EMPLOYMENT ARBITRATION AGREEMENTS: THE CASE FOR FREEDOM OF CONTRACT

Employment disputes have become one of the fastest growing areas of civil litigation. In the past two decades, employment litigation has increased at a rate almost 1000 percent greater than the increase in all other types of civil litigation combined.[1] Employment disputes now account for nearly 20 percent of pending civil cases and perhaps as many as 25 percent of incoming civil complaints in federal courts.[2] As litigation of employment disputes grows, and likewise the cost of defending against these claims escalates, employers are seeking to develop alternative methods for settling employment disputes that are less expensive and contentious.[3] The implementation of a mandatory arbitration policy is one of those methods. Employees are required, as a condition of employment or continued employment, to agree contractually to submit any dispute arising out of their employment to binding arbitration. If these contracts are valid and enforceable under the Federal Arbitration Act (FAA),[4] an employee will be compelled to submit any claims against the employer to arbitration, including claims regarding violations of statutory rights. Until recently, the courts had been reluctant to allow for nonjudicial determination of claims based on federal statutory rights. If these claims may be decided in arbitration, the principles of res judicata and collateral estoppel would

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1. Hope B. Eastman & David M. Rothenstein, *The Fate of Mandatory Employment Arbitration Amidst Growing Opposition: A Call for Common Ground*, 20 EMPLOYEE RELATIONS L.J. 595 (1995).

2. Jill Hodges, *Employment Disputes Balloon to Nearly 20 % of Pending Civil Cases*, STAR TRIB., June 11, 1995, at 3D.

3. According to a recent Government Accounting Office (GAO) report, almost all employers with 100 or more employees, who filed Equal Employment Opportunity (EEO) reports with the Equal Employment Opportunity Commission (EEOC), use one or more Alternative Dispute Resolution (ADR) approaches. Although arbitration is one of the least common approaches (only about ten percent of employers currently use arbitration), an increasing number of employers are considering implementing an arbitration policy for employee discrimination complaints. GAO/HEHS 95-150, *EmploymentDiscrimination - Most Private-Sector Employers Use Alternative Dispute Resolution*, 4, 7 (1995).

4. 9 U.S.C.A. (1995).

then preclude employees from seeking judicial determination of their claims.[5]

In December of 1994, a presidential commission investigating the "Future of Worker-Management Relations" released its report and recommendations.[6] One of the areas examined by the Commission[7] was the use of alternative dispute resolution (ADR) methods to include binding arbitration.[8] The Commission recommended that employers be prohibited from requiring employees to agree to binding arbitration as a condition of employment.[9] There has been support for this recommendation in Congress where Wisconsin Senator Russell Feingold submitted a bill that would invalidate existing employment arbitration agreements.[10]

This article will show that the prophylactic measures recommended by the Commission and Senator Feingold's bill are unnecessary to protect employees' rights. The first section will examine the Commission's report and recommendations as well as Senator Feingold's bill. Next, the article will review recent federal court[11] treatment of arbitration agreements in employment contracts.

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5. *See* Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982).

6. COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS: EXECUTIVE SUMMARY, 25 (1994) [hereinafter COMMISSION].

7. The Commission was asked to report on three questions:

> 1. What (if anything) should be done to increase the extent to which work-place problems are directly resolved by parties themselves, rather than [seeking remedies in] state and federal courts and government regulatory bodies?
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> 2. What (if any) new methods or institutions should be encouraged, or required, to enhance work-place productivity through labor-management cooperation and employee participation?
>
> 3. What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperative behavior, improve productivity and reduce conflict and delay?

COMMISSION, *supra* note 6, at xvi. Since this article focuses on the use of alternative dispute resolution methods, questions 2 and 3 will not be discussed.

8. *Id.* at 30.

9. *Id.* at 33.

10. S. 366, 104th Cong., 1st Sess.

11. It is beyond the scope of this article to attempt to review state court treatment of employment arbitration agreements, although many state courts have determined that employment arbitration agreements are enforceable. *See, e.g.*, Spellman v. Securities,

That section will then discuss when a court should enforce an arbitration agreement under the Federal Arbitration Act and under contract law and current principles protecting employees. Finally, the effect of an arbitration decision in a subsequent lawsuit between the same parties will be discussed along with procedural guidelines that should be included in employment arbitration agreements to prevent judicial resolution.

Annuities and Insurance Services, Inc., 10 Cal. Rptr. 2d 427 (Ct. App. 1992) (enforcing an arbitration agreement in an employment contract); Spooner v. Armour-Dial, 476 N.E.2d 454 (Ill. App. Ct. 1985) (employee's suit was barred by his failure to exhaust arbitration remedies provided in collective bargaining agreement); Goebel v. Blocks & Marbles Brand Toys, Inc., 568 N.E.2d 552 (Ind. Ct. App. 1991) (found valid employment contract containing arbitration clause, all further issues were for arbitrator); Dain Bosworth, Inc. v. Brandhurst, 356 N.W.2d 590 (Iowa Ct. App. 1984) (valid arbitration agreement required employee to submit claim to arbitration); Wilson v. McGraw, Dridgeon & Co., 467 A.2d 1025 (Md. 1983) (exclusion of arbitration agreement in Maryland's Uniform Arbitration Act was intended to apply only to collective bargaining agreements and does not include arbitration agreements between a single employee and employer); Ryoti v. Paine, Webber, Jackson & Curtis, Inc., 371 N.W.2d 454 (Mich. Ct. App. 1995) (affirmed lower court holding of a valid arbitration agreement); Johnson v. Piper Jaffray, Inc., 530 N.W.2d 790 (Minn. 1995) (exclusion in Federal Arbitration Act did not apply to employee's arbitration agreement, employee required to arbitrate claim); Fletcher v. Kidder, Peabody and Co., 619 N.E.2d 998 (N.Y. 1993) (compelled arbitration of race and gender discrimination claims under arbitration agreement in registered securities firm); Neubrander v. Dean Witter Reynolds, Inc., 610 N.E.2d 1089 (Ohio Ct. App. 1992) (arbitration provision in employment contract was enforceable); Waddell v. Shriber, 348 A.2d 96 (Pa. 1975) (compelled arbitration between members of stock exchange where rules of stock exchange required submission of disputes to arbitration); BWI Co. v. Kurtenbach, 910 S.W.2d 620 (Tex. Ct. App. 1995) (compelled arbitration based on employment arbitration agreement). The Idaho Supreme Court has ruled that employment arbitration agreements are not enforceable, Gumprecht v. Doyle, 912 P.2d 610 (Idaho 1995). In addition, the Supreme Court of Colorado refused to enforce an arbitration agreement in a claim based on the Wage Claim Act, stating that the specific non-waiver provision of the act prevailed over the Uniform Arbitration Act. Lambdin v. District Ct., 18th Judicial Dist., 903 P.2d 1126 (Colo. 1995). *See also*, Maine State Employees Ass'n v. Bureau of Employee Relations, 652 A.2d 654 (Me. 1995) (Supreme Judicial Court of Maine refusing to compel arbitration by finding that the agreement regarding arbitration had expired.)

I. THE MOVEMENT TOWARD LIMITING EMPLOYMENT ARBITRATION AGREEMENTS

A. The Commission Report and Recommendations

After investigating what should be done to increase the extent to which parties resolve disputes themselves rather than resorting to litigation, the Commission on the Future of Worker-Management Relations ("Commission") made several recommendations concerning the use of alternative dispute resolution (ADR) methods. The Commission strongly recommended the use of ADR with the condition that it not be mandatory.

