

APPENDIX C

GUIDELINES ON ARBITRATION OF STATUTORY
CLAIMS UNDER EMPLOYER-PROMULGATED SYSTEMS

In view of the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*,¹ these guidelines provide information for members appointed to hear individual claims alleging violation of federal or state statutes prohibiting discrimination or statutes providing other employee protections. The guidelines are in addition to the requirements of the *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*.

Members should recognize that in adjudicating a statutory claim they are in some respects acting as substitutes for a court rather than serving as the final step of a grievance procedure under a collective bargaining agreement. Arbitrators in statutory discrimination cases are confronted with an array of proposed procedures of varying degrees of formality. This will present the sometimes challenging question of whether procedures might be so lacking in fundamental due process that an employee claimant could not receive a fair hearing. The purpose of these guidelines is to provide an outline of practical, procedural, and evidentiary questions of application that the arbitrator might encounter in deciding whether to hear these cases and, if so, how they might be resolved.

Arbitrators should be aware that the power to withdraw from a case in the face of policies, rules, or procedures that are manifestly unfair or contrary to fundamental due process carries considerable moral suasion. Experience has shown that parties will generally comply with reasonable rules of procedure (*e.g.*, the Due Process Protocol²) and rulings made by the arbitrator to ensure adherence to fair and reasonable standards of due process.

¹500 U.S. 20, 55 FEP Cases 1116 (1991).

²A *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship* [May 9, 1995], in *Arbitration 1995: New Challenges and Expanding Responsibilities*, Proceedings of the 48th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1996), 298.

I. Should You Take The Case?

- A. Information Gathering—Considerations
1. Do you have a conflict of interest that should be disclosed?
 2. Do the parties have adequate rights of representation?
 3. Were you selected in a fair manner?
 4. Have you reviewed, and are you satisfied that you can serve in light of, the documents creating and defining the scope of the arbitrator's jurisdiction, *e.g.*, the:
 - (a) Arbitration agreement,
 - (b) Employment contract,
 - (c) Court order,
 - (d) Employer grievance procedure, or other policy?
 5. Have you reviewed and are you satisfied with applicable designating agency rules, if any?
 6. Are you satisfied with the fairness of any time constraints on the parties or yourself?
 7. Are you empowered to provide remedies consistent with the statute?
 8. Is the hearing location fair?
- B. Are you satisfied that the compensation arrangement is consistent with fairness and impartiality?

II. Pre-Hearing Consultation

Employment arbitration usually lacks the full disclosure of evidence that is the objective of the grievance process in collective bargaining. Whether by telephone conference call or by meeting prior to the start of the hearing, the arbitrator should identify and resolve issues concerning the conduct of the hearing.

- A. Formulation of Issues To Be Arbitrated
- It is important to assure the arbitrator is granted full remedial authority, including the right to award damages, interest, attorney's fees, and, if provided by case law or statute, punitive damages.
- B. Production of Evidence
- The arbitrator should determine the parties' access to documents, material, and evidence, and the schedule for exchanging and submitting such material.
- C. Discussion of Witness Lists
- The arbitrator should seek the production of lists of potential witnesses and the timetable for their exchange.

- It is recognized that the conduct of the hearing may lead the parties to call additional witnesses.
- D. Discovery, Including Depositions
 - The arbitrator should seek to control the extent of discovery, including depositions, consistent with what the arbitrator perceives as necessary for assuring a fair proceeding.
- E. Rules of Evidence To Be Applied
 - To the extent that the arbitration agreement or governing rules grant discretion, the arbitrator should determine whether federal, state, or informal rules of evidence should be used.
- F. Due Process and the Protocol
 - If the governing rules or the arbitration agreement raise questions of due process, the arbitrator should consult the Due Process Protocol.

The arbitrator should continue to serve in a case as long as the arbitrator is satisfied that fundamental due process protections are being afforded.

III. The Hearing

- A. Many of the issues that normally arise at the hearing will have already been discussed and ruled upon by the arbitrator at the pre-hearing consultation.
- B. At the hearing, the arbitrator should seek a comfortable balance between the traditional informality and efficiency of arbitration and court-like diligence in respecting and safeguarding the substantive statutory rights of the parties.
- C. In following informal rules of evidence, arbitrators should be mindful of instances where application of an informal rule would prejudice an underlying substantive right under the statute.
- D. Arbitrators should familiarize themselves with the statutory burdens of going forward and the statutory burdens of proof, including any shifting burdens of proof, that are applicable to the statutory claim.
- E. During the hearing the arbitrator should remain alert to any arguable conflict of interest disclosure not already anticipated and dealt with at the pre-hearing consultation.

IV. Opinion and Award

- A. The arbitrator should provide a written opinion and award.
- B. The opinion should record the type of dispute, the issues to be decided, and the relief requested.
- C. The opinion should recite findings of fact and the reasoning for the conclusions of law contained in the opinion and award. The arbitrator should identify and deal with all statutory issues raised, being mindful of the standards of judicial review which may apply. It is appropriate for the arbitrator to cite and rely on material supplied at the hearing, as well as on information in the public domain, including the jurisprudence of agencies and courts.
- D. Remedies should be consistent with the statute or statutes being applied, and with the remedies a party would have received had the case been tried in Court. These remedies may well exceed the traditional arbitral remedies of reinstatement and back pay, and may include witnesses' and attorneys' fees, costs, interest, punitive damages, injunctive relief, etc.
- E. The award should be signed by the arbitrator or a majority of a board of arbitrators. It should specifically cite the disposition of each claim and the damages and relief provided, if any.

These guidelines shall continue in effect for no longer than three years unless extended or modified.

[**Editor's Note:** Approved by the Board of Governors on May 21, 1997.]