The Courts and Legislature Begin to Adopt ADR Methods to Deal With Growing Number of Employment Discrimination Claims

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INTRODUCTION

Congress has to be honest with itself. It cannot continue to pass new anti-discrimination statutes, to underfund the enforcement agencies, and then ignore the burden it has put on the Federal court docket.¹

These statements were recently made by Representative Steve Gunderson (Republican from Wisconsin) as he introduced a new bill to alleviate problems associated with the rise in employment discrimination claims.² Representative Gunderson’s statements reflect the sentiment of a large number of commentators, litigants and others concerned with the problem of overburdened courts.³ This trend of increased federal court litigation is particularly marked in the employment discrimination area.⁴

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2. The bill, entitled the Civil Rights Dispute Resolution Act of 1992, was introduced on October 5, 1992. See infra part V.B for a detailed discussion of the bill.
Increasingly, Alternative Dispute Resolution ("ADR") is being viewed as a way to deal with employment discrimination claims. This article will focus on the Supreme Court and the legislature's growing acceptance of ADR and the manner in which two forms of ADR, arbitration and mediation, can be used in the employment discrimination area.

Part I of this article discusses problems posed by increased caseloads and general dissatisfaction with litigation as a means of resolving disputes. ADR as a possible solution to the increased caseload problem is examined. Two methods of ADR, mediation and arbitration, are reviewed, and the advantages and perceived disadvantages of ADR in general are considered. The historical use of arbitration to resolve disputes under collective bargaining agreements and whether that can serve as a model for arbitration of individual employment discrimination claims, will be explored. In part II, the Supreme Court's growing endorsement of binding arbitration of statutory claims, including employment discrimination claims, is outlined. In part III, questions remaining unanswered concerning the judicial enforcement of agreements to arbitrate employment discrimination cases are discussed. Finally, part IV considers action taken by the federal government to promote the use of ADR in employment discrimination disputes and proposes that a more active stance be taken by the government.

I. ADR AS A SOLUTION TO THE PROBLEM OF INCREASED LITIGATION

A. THE PROBLEM

Since the 1960s, the rate of civil litigation in the United States' federal courts has increased at a tremendous rate. To elucidate, the

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5. ADR refers to a variety of dispute resolution methods including arbitration, mediation, mini-trials, and med-arb. Stephen B. Goldberg et al., Dispute Resolution 12-13 (1985).

The overall federal caseload for the district courts increased 250% between 1960-1983, compared with a 30% increase over the preceding quarter century. The percentage rise in the general docket, however, is dwarfed when compared with the percentage rise of employment discrimination. Employment discrimination filings increased 2166% from 1970 to 1989 while general filings increased 125% over the same period. The recent enactments of the Civil Rights Act of 1991 and Americans with Disabilities Act ("ADA") will surely lead to further increases in the number of employment discrimination cases.

This increase is likely because the ADA expanded the number of workers protected by the employment discrimination laws. The enactments of the ADEA and the 1972 amendments to title VII of the Civil Rights Act of 1964, which similarly expanded the number of workers protected by the employment discrimination laws, resulted in a significant increase in employment discrimination claims. This litigation explosion has resulted in unprecedented problems for the courts and litigants alike. The most obvious are increased delay and expense, problems confronted by both the courts and litigants. As courts become more burdened, they are unable to resolve cases as quickly. Because courts are required to try criminal cases expeditiously, the civil cases languish.

The other problem associated with this increased workload is that judges have less time to spend on individual cases. Judges must decide cases based on less deliberation, rely on law clerks and others to perform traditional functions such as drafting opinions, and spend more time supervising their burgeoning staff. With the judges spending less time on cases, delegating some of their duties to others and overseeing an ever increasing bureaucracy, the quality of justice must suffer as a result of the rising caseload. These problems have led to the search for solutions.

7. The increase in the workload of the United States Court of Appeals was even more dramatic, rising 686% over the same period. Posner, supra note 3, at 59-77.
8. See Donohue & Siegelman, supra note 4.
9. Id. at 984.
10. Judge Posner indicates that both the amount of time allowed for oral argument as well as the number of cases in which oral argument is granted has decreased in the Court of Appeals, giving judges less time to focus on particular cases. Posner, supra note 3, at 119-20.
11. Id. at 102-19.
12. Id. at 129.
B. ALTERNATIVE DISPUTE RESOLUTION AS A SOLUTION

An increasing number of commentators are advocating the use of ADR to resolve cases and are exploring the contours of its usefulness. ADR is the broad term used to refer to all forms of dispute resolution other than litigation. Alternative forms of dispute resolution have long been used to resolve conflicts. With the explosion of litigation since the 1960s, however, renewed focus has been placed on these methods.

Although there are several methods of ADR that are available to help parties resolve their disputes. This article will focus on two of the most widely used — mediation and arbitration. The general use of mediation and arbitration and their advantages and perceived shortcomings will be outlined.

1. Mediation and Arbitration

a. Mediation

In mediation, a third party generally knowledgeable in the area of the dispute, assists the parties in coming to a mutually agreed upon solution. The mediator has no power to make a decision for the parties; his role is limited to assisting the parties to reach their own agreements. The mediator must work closely with both parties in helping them assess their positions and the areas where they are willing to compromise. He must create an environment where productive

13. See supra note 6.
14. Goldberg, supra note 5, at 3.
16. Professor Goldberg gives a short review of the renewed interest in ADR and the possible reasons for it. Goldberg, supra note 5, at 3-7.
17. The various methods include arbitration, mediation, med-arb, rent-a-judge, mini-trials, summary jury trials, and the use of ombudsmen and private fact-finders. Professor Goldberg outlines the characteristics of various ADR methods. Goldberg, supra note 5, at 5-6; see also Donovan Leisure Newton & Irvine ADR Practice Book 4-8 (John H. Wilkinson ed., 1990) [hereinafter ADR Practice Book].
20. The mediator's role is described as follows: "The mediator, of course, is the turbocharger who helps organize and bring about the exchanges of information between the parties. At some point, the mediator typically isolates the parties and visits each separately in caucus, encouraging the parties to examine their positions carefully, determine realistic goals, and move toward resolution." ADR Practice Book, supra note 17, at 115.
negotiations and compromise can take place. Therefore, the success of negotiations is dependent upon the trust and comfort level that the parties have for the negotiator.\textsuperscript{21} Mediation seems particularly effective in situations where the parties have an ongoing relationship and, thus, have a strong incentive to come to a mutually agreed upon solution.\textsuperscript{22}

