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Proceedings of the 1997 Annual Meeting Association of American Law School Sections on Employment Discrimination Law and Alternative Dispute Resolution

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PROCEEDINGS OF THE 1997 ANNUAL MEETING
ASSOCIATION OF AMERICAN LAW SCHOOL SECTIONS
ON EMPLOYMENT DISCRIMINATION LAW
AND ALTERNATIVE DISPUTE RESOLUTION

(The following is an edited transcript of the proceedings of the joint meeting of the Employment Discrimination Law and Alternative Dispute Resolution Sections at the AALS Annual Meeting, Washington, D.C., January 7, 1997.)

CAROL L. IZUMI, PROFESSOR OF CLINICAL LAW,
GEORGE WASHINGTON UNIVERSITY,
CHAIR, AALS SECTION ON ALTERNATIVE DISPUTE RESOLUTION

It is my pleasure to welcome you to the program today on "Mandatory Arbitration of Employment Disputes." The program is being jointly sponsored by the Section on Alternative Dispute Resolution and the Section on Employment Discrimination Law.

Professor Herbert Bernhardt, who is the Program Chair here with me, has helped to collaborate on assembling what we think is an excellent panel, who will present a variety of perspectives on this controversial topic. Let me first introduce Professor Herbert Bernhardt, who is to my immediate left. Professor Bernhardt is the Chair-elect of the Section on Employment Discrimination Law. He is a Professor of Law at the University of Baltimore, where he has been teaching since 1971. Prior to his association with the University of Baltimore, Professor Bernhardt taught at Rutgers, South Carolina and Northeastern Law Schools. Professor Bernhardt is active as a labor arbitrator. He specializes in teaching labor law and employment discrimination law. Professor Bernhardt will serve as our moderator this morning. Professor Bernhardt will give us a very brief overview, as our first speaker, of the legal developments in this area.

Our second speaker will be Catherine Hagen. Ms. Hagen is a partner in the firm of O'Melveny & Meyers, where she specializes in labor and employment law. Her practice includes the representation of employers in the public and private sectors, in the areas of employment discrimination, National Labor Relations Board and Public Employment Relations Board matters, collective bargaining, wrongful discharge litigation and public employee dismissals and layoff. She has lectured extensively on the subject of sexual harassment and the

Americans With Disabilities Act. She has served as the Chair of the 1990 Southern California Labor Law Symposium, and is on the Executive Committee of the Los Angeles County Bar Labor Law Section, is the co-editor of the 1996 Schlei and Grossman Employment Discrimination Law supplement, and has written extensively and made numerous presentations on the subject.

Our next speaker will be Paul Tobias. Mr. Tobias is the Senior Partner in the firm of Tobias, Krauss & Torchia in Cincinnati, Ohio, where he now specializes exclusively in the rights of individual employees, primarily in wrongful termination litigation. Mr. Tobias is a graduate of Harvard College and Harvard Law School. He has specialized in labor and employment law for 38 years, having represented companies, unions and individual employees. He is the author of ten published articles in the field of labor and employment law, has taught a Labor Law Seminar at the University of Cincinnati and has made over 100 presentations to bar associations and other groups concerning employee rights. Mr. Tobias is the founder of the National Employment Lawyers Association and has served as its first Executive Director, Chairman and Editor of the newsletter, *The Employee Advocate*. He is the author of a three-volume work, *Litigating Wrongful Discharge Claims*.

Following Mr. Tobias we have Marion Zinman, who is the Regional Vice President of the American Arbitration Association. Ms. Zinman is in charge of AAA's White Plains, New York office. She has been with AAA for seventeen years. Ms. Zinman received her bachelor's degree from Cornell University's School of Industrial and Labor Relations, and her M.B.A. from Fordham University's Graduate Business School. She is the author of numerous articles on alternative dispute resolution for the American and New York State Bar Associations and writes regularly for *The Dispute Resolution Times*, an AAA publication. Ms. Zinman is First Vice President of the Cornell NY ILR Women's Network, a member of the Visiting Committee of Fordham's Graduate Business School, and has served as a consultant to the Management Decision Labor Program of NYU Graduate School of Business. During her 17 years with the AAA Ms. Zinman has organized or participated in over two hundred training programs for neutrals, advocates and parties in the ADR process.

Our final speaker will be Professor Ted St. Antoine of the University of Michigan School of Law. Professor St. Antoine is the James E. and Sarah A. Degan Professor of Law. He is a graduate of Fordham College and Michigan Law School, and did post-graduate work in

law and economics at the University of London. He practiced labor law with the firm of Woll, Mayer & St. Antoine in Washington, D.C., and joined the Michigan Law faculty in 1965. He was the Dean of the Michigan Law School from 1971 to 1978. He is a past secretary and council member of the ABA's Labor and Employment Law Section, and past Chair of the Michigan Bar's Labor Relations Law Section. He has served as Vice President of the National Academy of Arbitrators and Chair of the UAW-GM Legal Services Plan. Professor St. Antoine is currently a member of the UAW's Public Review Board. From 1987 to 1992 Professor St. Antoine served as reporter to the Drafting Committee for the Uniform Law Commissioners' Model Employment Termination Act. He is co-editor of a widely used case book, *Labor Relations Law*, now in its ninth edition.

At this point, I am going to turn the panel over to Professor Bernhardt.

HERBERT BERNHARDT: Thank you, Carol. I will attempt a brief overview of what led up to the dispute over Mandatory Arbitration of Employment Disputes. We have an excellent panel, and I won't take too much of your time.

To take it a little bit back, the governing decision of the arbitration of employment disputes before the *Gilmer v. Interstate/Johnson Lane Corporation*¹ decision, was *Alexander v. Gardner-Denver*.² *Alexander v. Gardner-Denver*, decided in 1974, involved a collective bargaining arbitration. The lower courts had held that this arbitration in the collective bargaining context barred the employee in that case from bringing suit in the federal courts. The U.S. Supreme Court overruled that and held that the employee was not barred from bringing a law suit after having lost the arbitration.

