

ARBITRATION OR LITIGATION FOR EMPLOYMENT CIVIL RIGHTS?

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ABSTRACT

The Supreme Court's May, 1991, decision in *Gilmer v. Interstate Johnson Lane* allows and encourages Alternative Dispute Resolution (ADR) of employment discrimination claims without the Equal Employment Opportunity Commission's (EEOC) involvement. Congress endorsed ADR in Section 118 of the 1991 Civil Rights Act, amending the 1964 Civil Rights Act and the new Americans with Disability Act. In combination, *Gilmer* and Section 118 offer discrimination claimants and respondents relief from the costs and inefficiencies of the current anti-discrimination enforcement system. The ADR promises to be everything the EEOC-and-private-litigation system is not: fair, fast, final, and cheap.

Employment discrimination claimants are entitled to have their allegations reviewed and ruled on. But the exhaustive, repetitive examination of these claims in multiple forums ("fora" to you attorneys) must be the most inefficient dispute resolution process since dueling was outlawed.

The pitch-'till-you-win philosophy of Equal Employment Opportunity (EEO) charge processing is a measurable waste of economic resources. First, because most discrimination claimants allege violations of rights that do not exist. From 1983 to 1985 (the last years for which the EEOC published such details) federal, state, and local EEO agencies dismissed 50 percent of 325,000 charges for "no jurisdiction" (3%) or "no cause" (47%) [1]. Yet more than 15,000 of these dismissals became federal lawsuits plus an unreported number of state court suits, since agency rulings are not final and binding.

Second, our EEO charge processing system encourages claimants to hire attorneys regardless of the apparent strength of their claims. Under usual contingency fee arrangements, claimants pay attorneys little or nothing if they lose, and a share

of the settlement or court award if they win. And only in rare circumstances do courts order claimants to pay the legal fees of the employers or unions they sue [2]. This motivates the claimant-attorney team to pursue every opportunity for a cash deal, given attorneys' natural reluctance to work free.

If you have hired a contingency-fee lawyer you surely know already about the great advantage of giving him a piece of the action: he gets a powerful incentive to bring in the absolutely biggest cash amount. But when you think about it the absolutely biggest cash amount may not be what you want. . . . Most litigants tire of their fights . . . and at some point would rather get on with their lives than hold out for a little more. The incentive of the lawyer . . . can be to make you wait in order to go for the extra money [3, pp. 41-42].

The obvious strategy is repeatedly to charge, sue, and appeal (or threaten to do so) forcing the employer or union to amass large current and anticipated legal fees. The defendants' obvious strategy is to cut their losses and settle, in effect subsidizing the claimant's legal fees.

The case against the contingency fee has always rested on the danger it poses not to the one who pays it but to the opponent and more widely to justice itself [3, p. 45].

A third waste factor in our current system is that anybody can sue, everybody can sue, and no resolution is final. The employer, union, or employment agency—without regard to the merits of the charges against it—is open to multiple independent civil actions. Even if the claimant withdraws or settles a charge, the EEOC can investigate and sue [4-5]. Even if the EEOC settles a charge, the claimant can sue [6]. Even if a state or local Fair Employment Practices (FEP) agency investigates and finds no violation, the EEOC can investigate and join the claimant in suing [7]. Even if a state court affirms the FEP finding of no violation, the claimant and EEOC can sue in federal court [8]. While these overlapping civil actions are seldom applied and seldom result in decisions against respondents, they typify the high level of uncertainty and unpredictability facing respondents in employment discrimination issues. Individual claimants, cities, states, and the federal government have their own definitions of illegal discrimination; uniformity is neither intended nor desired. For employers, unions, and employment agencies, doing anything about discrimination is risky; so is doing nothing.

