THE MANDATORY ARBITRATION OF A WOMAN'S TITLE VII CLAIM IN THE SECURITIES INDUSTRY

THE STORY OF HELEN L. WALTERS[1]

Helen L. Walters worked for Bateman Eichler, a California brokerage firm. Thomas Gaian, a senior trader at the firm, was Walters's boss. Gaian was a hard-driving, notoriously volatile, brash man. From the time Walters started working at the firm, Gaian berated and disparaged Walters daily, typically using crude anatomical slang. Walters felt like she was singled out; once, Gaian shouted across the training floor, "Hey bitch, come over here," and other times added, "drag your ass [with you]."

Walters testified that Gaian would want to investigate whether her breasts had been enlarged. Once, when she refused, he threatened to "tear her titties off." He would call Walters a "hooker," "bitch," and a "streetwalker." He once left condoms on her desk and told student visitors that she and other female employees were there for the "sexual pleasure" of traders. Walters took and passed a trading assistant licence test, but Gaian did not promote her. Instead, he called her a "fucking idiot."

As Gaian's abusive behavior continued, Walters developed migraine headaches so severe that some days, she would go home and throw up. Walters often drove home in tears. Sunday nights for Walters were particularly bad, for she dreaded returning to her office. Walters thinks that Gaian knew of her sensitivity, but the more angry and distressed she became, the more he seemed to be amused. Walters resigned after twenty months, and after some encouragement from friends, filed a lawsuit against Bateman Eichler for sexual harassment.

Walters, however, signed the firm's mandatory arbitration contract when she took the test to become a registered securities agent. As a result, Bateman Eichler successfully moved to force the case into arbitration. The team of arbitrators hearing Walters' case was comprised of one female chairperson and two men.

The arbitrators all said that they struggled to understand and follow the law. Additionally, Gaian was relying on a defense that would have been legally irrelevant in a court case: that his behav-

1 *See generally* Margaret A. Jacobs, *The Boss Gave Her Condoms*, WALL ST. J., June 9, 1994, at A1. All information set forth in this section is contained in Jacobs' article, unless otherwise indicated or amplified.

ior and language is customary on trading-room floors.[2] The arbitrators did not help by repeatedly asking witnesses for industry comparisons. "How would you characterize . . . the use of indelicate language relative to other trading rooms that you worked in?," an arbitrator asked at one point.

The arbitrators deliberated at the close of the case, which lasted six weeks. One believed that Bateman Eichler "bore some responsibility." The other two arbitrators disagreed, on the grounds that Gaian's behavior was common within the industry and that Walters did not complain in time. Also, Walters' witnesses were deemed to be biased by their own lawsuits against Gaian or by their friendships with Walters.

The panelists eventually struck a compromise. Gaian and the brokerage firm would be cleared of any wrongdoing but would still be assessed the $3,900 cost of the arbitration.

Two of the three arbitrators from the Walters case defend the proceeding. Citing confidentiality rules, they will not discuss the substance of the case publicly, though one arbitrator says the attorneys may have been "remiss for not better explaining the legal issues to the arbitrators."[3] "She also says that Walters may have done better elsewhere," such as in a courtroom.[4]

Walters' experience may, unfortunately, be representative of situations where a woman in the securities industry has a sex discrimination claim against her employer. Her experience reflects several of many complaints commentators have about arbitration agreements.[5] For instance, did Ms. Walters know that she was waiving her right to a judicial forum, provided for by Title VII? Were the arbitrators connected to the securities industry, and if so, were they biased against Walters? Were they at all experienced in employment or discrimination law? Could she have benefitted from a more comprehensive discovery process? Finally, how difficult would it have been for Walters to appeal?

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[2] *See id.* Courts tend to analyze such Title VII sexual harassment claims from the perspective of a "reasonable woman." Leslye M. Fraser, *Sexual Harassment in the Workplace: Conflicts Employers May Face Between Title VII's Reasonable Woman Standard and Arbitration Principles*, 20 N.Y.U. Rev. L. & Soc. Change 1, 2 (1992) (pointing out that arbitrators focus on the harasser's standpoint, not the victim's). Arbitrators, however, analyze such claims by focusing on the harasser's conduct, especially looking at whether the harasser had an intent to harass. *See id.* Arbitrators are not bound by the Federal Rules of Evidence. *See* NASD Conduct Rules, Rule 10323 (September 1996), *available in* LEXIS, FedSec Library, Manual File; *see also* New York Stock Exch. Rule 620, N.Y.S.E. Guide (CCH) 4321 (1995).

[3] Jacobs, *supra* note 1, at A1.

[4] *Id.*

[5] *See infra* Part II (discussing problems that arise when arbitrating employment disputes in the securities industry).

A registered representative is an employee of a securities firm who accepts and executes the customer's buy and sell orders. Those who wish to be a registered representative in the securities industry must sign U-4 Forms containing agreements "to arbitrate any dispute, claim, or controversy . . . [arising between her and her employer] that is required to be arbitrated under the rules, constitutions, or bylaws of the organizations with which I register."[6] The employee then registers with a securities agency, which requires that disputes arising out of her employment or termination of employment must be arbitrated.[7] The Supreme Court, in *Gilmer v. Interstate/Johnson Lane Corp.*,[8] upheld the use of these clauses to force arbitration in age-discrimination claims.[9] Courts since *Gilmer* have upheld these clauses in Title VII sex discrimination cases against securities firms.[10] Part I of this Note discusses the history of arbitration in the securities industry.[11] Part II discusses some general arguments against the use of arbitration for Title VII disputes,

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6 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991). The registration application is called "Uniform Application for Security Industry Registration or Transfer." *Id.*

7 *See* NASD Conduct Rules, Rule 10101 (Sept. 1996), *available in* LEXIS, FedSec Library, Manual File [hereinafter NASD Manual Rule 10101]; *see also* New York Stock Exch. Rule 600(a), N.Y.S.E. Guide (CCH) 4311 (1995) [hereinafter NYSE Guide Rule 600(a)]. Recently, the NASD voted to eliminate mandatory arbitration of discrimination claims by registered brokers. *See* George Gunset, *Securities Group Yields on Suits: NASD Agrees to End Arbitration Rule in Discrimination Cases*, CHI. TRIB., Aug. 8, 1997, at 1, *available in* 1997 WL 3576314 (discussing the new policy which would allow employees to choose between arbitration or commencing a suit in federal or state courts). This policy is currently pending approval by the Securities Exchange Commission and would go into effect one year after approval. *See id.* One commentator predicted that, if the rule is approved, major broker-dealers will still succeed in requiring employees to sign pre-dispute arbitration agreements, though a few "star" employees might resist. *See* John C. Coffee, Jr., *Sex and the Securities Industry*, 217 N.Y.L.J. 5 (May 29, 1997) (discussing proposals to end mandatory arbitration agreements in the securities industry, but concluding that such a reform may not make much of a difference because a reformed arbitration system will most likely be used for employment discrimination cases).

8 500 U.S. 20 (1991).

9 *See id.* For further discussion of *Gilmer*, see *infra* Part I.B.

10 *See, e.g.*, Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1487 (10th Cir. 1994); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 699 (11th Cir. 1992); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 229-30 (5th Cir. 1991); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 307 (6th Cir. 1991); Beauchamp v. Great West Life Assurance Co., 918 F. Supp. 1091, 1098 (E.D. Mich. 1996); McNulty v. Prudential-Bache Sec., Inc., 871 F. Supp. 567, 571 (E.D.N.Y. 1994); Bender v. Smith Barney, Harris Upham & Co. Inc., 789 F. Supp. 155, 160 (D.N.J. 1992); Sacks v. Richardson Greensfield Sec., Inc., 781 F. Supp. 1475, 1486 (E.D. Ca. 1991); Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc., 957 F. Supp. 1460, 1475 (N.D. Ill. 1970). For an explanation of Title VII, see *supra* Part I.D.

11 The use of arbitration agreements is not limited to the securities industry. The agreements can be found in many business sectors, such as retail, restaurant and hotel chains, health care, broadcasting, and security services. *See EEOC Policy Statement on Mandatory Arbitration*, [1997] Daily Lab. Rep. (BNA) No. 133, at D-30 (July 11, 1997), *available in* LEXIS, BNA Library, Bnzlbr File. [hereinafter *EEOC Policy Statement*] ("An increasing number of employers are requiring as a condition of employment that [employees]

and the judicial response to such arguments.[12] Part III discusses one way in which arbitration can be made fairer to the employee but still attractive to the employer. Part IV concludes that although some courts are receptive to challenges to whether arbitration is a suitable forum to resolve sex discrimination suit, most courts recognize that *Gilmer* dismissed all the arguments the plaintiff in that case had for why the U-4 Form should not be enforced, and have upheld the use of these arbitration agreements in the securities industry. Because of *Gilmer*, courts have limited discretion in whether to uphold these agreements, but can still inquire whether there has been a knowing agreement to arbitrate. Thus, if anything is to be done about the mandatory arbitration of employment disputes in the securities industry, it will be up to the various exchanges such as the NASD to vote and prevent sex discrimination claims from being arbitrated.

I. The History of Arbitration the Securities Industry

A. *Arbitration and ADR*

> Arbitration can be the most wonderful dispute resolution device, going back in history when couples the world over came to their parish priest or their local rabbi and gave him the responsibility for deciding issues that they could not themselves resolve. We established, historically, the practice of going to a neutral third party that we trusted. The notion was simple: we would give that person, because of trust, the decision making that we ourselves could not achieve.[13]

In arbitration, two disputing parties relinquish the power to make a decision to an impartial arbitrator.[14] Arbitration is similar

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give up their right to pursue employment discrimination claims in court and agree to resolve disputes through binding arbitration.").

