

**Securities Industry Association**

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October 21, 1998

Jonathan G. Katz, Secretary
United States Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549

Re: File No. SR-NYSE- 98-28
Proposed Rule Change Regarding the
Arbitration of Employment Discrimination Claims

Dear Mr. Katz:

The Securities Industry Association ("SIA")¹ appreciates the opportunity to provide its comments to the Securities and Exchange Commission ("SEC" or "Commission") regarding the Commission's Notice of Proposed Rule to amend Rules 347 and 600 of the New York Stock Exchange ("NYSE") regarding the arbitration of employment discrimination claims in that forum.

I. Introduction

SIA is concerned, not only at the content of the proposed rule – which is not in accord with prevailing judicial precedent, as discussed below – but also at the fact that the NYSE has proposed such a significant rule change without any attempt to adhere to the usual protocol of soliciting comment from the NYSE's own membership. To this point, it should be noted that when NASD-Regulation ("NASD-R") proposed a significant departure from its own arbitration rules in the area of employment discrimination claims (i.e., the recent change in policy regarding employment discrimination claims submitted in accordance with the Form U-4), it sought extensive written comment from its membership (over a period of more than six (6) months) and, even sponsored a day-long hearing in Washington, D.C. to explore the issues and ramifications of such a rule change. Through this process, NASD-R sought to explore the full impact of its then-proposed rule change by permitting those most knowledgeable in this subject matter area a full opportunity to air, discuss and debate its effect. The NYSE participated in many of these discussions up to the time it filed its rule proposal. It would have been helpful if the NYSE had advised its membership that it was contemplating an even more dramatic rule and offer an opportunity for comment prior to submitting the rule to its Board of Directors and

now, to the SEC, particularly since its membership and SIA reasonably believed that the NYSE rule filing would merely conform to the NASD-R rule amendments previously approved by the Commission.

As for the substance of the proposed rule change, SIA submits that it represents a radical departure from the current state of affairs, and one that is not warranted by the facts. While the NYSE suggests that its rule is principally an attempt to make changes in accord with the NASD-R's recent rule change, the NYSE has gone far beyond that action. By providing that a claim alleging employment discrimination shall be eligible for arbitration before the NYSE only if the agreement to arbitrate was entered into after the dispute has arisen, the NYSE is essentially proposing to withdraw from the arbitration of employment disputes. The NYSE has apparently determined that it does not wish to offer a forum for the resolution of these types of disputes. To the extent that the NYSE proposal limits the ability of firms to privately agree with their employees on the types of disputes that must be submitted to arbitration, SIA strenuously objects to the proposal. Such a result would be a drastic change in the arbitration landscape and of the traditionally sacrosanct nature of private agreements to arbitrate – both pre- and post-dispute. SIA believes that because the NYSE did not elicit comment from its membership on the instant proposal, it did not comprehend the impact it will have on parties seeking to resolve claims alleging employment discrimination .

II. Overview

SIA and its membership have long been committed to the eradication of all forms of discrimination, not only in the securities industry, but in society as a whole. SIA readily recognizes that this is the very premise of our civil rights laws. However, we reject the unfounded leap now taken by the NYSE that all disputes involving allegations of discrimination should be forced into court, even if the parties have privately agreed that arbitration should be the forum for resolution of these disputes. The bottom line is that the court system is neither the best, nor the only proper, means by which workplace discrimination may be effectively redressed – a point with which courts have time and again agreed. The erroneously drawn conclusion that refusing to enforce pre-dispute agreements to arbitrate in the securities industry will somehow erode Congressional efforts to eliminate discrimination is not supported by the case law, or by any reasonable interpretation of historical data reflecting the results of arbitration hearings of discrimination claims.

III. Statement Of Position

The employees of SIA member firms frequently arbitrate claims arising out of their employment or termination of employment, including claims arising under the federal anti-discrimination laws. Until recently, securities industry employees agreed to arbitrate their claims by virtue of registering with a self-regulatory organization ("SRO") whose rules require arbitration through the execution of a Uniform Application for Securities Industry Registration (or Form U-4), or in some instances, by executing a private agreement to arbitrate with his or her firm. In June of this year, however, the SEC approved a rule change proposed by the NASD-R, which removed from the NASD's Code of Arbitration the requirement that employees must arbitrate statutory claims of employment discrimination as a condition of registration. That rule becomes effective on January 1, 1999 such that, on and after that date, claims may be filed in court for past conduct if they are within the applicable statutes of limitations and meet other statutory

requirements and no other predispute arbitration agreements apply. SEC Release No. 34-40109; File No. SR-NASD-97-77.