THE ALTERNATIVE ALTERNATIVE

Our discrimination charge processing system clearly needs an overhaul, and there is an attractive, underused option: Alternative Dispute Resolution (ADR). Congress and the courts now apparently favor ADR while the EEOC is wary. The EEOC's August, 1990, policy on processing the charges of employees bound by

mandatory arbitration contracts states that the commission believes in arbitration. But apparently the commission also feels that such contracts are binding on the employer, not the employee.

The Commission believes . . . (the) contract supplements rather than supplants the substantive and procedural rights guaranteed . . . the affected individual [9, p. 5153].

The commission found support for its policy in *Alexander vs. Gardner-Denver*, a 1974 Title VI case [10].

The arguments set forth by *Gardner-Denver* demonstrating why the purposes and structure of Title VII are incompatible with exclusive arbitration unequivocally support the same conclusion under the Age Discrimination in Employment Act (ADEA).

Contrary to this line of reasoning, The Supreme Court held 7-2 in May, 1991, in *Gilmer vs. Interstate-Johnson Lane* that ADEA was indeed subject to exclusive arbitration [11]. Perhaps the commission will follow its own logic and announce that the *Gilmer* decision unequivocally supports the same conclusion under Title VII. We do not need an EEOC policy announcement since *Gilmer* includes the Supreme Court's clarification of its logic in *Gardner-Denver*. The Court stated that *Gardner-Denver* (and case decisions based on it between 1974 and 1990) did not involve an arbitrator authorized by his appointment and submission agreement to resolve statutory claims. Since *Gilmer's* arbitrator was given such authority by the parties who hired him, the courts deferred to him under the strong federal policy favoring arbitration [12].

In arguing that arbitration is inconsistent with the ADEA, *Gilmer* also raises a host of challenges to the adequacy of arbitration procedures. Initially, we note that in our recent arbitration cases we have already rejected most of these arguments as insufficient to preclude arbitration of statutory claims.

Such generalized attacks on arbitration . . . are far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes [12, 1121].

Soon after issuing the *Gilmer* decision, the Supreme Court set aside the 5th Circuit opinion in *Dean Witter Reynolds v. Alford* [13], a case involving Title VII and exclusive arbitration, and directed the circuit court to reconsider the case in light of *Gilmer*. The 5th Circuit then ruled in August, 1991, that Title VII claims were subject to exclusive arbitration. The Sixth Circuit Court applied *Gilmer* in ruling that a Title VII sex discrimination claim is subject to binding arbitration [14].

The Supreme Court's May, 1991, endorsement of ADR was reinforced by Congress six months later with the passage of the Civil Rights Act of 1991 (CRA-91) amendments to the 1964 Civil Rights Act and the 1990 Americans with Disabilities Act.

SECTION 118. ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

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

The timing of Congress' inclusion of ADR in the new law is important for several reasons. Most of CRA-91 is congressional response to politically unpopular Supreme Court decisions such as *Wards Cove v. Antonio* [15] and *Martin v. Wilks* [16]. Certainly if Congress had found the *Gilmer* decision offensive, it would have written language different from that in Section 118. Congress wrote and the president signed the Civil Rights Act of 1991 well after the Court announced its reasoning in *Gilmer*. No politician could have mistaken the effect of Section 118 on future cases after reading in *Gilmer* that

Congress, however, did not specifically preclude arbitration or other nonjudicial resolution of claims, even in its recent amendments of ADEA. If Congress intended the substantive protection afforded by the ADEA to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. . . . The EEOC, for example, is directed to pursue "informal methods of conciliation, conference and persuasion" which suggests that out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress [12, 1121].

In future court reviews of discrimination suits by plaintiffs subject to ADR contracts, judges will again look for congressional intent regarding ADR. The judges will find both the text and the timing of Section 118 to be more than a suggestion that ADR is central to the scheme for discrimination law enforcement.

