employee, but a majority of U.S. Supreme Court justices told it that they had to take him back.

The third reason I think many employers favor arbitration is simply this: Before the Civil Rights Act of 1991, if an employment dispute was decided by a federal judge, it was decided by someone who had some experience in the area, as well as the time and inclination to sort out complex fact situations. I am, frankly, not a big believer in the jury system for civil cases; I certainly am for criminal cases, but not civil. Over 90 percent of all the jury trials conducted on this planet every year are conducted in the United States—90 percent!

Frankly, I think that—from an employer's standpoint in a labor dispute or certainly in an employment dispute—an employer is more willing to pay somebody $800 a day in the case of private arbitration, someone who has some experience and a postgraduate degree to decide fairly and unemotionally the dispute, than it is willing to pay 12 people $25 a day. I'm not an intellectual elitist; I am saying that this is what goes through an employer's mind in preferring arbitration to jury trials.

Other than that, I have no disagreement with Justice Grodin's excellent remarks.

III. EMPLOYEE PERSPECTIVE

EDWARD BUCKLEY III*

In my view, if federal judges are complaining about their case loads and that they have too many employment cases, they either should not accept the job or they should find another job in private practice. They should not sit there and say that we just ought to have a policy change—that is for Congress to decide. And the Supreme Court determined that it was going to make a policy decision when it decided *Circuit City*.

The Court had to mangle the FAA in order to arrive at the conclusion it made. It completely ignored the provision in the Civil Rights Act of 1991 that says employees are entitled to a jury trial in disparate treatment cases.[1]

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[1]42 U.S.C. §1981a(c).

Why is a jury trial important to employees? You have some control of the factfinder in the case; there is much less control in the arbitration setting. You are just given a panel; the lawyers strike the panel and can choose only one.

Second, a jury generally consists of employees. Arbitrators are a different group of folks: some are employees, some are self-employed, some are partners in law firms. A jury will consist of both management and rank-and-file workers. Plaintiffs' attorneys look for someone who will have some identity of interest with their clients.

One of the pros of arbitration is that it is done by agreement. One of the cons is that there is no agreement if it occurs through an application that is given to employees on the front end, or if it is given to employees with a stack of other documents that they are required to sign. That is not by agreement—that is "either sign it or get out the door."

A law professor at Georgia State University who is teaching students how to be extremely conservative in their approach to the practice of law said to me, "Well, the employee can go to another employer." Not if this catches on. Not if defense firms are regularly putting arbitration agreements out to every large or major employer in metropolitan areas. Then employees are going to go from arbitration agreement to arbitration agreement to arbitration agreement. That is not the law—that is policy at that point.

Arbitration is cheaper, but not if you share the fee. *Green Tree Financial Corp. v. Randolph*[2] suggests that perhaps you do not share the fee, but that case is concerned more with whether the fee is too high. Any additional fees that keep a plaintiff from getting justice are too many, and there are enough fees in court. Arbitration is only cheaper if the plaintiff cannot do discovery.

Jim Walters pointed out that there is less discovery in arbitration. The employer is custodian of most of the information that will be useful at trial and yes, there can be trial by ambush in that setting if the plaintiff does not get adequate discovery. A plaintiff can get a fair shot at adequate discovery under the Federal Rules of Civil Procedure, but if you have limited discovery, the employer has 90 percent of the evidence that is going to be relevant or arguably admissible at trial. And the plaintiff does not know what the employer has.

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[2]531 U.S. 79, 84 FEP Cases 769 (2000).

The plaintiff is going to take much more discovery than the employer because all the employer needs to do is depose the plaintiff and get whatever documents the plaintiff might have. That is pretty simple. When I represent an individual, I generally turn over to the employer a short stack of documents. When we get discovery from the defendants, we will get several boxes that often contain very relevant and very critical evidence. If you are limited in your discovery, you may never know it is there.

Is arbitration quicker? If you have less discovery, yes, but not necessarily—it may be quicker if it is professionally handled. There are many arbitrators who are professional, but arbitrators are like anybody else: there are great ones and there are not-so-great ones.

I recently arbitrated a case in front of an arbitrator who found in favor of two out of three of my clients in a Title VII race discrimination case. There was unrebutted testimony from one of the clients that he had lost his home, had nearly lost his family, and had been hospitalized because of what he had gone through in being terminated. The award was limited, however, to back pay and zero compensatory damages—unrebutted testimony, and not $1 for compensatory damages.