It is critical to note that although many urged the SEC and the NASD to invalidate private agreements to arbitrate statutory discrimination claims, the SEC declined to do so. Indeed, the NASD had expressly stated that "such [private] agreements would not be affected by this rule change." NASD Notice to Members 98-56, July 1998, p. 2. The rule now proposed by the NYSE is at odds with these pronouncements.

The juxtaposition of the NASD rule, as approved by the Commission, and the proposed NYSE rule would create an anomaly in the heretofore uniform arbitration system. Under the NASD rule, all non-discrimination claims are subject to arbitration at an SRO-sponsored fora, as provided on Form U-4. The NASD rule does not affect negotiated pre-dispute arbitration agreements, even with respect to discrimination claims. By contrast, the NYSE's proposed rule would declare a pre-dispute arbitration clause invalid with respect to discrimination claims before the NYSE. These two rules would produce an anomaly under the following circumstances. Ms. RR signs a Form U-4, agreeing to arbitrate all disputes other than discrimination claims, at an SRO arbitration forum. She also signs an agreement with Firm X to arbitrate all disputes, including discrimination claims. Two years later, Ms. RR quits Firm X alleging discrimination and economic claims. Under the NASD's rule, all claims will be arbitrated at the NASD; but under the NYSE's proposed rule, only the economic claims can be arbitrated, and the discrimination claims would be litigated (unless Ms. RR subsequently agrees to arbitrate the discrimination claim). The end result is a wasteful bifurcation of claims.

In addition, the differences between the two rules will inevitably lead to motion practice over what is and what is not arbitrable, as well as litigation over which forum is the appropriate one for the adjudication of a particular employee's claims (the NASD, the NYSE, some other SRO, or court). Just as it is illogical to bifurcate claims, it is equally illogical and contrary to other rule-making efforts to encourage disparate treatment between two SROs. But that is precisely the effect and intent of the NYSE submission.

Under Section 3(f) of the Securities Exchange Act of 1934 as amended by the National Securities Markets Improvement Act of 1996,² whenever the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, it is required to consider or determine whether an action is necessary or appropriate in the public interest, and to also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Clearly a system of inconsistent regulations that eliminates the efficacy of arbitration agreements and creates disparate treatment for similarly situated cases at different SROs, cannot be consistent with promoting efficiency, as required under Section 3(f) of the Exchange Act. Furthermore, the bifurcation of claims and the ensuing proliferation of litigation can clearly not withstand the scrutiny of any objective cost/benefit analysis.

The result is inconsistent with the goals of uniformity that the Commission has itself endorsed for years. Members of the Commission staff have attended the meetings of, and offered support to, the Securities Industry Conference on Arbitration ("SICA"). One of the major purposes of SICA is to engender uniformity and coordination in arbitration rules among SROs. By approving the NYSE's proposal, the Commission would undermine years of effort to

coordinate arbitration rules, without any justification.

NASD-R's proposal was approved by the SEC on June 23, 1998 and becomes effective on January 1, 1999. If the NYSE proposal is approved, pre-dispute arbitration agreements of employment matters will be enforceable before the NASD-R but not before the NYSE. Thereby, the NYSE is abdicating jurisdiction of these types of employment disputes to the NASD-R, other SROs and third-party arbitration forums, and placing an undue and unfair burden on such fora. Those SROs have indicated a desire to continue to make changes to the arbitration system to improve its fairness, efficiency and ability to resolve all types of employment claims. On the other hand, the NYSE, by its rule proposal, has determined that its forum will not consider such disputes.

Additionally, the NYSE has failed to consider that the proposal allows for the bifurcation of the employee's claims in two separate forums, i.e., the initiation of both an arbitration and lawsuit by the same employee against his or her employer. Why would an SRO choose to encourage an increase in the number of litigations with its attendant costs and disruption when there are viable alternatives? This process stands in sharp contrast to the NASD-R which focused on the Due Process Protocols adopted by the American Bar Association and was able to formulate a creative approach to the bifurcation issue.