In ending congressional exemption from employment civil rights statutes, CRA-91 specifies an ADR charge review process for senatorial employees. The process includes both mandatory mediation and a formal hearing before a board of three hearing officers recommended by the Federal Mediation and Conciliation Service (FMCS) or American Arbitration Association (AAA). This process, which excludes the EEOC, testifies to Congress' confidence in ADR for discrimination charges.

JUSTICE DELAYED IS JUSTICE DENIED

While in pre-*Gilmer* EEO cases the courts ruled that Congress intended for persons affected by employment discrimination to have multiple overlapping remedies, that is now neither true nor desirable. The Supreme Court has stated twice since 1987 that:

[b]y agreeing to arbitrate a statutory claim a party does not forgo the substantive rights afforded by the statute, it only submits their resolution to an arbitral rather than a judicial forum [17, 18].

Given the caseload in the federal courts, claimants' insistence on a right to trial is unwise. Between 1968 and 1988 the number of federal civil suits rose 281 percent while the number of authorized district judges rose only 78 percent [19]. The average number of civil and criminal cases per authorized district judge rose 56 percent, with the inevitable effects on clearing the docket—and the Constitution guarantees a speedy trial only to criminal defendants. By 1988, 9 percent of employee civil rights suits had been waiting over thirty-six months for a trial date.

COST OF EEO LITIGATION

There are other reasons to question the value of having one's day in court on an EEO charge. The EEOC dismisses about 83 percent of the charges it resolves with a right-to-sue notice authorizing the claimant to file suit on his or her own [1]. About 10 percent of dismissed charges become civil suits at the plaintiff's personal expense [19]. Since about 24 percent of employment discrimination plaintiffs win at trial, the rest must bear their costs along with their defeats [20, p. 372]. And the courts do not award full fees and costs to all winning plaintiffs. If all claimants receiving notices of right to sue consulted attorneys about suing, 98 percent of them would eventually bear the costs themselves (1 - (.10*.24)). Fay and Gould estimated that it cost plaintiffs about \$10,000 (in 1987) to get a civil rights case to trial and another \$40,000 (in 1989) during the trial [21-22]. Donohue and Siegelman show legal fees of \$10,000 to \$25,000 as "reasonable parameter values" for each party in a private Title VII suit [23, p. 1025]. Claimants would be unwise to expect EEOC support in litigation; the commission brings suit in 0.4 percent of charges it investigates [19].

The results of most claimants' day in court should discourage enthusiasm for EEO litigation. Burstein and Monaghan found that EEO plaintiffs won full or partial remedy in 24 percent of federal EEO suits 1965-1983 [20, p. 372]. Hoyman and Stallworth found that plaintiffs won 7 percent of 307 federal EEO trials 1974-1983 [24]. Elwell and Feuille found three plaintiff wins (10%) in thirty-one

federal district court EEO trials 1974-1983 and no wins in eighteen appeals court decisions [25].

ARBITRATION RESULTS

Arbitration results are more favorable to claimants than are litigation results. Block and Steiber found the grievant won reinstatement with or without back pay in 57 percent of 1,213 arbitration awards in discharge cases 1979-1981 [26]. Grievants won about 57 percent of 1,100 discipline awards published 1984-1986 and about 50 percent of 9,500 AAA awards 1986-1988 [26]. Nelson and Curry asked seventy-four arbitrators for a decision based on the transcript of discharge hearing; 45 percent recommended reinstatement [27]. Not only does the 50-50 pattern testify to the fairness of arbitration but it shows the value of the grievance review steps preceding arbitration. Both grievant and employer have multiple opportunities to settle or abandon "sure losers." Grievants who expect to lose at arbitration on the merits of their cases are likely to give up or settle; employers who expect to lose would do the same. Over time, cases reaching arbitration should be the "tough calls" in which there is the most uncertainty of outcome. One would expect an unbiased review of such cases to favor each party roughly half the time.