The Court, in effect, gave the back of its hand to the arbitrators, not only holding that the employee was not barred, but even holding that whether or not the Court gave any weight at all to the previous arbitration decision was dependent on the Court's view of the arbitrator's decision.³ *Gilmer* completely reversed this as to non-collective bargaining arbitrations. Indeed, there is a Fourth Circuit Court of Appeals decision that holds that *Gilmer* reversed, overruled, *Alexander v.*

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

2. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

3. *Id.* at 60 n.21.

Gardner-Denver, and that even union-management arbitrators must be resorted to before going to the courts.⁴

Gilmer was a stockbroker. His arbitration agreement was not in his employment contract. It was in his registration contract with the Exchange. The case was decided under both the Federal Arbitration Act⁵ and the Age Discrimination in Employment Act. Gilmer was 62 years old and he charged age discrimination when he was discharged, and the Supreme Court reached out and said that Gilmer must first go to arbitration. The Court went on to indicate, although it is only dictum, that such arbitration would finally settle the case.

Gilmer somewhat blindsided those of us who are in labor and employment law because the forbearers of *Gilmer* were not labor cases. The Supreme Court before the *Gilmer* case had been deciding a number of commercial arbitration cases, and directing the parties to arbitration rather than to the courts.⁶ It is perhaps not surprising, in terms of the goal of the Supreme Court in these earlier cases, that it extended the principle to labor cases. A table in the Fact Finding Report of the Commission on the Future of Labor Management Relations, known in short as the Dunlap Commission, indicated that in the Federal District Courts alone, employment cases from 1971 to 1991 had grown from 4,331 to 22,968, a 430 percent increase, which made labor cases the fastest growing category of cases in the Federal Courts.⁷ There has been a similar degree of growth in the State Courts.

The *Gilmer* decision could be limited in a variety of ways, not the least among which is the fact that the Federal Arbitration Act supposedly exempts arbitration clauses in employment contracts. The Courts of Appeals, however, have not seen it that way. They have in many cases ordered arbitration,⁸ and the use of arbitration and mediation

4. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996).

5. 9 U.S.C. §§ 1-14 (1994).

6. These cases are known collectively as the Mitsubishi Trilogy: *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989) (compelling enforcement of a private contract to arbitrate claims arising under section 12(2) of the Securities Act of 1933); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 262 (1987) (compelling enforcement of a private contract to arbitrate claims arising under both RICO and section 10(b) of the Securities Act of 1934); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985) (compelling enforcement of a private contract to arbitrate claims arising under the Sherman Antitrust Act).

7. COMMISSION ON THE FUTURE WORKER-MANAGEMENT RELATIONS, U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, REPORT AND RECOMMENDATIONS (1994).

8. See, e.g., *Cole v. Burns Int'l Sec. Servs., Inc.*, 105 F.3d 1465 (D.C. Cir. 1997).

has been growing to the extent that it now, at least theoretically, covers millions of employees.

There are a number of questions that I might be interested in raising, of course without limiting our panelists at all. The main one is how do you insure the fairness of arbitration where the system is drawn up by one of the two parties? How are the arbitrators selected? How do you go about making this system affordable to employees? Another question might involve the entire context of the system. Arbitration under collective bargaining agreements has been considered by most scholars and many practitioners as one of the fairest systems of protecting individual employees that has ever been devised.⁹ The arbitration system in collective bargaining, however, is really quite different from an arbitration system in an employment context. Under a collective bargaining agreement, the union is a watchdog and the parties bargain each individual grievance before it goes to arbitration. Indeed, the endorsement of arbitration in the collective bargaining system by the Supreme Court, was not simply an endorsement of arbitration, but an endorsement of a system of industrial self-government.¹⁰ In that system, 95 percent, or more, of the cases where grievances are raised are decided by the union and the employer bargaining with each other on a regular basis. How do you insure that kind of fairness, or anything approaching that kind of fairness, in a system where there isn't that kind of ongoing relationship?

Carol has already introduced our other speakers. I am very pleased that we were able to put together as distinguished a panel as we have, and I will now yield the floor to Catherine Hagen, who is an outstanding representative of employers.

CATHERINE HAGEN: Thank you Professor Bernhardt. I come to you with perhaps a different perspective. I am not an academic, where most of my panel members are and most of you certainly are. But I do represent employers, including some universities in California, in regard to almost anything that has to do with employment. I tried one of the first tenure cases in *Clark v. Claremont University*

9. See, e.g., Clyde Summers, *Protecting All Employees Against Unjust Dismissal*, 58 HARV. BUS. REV. Jan.-Feb. 1980 at 132, 133.

10. The three cases which established arbitration as a virtually unreviewable method of settling grievances under a collective bargaining agreement are known collectively as the *Steelworkers Trilogy*: *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

The system of industrial self government which these three cases endorsed is based largely on the thoughts of then Yale Dean, Harry Shulman, which the court cited. See Harry Shulman, *Reason Contract and Law in Labor Relations*, 68 HARV. L. REV. 999, 1016-1024 (1955).

Center and Graduate School,¹¹ and I am very familiar with tenure issues and those kinds of things, and I come to you as an extraordinarily strong advocate for mandatory ADR. I am going to talk about both arbitration and mediation from the employers' perspective, and why employers are pushing this battle so hard, that if you have an agreement, pre-dispute with employees, that requires arbitration or mediation, that those agreements ought to be enforced by the Court.

