

# Waiving Goodbye to *Gilmer*? Early Signs of Repatriating Employment Disputes to Courts

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## **Employment Arbitration Increasingly Disappoints Employers**

Employer exposure to liability rose sharply following implementation of the 1991 Civil Rights Act and Americans with Disabilities Act in 1992. Employment discrimination lawsuits in federal courts rose from 8,273 in 1990 to 15,965 in 1994, 19,059 in 1995, and 23,152 in 1996 (Administrative Office of the U.S. Courts 2004)—a nearly threefold increase in seven years. After the Supreme Court approved mandatory arbitration in *Gilmer v. Johnson/Interstate Lane Corp.* (1991), employers saw an opportunity to opt out of these lawsuits. By the late 1990s, most Fortune 1000 companies used employment arbitration (Bureau of National Affairs 2004).

*Gilmer* arbitrations initially functioned like sovereign islands. They provided a low-cost alternative to courts and sheltered companies from stricter law enforcement. Companies set damage limits below federal caps (*Morrison* 1999); shifted large forum costs to workers (*Shankle* 1999); limited class actions (*Adkins* 2002); selected arbitrators unilaterally (*Penn* 2000); and shortened legal filing periods (*Chappel* 2000). Some firms required workers to submit all claims to arbitration, while preserving their right to sue these individuals in court (*Ferguson* 2000).

Today, *Gilmer* arbitrations are not the tranquil paradise that employers envisioned. Employees often win at arbitration. Hill (2003) finds that they win 43 percent of American Arbitration Association cases. This is similar to the 46 percent win rate for employees who arbitrate in the securities industry (Delikat and Kleiner 2003). Maltby (1998) finds that employees win 63

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percent of arbitrations. Clearly, arbitrators are not puppet judges. Paradoxically, prospects are improving for employers who avoid arbitration. Only 3 percent of federal lawsuits go to trial (Litras 2000).

Remedies are undergoing a similar turnaround. More employers are hit by large punitive damages in awards (Table 1). In contrast, trials offer employers safer ground. The Supreme Court recently limited punitive damages in trials (*State Farm* 2003). Judges now apply *State Farm's* mathematical limit in employment cases. *Williams* (2004) reduced a \$6 million punitive damages judgment for race discrimination to \$600,000. *Gilbert* (2004) voided a \$21 million jury award for sexual harassment. Employers did not

TABLE 1  
Punitive Arbitration Awards

Decision	Summary
<i>Sawtelle v. Waddell &amp; Reed, Inc.</i> 754 N.Y.S.2d 264 (2003)	Securities broker was awarded \$2 million in compensatory damages and \$25 million in punitive damages
<i>Kanuth v. Prescott, Ball &amp; Turben, Inc.</i> 949 F.2d 1175 (D.C. Cir. 1991)	CEO was awarded \$3 million for emotional distress plus \$1 million for punitive damages as part of overall award of over \$38 million
<i>Eaton Vance Distributors, Inc. v. Ulrich</i> 692 So.2d 915 (1997)	Award of \$625,000 in compensatory damages supplemented by punitive award of \$1,125,000
<i>Siegel v. Prudential Ins. Co. of America</i> 79 Cal.Rptr.2d 726 (Cal.App. 2 Dist. 1998)	\$1 million punitive award added to actual damages of \$338,000
<i>Davis v. Reliance Elec.</i> , 104 S.W.3d 57 (Tenn.Ct.App. 2002)	Award of \$50,000 for emotional distress claim plus other damages, and also \$520,000 in punitive damages
<i>Glennon v. Dean Witter Reynolds, Inc.</i> 83 F.3d 132 (6 <sup>th</sup> Cir. 1996)	Employee awarded \$750,000 in punitive damages
<i>Turgeon v. City of New Bedford</i> 12 Mass.L.Rptr. 401 (Mass.Super 2000)	Arbitrator awarded unspecified punitive damages in addition to back pay and damages for emotional distress
<i>Barvati v. Josephthal</i> 28 F.3d 704 (N.D. Tex. 1997)	Punitive award of \$120,000
<i>Fahnstock &amp; Co., Inc. v. Waltman</i> 935 F.2d 512 (2d. Cir. 1991)	Award of \$100,000 in punitive damages

expect this moderation from courts a decade ago. In sum, remedies are capped in trials but unlimited in employment arbitrations.

