



Securities Industry Association

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April 25, 1997

Mary L. Schapiro

President

NASD Regulation, Inc.

1735 K Street, N.W.

Washington, D.C. 20006-1506

Re: Arbitration of Employment Discrimination Claims

Dear Ms. Schapiro:

This letter supplements our letter dated March 11, 1997 in support of maintaining the current practice requiring mandatory arbitration of employment discrimination disputes through the processes established by self-regulatory organizations ("SROs"). In our March 11 letter, SIA endeavored to correct numerous misconceptions as to how the arbitration process operates with respect to employment discrimination disputes. Our previous letter (i) explained the statutory and judicial bases for arbitration of employment discrimination disputes, (ii) described the safeguards instituted by SROs to assure that arbitrators who hear employment discrimination claims are impartial and knowledgeable in that practice area, and (iii) addressed why maintenance of the current system of arbitration is vital to further important policies established by Congress and implemented by the United States Supreme Court.

In a debate marked by stark differences of opinion, there is one fact about which there surely can be no dispute -- all forms of discrimination in the workplace should be eradicated, not only in our industry but in society as a whole. While SIA wholeheartedly embraces this goal, we categorically reject the illogical and unfounded leap taken by some that the court system is either the best, or the only proper, means by which this may be accomplished. The erroneously drawn conclusion that arbitrating employment discrimination disputes will somehow erode Congressional efforts to eradicate discrimination is not supported by the data or by common sense, as established below.

As aptly articulated by the New York Court of Appeals:

[T]here is no disagreement among the members of this Court about the general proposition that racial, gender, and all other forms of invidious discrimination, are ugly realities that cannot be countenanced and that should be redressable through the widest possible range of remedies (citation omitted). However, the issue before us is not whether discrimination is a social evil that should be eradicated with whatever tools we have. Rather, the issue is whether, under existing precedent, the important public policies underlying Title VII of the Federal Civil Rights Act may

be deemed to override the "`emphatic' national policy favoring arbitration" (citations omitted), as reflected in the [Federal Arbitration Act].¹

While arbitration's vocal detractors have unabashedly assumed -- without meaningful supportive data -- that the judicial system is the best forum for these disputes, unrebuttable statistics have proven quite the contrary. In Section I of this letter, we establish objectively that the arbitration process is superior and more equitable to employees than the litigation of discrimination claims in court. Section II rebuts some commonly espoused concerns about the arbitration process and, in Section III, several possible modifications to the SRO arbitration process are suggested in an effort to respond to concerns voiced by critics of arbitration.

I. EMPLOYEES ALLEGING DISCRIMINATION FARE BETTER IN ARBITRATION

The arguments against mandatory arbitration of employment discrimination disputes in the securities industry are grounded on the mistaken premise that the process yields unfair results to employees.

This is not so.

Indeed, employees alleging job discrimination benefit substantially when their claims are heard in arbitration. We establish below, with reference to governmental and other unbiased third-party statistics, that:

- Employees prevail more frequently before arbitration panels than before juries;
- Discrimination claims brought in arbitration are resolved more quickly than court actions;
- In arbitration, employees are virtually assured that their discrimination claims will be heard insofar as pre-hearing dismissal motions are virtually non-existent although such motions are quite common in the judicial setting;
- If arbitration is not an available alternative, employees' claims would be bifurcated, the cost prohibitions of which may result in the abandonment of otherwise valid claims; and
- The more informal arbitration procedures favor employees, who generally have more limited resources than do their employers.

A comparison of the results of discrimination claims brought before the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD"), with those brought by complaint in the United States District Court for the Southern District of New York ("SDNY") soundly demonstrates that the important goal of eradicating discrimination is well served by the arbitration process, which results in awards to claimants more often than the court process.² After identifying all claims in which any type of workplace discrimination was alleged (including discrimination based on age, race and color, sex, national origin, and religion), we examined all decisions rendered since October 1989 in arbitrations administered by the NYSE (the "NYSE Study") and by the NASD (the "NASD Study"). We compared these results with the results of all SDNY discrimination claims that culminated in a trial verdict since 1992 (the "SDNY Study"). ³ The results are as follows:

FORUM	LENGTH OF TIME FROM INCEPTION TO DISPOSITION	% OF CASES WHERE EMPLOYEE PREVAILED
NYSE	15.4 months	41%
NASD	16.7 months	26%
SDNY	28.7 months	19%

Employees alleging discrimination before NYSE and NASD panels prevail far more frequently than employees whose discrimination claims are heard by juries. Stated differently, an employee who brings a discrimination claim in arbitration before a NYSE panel is more than twice as likely to prevail before a panel in that forum than would that same employee before a jury. These results put to rest the mistaken belief that employees cannot get a fair hearing before an SRO panel. Indeed, the fact that employees alleging discrimination prevailed in forty-one percent (41%) of the decisions rendered by NYSE panels and twenty-six percent (26%) of the NASD decisions,⁴ as compared with a nineteen percent (19%) win rate in the SDNY leaves little doubt that critics' concerns about so-called industry dominated arbitrations are disingenuous, to say the least.

