circumstances where front pay is appropriate in lieu of reinstatement. I am extremely troubled by the front-pay concept, on the other hand, if an arbitrator without the authority of the parties or a request from the grieving party orders front pay in lieu of reinstatement. That threatens to remove control from the parties and place it with the arbitrator where it is not appropriate to do so. The union should not have to communicate to a grievant, "You win the case, but you're going to get some money instead of the job you wanted to return to." Absent an express request from the grievant, front pay in lieu of reinstatement is something that should be left to the employer, the union, and the grievant to work out among themselves.

IV. MANAGEMENT PERSPECTIVE

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Until recently, required arbitration of employment matters was restricted to claims that arose in the context of a labor union contract. It is an accepted premise of labor-management relations that a collective bargaining agreement between an employer and the representative of its employees will contain a grievance and arbitration clause. The last step in the grievance procedure is always "final and binding" arbitration by a neutral third-party arbitrator.

Commonly, claims under a labor agreement arise because an employee challenges a discharge as not based on "cause" or "just cause." Termination, or other disciplinary action taken by an employer pursuant to a labor agreement, must, under almost all labor contracts, be justified by a cause standard. It is accepted practice that the employer bears the burden of establishing cause for the disciplinary action. Should a labor arbitrator conclude that the discipline imposed was not for good cause, the traditional remedy is contractual and injunctive relief. The arbitrator directs that the employee be reinstated (affirmative injunctive relief) and reimbursed for contract damages suffered, that is, loss in wages.

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Claims for compensatory damages, which include emotional distress damages, and punitive damages are not awarded.

Interestingly, most labor union contracts bar discrimination on the basis of race, sex, and other protected classifications. However, claims of contractual discrimination that parallel statutory claims are not often processed through the bargaining agreement, probably because the parties to those contracts and labor arbitrators, who interpret the agreements, are not accustomed to such limited remedies.

Moreover, in *Alexander v. Gardner-Denver Co.*,[1] the U.S. Supreme Court held that an employee's statutory claim under Title VII of the Civil Rights Act of 1964[2] (in that case, race discrimination) could not be foreclosed by prior submission of the claim to "final" arbitration under a nondiscrimination clause of a collective bargaining agreement. The Court observed that Title VII provides for consideration of employment discrimination claims in several forums. "The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination."[3] *Gardner-Denver* was widely interpreted as prohibiting any form of compulsory arbitration of Title VII claims.[4] Thus, for the pragmatic and legal authority noted, most employees who are covered under the terms of a collective bargaining agreement have bypassed the contractual grievance and arbitration procedure and have proceeded directly to court, if they believe they have a case of employment discrimination.

However, in a very significant case for employment lawyers, the U.S. Supreme Court, at least at first blush, seemed to undermine the rationale behind its *Gardner-Denver* ruling. In *Gilmer v. Interstate/Johnson Lane Corp.*,[5] the Court held that compulsory arbitration of statutory employment discrimination claims pursuant to an arbitration agreement is not inconsistent with the statutory framework (the claim in *Gilmer* was for age discrimination under the Age Discrimination in Employment Act (ADEA) of 1967[6]). The Court explained: "'[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only

[1]415 U.S. 36, 7 FEP Cases 81 (1974).
[2]41 U.S.C. §2000e *et seq.*
[3]415 U.S. at 48–49, 7 FEP Cases at 85–86.
[4]*EEOC v. Children's Hosp. Medical Ctr. of N. Cal.*, 719 F.2d 1426, 1431, 33 FEP Cases 461 (9th Cir. 1983).
[5]500 U.S. 20, 55 FEP Cases 1116 (1991).
[6]29 U.S.C. §621 *et seq.*

submits to their resolution in an arbitral, rather than a judicial, forum.'"[7] The Court summarily rejected arguments that arbitration procedures are inadequate and therefore should preclude arbitration of a statutory claim. "Such generalized attacks on arbitration 'res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants' and . . . are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'"[8] Accordingly, the Court gave a broad imprimatur to resolving statutory employment discrimination claims through the process of final and binding arbitration.

