IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND LPA, INC. IN SUPPORT OF PETITIONER

ANN ELIZABETH REESMAN*
DANIEL V. YAGER
HEATHER L. MACDOUGALL
MCGUINESS NORRIS & WILLIAMS, LLP
Suite 1200
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600

**Counsel of Record*

August 2000

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND LPA, INC. IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council and LPA, Inc. respectfully submit this brief *amici curiae*.[1] The written consent of all parties has been filed with the Clerk of this Court. The

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[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

brief urges reversal of the decision below and thus supports the position of Petitioner Circuit City Stores, Inc. before this Court.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership now includes more than 340 of the nation's largest private sector companies, collectively providing employment to more than 17 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

LPA is a public policy advocacy organization representing corporate executives interested in human resource policy from more than 200 leading corporations doing business in the United States. LPA's purpose is to provide in-depth information, analysis, and opinion of current situations and emerging trends in labor and employment policy. LPA members are typically companies with business operations in the United States that have more than $750 million in revenues and more than 2,500 employees. The total number of persons employed by LPA member companies in the United States is nearly 13 million Americans, more than 12 percent of the private sector work force.

All of EEAC's and LPA's member companies are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. § 2000e *et seq.*, the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C § 621 *et seq.*, the Americans with Disabilities Act of 1990

(ADA), 42 U.S.C. § 12101 *et seq.*, and other equal employment statutes and regulations. Many of these companies have contracts with their employees governing some or all terms and conditions of employment. Some of these contracts include agreements to arbitrate disputes arising out of the employment relationship, including statutory claims of discrimination. Other member companies are considering arbitration as an alternative to resolving employee disputes in the courts although they have not yet implemented an arbitration program. For these reasons, EEAC's and LPA's members have an ongoing interest in preserving the enforceability of agreements calling for arbitration of employment-related disputes.

Thus, the issue presented in this appeal is extremely important to the nationwide constituency that EEAC and LPA represent. For many years, the Federal Arbitration Act (FAA) has been the enforcement mechanism for arbitration agreements of many kinds, including those providing for arbitration of employment disputes. Contrary to every other circuit court of appeals, the Ninth Circuit below ruled that arbitration agreements found in employment contracts are not enforceable under the FAA. This Court's decision in this case will have a substantial impact on the future enforceability of agreements to arbitrate employment claims. EEAC and LPA thus have an interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Because of their significant experience in these matters, EEAC and LPA are uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner Circuit City Stores, Inc. (Circuit City) requires its applicants and employees to agree to take their disputes against the company to mutually binding arbitration. Pet. App. 2a. Towards that end, applicants for employment must sign the "Circuit City Dispute Resolution Agreement" ("DRA"). *Id.*

Respondent Saint Clair Adams completed Circuit City's employment application, including the DRA, on October 23, 1995. *Id.*

At some time thereafter, Adams filed suit against Circuit City in state court in California. Pet. App. 6a. Circuit City petitioned the U.S. District Court for the Northern District of California to stay the state court action and compel arbitration. *Id.* The district court granted the petition. *Id.*

The U.S. Court of Appeals for the Ninth Circuit reversed. Pet. App. 4a. Relying on its prior decision in *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999), in which it held the Federal Arbitration Act inapplicable to any labor or employment contract, the Ninth Circuit concluded that Adams' agreement with Circuit City was an employment contract to which the FAA did not apply. Circuit City petitioned this Court for a writ of *certiorari*, which was granted.

SUMMARY OF ARGUMENT

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, which makes agreements to arbitrate as enforceable as any other contract, includes within its scope those agreements contained in employment contracts, save for those involving employees who actually move goods in interstate commerce. 9 U.S.C. § 1. Every federal court of appeals but one has so interpreted the FAA, and this Court should reverse the erroneous decision of the Ninth Circuit.

Both this Court and Congress have endorsed arbitration as a means of resolving employment disputes, and in the final analysis, it is far superior to litigation. Not only is arbitration more efficient and less costly, but plaintiffs actually are more likely to succeed. Arbitration also stands a better chance of meeting the ultimate goal of preserving, rather than destroying, the employment relationship in which both parties have invested so much.

ARGUMENT

I. THE FEDERAL ARBITRATION ACT IS APPLICABLE TO MOST EMPLOYMENT CONTRACTS

The Ninth Circuit below ruled incorrectly that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, is inapplicable to an arbitration agreement contained in a contract of employment.[2] Every other circuit court of appeals has ruled to the contrary.