Since there is little motivation for workers not to file EEOC or FEP charges, or to attempt settlement before filing, we should see signs that many workers file "junk charges." We do indeed see the EEOC dismiss 83 percent of the charges it receives and the state and local FEPs 70 percent of theirs. Litigation favored plaintiffs in only 10 to 24 percent of suits prior to *Gilmer*, indicating that plaintiffs felt little motivation to settle or abandon weak suits. Donohue and Siegelman presented an economic theory analysis of why this was especially true for well-paid plaintiffs or those cases in which the EEOC or union paid the legal costs [23]. We will see even more weak cases brought to litigation now that plaintiffs and their attorneys can share compensatory and punitive damages for intentional discrimination.

CONTINGENT PROBABILITY OF CLAIMANT VICTORY

The following tables estimate the probabilities that an EEO claimant will win a grievance brought to arbitration, or a charge brought to the EEOC. None of the tables considers the number of potential complaints *not* brought to the system, nor cases settled or withdrawn during litigation. Table 1 is drawn from LeRoy and Feuille [28], and from Hoyman and Stallworth [24]; Table 2 is drawn from EEOC annual reports [1] and federal court records; Table 3 from Hoyman and Stallworth [24].

TABLE 1: ARBITRATION AND COURT REVIEW

Win at Arbitration	50%
Lose at Arbitration	50%
Court Review of Award	17%
Court Overturns Award	10%
Win on Review = $.50 \cdot .17 \cdot .10 =$	$\frac{0.85\%}{51\%}$

TABLE 2: EEOC CHARGE PLUS LITIGATION

Negotiated Settlement	16%
Dismissal	83%
Suits	10%
Trials Won	24%
Litigation Win = $.83 \cdot .10 \cdot .24 =$	$\frac{2\%}{18\%}$

TABLE 3: ARBITRATION PLUS EEOC PLUS LITIGATION

Win at arbitration	50%
Lose at Arbitration	50%
EEOC Review of Charge	27%
Court Review of Award	63%
Court Overturns Award	7%
Win on Review = $.50 \cdot .27 \cdot .63 \cdot .07 =$	$\frac{0.60\%}{51\%}$

These estimates indicate that arbitration alone is more beneficial to EEO claimants than EEOC charge review plus litigation. Litigation adds only modestly to claimants' probability of reversing a loss at arbitration, and EEOC review and litigation of arbitral awards is no better than litigation alone. In summary, arbitration alone is the best combination of benefit to claimant plus low processing cost. If the law allowed the EEOC to review arbitral awards—as it now does not—it would add little to the speed, finality, or affordability of dispute resolution.

MAKING ADR WORK

To what ADR arrangements must the courts defer after *Gilmer*? First, the commitment to mandatory ADR by employer and employee must be in a written contract, entered into either before or after the dispute arises. A unilateral employment policy in employee handbooks mandating ADR is enforceable, since the employee gains from access to ADR.

The consideration exchanged for one party's promise to arbitrate must be the other party's promise to arbitrate at least some specified class of claims [29].

In the past, courts ruled contracts illegal retaliation under Title VII if they provided for grievance and arbitration but barred grievance processing once the employee filed an EEOC charge or lawsuit [30]. If the courts continue to follow *Gilmer* and CRA-91 Section 118, such contract provisions are unnecessary; the courts will insist on the employee exhausting ADR.

The ADR process must provide for hearing before an unbiased, neutral party or panel such as an arbitrator or peer-review board. The arbitrator or panel must be given the power to compel documents and testimony by subpoena, to give awards similar to those authorized by the courts (including injunction, back pay, and damages). The arbitrator's or panel's decision and award must be in writing. The ADR policy must empower the arbitrator or panel to hear complaints from multiple grievants ("class actions"), and must allow the grievant representation by an attorney.

If employers write these characteristics into an ADR process, the courts will generally stay any civil process, such as injunction, subpoena, or trial. The arbitrator's award is subject only to limited judicial review based on challenges to the arbitrator's impartiality, not to his or her reasoning.

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