Regarding its earlier *Gardner-Denver* holding, the Supreme Court in *Gilmer* pointed out that in the previous case the claimant was represented by a union in the arbitration proceeding. Accordingly, the Court noted a potential "tension" between the collective representation rights imposed by law on a union and the individual statutory rights of the grievant, a concern that was absent in *Gilmer* because the claimant was individually represented.

Federal and California courts have been receptive to the *Gilmer* rationale, and have—where the parties have contractually or voluntarily agreed to arbitrate claims of statutory nature—routinely enforced those understandings.[9]

The holding of the Supreme Court in *Gilmer* has encouraged many employers to include in their management or executive employment contracts a provision requiring that all disputes, including employment disagreements that arise out of termination in breach of contract or for an alleged statutory reason, be arbitrated. Similarly, many employers also require that newly hired employees, as a condition of employment, sign an agreement in which the employee agrees to arbitrate all employment disputes, and further that the employee agrees to waive the right to file a suit in

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[7]500 U.S. at 26, 55 FEP Cases at 1120 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth*, 473 U.S. 614, 628 (1985)).

[8]*Id.* at 30, 55 FEP Cases at 1121 (quoting *Rodriguez deQuijas v. Shearson/Am. Express*, 490 U.S. 477, 481 (1989)).

[9]*See, e.g., Nghiem v. NEC Elecs.*, 25 F.3d 1437, 64 FEP Cases 1669 (9th Cir. 1994) (race discrimination); *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 58 FEP Cases 178 (9th Cir. 1992) (sexual harassment and gender discrimination); *Willis v. Dean Witter Reynolds Inc.*, 948 F.2d 305, 57 FEP Cases 386 (6th Cir. 1991) (federal and state of Kentucky sex discrimination claims); *Alford v. Dean Witter Reynolds Inc.*, 939 F.2d 229, 56 FEP Cases 1046 (5th Cir. 1991) (gender discrimination); *Sacks v. Richardson Greenshield Sec.*, 781 F. Supp. 1475, 60 FEP Cases 1463 (E.D. Cal. 1991) (same); *Spellman v. Securities, Annuities & Ins. Servs.*, 8 Cal. App.4th 452, 10 Cal. Rptr.2d 427 (1992) (race discrimination).

court and seek a court-mandated remedy. These employer responses have raised some public policy concerns that will need to be addressed.

To what extent may employers set the rules of arbitration, and should the inclusion of statutory claims require greater judicial oversight of the arbitration process? As a judicial forum, arbitration lacks many of the characteristics that are considered by some to be critical to fairness in the court system. For example, access to appellate review is not guaranteed to those who are compelled to arbitrate. There are presently some minimal checks on the potential abuse of power built into arbitration statutes, but the checks may be too minimal to guarantee a "fair" hearing on a statutory employment claim. The *Gilmer* decision may motivate the courts to intervene to address this shortfall in employment arbitration matters, at a time when the courts seem more willing than ever to enforce arbitration awards in a commercial setting, without serious review of the arbitral procedures or arbitral findings of fact and conclusions of law.

Thus, in *Prudential Insurance Co. of America v. Lai*,[10] the Ninth Circuit, in determining that an employee did not freely choose to arbitrate her Title VII claims, imposed limits on an employer's ability to make the rules by which employees must resolve their employment disputes. The court held that the plaintiffs, Prudential employees, could not be compelled to arbitrate their statutory employment claims pursuant to their arbitration agreement since they did not knowingly waive their statutory remedies. The court acknowledged *Gilmer* and its rule that employees can be required to arbitrate statutory claims without resort to the judicial forum, but questioned "under what circumstances individuals may be deemed to have waived their rights to pursue remedies created by Title VII and related legislative enactments."[11] The court stated, "We agree with appellants 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."[12]

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[10]42 F.3d 1299, 66 FEP Cases 933 (9th Cir. 1994).
[11]*Id.* at 1303, 66 FEP Cases at 935–36.
[12]*Id.* at 1304, 66 FEP Cases at 936.