[12] The Author recognizes that Title VII encompasses discrimination against a person's race, color, and national origin as well as sex. *See* 42 U.S.C.A. § 2000e-2(a) (West 1994). A court will likely enforce an arbitration agreement for such claims in the securities industry. *See, e.g.*, Maye v. Smith Barney Inc., 897 F. Supp. 100 (S.D.N.Y. 1995). Title VII might also protect against a person from discrimination based on his or her sexuality. However, this Note will focus exclusively on a woman's Title VII sex discrimination claim.

[13] Judith P. Vladeck & Theodore O. Rogers, *New York Stock Exchange, Inc.: Symposium of the Arbitration in the Securities Industry—Employment Discrimination*, 63 FORDHAM L. REV. 1613, 1614 (1995) (describing the history of arbitration). Arbitration is a form of alternative dispute resolution ("ADR"), a generic term which refers to non-judicial dispute resolution. *See* Cheryl Blackwell Bryson & Anurag Gulati, *The Courts and Legislature Begin to Adopt ADR Methods to Deal With Growing Number of Employment Discrimination Claims*, 13 N. ILL. U. L. REV. 221, 224-30 (1993) (outlining the general use of the two most widely used forms of ADR, arbitration and mediation).

[14] *See* Bryson & Gulati, *supra* note 13, at 224.

to the judicial resolution of a dispute because both parties present their cases to an arbitrator or arbitration panel.[15]

Congress enacted the Federal Arbitration Act ("FAA") to place arbitration agreements on the "same footing" as other contracts.[16] It provides, in pertinent part, that "a written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[17]

Arbitration was historically considered inferior to judicial dispute resolution.[18] The United States Supreme Court has relied on the FAA in acknowledging a federal policy favoring arbitration.[19] "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development arbitration as an alternative means of dispute resolution."[20] Meanwhile, with regard to unlawful employment practices, Congress has passed many statutes which protect employees, including Title VII of the Civil Rights Act of 1964.[21]

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15 *See id.* In an arbitration,

> [a] hearing is held at which parties may present and cross-examine witnesses and introduce exhibits and other evidence. Opening and closing statements are generally made by each side. The parties often submit post-hearing briefs outlining their positions. But, the arbitrator is not bound by the rules of evidence and is generally liberal in admitting evidence. The arbitrator's decision is called an award.

Id.

16 *See* Loretta T. Attardo & Marjorie Flacks Wittner, *Employment Arbitration of Bias Claims After* Gilmer, MASS. LAW. WKLY., Oct. 18, 1993, at 11, *available in* LEXIS, Legnew Library, Malawr File (discussing the application of the FAA to employment contracts).

17 9 U.S.C.A. § 2 (West 1970).

18 *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) ("[The purpose of the FAA] was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts. . . ."); *see also* Jane Byeff Korn, *Changing Our Perspective on Arbitration: A Traditional and a Feminist View*, 1991 U. ILL. L. REV. 67 (examining the reasons courts formerly mistrusted arbitration, from a feminist perspective). Some commentators argue that the judicial system viewed arbitration in much the same way that men have historically viewed women — different, and therefore necessarily inferior and unworthy of respect. *See id.* at 69. Arbitration was viewed in comparison to the standard of litigation; that is, "arbitration necessarily [would come] in second because it is not litigation." *Id.* at 69 n.11.

19 *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) ("The liberal federal policy favoring arbitration agreements . . . manifested by the [FAA] is at bottom a policy guaranteeing the enforcement of private contractual arrangements. The Act simply creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate.") (citing Moses H. Cove Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n. 32 (1983)).

20 *Id.* at 626-27. *But see* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 96-12267-HG, 1997 U.S. Dist. LEXIS 7031, at *21 (D. Mass. Apr. 23, 1997) (allowing the plaintiff to offer evidence about the inadequacy of the arbitral forum).

21 *See* Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims with Special Reference to the Three A's — Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV.

In 1872, the NYSE became the first securities exchange to provide for arbitration in resolving disputes.[22] Ever since, many other self-regulatory organizations ("SROs") have established settlement programs for the settlement of such disputes.[23] The arbitration rules of the various SROs are derived from the Uniform Code of Arbitration, developed by the Securities Industry Conference on Arbitration ("SICA").[24]

In *Gilmer*, the Supreme Court was confronted with the question of whether an employee's claim under the ADEA could be subjected to compulsory arbitration pursuant to an arbitration agreement contained in a securities registration application.[25]

B. Gilmer v. Interstate/Johnson Lane Corp.

Cases prior to *Gilmer* had been split over whether plaintiffs who are subject to private employment-related arbitration agreements should be compelled to arbitrate statutory employment discrimination cases.[26] In *Gilmer*, the Supreme Court was presented

231, 233 (1996). Other statutory provisions protecting employees include the Fair Labor Standards Act ("FLSA") (setting minimum wage and overtime pay requirements and, as amended, prohibiting sex discrimination in pay); the Age Discrimination in Employment Act of 1967 ("ADEA") (making it unlawful to discriminate against individuals because of age); the Employee Retirement Income Security Act ("ERISA") (protecting employee rights and interests in pensions and benefits); The Occupational Safety and Health Act ("OSHA") (regulating workplace standards); The Family and Medical Leave Act ("FMLA") (entitling eligible employees to a total of twelve work weeks of leave during any twelve-month period to care for family members); and the Americans with Disabilities Act ("ADA") (protecting disabled individuals and prohibiting discrimination with regard to job application procedures, the hiring, advancement, or discharge of employees, employment compensation, job training, and other terms, conditions, and privileges of employment). *See id.* For the text of Title VII, see *supra* Part I.D.

[22] *See* U.S. Gen. Accounting Office, *Employment Discrimination — How Registered Representatives Fare in Discrimination Disputes*, Mar. 30, 1994 [hereinafter GAO Report] (providing background on the use of arbitration to resolve disputes in the securities industry); *see also* Vladeck & Rogers, *supra* note 13, at 1618.

[23] *See* Vladeck & Rogers, *supra* note 13, at 1618.

[24] *See* Catherine McGuire et al., *Current Issues in Securities Industry Arbitration*, 14 A.L.I.-A.B.A. 45, 79 nn.1 & 5 (1996). SICA membership includes members of various stock exchanges nationwide. *See id.*

[25] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991).

[26] *See* Stuart H. Bompey & Michael Pappas, *Is There a Better Way? Compulsory Arbitration of Employment Discrimination Claims After* Gilmer, 19 EMPLOYEE REL. L.J. 197, 198 (1993-1994) (citing Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195 (4th Cir. 1990)); *see also* Steck v. Smith Barney, Harris Upham & Co., Inc., 661 F. Supp. 543, 548 (D.N.J. 1987) ("The court reluctantly grants the defendant's motion to compel arbitration of the pendent state [law age discrimination] claims."). For cases holding that required arbitration would be going against legislative intent because discrimination statutes provide that plaintiff may bring their claims in court, see Utley v. Goldman Sachs & Co., 883 F.2d 184, 187 (1st Cir. 1989), *cert. denied*, 493 U.S. 1045 (1990) ("[T]he text of Title VII . . . does not mandate exhaustion of arbitration before allowing an employee to proceed to a judicial forum."); Nicholson v. CPC Int'l, Inc., 877 F.2d 221, 229 (3d Cir. 1989) ("Congress intended the EEOC and the courts to 'eliminate' discriminatory practices from the workplace, a role that arbitration cannot accomplish as effectively."); Swenson v. Management

with the question of whether an employee's claim under the ADEA could be subjected to compulsory arbitration pursuant to an arbitration agreement contained in a securities registration application.[27] Gilmer, the employee, was hired by Interstate/Johnson Lane Corp. as a manager of financial services.[28] He registered as a securities representative with the New York Stock Exchange ("NYSE") and several other regulatory agencies.[29] Gilmer signed the Uniform Application for Securities Industry Registration or Transfer ("U-4 Form"), which contained a provision providing for the arbitration of disputes when required by the NYSE.[30] The NYSE requires for the arbitration of a controversy arising out of a registered representative's employment.[31] When Interstate fired Gilmer, 62, he filed an age discrimination claim with the Equal Employment Opportunity Commission ("EEOC") and ADEA.[32] Interstate successfully moved to dismiss Gilmer's court case and compel arbitration.[33]

The *Gilmer* court concluded that the plaintiff had not shown that Congress intended to preclude arbitration of claims under the ADEA and held that the statutory claim could be the subject of an arbitration agreement.[34] As a result of the decision in *Gilmer*, suits under the ADEA were essentially preempted by arbitration agreements covering such statutory claims.

The *Gilmer* decision was an important step toward the judicial acceptance of mandatory arbitration as a suitable method for resolving statutory employment claims.[35] Although the NYSE form that Gilmer signed was not an employment contract, courts have

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Recruiters Int'l, Inc., 858 F.2d 1304, 1307 (8th Cir. 1988), *cert. denied*, 493 U.S. 848 (1989) ("The arbitration process may hinder efforts to carry out [the promotion of the public interest by assisting victims of discrimination].").

27 *See Gilmer*, 500 U.S. at 23.

28 *See id.*

29 *See id.*

30 *See id.*

31 *See id.*; *see also* NYSE Guide Rule 600(a), *supra* note 7.

32 *See Gilmer*, 500 U.S. at 23.

33 *See id.* at 24.

34 *See id.* at 35. The Supreme Court rejected all of Gilmer's arguments. Among them, Gilmer unsuccessfully argued that the Supreme Court's previous decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), precluded arbitration of employment discrimination claims. *See Gilmer*, 500 U.S. at 33-34. In *Alexander*, "the issue was whether a discharged employee whose grievance had been arbitrated pursuant to an arbitration clause in a collective-bargaining agreement was precluded from subsequently bringing a Title VII action based upon conduct that was the subject of the grievance." *Id.* (discussing the *Alexander* decision). Though the *Alexander* court held that the employee was not foreclosed from bringing the Title VII claim, the *Gilmer* court limited the holding of *Alexander* to the collective bargaining context. *See id.* at 34.