Arbitration Is Swifter And Less Expensive Than Court Litigation

Employees alleging discrimination, potentially out of work and lacking in funds, would surely echo the truism that "justice delayed is justice denied." Claims brought in the overburdened court system typically are not resolved for several years. Even the staunchest of critics cannot genuinely contend that such delays serve the greater good of eradicating workplace discrimination as Congress intended with its passage of the various civil rights statutes.

Arbitrations, on the other hand, are resolved much more swiftly than court litigation. The NYSE Study shows that the average length of time between the filing of a statement of claim in a discrimination case and the rendering of an award after hearing is 15.4 months. Similarly, the NASD Study reveals that, on average, discrimination cases are resolved in that forum in 16.7 months.

Conversely, resolution of discrimination claims in the overburdened court system is appreciably slower, taking almost 2½ years (28.7 months to be precise) to resolve. Such a calculation is in accord with the fact that the average civil case in the SDNY (**not** limited to discrimination cases) proceeds from inception to trial in 27 months.⁵ When the time associated with first exhausting administrative remedies in the EEOC and then fighting an employer's appeals are considered, it is even more clear that arbitrations afford aggrieved individuals much quicker resolutions of their claims. ⁶ In SRO arbitrations, claimants are not required to exhaust their administrative remedies before filing a statement of claim, and appeals from adverse arbitration decisions are rare.

Nor can it be said that overcrowded court dockets and increasing case delays are soon to be a thing of the past. Court statisticians openly recognize that the delays in court are on the rise due to the increased volume of civil cases in general and employment cases in particular. The number of new civil cases filed in the federal courts has quadrupled since 1960.⁷ Employment

discrimination cases commenced in the district courts have risen from 10,771 in 1992 to 23,152 in 1996, an increase of 115%.⁸ This surge of new job discrimination claims has led a panel of federal judges to propose that the EEOC be required to investigate cases more thoroughly before allowing workers to bring lawsuits.⁹

A faster resolution of employment discrimination disputes not only has the obvious direct benefit of compensating an aggrieved employee as quickly as possible but has several other tangible benefits as well. Many of the problems associated with delay, such as witnesses' inability to recall facts, difficulty of locating witnesses and documents and the attendant increases in costs and illogical results are reduced by a more expedient disposition. Delays can also result in substantial disruption of the employer's business and the employee's ability to earn a livelihood. These factors substantially increase the cost of litigating an employment discrimination claim in court, as compared to arbitration. Such a waste of resources, by both employers and employees, is to nobody's benefit and would be substantially reduced by continuing to permit less costly and more time efficient arbitrations to resolve discrimination claims.

Employees Enjoy Numerous Other Benefits in Arbitration

In court proceedings, employers are frequently successful in having discrimination claims dismissed on a motion to dismiss or a motion for summary judgment. Indeed, according to statistics compiled by the United States Bureau of Justice Statistics, during fiscal year 1995, federal district courts dismissed 10,904 discrimination cases such that only 1,021 discrimination cases actually went to trial.¹⁰ In fiscal year 1996, only 6.3% of employment discrimination cases concluded reached trial.¹¹ Similarly, a recent study of sex and age discrimination claims found that motions to dismiss were successful forty-six percent (46%) of the time and summary judgment motions were successful fifty-nine percent (59%) of the time. ¹²

Such is surely not the case in arbitration where employees in all but the rarest cases will have the opportunity to present their case at a hearing. As arbitration practitioners will readily acknowledge, pre-hearing dismissal rulings are rare.

Moreover, since discrimination claims are often brought in conjunction with other employment claims, such as breach of contract, tort and wage and hour claims, removing discrimination claims from arbitration would cause a bifurcation of disputes between employers and employees. The resulting bifurcation is wasteful to all parties, risks the anomaly of conflicting decisions arising out of the same facts, and is particularly onerous to the party less able to bear the burden of parallel proceedings -- typically, the employee.

