

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

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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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### Gilmer

The seminal case involving mandatory arbitration in the individual employment context remains *Gilmer v. Interstate/Johnson Lane Corp.*<sup>1</sup> In *Gilmer*, an employee, who as a condition of hire was required to register as a securities representative with the New York Stock Exchange (NYSE), was terminated and sued his employer for age discrimination under the Age Discrimination in Employment Act (ADEA). However, under the terms of his NYSE registration application, the employee had agreed to arbitrate any controversy he had with the company arising out of his employment or the termination thereof. Although he argued that he should not be compelled to submit his statutory employment discrimination claim to private arbitration, the U.S. Supreme Court held to the contrary, deciding that arbitration of a claim under the ADEA does not contravene that statute's purposes.

The Court reviewed the NYSE procedures for selecting arbitrators, for prehearing discovery, and for the conduct of the hearing and found all of the above to be adequate. In a nutshell, the Court seemed to be saying that even in cases involving statutory rights, waiver of the judicial forum in favor of arbitration does not do violence to the purposes of the statute as long as the remedies available under that statute were not impaired. Not fully addressed, however, were issues of classwide relief or the proper role of the administrative agency involved, the Equal Employment Opportunity Commission (EEOC), in obtaining a remedy appropriate to the vindication of the public's—as opposed to the individual's—interest in eradicating discrimination. *Alexander v. Gardner-Denver Co.*,<sup>2</sup> the Court's landmark case involving the effect of arbitration pursuant to a collective bargaining agreement on an employee's Title VII rights, was distinguished on the ground that the union, rather than the individual employee, controls the grievance arbitration process.

The *Gilmer* decision has given a major impetus to employers to consider imposing arbitration agreements on employees not represented by unions. Specifically, it seems settled at this point that statutory claims of job discrimination may be the subject of manda-

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<sup>1</sup>500 U.S. 20, 55 FEP Cases 1116 (1991).

<sup>2</sup>415 U.S. 36, 7 FEP Cases 81 (1974).

tory arbitration procedures.<sup>3</sup> Some big questions, however, that directly impact the scope of remedies available in individual employment arbitrations remain unresolved.

### Federal Cases

What if, for instance, an employee signs an agreement that purports to *wave* remedies available under an employment discrimination statute? A recent Ninth Circuit case addresses this issue not in the context of employment, but in the context of the relationship between franchisor and franchisee. In *Graham Oil Co. v. Arco Products*,<sup>4</sup> the court invalidated an arbitration clause in a franchise agreement that deprived the arbitrator of the authority to award exemplary damages or attorney fees (both of which were expressly provided for by the controlling statute, the Petroleum Marketing Practices Act).<sup>5</sup> That Act's one-year limitations period was also contravened by a 90-day period provided for in the agreement. The court struck the arbitration clause, observing: "That franchisees may agree to an arbitral forum . . . 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."<sup>6</sup>

The Ninth Circuit has also answered another related question recently. What if the affected employee *never even knew* she was giving up her rights to judicial determination of her statutory claims (with its attendant remedies) when she signed securities registration documents at the commencement of her employment? The court held in *Prudential Insurance Co. of America v. Lai*<sup>7</sup> that, to be enforceable, an agreement to arbitrate must have been *knowingly* entered into by the employee: "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."<sup>8</sup> Congress'

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<sup>3</sup>*Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 935, 58 FEP Cases 178 (9th Cir. 1992); *Willis v. Dean Witter Reynolds Inc.*, 948 F.2d 305, 307-08, 57 FEP Cases 386 (5th Cir. 1991). See also *Spellman v. Securities, Annuities & Ins. Servs.*, 8 Cal. App.4th 452, 10 Cal. Rptr.2d 427 (1992).

<sup>4</sup>43 F.3d 1244 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 275 (1995).

<sup>5</sup>15 U.S.C. §§2801-3806.

<sup>6</sup>43 F.3d at 1247.

<sup>7</sup>42 F.3d 1299, 66 FEP Cases 933 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995).