35 Bompey & Pappas, *supra* note 26, at 201.

relied on Gilmer when enforcing mandatory arbitration agreements in employment contracts.[36]

C. *Arbitration in the Securities Industry*

The *Gilmer* decision has had a substantial impact on securities industry employment litigation.[37] The majority of courts have upheld these arbitration provisions, especially in the securities industry.[38] For instance, because of the Supreme Court's decisions in *Shearson/American Express Inc. v. McMahon*[39] and *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[40] most investor claims against brokers and underwriters may be subject to arbitration.[41] Additionally, personnel registered with SROs are required to arbitrate disputes with their employers pursuant to the U-4 agreements.[42] An employee in the securities industry who has executed a U-4 form or similar registration document may be compelled to arbitrate statutory claims arising out of his or her employment.[43]

In *Alford v. Dean Witter Reynolds, Inc.*,[44] the Fifth Circuit was confronted with the issue of whether a Title VII claim can be subjected to mandatory arbitration. In *Alford*, the court granted the defendant's motion to compel arbitration, relying on the employee's U-4 Form and the *Gilmer* decision. "Because the ADEA and Title VII are similar civil rights statutes, and both are enforced by the EEOC, . . . we have little trouble concluding that Title VII claims can be subjected to compulsory arbitration. Any broad public policy arguments against such a conclusion were necessarily rejected by *Gilmer*."[45]

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[36] *See, e.g.*, Rojas v. TK Communications, Inc., 87 F.3d 745, 749 (5th Cir. 1996) (radio station employment agreement); Mugano-Burnstein v. Cromwell, 677 N.E.2d 242, 247 (Mass. Ct. App. 1997) (plaintiff was a wire operator). Dissimilarly, the contract at issue in *Gilmer* was between Gilmer and the securities exchange, not with his employer, Interstate. *See Gilmer*, 500 U.S. at 26 n.2.

[37] *See* Bompey & Pappas, *supra* note 26, at 200.

[38] For cases which apply the holding in *Gilmer* to Title VII claims, see *supra* note 10.

[39] 482 U.S. 220 (1987) (holding that claims under the Securities Acts of 1934 are arbitrable).

[40] 490 U.S. 477 (1989) (holding that agreements to arbitrate claims under the Securities Act of 1933 are enforceable).

[41] *See* Mahlon M. Frankhauser, *Arbitration: The Alternative to Securities and Employment Litigation*, 50 Bus. Law. 1333, 1336 (1995), *available in* LEXIS, Lawrev Library, Buslaw File (discussing the arbitrability of various securities laws claims).

[42] *See id.* at 1338.

[43] *See* Bompey & Pappas, *supra* note 26, at 200.

[44] 712 F. Supp. 547 (S.D. Tx. 1989), *aff'd*, 905 F.2d 104 (5th Cir. 1990), *cert. granted*, 111 S. Ct. 2050 (1991), *rev'd*, 939 F.2d 229 (5th Cir. 1991) (stockbroker who was fired by a brokerage firm brought a Title VII suit alleging sex discrimination and sexual harassment).

[45] *Alford*, 939 F.2d at 230. *But see* Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299 (9th Cir. 1994) (holding that the employees did not knowingly agree to arbitrate). The *Lai* court reasoned that "even assuming that the employees were aware of the entire U-4 Form,

D. *Title VII of The Civil Rights Act of 1964*

Title VII was enacted to "ensure equal opportunity in employment, and to secure the fundamental right to equal protection guaranteed by the Fourteenth Amendment to the Constitution."[46] It states, in pertinent part,

> It shall be unlawful for an employer... to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment . . . or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [her] status as an employee, because of such individual's . . . sex.[47]

The Civil Rights Act of 1991 provides for a jury trial.[48] The EEOC, in a policy statement, has stated that, "[t]he private right of access to a judicial forum to adjudicate claims is an essential part of the statutory enforcement scheme."[49]

However, Congress did include language encouraging the arbitration of discrimination claims. Section 118 of the Civil Rights Act of 1991 states, "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Act."[50] Courts have construed this language as proof that Congress is in favor of arbitration.[51]

Legislative history may provide insight into what Congress intended in drafting Title VII:

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they could not have understood that in signing it, they were agreeing to arbitrate sexual discrimination suits." *Id.* *See also infra* Part III.A.1 (discussing *Lai* in further detail).

46 *EEOC Policy Statement, supra* note 11, at D-30.

47 42 U.S.C.A. § 2000e-2(a) (West 1994). Through judicial decisions and the Equal Employment Opportunity Commission's guidelines, sexual harassment has been considered to be conduct within Title VII's provisions. *See* Fraser, *supra* note 2, at 3 (exploring the law of sexual harassment).

48 *See* 42 U.S.C.A. § 1981a(c) (West 1994) ("If a complaining party seeks compensatory or punitive damages under this section . . . any party may demand a trial by jury."); *see also* U.S. CONST. amend. VII ("In [s]uits at common law . . . the right of trial by jury shall be preserved.").

49 *EEOC Policy Statement, supra* note 11, at D-30.

50 Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991).

51 *See, e.g.,* Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc., 957 F. Supp. 1460, 1475 (N.D. Ill. 1997); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 880-81 (4th Cir. 1996) ("The meaning of this language is plain — Congress is in favor of arbitration."). *But see* Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994) (construing the "where appropriate" as evidence of congressional intent that Title VII disputes be arbitrated only when such a procedure was knowingly accepted).

> [T]he use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit issues to arbitration, whether in the context of a collective bargaining agreement or in employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.* . . . The Committee does not intend this section to be used to preclude rights and remedies that would otherwise be available.[52]

One court has used this passage as evidence of congressional preference for a jury trial over arbitration.[53] But another court has interpreted the same passage quite literally, as applying only to arbitration agreements in an employment contract or in a collective bargaining agreement.[54] In *Beauchamp*, the court said that this House report thus essentially restates the holding of *Alexander*, which held that such an agreement will not preclude a Title VII action.[55] That issue was distinguished, in *Gilmer*, from the issue of when a plaintiff may contractually agree to forego a judicial forum for her Title VII claim.[56] This passage from the House Report alone does not answer the question of under what circumstances did Congress intend for Title VII claims to be arbitrated.

II. The Problem with Mandatory Arbitration

A. *Arbitration May Be an Inappropriate Forum to Resolve Securities Industry Employment Disputes*

Independent groups are challenging the appropriateness of requiring securities industry employees to agree to arbitrate employment discrimination claims as a condition of their employment.[57] Some argue that compulsory arbitration conflicts with federal and state anti-discrimination laws.[58] Others have argued that it violates employee's rights to due process. The latest EEOC policy statement argues that Congress intended for the public en-

52 H.R. Rep. No. 40(I), *reprinted in* 1991 U.S.C.C.A.N. (102 Stat. 549) 635.

53 *See Lai*, 42 F.3d at 1304-05.

54 *See* Beauchamp v. Great West Life Assurance Co., 918 F. Supp. 1091, 1095-96 (E.D. Mich. 1996).

55 *See id.*

56 *See id.*; *see also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991) (limiting the holding of *Alexander* to the collective bargaining context).

57 *See* McGuire et al., *supra* note 24, at 73.

58 *See id.* The Equal Employment Opportunity Commission ("EEOC"), in a policy statement, stated that "mandatory binding arbitration imposed as a condition of employment is contrary to civil rights laws. . . ." *Id.* (quoting a July 1995 EEOC Policy statement).

forcement of Title VII, but mandatory arbitration "privatizes" the enforcement because the arbitrators are hired by the parties to the dispute.[59]

Some groups believe that mandatory arbitration of employment discrimination claims is just bad public policy,[60] simply not working,[61] and that additional safeguards are needed to protect women complaining of sex harassment in the securities industry.[62] In light of the story of Walters in the Wall Street Journal, some legislators condemn the system that requires brokerage firm employees to submit employment disputes to an industry-selected arbitration panel.[63] In 1994, two members of the House of Representatives, Patricia Schroeder (D-Colorado) and Olympia Stowe (R-Maine), called for the Securities Exchange Commission to incorporate "appropriate safeguards" into the arbitration system to protect employee's civil rights.[64]

Representatives Schroeder and Stowe are concerned that employees are asked to sign an agreement that waives their right to a trial guaranteed under Title VII of the Civil Rights Act.[65] They argue that women are instead forced to place their case in the hands of the industry arbitrators, who are not "required to follow the procedures and legal precedents—or even to know the law."[66] The two contend thus that the "basic rights" of private sector employees "have been severely eroded when an employee can be compelled to agree to arbitration as a condition of employment."[67] One attorney for a plaintiff in such a case has stated, "[Employees] are forced to give up important rights of process. [Employees] give up

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59 *See EEOC Policy Statement*, *supra* note 11, at D-30.

60 *See* McGuire et al., *supra* note 24, at 74 ("Independent groups have challenged the propriety of requiring securities industry employees to agree to arbitrate employment discrimination claims as a condition of their employment."); *cf.* Coffee, *supra* note 7, at 5 (pointing out that there are opponents to mandatory arbitration in employment discrimination cases within Congress, the SEC, and the NASD, who instead question whether the industry itself is entitled to impose acceptance of arbitration as a condition of employment). Those in the securities industry who dispute the appropriateness of mandatory arbitration in employment discrimination cases do not dispute whether pre-dispute arbitration agreements can cover discrimination cases; that would be a "red-herring" issue already resolved in *Gilmer*. *See id.*

61 *See* Vladeck & Rogers, *supra* note 13, at 1614.