> The Commission endorses and encourages the development of high quality alternative dispute resolution (ADR) systems to promote fair, speedy, and efficient resolution of work-place disputes. These systems must be based on the *voluntary acceptance* of the parties involved. The courts and regulatory agencies should hold these systems accountable for meeting high quality standards for fairness, due process, and accountability to the goals and remedies established in the relevant law. The Commission also encourages experimentation with internal responsibility systems for adapting workplace regulations to fit different work settings. Accordingly we recommend: . . .
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> Encouraging experimentation and use of private dispute resolution systems that meet high quality standards for fairness, *provided these are not imposed unilaterally by employers as a condition of employment.*[12]

In addition to the recommendations described above, the Commission also articulated its vision in its "Goals for the 21st Century American Workplace."[13] One goal was to improve resolution of disputes about workplace rights.

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12. COMMISSION, *supra* note 6, at xviii-xix (emphasis added).
13. *Id.* at 4.

> All American workers need to achieve the promised objectives of freedom from discrimination, unfair treatment, and fulfillment of their statutory rights.
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> All those who feel they have been unjustly treated should have access to rapid resolution processes that are inexpensive, fair, and that serve as effective deterrents to unfair behavior or employment practices.[14]

One of the ADR approaches recommended by the Commission was the use of private arbitration. In encouraging private arbitration, the Commission recognized that its use may allow for even the most contentious dispute to be resolved in a way that would allow the complaining employee to maintain a working relationship with the employer while contesting the disputed issue.[15]

The Commission was very concerned, however, that arbitration not be the sole method used by employers to settle workplace disputes. Instead, it recommended that employers provide multiple options for resolving problems. Options discussed included "direct negotiations among the disputants, counseling and assistance by a trained facilitator, mediation, fact-finding, peer review, and finally formal procedures for issuing a decision."[16] The Commission explained that the employer's use of multiple options would allow flexibility to settle a wide variety of disputes and also provide an employee with a choice between a more informal, confidential method and a more formal alternative.[17]

Although the Commission stressed the advantages of using ADR methods in resolving employment disputes, it refused to recommend that employers and employees be allowed the freedom to contract for ADR solutions. The Commission stated that "[b]inding arbitration

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14. *Id.* Other goals articulated by the Commission dealt with employee participation in the workplace decision making process, collective bargaining, workplace regulations, workplace safety and health, productivity, training, wages, and contingent workers.

15. *Id.* at 30.

16. COMMISSION, *supra* note 6, at 28.

17. *Id.*

agreements should not be enforceable as a condition of employment."[18] Instead, the Commission encouraged employees, who have the option, to use arbitration programs that meet the standards outlined in their report.[19] Following the release of the Commission's report and recommendations, a bill was submitted to the Senate that would adopt the Commission's suggestion that mandatory arbitration agreements not be enforceable as a condition of employment.

B. Congressional Actions Regarding Arbitration Agreements in Employment Contracts

With the increased use by employers of ADR methods for resolution of employment disputes, more employees will be asked to sign employment contracts making these methods mandatory. Under current law, the validity of these agreements is unclear.[20] In February of 1995, Senator Feingold reintroduced a bill that would invalidate existing agreements between employers and employees that require employment discrimination claims to be submitted to mandatory arbitration.[21]

> [T]he practice of requiring employees to submit claims of discrimination or harassment to arbitration as a term or condition of employment or advancement, and prohibiting the employee from resolving their [sic] claim in a court of law [means that] . . . employers can tell current and prospective employees, "if you want to work for us you'll have to check your rights as an American citizen at the door." . . .
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> [T]his practice should be stopped now. It is simply unfair to require an employee to waive, in advance, his or her

18. *Id.* at 33.

19. The standards will be discussed in section III, *infra*.

20. Section II, *infra*, discusses court enforcement of employment arbitration agreements.

21. 141 Cong. Rec. S2268-03, 2272 (1995). This bill was originally introduced in the 103rd Congress, where it never made it out of committee.

> statutory right to seek remedy in a court of law, in exchange for employment or a promotion.[22]

At the close of its session, the 104th Congress had taken no action on the reintroduced bill. Until Congress provides clear guidance on this issue, it will remain up to the courts to determine when and if employment arbitration agreements should be enforced.

II. ARE ARBITRATION AGREEMENTS BETWEEN AN EMPLOYER AND AN EMPLOYEE BINDING AND ENFORCEABLE?

The initial United States Supreme Court decisions involving employment arbitration agreements arose out of collective bargaining agreements. Employers and unions have utilized arbitration agreements in their employment contracts (the collective bargaining agreement) for many years. In all of those cases, the issue contested was whether the union's negotiated arbitration agreement in the collective bargaining agreement applied to an individual employee's statutory rights. If it did not, the broader question was whether any employee could be compelled to arbitrate statutory rights.

A. The Gardener-Denver *Series of Employment Arbitration Cases*

Between 1974 and 1984, the United States Supreme Court ruled in three cases that courts were not bound to compel arbitration pursuant to an employment arbitration agreement or to give preclusive effect to an arbitration decision. The first of these decisions was *Alexander v. Gardener-Denver Co.*[23] This case was brought under Title VII of the Civil Rights Act of 1964. The former employee had filed suit in district court after an arbitrator had upheld his dismissal. The company claimed the employee was bound by the arbitral decision. The Court found that "Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the

22. *Id.*
23. 415 U.S. 36 (1974).

nondiscrimination clause of a collective-bargaining agreement."[24] It held that "final responsibility for enforcement of Title VII is vested with federal courts. . . . [W]e hold that the federal policy favoring arbitration does not establish that an arbitrator's resolution of a contractual claim is dispositive of a statutory claim under Title VII."[25]

The presence of the arbitration clause in the collective-bargaining agreement was very significant to the Court in determining whether the employee could also pursue a discrimination claim.

> In submitting his grievance to arbitration an employee seeks to vindicate his contractual right under *a collective-bargaining agreement.* By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence.[26]

Another important factor in the Court's analysis was the limitation of the arbitrator's power under the collective-bargaining agreement. "[The arbitrator] must interpret and apply [the collective-bargaining] agreement in accordance with the 'industrial common law of the shop' and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties."[27] By the nature of the

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24. *Id.* at 49.

25. *Id.* at 44.

26. *Id.* at 49-50 (emphasis added). The Court appears to be saying that the employee has separate causes of action. One cause of action is a breach of contract under the collective bargaining agreement. This cause of action must be decided in accordance with the clause in the collective bargaining agreement providing for arbitration of disputes. The second cause of action, although arising out of the same set of facts, is a statutory claim. Since the statutory claim is not covered under the collective bargaining agreement, the arbitration clause in that agreement does not apply to this claim. This leaves open the possibility that when the arbitration agreement applies to individual statutory rights or to all claims or disputes arising out of employment, the Court might find that arbitration would serve to vindicate both contractual and statutory rights.

27. *Gardner-Denver*, 415 U.S. at 53.

agreement, the arbitrator would be unable to go beyond the agreement in deciding a dispute even if the dispute involved a claim of violation of law.

The majority stopped short of stating that the arbitration decision should have no impact on a subsequent suit in district court. Instead it left it for a case by case determination:

> We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with [the statute], the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue . . . and the special competence of particular arbitrators.[28]

The Court listed several considerations that can be used to determine if the arbitration decision should be accorded a preclusive effect. The first factor is whether the arbitrator was competent to resolve statutory or constitutional issues. Second, the arbitration fact-finding process should be equivalent to judicial fact-finding.[29] The fact that the relief obtained by the employee in arbitration may be equivalent to what may be obtained under the statute could be

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28. *Id.* at 60 n.21.