The Ninth Circuit reasoned that Congress articulated a concern "that Title VII disputes be arbitrated only 'where appropriate,' and only when such a procedure was knowingly accepted," which "reflects our public policy of protecting victims of sexual discrimination and harassment through the provisions of Title VII and analogous state statutes."[13] The court added, "This is a policy that is at least as strong as our public policy in favor of arbitration."[14]

The *Prudential* case indicates that courts may be more willing to intercede in private employment arbitration than they have in commercial arbitration. Thus, ironically, the use of arbitration for resolving statutory employment claims may magnify problems inherent in arbitration, thus resulting in increased judicial intervention. Some California legislators have recognized the unique problems of compelling arbitration of employment cases and have responded by introducing bills that would essentially prohibit arbitration in the employment context. Senate Bill 1012 and Assembly Bill 1406 are currently pending and seek to invalidate arbitration agreements that are entered into by employees prior to the existence of an actual dispute. On a similar note, the Dunlop Commission Report and Recommendations on the Future of Worker-Management Relations (issued in December 1994) urges that employers not be permitted to condition employment on an employee's agreement to arbitrate public law claims.

Significantly, the Equal Employment Opportunity Commission (EEOC) has also expressed its dissatisfaction with mandatory arbitration agreements. On April 25, 1995, the EEOC adopted a new policy in support of voluntary arbitration, but opposed arbitration agreements that employees must sign as a condition of initial or continued employment (the policy has not been officially published). In addition, the EEOC declared that it will receive and process charges regardless of the existence of a mandatory arbitration agreement. The policy was instituted after the EEOC's Houston office successfully enjoined an employer from requiring employees to sign a mandatory arbitration agreement. In *EEOC v. River Oaks Imaging & Diagnostic*,[15] the court found that the company's actions against employees who refused to sign the company's

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[13] *Id.* at 1305, 66 FEP Cases at 936 (citing *Alexander v. Gardner-Denver Co.*, *supra* note 1, at 47).

[14] *Id.*

[15] 67 FEP Cases 1243 (S.D. Tex. 1995).

alternative dispute resolution (ADR) policy "might constitute retaliation against those employees for making complaints to the EEOC."[16] The company was therefore enjoined from retaliating against any past or present employee "because of that employee's opposition to the mandatory ADR Policy."[17]

The EEOC's position does not square with the Supreme Court's decision in *Gilmer.* The Court enforced a mandatory arbitration agreement and held that a statutory age discrimination claim was subject to compulsory arbitration. The EEOC's opposition to mandatory arbitration agreements is inconsistent with the Court's clear support of them. Furthermore, the Court specifically addressed what the EEOC's role is when a discrimination claim is subject to arbitration pursuant to an arbitration agreement. The Court held that an individual ADEA claimant subject to a mandatory agreement remains free to file a charge with the EEOC. Moreover, in situations where broad equitable relief is appropriate, and/or in class action type matters, the court observed that "arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief."[18]

While the Court's decision in *Gilmer* is consonant with the EEOC's position that it may process charges despite the existence of a mandatory arbitration agreement, the opinion does not reconcile with the EEOC's position that an employee's refusal to sign a mandatory arbitration agreement is, essentially, protected conduct under Title VII. To the extent that the EEOC suggests that mandatory arbitration agreements may not be judicially enforced, the policy is clearly at odds with the holding in *Gilmer.* In *Gilmer,* the Court observed that an individual who is contractually obligated to arbitrate a statutory claim may nonetheless file a charge with the EEOC; however, "the claimant is not able to institute a private judicial action."[19]

Insofar as giving deference to awards of arbitrators, courts have traditionally been reticent to set guidelines in the arbitration of *commercial* disputes, deferring to the arbitration contract and the discretion of the arbitrator. The U.S. and California Supreme Courts have taken strict hands-off positions on the review of commercial arbitration decisions, basing their rationale on the

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[16]*Id.*, 67 FEP Cases at 1243.
[17]*Id.* at 1244.
[18]500 U.S. at 32, 55 FEP Cases at 1122.
[19]*Id.* at 28, 55 FEP Cases at 1120.

pro-arbitration policies articulated by the legislatures of those respective governments. It is questionable whether the same rules will apply when courts review *statutory employment issues* decided by arbitrators.