62 *See Hill Women's Caucus Blasts Defects in Securities Industry Arbitration*, 26 Sec. Reg. & L. Rep. (BNA) 915 (June 24, 1994) [hereinafter *Hill Women's Caucus*]. This was from a letter written by the Congressional Caucus for Women's Issues.

63 *See id.*

64 *Id.* Reacting to the Helen Walters story, they sent a letter expressing their alarm about the securities industry's arbitration system to the SEC, NYSE, NASD, American Stock Exchange, and Attorney General Janet Reno. *See id.*

65 *See id.*; *see also* 42 U.S.C.A. § 1981a (West 1994) (implying that a jury trial is not automatic but must be demanded by a party).

66 *Hill Women's Caucus*, *supra* note 62, at 915.

67 *Id.*

the right to have a case decided by a judge and a jury of your peers. [Employees] give up the right to appeal."[68]

In *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*,[69] the court analyzed the constitutionality of mandatory arbitration a registered securities representative.[70] The plaintiff in *Cremin* brought suit against her employer, her supervisor, NYSE and NASD, asserting gender and pregnancy discrimination claims under Title VII of the Civil Rights Act.[71] She asserted that the mandatory arbitration of Title VII claims violated her due process rights and statutory rights.[72]

First, Cremin argued that Article III of the Constitution guarantees her right to an in-court adjudication of her Title VII claims.[73] However, the court was unimpressed with this argument, reasoning that rights to an Article III court are waivable.[74] There are two possible scenarios; either Cremin did or did not waive this right.[75] Because the determining factor would be Cremin's action, the only way she would be denied her day in court would be if she waived her rights.[76] The court concluded that Cremin faces no Article III deprivation because she cannot argue that her own waiver violates the Constitution.[77]

The *Cremin* court similarly dismissed the plaintiff's Seventh Amendment claim.[78] "The Seventh Amendment does not confer the right to a trial, but only the right to have a jury hear the case once it is determined that the litigation should proceed before a court."[79] The court reasoned that if the claim properly comes

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68 Barbara Presley Noble, *Suit Challenges Mandatory Arbitration in Securities Industry*, DALLAS MORNING NEWS, Jan. 15, 1995, at 11H, *available in* 1995 WL 7466079 (discussing the filing of a lawsuit that challenges mandatory arbitration in the securities industry).

69 957 F. Supp. 1460. (N.D. Ill. 1970)

70 *See id.* at 1462 (stating that the plaintiff argued that "the exchange-mandated arbitration of discrimination claims deprives [her] of her constitutional due process and statutory rights.").

71 *See id.*

72 *See id.*

73 *See id.* at 1470 (claiming that the enforcement of the U-4's arbitration clause infringes upon her Article III rights).

74 See *id.* (citing CFTC v. Schor, 478 U.S. 833, 848 (1986) ("[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver."). Article III states that "[t]he Trial of all Crimes. . . shall be by Jury: and such trial shall be held in the State where the said Crimes shall have been committed. . . ." U.S. Const. art. III, § 2, cl.3.

75 *See* Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc., 957 F. Supp. 1460, 1470 (N.D. Ill. 1970).

76 *See id.*

77 *See id.* at 1470-71 (stating that she waived her rights to an in-court adjudication by signing the U-4).

78 *See id.* at 1471.

79 *Id.*

before an arbitral forum, then there is no jury trial right.[80] Whether the case is properly before an arbitral forum again depended on whether Cremin consented to arbitration.[81] The court found that she did not have a Seventh Amendment claim because nobody forced her to waive her rights to a jury trial.[82]

Whether mandatory arbitration is constitutionally correct or not, there are some problems inherent in the process of arbitration which may, in certain cases, make it an undesirable forum for a Title VII sex discrimination claimant. Some common complaints about mandatory arbitration are that the process is deficient because: a) there might be unequal bargaining power between the employer and the employee such that the employee is "forced" to sign the agreement; b) arbitrators are not obligated to issue written opinions, making judicial review difficult; c) securities arbitrators are biased for towards the industry and are untrained in discrimination law; d) the discovery procedures are inadequate; e) remedies such as punitive damages, provided for by Title VII, may be limited in the arbitration agreement.[83]

B. *The Problem with Arbitration in the Securities Industry*

> If I take a woman into the federal court who has a legitimate, meritorious case of discrimination, she is entitled to certain protection, she is entitled to a fair hearing, she is entitled to due process. If she wins [at trial], she gets whatever money she's lost in back wages, she gets enough in attorney's fees so that she nets whatever it is of the damaged provided, and if she has suffered emotional distress, under the Act she can get damages for that. Go into arbitration, even if you win they give you, say, twenty dollars with no explanation, no attorneys' fees, no compensation for emotional distress. Why are the people in this industry deprived of statutory benefits? . . . [A]rbitration of discrimination cases today . . . is unfortunate and deprives workers in this industry of fair treatment.[84]

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80 *See id.* (citing Geldermann, Inc. v. CFTC, 836 F.2d 310, 323 (7th Cir. 1987)).

81 *See id.*

82 *See id.*

83 *See* Nieminski v. John Nuveen & Co., No. 96 C 1960, 1997 WL 43241, at *6-7 (N.D. Ill. Jan. 23, 1997) (rejecting the employee's argument that mandatory arbitration deprives her of procedural and substantive rights).

84 Vladeck & Rogers, *supra* note 13, at 1625.

1. *Unequal Bargaining Power*

Employees might not have any voice in the selection of arbitrators.[85] Employers who draft the arbitration agreement may specify a certain arbitrator, and the employee, who needs a job, often must sign the agreement.[86] But plaintiffs will not win if they claim that the contract is a contract of adhesion: "[E]very court faced with the allegation that the U-4 Form is a contract of adhesion has rejected such allegation."[87] Courts have taken the view that ongoing employment is sufficient to constitute adequate consideration so as to defeat a contract of adhesion claim.[88]

The employee is further at a disadvantage because the employer has the opportunity to make informed decisions on what arbitrators to hire by knowing the "track record" of the arbitrator's record.[89] The employee, on the other hand, is only involved in the particular dispute she has with her employer; she would be less able to make an informed decision.[90]

In *Gilmer*, the Supreme Court rejected the employee's argument that the arbitration agreement should not be enforced because there is often unequal bargaining power between employers and employees, but left open the possibility that a plaintiff could have a valid argument.[91]

> Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context. . . . "[But] courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the 'revocation of any contact." . . . [The] claim of unequal bargaining power is best left for resolution in specific cases.[92]

However, in *Gilmer*, the plaintiff was an experienced businessman, so the court found no reason to believe that the contract was

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85 *Developments in the Law—Employment Discrimination—Mandatory Arbitration of Statutory Employment Disputes*, 109 HARV. L. REV. 1670, 1679 (1996) [hereinafter *Mandatory Arbitration*] (discussing concerns about the selection, bias, and training of arbitrators).

86 *See id.*; *see also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991) (finding no indication that the employee was coerced or defrauded into signing the arbitration agreement); *accord* Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc., 957 F. Supp. 1460, 1470 (N.D. Ill. 1997).

87 *Cremin*, 957 F. Supp. at 1470.

88 *See* Jonathan R. Mook, *Courts Becoming Increasingly Receptive to Mandatory Arbitration*, 4 EMPLOYMENT L. STRATEGIST 1, 2 (Dec. 1996) (discussing the growing acceptance of ADR).

89 *See EEOC Policy Statement*, *supra* note 11, at D-30.

90 *See id.*

91 *See Gilmer*, 500 U.S. at 33.

92 *Id.*

one of adhesion.[93] It is conceivable that there are and will be specific cases where the plaintiff can show unequal bargaining power.[94] Courts, however, have been reluctant to give merit to such a claim.[95] Because the *Gilmer* court did not characterize all arbitration agreements as non-contracts of adhesion, courts should allow for discovery in order to afford claimants the opportunity to prove "fraud or overwhelming economic power" underlying the signing of the contract.[96]

2. *No Written Opinions and Difficulty of Appeal*

Arbitrators are not required to issue written opinions, nor are their decisions made public without the consent of the parties.[97] Because of this, the employers are less accountable if found guilty, and judicial review is difficult.[98] The EEOC has stated that as a result, "arbitration affords no opportunity to build jurisprudence through precedent. . . . [T]here is virtually no opportunity for meaningful scrutiny of arbitral decision-making. This leaves higher courts and Congress unable to act to correct errors in statutory interpretation."[99]

Compounding the problem is that there is a high degree of judicial deference towards arbitrators. It takes nothing less than

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93 *See id.*

94 *See* Beauchamp v. Great West Life Assurance Co., 918 F. Supp. 1091, 1094 (E.D. Mich. 1991). In *Beauchamp*, plaintiff's employer told her that she was required to sign the U-4 Form in order to remain employed. *See id.*

95 *See* Carr v. Rockwell Int'l Corp., No. 3:96-CV-2964-D, 1997 U.S. Dist. LEXIS 4792 (N.D. Tx. Feb. 28, 1997) (finding consideration because both parties agreed to relinquish their right to go to court, but did not explore whether there was any unequal bargaining power); *see also* Bender v. Smith Barney, Harris Upham & Co., 789 F. Supp. 155, 159 (D.N.J. 1992) (finding no evidence supporting the plaintiff's claim that she was fraudulently induced to sign the agreement); *Beauchamp*, 918 F. Supp. at 1098 (finding no contract of adhesion because the U-4 form was not prepared by the employer, and there was no evidence that the plaintiff could not have worked anywhere without signing the form).