The format of mediation proceedings tends to be informal. The parties first jointly meet with the mediator and summarize their positions. The mediator also listens to the testimony of any witness and reviews documentary evidence. The mediator then caucuses with the parties to help them analyze the factual and legal aspects of their positions. His discussions with each party are confidential. After meeting with each side, he facilitates settlement by attempting to persuade the parties to consider alternatives and to communicate offers and counteroffers. As the process ensues he continues focusing each side on the merits of its case. The exchange of written material tends to be limited. Mediation typically takes no longer than one to three days.\textsuperscript{23}

b. Arbitration

In arbitration, unlike mediation, the parties generally relinquish power to the arbitrator to make a decision for them.\textsuperscript{24} The parties are each permitted an opportunity to present their cases to the neutral arbitrator prior to the arbitrator’s decision. In this way, arbitration is similar to judicial resolution of a dispute. Parties to the arbitration can tailor the process to serve their own needs. Therefore, it tends to be less formal than courtroom adjudication.

The process in an arbitration is more formal than in a mediation. A hearing is generally held at which parties may present and cross-examine witnesses and introduce exhibits and other evidence.\textsuperscript{25} Opening and closing statements are generally made by each side.\textsuperscript{26}

\begin{itemize}
\item \textsuperscript{21} "The mediator's impartiality is of paramount importance. If the mediator is a friend of one party, the process can backfire and undermine the trust of the other side, making the mediator's job more difficult." \textit{Id.} at 120.
\item \textsuperscript{22} Professor Goldberg states, "When an ongoing relationship is involved it is important to have the parties work out their own solution, for such a solution is more likely to be acceptable to them than an imposed solution and hence more long-lasting." \textit{Goldberg, supra} note 5, at 10.
\item \textsuperscript{23} For a general discussion of the procedures, see ADR Practice Book, \textit{supra} note 17, at 114-17; Rogers & McEwen, \textit{supra} note 18, at 7-10.
\item \textsuperscript{24} Frank Elkouri & Edna A. Elkouri, \textit{How Arbitration Works} 2 (1985); Trotta, \textit{supra} note 15, at 23.
\item \textsuperscript{25} For a description of arbitration procedures, see Elkouri & Elkouri, \textit{supra} note 24, at 222-95; Trotta, \textit{supra} note 15, at 90-105.
\item \textsuperscript{26} Elkouri & Elkouri, \textit{supra} note 24, at 267-68.
\end{itemize}
parties often submit post-hearing briefs outlining their positions. 27 But, the arbitrator is not bound by the rules of evidence and is generally liberal in admitting evidence. 28 The arbitrator’s decision is called an award. The award should be short and concise and it is generally in writing. 29

c. Primary Differences

There are certain key differences between arbitration and mediation. Arbitration is most often final and binding, while mediation is neither final nor binding. Additionally, the arbitrator decides the matter for the parties, while a mediator merely assists the parties in attempting to arrive at a solution. Finally, because arbitration is an adjudicatory process, it generally takes longer and is more expensive than mediation. These varying characteristics make mediation and arbitration helpful in different types of circumstances.

2. Advantages and Perceived Disadvantages of ADR

All ADR methods share certain advantages over litigation. First, ADR methods are generally less expensive than court proceedings because ADR is less formal and the processes themselves takes less time. 30 Second, ADR methods are not subject to the overburdened court calendar, so that delays are not encountered because of the court’s schedule. 31 Third, the decision-maker chosen to aid in the resolution of the dispute is generally an expert in the area because the parties can choose whomever they like to decide their dispute. 32 Fourth, since arbitration, unlike the courts, is a private forum, the resolution of the dispute can be kept confidential. 33 Finally, because ADR is flexible, it can be adjusted to suit the parties’ needs in resolving a particular dispute. 34

These advantages of ADR would seem to make it particularly appropriate for dealing with the problems caused by time-consuming and expensive litigation in the growing number of employment dis-
Dr. and Employment Discrimination cases. Already, a substantial number of corporate litigants are making use of ADR.35 Some commentators have pointed to shortcomings in arbitration, which they contend make it inappropriate for handling discrimination claims. They argue that the procedures in an arbitration are inadequate to protect litigants; that there is too great an imbalance in bargaining positions favoring employers in negotiating arbitration provisions; that arbitrators are not competent to decide statutory claims; and that disputes involving statutes, designed to achieve public ends, are best decided by courts.36 These arguments have largely been rejected by the United States Supreme Court, as will be discussed in part III of this article.

3. Use of Arbitration in Settling Grievance Disputes

Arbitration in the labor area primarily has been used to resolve grievances against employers. The agreement to arbitrate is generally contained in a collective bargaining agreement between the union and management. The union represents the interests of the individual employee in the grievance process. The grievance process consists of a series of steps at each of which the company and union attempt to settle the dispute. If these preliminary steps fail, the final step, arbitration, is triggered to resolve the dispute. The decision of the arbitrator is final and binding on the parties.37

Arbitration became the preferred method of resolving labor disputes at the time of the Second World War.38 Unfortunately, at that time, agreements to arbitrate were not always enforced by state courts and there was no federal policy concerning such agreements.39

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35. Dana H. Freyer, The Integration of ADR into Corporate Law Firm Practice, 45 ARB. J. 4 (Dec. 1990) (discussing the need for law firms to incorporate ADR into their practice to serve the needs of clients interested in using ADR).


37. For a detailed discussion of the grievance and arbitration process, see ELKOURI & ELKOURI, supra note 24, at 153-211, 222-95.

