Articles

JURY REVIVAL OR JURY REVILED? WHEN EMPLOYEES ARE COMPelled TO WAIVE JURY TRIALS

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[T]he right of jury trial . . . . is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.1

The friends and adversaries of the plan of the [constitutional] convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.2

I. INTRODUCTION

A. Statement of the Research Issue

Juries are waning on two fronts. Courts sentence convicted criminals. However, in 1984 Congress enacted binding sentencing guidelines, a sentencing system under which the court determines sentences according to factors which have been set forth in sentencing guidelines.3 Many states

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follow a similar course. These laws negate the fact-finding function of juries during sentencing. The civil jury is also fading, due to judicial encouragement of arbitration. This forum transfer is advocated to relieve congested courts. Private judging is replacing public adjudication.

Individual employment arbitration exemplifies the decline of the civil jury. Companies require individuals to submit employment disputes to private judges. The Supreme Court's seminal decision, Gilmer v. Interstate/Johnson Lane Corp., signals broad approval of this workplace dispute resolution method. The problem is that employees are pressured to waive access to a judicial forum, including a jury. A few years after Gilmer, millions of employees are now required to arbitrate. Firms


5. See Blakely, 124 S. Ct. at 2537 (“When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ and the judge exceeds his proper authority.” (citation omitted)). See also Booker, 125 S. Ct. at 751 (“Booker's actual sentence, however, was 360 months, almost 10 years longer than the Guidelines range supported by the jury verdict alone. To reach this sentence, the judge found facts beyond those found by the jury . . . .”).


7. See Warren E. Burger, Isn't There a Better Way?, Annual Report on the State of the Judiciary at the Midyear Meeting of the American Bar Association (Jan. 24, 1982), in 68 A.B.A. J. 274 (1982). In his memorable speech, Chief Justice Burger remarked, “[o]ne reason our courts have become overburdened is that Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties.” Id. at 275. He proposed to alleviate this caseload by “a system of voluntary arbitration.” Id. at 277.

8. See, e.g., Desiderio v. Nat'l Ass'n of Sec. Dealers, 191 F.3d 198, 200 (2d Cir. 1999) (noting that offer of employment was rescinded after successful job applicant refused to sign mandatory arbitration agreement).


10. See Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000) (holding that a mandatory employment arbitration agreement for a state-law claim is adhesive). The court stated, “[i]t was imposed on employees as a condition of employment and there was no opportunity to negotiate. . . . [T]he economic pressure exerted by employers . . . may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement.” Id.
embrace arbitration to lower dispute costs. But that is beginning to change as employers question its value. Key rulings make trials less expensive, while arbitrations are more costly. Remarkably, some employers are discarding arbitration to return to court, but with a condition: employees must waive access to a jury and agree to a bench trial.

This Article examines mandatory jury waivers in employment. These are like Gilmer arbitrations because they are contractual, agreed to before a dispute, and required for a job. Also, they aim to lower employer liability by denying individuals access to part of the civil justice system. By requiring bench trials, these contracts reflect a growing corporate belief that judges, unlike juries, are indifferent to a firm’s wealth. The Supreme Court agrees that civil juries can be unreasonable.

Ironically, jury waivers preclude arbitration. Employers who select a court relinquish criticized features of Gilmer arbitrations that favor them. In another contrast, jury waivers alter only one civil justice element. They do not impose an entire dispute resolution system on unwilling workers.

12. See infra note 77.
13. See infra notes 76 and 79.
14. Certain courts uphold jury awards based on evidence of what a “wealthy” corporation is able to afford in damages, suggesting that jurors are biased against rich companies. See, e.g., Hatrock v. Edward D. Jones & Co., 750 F.2d 767, 773 (9th Cir. 1984) (finding that firm’s “great wealth supports the jury’s award” of $200,000 in punitive damages against the firm).
16. Structural advantages favoring employers include the repeat player effect, whereby employers establish an arbitration system, select arbitrators, and capitalize on these advantages as a “repeat player” for the arbitrator’s services. In contrast, an employee typically arbitrates only one dispute and therefore selects an arbitrator only once. See Lisa B. Bingham, On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards, 29 MCGEORGE L. REV. 223, 223 (1998) (discussing the advantages repeat players have over one-shotters and noting that one-shotters “are not able to form continuing relationships with courts or institutional representatives”). Critics believe that the arbitrator’s perception of being a repeat selection predisposes him to rule in favor of the party who controls the system. See id. at 242 (“One possibility is that arbitrators, freed from the free market constraint of having to worry about future selection by both parties, might tend to rule in favor of the only party in a position to maintain an institutional memory and use arbitrators again in the future, namely the employer.”). An employer’s ability to require workers to pay forum costs—for example, half the arbitrator’s fee—is another inequality because firms are more able to absorb arbitrator fees that run $700 to $2,000 per day. See Michael H. LeRoy & Peter Feuille, When Is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever Green Tree of Mandatory Employment Arbitration, 50 UCLA L. REV. 143, 160 (2002) (“The average per diem fee charged by labor arbitrators has risen modestly to about $700, compared to $2000 per diem fees for employment arbitrators.”).
Jury waivers also provide public adjudication of disputes. This enables federal courts to perform a role that Congress prescribed, enforcing employment laws. New precedents evolve to update the statutes.

How do courts today treat pre-dispute jury waivers in employment contracts? Gilmer suggests that judges should routinely enforce these agreements. After all, if the Supreme Court approves compulsory agreements that waive entire access to a court, judges should not think twice about similar agreements that require a bench trial. My research of early cases shows, however, that courts scrutinize the bargaining process that results in these waivers. Adding to this surprising picture, lower courts have not yet digested new Supreme Court pronouncements in criminal cases that reaffirm respect for juries.

Considering that the Constitution provides individuals a jury in criminal and civil trials, is judicial revival of civil juries far behind? Strangely, although jury waivers in employment mark the first retreat from Gilmer waivers of the entire judicial forum and signify a return to public courts, their enforcement is more difficult.

B. Organization of this Article

Part II examines selection of a judge, jury, or arbitrator for employment disputes. Arbitration for discrimination claims was embraced by Gilmer. Because this private forum offered many advantages,

17. See New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 64 (1980) ("Of course, the 'ultimate authority' to secure compliance with Title VII resides in the federal courts.").

18. As Gilmer arbitrations are widely adopted, they displace federal courts. As a result, the Supreme Court is unable to play a corrective role in shaping employment law. Cf., e.g., Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (holding that former employee may bring a claim for retaliation); O'Connor v. Consolidated Coin Caterers, Corp., 517 U.S. 308, 312-13 (1996) (holding that comparator in age discrimination case need not be under forty); Harris v. Forklift Sys., Inc., 510 U.S. 17, 22-23 (1993) (rejecting view that sexual harassment plaintiffs must show psychological injury in hostile work environment cases).

19. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). The Court reaffirmed the ancient common law jury rule that "the truth of every accusation against a defendant should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors." Id. at 477 (alteration in original) (quoting 4 William Blackstone, Commentaries *343).

20. The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury." U.S. Const. amend. VI. Similarly, the Seventh Amendment to the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

21. See infra notes 51-56 and accompanying text.
employers widely imposed it on their workers. But new evidence shows that this forum is losing its appeal. Thus, employers are being urged to choose courts over arbitration, provided that workers sign jury waivers. This Article also explores the intent of Congress to enforce its main race discrimination law. Jury trials were prohibited at first because Congress feared biased juries, but this presumption changed in 1991. Lawmakers did not address jury trials when they passed an age discrimination law in 1967, but a decade later the law provided access to juries.