Finally, the reduced formality of SRO arbitrations favors the party with more limited resources. Arbitrations are therefore a convenient and hospitable forum both for employees and employers. The limited availability of hearsay objections and other technical objections and devices makes the process more "user-friendly" and therefore readily accessible to employees. Moreover, the arbitration process will sometimes enable employees to obtain relevant documents and information from employers through informal procedures. This benefit of the arbitration process was noted with approval by the Supreme Court in **Gilmer**.¹³

II. CRITICISMS OF THE PROCESS AND THEORY OF MANDATORY ARBITRATION ARE MISPLACED

The Federal Arbitration Act ("FAA") and numerous Court decisions provide compelling reasons to reject arguments against compulsory arbitration of employment discrimination claims. Indeed, on cue from **Gilmer** and its endorsement of mandatory arbitration of discrimination claims,¹⁴ federal courts have almost universally upheld the use of mandatory arbitration for a wide range of federal civil rights claims.¹⁵ Under the FAA, mandatory arbitration agreements are placed on the same footing as other contracts and are enforceable except "upon such grounds as exist in law or equity for the revocation of any contract." ¹⁶ As **Gilmer** makes clear, no such grounds exist here, and mandatory arbitration pursuant to a form U-4 is enforceable.¹⁷

Thus, it bears repeating that substantive rights are not waived by virtue of mandatory arbitration: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."¹⁸

Critics of mandatory arbitration frequently presume that courts are the best fora for employees asserting discrimination claims. As we demonstrated in Section I, this conclusion is unfounded. Employees' rights are more than adequately protected in arbitration since employees raising discrimination claims more frequently succeed before arbitration panels than before juries.¹⁹

Criticisms that many arbitrators are older, white males, and the implication that this demographic profile precludes them from rendering fair decisions in discrimination actions are -- ironically -- based on discriminatory and offensive stereotypes. Indeed, it is just such an unfounded presumption that led the Supreme Court to hold that gender and race based exclusions of potential jurors is an unconstitutional practice.²⁰ Moreover, the Supreme Court repeatedly has "decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators." ²¹ In all events, such criticisms are misplaced in light of the commendable efforts by the NASD and NYSE to diversify their arbitrator pools and to increase the extent of training provided to arbitrators -- training which is certainly not available to jurors. ²² This criticism also ignores the practical reality that arbitration panels ordinarily include a lawyer and an experienced business person, both of whom typically have a reasonable understanding of what the anti-discrimination laws require in terms of conduct and behavior.

Likewise misplaced is the suggestion by some that mandatory arbitration of employment discrimination disputes in the securities industry will significantly restrict the development of case law. The number of discrimination cases commenced in federal courts has increased by 115% since 1992, the year after the Supreme Court decided **Gilmer**. Plainly, the continued development of case law will survive mandatory arbitration in the securities industry. Similarly, the surge in complaints received by the EEOC, and the EEOC's right to pursue complaints for the public good even if an individual's remedy must be pursued in the arbitration process, ensures continued protection for the public and development of the law.

Critics have also claimed that the public nature of a court proceeding acts as a deterrent to discriminatory practices. This criticism is outdated in that arbitration awards are publicly available and are, in fact, often publicized.²³ A finding of discrimination remains a deterrent to future discrimination, regardless of whether the proceeding itself is open to the public. In

addition, the relatively private nature of the arbitration process may actually encourage employees to pursue their discrimination claims in arbitration rather than endure the public nature of a plenary trial.

Finally, in response to questions as to why the SROs should involve themselves in the regulation of employment discrimination disputes (by including a mandatory arbitration clause in the Form U-4), it should be self-evident that one of the critical functions of the NASD and other SROs is to establish a wide range of rules of conduct by which registered representatives and firms must abide. Establishing and maintaining a system to resolve employee discrimination disputes and requiring registered representatives to participate therein is a logical and necessary function of the SROs. Requiring employees in the securities industry to submit their discrimination disputes to arbitration is but one of the numerous examples of the manner in which SROs require that registered representatives comply with the various obligations imposed upon them as a consequence of their voluntary association with, and registration in, the industry. Moreover, arbitration is already mandatory for the firms such that member firms must arbitrate all claims among associated persons, including their employees. If this obligation is not reciprocal, the process would be susceptible to procedural gamesmanship and forum shopping.