Section 1 of the FAA, which defines "maritime transactions" and "commerce" for purposes of the FAA, states in pertinent part that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. As explained in detail by the Third Circuit in *Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers*, 207 F.2d 450 (3d Cir. 1953), Congress' description of the types of workers excluded from FAA coverage is crucial. The statutory construction principle of *ejusdem generis* dictates that where general words in a statute follow specific words, "the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A Norman J. Singer, Sutherland Stat. Const. § 47.17 (6th ed., 2000). Applying this principle, the Third Circuit reasoned that the specific identification of two groups of workers directly engaged in the transportation of goods in interstate commerce, "seamen" and "railroad employees," delimits the immediately following phrase "or any other class of workers engaged in foreign or interstate commerce" to workers who are likewise occupied in the movement of goods in commerce. Thus, the exception applies only to workers who are "actually

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[2] We assume, *arguendo*, that the agreement Adams signed is a "contract of employment" for purposes of § 1. If it is not, then the § 1 exclusion would be inapplicable to this case on that basis alone.

engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it," in other words, those in the transportation industry. *Tenney,* 207 F.2d. at 452.[3]

Since *Tenney*, every court of appeals has addressed the issue, and all but the Ninth Circuit have concluded that the § 1 limitation only excludes contracts of employment involving workers who actually move goods in commerce.[4] Given the clarity of the statutory language, there is no need to probe the legislative history in search of a contrary result. *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 199 (1977) ("[L]egislative history . . . is irrelevant to an unambiguous statute.").

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[3] Thus, this Court's footnote in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987), is not incompatible with the *Tenney* holding. Applying the FAA standard of reviewability to a labor arbitration award, this Court noted, "The Arbitration Act does not apply to 'contracts of employment of . . .workers engaged in foreign or interstate commerce,' 9 U.S.C. § 1, but the federal courts have often looked to the Act for guidance in labor arbitration cases." The Court in *Misco* was not ruling on the scope of the FAA exclusion.

[4] *Dickstein v. DuPont*, 443 F.2d 783 (1st Cir. 1971); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272 (4th Cir. 1997); *Rojas v. TK Communications*, 87 F.3d 745 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592 (6th Cir. 1995); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50 (7th Cir. 1995); *Patterson v. Tenet Healthcare*, 113 F.3d 832 (8th Cir. 1997); *McWilliams v. Logicon, Inc.*, 143 F.3d 573 (10th Cir. 1998); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Cole v. Burns Intl. Sec. Servs., Inc.* 105 F.3d 1465 (D.C. Cir. 1997).

II. ARBITRATION IS AN EFFECTIVE, INDEED PREFERABLE METHOD OF RESOLVING INDIVIDUAL EMPLOYMENT DISPUTES AND SHOULD BE PRESERVED BY THIS COURT

A. Both This Court and Congress Have Endorsed Arbitration as a Means of Resolving Employment Disputes

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court concluded that claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, can be subject to compulsory arbitration.[5] In so doing, the Court reiterated its "'strong endorsement of the federal statutes favoring this method of resolving disputes.'" 500 U.S. at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)).

Shortly after *Gilmer*, Congress too endorsed the use of arbitration to resolve employment discrimination claims. In plain language, the Civil Rights Act of 1991, Pub. L. 102-166, codified as 42 U.S.C. § 1981a, which made various amendments to most of the then-existing federal laws prohibiting discrimination in employment,[6] urges employers and employees alike to use out-of-court methods, including arbitration, to resolve disputes arising under each of these statutes:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including

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[5] Because the agreement to arbitrate was contained in a securities registration application, not a contract of employment, the Court "[left] for another day" the issue of the scope of the FAA § 1 exemption. 500 U.S. at 25 n.2. That day has arrived.

[6] 42 U.S.C. § 1981; Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.;* the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.;* and Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111 - 12117.

> settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and *arbitration, is encouraged* to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Pub. L. 102-166, § 118, codified as 42 U.S.C. § 1981 note (Alternative Means of Dispute Resolution) (emphasis added). The identical language appears in Section 513 of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12212, which is applicable to all titles of the ADA.[7]

This is not surprising. Arbitration has long been the preferred method of resolving workplace disputes. Since this Court's holdings in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), and the *Steelworkers* Trilogy,[8] strong federal policy,

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[7] For this reason, the Ninth Circuit also erred in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir.), *cert. denied*, 525 U.S. 982 (1998), holding that the Civil Rights Act of 1991 precludes mandatory, binding arbitration of statutory discrimination claims. To reach this conclusion, the Ninth Circuit reasoned creatively that mandatory arbitration was not "authorized by law" at the time the section was *drafted*, regardless of the fact that *Gilmer* had been decided by the time the law was *passed*. *Id.* at 1196. So far, the First, Second, Third, and Seventh Circuits have addressed the same issue and have flatly disagreed with the Ninth Circuit. *Seus v. John Nuveen & Co.*, 146 F.3d 175, 183 (3d Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 365 (7th Cir.), *cert. denied*, 120 S. Ct. 44 (1999); *Rosenberg v. Merrill Lynch, Inc.*, 170 F.3d 1, 10-11 (1st Cir. 1999); *Desiderio v. National Ass'n of Sec. Dealers*, 191 F.3d 198, 203-04 (2d Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3497 (U.S. Jan. 31, 2000) (No. 99-1285).

[8] The first of the *Steelworkers* Trilogy was *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960). In that case, the Supreme Court concluded that only by giving "full play" to the means chosen for settlement - arbitration - would the congressional policy in Section 203(d) of the Labor Management Relations Act ("LMRA" or "Taft-Hartley Act") be effectuated. *Id.* at 566. Therefore, the Court granted the union's petition to compel arbitration. Likewise, in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), the union petitioned the Court to compel arbitration by the employer. The Court noted that the "present federal policy is

endorsed by both congressional and Supreme Court action, has favored resolving labor disputes by way of mandatory arbitration. *See also United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987). Since then, arbitration clauses contained within collective bargaining agreements have become commonplace. Moreover, mandatory arbitration is much more than a substitute for work stoppages and litigation. Professor Harry Shulman declared in 1955:

> To consider . . . arbitration as a substitute for court litigation or as the consideration for a no-strike pledge is to take a foreshortened view of it. In a sense it is a substitute for both - but in the sense in which a transportation airplane is a substitute for a stagecoach. The arbitration is an integral part of the system of self-government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for the employees. It is a means of making collective bargaining work and thus preserving private enterprise in a free government.

Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1024 (1955). These words ring just as true today as they did forty-five years ago.

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to promote industrial stabilization through the collective bargaining agreement." *Id.* at 578 (footnote omitted). The Court then remarked that a "major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." *Id.* (footnote omitted). In addition, the Court noted that mandatory arbitration clauses were enforceable pursuant to Section 301 of the LMRA. *Id.* at 582-83. Finally, in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), the Court narrowly construed its judicial review power of decisions made by arbitrators pursuant to collectively-bargained arbitration clauses. *Id.* at 596.

B. On Balance, Arbitration Is Superior To Litigation For Resolution of Employment Disputes

1. Arbitration Agreements Change Procedures, Not Substantive Rights

As the Court observed in *Gilmer*, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" 500 U.S. at 31. In so doing, "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." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (quoted in *Gilmer*, 500 U.S. at 26). *Gilmer* put to rest any further contest over whether arbitration procedures are, as a general principle, adequate to resolve statutory claims; they are. 500 U.S. at 26. Rather, *Gilmer* properly left issues of "procedural inadequacies" to be resolved in individual cases. *Id.* at 33.

Towards this end, a multifactional task force of individuals designated by dispute resolution organizations, plaintiffs, management, labor and government, developed a "Due Process Protocol" designed to establish standards for the use of mediation and arbitration to resolve employment disputes. *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, Dispute Resolution Journal (Oct.-Dec. 1995) at 37, 39.[9]

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[9] Members of the Task Force and signatories to the Due Process Protocol were:

> Co-Chairs: Christopher A. Barreca, Partner, Paul, Hastings, Janofsky & Walker, Rep., Council of Labor & Employment Section, American Bar Association; Max Zimny, General Counsel, International Ladies' Garment Workers' Union Association, Rep., Council of Labor & Employment Section, American Bar Association; Arnold Zack, President, National Academy of Arbitrators. Members: George H. Friedman, Senior Vice President, American Arbitration Association; Joseph Gar-

True to this Court's direction, the lower courts reviewing such claims have not been reticent about refusing to compel arbitration under rules they viewed as lopsided. *E.g.*, *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (finding that the employer that was responsible for setting the terms of the arbitration contract that covered employment-related claims, had breached its duty of good faith by creating contract terms so unreasonable that a fair resolution of claims by a neutral decisionmaker was impossible).