The role that state law plays in jury waivers is analyzed in Part III. After showing that common law regulates private employment, this Article examines recent state court decisions on commercial jury waivers. Although the context is different, this Article explains how these rulings relate to employment. Most state and federal courts enforce these business contracts. However, California and Georgia courts have ruled that individuals must have access to juries.

Part IV discusses my sample of jury waiver decisions in employment disputes. Table 1 summarizes key information from these cases, including the jury clauses in these controversial contracts. Three decisions that enforce jury waivers and two decisions that deny enforcement, are analyzed. I conclude that courts scrutinize bargaining between workers and employers to ensure that jury waivers are “knowing and voluntary.”

Part V revisits the legislative history of the Federal Arbitration Act (FAA). Congress wanted to exempt employment contracts from this law because workers do not have the same bargaining power as two businesses

22. See infra notes 63–68, 75 and accompanying text.
23. See infra notes 76–77, 80–82 and accompanying text.
24. See infra note 87 and accompanying text.
25. See infra notes 89–92 and accompanying text.
26. See infra note 89 and accompanying text.
27. See infra note 91 and accompanying text.
28. See infra note 98–100 and accompanying text.
29. See infra notes 101–02 and accompanying text.
30. See infra notes 121–29 and accompanying text.
31. See infra notes 130–35.
32. See infra notes 137–46 and accompanying text.
33. See infra notes 130–35.
34. See infra note 136.
35. See infra Part III.B.
36. See infra Part IV.A.
37. See infra Table 1 at Part IV.A.
38. See infra Part IV.B.
39. See infra Part IV.C.
40. See infra notes 240–41 and accompanying text.
41. See infra note 234 and accompanying text.
engaged in an arm's length transaction.\textsuperscript{42} Over seventy years later, the Supreme Court ignored that intent.\textsuperscript{43} But the emerging experience in commercial jury waiver cases has an ironic result. Most decisions uphold these waivers because business owners demonstrate enough bargaining sophistication to indicate a conscious forum-selection decision. Strangely, however, even though judges routinely enforce entire waivers of courts in \textit{Gilmer} agreements, when they transplant this test from commercial cases to employment disputes they pay more attention to the contract formation process between workers and companies. As a result, they are less inclined to enforce jury waivers. I predict that employers will need to choose between jury trials and arbitration, both of which expose them to a greater possibility of reviled punitive judgments.

II. WHO ADJUDICATES FEDERAL EMPLOYMENT DISPUTES: JUDGE, JURY, OR ARBITRATOR?

Who adjudicates federal employment disputes: a judge, a jury, or an arbitrator? The answer is all of them, subject to certain qualifications. Those conditions are explored here. Arbitration, the most recent addition to the roster of employment adjudications, is examined first. Next, I explore two federal employment discrimination laws that specifically provide for a bench or jury trial. The fact that these laws currently authorize a judge, jury, or arbitrator to adjudicate an employment dispute glosses over serious disagreement between Congress and the Supreme Court in their forum preferences. Congress wants employees to have unfettered access to juries while the Supreme Court’s strong approval of arbitration implies its preference for private judges.\textsuperscript{44}

As I now show, mandatory jury waivers are a complex development. \textit{Gilmer} critics would seem to favor a new trend that allows more trials and less forced arbitrations. They trust judges more than arbitrators to apply

\textsuperscript{42} See infra note 234, 60-62 and accompanying text.

\textsuperscript{43} See infra note 237 and accompanying text.

\textsuperscript{44} These different perspectives are highlighted in a major lawsuit that challenged mandatory arbitration in the securities industry. The district court in Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F. Supp. 190 (D. Mass. 1998) concluded that it is "unlikely that the same Congress would in a single act create a new constitutionally-based right to a jury trial for Title VII plaintiffs, only to erode that right by endorsing mandatory pre-dispute arbitration agreements. . . . It makes little sense that Congress would have finally recognized this right in one section of 1991 Act, and then undermined it in another." \textit{Id.} at 205-06. On appeal, the First Circuit bluntly disagreed: “The district court’s comment that an endorsement of arbitration would be at odds with the 1991 CRA’s creation of a right to a jury trial . . . ignores \textit{Gilmer}'s endorsement of arbitration under the ADEA—which also provides for jury trials. It may also evince a distrust of arbitration that the Supreme Court has long since disavowed.” Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 11 (1st Cir. 1998).
discrimination laws. They abhor employer hand-picking of arbitrators. But the very act of employer compulsion—even to improve upon mandatory arbitration—would likely incite these critics.

A. Arbitrators as Adjudicators of Employment Disputes

1. Use of Arbitrators as Adjudicators of Employment Disputes Grow in the 1990s

The Supreme Court's approval of mandatory arbitration is a major development in employment law. The setting in Gilmer has broad appeal to employers who face discrimination lawsuits. Gilmer encourages companies to make arbitration an unquestionable condition of employment—to the point of firing otherwise good workers simply because they refuse to sign these contracts.


46. See Sarah Rudolph Cole, Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution, 51 Hastings L.J. 1199, 1233 n.152 (2000) (noting that "a party might act opportunistically by selecting an arbitrator the party considers predisposed to the particular argument the party will advance" and "the possibility of opportunistic behavior in arbitrator selection provides repeat players... a decided advantage in the arbitral forum"); Margaret M. Harding, The Redefinition of Arbitration by Those with Superior Bargaining Power, 1999 Utah L. Rev. 857, 863 (1999) (describing how parties with superior bargaining powers use arbitration agreements to gain advantages by selecting arbitrators).


48. Robert Gilmer, as a condition for being a registered securities broker, signed a standard industry agreement to submit any dispute to arbitration. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991). In this case, his employer went to court to transfer Gilmer's age discrimination lawsuit to arbitration, id. at 24, a venue that Gilmer perceived as fundamentally unsuited for this kind of dispute. Id. at 30–32. Gilmer argued that he had no ability to bargain over the contract, id. at 33, and in any event, the Age Discrimination in Employment Act precluded his waiver of access to federal court. Id. at 27–29. The Court rejected these arguments, id. at 27–33, and held that Gilmer's age discrimination claim could be subjected to mandatory arbitration pursuant to the arbitration agreement. Id. at 23. The holding in Gilmer pertained only to arbitration agreements in securities registration applications, which are contracts with the securities exchanges not the employer, and therefore did not rule directly on arbitration as provided in employment contracts. Id. at 25 n.2. Later, in Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001), the Court broadened Gilmer's narrow holding to apply the FAA to most employment arbitration agreements.

But mandatory employment arbitration pressures employees to waive access to a court, including their right to a jury. The *Gilmer* majority dismisses this concern. The Court rejects the idea that a private proceeding deprives individuals of a judicial forum, thwarts the Age Discrimination in Employment Act’s (ADEA) policy of eradicating age discrimination, and undermines the role of the Equal Employment Opportunity Commission (EEOC). The Court sees nothing amiss as long as an individual has access to a forum that functions like a court. In the view of the *Gilmer* majority, Congress enacted the FAA to counteract judicial hostility to this private dispute resolution forum.