In sum, maintaining the mandatory nature of the process is essential to reduce the costs, in terms of both money and human resources, incident to court-based litigation, and to ensure the equitable resolution of discrimination claims in the securities industry. The arguments against mandatory arbitration ignore (1) the confidence placed in the arbitration process by the Supreme Court; (2) the documented success of SRO arbitration panels in resolving discrimination claims fairly and efficiently; and (3) the increasing inability of the federal courts to resolve such claims effectively and efficiently.

III. SUGGESTIONS FOR MODIFYING THE ARBITRATION PROCESS

While arbitration provides an attractive and fair alternative to court litigation, the securities industry stands ready to work with Congress, the SEC, the EEOC, and the SROs to develop ways to improve the process. Rather than eliminating mandatory arbitration as a valuable and effective means of dispute resolution thereby throwing out the baby with the proverbial bath water, we recommend that a concerted effort be made to improve certain aspects of the process. To this end, the following list of possible improvements are the types of changes the securities industry is already considering:

- (i) Increasing the extent and quality of arbitrator training with respect to applicable employment law;
- (ii) Mandatory and automatic pre-hearing exchange of relevant documents;
- (iii) Increasing efforts to form a diverse pool of arbitrators from which panels are chosen to encourage demographic diversity of panels;
- (iv) Altering the method of arbitrator selection such as furnishing parties with an increased number of challenges or utilizing the list method of selection of arbitrators; and
- (v) Amending the Form U-4 and/or the various codes of arbitration procedure to enhance

disclosure to employees that statutory discrimination claims are subject to mandatory arbitration.

CONCLUSION

Mandatory arbitration of discrimination disputes in the securities industry has been a success for all parties. As recognized by the **Gilmer** Court and recently by the D.C. Court of Appeals,²⁴ arbitration of employment discrimination claims should continue since it provides an effective forum for vindicating statutory claims and does not diminish the employee's substantive legal rights. It provides a fair, fast and efficient means for resolving disputes and should be continued and, where necessary, improved.

We look forward to working with you and your staff to improve this system so that it continues to be an accessible and fair forum for employees and employers to resolve their employment discrimination disputes.

If you have any questions, or would like to discuss this letter, please do not hesitate to call me.

Sincerely,

Securities Industry Association
Stuart J. Kaswell
Senior Vice President and General Counsel

cc: The Honorable Arthur Levitt, Chairman, Securities and Exchange Commission; Linda Fienberg, NASDR; Ellen J. Vargyas, EEOC

Footnotes

1 Fletcher v. Kidder, Peabody , 981 N.Y.2d 623, 636, 601 N.Y.S.2d 686, 692 (1993).

2 The SDNY was selected because the largest number of employees in the securities industry are within the jurisdiction of that Court. Also, data necessary to analyze employment discrimination claims was available from the Clerk's office of the SDNY.

3 The following methods were used to ensure that the list of employment discrimination decisions rendered by panels in the NYSE, NASD and in the SDNY during the time periods studied was complete. For the NYSE, the **Securities Arbitration Commentator** ("SAC") provided us with all employment discrimination decisions. To be as complete as possible, we then reviewed every discrimination decision on file in the NYSE library at 20 Broad Street in New York, New York. A total of 68 arbitration decisions were issued by the NYSE during the time period. With regard to the NASD decisions, SAC again provided us with all employment discrimination decisions. As a check on the completeness of SAC's compilation, we requested that the NASD provide us with all awards in which discrimination was alleged. NASD personnel specifically represented to us that the 73 awards provided represented all employment discrimination decisions for the period requested. Finally, with respect to the SDNY aspect of the survey, the Clerk's office of the SDNY provided us with a computer printout of employment discrimination cases in which a SDNY judge had rendered any decision. For each of the 79 cases on the list that went to trial, we studied the docket sheet and other relevant documents to

ascertain the necessary data.

4 For purposes of this analysis, if a claimant in an arbitration proceeding or a plaintiff in a lawsuit asserted a claim for discrimination, even if coupled with other claims, it was included in the survey. If the claimant or plaintiff received any monetary award, the claimant or plaintiff was considered the prevailing party unless the decision expressly stated that the award was not for discrimination.

5 **1995 Federal Court Management Statistics**, Administrative Office of the United States Courts, Leonidas Ralph Mecham, Director, p. 48.

6 Appeals of adverse jury decisions add an additional 11.3 months from the filing of a notice of appeal to final disposition. **1996 Judicial Business of the United States Courts**, Report of the Director Leonidas Ralph Mechan, p. 105.

7 Judges Proposing To Narrow Access To Federal Court, NYT, 12/5/94, Section A, Page 1, Column 3.

8 1996 Judicial Business of the United States Courts, Report of the Director Leonidas Ralph Mechan, p. 139.

