Reports.\textsuperscript{302} It seems evident that a statutory social policy of deterrence, driven in part by the possibility of embarrassment over publicized public law violations, is not effectively served in any private arbitration forum.

VII. CONCLUSION

Arbitration is a possible solution to problems of overcrowded courts and long delays in acquiring a final judicial decision. Its advantages of speed and informality, to the extent that they exist, should be offered as inducements to enter into truly voluntary agreements to arbitrate, meaning, at minimum, those not a condition of being employed.\textsuperscript{303} Once employed (without having to sign such an agreement in order to be employed) an employee with a statutory discrimination claim could then weigh and balance arbitration's possible advantages of speed and informality, to the extent that they existed, against the range of possible substantive-rights affecting procedural disadvantages noted here, including those described in this article as being beyond the capacity of the arbitration process to overcome.

Having done that, an employee with a statutory discrimination claim might then decide whether to elect arbitration or a judicial trial for its resolution. No pre-dispute waiver, entered into as a condition of employment, could be truly voluntary.

Gilmer's "waiver" of a judicial forum was voluntary in name only.\textsuperscript{304} He was entitled to the courtroom Congress had in mind when

\textsuperscript{302} An arbitrator's publication of a labor arbitration decision without having received the consent of both parties to do so is a violation of the NAA's Code of Professional Responsibility. CODES OF PROFESSIONAL RESPONSIBILITY, supra note 149, at 317 (article II, section C(l)(a)) (indicating that under the Code, the arbitrator must solicit permission after the decision is written and sent to the parties, so that they may have an opportunity to object to publication after reading it).

\textsuperscript{303} Arguably, the Gilmer decision might be limited to instances in which the individual who signs an employer-formulated agreement to arbitrate employment claims is an "experienced businessman." Gilmer, 500 U.S. at 33. The Supreme Court so characterized Gilmer. Id. This was the Court's partial response to Gilmer's adhesion-contract argument. Id. Gilmer's status as a presumably intelligent businessman goes merely to his ability to understand what he was signing. It does not address the relevant question of his inability to bargain out of signing the agreement. To that extent, Gilmer was as disadvantaged as a high school dropout who applied for a different job with Gilmer's employer.

\textsuperscript{304} The question whether an employee may be fired for refusing to accept her employer's arbitration forum for a sexual harassment claim is being litigated in federal court and could very well reach the Supreme Court as a novel issue arising under Title VII of the Civil Rights Act of 1964. See Margaret A. Jacobs, Mandatory Arbitration Agreement Faces Direct Challenge By EEOC, WALL ST. J., Apr. 12, 1995, at B2.
it described the venue for an ADEA age discrimination claim as "... any court of competent jurisdiction ...." He would have had that courtroom, except for the United States Supreme Court's decision consigning him to a procedurally deficient arbitration forum, unilaterally set up and administered by his employer. This left him the options of accepting it or not working, which was justified by the Court on the dubious premise of a forum switch with no loss of statutory substantive rights.