<sup>8</sup>*Id.* at 1304, 66 FEP Cases at 936.

intent was manifested in this regard as recently as in the debates leading to the passage of the Civil Rights Act of 1991: only “where the parties *knowingly and voluntarily* elect to use these methods,” is arbitration appropriate, said Senator Robert Dole.<sup>9</sup>

The U.S. Supreme Court has also ruled recently on the issue of limitations on remedies in arbitrations. The issue in *Mastrobuono v. Shearson Lehman Hutton Inc.*<sup>10</sup> was: What if the dominant party’s contract’s choice of law provision operates to eliminate, for example, punitive damages? The Court addressed an arbitration provision selecting the law of New York, which allows courts, but not arbitrators, to award punitive damages.<sup>11</sup> The plaintiffs, a couple who had sued their stockbroker and won a \$400,000 punitive damages award in arbitration, asked the Court to hold that the Federal Arbitration Act (FAA) preempts the *Garrity* rule. (Since it had just done something very similar in *Allied Bruce Terminix Cos. v. Dobson*,<sup>12</sup> the chances looked good for such an outcome.) The defendant argued that the parties’ choice of law evidenced an express agreement that punitive damages should *not* be awarded. The Court took neither position, but construed the parties’ “Client Agreement” (which included a provision for use of the NASD Code of Arbitration Procedure, which in turn contemplates punitive damages) in such a way as to uphold the award. The decision was not the sweeping resolution of the question both sides hoped for, and its cautious approach suggests that the Court may have more to say.

### California Law

The California Supreme Court has not yet been called upon to decide a case involving mandatory employment arbitration. It has, however, issued several decisions interpreting arbitration clauses that should be of interest to employment litigators and arbitrators. In *Moncharsh v. Heily & Blase*,<sup>13</sup> the court, over a strong dissent from Justices Kennard and Mosk, held that an arbitrator’s award is final and binding upon the parties: “[A]n arbitrator’s decision is not

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<sup>9</sup>137 Cong. Rec. S15,472, S15,478 (emphasis added).

<sup>10</sup>115 S.Ct. 1212 (1995).

<sup>11</sup>*Garrity v. Lyle Stuart, Inc.*, 40 N.Y.S.2d 354, 353 N.E.2d 793 (1976).

<sup>12</sup>115 S.Ct. 834 (1995).

<sup>13</sup>3 Cal.4th 1, 10 Cal. Rptr.2d 183 (1992).

generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties.”<sup>14</sup> In *Advanced Micro Devices v. Intel Corp.*,<sup>15</sup> the court more recently held that an arbitrator is not bound by literal language of the contract under dispute when it comes to fashioning a remedy. Relief not contemplated in the agreement may be awarded, since “arbitrators, unless expressly restricted by the agreement of the parties, enjoy the authority to fashion relief they consider just and fair under the circumstances existing at the time of arbitration, so long as the remedy may be rationally derived from the contract and the breach.”<sup>16</sup> It seems fair to read the *Advanced Micro Devices* case as yet another endorsement of arbitration from a court that, as far as this writer knows, has never seen an ADR procedure it does not like.

Challenges to mandatory arbitration will continue, and, as they work their way through the courts, they will provide employers and employees with some guidance as to what to expect. Cases to watch include *Burton v. Archer Management Services*<sup>17</sup> in which employees of a copying and document management service providing in-house services to local banks and law firms have claimed that an arbitration agreement imposed on them is an unfair or unlawful business practice as defined by the California Business & Professions Code §17200. The agreement, among other things, deprives them of punitive damages, limits remedies otherwise available under statutory and common law, eliminates meaningful discovery, and even modifies existing limitations periods for various statutory and other claims. A copy of the disputed agreement appears in the Addendum at the end of this chapter. Agreements like this one come across my desk with increasing frequency.

While *Burton* does not take on directly the constitutional issue posed by the waiver of the right to jury trial, another case in Northern California, *Duffield v. Robertson Stephens*,<sup>18</sup> does just this. In this case the plaintiff, who alleges sexual harassment and sex discrimination, challenges the widespread securities industry’s practice of forcing employment claims into arbitration on the grounds that it violates her right to a jury trial. In a related

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<sup>14</sup>*Id.* at 6.