*Gilmer* exposes a serious problem in employee jury waivers. The majority opinion does not address this issue directly. Its treatment of the FAA’s legislative history sidesteps the question of whether Congress intended to enforce arbitration agreements only between businesses that make commercial transactions, or whether lawmakers also intended that this private forum be available to employers and workers. Instead,

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50. *See* Armendariz v Found. Health Psychcare Servs., Inc., 6 P.3d 669, 692 (Cal. 2000) (“The party who is required to submit his or her claims to arbitration [forfeits] the right, otherwise guaranteed by the federal and state Constitutions, to have those claims tried before a jury,” (alteration in original) (quoting Kinney v. United HealthCare Servs., Inc., 83 Cal. Rptr. 2d 348, 354 (Cal Ct. App. 1999))).

51. *See* Gilmer, 500 U.S. at 23 (holding that an age discrimination claim “can be subjected to compulsory arbitration pursuant to an arbitration agreement”).

52. Id. at 29.

53. Id. at 27.

54. Id. at 28.

55. *See id.* at 26 (stating that “[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” (alteration in original) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985))).


57. *See* 65 CONG. REC. 1931 (1924) (remarking that the law “creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts” (emphasis added)). When the bill was introduced in the House, its sponsor, Representative Mills, explained that it “provides that where there are commercial contracts and there is disagreement under the contract, the court can [en]force an arbitration agreement in the same way as other portions of the contract.” *Id.* at 11,080 (emphasis added). *See also* H.R. REP. No. 68-96, at 1–2 (1924) (describing the need for the law); S. REP. No. 68-536, at 3 (1924) (stating that by avoiding “the delay and expense of litigation,” arbitration appeals “to big business and little businesses . . . corporate interests [and] . . . individuals”).

58. The President of the Seamen’s Union of America expressed the objections of
Gilmer emphasizes more recent court approval of arbitration.\textsuperscript{59} Thus, it ignores congressional intent to limit the FAA to business contracts.\textsuperscript{60} The majority opinion sets aside congressional concern about the inequality of bargaining power between large businesses who want to avoid courts and ordinary workers who are powerless to resist this pressure.\textsuperscript{61} This, in turn, organized labor at the 1923 annual convention of his union:

"[T]his bill provides for reintroduction of forced or involuntary labor, if the freeman through his necessities shall be induced to sign. Will such contracts be signed? Esau agreed, because he was hungry. It was the desire to live that caused slavery to begin and continue. With the growing hunger in modern society, there will be but few that will be able to resist. The personal hunger of the seaman, and the hunger of the wife and children of the railroad man will surely tempt them to sign, and so with sundry other workers in "Interstate and Foreign Commerce."

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 126 n.5 (2001) (Stevens, J., dissenting) (alteration in original). In response to this strong concern, Secretary of Commerce Herbert Hoover suggested that "[i]f objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'" Id. at 127 (alteration in original).

\textsuperscript{59} Gilmer, 500 U.S. at 30 ("Such 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 complainants,' and as such, they are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'" (alteration in original) (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989))).

\textsuperscript{60} In Section 1 of the FAA, Congress enacted an exemption of contracts between certain workers and their employers. See § 1, 61 Stat. at 670. In approving this exclusion for the employment contracts of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," id., Congress appeared to agree with the President of the Seamen's Union. Senator Walsh of Montana expressed concern for the adhesive nature of employment contracts as well as contracts between large businesses and smaller businesses who lack power to negotiate contract terms:

The trouble about the matter is that a great many of these contracts that are entered into are really not [voluntary] things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you can not make any contract. It is the same with a good many contracts of employment. A man says, 'These are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.


\textsuperscript{61} See Gilmer, 500 U.S. at 29--30 (interpreting the FAA as being intended "to place arbitration agreements on the same footing as other contracts" and therefore rejecting the argument that the likelihood of unequal bargaining power in agreements to arbitrate employment claims should prevent their enforcement).
relates to whether employees have adequate bargaining power to negotiate a jury waiver.\(^62\)

These debating points did not interest employers when \textit{Gilmer} was decided. They heeded the opinion’s strong arbitration signal, and concluded that this private forum was a panacea to a growing litigation crisis.\(^63\) Arbitration was then touted for limiting employer damages.\(^64\) It offered privacy\(^65\) and protected documents from discovery.\(^66\) Early evidence suggested that arbitration was faster and more economical than trials.\(^67\) By unilaterally selecting arbitrators, employers also improved their odds of defeating discrimination claims.\(^68\) They added to these advantages by requiring workers to pay forum costs associated with private judging.\(^69\)

Following \textit{Gilmer}, courts are more willing to enforce mandatory arbitration agreements.\(^70\) Although these contracts are similar to compulsory jury waivers,\(^71\) the latter face more scrutiny from courts.\(^72\)

\begin{itemize}
  \item \textit{See infra} text accompanying notes 184, 199, 205, and 226.
  \item \textit{See Alternative Dispute Resolution: Most Large Employers Prefer ADR as Alternative to Litigation, Survey Says}, Daily Lab. Rep. (BNA) No. 93, at A-4 (May 14, 1997) (surveying 530 \textit{Fortune} 1000 companies and finding that seventy-nine percent of employers have used arbitration).
  \item \textit{See EEOC, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, EEOC Notice 915.002 (July 10, 1997) (discussing the “lack of public disclosure”), \textit{available at} 1997 WL 33159163, at *6.}
  \item \textit{See id. (“Discovery is significantly limited compared with that available in court and permitted under the Federal Rules of Civil Procedure.”).}
  \item \textit{See Bradford v. Rockwell Semiconductor Sys., Inc.,} 238 F.3d 549, 552 (4th Cir. 2001) (noting that “[t]he arbitration of disputes enables parties to avoid the costs associated with pursuing a judicial resolution of their grievances. By one estimate, litigating a typical employment dispute costs at least $50,000 and takes two and one-half years to resolve.”).
  \item \textit{See Reginald Alleyne, Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum,} 13 \textit{Hofstra Lab. & Emp. L.J.} 381, 428 (1996) (“[S]tatutory discrimination grievances relegated to... arbitration forums are virtually assured employer-favorable outcomes,” given “the manner of selecting, controlling, and compensating arbitrators, the privacy of the process and how it catalytically arouses an arbitrator’s desire to be acceptable to one side.”).
  \item \textit{See, e.g., LaPrade v. Kidder, Peabody & Co.,} 94 F. Supp. 2d 2, 4 (D.D.C. 2000) (recounting that an employee was assessed $8,376 for the National Association of Securities Dealers (NASD) forum fees).
  \item \textit{See Michael H. LeRoy & Peter Feuille, Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future,} 18 \textit{Ohio St. J. on Disp. Resol.} 249, 301 tbl.1 (2003) (showing that federal district courts enforced 51.3% of challenged arbitration agreements before \textit{Gilmer}, 66.1% of agreements after \textit{Gilmer} and before the Court’s 2001 \textit{Circuit City} decision, and 66.7% of agreements after \textit{Circuit City}).
  \item \textit{L & R Realty v. Conn. Nat’l Bank,} 715 A.2d 748, 753 (1998) (“We begin by noting that jury trial waivers entered into in advance of litigation are similar to arbitration agreements in that both involve the relinquishment of the right to have a jury decide the
Perhaps this is because courts invest so much in arbitration. The difference is odd considering that an individual is equally bound to forgo a jury under both agreements—but few courts are bothered by the fact that mandatory arbitration also forces individuals to waive their constitutional right to a jury.