96 *See* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 96-1267-NG, 1997 U.S. Dist. LEXIS 7031, at *21 (D. Mass. Apr. 23, 1997) (allowing discovery in order to resolve the claimant's challenges to the adequacy of the arbitral forum and the circumstances surrounding the claimant's signing of the arbitration agreement).

97 *See EEOC Policy Statement, supra* note 11, at D-30; *see also* Peter Blackman, *Defending Arbitration: Supporters Surface Among the Employment Bar*, 212 N.Y.L.J. 5 (July 14, 1994) (pointing out that claimants may complain about the absence of a written record, but attorneys defending arbitrations are quick to point out that the limitation applies to both sides). *But see* New York Stock Exch. Rule 627(a), N.Y.S.E. Guide (CCH) 4323 (1995) [hereinafter NYSE Guide Rule 627(a)] ("All awards shall be in writing and signed by a majority of the arbitrators. . . .").

98 *EEOC Policy Statement, supra* note 11, at D-30. *See also* Wilko v. Swan, 346 U.S. 427, 436 (1953), *overruled on other grounds by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 47 (1989) (indicating that "an award may be made without a complete explanation of the arbitrator's reasons, and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as 'burden of proof,' 'reasonable care,' or 'material fact'. . . cannot be examined.").

99 *See EEOC Policy Statement, supra* note 11, at D-30.

"manifest disregard" of the law to overrule an arbitrator's decision.[100] Under FAA rules, courts may only vacate an award if there is evidence of blatant misconduct by the arbitrator or by one of the parties.[101] Courts interpret 'manifest disregard' to mean that the arbitrator knew the law but chose to ignore it.[102]

In *Gilmer*, the plaintiff unsuccessfully asserted that arbitration is deficient because of there is no obligation to issue a written opinion, and consequently, there is no effective appellate review or no development of the law.[103] The court dismissed these concerns because NYSE rules require a written opinion available to the public, which includes "the names of the parties, a summary of the issues in controversy, and a description of the award issued."[104] With regards to judicial review, the *Gilmer* court recognized that judicial scrutiny is limited, but such review is sufficient to ensure that arbitrators comply with the requirements of the statute."[105]

Published NYSE and NASD arbitration opinions do indeed include the parties names, a list of the issues in controversy, and a

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100 *See Wilko*, 346 U.S. at 187-88. The arbitrator's opinion will not be overruled if there is an error in his factual findings or interpretation of the law, unless that interpretation shows a manifest disregard of binding law. *See* Denver & Rio Grande Western R.R. Co. v. Union Pacific R.R. Co., 119 F.3d 847, 849 (10th Cir. 1997). However, the *Wilko* Court did not state the factors that would establish this "manifest disregard." Frankhauser, *supra* note 41, at 1368.

101 *See* 9 U.S.C.A. § 10 (West 1994). The FAA provides that awards may be set aside:

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon significant cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any misbehavior by which the rights of any party may have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter substituted was not made.

Id. See also Willemijn Houdstermaatschappij v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997) (reviewing a district court's review of arbitration awards under a "manifest disregard of law" standard); Glennon v. Dean Witter Reynolds, Inc., 83 F.3d 132, 135 (6th Cir. 1996); O.R. Sec., Inc. v. Professional Planning Assoc., Inc., 857 F.2d 742, 746-47 (11th Cir. 1988).

102 *See, e.g., Willemijn*, 103 F.3d at 12; *Glennon*, 83 F.3d at 135; *O.R. Sec., Inc.*, 857 F.2d at 746-67.

103 *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31-32 (1991).

104 *Id. See* New York Stock Exch. Rule 627(e), N.Y.S.E. Guide (CCH) 4323 (1995) [hereinafter NYSE Guide Rule 627(e)]; *see also* NASD Conduct Rules, Rule 10330(e) (Sept. 1996), *available in* LEXIS, FedSec Library, Manual File [hereinafter NASD Manual Rule 10330(e)]. One commentator suggests that the narrow facts of *Gilmer* make it impossible to gauge the legal importance of the absence of a written opinion. *See Mandatory Arbitration*, *supra* note 85, at 1681.

105 *Gilmer*, 500 U.S. at 32 n. 4 (quoting Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987)).

description of the award issued.[106] However, the opinions do not provide a detailed analysis of facts, nor is there any explanation of why the panel decided the way it did.[107] As such, there is no recorded explanation of the law, and how it applies to the facts. It would thus be close to impossible to overturn these opinions if a court were to use a "manifest disregard" standard.

3. *The Arbitrators May Be Biased Against the Employee, and Are Not Trained in Discrimination Law*

Some commentators fear that women are at a disadvantage if they arbitrate their Title VII claims because arbitrators are usually male.[108] Women in the industry who have been through the process say they believe that their arbitrations were skewed against them.[109] One reason women may feel this way is because arbitrators in the securities industry are usually male. The United States General Accounting Office issued a report on employment discrimination in 1994, and found that about eighty-nine percent of the NYSE arbitrators are white men, usually about sixty years old.[110] Notwithstanding the GAO report, some commentators opine that these percentages are simply "not true."[111] They argue that the concept of "demographic incorrectness" is "one that is often thrown out without any real substantive or legitimate explanation as to its importance."[112]

This argument has nothing to do with the competency of arbitrators; as one commentator says, "I have no question about the integrity or the decency of any of the people who do this."[113] But other commentators have been more critical of the arbitrators. One legislator has asserted that arbitration panels in the securities

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106 *See, e.g., In re* Arbitration between Natalia Salaczynskyj v. Dillon Read & Co., No. 1995-005327, 1996 WL 807492(NYSE Dec. 5, 1996); *In re* Arbitration between Marilyn Ann Stringer v. Paine Webber, Inc., No. 90-03038, 1992 WL 233331 (NYSE Apr. 20, 1992).

107 *In re* Arbitration between Natalia Salaczynskyj v. Dillon Read & Co., 1996 WL 807492; *In re* Arbitration between Marilyn Ann Stringer v. Paine Webber, Inc., 1992 WL 233331.

108 *See* Vladeck & Rogers, *supra* note 13, at 1615; *see also Bill to End Forced Arbitration of Discrimination Claims Introduced*, 26 Sec. Reg. & L. Rep. (BNA), 1151 (Aug. 19, 1994) (discussing a bill that would prevent any employer from requiring arbitration of discrimination claims is motivated in part on findings that most NYSE and NASD arbitrations in discrimination cases are while males 60 years of age).

109 *See* Judith P. Vladeck, *Validity of ADR for Job Disputes: "Yellow-Dog Contracts" Revisited*, 214 N.Y.L.J. 7 (July 24, 1995) (describing the experience of women in sex discrimination cases in the securities industry as being "particularly egregious").

110 *See* GAO Report, *supra* note 22. The report stated that, although the NASD did not have data on their arbitrators' characteristics, NASD officials opined that their arbitrators would have similar characteristics to the NYSE arbitrators. *See id.*

111 *See* Vladeck & Rogers, *supra* note 13, at 1622.

112 *Id.*

113 Vladeck, *supra* note 109, at 7.

industry surprisingly do not reflect the traits one would desire in an arbitrator.[114] For instance, "[S]ome arbitrators in the securities industry have been known to have been criminally convicted and to have had other blemishes on their professional records."[115]

Lawyers who defend the securities industry on employment discrimination disputes argue that arbitrators are not captives of the securities industry.[116] At the NYSE and NASD, one of the three arbitrators on each panel is required to have no prior connection with the securities industry, and it is required that the arbitrators cannot have any prior contacts with arbitration.[117] One commentator opined that the fact that one impartial arbitrator knows something about how the securities industry works actually benefits all parties, because cases brought by securities industry employees often deal with the intricacies of how individuals do very complex jobs.[118] But, similar to the problem in Helen Walters' story, the intricacies of the securities industry have nothing to do with whether the employee was discriminated against.

In *Gilmer*, the court explained that NYSE arbitration rules protect against arbitrator bias because it requires "that the parties be informed of the employment histories of the arbitrators and that they be allowed to make further inquiries into the arbitrators' backgrounds."[119] Additionally, each party was allowed "one peremptory challenge and unlimited challenges for cause . . . [and] arbitrators are required to disclose "any circumstances which might preclude [them] from rendering an objective and impartial determination."[120] Moreover, "[t]he FAA also protects against bias, by

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114 *See id.*

115 *Id.* As of the time of the GAO Report, the NYSE did not require its arbitrators to disclose prior criminal convictions on their profiles. *See* GAO Report, *supra* note 22.

116 *See* Blackman, *supra* note 97, at 5 (stating that many lawyers argue that arbitration benefits the claimant); *see also* Vladeck & Rogers, *supra* note 13, at 1621 (providing a passionate discussion of how arbitrators in the securities industry are not biased against employees); Evan J. Charkes, *Employment Discrimination in the Securities Industry*, 217 N.Y.L.J. 5 (May 22, 1997) ("There has been no demonstrative statistical evidence that arbitration panels favor the industry in employment discrimination disputes.").

117 *See* Blackman, *supra* note 97, at 5 (stating that the parties involved in the arbitration are allowed to challenge the choice of arbitrators if they feel there is a potential conflict of interest); *see also* NASD Conduct Rules, Rule 10308(b) (September 1996), *available in* LEXIS, FedSec Library, Manual File [hereinafter NASD Manual Rule 10308(b)] ("at least a majority of the [arbitrators] shall not be from the securities industry"); New York Stock Exch. Rule 607(a)(1), N.Y.S.E. Guide (CCH) 4314 (1995) [hereinafter NYSE Guide Rule 607(a)(1)] ("[The] arbitration panel . . . shall consist of no less than three . . . arbitrators, at least a majority of whom shall not be from the securities industry. . . .").

118 *See* Vladeck & Rogers, *supra* note 13, at 1621.