38. Arbitration became the primary method of resolving grievances largely through the efforts of the National War Labor Board. The Board was created by President Roosevelt on January 12, 1942 and was charged with resolving labor disputes which might disrupt the war effort. The Board engaged in a policy of actively encouraging and, in some cases, ordering parties to include arbitration provisions in their collective bargaining agreements. Martin H. Malin, Forward: Labor Arbitration Thirty Years After the Steelworkers Trilogy, 66 CHI.-KENT L. REV. 551, 552-53 (1990); TROTTA, supra note 15, at 18.

39. At common law, agreements to arbitrate were not enforceable and some state courts continued to follow that common law rule. Malin, supra note 38, at 553-56.
This changed with the passage of the Labor Management Relations Act ("LMRA") of 1947, which declared a federal policy in favor of using arbitration to resolve grievance disputes.\(^4\) Under section 301(a) of the LMRA, the federal courts have jurisdiction to decide disputes for violations of collective bargaining agreements.\(^4\) Applying the LMRA, the United States Supreme Court provided a broad mandate in favor of arbitration.

In *Textile Workers Union v. Lincoln Mills*,\(^4\) the Supreme Court decided that the federal courts have the authority under section 301(a) to create a federal common law for the enforcement of arbitration clauses in collective bargaining agreements. The *Lincoln Mills* decision was followed by a series of three cases, referred to as the Steelworkers Trilogy.\(^3\) In these cases, the Supreme Court established a standard of judicial deference to the arbitrator's decision resolving a dispute.\(^4\) The Court found that this deference was warranted because arbitration was part of the parties' "system of industrial self-government." The Court saw arbitration as the chosen manner for the union and management to resolve the unforeseen problems that arise in their continuing relationship, and that court interference would generally be unwarranted.\(^4\)

Under this deferential standard from the Court, arbitration under collective bargaining agreements has flourished. Most collective bar-

\(^{40}\) "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. § 173(d) (1988).

\(^{41}\) Section 301(a) states that "[s]uits for violation of contracts between an employer and a labor organization representing employees ... may be brought in any district court of the United States having jurisdiction over the parties." 29 U.S.C. § 185(a) (1988).

\(^{42}\) 353 U.S. 448 (1957).


\(^{44}\) In *Enterprise Wheel*, the Court stated that "[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements." 363 U.S. at 596. It added that an arbitrator's decision is valid "so long as it draws its essence from the collective bargaining agreement." Id. at 597. In *Warrior & Gulf Navigation*, the Court found a presumption in favor of arbitration in collective bargaining agreements. 363 U.S. at 583-85. Finally, in *American Manufacturing Co.*, the Court stated, "[t]he function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator." 363 U.S. at 567-68.

\(^{45}\) *Warrior & Gulf Navigation Co.*, 363 U.S. at 580-82.
gaining agreements now contain agreements to arbitrate.46 This success of arbitration in the collective bargaining area has fueled interest in extending arbitration to other areas, including employment discrimination. Arbitration of employment discrimination claims would differ, however, from arbitration of collective bargaining cases in some important respects.

First, arbitration of collective bargaining disputes generally involves interpretation of the terms of a collective bargaining agreement, while arbitration of employment discrimination claims involves interpretation of statutes. Additionally, in negotiating arbitration provisions under collective bargaining agreements, union and employers have relatively equal bargaining positions, while an employer has much greater bargaining position than an employee in negotiating an arbitration clause in an employment contract. Finally, arbitration under a collective bargaining agreement is part of the system of industrial self-government, while arbitration under an employment contract is a way of alleviating the overcrowded court docket and expeditiously resolving a case. Because of these and other differences, commentators have urged caution in extending arbitration from the collective bargaining context to resolve individual employment discrimination cases.47

II. THE SUPREME COURT'S GROWING ENDORSEMENT OF ARBITRATION

A. INITIAL RELUCTANCE TO ENFORCE STATUTORY CLAIMS

Even though the Supreme Court strongly endorsed arbitration under collective bargaining agreements, the Court was initially reluc-

46. Professor Goldberg stated that more than 95% of all collective bargaining agreements contain provisions for final and binding arbitration. GOLDBERG, supra note 5, at 189.

47. Professor Estreicher argues that since the rationale for adopting arbitration in employment discrimination cases is not the same as the rationale for arbitration of collective bargaining agreements, the standard of judicial deference of arbitration awards under collective bargaining agreements cannot be readily adopted to arbitration awards under individual contracts. See Samuel Estreicher, Arbitration of Employment Disputes Without Unions, 66 CHI.-KENT L. REV. 753, 757-60 (1990). Professor Getman contends that it is the strength of unions and the collective bargaining process that makes arbitration under collective bargaining agreements successful. He does not believe that arbitration can be extended to other areas without these features, based merely upon the success of the process under collective bargaining agreements. Julius G. Getman, Labor Arbitration & Dispute Resolution, 88 YALE L.J. 916, 917 (1979).
tant to enforce agreements to arbitrate statutory claims.\textsuperscript{48} In the employment discrimination area this reluctance was demonstrated by the \textit{Alexander v. Gardner-Denver Co.}, decision.\textsuperscript{49} In \textit{Gardner-Denver}, a black employee was terminated and the union filed a grievance on his behalf.\textsuperscript{50} The collective bargaining agreement between the union and management provided for a multistage grievance process culminating in final and binding arbitration. The arbitration clause itself was broad and covered all disputes between union and management and "any trouble arising in the plant."\textsuperscript{51} The arbitrator found the employee was terminated for cause. Then, the employee filed a title VII claim challenging his discharge.

The \textit{Gardner-Denver} Court found that an arbitration agreement in a collective bargaining agreement did not prevent an employee from bringing a title VII claim after the arbitration.\textsuperscript{52} Among the reasons for not enforcing the arbitration agreement, the Court found that arbitration was poorly suited for resolving discrimination claims. The Court stated that "[a]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by title VII."\textsuperscript{53}

The Court followed the \textit{Gardner-Denver} decision with other decisions holding binding arbitration agreements did not preclude claims under other federal statues. In \textit{Barrentine v. Arkansas Best-Freight System, Inc.}, employees submitted their wage claim for a final and binding decision to a grievance committee pursuant to a clause in their collective bargaining agreement and the committee ruled against their claim.\textsuperscript{54} Despite the grievance committee's decision, the Court permitted the employees to pursue their wage claim under the


\textsuperscript{50} Id. at 38-39.

