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Re-Evaluating the Arbitration of Employment Discrimination Disputes

by William D. Nelson, Esq.*

INTRODUCTION

Having been involved in customer and employment securities arbitrations, largely on the defense side since 1985, I greeted with enthusiasm the United States Supreme Court's decision in Shearson/American Express, Inc. v. McMahon,[2] upholding the arbitrability of claims brought under the Securities Exchange Act. The often-filed motions to compel arbitration were becoming a thing of the past. I greeted with similar enthusiasm the 1991 United States Supreme Court decision in Gilmer v. Interstate/Johnson Lane Corp.[3] validating mandatory arbitration of age discrimination claims pursuant to the Form U-4 language. Subsequent decisions generally extended the Gilmer rationale to other statutory discrimination claims.[4]

By the early 1990's, everything was working as it should and all was right with the world from my defense perspective. Periodic attacks on arbitrability were met and defeated and material changes to the arbitration procedures were debated, and debated, and debated some more, but nothing of significance really happened. We had entered the longest bull market in history and many of the issues surrounding arbitration that had preoccupied us in earlier times became less significant.

It was disconcerting to me, therefore, when the NASD filed with the SEC in late 1997 a proposed amendment to the arbitration rules relating to the arbitration of discrimination claims pursuant to the Form U-4.[5] The old adage "if it ain't broke, don't fix it" immediately came to mind. I questioned the need for this change, as well as the motivation of the groups and persons supporting the proposal. The voices of support prevailed and the SEC approved the proposal, effective January 1, 1999.[6]

I doubt that I was alone in my belief that there would be a wholesale exodus of discrimination cases from arbitration. Given the level of distrust of the process expressed in the SEC rule proceeding,[7] it seemed only logical that these claims would hereafter be pursued in the court system. Surprisingly, this has not been the case**,** according to NASD statistics**,** which has prompted me to rethink my position on whether to arbitrate discrimination claims.

This article will discuss the background of the new rule, recently enacted NASD rules implementing procedures in discrimination arbitrations and standardization of disclosure, and the NASD's third-quarter 1999 statistics concerning arbitrations involving allegations of discrimination.

BACKGROUND OF THE 1999 NASD RULE AMENDMENT

Beginning in January, 1996, as the result of a NASD policy task force report on securities arbitration reform,[8] the NASD began a review of employment arbitration. In that process, the NASD met with and solicited com-

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Tribute to William J. Fitzpatrick

Securities arbitration lost one of its long-time and most enthusiastic advocates on November 4, 1999, when William J. Fitzpatrick passed away at age 72. Although retired for the past two years, Mr. Fitzpatrick remained actively supportive of arbitration, taking mediation training, serving as an arbitrator, and, as a member of SAC's Board of Editors, writing for the *Commentator* the last article he published before his death (see 11 SAC 1(1), for a spirited exchange between Prof. "Gus" Katsoris and Mr. Fitzpatrick).

For us, Bill's efforts, advice and support, when *SAC* began publication in 1988 and thereafter, were continuous and immeasurably helpful. He was then General Counsel of the Securities Industry Association, a post he held from 1980-1994. His guidance, assistance, and example were a factor, though, in so many more careers in the legal and compliance field, and in the securities industry in general, than just ours. He will be remembered by those individuals, not only for his wit, intelligence, and open spirit, but for his integrity as a legal and compliance officer.

Mr. Fitzpatrick's career in the securities industry began, after service in World War II and as a Special Agent with the FBI, when he joined Bache & Co. in 1960 as a Senior Regional Attorney. In 1965, he switched to Loeb-Rhoades & Co., where he became Partner in 1972. As SVP and General Counsel of Loeb, Rhoades, Hornblower, Inc., prior to Loeb's merger with Shearson Hayden Stone and his move to SIA, he was in charge of the Law Department, the Registration Department and the Compliance Department.