29. *Id.* at 57.

> [T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. . . . The record of the arbitration proceeding is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.

Id. at 57-58 (citations omitted).

dispositive.[30] These factors provide guidance for employers in drafting arbitration agreements.

Gardener-Denver also suggested that a party could waive a statutory cause of action in a private employment contract.

> In determining the effectiveness of [a waiver of a party's cause of action under a statute], a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing. In no event can the submission to arbitration of a claim under the *nondiscrimination clause of a collective-bargaining* agreement constitute a binding waiver with respect to an employee's rights.[31]

Seven years later, in 1981, the United States Supreme Court reaffirmed its stand in the *Gardener-Denver* decision in *Barrentine v. Arkansas Best-Freight System, Inc.*[32] In *Barrentine*, preclusive effect was denied to an arbitration decision arising out of a claim submitted to arbitration pursuant to a collective-bargaining agreement. The Court again differentiated between individual rights and those rights an employee has under a collective-bargaining agreement. "While courts should defer to an arbitral decision where an employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers."[33]

Barrentine also emphasized the Court's concerns about the capabilities and authority of the arbitrator.

> Although an arbitrator may be competent to resolve many preliminary factual questions, . . . he may lack the competence to decide the ultimate legal issue whether an

30. *Id.* at 51 n.14.
31. *Id.* at 52 n.15 (emphasis added).
32. 450 U.S. 728 (1981).
33. *Id.* at 737.

> employee's right[s] . . . under the statute [have] been violated.
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> Moreover, even though a particular arbitrator may be competent to interpret and apply statutory law, he may not have the contractual authority to do so. . . . His task is limited to construing the meaning of the collective-bargaining agreement so as to effectuate the collective intent of the parties.[34]

In the last decision in this series of cases, *McDonald v. City of West Branch*,[35] the United States Supreme Court again refused to give preclusive effect to an arbitration decision. In stronger language, the Court indicated that arbitration was not the equivalent of a judicial proceeding; therefore, the courts had no obligation to give an arbitration decision preclusive effect.[36] The rationale was based, in part, on the earlier decisions in *Gardener-Denver* and *Barrentine*.

> [A]rbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under [Title VII and Fair Labor Standards Act]. These considerations similarly require that we find the doctrines of *res judicata* and collateral estoppel inapplicable in this § 1983 action....
>
> [A]lthough arbitration is well suited to resolving *contractual disputes*, our decisions in *Barrentine* and *Gardener-Denver* compel the conclusion that it cannot provide an adequate substitute for a judicial proceeding in protecting the *federal statutory and constitutional rights.*[37]

Again, the Court discussed the capabilities and authority of an arbitrator to resolve statutory rights claims. "An arbitrator may not . . . have the expertise required to resolve the complex legal questions that arise in §1983 actions. Second, because an arbitrator's authority

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34. *Id.* at 743-744.
35. 466 U.S. 284 (1984).
36. *Id.* at 287.
37. *Id.* at 289-290 (emphasis added).

derives solely from the contract, . . . an arbitrator may not have the authority to enforce §1983."[38]

The fact that the arbitration decision was the result of a claim filed by a union on behalf of the employee pursuant to the collective bargaining agreement was significant.

> The union's interests and those of the individual employee are not always identical or even compatible. As a result, the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee. . . .Thus, were an arbitration award accorded preclusive effect, an employee's opportunity to be compensated for a constitutional deprivation might be lost.[39]

Despite the Court's refusal to compel arbitration or grant preclusive effect to an arbitration decision, three common themes can be identified in *Gardener-Denver, Barrentine* and *McDonald.* Although each case involved an employment dispute, the employee was represented by the union at the arbitration hearing. The arbitration dealt with claims arising under the collective bargaining agreement, not necessarily the individual's claim. In addition, the arbitrator's decision was necessarily based on the collective-bargaining agreement and limited to rights that arose under that agreement. Therefore, the arbitrator was unable to consider statutory claims. Finally, the Court had great concerns about the procedural fairness of the arbitration process. Since these decisions dealt with collective bargaining agreements to arbitrate, the Court had not yet addressed arbitration agreements between an individual and the employer.

38. *Id.* at 290.
39. *Id.* at 291.

B. The Decision on an Individual's Agreement to Arbitrate Employment Disputes

The United States Supreme Court, in *Gilmer v. Interstate/Johnson Lane Corp.*,[40] was asked to decide if Gilmer was required to submit his age discrimination claim to arbitration pursuant to an agreement he had signed in a registration application with the New York Stock Exchange. Gilmer was required to register with the exchange by his employer. The registration application contained an agreement to arbitrate *any disputes* arising out of the employment or termination of employment.[41] The Court held that Gilmer was required to submit his statutory discrimination claim to arbitration. "[W]e recognized that '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'"[42] The Court further stated:

> Although all statutory claims may not be appropriate for arbitration, "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." . . . If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an "inherent conflict" between arbitration and the [statute's] underlying purposes. Throughout such an inquiry, it should be kept in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."[43]

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40. 500 U.S. 20 (1991).

41. *See, e.g., id.* at 23.

42. *Id.* at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

43. *Id.* (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628 and Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983)).

The Court then held that nothing in the Age Discrimination in Employment Act (ADEA) of 1967 precluded arbitration of claims arising under it.[44]

To a certain extent, the Court acknowledged the change in its position since the *Gardener-Denver* cases. Although Gilmer did challenge the adequacy of arbitration procedures, most of these arguments had already been rejected as insufficient to preclude arbitration of statutory claims.[45] In an attempt to distinguish *Gardener-Denver* and its progeny, the Court found:

> Those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. . . . Finally, those cases were not decided under the [Federal Arbitration Act], which . . . reflects a "liberal federal policy favoring arbitration agreements."[46]

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44. *Id.* at 35.

45. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991). Some of the specific challenges addressedwere: biased arbitration panels, limited discovery, no written opinion which precluded effective appellate review, limit on relief, and unequal bargaining power. None of these concerns were found to apply to this case. The New York Stock exchange arbitration rules provided protection to ensure an unbiased arbitrator. There was no showing that the rules would prove insufficient to allow a fair opportunity to present claims. Since the rules required a written opinion, the Court felt it would be sufficient to ensure the arbitrator's compliance with requirements of the statute, even though review of the opinion would be limited. The rules did not restrict the types of relief an arbitrator may award. Finally, there was no evidence of unequal bargaining power in this case. *Id.* at 30-33. The Court's response to these challenges will be addressed further in Section V.

46. *Id.* at 35 (quoting *Mitsubishi Motor Corp.*, 473 U.S. at 625).

Gilmer indicates that the Supreme Court is willing to compel arbitration or give an arbitration decision preclusive effect in cases involving employment statutory claims. Following the growing trend of a preference for enforcing arbitration agreements, the Court, for the first time, allowed for a nonjudicial settlement of individual statutory rights. This opened the door for employers to implement mandatory ADR procedures that would prohibit the employee from seeking a judicial determination of a claim of discrimination or violation of other statutorily created rights. What *Gilmer* failed to address was a key issue concerning the validity of employment arbitration agreements: Does the Federal Arbitration Act apply to employment arbitration agreements?

C. The Federal Arbitration Act

The Federal Arbitration Act (FAA) provides the means by which courts are required to force parties who have agreed to arbitration in a contract to submit their disputes to arbitration.