\textsuperscript{51} Id. at 40-41.

\textsuperscript{52} Id. at 42.

\textsuperscript{53} Id. at 56. The Court noted among the shortcomings of arbitration is the arbitrator's primary obligation to the terms of collective bargaining agreement rather than the statute; the arbitrator's area of competence is the law of the shop, not statutory law; arbitration has limited fact-finding; the record is not complete; procedural rules and rules of evidence do not apply; and the arbitrator is not required to give a reasons opinion. Id. at 56-58.

\textsuperscript{54} 450 U.S. at 730-31.
Fair Labor Standards Act. Again, as in Gardner-Denver, the Court expressed distrust of arbitrators handling statutory claims.\(^5\)

Similarly, in McDonald v. City of West Branch,\(^6\) the Court failed to give preclusive effect to an arbitration decision. In that case, a terminated employee challenged a discharge decision through a grievance process established by a collective bargaining agreement between his union and his employer. The grievance procedure culminated in binding arbitration, and the employee's claim progressed through the grievance process to arbitration. The arbitrator decided the employee's discharge was proper. Despite the arbitrator's decision, the Court permitted the employee to file a section 1983 claim in federal court. Again, the court based its decision, in part, upon suspicion over an arbitrator's ability to handle complex legal questions.\(^7\)

**B. THE COURT'S CHANGED APPROACH**

The Court's attitude toward arbitration of statutory claims has changed markedly in recent decisions. In a series of cases beginning with the 1985 decision of Mitsubishi Motors v. Soler Chrysler Plymouth,\(^8\) the Court expressed a position strongly favoring enforcement of agreements to arbitrate. In Mitsubishi Motors, the parties to a commercial transaction signed an agreement to submit all of their disputes with one another to final and binding arbitration. The Court found that this agreement required the parties to submit a federal antitrust claim by one of the parties against the other to arbitration.\(^9\)

Relying on the Federal Arbitration Act\(^6\) ("FAA"), the Mitsubishi Motors Court found a federal policy in favor of arbitration.\(^6\) The Court stated that agreements to arbitrate a statutory claim, which are governed by the FAA, are enforceable unless, "Congress itself has

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55. The Court stated that arbitrators were ill-suited to handle complex legal questions. It also found that arbitrators may be required to apply the terms of a collective bargaining agreement even where it conflicted with statutory law. *Id.* at 743.

56. 466 U.S. at 289-92.
57. *Id.* at 290-93.
59. *Id.* at 640.
evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.\textsuperscript{62} No such intent to preclude arbitration was found in the federal antitrust laws at issue in the case. The Court also reject the same arguments concerning the inadequacy of arbitration that it had earlier accepted in \textit{Gardner-Denver, Barrentine,} and \textit{McDonald.} The Court stated that arbitrators could handle complex legal questions and would enforce the federal laws even where the law conflicted with the terms of the arbitration agreement between the parties.\textsuperscript{63}

The \textit{Mitsubishi} case was followed by other cases finding that statutory claims could be arbitrated. In \textit{Shearson/American Express v. McMahon,}\textsuperscript{64} the Court held claims under the Securities Exchange Act of 1934 and under the Racketeering Influenced and Corrupt Organizations Act could be subjected to final and binding arbitration. Also, in \textit{Rodriquez de Ouijas v. Shearson/American Express,}\textsuperscript{65} the Court enforced an agreement to arbitrate a claim under the Securities and Exchange Act of 1933.

In its most recent decision on the subject, \textit{Gilmer v. Interstate/Johnson Lane Corp.},\textsuperscript{66} the Court, reasoning that there was no evidence that Congress intended that ADEA claims be resolved only in a judicial forum, found that a pre-dispute agreement to arbitrate an ADEA claim was enforceable. The discrimination claim was brought by an employee of a financial services company against his former employer. Upon being hired, the employee was required to register as a securities representative with the New York Stock Exchange ("Exchange"). Under the terms of the registration application the employee "agree[d] to arbitrate any dispute, claim or controversy arising between him and his employer" that was required to be arbitrated under Exchange rules. One of the Exchange rules required arbitration of "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative."\textsuperscript{67}

\textsuperscript{62.} Mitsubishi Motors, 473 U.S. at 628. The burden of proving Congress intended to preclude waiver if a judicial forum is on the party opposing enforcement of the arbitration agreement. \textit{McMahon,} 482 U.S. at 227. The courts examine the text, legislative history and the underlying purpose of the statute to determine congressional intent. \textit{Id.}

\textsuperscript{63.} \textit{Id.} at 633-34.

\textsuperscript{64.} 482 U.S. 220 (1987)

\textsuperscript{65.} 490 U.S. 477 (1989).


\textsuperscript{67.} \textit{Id.} at 1651-52.
After being terminated the employee filed a ADEA claim against his employer. The employer sought to stay the proceeding because of the agreement to arbitrate claims contained in the securities application.  

Following the Mitsubishi line of cases, the Gilmer Court found a federal policy in favor of arbitration under the FAA. The Court also stated that the FAA applied to ADEA claims. The Court then went on to examine the language, legislative history, and purposes of the ADEA to determine whether Congress had demonstrated an intent to preclude arbitration of claims. The Court found nothing that indicated Congress only intended a judicial resolution of ADEA claims. The court also stated that arbitration did not conflict with the ADEA’s purposes. Therefore, the Court held the agreement must be enforced under the FAA. The Court distinguished Gardner-Denver and its progeny on three principal grounds. First, those cases involved arbitration agreements in collective bargaining agreements and an employee’s rights under a collective bargaining agreement were distinct from his rights under a federal statute. Second, under an arbitration conducted under a collective bargaining agreement, an individual employee’s rights may be subordinated to the interests of the union as a whole. Third, the Court noted Gardner-Denver and the other decision were not decided under the FAA.