Employers also underestimated another drawback of *Gilmer* isolation. An arbitrator's award is hard to overturn. Judicial review of *Gilmer* awards is governed by the very deferential standards in the Federal Arbitration Act. This dilemma is magnified because arbitrators often rule without explaining their awards in writing, leaving little basis for appeal. In contrast, 44 percent of employee verdicts in discrimination trials are reversed on appeal (Clermont and Eisenberg 2002).

*Gilmer* arbitrations can also be time consuming (Table 2) and costly (Table 3). *LaPrade* (2001) took 74 hearing days, followed by *Sobol* (1999) with 62 days and *Owens-Williams* (1996) with 19 days. The company and employee paid more than \$650,000 "in fees and costs related to the arbitration" (*Brook* 2002, 673 n. 3). The award of \$160,000 in attorney's fees to the employee in *Cassedy* (2000) is more evidence that *Gilmer* arbitration is a costly process. A federal appeals court (*Morrison* 2003) observed that "as the monetary stakes rise and more days of hearings are necessary, arbitration's relative cost increases" (669).

The present study examines an emerging employer response to these developments. Some firms are foregoing *Gilmer* arbitration and preferring

TABLE 2  
Lengthy Arbitration Hearings

Decision	Summary
<i>Kanuth v. Prescott, Ball &amp; Turben, Inc.</i> 949 F.2d 1175 (D.C. Cir. 1991)	7,000 transcript pages and 1,200 exhibits
<i>Sobol v. Kidder, Peabody &amp; Co., Inc.</i> 49 F.Supp.2d 208, 223 (S.D.N.Y. 1999)	Arbitration took 62 hearing days from 1994–1998
<i>LaPrade v. Kidder, Peabody &amp; Co., Inc.</i> 246 F.3d 702 (D.C. Cir. 2001)	74 hearing dates and conferences from 1991–1996
<i>Owens-Williams v. Merrill Lynch, Pierce,</i> 103 F.3d 1119 (4 <sup>th</sup> Cir. 1996)	Arbitration took 19 hearing days
<i>Kiernan v. Piper Jaffray Companies, Inc.</i> 137 F.3d 588 (8 <sup>th</sup> Cir. 1998)	Arbitration took 14 hearing days
<i>Eisenberg v. Angelo, Gordon &amp; Co., L.P.</i> 234 F.3d 1261 (2d Cir. 2000)	Arbitration took 10 hearing days
<i>Mays v. Lanier Worldwide, Inc.</i> 115 F.Supp. 1330 (M.D. Ala. 2000)	Arbitration took 9 hearing days

TABLE 3  
High Costs Association with Arbitration Hearings

Decision	Summary
<i>Brook v. Peak Int'l, Ltd.</i> 294 F.3d 668 (5 <sup>th</sup> Cir. 2002)	Parties spent over \$650,000 in arbitration fees and costs
<i>Cassedy v. Merrill Lynch, Pierce, Fenner &amp; Smith</i> , 751 So.2d 143 (Fla.App. 1 2000)	Employee awarded \$160,000 in attorney fees
<i>Campbell v. Cantor Fitzgerald &amp; Co., Inc.</i> 205 F.3d 1321 (2d Cir. 1999)	Employee was charged with \$45,000 in forum fees

courts, provided that workers sign a pre-dispute agreement that waives their constitutional right to a jury trial. This follows legal advice from experienced counsel: “In light of the difficulties that many of our clients have recently encountered with arbitration, we’ve been advising them to consider entering into jury trial waiver agreements with employees instead of arbitration agreements” (Brody and Oncidi 2003).

This study analyzes court enforcement of these agreements. Jury waivers are like *Gilmer* forum waivers. They are presented to individuals as a condition of employment. Also, they aim to lower employer liability from lawsuits by denying workers access to part of the civil justice system. Oddly, however, they preclude arbitration and require court adjudication. Firms relinquish criticized features of *Gilmer* arbitrations that tip the scales of justice in their favor. In another contrast, jury waivers alter just one part of a trial. They do not impose across-the-board dispute resolution procedures on unwilling individuals. Also, these contracts ensure that laws, rather than industry norms, apply to employment disputes. Ironically, compared to arbitration, this new type of waiver may improve employee access to procedural and substantive justice.