Likewise, courts have enforced arbitration agreements but reformed their terms if they viewed the procedures as too burdensome on the employee. *E.g.*, *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997) (granting motion to compel but requiring employer to pay the costs of arbitration). Closely related are cases in which a court refuses to enforce an arbitration agreement because the employee did not have adequate notice of its terms. *Rosenberg v. Merrill Lynch, Inc.*, 170 F.3d 1 (1st Cir. 1999) (refusing to enforce a mandatory, predispute arbitration agreement contained in the securities industry registration form U-4 because the employer had not provided a copy of the rules that required the employee specifically to arbitrate employment discrimination disputes).

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rison, President, National Employment Lawyers Association; Michael F. Hoellering, General Counsel, American Arbitration Association; Charles F. Ipavec, Arbitrator, Neutral Co-Chair, Arbitration Committee of Labor & Employment Section, ABA; Wilma Liebman, Special Assistant to the Director, Federal Mediation & Conciliation Service; Lewis Maltby, Director, Workplace Rights Project, American Civil Liberties Union; Robert D. Manning, Angoff, Goldman, Manning, Pyle, Wanger & Hiatt, P.C., Union Co-Chair, Arbitration Committee of Labor & Employment Section, ABA; W. Bruce Newman, Rep., Society of Professionals in Dispute Resolution; Carl E. VerBeek, Partner, Varnum Riddering Schmidt & Howlett, Management Co-Chair, Arbitration Committee of Labor & Employment Section, ABA.

Dispute Resolution Journal (Oct.-Dec. 1995) at 39.

2. Procedurally Fair Arbitration Programs Offer Significant Benefits Over Litigation

Employment arbitration programs that are scrupulously fair are of substantial benefit to employees. As discussed below, avoiding the time, expense and stress of litigation can be advantageous for employees as well as employers.

One of the first comprehensive in-house corporate programs for resolving employment disputes is that developed and implemented by Brown & Root, a Houston-based company employing between 25,000 and 30,000 employees. Richard A. Bales, *Compulsory Arbitration: The Grand Experiment in Employment* (Cornell Univ. Press, 1997) at 102.[10] After spending almost $450,000 to defend successfully a sexual harassment and tort claim case in 1992, Brown & Root decided that there had to be a better way, and "began a concerted effort to examine alternatives to the litigation system for resolving employment matters." William L. Bedman, *From Litigation to ADR: Brown & Root's Experience*, Dispute Resolution Journal (Oct.-Dec. 1995) at 8. As the company's in-house labor counsel explained, tort-type litigation "as a system of employment dispute resolution, is highly inefficient, both economically and morally." *Id.* at 11. Not only was litigation extremely expensive for both employer and employee, but it irreversibly damaged employment relationships. *Id.*

In designing its process, Brown & Root interviewed approximately 300 employees from all over the company, both individually and in "focus groups," to obtain their views on the company's current approach to workplace conflict and their reactions to various alternative methods. *Id.* at 9. From this, the company developed a four-step program that encourages early

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[10] Brown & Root is a subsidiary of Halliburton, Inc. *See* www.halliburton.com/corp/whoweare/about_halhistory4.asp

resolution by agreement, with arbitration as a last resort. Bales at 104-05. The company will not send a lawyer to the arbitration if the employee is unrepresented by counsel. Bales at 109. If the employee does have an attorney, the company will reimburse an employee up to $2,500 per year for ninety percent of his or her legal expenses for preparing and presenting the employee's case at arbitration. *Id.*

During its first two years in existence, nearly 1,000 employees used the program, which led to a resolution of over 75% of the cases in the first eight weeks following the employee's first contact with the program. Bedman at 13. Only about 15 cases went to arbitration, where the company's "win/loss record" was comparable to its prior record in litigation of such cases. *Id.* Subsequent data reflect that the company's percentage of wins actually has declined slightly. Bales at 112.

At the same time, the company reports substantial savings, not just in litigation costs, but in "human capital", given the number of relationships with employees that the program has preserved. *Id.* at 113. Employees who have used the Brown & Root program also have reported that they were satisfied by its procedures. *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace*, United States General Accounting Office, GAO/GGD-97-157 (Aug. 1997) at 40.

As a result, Brown & Root's process has been described by one commentator as "a *model* dispute resolution system." Bales at 113 (emphasis added). The success of Brown & Root's program has made it "one of the most admired and studied ADR programs." Michael Barrier, *A Working Alternative for Settling Disputes*, Nation's Business (July 1998), *available in* LEXIS, NEWS Library, NATBUS File, at *2. In the years since *Gilmer*, countless other employers have developed ADR programs using Brown & Root's system as a guide.