In reaching its decision, the Court rejected many of the arguments offered in Gardner-Denver and by various commentators against the use of arbitration to resolve statutory claims.

The Court rejected arguments that agreements to arbitrate should not be enforced because the employer has an unfair advantage over the employee in bargaining for arbitration and because arbitrators may be biased in favor of employers. The Court stated that an unequal bargaining position was generally not a reason to refuse to enforce a contract and, under the FAA, an agreement to arbitrate is treated like any other contract. The Court added that a party was free to challenge the agreement to arbitrate on the same grounds that any other contract could be challenged as unenforceable, such as fraud and coercion. Additionally, the Court refused to accept the argument that arbitrators will be biased in favor of employers because employers are more likely than employees to need the services of an arbitrator in the future.

68. Id.
69. Id. at 1652-56.
70. Id. at 1656-57.
71. Id. at 1655-56.
72. Id. at 1654.
Also rejected by the Court were arguments concerning the inadequacy of the arbitration procedure. First, the Court found that the fact that discovery prior to an arbitration is more limited than discovery in federal courts does not make arbitration an unsuitable forum for resolving statutory claims. The Court stated that the plaintiff in *Gilmer* did not show that the discovery provisions provided under the statutory rules in that case would be inadequate to allow him to present his claims.73 The Court stated that the party entering into an agreement to arbitrate trades the procedures of federal courts for the simplicity and expediency of arbitration.74

Next, the Court addressed whether an arbitrator was required to issue a written opinion. After noting that the arbitration rules at issue provided for written opinions,75 the Court noted that lack of written opinions would not impede the development of the law because many claims would still be decided by the courts where, presumably, written opinions would be issued.76 Additionally, settlement of claims presented many of the same problems as lack of written opinions.77

The Court also dismissed arguments that arbitrators should not decide statutory claims because they could not issue equitable and class relief. The Court stated that arbitrators were not restricted from issuing equitable relief. Additionally, the Court noted that even if arbitrators could not issue class relief, they should not be prevented from handling an individual case.78

C. POST-GILMER CASES

The federal appellate courts have extended the reasoning of *Gilmer* to title VII cases. After *Gilmer*, the Supreme Court vacated the Fifth Circuit in *Alford v. Dean Witter Reynolds*,79 for reconsideration in light of its ruling in *Gilmer*, for reconsideration in light of its ruling. Prior to remand, the *Alford* court had refused to order

73. *Id.* at 1654-55. The arbitration rules governing that dispute provided for "document production, information requests, depositions and subpoenas." *Id.*

74. *Id.* at 1655.

75. The Court stated that the applicable arbitration rules "require that all arbitration awards be in writing, and that the awards contain the names of the parties, a summary of the issues in controversy, and a description of the award issued." *Id.* at 1655.

76. *Id.* The Court also stated that the arbitration procedure in *Gilmer* had provisions for a written agreement. *Id.*

77. *Id.*

78. *Id.*

arbitration of a title VII claim. The facts of the case were similar to Gilmer. A stockbroker was discharged from her job and sued for sex discrimination under title VII. The employer moved to compel arbitration pursuant to the agreement to arbitrate. The arbitration agreement was contained in an application to register with a securities exchange that the employee had completed upon being hired. It provided for arbitration of employment disputes. After remand, the Fifth Circuit reversed its earlier ruling, and granted a motion to compel binding arbitration. The Alford court reasoned that the Supreme Court's decision in Gilmer and the similarity between title VII claims and ADEA suits required that the arbitration agreement be enforced.

Other circuit courts presented with similar factual situations have likewise held that title VII claims can be arbitrated. These cases all involved claims by employees in the securities industry, who alleged discrimination in violation of title VII. The employees had completed registration applications with broad arbitration agreements upon being hired. Following the lead of Alford, the courts in these cases enforced the arbitration agreements based upon reasoning of the Supreme Court's decision in Gilmer and the absence of any intent by Congress to preclude arbitration of title VII claims.

The growing endorsement of arbitration by the United States Supreme Court and various lower courts has opened the possibility of arbitration for employment discrimination claims under employment agreements between employers and employees. While the Court rejected most of the policy grounds against arbitration of discrimination claims, it has not yet resolved all questions concerning arbitration of these claims between employers and employees.

III. Unanswered Questions Concerning Arbitration of Discrimination Claims

The decisions of the Supreme Court supporting arbitration of statutory claims leave unanswered some significant questions. The one substantive question remaining regarding enforcement of agreements to arbitrate discrimination claims is whether such agreements con-

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80. 939 F.2d 229 (5th Cir. 1991).
81. Id.
82. See Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991).
83. 971 F.2d at 689-99; 934 F.2d at 933-34; 948 F.2d at 306.
84. 971 F.2d at 699-700; 956 F.2d at 934-35; 948 F.2d at 312.
tained in employment contracts fall within the coverage of the FAA. Other questions relate to the procedures to be applied during an arbitration, the standard of review, and the role of the EEOC.

A. ARBITRATION AGREEMENTS IN INDIVIDUAL EMPLOYMENT CONTRACTS

As stated earlier, the Court’s recent endorsement of arbitration has been grounded on the favored status that contracts to arbitrate enjoy under the FAA. It is uncertain, however, whether employment contracts are covered under the FAA. Gilmer skirted this question by finding that the agreement to arbitrate in that case was not contained in an employment agreement.85

From the plain language of the FAA it is not clear whether employment contracts were meant to be excluded from coverage. Section 1 of the FAA provides, “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 86 The exclusion clearly applies to seamen and railroad workers, but it is unclear what other categories of workers are covered or what is meant by contracts of employment. The limited legislative history of the statute does not clear up the uncertainty created by the statutory language. There appear to be three theories concerning the meaning of the exclusion.