9 **Judges Proposing To Narrow Access To Federal Court**, NYT, 12/5/94, Section A, Page 1, Column 3.

10 Letter dated April 15, 1997, from John Scalia, Statistician, Bureau of Justice Statistics.

11 **1996 Judicial Business of the United States Courts**, Report of the Director Leonidas Ralph Mechan, p. 160.

12 **Employment Discrimination Against Midlife And Older Women, Volume I: How Courts Treat Sex And Age Discrimination Cases**, a report by the Women's Legal Defense Fund for the American Association of Retired Persons, 1996, p. 28.

13 **Gilmer v. Interstate/Johnson Lane Corp.**, 500 U.S. 20, 31 (1991).

14 **Gilmer**, 500 U.S. at 26-28.

15 See, e.g., **Golenia v. Bob Baker Toyota**, 915 F. Supp. 201 (S.D. Cal. 1996) (Americans with Disabilities Act); **Gilmer v. Interstate/Johnson Lane Corp.**, 500 U.S. 20 (1991) (Age Discrimination in Employment Act); **Williams v. Katten Muchin & Zavis**, 837 F. Supp. 1430 (N.D. Ill. 1993) (Older Workers' Benefits Protection Act); **Bird v. Shearson/Lehman/American Express, Inc.**, 926 F.2d 116 (2d Cir.), cert. denied, 501 U.S. 1251 (1991) (Employee Retirement and Investment Security Act (ERISA)); **Nghiem v. NEC Elec., Inc.**, 25 F.3d 1437 (9th Cir. 1994) (Civil Rights Act of 1991); **Saari v. Smith, Barney, Harris Upham & Co.**, 968 F.2d 877 (9th Cir.), cert. denied, 506 U.S. 986 (1992) (Employee Polygraph Protection Act); **McNulty v. Prudential-Bache Sec. Inc.**, 871 F. Supp. 567 (E.D.N.Y. 1994) (Protection of Jurors' Employment Act ("Juror's Act")); **Great Western Mortgage Corp. v. Peacock**, No. 96-5273, BNA Emp. Practice, 73 Fair Emp. Practice Cases (3d Cir. April 17, 1997) (New Jersey Law Against Discrimination). But see **Prudential Ins. Co. of Am. v. Lai**, 42 F.3d 1299 (9th Cir. 1994).

16 9 U.S.C. § 9.

17 **Gilmer**, 500 U.S. at 33.

18 **Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.**, 473 U.S. 614, 628 (1985).

19 Also misplaced is the suggestion that court is preferable to arbitration for employees because some jury awards are larger than arbitration awards. If one aberrationally high award is removed from the SDNY survey, the average award of damages to prevailing plaintiffs closely approximates the average award to claimants who prevail before the NYSE and NASD. Even if some jury awards are larger than arbitration awards, it is beyond serious dispute that the vast majority of employees benefit from arbitration because (1) employees are more likely to pursue arbitration claims; (2) many complaints are dismissed on motions in court, and few are dismissed in arbitration; and (3) employees are more likely to prevail in arbitration than in court. The suggestion that the interests of a small minority should dominate over the interests of the vast majority of employees, who benefit from having a quicker, fairer and more efficient mechanism for resolving employment discrimination claims, should be rejected.

20 See, e.g., **Batson v. Kentucky**, 476 U.S. 79 (1986) (potential jurors not subject to peremptory challenges on account of race based on the assumption that a potential juror of a particular race cannot impartially consider merits of case is invalid and unconstitutional); **Edmonson v. Leesville Concrete Co.**, 500 U.S. 614 (1991) ("**Batson**" rule extended to private civil cases such that the exercise of peremptory challenges to exclude potential jurors based on race deemed unconstitutional); **J.E.B. v. Alabama**, 511 U.S. 127 (1994) (gender-based exclusion from jury is unconstitutional).

21 **Gilmer**, 500 U.S. at 30; **Mitsubishi Motor Corp.**, 473 U.S. at 634.

22 **Arbitration Training: Employment Law Seminar**, Sec. Arb. Commentator, June 1993, at 8.

23 Several notable examples of arbitration awards which have received ample publicity in the media are the decisions in **Jett v. Kidder, Peabody & Co.**, Wall St. Journal, 12/20/96, Section C, Page 23; **Gardner v. Stratton Oakmont**, Wall St. Journal, 4/17/97, Section B, Page 9.

24 **Cole v. Burns Int'l Security Service**, 105 F.3d 1465 (D.C. Cir. 1997).