Brown & Root's experience demonstrates graphically why employment disputes should not be resolved in the same way as

a car crash. Unlike two automobile drivers who collide, employers and employees both have a strong interest in preserving a positive relationship with each other. Employers invest substantial funds, as well as the time and effort of a variety of personnel, in training each employee to do the best possible job. Simultaneously, employees invest their time, their effort, and considerable emotional capital in learning their craft and developing their careers. All of this can be destroyed irretrievably by the acrimony and scorched earth tactics of drawn-out litigation.

What do employers get out of litigation? Even a victory in court can cost hundreds of thousands of dollars. One survey showed that the average cost to an employer of litigating a seriously contested employment discrimination case is $130,000. Jacqueline R. DeSouza, *Alternative Dispute Resolution: Methods to Address Workplace Conflicts in Health Services Organizations*, Journal of Healthcare Management (Sept. 1, 1998), *available in* LEXIS, NEWS Library, ASAPII File, at *2. Yet the sum total of their victory is that they have successfully defended against a claim that might have cost more. They still experience a net loss, taking into consideration not only the money spent for legal fees, and the productivity cost stemming from the time commitment of employees involved in the case as witnesses, but the loss of their substantial investment in the plaintiff as an employee.

What do employees get out of litigation? Far less than even a 50/50 chance of a favorable verdict. Plaintiffs in federal employment litigation win in only about 40 percent of jury trials.[11] And only a tiny fraction of cases even reach a jury. "Employers win 98 percent of cases which are resolved through summary judgment." Lewis Maltby, *Employment Arbitration: Is It*

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[11] Source: Database of Federal Trial Statistics, http://teddy.law.cornell.edu:8090/questtr7997.htm (results of trials from 1985-1997).

Really Second Class Justice?, Dispute Resolution Magazine (Fall 1999) at 23, 24.[12]

Despite these odds, a prospective plaintiff in an employment-related lawsuit still has to anticipate fees and expenses as a cost of pursuing litigation. The federal statutes prohibiting employment discrimination provide an award of attorney's fees only for the *prevailing* plaintiff,[13] and few plaintiffs prevail. As a result, employment discrimination plaintiffs must either pay their litigation expenses out of pocket or find an attorney willing to take the case on a contingent fee basis, which may be difficult given the limited chance of success. For many individuals, the costs involved in litigation may be prohibitive.

Employees are more likely to get their "day in court" in arbitration than they are in the judicial system. "Arbitration also offers employees a guarantee that there will be a hearing on the merits of their claims; no such guarantee exists in litigation where relatively few employees survive the procedural hurdles necessary to take a case to trial in the federal courts." *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1488 (D.C. Cir. 1997). Moreover, they are also more likely to get an explanation of the outcome in arbitration, since most employer-sponsored arbitra-

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[12] The EEOC finds "no reasonable cause" in 59.5 percent of the charges filed with it. Equal Employment Opportunity Commission, Enforcement Statistics, Fiscal Year 1999. This strongly suggests that the agency may be the recipient of a fair number of gripes that, while legitimate, do not represent unlawful conduct, and that the charges are filed by employees who have no other choice but to characterize their grievance as discrimination. Through the use of ADR processes, sensible employers are providing these employees with an outlet for their concerns.

[13] *E.g.*, 42 U.S.C. § 2000e-5(k) (Title VII); 42 U.S.C. § 12117(a) (ADA) (incorporating 42 U.S.C. § 2000e-5 by reference). *See also* 29 U.S.C. § 626(b) (ADEA) (incorporating by reference 29 U.S.C. § 216(b) providing for a "reasonable attorney's fee" "in addition to any judgment awarded to the plaintiff").

tion programs, as well as the AAA Rules, require the arbitrator to produce a written opinion. Mei L. Bickner et al., *Developments in Employment Arbitration*, Dispute Resolution Journal (Jan. 1997) *available in* LEXIS, ADR Library, DRJNL File, at *16. A jury, of course, does not do so.

Not only are employees more likely to be heard in arbitration —but also, they are more likely to succeed. Employees are *more* successful in employment arbitration than they are in court. Partly because arbitration procedures typically do not provide for summary judgment, "far more employees win in arbitration than in court, and overall, employees who take their disputes to arbitration collect more than those who go to court." Maltby at 24. This fact is particularly significant given the limited grounds on which a reviewing court may vacate an arbitration award. 9 U.S.C. § 10.