The first theory is that the section 1 exclusion applies only to workers engaged in transporting goods in interstate commerce. The theory is based upon the fact that the two specific classes of workers listed in the exclusion, seamen and railroad workers, are engaged in interstate transport. Therefore, the general category of “any other workers engaged in foreign or interstate commerce” must also relate to those engaged in interstate transport. This theory has found acceptance by a number of courts, before and after Gilmer was decided.87 The major problem with the theory is that there is scant

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85. Gilmer, 111 S. Ct. at 1651 n.2. In Gilmer, the agreement to arbitrate was contained in an application for registration with the New York Stock Exchange. The employee was required to register with the New York Stock Exchange as a condition of employment. Under the terms of the agreement, the employee was required to arbitrate all claims with his employer. The Court found that the application for registration was not an employment agreement. Id.


evidence that the exclusion was added to deal specifically with employees of the transportation industry. Therefore, this first theory does not appear to be the best reading of the section 1 exclusion.

The second reading of the section 1 exclusion is that the general category of "workers engaged in foreign and interstate commerce" was meant to exclude all employment contracts. This theory has found support among some courts and some of the justices of the Supreme Court. It is also supported by the broad definition of commerce adopted by the Court in interpreting another section of the FAA. And there is some limited legislative history supporting this interpretation. This second reading of the exclusion, however, is also problematic. The section 1 exclusion was added in response to protests by

88. The FAA was originally proposed without the section 1 exclusion. After the original bill was proposed, a protest against the bill was started by the president of the International Seamen's Union and joined by American Federation of Labor. Apparently, organized labor feared that the Act would lead to arbitration of interest disputes and take away their right to strike. The protest resulted in the section 1 exclusion. See Estreicher, supra note 47, at 761 n.24. Therefore, while the protest leading to the exclusion appears to have been started by a union for certain transportation workers, it was joined by organized labor in general. The concerns that led to the exclusion have not been peculiar to transportation workers.

89. In the dissent in Gilmer, Justice Stevens and Justice Marshall first found that the arbitration agreement contained in the registration application contained a contract of employment. They then went on to find that section 1 excludes all employment agreements from the FAA. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1660 (1991) (Stevens, J., dissenting); accord Scott v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 98 Civ. 3749, 1992 WL 245506 (S.D.N.Y. Sept. 14, 1992) (dictum); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 311 (6th Cir. 1991) (dictum). This view is also supported by Professor Matthew W. Finkin. See Matthew W. Finkin, Arbitration of Employment Disputes Without Unions, 66 CHI.-KENT L. REV. 799, 802 (1990).


91. See Gilmer, 111 S. Ct. at 1659-60 (Stevens, J., dissenting). The legislative history concerning the meaning of section 1 is sparse. However, one frequently cited quotation supporting this second reading is the statement made by the chairman of the ABA committee which drafted the bill to the Senate Judiciary Subcommittee. He stated: "[The bill] is not intended [to] be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it." Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 4th Sess. 9 (1923).
organized labor against arbitration. Organized labor was concerned about being forced to arbitrate all claims against management. Given that section 1 was included for the benefit of organized labor and the uncertain legislative history, a broad reading of the provision to exclude all labor contracts would seem unjustified. Such a broad reading would also seem unjustified because it would restrict an employer’s and a union’s right to agree to an efficient means of resolving their disputes.

The third reading of section 1 of the FAA is that it was meant to exclude only collective bargaining agreements. This appears to be in accord with the reason section 1 was included — to address the concerns of organized labor. Union leaders at the time saw the FAA as an attempt by government to force them to give up their right to strike in favor of compulsory arbitration of “interests disputes.” They were reluctant to give their right to strike and opposed passage of the FAA. The section 1 exclusion appears to have been included to address the concerns. This reading would not restrict parties from selecting arbitration as the forum for resolving their disputes. It does not appear, however that any courts have been adopted this approach.

At the present time it is uncertain which of these three theories will be adopted by the Supreme Court. Given the Court’s current endorsement of arbitration and its willingness to read the section 1 exclusion narrowly in *Gilmer*, it appears hopeful that the Justices will adopt an approach that will favor arbitration of discrimination claims.

B. ARBITRATION PROCEDURE

Another question not fully answered by the Supreme Court is the extent to which arbitration procedure must parallel that offered in a judicial forum. The Court has rejected generalized arguments that the less formal and less extensive procedures offered in arbitration are inadequate. The Court failed to set any guidelines for the procedures, to be adopted. We examine three areas of procedure — discovery, the rules of evidence and written opinions, and make recommendations for their use in arbitration.

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92. See Estreicher, *supra* note 47, and discussion of Section 1 contained in *supra* note 88.
93. This reading of section 1 is adopted by Professor Estreicher. See Estreicher, *supra* note 47, at 762.
95. See discussion *supra* part III.C.
1. Discovery

The Court in *Gilmer* indicated that it would adopt a flexible approach in assessing the adequacy of discovery. The court stated that it would not overturn the discovery procedure if it provided the claimant with a fair opportunity to present his case.\(^9\) The minimum procedural requirements, however, are likely to vary with the circumstances of the case.

When determining what is needed to afford the claimant a fair opportunity, the court should generally defer to the judgment of the parties or the arbitrator as to the extent of discovery. Given the flexibility of arbitration, the parties can set the amount of discovery to suit their needs. Only where it appears that a party was unreasonably denied any discovery or discovery was very limited, should the court consider ordering a new arbitration, with a greater opportunity for discovery.

2. Rules of Evidence

Generally, in arbitration, the rules of evidence are not closely followed.\(^9\) This benefits the parties by allowing them to expedite the proceeding and introduce evidence freely. The *Gilmer* court acknowledged that the rules of evidence did not apply in an arbitration and found this a favorable aspect of arbitration in some respects because it counterbalanced the reduced discovery available.\(^9\) It does not appear that there is any significant danger presented if the arbitrator does not strictly follow the rules of evidence. There is no jury that is in danger of being prejudiced by the introduction of evidence. Therefore, the courts should be extremely reluctant to reverse an arbitration award because a particular rule of evidence or the rules of evidence generally were not followed.