In *Moncharsh v. Heily & Blase,*[20] a commercial arbitration case, the California Supreme Court held that an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not the error appears on the face of the award and causes substantial injustice to a party. The rationale for this ruling was that by voluntarily submitting to arbitration, parties agree to bear the risks that an arbitrator will make a mistake, in return for a quick, inexpensive, and conclusive resolution of the dispute.

Similarly, in *Advanced Micro Devices v. Intel Corp.*,[21] the California Supreme Court held that an arbitrator did not exceed his powers in fashioning a remedy, since the remedy had a rational relationship to the underlying contract as interpreted by the arbitrator and to the breach of the contract as found by the arbitrator. In this case, the court was required "to decide the standard by which courts are to determine whether a contractual arbitrator has exceeded his or her powers in awarding relief for a breach of contract."[22] The court went on to state, "Having rejected the extremes of 'de novo' review on the one hand, and complete unreviewability on the other, we must attempt to articulate a standard capturing the middle ground of deferential yet meaningful review."[23]

The court commented that arbitrators, unless expressly restricted by the agreement of the parties, have the authority to fashion relief they consider just and fair under the circumstances, so long as the remedy may be rationally derived from the contract and the breach. The court opined that parties entering into commercial contracts with arbitration clauses, if they wish the arbitrator's remedial authority to be restricted, are well-advised to set out the limitations explicitly in the arbitration clause.

The Federal Arbitration Act[24] also specifies certain limited circumstances under which an award may be reviewed. When arbitrators rule on matters not submitted to them, or act outside the scope of the party's contractual agreement, the award may be

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[20]3 Cal.4th 1, 10 Cal. Rptr.2d 183 (1992).
[21]9 Cal.4th 362 (1994).
[22]*Id.*
[23]*Id.*
[24]9 U.S.C. §1 *et seq.*

overturned, because the arbitrators exceeded the scope of their authority.[25] The award will be continued so long as it "draws its essence" from the contract, and is not irrational or in manifest disregard of law.

Federal and California state courts thus give broad discretion to arbitrators, upon review of substantive awards and the remedies imposed by arbitrators on account of the contractual breaches. Deference has long been the general rule for review of labor arbitration decisions initiated pursuant to collective bargaining agreements. It is doubtful whether the same degree of deference will be attributed to arbitration awards involving statutory employment discrimination. The signals are that the rules will be different, and for good reason.

Statutory employment discrimination issues go to the root of our status as a principled society. Even those who posture an end to "affirmative action" posit a predicate that society should rid itself of all vestiges of discrimination. Society has created numerous well-intended and elaborate laws to protect those in categories where discrimination has traditionally occurred.

Gilmer opened the doors for employment discrimination claims to be heard by arbitrators. There are different public policy concerns involving statutory employment discrimination, situations involving traditional labor-management disputes, and arbitrations involving the rapidly evolving area of law pertaining to commercial disagreements.

Gardner-Denver noted the strong consensus for full statutory remedial relief in employment discrimination cases. *Prudential Insurance* reiterated the importance of paying heed to policy concerns involving employees in the area of employment discrimination. These cases, and the strongly entrenched legislative policies banning discrimination, suggest a different role for courts (1) in deciding whether to initially compel arbitration of an employment discrimination case (where an employer and an employee have contractually agreed to use arbitration exclusively), and (2) in reviewing the merits of an arbitration award involving an issue of em-