The NYSE's proposed rule comes at a time when the current court process for resolution of employment claims is long, burdensome and expensive -- an unfortunate reality that benefits neither employee nor employer. Courts simply cannot manage their current caseload, save any influx of cases that further change would engender. Indeed, even without an increase in volume of caseload, the court system has not been shown to be a particularly hospitable environment for discrimination claims.

Finally, arbitration's vocal detractors, including the EEOC, have unabashedly assumed -- without meaningful supportive data -- that the judicial system is the best forum for resolving these disputes, and therefore, they argue, is the most effective way to further the goals of our civil rights laws. This argument is based neither on objective facts or statistical evidence.

A. Long Endorsed By Congress And The Courts, Arbitration Is A Fair And Efficient Means Of Resolving Civil Rights Claims

1. Congress Has Expressly Endorsed Arbitration Of Employment Discrimination Claims

Those who oppose arbitration as a forum for resolving civil rights or employment discrimination claims assert that arbitration of employment discrimination disputes runs contrary to Congressional intent and deprives individuals of substantive statutory rights. To the contrary, Congress long ago endorsed the resolution of statutory claims by arbitration, including employment discrimination claims. Congress enacted the Federal Arbitration Act ("FAA")³ in 1925 specifically to encourage the enforcement of arbitration agreements and to make agreements to arbitrate enforceable to the same extent as other contracts. As the U.S. Supreme Court and countless courts have noted, the FAA thus constitutes a "congressional declaration of a liberal federal policy favoring arbitration agreements," ⁴ and the NYSE proposal

is against public policy because it violates the words and spirit of the FAA. In the case of those member firms which employ pre-dispute arbitration agreements, the NYSE proposal specifically vitiates an otherwise valid agreement to arbitrate disputes. By not giving force to an arbitration agreement, the NYSE rule undermines the FAA, in which Congress specifically sought to encourage the enforcement of arbitration agreements, notwithstanding judicial hostility. SIA believes that the provisions of the proposed NYSE rule is inconsistent with the FAA and will not withstand judicial scrutiny.

Arbitration's critics not only ignore Congress's longstanding endorsement of arbitration but foster a view that is inconsistent with the national trend to resolve disputes through alternative means of dispute resolution. More specifically, in 1991, Congress enacted the Civil Rights Act of 1991 (the "Act"),⁵ which amended various civil rights laws, by adding a provision endorsing arbitration as a fair and effective means of resolving employment discrimination disputes. Section 118 of the Act provides as follows:

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini trials and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.⁶

Since the passage of the 1991 Civil Rights Act, many courts have recognized that Section 118 constitutes a clear Congressional endorsement of arbitration, including arbitration of employment discrimination claims pursuant to predispute arbitration agreements.⁷ More fundamentally, the Supreme Court noted in 1995 that Congress's purpose in enacting the FAA was "to overcome courts' refusal to enforce agreements to arbitrate."⁸ As a federal appellate court recently held, "the FAA not only reversed the judicial hostility to the enforcement of arbitration contracts, but also created a rule of contract construction favoring arbitration."⁹

2. The Courts Have Approved Of Arbitration As An Effective And Fair Means Of Resolving Employment Discrimination Claims

In its rule proposal, the NYSE relies exclusively on EEOC pronouncements in this area and on two federal court cases. SEC Release No. 34-40479; File No. SR-NYSE-98-28, p. 2. It is somewhat surprising that the NYSE relies on either as a definitive "authority" for its position. Indeed, it is important to note that the EEOC's well publicized view – that both pre and post-dispute agreements to arbitrate are contrary to Title VII – have been rejected by the vast majority of courts to which the EEOC has made that very argument. Such has been the case since the landmark decision in Gilmer, in which the Supreme Court has expressly disavowed such anti-arbitration rhetoric. The Supreme Court held, "[b]y 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."¹⁰

In Gilmer, the Court upheld the arbitration of an age discrimination claim pursuant to a Form U-4 agreement.¹¹ After reiterating Congress's strong endorsement of arbitration agreements, and rejecting criticisms of the arbitration process, the Court stated that "[s]uch generalized attacks on arbitration 'res[t] on suspicion of arbitration as a method of weakening the

protections afforded in the substantive law to would-be complaints', and as such, they are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.' "12 Notably, the Court considered the arbitration procedures used by the self-regulatory organizations in detail and rejected criticisms of them.¹³