Let me tell you where these disputes start from the employers' side. First of all, the jury system, the court system, has evolved in a way that at least from looking at it from our perspective, is destructive of employer-employee relationships, is not an economic forum, is not a speedy forum, is not a forum where the employment relationship can be preserved after the dispute has arisen, and it frankly does not work very well for anyone except for the lawyers. Employers' lawyers have at least as much self-interest in preserving an expensive system as employee lawyers do. I get a lot of money for representing employers, at least in part, because if the employer goes to court on a case, particularly a sex harassment case, and loses in front of a California jury, they are often looking at seven, eight figures of damages. That justifies me charging the high rates that we charge on the employers' side to get that case into a position that we can either settle it, win it on motion, or, heaven help us, try it in front of a jury. These are very expensive cases. The cheapest case, and I did some research internally – and we are not an inexpensive law firm, but we are not unusual in the big-firm practice – the cheapest case we could find in the last five years of an employment discrimination case that had gone to a jury, we won that case. We spent \$200,000.00 in attorneys' fees. That's the cheapest one, winning that case. I tried a big sex case a couple of years ago for IBM, where our fees were in the seven-figure range to get that case to a jury and win. Our clients would rather spend that money in other ways. We like getting it, but they would rather not spend a minimum of \$200,000.00 on a simple case to get it to a jury even though they win. There are better ways to solve employer problems.

Second, those of you and those of us who grew up in the union-management context know that many times in a grievance procedure, you do not need to destroy the relationship in order to resolve the dispute. You have to keep the relationship going, because with a union, you work with the same people year after year. You might

11. 8 Cal. Rptr. 2d 151 (Cal. Ct. App. 1992).

have a very bitter dispute, one involving sexual harassment, or racial harassment, or something very onerous, something very, very troublesome, that does get worked out and the parties go back to work, and people do not have to go looking for other jobs. In the litigation context, that almost never happens. The relationship is irreparably harmed by the litigation process.

The third point, these are very time-consuming cases. At least in our California system, the best case is two to three years from dispute to resolution, and then you still have the appeal to go.

Finally, the jury system, at least as seen from the employer perspective, is not much different from a lottery. I have seen cases that have outrageous facts where the employer or a manager of the employer has done something truly awful; either in the sexual harassment arena, in the racial arena, they've made a decision based on race, or they have allowed an employee to sexually humiliate another employee. And those are not the cases, folks, that go to jury trials. Those are settled very, very fast; they are resolved, and they are over. The cases that come across my desk that are the six-figure attorney fee, jury trial cases, are often very "iff-y" cases. That is why they are there, because the employer cannot be convinced that they did anything wrong, and the employees, for either right or wrong reasons, think that their life is ruined and they deserve seven million dollars to get it back together. The jury system, at least in my jurisdiction in California, is one that works a whole lot more like a lottery than it does like a system of justice. You have people who hit the jackpot with very "iff-y" cases that do very well, and all of us have seen other cases where the employer ought to pay something and the jury exonerates the employer. In my view, for the greater societal good, for the promotion of genuine equality in the work environment, that's a dumb system to enforce it. Now, I know that my friend, Paul, over here is going to tell you why you need the threat of the big jury verdict to keep employers honest – and that is a position that certainly has an argument that can be made. I would submit that arbitral, regular justice, justice that the small case can afford, that can get to a neutral fact-finder, is going to be, in the long run, better for both employers and employees. Maybe not for the lawyers but for the parties.

Arbitration is cheaper, it has less publicity, it's truly private justice or it can be private justice, which often, particularly in a troublesome sexual harassment case, has immense appeal to both sides. People do not want to litigate what they did in their personal lives in front of the world. It's faster, it's cheaper, and it's more manageable.

If properly managed, it can provide a broader access to a neutral process.

Let me talk about a couple of cases in point, because I think that is the best way to make the points I want to make. I have a client, a large bank system in California, that several years ago decided to have a mandatory ADR system for all of its employees. They worked with counsel to develop a five-step program, and these are the steps:

1. The Open Door - Go to your manager and say that things are not going well and I don't like it, and the manager maybe resolves it and maybe he doesn't. That's the open door step.

2. Employee Peer Panel - A hearing is held with three employees chosen by the employee, three employees chosen by the management of the section of the bank that is involved. (This, by the way, is a non-unionized bank. These are all non-union employees.) That is a fact-finding panel, attorneys are not allowed to participate. The decision of this group, whatever the polling of the group, has no admissibility if this case ever eventually does get to court or arbitration. The panel's decision is then reported to the parties, and at that point step three is a Mandatory Mediation Process.

3. Mandatory Mediation Process - Held before one mediator chosen mutually by the parties - the employee and the company - from a list that the company maintains. I believe that the Mandatory Mediation is paid for by the company.

At that last point, if the dispute is not settled, it goes to Mandatory Arbitration. Mandatory Arbitration is sort of mandatory. That is, if you are a new employee of this company since 1993, the year they put this process into place, you have Mandatory Arbitration as a condition of employment you signed up for when you signed on the dotted line to become an employee. If you were an existing employee in 1993, you had 90 days to opt out of Mandatory Arbitration. So, you had to file a form, which was widely distributed within the company, within 90 days saying, "I do not agree to mandatorily arbitrate any disputes I may have with this company." If you did not do that, you are bound by the Mandatory Arbitration provision in their employment policies.

Since this company has had the Mandatory Mediation Arbitration requirements in place, I am aware of about 15 cases that have made it to the Mandatory Mediation phase that were not settled at the Open Door level. Of those cases, most of them were brought by people who opted out of the Mandatory Arbitration. So you know that if

it gets there, they don't have to arbitrate if they don't want to. I have to tell you that not one of those cases has yet gotten to court, which is not good for my bottom line but is great for the company's because they are not paying all these legal fees. Every single one of those cases has resolved itself at the Mediation level. I think that that tells us something about the employment disputes – even tough disputes, sex harassment, race discrimination – those disputes, when given an opportunity to be resolved through intelligent ADR do get resolved. What has happened in a number of those cases that I have been involved in the background of, because lawyers are not invited to participate until the Mediation phase (they are not allowed to participate in this Step 2 - Peer Panel Phase, and we are not often called if the employee does not bring a lawyer to the Mediation Phase), I typically get the Demand Letter from the employees' lawyer, saying my client has been grievously harmed and we demand 1.7 million dollars to remedy the harm. I write back and say, "This company has the mandatory ADR process, here are the steps, do it, then call me later." Routinely the lawyer writes back and says, "You can't mandate mediation. This is crazy." And I write back and say, "We can at least mandate that you exhaust your internal remedies, and mediation is an internal remedy. Call me after you have mediated, and we'll decide whether you have to go to arbitration or not." In every single one of those cases, the company resolves it. Those cases have been resolved at the Mediation level, sometimes with the lawyers participating, if the grievant chooses to do so. Most of the time it is done with only the company and the grievant doing it.