During his tenure at Loeb, he was instrumental in the founding of the Securities Industry Conference on Arbitration and was an industry representative on SICA from its inception in 1977. Mr. Fitzpatrick was also an advocate of an AAA choice in brokerage account agreements, saw to it that SIA's model forms included AAA as one of the available forums, and served on advisory committees of the American Arbitration Association. Among his many writings was The Arbitration Chapter in *Securities Law Techniques*, published by Matthew Bender.

A graduate of St. John's College and St. John's University Law School, he was admitted to practice in the State of New York and also before the United State Supreme Court, the United State Court of Claims, the United States Court of Military Appeals and in the United States Courts of Appeals for the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and District of Columbia Circuits. He was a member of numerous professional organizations, a frequent lecturer, Chair for ten years of the American Revolution Roundtable, and an arbitrator for four SRO forums. From 1994-1997, he served as consultant to the SIA Litigation Committee and later as an independent consultant on securities matters.

Mr. Fitzpatrick recently moved upstate to Highland Mills, NY, but he lived most of his life on Staten Island, NY. It was there the funeral services were held. His body was cremated and his ashes spread over the waters of New York Harbor, in accordance with his final wishes.

--R. Ryder, SAC

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Letter to Editor

Philip J. Hoblin, Jr.
White Plains, NY

I have the following observations on the passing of William J. Fitzpatrick.

"Now he belongs to the ages." Lincoln's doctor made this pronouncement after the President's death. This sentiment can be equally applied to the passing of my close friend "Fitz."

I have had the pleasure of Bill's friendship and business advice for forty years. It proved to be a very rewarding experience. The Street owes Bill a debt of gratitude for his contributions to the legal and compliance activities. No one had a greater impact on the Industry in this area. He brought to the table not only in-depth knowledge, but also an integrity and strength of conviction that affected not only his associates but also those who disagreed with him. Whatever his position, all knew it was well thought out and sincere.

Bill generally played down his legal acumen. This was an act of humility and he was a very honorable and sincere man. Yet, it was Bill's theory which was followed and resulted in the victory in the *McMahon* case. Bill never had to take second seat to any other member of the legal profession in the Securities area. He was head and shoulders over most of them.

Bill's passing has been a blow to me. I will miss his counsel and his friendship. He was a very unique person.

Bill was always guided by his faith in God. He lived by a code which accepted no compromise with faith. He personified the concept of Saint Paul. He was all things to all men.

AVE ATQUE VALE

(ed: Mr. Hoblin is a member of SAC's Board of Editors. He was General Counsel of Shearson when the McMahon *case was argued and decided.)* ■

EMPLOYMENT DISCRIMINATION *cont'd from page 1*

ments from such diverse groups as the Securities Industry Association, the Equal Employment Opportunity Commission, the Women's Legal Defense Fund and the American Civil Liberties Union. Generally, those groups representing the securities industry favored the continued arbitration of employment disputes, while those groups representing the interests of employees were unanimous in their distrust of the process.[9]

Despite the fact that case law enforced mandatory arbitration pursuant to the Form U-4 language, the NASD's proposed rule was approved by the SEC. That rule simply states that:

> A claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute, is not required to be arbitrated. Such a claim may be arbitrated only if the parties have agreed to arbitrate it, either before or after the dispute arose.[10]

Upon enactment of the rule, the NASD attempted to provide guidance to participants and practitioners alike in dealing with claims under the new rule.[11] For example, a statutory claim of employment discrimination was broadly defined to include not only federal, state, county or municipal laws or ordinances, but regulations or interpretations under such laws or organizations issued by a governmental body. Pregnancy discrimination or sexual harassment in violation of EEOC guidelines would be a "statutory" claim, even though such discrimination is not specifically mentioned in Title VII of the Civil Rights Act of 1964.[12]

Non-statutory (judicially created) claims of discrimination must be arbitrated unless all parties agree to resolve the matter in court. If an employee alleges both statutory employment discrimination claims and non-statutory claims, the statutory claims may be taken to court or decided in arbitration, at the option of the employee. The non-statutory claim must be arbitrated unless all parties agree to resolve it in court. If an employee files a statutory discrimination claim in arbitration, the adverse party may opt to take the claim to court. If the statutory discrimination claim is a counterclaim to an arbitration filed by a securities firm against a registered person, the claim may be pursued in court or as a counterclaim in arbitration. The other claims may not be taken to court unless the securities firm agrees.[13]