### Who Adjudicates Federal Employment Disputes: Judge, Jury, or Arbitrator?

The Seventh Amendment provides a right to a jury in civil trials. But this right is not absolute. Early in the history of employment discrimination laws, Congress allowed only bench trials. The reasons varied. In Title VII cases, Congress feared racially biased juries (Medina 1997). Other individual employment laws were patterned after the Wagner Act. That law provided equitable remedies. In courts, this make-whole relief can be ordered only by a judge. By specifying only these remedies, Congress implicitly rejected jury trials. But over time, Congress added tort-like damages to employment laws

and expressly authorized juries to award compensatory and punitive damages. Thus, juries play a greater role today in awarding relief to prevailing employees. But the recent empowerment of juries has collided with a different trend. *Gilmer* allows employers to disenfranchise juries by requiring workers to arbitrate. Complicating the picture, Congress approved arbitration in discrimination laws. The same institution that provided for juries in employment disputes also made these juries totally avoidable.

### *Race Discrimination*

Title VII of the 1964 Civil Rights Act originally provided only bench trials. However, in passing the 1991 Civil Rights Act, Congress came to a new conclusion. Juries should be able to hear employment discrimination cases. A committee report concluded: "Just as they have for hundreds of years, juries are fully capable of determining whether an award of damages is appropriate and if so, how large it must be to compensate the plaintiff adequately and to deter future repetition of the prohibited conduct" (U.S. House 1991, 12). Remedies expanded to allow compensatory and punitive damages but were capped at \$300,000.

But Congress added a potentially confusing twist. Section 118 of the 1991 law allows for "alternative means of dispute resolution, including . . . arbitration." This implies that employers can seclude themselves and their employees on a private dispute resolution island to avoid a more rigorous enforcement regime. Courts have ruled inconsistently on the contradictory legislative messages as to whether a judge, jury, or arbitrator should adjudicate a Title VII claim. Some emphasize Section 118's approval of arbitration. *Rosenberg* (1999) says there is "no conflict between the language or purposes of Title VII, as amended, and arbitration" (13–14). Others conclude that Section 118 is just a half-hearted bow to arbitration. According to *Gibson* (1997), the main point of the 1991 law is to increase employer penalties. If Title VII plaintiffs are "forced into binding arbitration they would be surrendering their right to trial by jury—a right that civil rights plaintiffs . . . fought hard for and finally obtained in the 1991 amendments to Title VII, and they also have under the age discrimination and disability acts" (1129).

### *Age Discrimination*

Originally, the Age Discrimination in Employment Act (ADEA) was silent on juries. Federal courts disagreed as to whether plaintiffs were entitled to jury trials. The Supreme Court resolved the issue in favor of juries (*Lorillard* 1978). Congress reached the same conclusion just before the Court decided this issue (U.S. Congress 1978). Lawmakers reinforced the importance of juries in age discrimination disputes when they passed the Older Worker

Benefits Protection Act of 1990 (OWBPA). After studies showed that employers coerced older workers into waiving their right to sue under the ADEA as a condition for severance pay, Congress strictly regulated age discrimination waivers (U.S. House of Representatives 1990).

The OWBPA has detailed procedures for an age discrimination waiver to be knowing and voluntary. Waivers must refer to all rights and claims under the ADEA. This implies that an ADEA waiver must disclose the procedural right to a jury trial. But *Gilmer's* broad approval of mandatory arbitration rejected similar reasoning that the ADEA prohibits forced waiver of a trial because that law provides for a jury. By implication, *Gilmer* directs judges to ignore the strict, procedural waiver requirements for an ADEA lawsuit as long as arbitration provides a substitute for juries. Courts face conflicting public policies when they are asked to enforce arbitration agreements that omit OWBPA waiver requirements. Most favor *Gilmer*. *Williams* (1995) ruled that the OWBPA protects against the waiver of a right or claim but not waiver of a judicial forum. Only the Ninth Circuit has suggested that the OWBPA precludes *Gilmer* agreements (*Duffield* 1998), but that court reversed course (*E.E.O.C.* 2002).