2. Use of Arbitrators as Adjudicators of Employment Disputes Is Now Questioned

Sold on arbitration after Gilmer, employers flocked to this dispute resolution method. Now, they are having second thoughts. Defying convention, some employment arbitrators order whopping punitive damages. Paradoxically, as companies switch to mandatory arbitration,
the Supreme Court now imposes strict limits on punitive damages awarded by courts. However, this ruling does not extend to arbitrators, who have great discretion to order relief. Whether they impose punitive or make-whole remedies, they order more damages than before. Arbitrations are also more time-consuming and costly.

Adding to employer disappointment in arbitration, awards in favor of unspecified punitive damages in addition to back pay, reinstatement, and damages for emotional distress; Sawtelle v. Waddell & Reed, Inc., 754 N.Y.S.2d 264, 267 (App. Div. 2003) (awarding a securities broker $2 million in compensatory damages and $25 million in punitive damages); Davis v. Reliance Elec. Indus. Co., 104 S.W.3d 57, 60 (Tenn. Ct. App. 2002) (upholding arbitrator's award of $50,000 for emotional distress claim plus compensatory damages, and in addition, $520,000 in punitive damages). 78

78. In State Farm Mutual Auto Insurance Co. v. Campbell, 538 U.S. 408, 416-17 (2003), the Supreme Court ruled that excessive punitive damages violate the Fourteenth Amendment due process clause. The Court stated: "We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Id. at 425. This decision followed the Court’s refusal in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), to sustain a $2 million punitive damages award which accompanied a $4,000 compensatory damages award.

79. See United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960) ("The . . . arbitrator’s source of law is not confined to the express provisions of the contract . . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.").


82. E.g., Brook v. Peak Int’l, Ltd., 294 F.3d 668, 672 n.3 (5th Cir. 2002) ("[P]arties spent over $650,000 in fees and costs related to the arbitration."); Campbell v. Cantor Fitzgerald & Co., No. 98-9582, 1999 U.S. App. LEXIS 34081, at *2 (2d Cir. Dec. 23, 1999) (employee was charged with $45,000 in forum fees by the arbitration panel for fifteen hearing days); DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 820 (2d Cir. 1997) (employee awarded $220,000 in damages but denied $249,050 in attorney’s fees); Cassedy v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 751 So. 2d 143, 145 (Fla. Dist. Ct. App. 2000) (prevailing employee was awarded $160,000 in attorneys fees).
discrimination complainants are usually final and binding because courts apply an extremely deferential standard of review. This problem is aggravated by the fact that arbitrators are allowed to rule without explaining their awards in writing. Thus, a court cannot determine if the arbitrator misapplied the law. A new proposal would require a written explanation for arbitrator rulings but does not apply to employment disputes. In contrast, appellate courts often overturn verdicts for discrimination plaintiffs. This is because trial court decisions set forth facts and legal reasoning in written opinions, creating a bigger target for reversal. In addition, appellate standards are broader compared to arbitrations. Thus, some lawyers advise firms to use jury waivers in place of Gilmer arbitrations.

83. See the seminal Steelworkers Trilogy, comprised of United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960), United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), for a discussion of the finality of arbitration awards. The Enterprise Wheel Court stated that an award should not be disturbed unless the arbitrator “has abused the trust the parties confided in him and has not stayed within the areas marked out for his consideration.” Id. at 598. Reinforcing this approach, courts that review individual employment arbitration awards under the FAA apply a “grudgingly narrow” standard of review. Bargenquast v. Nakano Foods, Inc., 243 F. Supp. 2d 772, 776 (N.D. Ill. 2002).

84. See Green v. Ameritech Corp., 12 F. Supp. 2d 662, 666 n.3 (E.D. Mich. 1998) (“[I]n the absence of an express provision requiring the arbitrator to explain the reasoning for his award, the arbitrator need not do so.”).

85. See News Release, NASD, New Arbitration Rule Requires Award Explanations Upon Investor Request (Jan. 27, 2005), at http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_013145&ssSourceNodeId=12. NASD approved an amendment to the Code of Arbitration Procedure to require a written explanation of the arbitration panel’s decision. This proposed change would alter the current practice of not requiring written decisions but only in arbitrations of securities industry disputes.

86. Jess Bravin, U.S. Courts Are Tough on Job-Bias Suits, WALL ST. J., July 16, 2001, at A2, available at 2001 WL-WSJ 2869570. After analyzing nine years of federal trial statistics, Professors Stewart J. Schwab and Theodore Eisenberg concluded that federal appeals courts are less sympathetic to workers who allege job discrimination than they are to almost any other type of plaintiff. Id. Appeals courts reversed victories for plaintiffs in forty-four percent of cases. Id.

87. See Harold M. Brody & Anthony J. Oncidi, Careful What You Wish for: Is Arbitration the Employer’s Panacea? Perhaps There Is a Better Alternative, HR ADVISOR: LEGAL AND PRACTICAL GUIDANCE 9 (Nov./Dec. 2003) (“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.”); see also Samuel Estreicher & Rene M. Johnson, Contractual Jury Trial Waivers in Federal Employment Litigation, 229 N.Y. L.J. 3 (2003) (explaining how jury waivers should be placed in arbitration agreements).
B. Judge and Jury as Adjudicators of Employment Disputes

1. Title VII Discrimination and Jury Access

The Seventh Amendment provides a right to a jury in civil trials. But this does not mean that all civil cases are tried by a jury. Consider employment discrimination lawsuits. Early in the history of Title VII, Congress precluded access to juries. Only bench trials could occur because of concern for racial bias. This changed in the Civil Rights Act of 1991, when Congress concluded that juries should be able to hear these cases. The provision for tort-like remedies to Title VII adds another factor to jury access. Because relief is expanded beyond equitable remedies to include damages, juries now play a remedial role in cases of intentional discrimination. But the empowerment of Title VII juries in the 1991 law collides with a different authority. Gilmer, decided the same year, disenfranchises juries by allowing an employer to require arbitration. In other words, an employer can subvert congressional intent to toughen the enforcement of Title VII by opting out of the law’s elaborate remedy structure. Under Gilmer, an employee agrees to work without these new legislative protections or is fired.

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88. See supra note 20.

The legislative record for the 1964 Act reveals legislative unease with juries because they were perceived to be hostile or unfriendly to civil rights claimants. This was certainly the case with racial discrimination, plainly the driving force behind the 1964 Act. It was a fair inference for legislators to make from the response to the federal judiciary-driven push to desegregate the South, that federal judges would be more receptive to victims of racial discrimination than primarily white, male juries in the South.

Id.
91. See H.R. REP. NO. 102-40(I) (Apr. 24, 1991), reprinted in 1991 U.S.C.C.A.N. 549, 610, 1991 WL 70454, at *72 (“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.”).
93. See infra note 101.
94. See Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1311–12 (11th Cir. 2002) (denying terminated employees’ claims of retaliation because plaintiffs could not reasonably
This countermanding of legislative intent is approved, interestingly enough, by the same Congress who increased enforcement of Title VII. Section 118 of the 1991 law marginalizes juries by allowing "alternative means of dispute resolution, including ... arbitration." This sends a mixed signal about Congress' desire to provide discrimination plaintiffs a jury trial. Courts who give weight to the vague arbitration policy in section 118 enforce Gilmer contracts. This replaces a jury with an arbitrator. But other courts reason that 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."