119 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991).

120 *Id. See* New York Stock Exch. Rule 609 and 610, N.Y.S.E. Guide (CCH) 4315-16 (1995) [hereinafter NYSE Guide Rules 609 and 610]; *see also* NASD Conduct Rules, Rules 10311 and 10312 (September 1996), *available in* LEXIS, FedSec Library, Manual File [hereinafter NASD Manual Rules 10311 and 10312].

providing that courts may overturn arbitration decisions '[w]here there was evident partiality or corruption in the arbitrators."[121]

Under these SRO guidelines, the arbitration panel is composed of people desirable to both parties. However, the quality of the group of arbitrators inevitably determines whether this outcome can be reached. As one commentator has aptly stated, "[t]he most even-handed system of selecting arbitrators from a pool is useless if the method of selecting arbitrators for the pool is biased. A pool composed entirely of corporate CEOs would surely decide for employers more often. . . ."[122] Some courts have taken the issue very seriously.[123]

Aside from allegations of bias, some commentators argue that the NYSE arbitrators do not know what they are doing when it comes to discrimination law.[124] Even experienced arbitrators are not always well-steeped in employment law.[125] The NYSE is faced with "a burden for which it simply was not prepared and probably still is not prepared, that is, to deal with public law issues for which it was not trained, had no background, no experience, and no philosophy."[126] Simply, neither employment nor discrimination law is the area of the arbitrator's competence.

Most of the SRO arbitrators are experts in securities issues, but not discrimination issues.[127] The GAO report stated that neither the NYSE nor NASD assigns arbitrators to the panels on the basis of subject matter expertise.[128] "According to one NYSE official, the determining issue in assigning an arbitrator to a panel is whether the arbitrator can determine the facts of a dispute, not whether he or she has expertise appropriate to the type of dispute being decided."[129] As one commentator has stated,

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121 *Gilmer*, 500 U.S. at 30. *See also* 9 U.S.C.A. § 10(a)(2) (West 1970); *accord* Crisan v. A.G. Edwards & Sons, Inc., No. Civ. 94-20025, 1996 WL 67317, at *3 (N.D. Cal. 1996) (rejecting plaintiff's argument that "she will not be afforded a fair hearing before an arbitration panel.").

122 Lewis Maltby, *Paradise Lost — How the Gilmer Court Lost the Opporunity For Alternaztive Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1, 21 (1994).

123 *See* Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465, 1482 (D.C. Cir. 1997) (finding that the arbitration agreement at issue provided for neutral arbitrators).

124 *See* Vladeck & Rogers, *supra* note 13, at 1614.

125 *See Mandatory Arbitration, supra* note 85, at 1680.

126 Vladeck & Rogers, *supra* note 13, at 1614.

127 *See Mandatory Arbitration, supra* note 85, at 1681.

128 *See* GAO Report, *supra* note 22, at 3; *see also* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, No 96-12267-NG, 1997 U.S. Dist. LEXIS 7031, at *37-*38 (D. Mass. Apr. 23, 1997) (finding that more discovery is needed to ascertain whether in 1997 the NYSE and NASD panels were biased or inappropriately selected).

129 *See* GAO Report, *supra* note 22, at 3.

> [l]abor law, for those who don't do it, is complicated. You may not have to be a rocket scientist, but you have to spend time [learning about it]. A few sessions . . . where highly experienced law attorneys provide [instruction] . . . is not going to produce a body of arbitrators that are skilled in labor law matters.[130]

The GAO recommended that the SROs assess and maintain information on arbitrators' expertise, and use this information to choose arbitrators for discrimination cases.[131] The report called for SROs to train a portion of the existing arbitrator pool, or perhaps to recruit arbitrators who are experts in discrimination law.[132] The SROs have also been asked to expand training programs in order to give a balanced presentation of discrimination issues that may arise in industry disputes.[133]

In an attempt to overcome such problems, both NYSE and NASD have conducted two-hour training programs for arbitrators.[134] These seminars were designed to provide an awareness of the issues involved in discrimination law.[135] As two defenders of the system suggest, "[a]rbitrators are bound to be more knowledgeable than members of a jury. . . . 'There is no reason to think that a judge's instructions to a jury leave it better informed than trained arbitrators.'"[136] Additionally, "[t]hose who criticize the supposed lack of legal training by arbitrators ignore the fact that juries have no training in discrimination law."[137]

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130 Vladeck & Rogers, *supra* note 13, at 1629. *See also* GAO Report, *supra* note 22, at 13 ("Discrimination suits are inherently different from the usual types of employment disputes arbitrated by SROs because they involve issues in federal civil rights laws that lie beyond the scope of securities statutes and industry practices.").

131 *See* McGuire et al., *supra* note 24, at 72-73 (discussing the GAO recommendations); *see also* GAO Report, *supra* note 22, at 17 ("We recommend that SEC direct SROs to . . . assess and maintain information on arbitrators' expertise and use this information when selecting arbitrators to serve on panels, especially those deciding discrimination disputes.").

132 McGuire et al., *supra* note 24, at 73.

133 *See id.*

134 *See* Blackman, *supra* note 97, at 5 (stating that the program "was designed to provide arbitrators an awareness of the issues involved in discrimination law."). One option being explored by the NASD is to have one member of the panel have expertise in employment law. *See* Charkes, *supra* note 116, at 5 ("[B]oth the NASD and the NYSE provide seminars around the country for arbitrators.").

135 *See* Blackman, *supra* note 97, at 5 (pointing out that it was not until the 1990s that arbitrators handled discrimination cases). Attorneys defending arbitration claim that such an overview of the basics is enough to get the arbitrators started. *See id.* They cautioned that arbitrators should not be expected to be experts, and so it is up to the attorneys of both parties to educate them with additional necessary background and by zeroing in on the two or three core issues in their written briefs to arbitrators. See *id.*

136 *Id.* (citing David E. Robbins, partner at Kaufmann, Feiner, Yamin, Gildin, & Robbins, and quoting Theodore E. Rogers, partner at Sullivan & Cromwell).

137 Vladeck & Rogers, *supra* note 13, at 1620.

The court in *Gilmer* did not address the argument that the mandatory arbitration of discrimination claims is inappropriate because arbitrators in the securities industry are not experienced in employment law.[138] Because this argument attacks the adequacy of the arbitrators, the issue may be precluded by the *Gilmer* decision as an argument "res[ting] on the suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants."[139] Thus far, there has been no court that refused to compel an arbitration agreement because of the possibility that the arbitrators are not schooled in employment law.

4. *Discovery*

Under the Federal Rules of Civil Procedure, discovery includes the use of depositions, written interrogatories, production of documents, and sanctions for failure to cooperate in discovery.[140] In a civil trial, discovery is vital to the plaintiff's case because [m]uch of the evidence necessary for an employee to prove discrimination or other claims against an employer is in the hands of the employer; conversely, much of the evidence necessary to defend against such claims may well be in the hands of the employee. Evidence crucial to a case's resolution is often obtainable only through the use of various discovery devices.[141] One plaintiff has asserted that discovery, along with pretrial and trial procedures and the rules of evidence, is meant to level the playing field between the parties.[142] "This is especially important in employment discrimination cases where the claimant is often a person of limited means battling a defendant with far deeper pockets."[143]

Unlike a civil trial, in arbitration, there is much more limited discovery, which may favor the employers.[144] But courts have upheld arbitration agreements despite the difficulty of proof in statu-

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138 *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, (1991); *see also* Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc., 957 F. Supp. 1460, 1472 (N.D. Ill. 1970) (recognizing the concern by many legal commentators regarding the competence of arbitrators to effectively enforce public laws and regulate the workplace, but still following the holding in *Gilmer*).

139 *Gilmer*, 500 U.S. at 30 (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989)).

140 *See generally* FED. R. CIV. P. 26-37.

141 Arthur F. Silbergeld & Mark B. Tuvim, *Terms of Arbitration Agreement May Affect Employment*, EMPLOYMENT REL. TODAY, Dec. 1, 1995, at 95, available in 1995 WL 12245787 (arguing that discovery should be provided).

142 Brief for Appellee, Klieforth v. Benefits Communication Corp., No. 92-CV-996, C874 ALI-ABA 567, 600-01 (D.C. App. Super. Ct. 1993).

143 *Id.*

144 *See* Silbergeld & Tuvim, *supra* note 141, at 95.

tory discrimination cases.[145] The court in *Gilmer* addressed and dismissed the concern that the lack of discovery makes arbitration inferior to judicial resolution of disputes.[146] The *Gilmer* Court considered the NYSE guidelines to allow for adequate discovery by allowing for "document production, information requests, depositions, and subpoenas."[147] The court also relied on the fact that the party agreed to arbitrate; in doing so, it "trade[d] the procedures and opportunity for review of the court for the simplicity, informality, and expedition of arbitration."[148] But this explanation only works if it is true that the employee indeed "agreed" to arbitrate. When deciding on a motion to compel arbitration, courts should at least allow for discovery to determine whether the employee has knowingly agreed to arbitrate.[149]

The *Gilmer* court suggested that the shortcomings of the reduced discovery in securities arbitration is tempered by the fact that arbitrators are not bound by the rules of evidence.[150] However, arbitrators not being bound by the rules of evidence can put a woman in a sex discrimination claim at a severe disadvantage. For instance, some evidentiary rules were specifically drafted to protect the claimant against invasion of privacy, potential embarrassment, and sexual stereotyping, or help claimants if there are no witnesses.[151] Thus, the claimant is impeded by the limited discovery

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145 *See* Energy Factors, Inc. v. Nuevo Energy Co., No. 91 CIV 4273, 1992 WL 110541, at *3 (S.D.N.Y. Apr. 29, 1992).