From the company's point of view, this program is an overwhelming success, even though they side-stepped the issue of "Can they mandate pre-dispute arbitration for existing employees when they changed their policy?" (because they allowed the opt-out). Even though they chose to do that, which I think in this case was an excellent decision, they have won, in the sense that they are paying a whole lot less money for legal fees than they were three years ago.

I think two of the issues that enlightened employers have to consider are (1) if you're going to have a mandatory mediation or arbitration provision, are you going to try to limit the remedies that the person could get if they went to court; and (2) how is it going to work: are you going to limit procedurally some of the Due Process guarantees? I need to tell you that my bias, which is not shared by every employer lawyer I know, is that to the extent you limit remedies and

due process protections, you are probably hurting your chances to have a court require that the arbitration remedy be used.

Next, I'll go to mandatory arbitration of statutory claims. I routinely recommend this for most employers even though I understand the employer will get more claims than it might have otherwise gotten because it is such a more approachable system, so much less expensive for the employee. Some employers say, "But I don't want to let the arbitrator give punitive damages, I'm not going to let the arbitrator give punitive damages." My advice on that is: then, you may not get a court to enforce your arbitration provision, and I don't think that's a good idea. And my advice routinely is that arbitration, if mandatory, ought to be a choice of forum and it should not affect substantive remedies. As I said, that is not a universally held view.

Another issue that is somewhat related is whether the parties can engage in discovery in a mandatory arbitration forum? The AAA (and you are going to hear more about this in a few minutes from AAA itself) has determined that it is up to the arbitrator, whatever the arbitrator decides. I actually, as an employer's lawyer, think that's O.K., that is as good an answer as you are going to get. I have colleagues who will argue that arbitration in the employment discrimination kind of case ought to be identical to arbitration in a union-management case. You do not need discovery in a union-management case, so why do you need discovery in the sex harassment or the race discrimination case. I do not agree with that. I think that for there to be a fair forum, there has to be some opportunity for depositions, there has to be an opportunity to get documents, there has to be an opportunity to discover what the case is about. Discrimination cases are typically trying to get inside the heads of the decision-makers and say, "Yeah, this was because I'm a woman, and not because I didn't turn in my report on time." It is very difficult, I think, to do that in a traditional union-management type arbitration with no discovery at all. So for that reason, when I draft these clauses, I draft them as a choice of forum, we say that the employee agrees to arbitrate before a neutral selected this way (however we decided: by a panel, or AAA, or through some other system) any claim that could have been brought in state or federal court, or an administrative agency of the federal or state government, such as wage claims, under the procedural rules as determined by the arbitrator selected. We think we are more likely to compel arbitration in that case, we think we are more likely to enforce the exclusivity of that remedy in that

case, and we certainly think we are going to win the exhaustion case even if we lose the exclusive remedy case in that case.

More importantly, I think that the perception of fairness by both sides, the employer and the employee who has a lot more reason in most cases to distrust the system (whatever the system is because of his or her inexperience with it), I think that to the extent that the system is perceived as fair in giving both sides a fair shot, it will be an exclusive remedy whether or not legally its an exclusive remedy or not. Mainly because the employee who has been harmed wants to have his or her day in court, and if he or she perceives that he or she is going through a kangaroo court process with someone who is beholden to the company, paid by the company, bought by the company, that employee is much more likely to pursue that issue in a state or federal forum rather than in front of an arbitral forum, which is a private forum. For that reason, I think that the system needs to be genuinely fair, not just appear to be fair. I also don't try to limit the equitable remedies of the arbitrator. Under Title VII or under our State Statute, you can get reinstatement, for example, as an equitable remedy. My advice to employers in drafting these arbitration agreements is: don't limit the remedies; give the arbitrator the power to order back pay, which is an equitable remedy, to order punitive damages; which is a legal remedy, to order reinstatement, to order an injunction requiring a particular manager to go to harassment training or valuing diversity training, or whatever the arbitrator in his or her judgment thinks is important.

Obviously, there are all sorts of issues, and I think the other panelists will get into those as to who pays, how do you choose the neutral, etc. Finally, let me suggest that if you are considering, as an employer, a mandatory arbitration remedy, our experience, at least in the forum where I come from where the jury system is scary enough for employers that will do almost anything (we call it the ABC Rule: Anyplace But Court; some people call it: Anyplace But California) consider mandatory mediation as well. The full panoply of ADR remedies is one that could be very useful from the employers' side in these kinds of disputes.

MARION ZINMAN: Professor Bernhardt brought up three subjects very near and dear to the AAA, and three subjects we dealt with extensively in developing our national employment ADR Rules. Those three subjects have to do with what we call the Due Process Protocols, the method of selecting arbitrators and who pays for the process. I want to deal with those three issues.

The AAA, quite a number of years ago, developed employment rules and those rules were based on rules that many of you may be familiar with. Those were rules dealing with commercial disputes, business disputes. The AAA has handled employment disputes for non-unionized employees for many, many years. Certainly more than the 17 years I've been associated with the AAA. In the years that I've been associated with the AAA, I have seen literally hundreds of cases involving executive employment contracts, and those contracts are sometimes severed by dissatisfaction between the employee and the employer. What do you do with such cases? You can go to court with them, particularly if you can find a statutory violation. Or you can litigate on a contract violation. The problem with litigating on a contract violation is that everybody goes to court and then your dirty linen is aired in public. This sounds sort of familiar. Many of the same concerns that happened in a breakup of an executive compensation agreement are the same concerns that occur to employees in a company. Maybe you don't want to have this information made public. Certainly employers didn't want to have this information made public. Therefore, in the last few years the AAA processed about 800 cases a year involving executive employment contracts, sales commission cases, and we are still handling them. They are handled in a form loosely related to our commercial arbitration rules.