> 9 U.S.C. § 2 . . . is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.[47]

Any doubts about the scope of arbitrable issues should be resolved in favor of arbitration as a matter of federal law.[48] It is clear from *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[49] and other cases, that there is a strong federal preference for

47. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).
48. *Id.* at 24-25.
49. 460 U.S. 1 (1983).

arbitration of issues when the parties have consented to arbitration in a contract.[50]

The problem that has arisen with regard to employment arbitration agreements is that 9 U.S.C. § 1 contains an exclusion that renders the act inapplicable to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[51] In *Gilmer*, several amici curiae briefs argued that the FAA did not apply in the case because of the section 1 exclusion. However, the Court stated "it would be inappropriate to address the scope of the Section 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment."[52] Justice Stevens, in his dissenting opinion, disagreed with the majority's refusal to address the issue of whether this arbitration agreement fell under the FAA. "In my opinion, arbitration clauses contained in employment agreements are specifically exempt from coverage of the FAA."[53] Although the United States Supreme Court has never ruled on what this exclusion means, several lower courts have interpreted the clause.

D. Interpreting Section One of the FAA

The seminal case interpreting the exclusionary clause in section 1 of the FAA was *Tenney Engineering Inc. v. United Electrical Radio & Machine Workers Local 437*.[54] The Third Circuit determined that the drafters of the FAA were concerned about including the employment contracts of seamen and railroad employees under the FAA. Both of these classes of workers had other legislative acts that

50. *See, e.g.*, Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); Dickinson v. Heinold Sec., Inc., 661 F.2d 638 (7th Cir. 1981); Wick v. Atlantic Marine, Inc., 605 F.2d 166 (5th Cir. 1979); Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39 (3rd Cir. 1978).

51. 9 U.S.C. § 1.

52. *Gilmer*, 500 U.S. at 25 n.2.

53. *Id.* at 36. Justice Marshall joined in this dissent.

54. 207 F.2d 450 (3rd Cir. 1953).

provided for arbitration. Using the canon of *ejusdem generis*,[55] the court held that the language of the act was intended to cover "only those other classes of workers who are likewise engaged directly in commerce, that is, only those other classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it."[56] This decision has provided the foundation for many decisions of the other circuit courts. The First, Second and Tenth Circuits have followed the holding in *Tenney* and determined that the exclusion in section 1 of the FAA applies only to workers actually engaged in the movement of goods in interstate commerce.[57] The Sixth Circuit took the opposite approach from *Tenney* in *Willis v. Dean Witter Reynolds, Inc.*[58] There the court held that "all employment contracts with employers subject to Title VII -- or other similar acts of Congress designed to protect employees from unlawful discrimination and enacted pursuant to Congress's commerce power -- fall within the exclusion of 'contracts of employment' under section 1 of the FAA."[59] However, the Sixth Circuit overruled *Willis* in a case decided in 1995.[60] The court accepted the rationale of *Tenney* in interpreting the exclusionary clause.[61] While not agreeing with the holding in *Tenney*, the Fourth Circuit held that the exclusion clause was introduced into the act to meet an objection of the Seafare's International Union and was directed at collective bargaining agreements.[62] The court stated "[n]o one would have serious objection to submitting to arbitration the

55. The *ejusdem generis* rule of construction states that when general words follow more specific words or phrases, the general words should be interpreted as being of the same type or category as the more specific phrases.

56. 207 F.2d 450, 452 (3rd Cir. 1953).

57. *See, e.g.*, Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994); Dickstein v. duPont, 443 F.2d 783 (1st Cir. 1971); Signal-Stat Corp. v. Local 475, United Elec., Radio and Mach. Workers, 235 F.2d 298 (2d Cir. 1956).

58. 948 F.2d 305 (6th Cir. 1991).

59. *Id.* at 311.

60. Asplundh Tree Expert Co. v. Bates, 71 F.3d 592 (6th Cir. 1995).

61. *Id.* at 598-99.

62. United Elec., Radio & Mach. Workers v. Miller Metal Prod., Inc., 215 F.2d 221, 224 (4th Cir. 1954).

matters covered by the individual contracts of hiring. . . ."[63] The court refused to stay the court proceedings in *United Electrical, Radio & Machine Workers of America v. Miller Metal Products*[64] finding that collective bargaining agreements of workers engaged in interstate commerce were covered under the exclusion.[65] In a recent case, the Fourth Circuit did enforce an arbitration agreement contained in a contract between an individual employee and the employer.[66]

Several of the other circuit courts have enforced employment arbitration agreements without commenting on the language in the exclusionary clause in the FAA. In a case decided before *Gilmer*, the Seventh Circuit held that tort claims asserted by an employee could not be judicially decided because the employment agreement contained an arbitration provision.[67] Both the Fifth and the Tenth Circuits have enforced arbitration of statutory claims following *Gilmer*.[68] The Ninth Circuit has gone the furthest in enforcing employment arbitration agreements, finding that even an arbitration policy contained in an employee handbook was binding on the employee when the employee requested that the company's problem resolution process be initiated.[69]

Not all of the circuit courts have been consistent in enforcing employee arbitration agreements. Even though *Tenney* is the seminal case in interpreting the exclusion language in the FAA, the Third Circuit refused to enforce an arbitration requirement in an individually negotiated employment contract.[70] The court found that the contract was not comparable to an agreement entered into in a commercial

63. *Id.*

64. 215 F.2d 221 (4th Cir. 1954).

65. *Id.* at 224.

66. Austin v. Owens-Borckway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996).

67. Rao v. Rao, 718 F.2d 219, 225 (7th Cir. 1983).

68. *See, e.g.*, Armijo v. Prudential Ins. Co., 72 F.3d 793 (10th Cir. 1995) (employee compelled to arbitrate federal and state discrimination claims); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991) (Title VII claims subject to compulsory arbitration).

69. Nghiem v. NEC Elec., Inc., 25 F.3d 1437, 1439 (9th Cir. 1994). *See also* Prudential Ins. Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994); Saari v. Smith Barney, Harris Upham & Co., 968 F.2d 877 (9th Cir. 1992).

70. Nicholson v. CPC Int'l, Inc., 877 F.2d 221 (3rd Cir. 1989).

context.[71] Implying that employment arbitration agreements are likely to be the product of duress or unfair bargaining power, the court held that "we cannot close our eyes to the realities of the workplace" and refused to enforce the arbitration agreement.[72] In a pre-*Gilmer* decision, the Eighth Circuit held that employment discrimination claims under Title VII are not subject to arbitration but that other state law claims are.[73] In 1985, the Eleventh Circuit refused to enforce an arbitration agreement in an employment contract.[74] Although the general trend appears to be to uphold arbitration agreements, some courts have held that employment arbitration agreements are not enforceable under the FAA.[75]

Additional guidance on the enforceability of employment arbitration agreements may be found in state legislative actions. The Uniform Arbitration Act (UAA) was developed to provide a framework for state legislatures to adopt their own arbitration laws.[76] Section 1 of the UAA provides:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This act also applies to arbitration

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71. *Id.* at 229.

72. *Id. But see* Barrowclough v. Kedder, Peabody & Co., Inc., 752 F.2d 923 (3rd Cir. 1985).

73. Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304 (8th Cir. 1988). *See also* Nordin v. Nutri/System, Inc., 897 F.2d 339 (8th Cir. 1990).

74. Hull v. Norcom, Inc., 750 F.2d 1547 (11th Cir. 1985). The decision was based on the determination that the agreement to arbitrate was not mutually binding on both parties. The opinion gives the impression that an employment arbitration agreement would be enforced if it were drafted correctly.