On cue from Gilmer and its endorsement of mandatory arbitration of discrimination claims, federal courts have widely upheld the use of mandatory arbitration for a wide range of federal civil rights claims. While it is true that the Ninth Circuit Court of Appeals decision in Duffield v. Robertson Stephens, 1998 WL 230891 (9th Cir. May 8, 1998) supports the position espoused by the NYSE in its current rule proposal, it is indisputable that the Duffield decision is in direct conflict with the decisions of each and every of the other Circuit courts which have addressed this issue, including recent decisions by the Third, Fifth and Second Circuits. In Seus v. John Nuveen, 146 F.3d 175 (3d Cir. June 8, 1998) (Title VII), the Court sharply criticized the Ninth Circuit's analysis in Gilmer and of the text and legislative history of the Civil Rights Act, as did the Court recently in Mouton v. Metropolitan Life Ins. Co., 147 F.3d 453 (5th Cir. July 31, 1998). Similarly, in Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997), the Court held that "the arbitrability of Title VII claims finds support in the Civil Rights Act of 1991 and in Cole v. Burns International, 105 F.3d 1465 (D. C. Cir. 1997), the Court held that Gilmer required enforcement of arbitration agreements signed as "a condition of employment, to forego all access to jury trials and . . . to use arbitration in place of judicial fora for the resolution of statutory as well as contractual claims. ¹⁴

In another recent case in which the EEOC's position has been rejected, EEOC v. Kidder Peabody & Co. Incorporated 1998 WL 635699 (2d Cir. August 28, 1998), the Second Circuit Court of Appeals adopted the view espoused by SIA and others that the EEOC should not be permitted to pursue monetary damages on behalf of employees who have filed federal civil rights claims. This holding supports the concept of mandatory arbitration of civil rights disputes in that the reasoning behind the holding is as follows: If the EEOC was permitted to pursue monetary damages on behalf of employees with civil rights claims, such a practice would be subversive of mandatory arbitration because employees could simply allow the EEOC to pursue their monetary remedies on their behalf in court (the forum in which the EEOC has the right to be) without having to pursue their claims in arbitration. Thus, the Court held that "allowing the EEOC to pursue injunctive relief in the federal forum while encouraging arbitration of the employee's claim for private remedies, strikes the right balance between these two interests. Further, to permit an individual who has freely agreed to arbitrate all employment claims, to make an end-run around the arbitration agreement by having the EEOC pursue back pay or liquidated damages on his or her behalf would undermine the Gilmer decision and the FAA.

Notably, the only courts to have disavowed this view are the cases cited by the NYSE in its rule proposal; namely, Duffield v. Robertson Stephens, 1998 WL 230891 (9th Cir. May 8, 1998) and Rosenberg v. Merrill Lynch, 995 F. Supp. 190 (D. Mass. January 26, 1998). In both cases appeals are pending, and it is disingenuous for the NYSE to fail entirely to cite a single countervailing view – particularly where the "other" side is the prevailing law in the land.

B. Relegating Civil Rights Claims To The Already Overburdened Court System Will Not Further The Laudable Purposes Of The Civil Rights Laws

It is counterintuitive to argue, on the one hand, that the goals of the civil rights laws are paramount while, on the other hand, blindly to insist that a system which is demonstrably slower and less fair, is the best means to further those goals. Yet this is precisely the illogical argument advanced by some who oppose arbitration. This being said, there is compelling evidence that the federal courts are not the purveyors of blind justice that plaintiffs' lawyers and other critics of arbitration would have us believe. The court system is far from the flawless, time efficient or impartial forum that opponents of arbitration claim it to be.