Moreover, the speed with which disputes are resolved through arbitration far outpaces the judicial system. The federal courts take an average of 21 months to complete a civil case through jury trial, although ten percent of cases take more than 46 months. Table C-10[14], Administrative Office of United States Courts (Sept. 30, 1999). "An arbitration award usually is issued within nine months after the time an arbitrator is selected." Toby Brink, *Alternative Dispute Resolution: Pros and Cons*, Connecticut Employment Law Letter (Mar. 2000) *available in* LEXIS, 2NDARY Library, MSMITH File, at *3. The alacrity benefits both sides, but particularly employees, who can less afford a lengthy battle.

> Most employees simply cannot afford to pay the attorney's fees and costs that it takes to litigate a case for several years. Even when an employee is able to engage an attor-

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[14] U.S. District Courts—Time Intervals From Filing to Trial of Civil Cases in Which Trials Were Completed, by District, During the 12-Month Period Ending September 30, 1999.

> ney on a contingency fee basis . . . the employee nonetheless often must pay for litigation expenses, and put working and personal life on hold until the litigation is complete.

Bales, *supra*, at 153-54.

For the same reason, the liberal discovery offered under the Federal Rules of Civil Procedure is a two-edged sword for employees. Discovery in arbitration typically is somewhat limited in comparison. *Compare* Fed. R. Civ. P. 26-37 *with* Rule 7, *National Rules for the Resolution of Employment Disputes* ("AAA Rules") (American Arbitration Association, 1999) ("The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.") and Rule 13, *JAMS Arbitration Rules and Procedures for Employment Disputes* ("JAMS Rules") (2000) (providing for good faith, voluntary exchange of relevant documents, exhibits, and names of witnesses, and for one deposition as of right). While more exhaustive discovery arguably might expose hidden evidence the employee needs to support her claim, typically it is the employer who has an incentive to test the limits of the discovery process, perhaps merely for purposes of delay and creating additional expense, or even in a quest for after-acquired evidence to limit available remedies and drive down the potential damages award. *Cf. McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995).

Similarly, the more relaxed procedural and evidentiary rules used in arbitration cannot help but benefit the employee, at least one not represented by counsel. *E.g.*, Rule 24, AAA Rules ("conformity to legal rules of evidence shall not be necessary"); Rule 18(d), JAMS Rules ("The Arbitrator may be guided . . . by the Federal Rules of Evidence . . .; however, strict conformity to such rules of evidence is not required, except that the Arbitrator will apply the law relating to privileges and work product.").

Indeed, as some employment arbitration programs such as Brown & Root's have shown, the procedural rules can be simple enough that neither party needs or wants a lawyer.

As a practical matter, "[a]rbitration thus provides access to a forum for adjudicating employment disputes for employees whom the litigation system has failed." Bales at 159 (footnote omitted).

> Procedural rights, such as the right to trial by jury, extensive (and often excessive) discovery, and formal rules of procedure and evidence, mean little to employees who cannot find an attorney to take their case, and who, therefore, feel that the doors to justice are closed to them. Arbitration gives these employees a ready opportunity to have their claims heard.

Id. See also Commission on the Future of Worker-Management Relations, U.S. Dep't of Labor and U.S. Dep't of Commerce, Report and Recommendations (Dec. 1994) (also known as the "Dunlop Commission Report") at 30 (describing litigation as "a less-than-ideal method of resolving" statutory employment claims, due to long delays and costs).

"Over the years, there have been many things which everyone *knew* were true that turned out to be wrong. The idea that employees are better off in court than in arbitration may well be one of them." Maltby at 24. In a recent newsletter directed to its employer clients, a U.S. law firm said, "Try not to panic if an administrative complaint or lawsuit is filed. Just remember, litigation is simply the 'American way' of resolving disputes between employers and employees." Anna Elento-Sneed, Carlsmith Ball, *Here are suggestions for minimizing conflicts over workplace diversity*, Pacific Employment Law Letter (Oct. 1999), *available in* LEXIS, 2NDARY Library, MSMITH File, at *3-4. Some employers have found a better way.

CONCLUSION

For the reasons set forth above, the *amici curiae* Equal Employment Advisory Council and LPA, Inc. respectfully submit that the decision below should be reversed.

Respectfully submitted,

ANN ELIZABETH REESMAN*
DANIEL V. YAGER
HEATHER L. MACDOUGALL
MCGUINESS NORRIS & WILLIAMS, LLP
Suite 1200
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600

**Counsel of Record*

August 2000