### **The Role of State Law in Mandatory Jury Waivers**

State law plays a growing role in regulating employment. Employment-at-will is a dominant common law rule, but it is eroding. Courts now apply an array of torts to employment disputes—for example, emotional distress, negligence, and defamation. Constitutions add to state regulation of employment by creating privacy rights for workers.

State courts also regulate jury waivers. Most apply the same common law test in commercial and employment disputes. Appellate courts recently enforced commercial jury waivers in Alabama (*Ex Parte Cupps* 2000), Connecticut (*L & R Realty* 1998), Missouri (*Malan Investors* 1997), Nevada (*Lowe* 2002), Rhode Island (*Rhode Island Depositors* 2003), and Texas (*In re Prudential* 2004). Federal courts take a similar approach (*Today's Man* 2000). While the trend is to enforce jury waivers, courts require clear evidence that a business makes a voluntary and knowing decision.

These decisions have direct implications for employment contracts. In an example that relates to employment, Alabama enforces jury waivers but only if parties have equal bargaining power. In another business dispute opinion that bears on employment (*RDO* 2002), a court refused to enforce a waiver because the contract language “was buried in the middle of a lengthy paragraph, not set off from the rest of the text through differential bold, larger print, italics, or any other form of emphasis or distinction . . . [and was] wholly one-sided” (814). In addition, two states reject all jury waivers.

Notably, these commercial decisions discuss employment contracts. *Grafton* (2004), a California appeals court decision, finds that pre-dispute jury waivers violate the state's policy against coercive contracts. The Georgia Supreme Court (*Bank South* 1994) rejects pre-dispute jury waivers because they violate the state's constitutional provision for civil juries.

### **How Courts Respond to Employee Challenges to Mandatory Jury Waivers**

*Gilmer* was decided in May 1991. A General Accounting Office (GAO) study (1994) found that from 1990 to 1992 only eighteen discrimination claims were arbitrated in the securities industry. Even with a tiny sample, the GAO investigated this new process. By comparison, this study finds only five court opinions on employee challenges to jury waivers. However, because employers are easily able to diffuse a mandatory dispute resolution process, early signs of a change should be watched. The following reasons explain why jury waivers in employment are more numerous than these cases suggest.

Lawyers have only recently advised employers to use bench trials instead of arbitration. Also, people may not realize they have waived a jury. Even if workers see this information, they may not understand the meaning and implication of these terms. Examples of waiver legalese in employment contracts appear at the bottom of Table 5.

In addition, jury waiver challenges cannot be quantified unless there is a legal dispute, but these complaints are rare. The Equal Employment Opportunity Commission (EEOC) fielded 81,293 discrimination complaints in 2003, from approximately 140 million job holders. At the same time, in federal courts 20,507 workers took their complaint a step farther by filing an employment discrimination lawsuit. Thus, about 1 in every 7,000 employees annually files a federal discrimination lawsuit. This threshold step in the dispute resolution process may be the first time a worker learns that she waived a jury. Unless there is a legal complaint and it proceeds to this point, a jury waiver is unlikely to be noticed.

In sum, this study is unlikely to reflect current use of jury waivers in employment contracts. No waiver can be analyzed here unless (a) an employer requires this pre-dispute agreement, (b) an employee is aware of the waiver, (c) an employment dispute occurs, (d) a legal complaint is filed, (e) the employee objects to the waiver, and (f) the court opinion is published.

#### *Three Decisions Enforced Jury Waivers*

In *Schappert* (2004) a publishing company fired a fifty-four-year-old female vice president after a younger male executive restructured the firm. After *Schappert* sued in a New Jersey court under that state's employment

discrimination law, the company moved to enforce its pre-dispute employment agreement. The contract required that an employment claim be adjudicated in a federal court without a jury. It also provided for fifteen months of severance salary, which the company paid to the plaintiff. Schappert then petitioned the federal court for a jury, claiming that her waiver was invalid because it violated the knowing and voluntary standard in the OWBPA. The court disagreed. The jury waiver was printed in conspicuous typeface above her signature. The generous severance payment (\$243,750), which resulted from back-and-forth negotiation, defeated Schappert's argument that she had no bargaining power. The court reasoned when a pre-dispute agreement is negotiable, its jury waiver is conspicuous, both parties have a degree of bargaining power, and the party waiving the right has business acumen, the high standards for enforcing a waiver are met.