The NASD rule change neither affects nor prohibits private agreements between registered persons and their member firms to arbitrate disputes. It is not uncommon, for example, for a registered person to be an independent contractor of a securities broker-dealer and operate pursuant to an independent contractor agreement containing a mandatory arbitration clause.[14] However, the Ninth Circuit has held that employers may not, as a condition of employment, compel individuals to waive their rights to a judicial forum in cases alleging employment discrimination under Title VII of the Civil Rights Act of 1964.[15]

The new rule has been criticized for two primary reasons. The NASD's Frequently Asked Questions**,** designed to provide guidance to participants and practitioners**,** highlight the first criticism — the rule may lead to proceedings in multiple forums thereby generating increased expense for all parties, parallel proceedings that may be ongoing in different states with different lawyers, pretextual court filings to augment discovery in arbitration, and complex issues of res judicata and collateral estoppel.

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EMPLOYMENT DISCRIMINATION *cont'd from page 3*

The second criticism lies on a more fundamental level. It has been suggested that the new rule will decrease public confidence in the customer arbitration process. If the rationale for the NASD's new rule is that arbitration is unfair for statutory discrimination disputes, why does the NASD continue to permit customers to have contracts with member firms containing mandatory arbitration provisions?[16]

NEW NASD PROCEDURES AND DISCLOSURES REGARDING DISCRIMINATION CLAIMS

On October 27, 1999, the Securities and Exchange Commission approved a February 1999 filing by the NASD[17] that creates new disclosures when an associated person signs a Form U-4 and puts in place new arbitration procedures for employment claims, including discrimination.[18] The rule filing amends Rules 10201 and 10202, adds new Rule 3080 and a new Rule series 10210 to enhance the procedures for the handling of employment discrimination disputes and to improve the arbitration disclosure for associated persons signing a Form U-4.

New Rule 3080, entitled "Disclosure to Associated Persons When Signing Form U-4," requires members to provide an associated person with a specified written disclosure statement whenever the associated person is asked to sign a new or amended Form U-4. The language of the required statement is similar in most respects to the arbitration disclosure provisions required in customer agreements. The Rule requires a specific disclosure as to employment discrimination claims as follows:

> A claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute is not required to be arbitrated under NASD rules. Such a claim may be arbitrated at the NASD only if the parties have agreed to arbitrate it, either before or after the dispute arose. The rules of the other arbitration forums may be different.

The amendments to Rules 10201 (Required Submission) and 10202 (Composition of Panels) incorporate references to the new Rule series 10210. The Rule 10210 series, entitled "Statutory Employment Discrimination Claims," sets forth in Rules 10211 through 10216, a series of special requirements in discrimination arbitrations for the qualifications of arbitrators, the establishment of single and three-person arbitration panels, the composition of panels, discovery, awards, attorneys' fees**,** and coordination and management of bifurcated claims.

Generally speaking, for cases involving statutory discrimination claims, only public arbitrators will be selected. Arbitrators selected to serve as single arbitrators or as chairs of three-person panels should have law degrees, substantial familiarity with employment law and at least ten years of legal experience, at least five years of which must be in specified areas. Single arbitrators with this experience will be appointed to hear claims involving damages of $100,000 or less. All larger claims will go to three-person panels.

With respect to discovery, Rule 10213(a) states that "[n]ecessary prehearing depositions consistent with the expedited nature of arbitration shall be available."

Rule 10215 expressly recognizes the arbitrator(s)' authority "to provide for reasonable attorneys' fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law."

Rule 10216 contains an elaborate mechanism to coordinate and manage bifurcated claims. Of particular interest is the provision in subsection (a) giving a respondent named in a statutory discrimination claim in court and in a related arbitration claim the option to move to compel the claimant to bring the related arbitration claim in the same court proceeding, provided that the option is exercised in a timely manner.