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[25] *Id.* §10(a)(4). *See Coast Trading Co. v. Pacific Molasses Co.*, 681 F.2d 1195, 1198 (9th Cir. 1982). *Western Employees Ins. Co. v. Jeffries & Co.*, 958 F.2d 258, 261 (9th Cir. 1992). *See also Michigan Mut. Ins. v. Unigard Sec. Ins. Co.*, 44 F.3d 826 (9th Cir. 1995), where the court held broadly that when an arbitrator rules on a matter not submitted to him or her, or acts outside the scope of the parties' contractual agreement, the award may be overturned because the arbitrator exceeded the scope of his or her authority, pursuant to the Federal Arbitration Act.

ployment discrimination. In these instances, courts may seek to oversee the process in order to ensure that procedural and substantive due process is accorded; in other words, that a "fair" hearing is held.

It behooves institutions that are regarded as advocates of neutrality in the arbitration process to define the procedural and substantive elements that ensure a fair resolution in arbitration of an employment discrimination claim. Well-regarded institutions such as the American Arbitration Association (AAA) and the National Academy of Arbitrators should be at the forefront in developing these fundamental rules. In fact, in April of this year, the AAA published California Employment Dispute Resolution Rules, which are effective June 1, 1995. The Introduction to the Rules states, "Conflicts which arise during the course of employment, such as wrongful termination, sexual harassment, and discrimination based on race, color, religion, sex, national origin, age and disability have redefined responsible corporate practice and employee relations. Increasingly, corporations look to the American Arbitration Association as a resource in developing prompt and effective employment dispute procedures . . . ." These Rules "make more explicit the authority of the arbitrator for non-union employment disputes."

Specifically, the Rules provide (1) that the arbitrator "shall have the authority to order such discovery . . . as the Arbitrator considers necessary to a full and fair exploration of the issues in dispute" (§6), and (2) that the arbitrator may "grant any remedy or relief that the Arbitrator deems just and equitable, including, but not limited to, any remedy or relief that would have been available to the parties had the matter been heard in court" (§31). Text of the Rules appears in Appendix C.

The AAA has acted quickly and responsibly in articulating rules that will increase the likelihood that mandatory arbitration will succeed in the employment context. The Rules may serve as a guide to the types of agreements that courts will defer to in deciding initially whether to compel arbitration of a statutory employment claim, and later whether to enforce the award of the arbitrator. A court is likely to give great deference to arbitrators who adhere to standards that ensure the integrity of awards, perhaps even the same degree of deference courts give to traditional labor-management and commercial arbitrations. Otherwise, courts on their own—as in *Prudential Insurance*—will take the lead in defining the parameters of fundamental fairness in arbitrations involving statutory employment discrimination claims.

Finally, while deference to employment arbitration awards may be accorded as a principle of law, assuming that fairness in the process is assured, the issue of appellate review nonetheless remains. According deference does not assure rubber stamp treatment. In the civil arena, a party has a right to challenge as erroneous key findings of facts and essential conclusions of law. The same should be true for review of arbitration awards in an employment setting. Findings of fact should not be disturbed unless they are unsupported. Conclusions of law in arbitration awards involving employment discrimination should be reviewed to ensure that the applicable legal standards have been followed, and where the legal conclusions are in error the award should be vacated.

In sum, *Gilmer* has opened up a new means of employment discrimination conflict resolution. It may take a while to sort out the parameters of this new method of dispute determination.

V. INDIVIDUAL EMPLOYEE PERSPECTIVE

JOHN M. TRUE, III*

Alternative dispute resolution (ADR), in one form or another, is on its way to profoundly transforming the way individual employment disputes are handled. Cases of this kind are now settled with the assistance of professional mediators, for instance, far more frequently than they were in the past. Generally, both plaintiff and defense counsel consider this a salutary development. However, another form of ADR, mandatory arbitration, is by no means as universally and enthusiastically acclaimed. Indeed, it has been the subject of spirited debate among employment lawyers representing both management and plaintiffs. One of the hot button issues in this area is the extent to which employers, by compelling employees to agree in advance to arbitration of any and all work-related disputes, can limit the remedies that traditionally have been available for, for example, discrimination, harassment, or wrongful termination.

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