Several years ago, we began to recognize, if we hadn't recognized before that, that there are issues that come up for employees that may not be contractual in nature. Certainly there are statutory issues. Dissatisfaction with the forums that existed, I'm thinking of the EEOC particularly, and the New York State Human Rights Commission and we began to look at this dissatisfaction possibility of business for us, as something we could do, and had done, quite well. We formed a committee and task force. We eventually developed a National Employment Rules, first as a California model. In that California model, we began to encompass what we called the Due Process Protocol. Involved in the development of this Protocol was the American Civil Liberties Union and their General Counsel, Lou Maltby, consultation with NELA (and I know Mr. Tobias is a fine representative of that organization), and employer groups. We worked with everybody, because we felt that we could do something for both employees and employers in this very sensitive area.

What does the Due Process Protocols involve? It means that we don't limit remedies. We provide for discovery, as Catherine rightly said, through the arbitrator. We provide, at least in our rules, that the

parties may split the fees in arbitration, although we recommend, very frankly, that the employer pay most of the cost, simply because there is an uneven balance of pocketbook there. An employee may have a very justifiable case and be terminated, and may not have any money. We provide for equitable remedies, that includes anything and everything that you could get in a court of law. Loosely speaking, this is what the Due Process Protocols provide for through the AAA.

There were systems that we reviewed that wrote in the AAA and said, "No lawyers present." We won't handle those cases anymore. In fact, we won't handle any cases in which the parties do not agree to submit to our arbitration rules, and we have asked employers who we know, or may know, are developing systems to send them to us, and we will give them advice and suggestions. We will go in and assess an employer's system, and what problems they have, and make recommendations. The recommendations we make involve the use of our rules. That's perfectly natural. We're in an organization to do business, and although we're not for profit, we're not for loss either.

How do we select our arbitrators? Our arbitrators have been selected from all over the country by special outside panels. We've asked very illustrious corporate and individual employee representatives to make recommendations. We screen those selections through an advisory committee. We select people with very specialized backgrounds. In fact, each of the regional offices (we have 37 around the country) has a separate list. In New York State, there is a list of qualified people who have quite a number of years of experience sitting on both sides of the table, who have very illustrious backgrounds. There are about 30 arbitrators in the New York Metropolitan area. These people are then specially trained in how to administer these rules.

Why are they specially trained? You would think they would know this stuff cold, and some of them do. But some of them have a specific labor-management background, and these non-unionized issues don't involve a collective bargaining agreement. They involve a certain kind of procedure that is slightly different from the labor-management context. You may, for example, need dates very soon, and we have a number of labor arbitrators who are involved in this system who have said that they will honor the request for terminated employee to have a hearing in a couple of months instead of six months, in some cases. These arbitrators have been known to waive cancellation fees, because you are talking about terminated employees with no financial wherewithal. We select our arbitrators very carefully.

Who pays for these new processes? In general, our rules provide that the fees are split. For employees and employers it's generally \$500.00 to get into the system, which means \$250.00 each, plus the cost of the arbitrator. Arbitrators charge their normal fee. In some cases, they will waive some of that fee if there is a real hardship situation. We recommend that employers pick up most of the cost, charging the employee a nominal fee to keep out those people who are going to register grievances constantly and abuse the system.

This system has been adopted so far by about 100 to 150 employers. It is a little difficult to tell because I get cases on my desk where I didn't even know the employer was writing us in – and there we are! We estimate several million employees are now covered by these kinds of systems. We certainly recommend that they have internal procedures first. In fact, we estimate that no more than 2 percent of the cases that start at the bottom ever come to us, probably less. It isn't an enormous caseload. As more and more employees get covered, there will inevitably be more cases, but if you have a good type internal system, providing for mediation first, most cases, as Catherine correctly pointed out, will never come to AAA arbitration at all. The only thing we say, is that if the case is filed we can provide a mediator, we can provide an arbitrator. If the case does come to us, we have fair and impartial procedures. Thank you.

PAUL TOBIAS: Ladies and gentlemen I want to thank you very much. Today is my birthday. I'm the oldest man in the room. I'm 67. And I thank you for bringing me from Cincinnati, giving me a free trip to Washington, a free hotel, I got my breakfast paid for, my dinner – what a birthday present! Its great.

Also, this is a unique opportunity for me. For 38 years I have been hoping someday I could talk down to about 75 law professors. I've been waiting. I was beat up pretty bad about 40 years ago by some professors. I have some wounds. I reserve the right, for those in the back row, to call on you in the course of this talk. So, be on your toes. No seriously, I feel very comfortable in this room. All my problems with law professors are gone. In fact, I really relish this opportunity as a representative of the private bar to work with law professors. I don't think there is enough interaction between the ivory tower, where you are, and the trenches, where I am. We need more interaction. I think that would be good for us.

First, I want to discuss voluntary arbitration after a dispute arises. The plaintiffs' bar favors giving employees the option of going to arbitration. We're all for it. After a dispute arises, the parties can get

together, decide to go to AAA, and resolve the matter in arbitration. Arbitration is good for many cases. The employer can't get summary judgment in arbitration. It's usually cheaper and faster than court. The employee gets an absolute right to tell the story to a neutral party. Sometimes employees prefer arbitration to court. Voluntary arbitration-Yes! Also we're all for mediation. I personally don't oppose mandatory mediation, because it doesn't require the employee to accept the result. That's something else.

I'm here to talk about mandatory arbitration of statutory claims set forth in the United States Code, passed by the Congress of the United States, and on that subject matter-mandatory arbitration-No! No question, no brainer-No! That's what I'm here to say.