Indeed, the Federal Judiciary itself has acknowledged that, with respect to all manner of discrimination claims, there exists perceptible bias in the judicial treatment of parties, witnesses and counsels throughout the federal court system. Report of the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts, June 1997 (the "Second Circuit Study"). The Second Circuit Study found that judges often express open hostility to employment discrimination claims and their litigants. In the study, trial judges "expressed their belief that the proliferation of small cases involving individual claimants, including employment discrimination cases, clog the federal courts and divert the attention of judges away from larger, more significant civil cases."¹⁵ Similarly, trial judges "exhibited impatience" with employment discrimination claims to the point where one district court judge is reported to have unexpectedly awarded summary judgment to the defendants despite the fact that neither side requested such a ruling, nor had addressed any of the significant issues in the cases other than jurisdictional ones. ¹⁶ "These preliminary indications in the . . . study raise a concern that, when, an employment discrimination case is properly before a federal court, a judge's belief that the matter is too trivial for his or her attention may too easily translate into actual unfairness to a litigant as the case proceeds through the system." ¹⁷

In this context of judicial hostility to discrimination claims, a noted federal district court judge recently held, in dismissing a Title VII claim for racial discrimination:

"This is another example where the nation's anti-discrimination laws are being misused. Here, a U.S. district court is asked to involve itself in a minor internal employee assignment decision . . . It would be hoped that at some point Congress would review the law in this area and make the necessary adjustment to eliminate these meritless, lottery-type cases."¹⁸

Thus, while employees and their lawyers seeking to avoid arbitration contend that arbitration is unfair simply because it is not litigation, there is credible evidence to suggest that the crushing discrimination caseload in federal courts has caused judges to look askance at even meritorious discrimination claims, and that this attitude may result in unfairness in the eventual result.

Arbitration, by contrast, seeks to resolve disputes fairly, quickly and efficiently, as recognized by unbiased statistics, as well as in a 1996 study by the Arbitration Policy Task Force to the Board of Governors of the NASD, which stated that "arbitration of employment related disputes offers advantages in terms of speed and cost . . . [and that] arbitration's essentially equitable approach to dispute resolution is fully capable of vindicating the important public rights expressed in anti-discrimination statutes."¹⁹

C. Arbitration Offers Significant Benefits to Employees

Governmental, and other unbiased third-party statistics establish that arbitration offers significant benefits to employees, including, but not limited to, the following:

- (1) Employees prevail more frequently before arbitration panels than before juries;
- (2) Discrimination claims brought in arbitration are resolved more quickly than court actions;
- (3) In arbitration, employees are virtually assured that their discrimination claims will be heard insofar as pre-hearing dismissal motions are virtually non-existent. By contrast, in court, such motions are common and often granted;
- (4) 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
- (5) The more informal arbitration procedures favor employees, who generally have more limited resources than do their employees.

These benefits have been addressed in numerous comment letters previously submitted by SIA to the Commission and/or SRO's, and were discussed in depth in the testimony of Stuart J. Kaswell, SIA General Counsel, before the Senate Committee on Banking, Housing and Urban Affairs on July 31, 1998. A copy of that testimony is attached to this submission.

It is also important to consider that SRO sponsored arbitration fora offer the best opportunity to have employment discrimination disputes adjudicated by persons uniquely qualified by training or experience to evaluate the merits of such claims. For example, in a dispute where an employee alleges that they were denied a promotion to a Head Trader position due to gender, racial or religious discrimination, an arbitrator having knowledge of the skills required of a Head Trader would be better able to objectively determine whether the employee was fairly treated by his or her firm. We strongly believe that the subject matter expertise available in arbitration fora is one of the leading reasons why the FAA favors arbitration. Any rule, such as the instant NYSE proposal, which would effectively eliminate the availability of such critical subject matter expertise, clearly runs counter to the FAA's intent.

D. Conclusion

For all of the foregoing reasons SIA believes it is not in the interest of the securities industry or the employees in the securities industry for the NYSE to withdraw itself as a potential forum for resolution of employment discrimination disputes.

SIA thanks the Commission for the opportunity to comment on the proposed rule. As discussed, we strenuously urge the Commission to reject any rule which infringes on parties' contractual rights or undermines strong public policy encouraging the use of arbitration. If SIA can provide further information, please contact the undersigned, Stuart J. Kaswell, Senior Vice President and General Counsel or Michael Udoff, Vice President, Secretary and Associate General Counsel.