Undoubtedly, these new procedures will give rise to lively debate and future articles in this publication, but I will leave that to other authors.

IMPACT OF THE SYSTEM NASD STATISTICS THROUGH SEPTEMBER 30, 1999

The new system has only been in place for ten months and it is premature to draw any firm conclusions from the available information or to address the criticisms directed at the new rule. Nevertheless, the statistics compiled by the NASD through the first three quarters of this year are both revealing and surprising.

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Table 1 breaks down NASD arbitration cases served involving allegations of discrimination or wrongful termination for the period 1995 through September 30, 1999, and then projects year-end figures for 1999 based upon the prior three quarters.

NASD Regulation, Inc.
Cases Served Involving Allegations of Discrimination or Wrongful Termination

Type of Controversy*	1995	1996	1997	1998	Sept. 1999	1999 YTD Run-Rate
Age Discrimination	13	32	45	29	19	25
Disability Discrimination	5	18	14	15	11	15
Gender Discrimination	13	32	43	25	23	31
National Origin Discrimination	1	5	14	8	6	8
Race Discrimination	5	13	14	10	15	20
Religious Discrimination	2	5	2	5	6	8
Unspecified Discrimination**	21	12	8	5	1	1
Sexual Preference Discrimination	1	8	1	2	0	0
Sexual Harassment**	17	31	26	16	11	15
Wrongful Termination**	112	119	166	125	62	83
Number of Discrimination Cases*	*152*	*191*	*235*	*175*	*108*	*144*

*Each case can be coded to contain up to four controversy types. Therefore, the columns and rows in this table cannot be totaled to determine the number of cases served in a year.
**Prior to 1995 the NASD only tracked these 3 types of cases; thus, in the earlier years, all the cases were coded with one of these codes.

Table 2 shows the percentage change in the number of NASD arbitration cases served involving the nine categories of discrimination from 1998, the year prior to the rule enactment, to 1999 (projected), the first full year after the rule enactment.

NASD Cases Served Involving Allegations of Discrimination 1998 vs. 1999

Type of Discrimination	1998	1999 (projected)	Percentage Change
Age Discrimination	29	25	-14%
Disability Discrimination	15	15	0%
Gender Discrimination	25	31	+24%
National Origin Discrimination	8	8	0%

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EMPLOYMENT DISCRIMINATION *cont'd from page 5*

1998 vs. 1999 (cont'd)

Type of Discrimination	1998	1999 (projected)	Percentage Change
Race Discrimination	10	20	+100%
Religious Discrimination	5	8	+60%
Unspecified Discrimination	5	1	-80%
Sexual Preference Discrimination	2	0	-100%
Sexual Harassment	16	15	-6%

Table 3 takes an average of the NASD arbitration cases served involving the nine categories of discrimination from 1995 to 1998 and shows the percentage change to 1999 (projected).

NASD Cases Served Involving Allegations of Discrimination 1995-1998 (average) vs. 1999

Type of Discrimination	1995-98(average)	1999 (projected)	Percentage Change
Age Discrimination	30	25	-17%
Disability Discrimination	13	15	+15%
Gender Discrimination	28	31	+10%
National Origin Discrimination	7	8	+14%
Race Discrimination	11	20	+82%
Religious Discrimination	4	8	+100%
Unspecified Discrimination	12	1	-91%
Sexual Preference Discrimination	3	0	-100%
Sexual Harassment	23	15	-35%

CONCLUSION

This preliminary NASD statistical information suggests that, since the discrimination rule enactment, rather than a wholesale exodus from arbitration, discrimination claims continue to be brought in arbitration in numbers approximating and in some cases exceeding historical averages.

Interestingly, this result was predicted by the study of the Securities Industry Association in connection with Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,[19] wherein it compared the results of employment discrimination claims brought before NASD and NYSE arbitration panels over a seven-year period with claims tried before juries in the Southern District of New York. The study suggested that discrimination claimants fared better on their claims in arbitration than in court. The study found that employees prevailed 41% of the time in NYSE arbitrations and 26% of the time in NASD arbitrations. The success rate in court was only 19%. The study did not consider cases which settled prior to hearing.