We talked about the jury trial. It's my recollection that the right to jury trial is set forth in the United States Constitution. The ADEA permits jury trial. In 1991, not so long ago, the right to jury trial was mandated in the Civil Rights Act Amendment for Title VII which also covers the ADA. So, as recently as five years ago, the Congress said, "Jury trial-Yes! Punitive damages-Yes! Emotional distress damages-Yes!" Thus statutory rights are litigated in the United States Courts before a judge trained in the law, under procedures of the federal rules, subject to an appellate system. The whole panoply of the judicial system, that's what you're entitled to. And employers want to take it away. *Gilmer* taketh away-supposedly. Well, I don't think it did by a long shot.

But certainly, we think that mandatory arbitration is bad. We fear that timid arbitrators, unlike juries, will not have the courage, when there is serious wrongdoing, to award the punitive damages, the emotional damages, and front pay to which the victim is entitled. The whole system that drives settlements (and 90 percent of the cases are settled), the reason that employers settle cases, is that they are afraid of a jury trial, they are afraid of punitive damages. That's why 90 percent of the cases are settled. They're not afraid of arbitration. Employers never have been afraid of an NLRB hearing, never. The possibility of reinstatement without backpay—that never stopped employers from firing people. The jury system is what keeps getting cases settled and keeps the employers honest.

Discovery! In Cincinnati, General Electric Company has one of these typical arbitration programs. Concerning discovery, you only get ten interrogatories, you only get the right to inspect five employer documents, and you only get eight hours total for all depositions.

That's all this particular mandatory arbitration gives you. Now, that's one of the biggest companies in America. That's the pattern. They're trying to limit discovery. No plaintiff's lawyer can win a major discrimination case, except the real good ones, without extensive depositions and detailed information possessed by the Defendant and unavailable to the Plaintiff. To prove discrimination we must show what happened to the other fellow or lady. The employee needs to look at the files of similarly situated coworkers. The employee needs to review statistical data. Are these arbitrators going to have the courage to force the employers to disgorge their secret smoking guns? No! Do you think the Texaco case result would have been the same before an arbitrator? I don't think so! I think that defense lawyers, like plaintiffs' lawyers, are scared to death of federal judges. That's why they tell their employer-clients, "We've got to give these documents." I tell my clients, if they're hiding documents, "You've got to give me those documents or you could go to jail." Well, I don't think any arbitrators will put anybody in jail, or that anybody's afraid of any arbitrator putting them in jail. But that's what drove the Texaco settlement. And if anti-discrimination policy of the United States means anything, then the right to all these court remedies is important.

If everybody's got to go to mandatory arbitration, what happens to the right to utilize government agencies like the EEOC or state FEP? It appears you can't go there. Also I'm fearful of having no appeal rights. If you get a wild arbitrator who doesn't know what he's doing, which will happen, you have really no effective appeal rights in an arbitration. So, there are a lot of reasons why mandatory arbitration is bad.

And incidentally, the Supreme Court of the United States has not faced up to several legal issues, which it will soon. The purpose of the Arbitration Act was for commercial disputes not employment disputes. There's a provision in the Act (as you all know) that says, disputes of workers engaged in commerce are not even covered by the Act. The employers will argue that the exception is just for transportation workers. *Gilmer* did not deal with that issue. We think we have a fighting chance to win that issue in the Supreme Court. Hopefully the Supreme Court will not be influenced by the so-called docket clearing policy designed to reduce the case loads of federal judges. Hopefully the belief that arbitration is wonderful will not dominate every issue facing the Court. As *Gilmer* suggests, the United States Supreme Court is very pro-arbitration, so we may not win that issue. But there is another issue we surely will win at the United States

Supreme Court level, and that is the “knowing” and “voluntary” waiver requirement. If you’re going to give up your statutory rights, if the employer says you are required to arbitrate, surely there must be a truly knowing and voluntary waiver of your procedural substantive rights under the anti-discrimination statutes. If you’re forced to give up all these statutory rights, there should be an express intentional giving up. I disagree that if you read and sign an agreement to arbitrate, you presume to know everything about the details of what you are giving up and that all sorts of documents are incorporated by reference. A broadly worded agreement to arbitrate buried in fine print in an employment contract should not be read to imply an intentional waiver of jury trial. Did you know that if you’re sexually harassed ten years from now, that you’ve given up your right to go to a jury trial in court? Did you know that if the company fired you ten years from now for age discrimination that you’re giving up your rights to go to federal court? Did you know that when you signed it? I doubt it! The test should be, did the employee reasonably know that by signing the document, there was a waiver of the statutory right to go to court. I think that employers are going to have to, from now on, make it very clear to employees exactly what rights they’re giving up.

That gets us to the next issue concerning the “voluntary” requirement. If an employer says you must give up all your court rights, now sign it or you’re fired or not hired, what are you going to do? You’re going to sign it. It’s your job or your civil rights, and you’ll take the job. The economic pressure amounts to duress. In any event, there is a “voluntary” issue. When you are a current employee and when they put the agreement in front of you, and they don’t give you any consideration, we say that’s not a voluntary waiver. The knowing and voluntary issues will some day be resolved by the Supreme Court. The *Prudential Ins. Co. of America v. Lai*¹² case we think will become the law. You’re familiar with that Ninth Circuit case requiring any waiver to be knowing and voluntary.

The third issue is one that Ted St. Antoine will talk about. It is my view that if you have to arbitrate, it isn’t collateral estoppel or res judicata in a second proceeding in federal court. If you are forced to arbitrate, then you get a second bite of the apple in court. Some say it should depend on how bad the first bite was. If the arbitration was based on inadequate procedure and produced an unfair decision, you

12. *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995).

surely should be able to go into federal court. Perhaps the arbitration will be entitled to some weight, as per *Gardner-Denver*, but you should get a de novo hearing in the federal court.

Everybody is talking and writing about mandatory arbitration, as if it is common practice. The AAA says we have a couple of million people subject to it. Our law office receives a thousand calls a year. We have handled only one mandatory arbitration case. There are only one or two major non-union Cincinnati employers which require arbitration. It is still very much a thing of the future. We have 120 million non-union workers out there. There are only a very small percentage covered by mandatory arbitration. Therefore, this is a theoretical discussion in some sense. It may be twenty or thirty years before we are really into mass mandatory arbitration. Hopefully never.