A similar result occurred in *Morris* (2004). An Iowa clinic recruited a California neurosurgeon. After the doctor closed her practice and moved she was unable to obtain an Iowa license. Thus, she did not meet a condition for employment. She sued the clinic for fraud, breach of contract, and negligence. The clinic moved to enforce a jury waiver in the contract. A federal court ruled that Dr. Morris executed a knowing and voluntary waiver. Again, there was evidence of bargaining over terms of employment. Dr. Morris persuaded the clinic to modify its contract offer by increasing her relocation expenses and reimbursement for malpractice insurance. The court reasoned that the doctor could have bargained the jury waiver, too. E-mail showed that Dr. Morris was happy with changes in her proposed contract. The court ruled that even if there was unequal bargaining power in the negotiations, this did not harm her. Also, the jury waiver clause was the only capitalized print in the contract and therefore was conspicuous.

The third decision to enforce a jury waiver involved another well-educated professional (*Brown* 2002). The plaintiff earned an MBA from Harvard and worked as an investment banker before taking a job as a commercial real estate broker. After she was fired, she sued for breach of contract and sex discrimination. The firm moved to enforce a pre-dispute jury waiver. A federal court ruled for the employer. Giving weight to the plaintiff's professional education and work experience, the court concluded that Brown could have negotiated the clause. The judge dismissed her contention that the waiver is unenforceable because she did not read the employment agreement before signing it. In addition, the court rejected Brown's contention that the Pregnancy Discrimination Act precludes a jury waiver. If the firm could compel Brown to arbitrate her sex discrimination claims under *Gilmer*, it could also require a bench trial.



### *Two Decisions Rejected Jury Waivers*

A seventy-three-year-old insurance office manager was fired in *Hammaker* (2002). This occurred soon after his former employer sold the firm. The new employer required him to sign a jury waiver. Hammaker also alleged that he was pressured to retire. After he was fired and sued under the ADEA, the employer moved in federal district court to enforce the pre-dispute jury waiver. Hammaker responded that the agreement did not expressly refer to his rights under the ADEA. Thus, he did not waive his right to a jury. The court rejected the employer's contention that the OWBPA's waiver requirements apply only to substantive rights and concluded that this law also strictly regulates waivers of trial procedures.

In *Mafcote Industries* (1998) an employer tried to repossess a company car from a recently fired sales manager. This confrontation occurred when only a teenager was home and after the employee offered to buy the car while he disputed how much money the company owed him. The firm sued, claiming theft of a car, and the employee counterclaimed for emotional distress and breach of contract. As the case went to trial, the employer moved to enforce the jury waiver in the employment contract. The court denied the motion, concluding that a contractual jury waiver is not automatically enforceable. In its remand to the magistrate, the court sent instructions to consider the conspicuousness of the waiver, whether the parties were represented by counsel, whether there was a gross disparity in bargaining power between the parties, the business or professional experience of the party opposing the waiver, and whether the party opposing the waiver had an opportunity to negotiate contract terms.

### **Questions About *Gilmer* Arbitrations and Changing Conditions in Federal Courts**

This study raises new questions about *Gilmer* arbitrations. Tables 1–3 present fresh evidence of employer problems with this forum. The study also reports on management lawyers who advise employers to return to courts. Companies are confronting comparatively low win rates, punitive awards, and poor efficiency. Some are now being advised to use contracts to customize trial procedures for workplace disputes. Several themes emerge from this study.

### *Employment Arbitration May Be Part of a Broader, One-Size-Fits-All Corporate Strategy to Manage Dispute Costs and Outcomes*

Studies of *Gilmer* arbitrations focus on fairness and outcomes for employees. This worthwhile research is cited by courts to evaluate *Gilmer*

procedures (for example, Bingham 1997, cited by *Rosenberg* 1999; and Alleyne 1996, cited by *Cole* 1997). But much of this research stream examines employment arbitration as a stand-alone process, without considering that mandatory arbitration may emanate from a one-size-fits-all approach that companies use to manage all dispute costs and outcomes. Lipsky, Seiber, and Fincher (2003) offer a notable exception. They view *Gilmer* arbitration as a point on a spectrum of conflict management strategies adopted by large corporations. This highlights a problem with mainstream employment arbitration studies: they may fail to anticipate changes in broader currents that modify use of dispute resolution procedures. This study sees pre-dispute employment contracts as an extension of a broader corporate strategy. For large companies, it does not matter whether a potential complainant is a customer, supplier, credit card debtor, or employee (Spencer 2004). Firms are largely free to impose terms that customize dispute resolution features to their liking.