75. *See* Arce v. Cotton Club of Greenville, Inc., 883 F. Supp. 117 (N.D. Miss. 1994) (FAA's terms and legislative history indicate FAA was intended to apply to commercial and admiralty contracts; court refused to enforce arbitration agreement in executive's employment contract); Benestad v. Interstate/Johnson Lake Corp., 752 F. Supp. 1054 (S.D. Fla. 1990) (District Court refused to enforce an arbitration agreement in a Title VII sex discrimination case).

76. Eastman, *supra* note 1, at 598.

> agreements between employers and employees or between their respective representatives unless otherwise provided in the agreement.[77]

Eleven states have adopted identical or similar language in their arbitration statutes.[78] Seven states have specifically excluded employment contracts from coverage under their arbitration acts.[79] The remaining thirteen states with arbitration statutes have neither expressly included nor excluded employment agreements in their arbitration statutes.[80] If the arbitration statutes allow for enforcement of employment arbitration agreements, what protection does the employee have from being compelled to agree to arbitration?

E. Contract Law

Many of the witnesses before the Commission on the Future of Worker-Management Relations voiced concerns that allowing employers to require employees to agree to submit disputes to

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77. *Id.*

78. *See* Colorado (COLO. REV. STAT. ANN. § 13-22-203 (West 1995)); Delaware (DEL. CODE. ANN. 10 § 5701 (1995)); District of Columbia (D.C. CODE ANN. § 16-4301 (1981)); Indiana (IND. ANN. CODE. § 34-4-2-1 (West 1996)); Minnesota (MINN. STAT. ANN. § 572.08 (West 1995)); North Dakota (N.D. CENT. CODE § 32-29.2-01 (1995)); South Dakota (S.D. CODIFIED LAWS ANN. § 21-25A-1 (1968)); Virginia (VA. CODE ANN. § 8.01-581.010 (Michie 1995)); Wyoming (WYO. STAT. § 1-36-103 (1977)).

79. *See* Arkansas (ARK. CODE ANN. § 16-108-201 (Michie 1987)); Idaho (IDAHO. CODE § 7-901 (1948)); Iowa (IOWA CODE ANN. § 679A.1 (West 1995)); Kansas (KAN. STAT. ANN. § 5-401 (1994)); Kentucky (KY. REV. STAT. ANN. § 417.050 (Baldwin 1984)); Maryland (MD. CODE ANN., CTS. & JUD. PROC. § 3-206 (1995)); and South Carolina (S.C. CODE ANN. § 15-48-10 (Law Co-op. 1993)). Courts in Idaho, Iowa and Maryland have limited this exclusion to collective bargaining agreements only.

80. *See* Alaska (ALASKA STAT. § 09.43.010 (1962)); Arizona (ARIZ. REV. STAT. ANN. § 12-1501 (1995)); Florida (FLA. STAT. ANN. § 682.02 (West 1995)); Illinois (ILL. REV. STAT. ch. 710 ILCS 5/1 (1995)); Massachusetts (MASS. GEN. LAWS. ANN. ch. 251 § 1 (West 1995)); Michigan (MICH. COMP. LAWS ANN. § 600.5001(2) (West 1995)); Oklahoma (OKLA. STAT. ANN. tit. 15, § 802 (West 1996)); Pennsylvania (42 PA. CONS. STAT. ANN. § 7302-7303 (1995)); Tennessee (TENN. CODE ANN. § 29-5-302 (1955)); Texas (TEX. REV. CIV. STAT. ANN. art. 238-20 (West 1996)); and Utah (UTAH CODE ANN. § 78-3la-3 (1995)). See Eastman, *supra* note 71, at 598-600, for further information on state actions regarding employment arbitration agreements.

arbitration would be unfair to the employees because of the imbalance of power between the parties.[81] These contracts, frequently referred to as "contracts of adhesion," have been addressed by the courts.[82] In *Griffith Laboratories v. Pomper*,[83] the court held:

> Courts have consistently enforced revised employment agreements which were conditioned upon continued employment. . . .When the terms of employment at will are revised, an employee must decide whether to accept the new terms or seek alternative employment. Continued employment under the old terms may simply not be one of the options available to the employee, and the fact that it is not one of the options available to the employee does not make the employee's decision the product of coercion. . . . The fact that his agreement to the contract's terms may well have been a condition for his continued employment with [the company] does not, in itself, constitute duress or coercion.[84]

Another court expressed the issue in a slightly different manner:

> The narrow issue is whether [the arbitration provision] inclusion amounts to duress, thereby rendering the provision invalid as a contract of adhesion, a shorthand term for a 'take it or leave it' contract entered into by parties in unequal bargaining positions. If so, it is unenforceable under both Federal and [state] law. . .
>
> Plaintiff, if dissatisfied with compensation offered or other conditions pertaining to his work, was free to seek employment with another [employer]. . . . It is also significant to note that rather than being viewed as oppressive,

81. COMMISSION, *supra* note 6, at 29.

82. *See, e.g.*, Medtronic, Inc. v. Benda, 689 F.2d 645 (7th Cir. 1982); Griffith Laboratories U.S.A., Inc. v. Pomper, 577 F. Supp. 903 (S.D.N.Y. 1984); Rust v. Drexel Firestone Inc., 352 F. Supp. 715 (S.D.N.Y. 1972).

83. 577 F. Supp. 903 (S.D.N.Y. 1984).

84. *Id.* at 906.

> arbitration clauses are favored by both state and federal law, as an economical form of dispute resolution which relieves the congestion of overburdened courts.[85]

Many courts have held that contracts or clauses of contracts may not be valid if they are the result of unfair bargaining power or coercion.[86] Last year, two different courts ruled that arbitration clauses were unenforceable for these reasons.[87] The Ninth Circuit, in reversing a lower court's summary judgment based on franchisee's refusal to submit to arbitration, explained that "the fact that franchisees may agree to an arbitral forum for the resolution of statutory disputes in no way suggests that they may be forced by those with dominant economic power to surrender the statutorily-mandated rights and benefits that Congress intended them to possess."[88] In Texas, a federal district judge has issued a permanent injunction prohibiting an employer from enforcing a mandatory ADR policy.[89] The injunction was issued after the court had determined that the ADR policy was instituted as a form of retaliation against employees who had opposed discriminatory conduct or had filed discrimination complaints under Title VII.[90]

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85. *Rust*, 352 F. Supp. at 717.

86. *See* Southland Corp. v. Keating, 465 U.S. 1 (1984); Blistein v. St. John's College, 74 F.3d 1459 (4th Cir. 1996); Doctor's Associates., Inc. v. Distajo, 66 F.3d 438 (2d Cir. 1995); Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924 (7th Cir. 1983); First Nat'l Bank of Cincinnati v. Pepper, 454 F.2d 626 (2d Cir. 1972); Lawlor v. Nat'l Screen Serv. Corp., 211 F.2d 934 (3rd Cir. 1954); Leasing Serv. Corp. v. Justice, 673 F.2d 70 (2d Cir. 1982); Mayflower Transit, Inc. v. Ann Arbor Warehouse Co., 892 F. Supp. 1134 (S.D.Ind. 1995); In re Apollo Air Passenger Computer Reservation Sys., 720 F. Supp. 1061 (S.D.N.Y. 1989); Middleton Enter., Inc. v. Churm, 618 F. Supp. 477 (E.D. Mo. 1985); Fuller Co. v. Compagnie Des Bauxites De Guinee, 421 F. Supp. 938 (W.D. Pa. 1976).

87. *See* Graham Oil Co. v. Arco Products Co., 43 F.3d 1244, 1247 (9th Cir. 1995); EEOC v. River Oaks Imaging and Diagnostic, 63 U.S.L.W. 2733 (S.D. Tex. April 19, 1995) (No. H-95-7755).