In any event, there are some good things about arbitration. There are some general advantages to voluntary arbitration, particularly of small damage cases. But mandatory arbitration of statutory claims, we think, is just plain wrong. An interesting angle is that if employers are going to have mandatory arbitration of statutory claims, there may be a creeping creation of a just cause standard. At present very few non-union employers are willing to create a just cause standard in their handbooks. Almost none are offering mandatory arbitration of claims of unfair treatment. Employers are going to look disingenuous to say to employees, "You have to arbitrate your statutory claim but you can't arbitrate your claim of unjust dismissal."

We think that mandatory arbitration may create an employer dominated kangaroo court. Clerks of court are often rude and bureaucratic, but at least they act the same to everybody. Nobody owns the federal clerks. But I am concerned when I see the General Electric arbitration system and it says that if you have any discovery problems, go to the G.E. administrator and he will straighten them out. In other words pre-arbitration procedure tends to be controlled by the employer to the extreme prejudice of the employee.

Finally, we are concerned that because of the "repeat player" problem, it will be difficult to obtain neutral arbitrators who understand the law of discrimination and are courageous enough to award substantial damages in appropriate cases.

THEODORE ST. ANTOINE: Good morning. Well, after hearing those wonderful pyrotechnic statements by the advocates, one for

management and one for plaintiffs, I would like to think that I was bringing to you the calm, reasonable, objective solution to what is best for employee rights with regard to mandatory arbitration. In the interest of full disclosure, I guess I should point out that for the last twenty-five years or so, I have been engaged in a fair amount of moonlighting arbitration, and who knows the extent to which that may affect some of my supposedly objective, third-party consideration.

I am going to put a couple of theses before you this morning. One is that I think the answer to the question of whether mandatory arbitration for individual employees is fair, should be made on the basis of a quite pragmatic assessment of what is best for individual employees and not on abstract appeals to the sanctity of statutory rights and of access to a jury. I don't know what would be the result of a pragmatic assessment of the best interests of individual employees, and I would be delighted to have some commentary from those of you who have practical experience in this area, from a somewhat more disinterested point of view than either a union or a management or an individual plaintiff's representative. But, I do think that that is the way the matter should be approached.

Second, and here I put a little weight on the scales, I do think that in light of overloaded dockets of the federal courts, and the underfunded, understaffed EEOC, at least it seems arguable that it might be in the best interests of individual employees to have mandatory arbitration even of statutory claims – if two important conditions could be met. First, that due process guarantees apply to the procedure; and second, that the arbitrators were authorized to award the full range of statutory remedies. So, if those two conditions were met—due process in the procedure, and the full range of statutory remedies—it is arguable that employees would be better off with mandatory arbitration than with the present regime. At least theoretically, anti-discrimination legislation entitles them to resort to the courts, but for the ordinary employee, that may not be the reality.

Let me say a couple of words about my view of two of the leading Supreme Court decisions. The first is *Alexander v. Gardner-Denver Co.*, the famous case in which an arbitrator's decision in favor of the employer under a collective bargaining agreement was not a bar to the employee's subsequent claim of racial discrimination before the EEOC and a federal court.¹³ At least on its face that case could readily be limited because the Court emphasized that under the collective

13. 415 U.S. 36 (1974).

bargaining agreement, the arbitrator in *Gardner-Denver* was only authorized to deal with the contractual claims.¹⁴ The arbitrator was not authorized to deal with statutory claims. The Court in *Gilmer*, the subsequent case dealing with a claim of age discrimination under an individual contract of employment, specifically pointed out that distinction between *Gardner-Denver* and *Gilmer*.¹⁵

Second, with regard to *Gilmer* itself, I think one can read *Gilmer* too broadly. Here Paul Tobias alluded to a view with which I agree. *Gilmer* is not quite as powerful in its holding on this question of mandatory arbitration as some have seemed to think. All that really was involved in *Gilmer* was whether an employee, before having gone to arbitration, could be required to arbitrate prior to bringing the claim to court. In other words, at least on the facts and as a matter of holding, the Supreme Court could have disposed of that case simply on an old-fashioned exhaustion of remedies basis. Now, I must say, in some respects it makes it all the more powerful that the Court proceeded to go forward and quite elaborately salute arbitration, speaking in terms of substituting arbitration as the forum for the resolution of statutory disputes. Let me be clear again: *Gilmer* as a holding could simply be read to say, "You must exhaust remedies in arbitration if you have agreed to go to arbitration. You cannot go directly to the EEOC and the courts." It does not seem, however, in light of the very powerful dictum, that one can safely conclude that the Court, when faced with the issues that Paul wants to bring before it, is going to say, "Well, *Gilmer* was just an exhaustion of remedies case." The opinion itself, the language, speaks much more in terms of a ringing endorsement of arbitration, emphasizing that it is a substitute forum for the disposition of statutory claims.

In the *Austin v. Owens-Brockway*¹⁶ case, decided just last year by the Fourth Circuit in a two-to-one decision, dealing with a collective bargaining agreement, the court seemed to come very close to suggesting that *Gilmer* had superseded *Gardner-Denver*. Again, technically, I should point out that that was another exhaustion of remedies case. It wasn't a case where the arbitrator had already decided the issue.

Finally, I am going to join Paul Tobias halfway, with regard to the *Prudential Insurance Co.* case, decided by the Ninth Circuit two years

14. *Id.* at 52-54.

15. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 34-35 (1991).

16. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), cert. denied, 117 S. Ct. 432 (1996).

ago. There the Ninth Circuit said that at least the employee's waiver of the right to go to court had to be knowingly made.¹⁷ It did not go on to deal with that tougher question of voluntariness in the course of the waiver. The federal agencies that have been involved in this have been much more on Paul's side. The EEOC in a policy statement issued a year-and-a-half ago, July 1995, said that parties must knowingly, willingly and voluntarily enter into any ADR proceeding. In fact, the EEOC went so far as to say that until the actual arbitration decision was rendered, it would not hold the employee bound. At any point the employee could escape the ADR proceeding and insist upon pursuing the claim before the EEOC.