3. Written Decisions by the Arbitrator

The *Gilmer* Court has left it somewhat unclear whether a written opinion must be issued by the arbitrator.\(^9\) Arbitrators generally issue

\(^9\) See *supra* part I.B.1.b.
\(^9\) *Gilmer*, 111 S. Ct. at 1655.

\(^9\) In *Gilmer*, the arbitration procedure at issue required written opinions. However, the Court did not seem to find the prospect of no written opinions troubling. Addressing concerns that lack of written opinions will prevent public knowledge of the dispute, inhibit the development of the law and preclude effective appellate review the Court stated, "judicial decisions addressing ADEA claims will continue to be issued [even if arbitrators do not issue opinions] because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements." *Id.*
written opinions, and it would seem appropriate to require them to do so. Without written opinions, it would be extremely difficult for the court to review an arbitrator’s decision and, as stated in the next section, the court still retains some power for such a review.

Written opinions provide the court with some meaningful basis to review an arbitrator’s decision. The arbitrator’s opinion does not have to be long. It can merely recite some of the salient facts of the case, the authorities relied upon by the arbitrator in reaching his decision and a brief analysis setting forth the result. This will enable the court to make sure that the arbitrator applied the relevant authority in the case.

4. Role of the EEOC

An employee is generally required to file a charge with the Equal Employment Opportunity Commission (‘‘EEOC’’) prior to filing an employment discrimination action in federal court. During this period, the EEOC is given an opportunity to become apprised of the claim and file on behalf of the employee if it so chooses. To preserve the EEOC’s role, Professor Estreicher suggests that arbitration should be stayed during this period provided for the EEOC to review the claim. He adds that the EEOC could then decide whether to file an enforcement action, precluding private resolution of the dispute. In considering whether to file a claim, the EEOC would also assess the adequacy of the arbitration procedures.

More important, the Supreme Court also envisioned a continued role for the EEOC in cases that are arbitrated. In addressing the concern that arbitrators could not award classwide or equitable relief in Gilmer, the Court stated that “it should be remembered that arbitration agreements will not preclude the EEOC from bringing actions seeking classwide and equitable relief.” The Court did not state, however, that the administrative review process must be completed before a matter can be arbitrated. And there does not appear to be any reason to impose such a requirement. The administrative review by the EEOC is merely part of the procedure the parties have

100. See supra part I.B.1.b.
103. Estreicher, supra note 47, at 790-91.
104. Id.
chosen to forego in favor of a private resolution of the dispute. Estreicher’s proposal can thwart the will of the parties. Despite their agreement to a private, expedient resolution of the dispute, under his proposal the EEOC can force a public, time-consuming and expensive forum upon them. Under Estreicher’s proposal, the EEOC would even have the power to decide if the procedure agreed to by the parties is adequate. Furthermore, Professor Estreicher’s approach also places additional burdens on the already overburdened EEOC because it must closely examine the arbitration procedure prior to deciding whether to follow an arbitration or file an enforcement action.

Because the arbitrator is in a position to take appropriate action in a case, the EEOC has no further role. If the arbitrator cannot afford the remedies sought by the parties, such as classwide relief, the parties can, then, seek relief from the EEOC.

C. STANDARD OF REVIEW BY THE FEDERAL COURTS

The Supreme Court has stated that its review of an arbitrator’s decision will be limited, but it will be “sufficient to ensure that the arbitrator complies with the requirements of the statute.”106 From this statement it is unclear whether the court will review an arbitrator’s legal judgments or merely make sure he took into consideration relevant authority. The better approach would limit the court’s review to whether the arbitrator took into account relevant legal considerations. This approach is consistent with the “manifest disregard” standard for review of arbitrator’s decisions under the FAA.107

While this standard appears to allow great deference to the arbitrator’s judgment, such deference appears justified. The parties chose arbitration knowing its benefits and costs. An arbitration proceeding has the benefits of speed and efficiency, although it lacks formal court procedures and review. These benefits would be lost if arbitration decisions were subject to lengthy delays and appeals. Therefore, the court should not review the arbitrator’s decision for errors of law or fact as it would a lower court decision.

The court, however, should make an additional inquiry in reviewing an arbitration award. It should ensure that the arbitrator had the power to award all the remedies that the claimant would be entitled to under the statute. In agreeing to arbitration, an individual relinquishes the procedures of a judicial forum, not statutory substantive

Finally, the award would be subject to reversal under the standards stated in sections 10 and 11 of the FAA, such as bias by the arbitrator, fraud and corruption.

V. THE LEGISLATURE BEGINS TO EXAMINE THE ADR OPTION

Realizing that federal courts are overcrowded, the federal government is increasingly looking to ADR as an option. However, in the employment discrimination area, the federal government has mainly restricted itself to simply encouraging the use of ADR. While these efforts are a step in the right direction, this article advocates a more aggressive posture by the government. The government should facilitate the use of ADR to resolve employment discrimination claims for parties who wish to use it.

A. CURRENT PRACTICE

The new employment discrimination statutes, both the ADA and the Civil Rights Act of 1991, encourage the use of alternative dispute resolution practices. However, these Acts do not take any concrete steps to provide mechanisms for the use of alternative dispute mechanisms nor do they assure parties that use of arbitration will be considered final and binding by the courts. To create increased use of ADR the government should provide a mechanism to encourage its voluntary use.