146 *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (reasoning that "[i]t is unlikely . . . that age discrimination claims requires more extensive discovery than other claims that [the Supreme Court has] found to be arbitratable, such as RICO and antitrust claims."); *accord* Willis v. Dean Witter Reynolds, Inc., 948 F.2d 301, 310 (6th Cir. 1997) (reasoning that the NASD arbitration code makes the same discovery tools available as the NYSE provisions); *see also Energy Factors Inc.*, 1992 WL 110541, at *3 (finding no proof that "an insider trading claim is sufficiently more elusive to warrant departure from the strong federal preference for arbitration.").

147 *Gilmer*, 500 U.S. at 31; *see generally* New York Stock Exch. Rule 619, N.Y.S.E. Guide (CCH) 4319-21 (1995) [hereinafter NYSE Guide Rule 619] and National Association of Securities Dealers Manual § 10321 [hereinafter NASD Manual Rule 10321] ("The parties shall cooperate to the fullest extent practicable in the voluntary exchange of documents and information to expedite the arbitration.").

148 *Gilmer*, 500 U.S. at 31.

149 *See* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, No. 96-12267-NG, 1997 U.S. Dist. LEXIS 7031, at *40-43 (D. Mass. Apr. 23, 1997) (allowing for discovery to resolve issues of adequacy of the NYSE forum and the circumstances surrounding the plaintiff's waiver of rights to a federal forum).

150 *See Gilmer*, 500 U.S. at 31.

151 *See, e.g.*, Fed. R. Evid. 412 (the prior sexual acts or sexual disposition of the alleged victim in a sexual assault case is inadmissible); Fed. R. Evid. 415 (evidence of similar acts by the accused in a sex assault case is admissible). But some commentators suggest that the process can favor the claimant. *See* Blackman, *supra* note 97, at 5 (stating that arbitration is not burdened by the formal procedures, standards, and evidentiary rules that are applied in the court system). For instance, arbitrators may consider arguments that would normally be thrown out of court because they lack merit. *See id.* In addition, there is no mo-

but is subject to questions about her own sexual history, something that could not happen in a courtroom.

5. *Punitive Damages*

The availability of punitive damages is one of the most debated issues in matters relating to arbitration.[152]

> Punitive damages provide a civil source of public retribution and are designed to punish the wrongdoer and to deter the wrongdoer and others from repeating the same offense. . . . [T]hey provide an incentive to wronged parties to pursue causes of action where tangible harm and resulting damages are nominal but where the defendants behavior subjects society to substantial risks.[153]

One of the reasons the securities industry has long favored arbitration is because arbitrators are believed to be less likely than juries to enter large punitive damages awards.[154] But arbitration agreements sometimes restrict the types of relief an arbitrator may award, including punitive damages.[155] As one commentator suggests, an agreement to waive punitive damages might be an unenforceable waiver of employees' Title VII right to seek statutory damages.[156] To do this would be to deprive a woman of the possibility of collecting reparations for sex discrimination and punishing the violator in the process.

In a recent report ("Ruder Report") the securities industry has argued that "[1]) punitive damages are inappropriate in a system, such as securities arbitration, where the procedural safeguards and right to appeal are limited, and [2]) punitive damages issues interfere with the goals, merits, and functions of the securities arbitra-

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tion to dismiss for failure to state a claim or summary judgment, two mechanisms that keep many claims from even getting to trial. *See id.*

152 *See Mandatory Arbitration, supra* note 85, at 1681.

153 Julie A. Friedlander, *Punitive Damages as a Remedy for Discrimination Claim Arbitrations in the Securities Industry*, 23 HOFSTRA L. REV. 225, 230 (1994) (criticizing punitive damage awards by arbitration panels due to the lack of judicial review). *See* 25 CORPUS JURIS SECONDUM § 2 (citing Monongahela Nav. Co. v. United States, 148 U.S. 312, 326 (1893)).

154 *See* Frankhauser, *supra* note 41, at 1359. Unfortunately for the employers, this has not always been the case because there are occasions where arbitration panels award large amounts of punitive damages. *See id.*; *see also Gilmer*, 500 U.S. at 30 (reasoning that the arbitrator has the ability to afford claimants the same substantive relief as available in federal court).

155 *See Gilmer*, 500 U.S. at 32 (citing NYSE Guide Rule 627(e)); *see also* Frankhauser, *supra* note 41, at 1359-61 (providing a detailed analysis of the development of the issue of punitive damages awarded by arbitrators).

156 *See Mandatory Arbitration*, supra note 85, at 1682; *see also* 42 U.S.C.A. § 1981a (Supp. 1993).

tion system."[157] As a matter of public policy, the industry asserts that punitive damages are

> [I]ntended to serve a broad societal purpose of deterring misconduct; they are not intended to compensate individual claimants . . . [whereas] arbitration is a private mechanism designed to resolve particular disputes in an inexpensive, efficient and expedited forum. A private forum, without the safeguards and procedures of the judicial system, does not have the capacity to impose penalties intended to protect the public welfare.[158]

The Ruder Report acknowledged that although the industry's argument that procedural safeguards are more limited in the arbitral forum, concerning rights to appeal, "it is vital that investors believe their rights to be appropriately recognized in the NASD arbitration system."[159] It should similarly be important for a woman to believe her rights to be appropriately recognized. The Ruder Report thus recommended that the NASD retain punitive damages subject to a cap of two times compensatory damages or $750,000, whichever is less.[160]

III. The Benefits of Arbitration

A. *Why Arbitration Is Popular*

Employers have fared rather well in arbitrating employment discrimination claims before the NASD and NYSE.[161] In a survey of NASD and NYSE awards involving discrimination claims, employers prevailed seventy-five percent of the time in the NASD, and sixty percent on the NYSE.[162] The awards in the two decisions won by the employee did not exceed $6,000.[163] In the NYSE, the employers won sixty percent of the employment disputes arbitrated, and

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157 1996 *Securities Arbitration Reform: Report of the Arbitration Policy Task Force to the Board of Governors National Association of Securities Dealers, Inc.* at 36 [hereinafter *Ruder Report*]. This report, chaired by former SEC chairman David Ruder, was prepared by the Arbitration Policy Task Force. The Ruder Report studies the securities arbitration process administered by the NASD and makes suggestions for its reform. *See id.*; *see also* Dominic Bencivenga, *Securities Arbitration: NASD Panel Proposes Far-Reaching Changes,* 217 N.Y.L.J. 5 (June 26, 1997) (reporting on certain proposed changes in NASD regarding arbitration).

158 *Ruder Report, supra* note 157, at 36.

159 *Id.* at 40-41.

160 *See id.* at 42. The Ruder Report made this suggestion in part to protect broker-dealers from "'runaway' awards that have no relationship to compensatory damages", and to "reduce the fear that a brokerage firm could be bankrupted by an arbitral award." *Id.* at 43.

161 *See* Bompey & Pappas, *supra* note 26, at 208.

162 *See id.* This survey was conducted by the *Securities Arbitation Commentator Publication,* P.O. Box 112, Maplewood, New Jersey 17040. *See id.* at 215-16 n.23.

163 *See id.*

prevailing claimants have been awarded substantially more in damages.[164]

However, these statistics may only tell part of the story. The Securities Industry Association ("SIA") has conducted a study in an attempt to show that employees fare better in arbitration than litigation, and that arbitration is faster and *has discovered comparable percentages*.[165] The SIA also found that the employee succeeded in only nineteen percent of the time in civil trials at the Southern District of New York.[166] As for speed, the SIA also found that arbitrations lasted about sixteen months in both the NASD and NYSE, while litigations were significantly longer, lasting almost twenty-nine months in the Southern District of New York.[167]

Employers in the securities industry tend to favor arbitration because of concerns about time and money.[168] In 1994, the Dunlop Commission[169] found that litigation is expensive and that court processes make it difficult for employees to pursue claims.[170] The Commission also found that more than one dollar is spent in costs, attorney's fees, and other "wasted money" for each dollar that goes to a claimant in compensation for a court finding of discrimination.[171] The Commission found that the costs, difficulty, and complication of employment litigation ultimately restrict litigation to upper-level professionals, usually complaining of their termination.[172] As even some opponents of mandatory arbitrations

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164 *See id.* For instance, in one case, a prevailing sex discrimination claimant was awarded more than $400,000. *See id.*

165 *See* Coffee, *supra* note 7, at 5 (analyzing the SIA's findings).

166 *See id.* Mr. Coffee points out that the statistics can be misleading because cases settle disproportionately more in civil trials than they do in arbitration because of the likelihood of the "runaway jury" award. *Id.* Additionally, the definition of "prevail" is unclear because, for instance, if "a panel awards $10,000 to a claimant who sought $1 million, it is questionable which side actually 'won.'" *Id.*

167 *See id.*

168 *See* Vladeck & Rogers, *supra* note 13, at 1618. Judges favor arbitration as well because they "realize that they cannot handle the tidal wave of employment discrimination claims." *Id.* *See also* Alex Friend, *State Litigators Watching as Arbitration Zooms as Fastest Growing Legal Trend*, WARFIELD'S BUS. REC., Nov. 6, 1992, at 21, *available in* LEXIS, News Library, Warfld File (discussing the growth of arbitration to adjudicate civil disputes since "[t]he nation's state and federal courts have become so overloaded with criminal cases that it often takes two years to resolve a civil dispute.").