88. *Graham Oil Co.*, 43 F.3d at 1247.

89. EEOC v. River Oaks Imaging and Diagnostic, 63 U.S.L.W. 2733 (S.D. Tex. April 19, 1995) (No. H-95-7755).

90. Jay W. Waks & John Roberti, *Challenges for Employment Alternative Dispute Resolution*, N.Y.L.J., August 7, 1995, at S4.

Although the courts will look at a variety of factors in determining if a contract is the result of duress, coercion or unfair bargaining power, one of the primary concerns in an agreement to arbitrate statutory claims is whether the waiver of the statutory claim was knowingly given. The Ninth Circuit held in *Prudential Insurance Co. of America v. Lai,*[91] that:

> The issue in this case . . . is under what circumstances individuals may be deemed to have waived their rights to pursue remedies created by Title VII and related legislative enactments. . . .
>
> . . . .
>
> We agree . . . that Congress intended there to be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies and procedural protections prescribed in Title VII and related state statutes.[92]

The court of appeals went on to conclude that "a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration."[93] The Second Circuit reached the same conclusion by finding that an employee can knowingly and voluntarily waive claims of discrimination under Title VII and Age Discrimination in Employment Act (ADEA): "In order to ensure that an individual decision characterized as a waiver is not, in fact, an impermissible exclusion, it is appropriate that an individual's waiver of his right . . . be carefully examined to ensure that it is knowingly and voluntarily made."[94]

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91. 42 F.3d 1299 (9th Cir. 1994).
92. *Id.* at 1303.
93. *Id.* at 1305.
94. Laniok v. Advisory Comm. of Brainerd Mfg. Co. Pension Plan, 935 F.2d 1360, 1367 (2d Cir. 1991).

The Second Circuit also identified a number of factors to be used in determining if the "totality of the circumstances showed" that the individual had knowingly and voluntarily waived a statutory right:

> 1) the plaintiff's education and business experience,
> 2) the amount of time the plaintiff had possession of or access to the agreement before signing it,
> 3) the role of plaintiff in deciding the terms of the agreement,
> 4) the clarity of the agreement,
> 5) whether the plaintiff was represented by or consulted with an attorney, [as well as whether an employer encouraged the employee to consult an attorney and whether the employee had a fair opportunity to do so], and
> 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.[95]

Since *Gilmer*, there are three factors a court must take into consideration in determining whether to enforce an employment arbitration agreement. First, the court must determine if the statutory right being contested is appropriate for arbitration. This is done by

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95. *Id.* at 1367-68. Other authorities have also stressed the importance of the knowing agreement of the employees to the arbitration agreement. As one author stated:

> A[n] . . . essential element in constructing a successful ADR program is its appropriate presentation to employees. Employers should take care to emphasize the advantages to employees. . . . Copies of the entire procedure should be given to all current employees when the policy is implemented; employees starting after the implementation should receive a copy of the procedures when they begin. They should be given time to read the policy and, to ensure that they understand, be required to sign a statement acknowledging that they have received a copy of and read the policy and have had an opportunity to raise any questions about the policy with management.

Jay W. Waks & John Roberti, *Challenges for Employment Alternative Dispute Resolution*, N.Y.L.J. August 7, 1995, at S4. This article also emphasizes that an employment ADR policy should include more than just arbitration. To be effective, any ADR program that is implemented should meet minimal standards of fairness.

determining whether there is a Congressional intent to preclude resolution by a non-judicial forum. Following the Court's lead in *Gilmer*, courts have determined that virtually all statutory rights claims are appropriate for arbitration.

Second, a federal court must decide whether the FAA exclusion applies. As noted earlier, the majority of the federal courts of appeal have limited the FAA exclusion to a narrow category of workers. This is in line with a common canon of statutory interpretation, *ejusdem generis,* which limits a general phrase by listing more specific things.

The final factor to be considered in deciding if the arbitration agreement is enforceable is whether the agreement is a valid contract. There is sufficient case law to aid courts in determining on a case by case basis whether the arbitration agreement is valid or whether it should be revoked under contract law principles. If a court determines that the agreement to arbitrate was knowingly and voluntarily made, i.e., not a product of duress, coercion or unfair bargaining power, the agreement should be enforced. On the other hand, if a court finds that the agreement was not made knowingly or voluntarily, the court has ample precedent to determine that the agreement should not be enforced. This, however, is standard contract law. Therefore, there is no need to have a standard policy prohibiting the use of arbitration agreements in employment contracts because of the possibility that some employees may be coerced into giving up their statutory rights. Employees already have legal protection against this possibility. If the employee has entered into a valid and enforceable arbitration agreement, the next question to be decided is what effect should the arbitration decision have on a court in a subsequent proceeding.

III. WHAT EFFECT SHOULD AN ARBITRATION DECISION HAVE IN A SUBSEQUENT LAW SUIT?

To determine what effect the arbitration decision should have, the court must balance the public's and the parties' desire to have finality in the legal process with the individual's right to have a full and fair opportunity to be heard.

A. Res Judicata and Collateral Estoppel Effects of Arbitration

Traditionally our system of justice has tried to ensure that a party in a legal action is not required to relitigate the same issues in other suits with the same party. "In our system of jurisprudence the usual rule is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another forum."[96] Known as "claim preclusion" or res judicata, this process protects both the private interests of litigants and the public interest in efficient and effective judicial administration.[97] The doctrine of res judicata precludes the parties or their privies from relitigating issues that were or could have been raised in an action where a final judgment on the merits was rendered.[98]

> Modern interpretations of res judicata define the scope of a "claim" quite broadly to include all the legal theories and rights to remedies that spring from the transaction giving rise to an injury or wrong. The term "privity" also has an extremely flexible meaning in the law of res judicata and signifies simply that parties are in such relationship to one another that a judgment involving one may justly be conclusive upon the other.[99]

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96. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 485 (1982).

97. G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 U.C.L.A. L. REV. 623, 640 (1988).

98. Allen v. McCurry, 449 U.S. 90, 94 (1980).

99. Shell, *supra* note 97, at 640.

The related doctrine of collateral estoppel "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation."[100]

> [The determination of] the appropriate application of collateral estoppel . . . necessitates three further inquiries: first, whether the issues presented by this litigation are in substance the same as those resolved [in the first action]; second, whether controlling facts or legal principles have changed significantly since the [first action]; and finally, whether other special circumstances warrant an exception to the normal rules of preclusion.[101]

Once a court has decided an issue of fact or law, that decision may preclude relitigation of the issue in a subsequent suit involving a party to the first case, on a different cause of action.[102] In *Parklane Hosiery Co., Inc. v. Shore*,[103] the Court said that "[a]lthough neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard."[104] The Court went on to define when a court should deny the use of collateral estoppel: first, when a plaintiff could not have joined in the previous action and, second, when the party did not have a full and fair opportunity to litigate the issue.[105] In a different case, the Court explained that "[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in the prior litigation."[106] The requirement of having a full and fair opportunity to litigate the issue is

100. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 (1979).
101. Montana v. United States, 440 U.S. 147, 155 (1979).
102. *Allen*, 449 U.S. at 94.
103. 439 U.S. 322 (1979).
104. *Id.* at 328 (quoting Blonder-Tongue Lab., Inc. v. University of Illinois Found., 402 U.S. 313, 329 (1971)).
105. *Parklane*, 439 U.S. at 332.
106. *Montana*, 440 U.S. at 164 n.11.

not limited to collateral estoppel, as in *Kremer v. Chemical Construction Corp.*[107] The United States Supreme Court determined that this requirement applies to res judicata as well.[108]

The requirement that the litigant have a "full and fair opportunity to litigate" applies to arbitration agreements. In *Allen v. McCurry,*[109] the Court recognized that there could be an exception to the application of res judicata and collateral estoppel to state court proceedings when the state law did not provide "fair procedures for litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim."[110] However, the Court went on to say that this exception is essentially the same as the current limits on the use of preclusion. "Collateral estoppel [or res judicata] does not apply where the party against whom an earlier . . . decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first [forum]."[111] If the arbitration process afforded the parties a full and fair opportunity to litigate their claims, the principles of res judicata and collateral estoppel would bar them from relitigating the claim in court.