Very truly yours,

Stephen G. Sneeringer
Chairman, SIA Arbitration Committee

cc: The Honorable Arthur Levitt, Chairman
The Honorable Paul A. Carey, Commissioner
The Honorable Norman S. Johnson, Commissioner
The Honorable Isaac C. Hunt, Jr., Commissioner
The Honorable Laura S. Unger, Commissioner
James E. Buck, Senior Vice President and Secretary, NYSE
Robert Clemente, Director of Arbitration, NYSE
Linda D. Fienberg, Executive Vice President, NASD-R

Footnotes:

¹ The Securities Industry Association brings together the shared interests of nearly 800 securities firms throughout North America to accomplish common goals. SIA members -- including investment banks, broker-dealers, and mutual fund companies -- are active in all markets and in all phases of corporate and public finance. In the U.S., SIA members collectively account for approximately 90 percent, or \$100 billion, of securities firms' revenues and employ about 350,000 individuals. They manage the accounts of more than 50-million investors directly and tens of millions of investors indirectly through corporate, thrift and pension plans. More information about SIA is available at our Internet web site, <http://www.sia.com>.

² Pub. L. No. 104-290

³ 9 U.S.C. § 1, *et seq.*

⁴ Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983).

⁵ Pub. L. No. 102-166, 105 Stat. 1045 (codified in 42 U.S.C. § 2000e, *et seq.* (1991)).

⁶ *Id.* at § 118. Some critics of arbitration argue that Section 118 should not be construed as an endorsement of mandatory arbitration agreements. See Duffield v. Robertson Stephens & Co., 1998 WL 230891 (9th Cir. May, 8, 1998), appeal pending. We think the more compelling view is that which was expressed recently by the Third Circuit Court of Appeals in Seus v. John Nuveen, 146 F.3d 175 at *8 (3d Cir. June 8, 1998). Expressly disagreeing with the Duffield Court, the Third Circuit held that, "on its face, the text of § 118 evinces a clear Congressional intent to encourage arbitration of Title VII and ADEA claims, not to preclude arbitration. . . .Nor do we believe this straightforward declaration of the full Congress can be interpreted to mean that the FAA is impliedly repealed with respect to agreements to arbitrate Title VII claims which were executed as a condition of securing employment.) See also cases cited infra, fn. 8.

⁷ See, e.g., Seus v. John Nuveen, 146 F.3d 175 at *8; Austin v. Owens Brockway Glass Container, Inc. 78 F.3d 875, 881 (4th Cir. 1996) (holding that the language of the 1991 Act "could not be any more clear in showing congressional favor towards arbitration" and that agreements to arbitrate both Title VII and Americans with Disabilities Act statutory claims were enforceable); Maye v. Smith Barney Inc., 897 F. Supp. 100, 107 (S.D.N.Y. 1995), request for leave to appeal denied, 903 F. Supp. 570 (S.D.N.Y. 1995) (referring to "seemingly unambiguous congressional endorsement of arbitration in § 118").

⁸ Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 115 S. Ct. 834, 838 (1995).

⁹ Kuehner v. Dickinson & Co., 84 F.3d 319, 320 (9th Cir. 1996).

¹⁰ Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

¹¹ Id. at 20.

¹² Id. at 30 (quoting Rodriguez de Quijas, 490 U.S. at 481).

¹³ Id. at 30-32.

¹⁴ Accord Golenia v. Bob Baker Toyota, 915 F. Supp. 201 (S.D. Cal. 1996) (Americans with Disabilities Act); Williams v. Katten Muchin & Zavis, 837 F. Supp. 1430 (N.D. Ill. 1993) (Older Workers' Benefits Protection Act); Byrd v. Shearson/Lehman/American Express, Inc., 926 F.2d 116 (2d Cir.), cert. denied, 501 U.S. 1251 (1991) (ERISA); Nghiem v. NEC Elec., Inc., 25 F.3d 1437 (9th Cir. 1994) (Title VII); 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); Great Western Mortgage Corp. v. Peacock, 110 F.3d 222 (3d Cir.), cert. denied, 118 S. Ct. 299 (1997) (New Jersey Law Against Discrimination).

¹⁵ As noted in the Second Circuit Study, from 1970 to 1989, the number of employment discrimination classes filed in federal courts increased by a staggering 2166%, as compared with the 125% increase in the overall civil caseload for that same time period. Id. at fn. 82.

¹⁶ Id. At 90.

¹⁷ Id.

¹⁸ King v. Georgetown University Hospital, 9 F. Supp. 2d4 (D.D.C. June 16, 1998).

¹⁹ January 1996 Report of the Arbitration Policy Task Force to the Board of Governors of the NASD ("Ruder Report"), at 119.