A Regional Director of the NLRB has issued a complaint, I assume practically it was done in Washington, on the theory that requiring employees to sign mandatory arbitration agreements or firing them for a refusal to do so is an unfair labor practice. So the Board is weighing in on this as well.

Now let me start dealing with some of what I regard as the pragmatic considerations. I find it quite significant that a number of very distinguished federal judges, Judge Harry Edwards of the D.C. Circuit, Betty Fletcher of the Ninth Circuit, the late Alvin Rubin of the Fifth Circuit, have all come out over the years with strong statements endorsing the arbitration of statutory disputes. I should emphasize they were not stating that mandatory imposition of arbitration agreements would be allowed. They were simply dealing with the merits of arbitration. They were looking at the fact that the federal courts' dockets are terribly overcrowded and that arbitrators properly trained are capable of rendering sound decisions in statutory disputes.

During the past year-and-a-half or so real strides have been made in trying to provide us with some notion of what constitutes the sort of due process that ought to exist in any arbitration of a statutory claim, whether it's mandatory or otherwise. The Dunlop Commission in its report of December 1994 and the Protocol that was developed by a wide variety of groups under the sponsorship of the ABA (it included everybody from the ACLU to management representatives of the ABA Labor Section, with the National Academy of Arbitrators, and the American Arbitration Association in between) came up with surprisingly parallel notions of what due process would mean specifically.

17. *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1304 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995).

Let me just quickly run through the seven different requirements that these two bodies embraced: First, a jointly selected arbitrator who knows the law. Second, a simple adequate discovery procedure. Discovery is necessary in these individual cases where you do not have the union experience with a particular relationship and the general grievance procedure to develop the facts. Third, cost sharing to insure arbitrator neutrality. Fourth, representation by a person of the employee's choice. Fifth, remedies equal to those provided by the law. That last is very important. Sixth, an opinion and an award with the reasons for the arbitrator's decision. And finally, an incursion on the traditional finality of arbitration awards, judicial review on the law – not the facts, but judicial review on law. That is a very good summation of the kinds of due process requirements that ought to exist if we are to even contemplate the notion of making arbitration mandatory.

Now, the Dunlop Commission and the ABA-sponsored Protocol did diverge on this question of mandatory arbitration. The Dunlop Commission in terms said, "No. No mandatory arbitration." Clues suggest there was a bit more discussion within the Commission than the final report reflects, except for a very interesting line. The Dunlop Commission, if you read the report closely, does comment that after a few years of watching the development of arbitration of statutory claims (this assumes voluntary arbitration of statutory claims), it might be well for the country to revisit the issue of whether or not we could safely allow such claims to be subjected to a mandatory arbitration system.

The ABA-sponsored body, which as I said embraced ABA management members as well as the ACLU as well as Paul Tobias' organization, punted – probably quite properly – on this question. They made no determination with regard to what we call pre-dispute arbitration agreements. They did agree that such agreements would have to be knowingly made. I think everybody can accept the knowing concept. The issue is voluntariness and whether or not you can ever have a pre-dispute arbitration agreement that is genuinely voluntary. This is controversial.

I think that you can all recognize the simple practicalities of the difference between a pre-dispute agreement to arbitrate and a post-dispute agreement to arbitrate. If it's post-dispute, the employee really does not have anything to lose. The employee has been discharged. There is no worry about the job's future depending upon the goodwill of the employer; the job has been lost. The employee can make a very free judgment as to whether to stick with the right to jury

trial or to go on to arbitration. It is the pre-dispute case that presents the difficult question of the inherent pressure of the employer's control over the job. And it is not just a matter of firing. At stake are all the future relationships that the job entails – promotions, job assignments, and all the other subtle ways in which employers can put a thumb on the scales.

On this pre-dispute/post-dispute controversy, however, I should point out there was testimony before the Dunlop Commission by some very well-respected management representatives that employers generally are not going to be willing to enter into post-dispute agreements to arbitrate. Their feeling is that at that point, in most cases, they can sit back and just see what happens. The ordinary employee with the ordinary claim is not going to have the money to go out and get an attorney to carry that claim forward. Most run-of-the-mill disputes are simply going to be passed by. It's avoiding the big six- or seven-figure jury verdict that is the employers' reason for accepting pre-dispute agreements to arbitrate. Unless employers are bluffing on this contention that they won't enter into post-dispute agreements to arbitrate, I think the ordinary employee may very well have the practical choice of agreeing to mandatory arbitration in advance or not having a realistic way of prosecuting his or her claim. Remember that until the EEOC started into this wonderful triage procedure in which it classifies cases as A, B or C and tosses out a large proportion in a summary fashion, it was getting 100,000 charges of discrimination a year and its backlog had soared past that figure.

This morning at breakfast, Paul Tobias, whom I regard as one of the preeminent plaintiff's attorneys in the country, told us that he accepts one out of a hundred people who contact his office seeking his assistance. One out of a hundred. He wants that big, good case – and he is entitled to it, he's got that kind of talent. Someone else spoke up and said that one out of a hundred was a very realistic figure. Well, I can be a little more precise. One of Paul Tobias' counterparts, a very fine Detroit plaintiff's lawyer, told me that his secretary actually kept count, and he averaged an acceptance of one out of eighty-seven people who came into his office seeking his assistance. One out of eighty-seven. Why? Because it is terribly expensive for a lawyer to invest in a case that may come to naught. One of the realities that must be faced here is that the present regime is much too expensive and time-consuming. That is why it is going to be very difficult for the ordinary man or woman to press forward with a discrimination case in today's complex and costly environment. These are the practical considera-

tions we must examine before we make a judgment as to the soundness or the lack of soundness of mandatory arbitration, and the cheaper, faster process it would provide.