<sup>15</sup>9 Cal.4th 362 (1994).

<sup>16</sup>*Id.* at 383.

<sup>17</sup>No. 965632 (San Francisco, Cal. Super. Ct. 1994).

<sup>18</sup>No. C 95 0109 CAL (N.D. Cal. 1995).

Northern District of California development, Judge Marilyn Hall Patel has struck down an employer's claim that it should be immune from suit because of a "general waiver" signed by a prospective employee. In *Thompson v. Borg-Warner Protective Services Corp.*,<sup>19</sup> Judge Patel ruled that an employer may not immunize itself from liability under the Americans with Disabilities Act, the California Fair Employment and Housing Act (FEHA), the California Labor Code, and the California Business and Professions Code by forcing employees to give up their rights ahead of time.

### Other Developments

In the meantime, the Equal Employment Opportunity Commission has weighed in against mandatory arbitration of discrimination claims with a lawsuit in Houston, Texas, against River Oaks Imaging & Diagnostic,<sup>20</sup> a provider of CAT scans and MRIs, which imposed arbitration on its 150 employees after claims of sex discrimination had been lodged with the agency.<sup>21</sup>

In related California developments, on February 24, 1995, Senator Nicholas Petris introduced Senate Bill 1012, which would amend section 1281 of the Code of Civil Procedure and section 12940 of the Government Code to prohibit predispute agreements to arbitrate claims under the California FEHA. Finally, the major providers of arbitration services, including the American Arbitration Association (AAA) and JAMS/Endispute, have taken stands against mandatory arbitration agreements that delete existing remedies from those that an arbitrator may award. The AAA has just announced that a new version of its Employment Dispute Resolution Rules will go into effect on a pilot basis in California. Under these rules, arbitrators are explicitly empowered to follow statutory presumptions and burdens of proof, permit such discovery, including document exchange and depositions as may be necessary to a fair resolution of the case, and to afford the parties the full benefits of the remedies provided by law. The AAA's Rules appear in Appendix D.

<sup>19</sup>No. C 94 4015 MHP (N.D. Cal. 1995).

<sup>20</sup>*EEOC v. River Oaks Imaging & Diagnostic*, 67 FEP Cases 1243 (S.D. Tex. 1995).

<sup>21</sup>See Jacobs, *Mandatory Arbitration Agreement Faces Direct Challenge by EEOC*, Wall St. J., Apr. 12, 1995, at B-6; see also *EEOC v. Kidder, Peabody & Co.*, 62 FEP Cases 899 (S.D.N.Y. 1993).

### Conclusion

The courts have not yet had the opportunity to address private, individual arbitration of employment cases sufficiently to answer all of the questions left open by *Gilmer*. Arbitrators will therefore be faced with the challenge of sailing through only partially charted waters. However, it seems sensible to suggest that arbitration agreements should provide, at the very minimum, the full remedies employees would be entitled to under statutes applicable to their employment, adequate discovery, and fair and regular opportunities to select arbitrators.

### Addendum

Agreement made as of the earlier of September 7, 1994 or the date appearing at the end of this Agreement, between Employer A.F.M. Services, Inc. ("Archer") and Employee whose names and signatures appear below.

In consideration of continued employment, the giving to employee and other mutual promises herein, the parties below agree as follows:

1. The parties agree that their employment relationship is an "at will" relationship which means that either party may terminate it at any time, without notice and without any reason.
2. Any controversies, claims or disputes ("claims") arising out of or relating to any employment relationship including, but not limited to, claims for wages or other compensation, claims for wrongful termination of any kind or for violation of any federal, state or local fair employment practices law, statute, rule, regulation or ordinance of any kind, as now or hereafter may exist, must initially only be submitted to and filed with the federal, state or local administrative agency or, where there is joint jurisdiction, agencies established by law to investigate and/or hear and decide such claims. Such agency or agencies shall make the initial decision.