The recent upsurge of high-level jury waiver court opinions in commercial disputes across the country may be a telling sign. Similar contracts are beginning to appear in employment disputes. Together, these new cases suggest that some companies are interested in trials rather than arbitrations—as long as the firm's boilerplate conditions apply. This magnifies the importance of current *Gilmer* agreements, now estimated to cover millions of workers. These contracts can be easily amended. In short, a low-cost infrastructure already exists to allow employers to migrate customized dispute resolution procedures from arbitration to courts.

### *Federal Courts Are Becoming More Attractive to Employers*

This idea would have been absurd in the early 1990s, but the federal regulatory landscape is improving for companies. Meanwhile, arbitration is disappointing some employers. Data in Tables 2 and 3 perversely support *Gilmer's* idea of forum substitution: arbitration is becoming a more court-like process, burdened by cost and delay problems. However, company lawyers also realize now that *Gilmer* arbitrators rarely grant motions for summary judgment to dismiss a claim, are less likely than judges to exclude evidence, and have a tendency to split the baby. These typical arbitrator behaviors are cause for employers to prefer a starchy federal judge who enjoys lifetime tenure (Estreicher and Johnson 2003). Also, changes in federal law may encourage some employers to avoid *Gilmer* arbitrations in the first place, or repatriate their private dispute resolution procedures to these courts. The recent 10:1 limit of punitive to actual damages gives federal courts a comparative advantage to arbitration, where no limit is recognized.

*Will Courts Enforce Mandatory Jury Waivers as Readily as Gilmer Waivers?*<sup>9</sup>

This study does not answer whether jury waivers are good or bad for workers but it does reveal the complexity of this development. If bench trials are fair, there is no reason to force them on workers. Also, Congress clearly intended to make juries available to employees, knowing that this would expose unlawful employment practices to the judgment of a worker's peers. On the other hand, *Gilmer* critics cannot argue persuasively that bench trials are worse for workers than mandatory arbitration. The repeat player concern about arbitrators does not apply to judges. Also, there are no required qualifications for arbitrators. To be nominated, however, a federal judge must first meet high minimum standards related to licensing and years of legal experience. It is also hard to argue that an employee cannot get a fair trial before a federal judge. Are bench trials a reasonable compromise of employer and worker interests?

*Gilmer* allows an island for private adjudication of disputes. But when employers use the same contractual method merely to substitute bench trials for arbitration, courts apply a much more challenging test from commercial law. Only one case here (*Brown*) paid even passing attention to *Gilmer*. The others tracked the jury waiver test for commercial disputes, which pays close attention to bargainer sophistication. In the one pure age discrimination case, the *Hammaker* court ignored *Gilmer* and focused instead on a waiver-protection law, the OWBPA.

This highlights the importance of the commercial cases in Table 4. Six of the seven state supreme court rulings occurred from 1997 to 2004. In addition, *Grafton* is now before the California Supreme Court. These recent controversies imply that jury waivers in form contracts are a growing phenomenon. The other striking features are the amount of negotiation and bargainer sophistication. As the table shows, negotiations involved lawyers or experienced business people. There was give and take before contracts were signed. This differs from the experience of ordinary workers. In Table 5 courts weighed an employee's bargaining power. They found that a corporate vice-president, Harvard MBA, and neurosurgeon/clinic manager had business acumen. But these were elite employees. When courts refused to uphold jury waivers, the employees were salaried managers. Even then, judges were not convinced that they made knowing and intelligent decisions. No case dealt with hourly workers, but the implication is that courts will not accept their jury waivers as readily as in *Gilmer* agreements.