2. ADEA Discrimination

When the ADEA was passed, it borrowed the definition of discrimination from Title VII but adopted the enforcement procedures of the Fair Labor Standards Act (FLSA). ADEA's silence on jury trials, combined with its provision for equitable relief, implied that age claims could only be tried before a judge. But the law's use of FLSA enforcement powers also suggested that plaintiffs were entitled to juries. The Supreme Court resolved this confusion by concluding that Congress' decision to model ADEA enforcement procedures after the FLSA, and not Title VII, provides a right to a jury trial. While the Court reviewed this
matter, the Senate amended the ADEA to afford access to a jury. Thus, two sources provide for jury trials, removing any doubt in the matter.

This right is undermined, however, by employment agreements that waive a worker’s right to sue for age discrimination. The Older Workers Benefit Protection Act (OWBPA) addresses this concern. Employers use exit incentives to encourage older workers to retire. Congress applauds firms for paying employees to quit, instead of resorting to mass terminations, but objects to incentives that are conditioned upon waivers. The problem is that older workers are “often coerced or manipulated into signing waivers as a condition of their participation in exit incentive or early retirement programs.”

Before this law was enacted, the EEOC did not regulate ADEA waivers. Against this backdrop, Congress heard from older workers who were forced to waive potential discrimination claims. Statistics supported these accounts. A General Accounting Office (GAO) study bolstered this concern. Lawmakers believe that older workers are exposed to in private actions under the ADEA.” (citation omitted)). The Court believed that congressional selection of FLSA enforcement procedures meant that Congress also intended that ADEA plaintiffs have access to juries. The Court relied on comments made by Senator Javits, a floor manager of the ADEA bill, who explained, “[t]he enforcement techniques provided by [the ADEA] are directly analogous to those available under the Fair Labor Standards Act; in fact [the ADEA] incorporates by reference, to the greatest extent possible, the provisions of the [FLSA].” Id. at 582 (alterations in original) (quoting 113 CONG. REC. 31254 (1967)).


104. H.R. Rep. No. 101-664 (1990), available at 1990 WL 200383. Congress observed that employers frequently laid off workers because of global competition and merger activity. Lawmakers concluded that “[e]mployers know that if hundreds of thousands of employees are simply laid off with no benefits or terminated for cause, the result may be bitterness and lawsuits. Accordingly, employers have come to rely heavily on early retirement and other exit incentive programs to reduce their workforce.” Id.

105. See id. (stating that exit incentive programs “if properly conceived and administered, can be both humane and economically efficient. By treating employees with decency and respect, employers minimize the prospect of litigation from those who leave, and of disillusionment from those who remain.”).

106. See id.

107. Id.

108. Id.

109. Id. (“The House and Senate hearing records are replete with evidence of older workers who have been manipulated or coerced into waiving their rights under the ADEA. This evidence, although anecdotal, paints a disturbing picture of waiver practices.”).

110. Id.

111. GAO, Age Discrimination: Use of Waivers by Large Companies Offering Exit
employer over-reaching in impending layoffs because they are “faced with a situation that leaves them very few alternatives.” Many “employees are unable even to recognize the potential of their claims because no dispute exists between them and their employer.” Thus, “it is reasonable to assume that many employees would be coerced by circumstances into accepting significant compromises.”

In short, Congress pays close attention to the bargaining process when employers extract age discrimination waivers from older workers. The ultimate justification for the OWBPA is that “workers are given no reason to suspect age discrimination and often are not even aware of their rights under the ADEA. For them, waiving all rights and claims through a general release effectively chills any meaningful inquiry into whether they are the victims of unlawful age discrimination.” As a result, the OWBPA strictly regulates waivers to ensure they are knowing and voluntary.

This law states a clear and unequivocal policy, but does not stand in isolation. Recall that Gilmer involves an ADEA claim, and the majority opinion emphatically and broadly approves mandatory arbitration. It rejects the argument that the ADEA precludes waiver of a judicial forum.

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Incentives to Employees, GAO/HRD-89-87, at 3, Apr. 1989, available at http://archive.gao.gov/d25t7/138559. In relying on this research, lawmakers found that “80 percent of Fortune 100 companies sponsored an exit incentive program.” Id. at 4.

113. Id.
114. Id.
115. Id.
116. Section 201 of the OWBPA adds subsection 7(f)(1) to the ADEA and provides that:

a waiver may not be considered knowing and voluntary unless at a minimum—
(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
(B) the waiver specifically refers to rights or claims arising under this chapter;
(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;
(F) the individual is given a period of at least 21 days within which to consider the agreement;
(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired . . . .

But notice that this reasoning contradicts the strict waiver requirements of the OWBPA. When courts are asked to enforce arbitration agreements that omit OWBPA waiver procedures, they are torn between conflicting public policies. Most follow the pro-arbitration signal in *Gilmer*. The few who enforce the OWBPA no longer do so.

III. THE ROLE OF STATE COMMERCIAL LAW IN MANDATORY JURY WAIVERS

State law plays a growing role in regulating employment. Employment-at-will (EAW) is a basic common law principle. But this rule is crumbling. Courts now apply an array of torts to employment disputes—for example, the public policy exception to EAW and related whistleblower protection, emotional distress, assault and battery in severe cases of sexual harassment, negligence, and defamation. State constitutions compound the decline of EAW by creating privacy rights for workers.

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118. See, e.g., Williams v. Cigna Fin. Advisors, Inc., 56 F.3d 656, 661 (5th Cir. 1995) (holding that arbitration clause is enforceable).

119. See, e.g., Thiele v. Merrill Lynch, Pierce, Fenner & Smith, 59 F. Supp. 2d 1067, 1069 (S.D. Cal. 1999) (stating that “in dicta, the Ninth Circuit in *Duffield* reads the OWBPA amendments to the ADEA to include the right to a jury trial. This Court follows the guidance provided by *Duffield*”); see also *Duffield* v. Robertson Stephens & Co., 144 F.3d 1182, 1190 (9th Cir. 1998) (stating that Congress intended to protect an employee from waiving his or her right to a judicial forum by passing the 1991 Civil Rights Act). The court extended its reasoning to ADEA claims: “After the Supreme Court granted certiorari in *Gilmer*, Congress amended the ADEA to provide that all waivers of rights under the Act, apparently including the right to a jury trial must be ‘knowing and voluntary’ . . . . The Supreme Court did not, however, consider this new statutory language in *Gilmer*. Thus, current ADEA claims may require different treatment.” *Id.* at 1190 n.5 (citations omitted).

120. The Ninth Circuit overruled *Duffield*, and by extension its dicta for ADEA claims, with obvious reluctance—and perhaps sullen foreshadowing—in *E.E.O.C. v. Luce, Forward, Hamilton & Scripps*, 303 F.3d 994, 1002 (9th Cir. 2002) (“*Duffield*, like Bikini Atoll, now sits ignominiously alone awaiting remediation.”).

121. The doctrine was first recognized in H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877), which noted that “[w]ith [American courts] the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will.”


123. E.g., Green v. Ralee Engineering Co., 19 Cal. 4th 66 (Cal. 1998).

124. E.g., Wilson v. Monarch Paper Co., 939 F.2d 1138 (5th Cir. 1991) (applying Texas law to an emotional distress claim).