In the event the employee disagrees with that decision, such person has the right, within one (1) year from the date of such decision, to submit such claims to arbitration for binding determination by the American Arbitration Association ("AAA") in accordance with its Labor Arbitration Rules then in effect, using a single Arbitrator, which Arbitrator shall be guided by applicable federal, state and local discrimination and labor laws. Arbitration request form shall be obtained from the AAA.

3. Except for any restrictive covenants which may be signed now or in the future between the parties, and except for workers compensation or unemployment insurance benefits and/or claims relating to employee evaluations, bonuses, merit increases, lay-offs and/or wage claims of any kind, any other claims including, but not limited to, claims of any express or implied contract or tort claims shall be submitted to arbitration within one (1) year from the date such claims arose, to the AAA for binding arbitration in accordance with its Labor Arbitration Rules then in effect using a single Arbitrator.
4. By you and Archer consenting to arbitrate claims as described above, this means that you and Archer are giving up your rights to bring such claims to court for trial and determination.
5. The fees of the AAA and the Arbitrator shall be borne equally by the parties. Each party shall otherwise be responsible for any other costs it incurs in the course of arbitration.
6. In order to submit claims for arbitration, the submitting party shall file its arbitration demand in any office of the AAA located in the state in which the employee resides or works, which office shall be the place for the arbitration hearing.

If there is no AAA office within such state, then the demand shall be filed in the AAA office located in New York City, Chicago, Los Angeles or San Francisco, whichever of those offices is closest to employee's residence or place of employment. Upon receipt of any demand, the AAA shall fix the locale of the arbitration to be within a fifty (50) mile radius of employee's residence or place of employment at a facility it considers appropriate for the conduct of such arbitration. A list of AAA offices may be obtained from the Human Resources Department of Employer or from the AAA upon written request.



7. Should any court determine that the agreement herein to submit to, arbitration is not binding, or otherwise allows litigation, regarding claims covered herein, to proceed in a court of law the parties hereto expressly waive any and all right to demand a jury in such litigation.
8. The parties agree and consent that the arbitrator shall not be empowered to award punitive damages in any claims arbitrated hereunder. This waiver of punitive damages shall apply to any claims which may proceed in a court of law in the event a court determines that the agreement herein or agreement to arbitrate a specific claim covered herein is not binding.
9. The parties agree that in any arbitration the Arbitrator shall be limited to allowing parties pre-hearing discovery at least ten (10) days prior to the scheduled arbitration date, which shall consist only of there being a mutual exchange of lists containing the names of witnesses, including expert witnesses to be used and a copy of all proposed exhibits to be used, and that the Arbitrator shall give a written explanation for his Opinion and Award.
10. The parties agree that neither of them nor the Arbitrator may talk about or discuss the facts involved in the arbitration or the decision except where required to make such disclosure by law; or to the parties' legal and tax advisors; or in connection with an application to enforce, vacate or modify any award and any papers containing such disclosure must be submitted under seal.
11. Any provision herein determined by a court of competent jurisdiction as unenforceable shall not affect the balance of this Agreement.
12. Archer has the right of assignment of this Agreement.
13. This Agreement shall be deemed as made in the State of New York wherein it was executed by Employer and is to be construed according to the laws of the State of New York without reference to the principles of the conflict of laws thereof.
14. A facsimile of the signature of the Chairman and Chief Executive Officer of Archer, appearing on the signature line below for Archer, shall be considered as an original signature, binding upon Archer provided there are no changes of any kind to any of the text of this Agreement.

15. The Agreement herein to arbitrate may not be changed except by writing, signed by both parties.

Dated the \_\_\_\_ day of \_\_\_\_, 1994

A.F.M. Services, Inc.  
by

\_\_\_\_\_  
Employee

\_\_\_\_\_  
/S/

\_\_\_\_\_  
Chairman and Chief  
Executive Officer

\_\_\_\_\_  
Social Security Number

\_\_\_\_\_  
Title