B. Preclusion of Litigation in Cases Involving an Arbitration Decision

To determine the effect of an arbitration decision on a subsequent case brought under a federal discrimination claim, "a federal court generally is required to consider first the law of the [s]tate in which the judgment was rendered to determine its preclusive effect."[112] The United States Supreme Court has held that a federal court may give

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107. 456 U.S. 461 (1982).
108. *Id.* at 481 n.22.
109. 449 U.S. 90 (1980).
110. *Allen*, 449 U.S. at 101.
111. *Id.*
112. Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 375 (1985). Although this case dealt with whether a state court judgment should have a preclusive effect in federal court, many of the same issues apply to determining whether an arbitration decision should have preclusive effect.

preclusive effect in some cases that are based on a claim created by a federal statute.[113] In a concurring opinion in *Marrese v. American Academy of Orthopaedic Surgeons,*[114] Chief Justice Burger stated

> if a state statute is identical in all material respects with a federal statute within exclusive federal jurisdiction, a party's ability to assert a claim under the state statute in a prior state action might be said to have provided, in effect, a "full and fair opportunity" to litigate his rights under the federal statute.[115]

The due process clause is also a consideration in determining preclusive effect.

> The [s]tate must . . . satisfy the applicable requirements of the Due Process Clause. A [s]tate may not grant preclusive effect in its own courts to a constitutionally infirm judgment and other state and federal courts are not required to accord full faith and credit to such a judgment. . . .
>
> We must bear in mind that no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause.[116]

The lower federal courts have used the doctrines of res judicata and collateral estoppel in determining whether a decision made in a forum other than a court should be given preclusive effect. The Tenth

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113. For instance, the Court held in *Allen*:

> [N]othing in the language of section 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. section 1738. . . . Section 1983 creates a new Federal cause of action. It says nothing about the preclusive effect of state-court judgments.

Allen, 449 U.S. at 97-98.

114. 470 U.S. 373 (1985).

115. *Marrese*, 470 U.S. at 391.

116. *Kremer*, 456 U.S. at 482-3.

Circuit refused to apply res judicata to a state administrative determination, even though the decision had been upheld by state courts.[117] In justifying its decision, the court found that the plaintiff had not had a "full and fair opportunity to litigate the merits" of his claim.[118] The Tenth Circuit refused to give preclusive effect, in a subsequent suit brought under 42 U.S.C.A. §§ 1981, 1983 and Title VII, to an arbitration decision from an arbitration procedure that was initiated under a collective bargaining agreement based, again, on a finding that the plaintiff did not have a full and fair opportunity to litigate the merits of his claim.[119] The Second Circuit has also refused to give preclusive effect to a binding arbitration decision reached pursuant to a collective bargaining agreement when a different result had been reached by an election officer and independent administrator.[120] The court of appeals, however, stressed that this case had extenuating circumstances that led to the result. "We do not question the invaluable role that arbitrators serve in aid of smooth labor relations, and nothing we have said herein should be construed as taking issue with the well established federal policy favoring arbitration of labor contract disputes."[121]

The courts have granted preclusive effect to arbitration decisions in commercial cases for many years.[122] Courts have traditionally used the doctrines of res judicata and collateral estoppel to determine what effect an arbitration decision should have. These doctrines should apply equally to commercial arbitration cases and employment arbitration cases. An individual entering into a contract must be

117. Scroggins v. State of Kansas, Dep't. of Human Resources, Div. of Ceta, 802 F.2d 1289, 1293 (10th Cir. 1986).

118. *Id.* at 1292.

119. Ryan v. City of Shawnee, 13 F.3d 345 (10th Cir. 1993).

120. United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 954 F.2d 801 (2d Cir. 1992).

121. *Id.* at 810. In an earlier case, the Second Circuit had upheld a district court's grant of preclusive effect to an arbitrator's decision. The court of appeals determined that: the issue was covered in arbitration; the arbitrator had the power to decide the issue; the arbitrator was competent to decide the issue; the issue involved statutory law, not a constitutional issue; and the procedures were fair. Benjamin v. Traffic Executive Ass'n E. R.Rs., 869 F.2d 107, 112 (2d Cir. 1989).

122. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); New York Lumber & Wood-working v. Schneider, 119 N.Y. 475 (1890); Braxill v. Isham, 12 N.Y. 9 (1854).

equally bound whether the contract is for commercial or employment purposes.

C. Procedural Guidelines for Drafting Arbitration Agreements

There are two considerations in determining whether an arbitration agreement will be enforced by the courts. First, the agreement to arbitrate must comply with standard contract law principles, including that the employee's consent to arbitration must be voluntary and knowing. Second, for an arbitration decision to be final, the arbitration process must allow the employee (and presumably the employer) a full and fair opportunity to litigate. This section will look at what guidelines have been developed to determine whether the arbitration process affords a full and fair opportunity to litigate.

The *Gilmer* Court suggested some items for a court to examine to determine if the arbitration process was adequate.[123] The specific factors that the Court considered were: fairness in selecting the arbitrator to prevent bias; discovery procedures that allow the parties a fair opportunity to present their claim; a written opinion that will allow for effective appellate review; and no limitation on relief that the arbitrator may award.[124] *Gilmer* provides a basic framework for drafting arbitration agreements.

The Commission on the Future of Worker-Management Relations was more specific on what the arbitration agreement should include.

> [B]oth employers and employees agree that if private arbitration is to serve as a legitimate form of private enforcement of public employment law, these systems must provide:
>
> [1] a neutral arbitrator who knows the laws in question and understands the concerns of the parties;

123. *Gilmer*, 500 U.S. at 30.

124. *Id.* at 30-32. The final item that the Court considered was equality in the bargaining process. Since this deals more with enforcing the arbitration agreement according to contract law principles, it will not be considered in this section.

> [2] a fair and simple method by which the employee can secure the necessary information to present his or her claim;
>
> [3] a fair method of cost-sharing between the employer and the employee to ensure affordable access to the system for all employees;
>
> [4] the right to independent representation if the employee wants it;
>
> [5] a range of remedies equal to those available through litigation;
>
> [6] a written opinion by the arbitrator explaining the rationale for the result; and
>
> [7] sufficient judicial review to ensure that the result is consistent with the governing laws.[125]

The Commission expanded on the arbitrator selection process by stating that the "process should allow both the employer and the affected employee[s] to participate."[126]

Many of the guidelines contained in the Commission Report are similar to those found in *Gilmer*. Both require that the process allow for the appointment of a neutral arbitrator. The *Gilmer* Court said that there should be no limitation on the relief that could be awarded, while the Commission suggested that the remedies be equal to those available through litigation. Both guidelines require a process that will allow the parties a fair opportunity to present their claim. Finally, a written opinion that will allow for sufficient judicial review is required in both places.[127] Based on these guidelines, how do current arbitration policies stack up?