128. Lewis v. Equitable Life Assurance Society, 389 N.W.2d 876 (Minn. 1986).

A. An Emerging Trend: Courts Enforce Jury Waivers in Commercial Lawsuits

State courts regulate jury waivers by applying common law doctrines alike to commercial and employment contracts. Appellate courts have recently considered whether parties may agree to pre-dispute jury waivers. These business contracts are enforced in Alabama, Connecticut, Missouri, Nevada, Rhode Island, and Texas. Federal courts take a similar approach.

130. Ex Parte Cupps, 782 So. 2d 772 (Ala. 2000) (applying Mall, Inc. v. Robbins, 412 So. 2d 1197 (Ala. 1982)).
132. Malan Realty Investors, Inc. v. Harris, 953 S.W.2d 624 (Mo. 1997).
136. The Court of Appeals for the First Circuit has not ruled on contractual jury waivers. See Luis Acosta, Inc. v. Citibank, N.A., 920 F. Supp 15, 18 (D.P.R. 1996) (holding that the lender had not carried its burden of proving that the borrower knowingly and voluntarily waived its right to a jury trial because the lender provided no evidence whatsoever as to the parties' specific negotiations over the waiver, the conspicuousness of the provision, nor the parties' relative bargaining power). The Second Circuit applies a presumption against enforcement of jury waivers because the court has found that the right to a jury trial is fundamental. Nat'l Equip. Rental, Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977). However, this presumption is not applied if a waiver meets a knowing and voluntary standard. See Morgan Guar. Trust Co. of N.Y. v. Crane, 36 F. Supp. 2d 602, 603 (S.D.N.Y. 1997) (holding that defendants knowingly and voluntarily waived their right to trial by jury when they signed the demand note). District courts in the Third Circuit “have consistently enforced contract provisions waiving the Seventh Amendment right to a jury trial as long as the waiver is knowing, voluntary and intelligent.” Today’s Man, Inc. v. Nationsbank, N.A., No. Civ. A. 99-479, 2000 U.S. Dist. LEXIS 8710, at *11 (E.D. Pa. June 22, 2000). The lead case in the Fourth Circuit, Leasing Serv. Corp. v. Crane, 804 F.2d 828, 833 (4th Cir. 1986), holds that “where waiver is claimed under a contract executed before litigation is contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed.” A Fifth Circuit district court recently denied enforcement to a jury 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.” RDO Fin. Servs. Co. v. Powell, 191 F. Supp. 2d 811, 814 (N.D. Tex. 2002). However, as a matter of policy, the court said that jury waivers are enforceable if they are knowing and voluntary. Id. at 813. In K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 758 (6th Cir. 1985), the Sixth Circuit ruled that “in the context of an express contractual waiver the objecting party should have the burden of demonstrating that its consent to the provisions was not knowing and voluntary.” The Ninth Circuit stated a similar policy in Phoenix Leasing Inc. v. Sure Broad, Inc., 843 F. Supp. 1379 (D. Nev. 1994), aff'd, 89 F.3d 846 (9th Cir. 1996) (unpublished table decision). Likewise, the Tenth Circuit placed the burden on the party seeking to enforce a jury waiver because of a “strong presumption” in favor of jury trials. Dreiling v. Peugeot Motors of
These decisions involve commercial transactions, but have direct implications for employment contracts. Recall that the FAA was passed in 1925 to regulate arbitration agreements for businesses, but today most courts transplant that law's pro-arbitration policy to workplace disputes. This suggests that common law rulings on jury waivers for commercial contracts also pertain to employment agreements. Consider, too, that pre-dispute jury waivers for businesses are valid if parties make a knowing, voluntary, and intentional decision. This resembles OWBPA regulation of bargaining between employers and employees for discrimination claims.

Many states apply the same legal test to commercial jury waivers but give different emphasis to its specific requirements. In a good example that relates to employment, Alabama enforces jury waivers but only if parties have equal bargaining power. By contrast, other states advocate freedom of contract. Missouri upholds jury waivers because "businesses and individuals should have the ability to agree to waive a jury if a lawsuit arises from their contract." Nevada reasons "pre-litigation jury trial waivers are grounded in the parties' freedom to contract and their corresponding ability to allocate risk." These courts only monitor for abuse of bargaining power in jury waivers.

Underscoring the close relationship between commercial jury waivers and those in employment contracts, the Texas Supreme Court approves the former because arbitration is overused. The court reasons "if parties are willing to agree to a non-jury trial, we think it preferable to enforce that agreement rather than leave them with arbitration as their only enforceable option." In arbitration, "parties waive not only their right to trial by jury but their right to appeal, whereas by agreeing to waive only the former right, they take advantage of the reduced expense and delay of a bench trial, avoid the expense of arbitration, and retain their right to appeal." Also, the

Am., Inc., 539 F. Supp. 402, 403 (D. Colo. 1982). In sum, federal courts do not automatically enforce jury waivers. If, however, these contracts meet simple procedural requirements to ensure that a signer makes a knowing and voluntary decision, then courts enforce these waivers.

137. See supra note 56.
138. See LeRoy & Feuille, supra note 70, at 282.
139. See cases cited supra notes 130–35.
140. See supra note 91.
141. Mall, Inc. v. Robbins, 412 So. 2d 1197, 1199 (Ala. 1982) ("[T]he public policy favoring jury trials subjects jury waiver agreements to strict construction . . . ").
142. Malan Realty Investors, Inc. v. Harris, 953 S.W.2d 624, 627 (Mo. 1997).
145. Id.
parties obtain dispute resolution of their own choosing in a manner already afforded to litigants in their courts. Their rights, and the orderly development of the law, are further protected by appeal. And even if the option appeals only to a few, some of the tide away from the civil justice system to alternate dispute resolution is stemmed.146

B. A Minority of Important Courts Deny Enforcement to Jury Waivers in Commercial Lawsuits

Two important state courts reject jury waivers. Notably, these commercial decisions discuss employment contracts. A California appeals court finds that pre-dispute jury waivers violate state law.147 In overruling an appellate decision, it reasons that only the legislature can prescribe methods for a jury waiver.148 A permissive jury waiver rule promotes business deals—a rationale in the earlier ruling to enforce a jury waiver149—but ignores California’s policy on adhesion contracts.52 Referring to the workplace, the court believes that employees cannot reasonably foresee the consequences of a pre-dispute waiver.151 Just because parties can agree to arbitrate their disputes, they are not free to modify the state’s judicial procedures in their contract.52

The Georgia Supreme Court also rejects pre-dispute jury waivers on
the grounds that they violate the state’s constitution. The court believes that the framers of the constitution allowed jury waivers only when litigation is pending—specifically, “when the parties fail to demand a jury trial.” Since a waiver must be made knowingly, it must occur during “the pendency of litigation,” but not before a dispute. The court refuses to equate pre-dispute arbitration agreements and jury waivers. The latter “entails giving up valuable rights.” Georgia statute “carefully control[s]” when individuals are permitted to forgo these rights. Pre-dispute arbitration agreements are different, and can be enforced, because Georgia’s legislature enacted an arbitration code.