169 *See* Vladeck & Rogers, *supra* note 13, at 1619. The U.S. Departments of Labor and Commerce formed the Dunlop Commission to study worker-management relations. *See id.*

170 *See id.* The report also found that from 1971-1991 the overall number of civil rights cases brought in federal court increased by 110%, and simultaneously the number of employment claims rose by 430%. *See id.* Theodore Rogers, a proponent of mandatory arbitration, suggests that these figures are from before the ADA and 1991 Civil Rights Act became effective, so by now, the increase in discrimination claims may be much larger. *See id.*

171 *See id.*

172 *See id.*

agree, "arbitrators can secure significant savings in overall time and significant savings in overall difficulty for everyone."[173]

B. *Standard for the Validity of Arbitration Agreements*

The Ruder Report has concluded that securities firms should continue using predispute arbitration agreements.[174] It considers arbitration to offer a "more efficient, faster, and cheaper process than court litigation."[175] Further, the Ruder Report stated that "[n]either the independent studies conducted, nor the statistics of the results of customer-broker arbitrations, support [the argument that securities arbitration is unfair."[176] Many commentators understand that arbitration is, today, an acceptable form of dispute resolution but urge for the process to be made fairer to individual claimants.[177]

Many employment lawyers in the securities industry who support mandatory arbitration argue that the system works well and may even favor the employees.[178] However adequate arbitration may be in a general sense, on a case-by-case basis, the process would be fair to the employee while still affording the employer the attractive expedited process. To achieve this, when construing the arbitration agreement, the court should see to it that the waiver of a judicial forum is knowing.[179]

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173 *See id.*

174 *See Ruder Report, supra* note 157, at 18.

175 *Id.*

176 *Id.*

177 *See, e.g.*, Pierre Levy, Gilmer *Revisited: The Judicial Erosion of Employee Statutory Rights*, 26 N.M. L. Rev. 455, 480 (1996) ("Courts . . . [should] see to it that arbitration is both fair and non-coercive."); Turner, *supra* note 21, at 294 ("[The flaws of arbitration] must be addressed if [it] is to assume the fundamental role created by the use of and reliance on employment arbitration."); *Mandatory Arbitration, supra* note 85, at 1692 ("The goal of [these proposals] is to protect employees from exploitation while giving arbitrators the discretion to craft awards that are fast, fair, and responsive to the interests of both parties.").

178 *See* Blackman, *supra* note 97, at 5. "Those unhappy with the system are looking at a well-functioning Chevy and asking why it is not a Cadillac," said one attorney. *Id.* Another attorney who is opposed to mandatory arbitration concedes that some claimants want to choose arbitration for the sake of privacy as well as for cost savings. See *id.* "Even someone with a strong basis for a discrimination suit may fear alienating future employers who may assume anyone bringing a suit is a troublemaker. Going through the courts can generate unwanted publicity and leave a public record of the proceeding, both avoidable with arbitration." *Id.*

179 Silbergeld & Tuvim, *supra* note 141, at 95. This article also suggests that the arbitration agreement allow for the selection of an unbiased arbitrator and allow for adequate discovery. *See id.* However, the NYSE Guide and NASD Manual both contain provisions covering these requirements. *See* New York Stock Exch. Rules 607(a)(1) and 619(a), N.Y.S.E. Guide (CCH) pp 4314 and 4319 (1995) and NASD Conduct Rules, Rules 10308(a) and 10321(a) (Sept. 1996), *available in* LEXIS, FedSec Library, Manual File (covering designation of arbitrators and document and information requests).

1. *Knowing Waiver of Judicial Forum*

The Court in *Gilmer* did not find any indication that the employment agreement was signed because of coercion or fraud, and so upheld the employee's waiver of a judicial forum.[180] However, the court did leave open the opportunity for a court to explore whether there has been a knowing waiver.[181] The Ninth Circuit in *Prudential Insurance Company of America v. Lai* explored whether there was a waiver of statutory court remedies in that particular case, and found no waiver.[182]

Similar to *Gilmer*, in *Lai*, the employer moved to compel arbitration pursuant to a U-4 Form signed by the employee.[183] The plaintiffs in *Lai* alleged that they signed the U-4 form because they were told that they were applying to take a test required for their employment by Prudential and were simply directed to sign the relevant place on the form without being given the opportunity to read the document.[184] They further claimed that the arbitration was never mentioned to them, and had never seen a copy of the NASD manual that contained the actual terms of the arbitration agreement.[185] The court in *Lai* found no waiver because the plaintiffs did not knowingly "contract to forego their statutory remedies in favor of arbitration."[186]

This opinion should be heeded in the opinion of some commentators.[187] "In order to better insure that an arbitration agreement will be found enforceable, there should be a knowing waiver of rights and remedies by an employee of his or her judicial fo-

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180 *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991).

181 *See id.*; *see also* Cremin v. Merrill Lynch Pierce Fenner & Smith, 957 F. Supp. 1460, 1470 (N.D. Ill. 1997) (agreeing that the right to a judicial forum can be waived). The *Gilmer* court did not address the standard governing waiver. *See* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, No. 96-12266-NG, 1997 U.S. Dist. LEXIS 7031, at *23 (D. Mass. Apr. 23, 1997). In the Seventh and Ninth Circuits, waiver must be knowing and voluntary. *See id.* (citing Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997)). The majority of circuits presume mandatory arbitration, even when faced with challenges to the knowingness or voluntariness. *See id.* (citing Benefits Comm. Corp. v. Klieforth, 642 A.2d 1299, 1304-05 (D.C. 1994)).

182 *See* Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299 (9th Cir. 1994).

183 *See id.*

184 *See id.* at 1301.

185 *See id.*

186 *Id.* at 1305. The *Lai* court relied on the words of the U-4 Form which did not "purport to describe the types of abuses that were to be subject to arbitration" and the NASD arbitration clause did not "refer to employment disputes," so the employees were not "put on notice that the were bound to arbitrate Title VII claims." *Id.*; *accord* Turner, *supra* note 21, at 291.

187 *See* Silbergeld & Tuvim, *supra* note 141, at 95 ("Accordingly, language stating how disputes will be resolved should be conspicuous, clear and unambiguous."). *But see* Johnson v. Hubbard Broadcasting, Inc., 940 F. Supp. 1447, 1455 (D. Minn. 1996) ("[T]he *Lai* decision has met with widespread criticism in several circuits.").

rum."[188] One court has allowed discovery to determine whether there has been a waiver.[189] Courts may be more receptive to claims of lack of knowledge depending on how persuasive the plaintiff's affidavit is.[190] In order to protect women from unknowingly waiving their statutory rights, perhaps the U-4 Form and the arbitration clauses of the various exchanges should be more candid and describe some of the types of disputes which may be arbitrable.

In order to ensure uniformity, consistency, and clarity concerning pre-dispute agreements and SRO rules, the Ruder Report recommends that the pre-dispute arbitration agreements contain uniform provisions on critical and procedural issues, be made more readable (preferably in "plain English"), set forth the legal and procedural differences between court litigation and arbitration, and provide clauses of the agreement concerning arbitration in a separate document, or that the section of the agreement containing the arbitration clauses be separately initialed.[191]

IV. CONCLUSION

Arbitration is an inexpensive alternative to litigation. It is not difficult to see why employees sign clauses compelling arbitration; the U-4 Form is an agreement standard to the securities industry. In order to be a registered representative, a company must require its employees to sign the clauses. It is also not difficult to understand why courts often uphold these agreements. The trend in this country has been in favor of arbitration as an acceptable means of dispute resolution. And because of the *Gilmer* decision, courts have the authority to uphold the mandatory arbitration of employment discrimination claims in the securities industry.

The federal courts have overwhelmingly upheld the mandatory arbitration of Title VII claims in the securities industry. In the process, these courts have been faced with claims that mandatory arbitration agreements are unconstitutional, the agree-

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188 Silbergeld & Tuvim, *supra* note 141, at 95.

189 *See* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 97-12267-NG, 1997 U.S. Dist. LEXIS 7031, at *42 (D. Mass. Apr. 23, 1997).

190 *See id.* at *41 (the plaintiff claimed that she did not receive copies of the rules of the NASD or NASD, and there was nothing in the employer's handbookwhich mentioned arbitration.). *But see* Bender v. Smith Barney, Harris Upham & Co., Inc., 789 F. Supp. 155 (D.N.J. 1992) (compelling arbitration even thought the plaintiff asserted that she did not believe the U-4 Form applied to employment related disputes); Beauchamp v. Great West Life Assurance Co., 918 F. Supp. 1091, 1098 (E.D. Mich. 1996) (reasoning that "[i]f planitiff did not make herself aware of the existence or scope of the [arbitration clause], she did so at her own peril.").

191 *See Rosenberg*, 1997 U.S. Dist. LEXIS 7031, at *20. These recommendations are meant to result in giving the investor clear notice and an informed understanding of the arbitration provisions.

ments are contracts of adhesion, arbitrators are biased and not adequately trained, and the process is deficient because there is limited discovery and punitive damages may not be available. With the exception of the defendants in *Lai*, securities firms have been successful in compelling arbitration despite these arguments.

The *Gilmer* decision thus remains good law despite the efforts of special interest groups, legislators, and individual plaintiffs. Women in the securities industry like Helen Walters still must go to arbitration with their sex discrimination claims; it is unknown how many women will choose not to pursue their claims because they perceive the process as unfair and skewed against them. For now, courts can at least be receptive to individual claims of why an arbitration agreement, in that particular case, should not be enforced because of fraud or coercion. Perhaps with *Rosenberg* taking the lead, courts may even be more receptive to investigate levels of knowledge and voluntariness. For firms to be able to avoid the possibility of arbitration agreements not being enforced for these reasons, they should institute the Ruder Report's recommendations to make sure that the employee is knowledgeable about the differences between litigation and arbitration. It appears that if the mandatory arbitration of employment disputes is to be prohibited in the securities industry, then it will have to be because one by one, the regulatory agencies forbid the arbitration of employment disputes, such as the NASD has recently voted to do.

Vincent J. Roldan