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.

---

*Attorney at Law, Stanford, Fagan & Giolito, Atlanta, Georgia.

In the field of labor-management relations, labor has always seen and supported private arbitration as a method of resolving disputes. But labor objects to having arbitration thrust upon employees unwillingly, particularly when we have spent many, many years fighting for the right to have the federal courts and federal agencies investigate, decide, and enforce laws that regulate important legal rights such as the right to be free of discrimination, to have a safe and healthy workplace, and to organize labor unions and engage in other collective activity.

This new privatization of employment dispute resolution has been accomplished not through private mutual agreement or democratic legislative enactment, but through judicial fiat by, I must say, a very activist Court. The statutory histories of various laws show absolutely no discussion in Congress of substituting private arbitrators for federal courts and agencies to resolve these important issues. In the United States, that employers now require us to give up important rights granted by our Congress in order to get a job and live as a free citizen seems contrary to the whole point of protective labor legislation.

Although some may claim that requiring arbitration involves no loss of substantive rights, the last time I looked, the right to a jury trial was still part of the Bill of Rights.[1] One can analyze *Circuit City* as the end of a process started 10 years ago with the passage of the Civil Rights Act of 1991. Those amendments provide for jury trials and awards of significant compensatory and punitive damages in employment discrimination cases.[2]

A powerful plaintiffs' employment bar was created virtually overnight, replacing the few mostly NAACP lawyers who had labored in the Title VII vineyards for many years. The new lawyers successfully sought and obtained mammoth, so-called lottery verdicts and huge damage awards that humbled some of the largest and most powerful of all corporations—Texaco and Coca-Cola, to name but two. Employees around the country became more aware and demanding of their statutory employment rights. The number of employment lawsuits filed in every court soared dramatically. Obviously, there had to be a reaction.

Clever management lawyers rediscovered the FAA, something that we had all been taught did not apply to employment contracts

---

[1] *See* U.S. Const. amend. VII.
[2] 42 U.S.C. §1981a.

at all—in fact, it is still not listed as one of the statutes in West's *Federal Labor Laws*. Those lawyers persuaded judges, tired of endless complex employment litigation, to ignore clear legislative history and shove the whole mess into the willing hands of our nation's private arbitrators, to let them sort it out.

Ironically, I believe that the *Circuit City* decision will lead to the very thing that the FAA was meant to avoid: government regulation and limitation of private arbitration. It is only a question of time and politics, but I do not think that, as the impact of *Circuit City* spreads to corporate personnel offices around the land, the citizens of this country will long allow corporate interests to dictate unilaterally how, when, where, and by whom their important employment rights will be adjudicated.

As for arbitrators, you now have a unique opportunity to seize this time to help provide answers to the questions left unanswered by the Court majority. You have the opportunity to use your wisdom and your experience to help inform the inevitable regulation that will occur in this field. I would hope and expect that you would rely on the principles of fairness, justice, and equality as the touchstones for your own involvement in this process.