D. How Current Policies Meet the Guidelines

The American Arbitration Association (AAA) is one of the largest independent organizations of arbitrators in the country. They have

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125. COMMISSION, *supra* note 6, at 30-31.
126. *Id.* at 31.
127. *See, e.g.*, *Gilmer*, 500 U.S. 20 and COMMISSION, *supra* note 6.

published "Employment Dispute Resolution Rules" that govern arbitration proceedings for those parties that agree to submit the dispute to arbitration under the AAA.[128] The rules require the appointment of a neutral arbitrator who is familiar with the employment field.[129] Each party is allowed to participate in the selection of the arbitrator(s).[130] The arbitrator determines what evidence will be allowed to be submitted; however, each party may offer evidence it feels is relevant and material to the dispute. The arbitrator may also subpoena witnesses or documents that the arbitrator deems necessary to the determination of the dispute.[131] According to the AAA rules, the costs of arbitration should be shared equally by the parties unless they have agreed otherwise or the arbitrator may direct the division of the costs in the award.[132] Each party may be represented by counsel or any other authorized representative.[133] The arbitrator may award "any remedy or relief that the arbitrator deems just and equitable and [is] within the scope of the agreement of the parties."[134] Although the rules do require a written decision,[135] they do not specify the contents of the decision. Therefore, there is no requirement that the arbitrator explain the rationale for the result.

It would appear that the AAA Rules comply with the minimum requirements laid out by the United States Supreme Court in *Gilmer*. It is questionable, however, whether a decision that does not contain a rationale would meet the Court's requirement that the decision allow for appellate review. The AAA Rules also meet most of the guidelines laid out by the Commission. Once again, the written opinion does not have to contain the rationale for the result or demonstrate that the

128. AMERICAN ARBITRATION ASSOCIATION, EMPLOYMENT DISPUTE RESOLUTION RULES (1993) *available in* WESTLAW, 1993 WL 592205 [hereinafter AAA Rules].
129. *Id.* at 8.
130. *Id.* at 9.
131. *Id.* at 19.
132. *Id.* at 33.
133. AAA Rules, *supra* note 128, at 12.
134. *Id.* at 29(c).
135. *Id.* at 29(b).

result is consistent with current law. In addition to the AAA Rules, many private employers have developed their own arbitration policies.

At the request of Congress, the Government Accounting Office (GAO) evaluated the dispute resolution policies of twenty-six employers (that reported using arbitration to resolve discrimination complaints by employees not covered by collective bargaining agreements) according to the standards listed in the Commission report.[136] No policy fully complied with all of the standards listed. The majority of the policies provided for the appointment of a neutral arbitrator and allowed for the employee to be represented by an attorney during arbitration. However, none of the policies had provisions to ensure that the arbitrator "knows the laws in question and understands the concerns of the parties."[137] Also, it is noteworthy that one arbitration policy in the study prohibited representation by an attorney.[138]

The vast majority of the policies did not address the employee's access to information. In fact, only three policies had any provision dealing with this issue. These provisions varied greatly.

> One policy states that discovery will be allowed and governed under the discovery rules of the state code of civil procedure unless otherwise agreed to by the parties; one policy provides for two days of depositions; and the remaining policy limits the taking of depositions to one company representative, two other persons, and one expert witness named by the company but also allows requests for documents related to the complaint.[139]

The Commission recommended "a fair method of cost sharing between the employer and the employee."[140] Most of the policies did have provisions to ensure that the costs of the arbitration were either

136. GAO/HEHS 95-150, *supra* note 3.
137. COMMISSION, *supra* note 6, at 31.
138. GAO/HEHS 95-150, *supra* note 3, at 12.
139. *Id.* at 11.
140. COMMISSION, *supra* note 6, at 31.

shared by the parties or paid by the employer. However, it should be noted that one-fourth of the policies did not discuss cost sharing at all.[141] The policies did not adequately address remedies either, with more than half of the policies failing to mention remedies at all. Seven of the policies allow the arbitrator to use any remedy available under law. But one policy placed a limit on the remedies that could be awarded by the arbitrator.[142]

The major problem with the arbitration policies reviewed by the GAO was with the guideline that there be a written opinion explaining the rationale for the decision and that the decision allow for sufficient judicial review to ensure that it is consistent with governing laws. Sixteen policies required a written opinion; however, no policy required that the decision explain the interpretation of governing laws and be reviewable on that basis. Although sixteen of the policies said that the results of the arbitration should be "final and binding," none of these policies provided for judicial review. The remaining ten policies did not require a written opinion or address review of the arbitration decision.[143]

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141. Seven policies do not address cost sharing. In four policies, the employer pays all arbitration costs; costs are to be shared equally in nine policies; and the employee share is either capped or limited to less than half the costs in the remaining six policies. GAO/HEHS 95-150, *supra* note 3, at 11.

142. *Id.* at 12.

143. *Id.* at 12-13. In a recent article reviewing Hughes Aircraft Company's "Employee Problem Resolution Procedure," the author found that

> [the arbitration] agreement empowers arbitrators to apply company policies as well as the substantive federal or state law. Evidence may be discovered and weighed according to the Federal Rules of Evidence, and both sides may depose one individual and an expert witness and subpoena documents. Arbitrators may hear motions to dismiss or for summary judgment as federal judges would under the Federal Rules of Civil Procedure.
>
> In addition, the agreement doesn't [sic] remove substantive remedies–such as punitive damages–from an arbitrator's reach. And though both sides must share arbitration cost, employees may shift some of their expenses onto the company if they show sufficient financial hardship.

Jorge Aquino, *Shifting Sands of Arbitration Arena; Courts have begun limiting how far employers can go in forcing workers to abide by mandatory ADR provisions*, THE RECORDER (March 24, 1995).

The guidelines for companies desiring to implement or update an arbitration policy seem clear and straight forward. To be effective, an arbitration agreement must give the parties a full and fair opportunity to litigate the issues. This opportunity is provided by having an impartial arbitrator, discovery procedures, a written opinion that shows that the decision is based on current law, and no limitation on remedies that would be allowed in a judicial decision. The question for the future is whether companies can develop and implement an arbitration policy that complies with these standards while still preserving the traditional goals of reducing the time and money involved in resolving a dispute. The Commission summed up the challenge well:

> To be effective, a system for resolving disputes about labor standards must settle claims fairly, close to the workplace, at an early stage, in a manner consistent with law and public policy, and with direct involvement of the disputing parties rather than through litigation much later with legal representation, with higher transaction costs. In particular, disputing parties need to achieve early and direct settlement if they are to continue to work together productively. Absent an effective dispute resolution system, litigation tends to lead to the departure of the employee, regardless of the legal verdict.[144]

IV. CONCLUSION

In *Gilmer*, the Supreme Court opened the door to enforcement of arbitration agreements in employment disputes. Lower federal courts have used *Gilmer* to enforce arbitration agreements in a wide variety of employment disputes. There has long been a stated federal preference for enforcing arbitration agreements in commercial disputes and there seems little reason to treat employment disputes differently.

A number of legal doctrines will protect employees from

144. COMMISSION, *supra* note 6, at 45.

overreaching by employers. The established legal precedents for invalidating a contract will protect an employee who has not knowingly or voluntarily agreed to waive statutory rights. Also, the doctrines of res judicata and collateral estoppel will protect the employee who has been required to submit his dispute to an arbitration process that has not allowed for a fair and full opportunity to be heard.

Likewise, several Supreme Court decisions, as well as the Commission report, provide employers and lower court with guidelines on what the arbitration process should look like to ensure a full and fair opportunity to litigate. Denying employers and employees the opportunity to agree to submit disputes to arbitration, regardless of where the claim may arise, is contrary to established principles of freedom of contract and the federal preference for arbitration.

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