IV. COURT RULINGS ON EMPLOYEE CHALLENGES TO MANDATORY JURY WAIVERS

A. The Sample of Jury Waivers in Employment Agreements

Gilmer was decided in May 1991. A GAO study found that from 1990 to 1992 only eighteen discrimination claims were arbitrated in the securities industry, the origin of employment arbitration. Even with this small sample, the GAO investigated these cases. By comparison, I find only five court opinions on employee challenges to mandatory jury waivers. This sample is small but underestimates the prevalence of jury waivers. Lawyers have only recently advised employers to use these waivers instead of arbitration. Time is needed to diffuse a new practice. Consider, too, that most people do not realize they have waived judicial procedures. That is why the law requires conspicuous notice of a jury waiver. Even if workers see this information, they are not likely to understand it. This concern is underscored in Table 1’s (infra) summary of

154. Id. at 800 (citing GA. CONST. art. I, § I, para. XI(a), which states that “[t]he right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party”).
155. Bank South, 444 S.E.2d at 800.
156. Id.
157. Id. at 800 n.5.
158. GAO, Employment Discrimination—How Registered Representatives Fare in Discrimination Disputes, GAO/HEHS 94-17, Mar. 30, 1994, 1994 WL 836270. The GAO study reported that only eighteen discrimination arbitrations occurred in the securities industry between August 1990 and December 1992. Id. at 7.
159. See supra note 87.
jury waivers in the sample. In addition, jury waiver challenges cannot be quantified unless there is a legal dispute. But these are rare. The EEOC fielded 81,293 discrimination complaints in 2003,\(^{161}\) from approximately 140 million job-holders.\(^{162}\) At the same time in federal courts, 20,507 workers took their complaint a step farther by filing an employment discrimination lawsuit.\(^{163}\) Thus, about one 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 cannot be counted.

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<th>Table 1: Court Rulings on Mandatory Jury Waivers in Employment Agreements</th>
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<td>Decision by Year</td>
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<td>Schappert v. Bedford, Freeman &amp; Worth Publ'g Group, LLC (2004)</td>
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Jury waivers are undercounted for other reasons. Plaintiff lawyers who deal with Gilmer arbitrations may see jury waivers as an improvement for their client, and therefore, acquiesce to their use. Unlike Gilmer agreements, jury waivers provide access to a court's powerful discovery procedures. A client avoids large arbitration fees. She is protected from losing claims that fail to conform to artificially short filing requirements in arbitration. Courts are imperfect but not "egregiously unfair," as are some employer-created arbitration systems. Thus, compared to Gilmer arbitrations and jury trials, a bench trial may be an acceptable compromise of employer and employee interests. When plaintiff lawyers reach this conclusion, there is no practical way to investigate jury waivers. In sum, a jury waiver cannot be counted unless an employer requires this contract and (a) an employee becomes aware of the waiver, (b) an employment dispute occurs, (c) a legal complaint is filed, (d) the employee objects to the waiver, (e) a court rules on the merits of a challenged waiver, and (f) its opinion is published. Still, why are these five cases noteworthy? Recall that employment arbitrations blossomed soon after the GAO studied eighteen discrimination cases. There is potential for a shift from Gilmer arbitrations to mandatory bench trials. Also, recent jury waiver decisions in business disputes suggest that these five cases are the tip of a larger iceberg.

164. See Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997). Judge Edwards observed that some employers draft mandatory arbitration agreements to shield them from intrusive discovery procedures. Id. at 1477.

165. See Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1235 (10th Cir. 1999) (refusing to enforce an arbitration agreement that did not provide an accessible forum and thereby undermined the federal anti-discrimination laws).

166. See Chappel v. Lab. Corp. of Am., 232 F.3d 719, 726 (9th Cir. 2000) (invalidating an employer's imposition of a sixty-day filing period for ERISA claims that, under the law, are subject to a filing limit of four years).


168. See cases cited supra notes 130–35.
B. Three Courts Enforced Pre-Dispute, Mandatory Jury Waivers in Employment Lawsuits

In *Schappert v. Bedford, Freeman & Worth Publishing Group, LLC*, a publishing company fired a fifty-four year-old female vice president after a younger male executive restructured the firm. The male executive fired Marie Schappert for job-related reasons. She countered that he discriminated against her on the basis of age and gender. 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 firm paid.

Schappert then petitioned the federal court for a jury trial, claiming that her waiver was invalid because it violated the knowing and voluntary standard in the OWBPA. She contended that the jury waiver was “buried” in the agreement and never discussed. But her employer said that Schappert had a copy of the agreement for two years before she signed it and therefore had time to review it. The company also contended that the OWBPA only requires disclosure of substantive rights. Because the right to a jury trial is procedural, no disclosure is required. The court ruled that Schappert made a knowing and voluntary jury waiver. The provision was conspicuous and clear, and it appeared right above her signature. The fact that she negotiated a severance payment of $243,750 defeated the argument that she had no bargaining power. The court reasoned that when a pre-dispute agreement is negotiable, its jury waiver is conspicuous, both parties have some bargaining power, and the party waiving the right has business acumen, the waiver should be

170. *Id.* at *5-*7.
171. *Id.* at *8-*9.
172. *Id.* at *2.
173. *Id.* at *11-*12.
174. *Id.* at *9.
175. *Id.* at *9 n.4.
176. *Id.* at *29-*30.
177. *Id.* at *33.
178. *Id.* at *32.
179. *Id.* at *28-*29.
180. *Id.* at *31.
181. *Id.* at *35.
182. *Id.*
183. *Id.* at *9.
184. *Id.* at *36.
enforced.185

A similar result occurred in *Morris v. McFarland Clinic P.C.*186 An Iowa medical clinic recruited a California neurosurgeon.187 After she closed her practice and moved, Dr. Morris failed to obtain an Iowa license, thus failing to meet a condition for employment.188 She sued for fraud, breach of contract, and negligence.189 The clinic moved to enforce a jury waiver in the contract.190

The federal court recognized that "[t]he resolution of civil disputes by trial by jury is of historic and fundamental importance,"191 but ruled that Dr. Morris executed a knowing and voluntary waiver of her right to a jury.192 The parties bargained over terms of employment. Dr. Morris persuaded the clinic to modify its contract offer by increasing her relocation expenses and reimbursement for malpractice insurance.193 The court concluded that the doctor could have bargained for the jury waiver too.194 In careful scrutiny, the court saw Dr. Morris as "a highly intelligent, well-educated, sophisticated individual."195 Furthermore, "[s]he was no stranger to contract negotiations. At the time McFarland was soliciting her she was the administrative oversight and contract negotiations manager at the clinic in which she practiced."196 Thus, it is "not likely she failed to notice the waiver provision, and is likely that had she had an objection to it she would have raised it with McFarland."197 The clinic also showed e-mail messages that expressed Dr. Morris's satisfaction with the contract.198 Even if there was unequal bargaining power in the negotiations, the inequality was not "manifestly or grossly in favor of the proponent of the waiver."199 In addition, the jury waiver clause was the only capitalized print in the agreement, and therefore was conspicuous.200

The third decision to enforce a jury waiver, *Brown v. Cushman &
Wakefield, Inc., also involved a well-educated employee. Farran Tozer Brown 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. A magistrate judge recommended granting the company’s motion to enforce the pre-dispute jury waiver. The judge agreed that the plaintiff waived her right to a jury. Giving weight to her work experience and professional education, the court concluded that Brown could “have negotiated about the clause if she tried.” The judge found no merit in her contention that the waiver is unenforceable because she did not read the employment agreement before signing it. While justifying its waiver ruling, the court observed that this outcome is no different than cases where courts enforce arbitration agreements that apply to sex discrimination claims. The judge implied that if this employer had a right to compel Brown to arbitrate her sex discrimination claims, the company could also require a bench trial.