In sum, employers face an increasingly difficult choice. They can seclude themselves on a *Gilmer* island that is more unfriendly and costly and less

TABLE 4  
State Supreme Court Rulings on Mandatory Jury Waivers in Commercial Agreements

Decision by Year	Ruling	Legal Claim	Parties	Negotiation
<i>In re Prudential</i> (2004) Texas Supreme Court	Waiver is enforced	Lessor sued lessee	Family business and shopping mall	“Lease agreement was product of six months of active negotiations,” with changes to standard contract
<i>R.I. Depositors</i> (2003) Rhode Island Supreme Court	Waiver is enforced	Creditor sued debtor	Lawyers as firm partners and lender	Law firm with three partners who signed personal loan guarantee contained valid jury waiver
<i>Lowte</i> (2002) Nevada Supreme Court	Waiver is enforced	Lender sued borrower	Two businesses	“Sophisticated and experienced business people” negotiated loan that contained jury waiver
<i>Ex Parte Cupps</i> (2000) Alabama Supreme Court	Waiver is enforced	Bank sued on loan	Bank and businessman	Businessman negotiated 90-day repayment extension contract with jury waiver after he defaulted on loan
<i>L &amp; R Realty</i> (1998) Connecticut Supreme Court	Waiver is enforced	Bank sued on loan	Lawyers as realty partners and bank	Two of three partners were lawyers who orally negotiated terms with bank’s senior vice president
<i>Malan</i> (1997) Missouri Supreme Court	Waiver is enforced	Lessor sues lessee	Two businesses	Lessee was represented by attorney when lease was transacted in an “arm’s length negotiation”
<i>Bank South</i> (1994) Georgia Supreme Court	Waiver is invalid	Lender sued borrower	Two businesses	Supreme Court does not examine negotiations, but concludes that state’s constitutional guaranty of right to civil jury precludes all jury waivers

TABLE 5  
Court Rulings on Mandatory Jury Waivers in Employment Agreements

Decision by Year	Ruling	Legal Claim	Parties	Negotiation
<i>Morris v. McFarland Clinic P.C.</i> (2004)	Waiver Is Enforced <sup>A</sup>	Fraud/Contract/ Negligence	Neurosurgeon	Doctor negotiated increase in relocation reimbursement when she signed waiver
<i>Schappert v. Bedford, Freeman &amp; Worth Pub. Group, LLC</i> (2004)	Waiver Is Enforced <sup>B</sup>	Title VII/ADEA/ N.J. Discrimination	Vice President	Employee negotiated \$243,750 severance at time she signed waiver
<i>Brown v. Cushman &amp; Wakefield, Inc.</i> (2002)	Waiver Is Enforced <sup>C</sup>	Title VII/PDA	Commercial Real Estate Broker	Harvard MBA and former investment banker held to terms of contract that she failed to read
<i>Hammer v. Brown &amp; Brown</i> (2002)	Waiver Is Invalid <sup>D</sup>	ADEA/OWBPA	General Manager	None
<i>Mafco Industries v. Swanson</i> (1998)	Waiver Is Invalid <sup>E</sup>	Emotional Distress/ Breach of Contract	Sales Manager	None

<sup>A</sup> “Each of the parties hereto irrevocably waives all right to trial by jury in any action, proceeding, or counterclaim arising out of or relating to this agreement.” <sup>B</sup> “Any dispute between the parties relating to this Agreement that they do not settle between them may only be resolved by the state and federal courts located in New York . . . . Each party hereby waives the right to a jury trial in any lawsuit arising out of or relating to the Agreement or Executive’s employment by the Company.” <sup>C</sup> “C & W and Employee shall and hereby do waive a trial by jury in any action, proceeding or counter-claim brought or asserted by either of the parties hereto against the other on any matters whatsoever arising out of this Agreement.” <sup>D</sup> “Employee and Company hereby knowingly, voluntarily and intentionally waive any right either may have to a trial by jury with respect to any litigation related to or arising out of, under or in conjunction with this Agreement.” <sup>E</sup> The employee “consents to the personal jurisdiction of the Superior Court of the State of Connecticut and the United States District Court for the District of Connecticut and agrees that any action to enforce the foregoing may be brought in either such court. In any action or proceeding relating to this Agreement, the parties mutually waive trial by jury.”

easy to control. Once there, they have little hope of rescue from an appeals court to vacate adverse awards—which occur in about half of all cases. An emerging option is to repatriate their dispute resolution procedures to the judicial mainland. Some experienced management lawyers see federal courts as a better alternative, as long as employers do not have to face a jury. This study finds early signs, however, that courts will not enforce employer-imposed jury waivers to the degree that they have permitted *Gilmer* waivers of the entire judicial system.

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