110. ADR is enjoying increasing acceptance at the federal level. Federal agencies are required to adopt a written policy on how to implement ADR at their agency under the Administrative Dispute Resolution Act of 1990, 5 U.S.C. § 581 (Supp. 1991). Under the Act, the Labor Department adopted a pilot program which used mediation to resolve disputes. This program was very successful and the Department plans to expand the program. Marshall J. Breger, Labor Dept. Leads Way On ADR, Nat'l L.J., Feb. 15, 1993, at 15-16.
113. Most employment discrimination claims are brought by discharged employees. See Donohue & Siegelman, supra note 4, at 984. These employees have a particular interest in pursuing ADR because they may not have the resources to litigate and have an interest in recovering damages or being reinstated as soon as possible.
B. ENCOURAGING USE OF MEDIATION

Mediation is a procedure where the parties must have implicit trust in the mediator. Therefore, the Congress could encourage the use of mediation by providing a statutory mechanism whereby neutral mediators are chosen by the parties jointly. Additionally, the parties are likely to feel more comfortable about its use if such a mediation is provided for in the law rather than suggested by one of the parties. Some parties may be unfamiliar with mediation and may be reluctant to agree to it. If it is suggested by an opposing party, who they felt may be suggesting it merely as a device to gain a tactical advantage. Parties unfamiliar with mediation are less likely to feel threatened by the idea if it is introduced by a neutral third party, like the government. A federally assisted mediation is just what was proposed by Representative Gunderson and Senator Danforth at the end of the 102nd Congressional session.

The bill provides a mechanism for mediation of claims under title VII, the ADA and section 1981. Under the bill, the claimant or respondent can request mediation fourteen days after the claimant receives a right-to-sue letter. The responding party can also request mediation fourteen days after being notified that a state or federal authority is planning to file a civil action against him. A mediator would be provided by the Federal Mediation and Conciliation Service ("FMCS") or the parties could agree to a mediator who would be bound to follow the rules of the FMCS. After such a request is made, no suit would be filed until the mediation is completed or ninety days have passed.

This bill has three aspects that make it particularly appealing. First, neither party can sue during the time the mediation is taking place, which allows the parties to focus exclusively on mediation. Second, as Representative Danforth stated, "[t]he most important feature of this bill is that mediation is done by a true neutral." Since the mediator is either provided by the government or has to follow procedures outlined by the government, he will not have an appearance of bias for either side. Third, the mediation takes place

114. See supra part II.B.1.a.
115. The bill entitled the Civil Rights Dispute Resolution Act of 1992 was jointly introduced by Representative Gunderson and Senator Danforth on October 5, 1992. It was reintroduced on March 30, 1993 as H.R. 2016. After reintroduction it was referred to the Judiciary Committee and a committee on labor.
at the beginning of the lawsuit before major expenses are incurred in litigation.

This effort by Representative Gunderson is to be applauded and supported because it aids the parties in coming to a time-efficient and inexpensive way of resolving a dispute. The bill could also be extended to resolving ADEA claims.

The limitation of this bill is that mediation may not be appropriate for all discrimination disputes. It must be remembered that in mediation, the parties must agree to a solution, and this may be difficult especially if there are strong animosities between a recently discharged employee and employer. The parties should also be given the opportunity for resolving a claim through arbitration, where a neutral third party can decide the case but which is less expensive and time-consuming than the courts. With the parties having the joint option of arbitration and mediation, the court calendar will also be reduced.

C. ALLOWING USE OF ARBITRATION

We propose that the federal legislature should ensure that employment agreements to arbitrate are enforceable. The legislature could easily accomplish this by removing or amending section 1 so that it is clear that it does not include individual employment contracts. This would alleviate any confusion on the part of courts and assure parties that agreements to arbitrate employment discrimination claims will be enforced.

Although the FAA contains protections against fraud, coercion or bias by the arbitrator, the legislature could amend the FAA to provide additional protection for employees if it so chooses. Given that one of the primary advantages of arbitration is its flexibility, the procedure to be used should remain largely in the hands of the parties. However, to deal with the problem of unequal bargaining position, the legislature may want to include a provision requiring an employer to give the employee the right to accept or reject an arbitration provision in the contract, after the employee has been hired, without it affecting the employee's job status.

By amending the FAA to explicitly require enforcement of agreements to arbitrate, the legislature would reduce uncertainty on the part of employers and employees, encourage arbitration, reduce the number of employment discrimination cases in federal court, and, also, create place any protection for employees that it believes necessary.
Due to a rise in the civil docket in federal courts and the growing dissatisfaction with litigation, ADR is gaining acceptance as a means of resolving such disputes. This article discussed the use of arbitration and mediation to resolve one of fastest growing areas of the federal docket — employment discrimination cases. Old attitudes concerning the inadequacy of arbitration procedures and the perceived inability of arbitrators to resolve statutory claims have largely been rejected by the Supreme Court. But questions do remain concerning the use of arbitration.

Applying the Federal Arbitration Act, the Supreme Court has endorsed arbitration as a way to resolve employment discrimination cases. However, it has left open the question of whether employment contracts fall within the section 1 exclusion to the FAA. While there are various readings of section 1, the one most in accord with the reason for the statute's enactment and with the Courts' current endorsement of arbitration, only excludes collective bargaining agreements from the FAA. Thus, should the court decide to go this far, section 1 can be read to endorse arbitration of employment claims arising outside the context of collective bargaining agreements.

The Court has also left unanswered questions concerning adequate arbitration procedure, the role of the EEOC where parties have selected arbitration, and the standard of review from an arbitrator's decision. First, this article argues that arbitration procedure, including the extent of discovery and the adherence to the Federal Rules of Evidence, should largely be left to the parties to decide. Arbitration procedure is flexible and the parties can adjust it to suit their needs in a particular case. Second, the role of the EEOC should be limited in cases where arbitration is chosen by the parties. The administrative procedure provided by the EEOC is part of the procedure that has been given up by the parties when entering into arbitration. Third, the standard of review should be limited to primarily discovering whether the arbitrator applied the correct standards. Given that the parties chose the arbitrator to resolve the dispute, challenging his legal judgment and factual findings would not be warranted.

Finally, the role of the federal government in expanding the ability of parties to use arbitration and mediation to resolve their dispute was examined. Representative Gunderson has offered a proposal that would encourage the use of mediation by providing a neutral federal mediator and a procedure where parties can mediate prior to a costly litigation. We endorse Representative Gunderson's
efforts because they provide a neutral mediator and a government endorsed procedure for resolving disputes. It is also recommended that the FAA be amended to make it clear that employment agreements are not excluded from its coverage. This would allow parties to negotiate arbitration agreements with the certainty that they would be enforced.