C. Two Courts Denied Enforcement to Pre-Dispute, Mandatory Jury Waivers in Employment Lawsuits

A seventy-three year-old general manager in an insurance office was fired in Hammaker v. Brown & Brown, Inc. His termination occurred soon after a new employer bought the firm. Wilbur Hammaker signed an employment agreement that contained a jury waiver. Around this time, the company allegedly pressured him to retire. Hammaker was then fired and commenced an age discrimination lawsuit. The employer moved in federal district court to enforce the contract’s pre-dispute jury waiver. Hammaker responded that the agreement did not expressly waive his rights under the ADEA. Thus, he did not waive a jury. The court rejected the firm’s view that OWBPA waiver requirements apply only to substantive

202. Id. at 294.
203. Id. at 292.
204. Id.
205. Id. at 294.
206. Id.
207. Id.
208. Id. (citing Gateson v. ASLK-Bank, N.V., No. 94 Civ. 5849, 1995 U.S. Dist. LEXIS 9004 (S.D.N.Y. June 29, 1995)).
210. Id. at 576–77.
211. Id. at 577.
212. Id.
213. Id.
214. Id.
215. Id.
rights. By a plain reading of the statute, the court concluded if “Congress wanted the protections of the OWBPA to apply only to substantive rights, Congress could have adopted language that clearly conveyed such an intent.” The court added that the “OWBPA implements Congress’ policy via a strict, unqualified statutory stricture on waivers.”

In Mafcote Industries, Inc. v. Swanson, a company tried to repossess its car from a recently fired sales executive. The attempted repossession occurred on New Year’s Day, when only a teenager was home. This took place after Swanson offered to purchase the car and disputed how much money the company owed him. The employer sued, claiming car theft. Swanson counterclaimed for emotional distress and breach of contract. As the case went to trial, Mafcote moved to enforce the jury waiver in the employment contract. The court denied the motion, concluding that a jury waiver is not automatically enforceable. In remanding to a magistrate, the court sent instructions to examine 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.

V. CONCLUSIONS: JURIES REVILED AND JURIES REVIVED

Employers are beginning to abandon arbitration and are returning to courts, to manage litigation costs. Mandatory arbitrations are becoming costly and time consuming. But recent landmark court rulings cap

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216. Id. at 581.
217. Id.
219. Id. at *5.
220. Id.
221. Id. at *5–*6.
222. Id. at *1.
223. Id.
224. Id. at *13.
225. Id. at *16–17.
226. Id.
227. Disputants in arbitration pay for their forum expenses, while similar costs for trials are paid by taxpayers. Private forum costs are the arbitrator’s fee and expenses, including travel; fees charged by the entity providing arbitration services, which may include filing fees and daily administrative fees; space rental fees; and reporter fees. See The Costs of Arbitration, at http://www.citizen.org/publications/release.cfm?ID=7173 (last visited June 25, 2005) (describing the costs saved through arbitration).
228. See supra note 81.
punitive damages. Today, some employers conclude that courts are not the problem they once imagined. The culprit is the reviled jury. While I focus on employment disputes, my research suggests that firms do not isolate one dispute resolution process for workers and another for businesses. The re-evaluation of arbitration is part of a broader effort to manage all employment and commercial litigation. This is suggested by recent state court rulings on mandatory jury waivers in business lawsuits, and similar rulings in employment disputes. The import is that certain firms embed the same pre-dispute resolution processes in boilerplate contracts.

A one-forum-fits-all-litigation approach is not new. Congress dealt with this issue when it passed the FAA in 1925. By exempting certain employment arbitration agreements, Congress believed that workers lack the bargaining power of businesses. For decades, employers made no effort to deny workers access to courts by requiring them to arbitrate. Mandatory employment arbitration did not spread until the early 1990s, when the securities industry used broker agreements to block discrimination lawsuits. Following Gilmer, the Supreme Court in Circuit City Stores, Inc. v. Adams narrowly construed the FAA exemption for worker arbitration agreements. This ignored congressional concern for workers who are forced to arbitrate.

229. See supra note 78.
230. See Brody & Oncidi, supra note 87, at 7 (explaining why employers choose to use arbitration over jury trials due to their pro-employee leanings).
231. See Legislation: Amendment to Exclude Wage, Hour Disputes from Class Action Bill Defeated by Senate, Daily Lab. Rep. (BNA) A-13 (Feb. 10, 2005) (reporting on the Senate’s readiness to pass a major overhaul of class action rules after voting down a proposed amendment that would have excluded class actions based on state civil rights and wage and hour laws, but was defeated by intense lobbying by business interests).
232. See cases cited supra notes 130-35.
233. See supra Part IV.B.
234. See supra notes 60–61.
235. See Martin H. Malin, Arbitrating Statutory Employment Claims in the Aftermath of Gilmer, 40 St. Louis U. L. J. 77, 77 (1996) (stating that Gilmer “appeared to open the door for extensive employer-imposed requirements on employees to arbitrate a broad range of statutory employment-related causes of action.”).
237. Id. at 119 (“Section 1 exempts from the FAA only contracts of employment of transportation workers.”). The express terms exempt the “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” from FAA coverage, id. at 137, meaning that federal courts lack jurisdiction to enforce these employment arbitration agreements.
238. Id. at 128 (Stevens J., dissenting) (“As proposed and enacted, the exclusion fully responded to the concerns of the Seamen’s Union and other labor organizations that § 2 might encompass employment contracts by expressly exempting the labor agreements not only of ‘seamen’ and ‘railroad employees,’ but also of ‘any other class of workers engaged in foreign or interstate commerce’”).
Today, the Court sees no real difference between businesses and workers who must waive court access in order to enter into an economic relationship. Thus, the more well-defined line of cases in commercial disputes is ready to be transplanted to employment lawsuits. The clear trend of authority is that mandatory jury waivers are enforced. But my research paints a more complex and uncertain picture. Jury waiver decisions in employment disputes apply the commercial law test for a knowing and voluntary waiver. Courts are less willing to enforce jury waivers against workers, however, because this standard results in close scrutiny of the bargaining that produces the agreement. Firms are therefore losing the Supreme Court’s symmetry and simplicity of requiring forum waivers for workers and businesses. Jury-waiver courts do not consciously reflect the concerns of lawmakers who passed the FAA, but the result is the same. Today’s courts, like the 1925 Congress, distinguish between forum waivers in arm’s length business deals and those that are forced upon unwitting or powerless workers.

These trends are only preliminary, but they box employers into a corner. The path is clear under *Gilmer* and *Circuit City* to impose arbitration on unwilling workers. However, this private forum shows signs of backfiring. Yet, when employers use the same contractual method merely to substitute jury waiver in place of arbitration, courts obstruct this path. They not only pay closer attention to the arm’s length nature of the bargain, but also take more seriously employment discrimination laws that provide worker access to juries. The portrait from this study features two swelling tides moving toward collision—employers who revile juries, and lawmakers who revive juries to bolster employment discrimination laws. Until the Supreme Court or Congress clears these muddy waters, my analysis predicts that employers will be less successful in enforcing mandatory jury waivers compared to their experience with mandatory arbitration.

239. *Id.* at 123 (“We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context.”). This provokes the bitter charge from dissenters that the majority opinion is “[p]laying ostrich to the substantial history behind the amendment” that excludes employment contracts from the FAA. *Id.* at 128 (Stevens J., dissenting).