I submit to you, and we submitted to that arbitrator, in a motion for reconsideration, that this was not following the law. The arbitrator submitted a one-line order saying "motion for reconsideration denied"—no written opinion, no reasoning, no rationale whatsoever. It is true that all damages can be available through arbitration, but the conventional wisdom among both defense and plaintiffs' counsel is that these sums are generally smaller than you get in front of a jury.

Congress provided for a jury, so why not let plaintiffs have it, unless they consent to arbitration? That is an important thing. If arbitration is not mandatory and somebody says it is going to be more efficient and cheaper, and I do not have a claim that involves a lot of money anyway, then let's do it. That makes sense.

Defense lawyers tell me that there are more verdicts for plaintiffs,[3] but I do not know—I have not seen any statistics on that. They say that they feel that there are more verdicts for plaintiffs and that they are smaller verdicts, but I am uncertain about that as well.

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[3] *See* Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29 (1998).

There typically is no summary judgment, but summary judgment can still be a valuable tool for the plaintiff. Not that we move for summary judgment often, but occasionally I like to have the issues narrowed. In arbitration you do not necessarily have that narrowing of issues.

The issue of finality of appeals is important. It is important to have somebody on a meaningful basis question the decision of the decisionmaker, but in arbitration we do not really have that. There are very, very limited and very narrow circumstances under which there can be an appeal.

You may remember that, in *Green Tree*, the Supreme Court indicated that there may be circumstances under which the cost of arbitration is too high.

We had a case in our office in which our clients had an arbitration agreement that we did not like. The agreement said that arbitration had to be held in Orange, California, regardless of where the employee worked. It said that the employee had to share fees and costs of arbitration regardless of the applicable fee-shifting law. It also said that the employee was limited to one deposition in discovery, that a 1-year statute of limitations applied, and it lacked a warning to employees that they were waiving any statutory or constitutional rights to a jury trial.

Our client said, "Yeah, I guess we did sign those agreements." We called the American Arbitration Association in California and found that there would be a $500 filing fee, a $150-per-day administrative fee, and a $250–500-per-hour arbitration fee, all split with the defendant. We also knew that the case would take 3–5 days to try before an arbitrator because we had two plaintiffs.

We then computed the travel cost. We checked on airfare and hotels in that area and came up with a cost of $9,200–13,200 per plaintiff in order to arbitrate this case—not including depositions and everything else that goes on. Of course, we only got one deposition under this agreement

We prepared an affidavit that described what we had found. In response to the employer's motion to compel arbitration or stay litigation, we filed the affidavit and argued that the agreement was void. The magistrate judge agreed. He said that the arbitration agreement was unenforceable because the costs of arbitrating in a forum far away would likely preclude the plaintiffs, as well as other similarly situated employees, from vindicating their statutory rights, effectively defeating the remedial purpose of Title VII.

The defendants appealed to the Eleventh Circuit. Even for an employer, the right to appeal can be a valuable thing. The Eleventh Circuit reviewed the appeal, and as they did the *Circuit City* decision came out. The Eleventh Circuit's decision was one page long and stated that, for the reasons set forth by the magistrate judge, it affirmed, and the motion for rehearing was denied. So, for a plaintiff's lawyer it is important to compute the costs up front and put that information into evidentiary form for the court in the event there is a motion for stay.

The right to a jury trial is important. The right to substantial damages and fair damages is important, particularly with regard to punitive and compensatory damages. There is a real concern on the plaintiff's part that this is not occurring in arbitration. A jury consists of the plaintiff's peers—employees, people who work, people who know about sexual harassment and maybe have been harassed themselves, people who have been discriminated against on the basis of their race, gender, or age—real folks like that. Not that anybody in this room is not real folk, but I would rather have a jury of real folks listening to the case and making a decision than just one person.

IV. UNION PERSPECTIVE

ROBERT GIOLITO*

The quartet of decisions that Justice Grodin was speaking about makes very clear the present Supreme Court's commitment to supporting private arbitration as a preferred method for resolving private contractual and employment disputes.

In *Green Tree* and *Circuit City*, the Supreme Court majority has gone so far as to impose the arbitral forum on obviously unwilling parties, leaving numerous troubling questions as to the consequence unanswered, the very questions Justice Grodin addressed. The statement in *Green Tree* could not be any stronger, that statutory claims can be resolved by arbitrators, even claims arising under a statute designed to further important social policies. The justices are very, very clear and firm on this point.

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