The securities industry's experience with arbitration of employment disputes is indeed filled with ironies. The securities industry fought long and hard in favor of the arbitration of employment disputes, while at the same time its major trade association produced a study suggesting that employees fare significantly better in arbitration than in court on discrimination

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EMPLOYMENT DISCRIMINATION *cont'd from page 6*

claims. The groups representing the interests of employees ultimately prevailed in eliminating mandatory arbitration of employment discrimination claims, yet counsel representing employees continue to use the arbitration forum at a rate as high, if not higher, than historical levels.

The success of employees in prosecuting discrimination claims in securities industry arbitration may be attributable to a number of things, including the relative absence of dispositive motions practice, the unwillingness of arbitrators to dismiss cases on technical grounds and the more liberal application of the law and the rules of procedure and evidence. It would appear that counsel for employees have come to understand that their chances of success are in fact greater, not less, in the arbitration forum, a fact which seems to have been overlooked by the industry in its zeal to use arbitration for all purposes.

With so-called financial modernization legislation having been recently enacted overhauling depression-era banking laws and allowing banks, securities firms and insurance companies to affiliate freely with one another through a holding company structure, consolidation within the financial services community will increase and with it the dislocation of employees. This will undoubtedly give rise to the filing of additional employment-related claims, including discrimination claims, by employees.

With the newly enacted procedures which appear to permit at least limited depositions in statutory discrimination cases, there is every reason to believe that employees and their counsel will continue to bring these claims in arbitration, perhaps in record numbers.

That being said, and although there may be exceptions based upon the facts and circumstances of a particular case, I am no longer inclined to recommend to broker-dealer clients that they agree to arbitrate statutory discrimination claims. The newly enacted procedures at NASD will lengthen the process and increase the cost, negating two of the primary arguments in favor of arbitration. To the extent that brokerage firms continue to use pre-dispute arbitration agreements in their employment contracts, inclusion of a non-SRO forum, such as the AAA, makes sense to me.

The perceived advantage of arbitration in statutory discrimination cases no longer exists and perhaps never existed. The new system is neither arbitration as we know it, nor does it provide participants with the full array of substantive, procedural and discovery tools of litigation. Statutory discrimination claims involve complex legal, procedural and evidentiary issues which can only be managed effectively in a judicial proceeding.

ENDNOTES

[1] Credits regarding the author have been placed on page 1 of the article.

[2] Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987).

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

[4] See, e.g., Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991) (Title VII of the Civil Rights Act of 1964); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir.), cert denied. 117 S.Ct. 432 (1996) (Americans With Disabilities Act); Kaliden v. Shearson Lehman Hutton, Inc., 789 F. Supp. 179 (W.D. P.A. 1991) (state discrimination statute).

[5] SR-NASD-97-77, filed October 16, 1997 and amended November 19, 1997.

[6] SEC Release No. 34-40109. The NYSE proposed and adopted a similar rule which is not the subject of this article. SR-NYSE-98-28, October 1, 1998.

[7] SR-NASD-97-77 Amendment No. 2, Response to Comments, April 14, 1998; SEC Release No. 34-40109, supra, at 9-19.

[8] The NASD created an arbitration policy Task Force chaired by David Ruder in September 1994 to study the NASD securities arbitration process and to make recommendations for reform. The Task Force was primarily concerned with customer-member arbitration rather than employment arbitration.

[9] SR-NASD-97-77 Amendment No. 1, pp. 7-8.

[10] NASD Code of Arbitration Procedure Rule 10201(b).

[11] Arbitration of Employment Discrimination Claims, Frequently Asked Questions. www.NASDR.com.

[12] Id.

[13] Id.

[14] Id.

[15] Duffield v. Roberts Stephens & Co., 144 F.3d 1182 (9th Cir. 1998), cert. denied 119 S.Ct. 445 (1998).

[16] SR-NASD-97-77 Amendment No. 2, Response to Comments, April 14, 1998; SEC Release No. 34-40109, supra, at 9-19.

[17] SR-NASD-99-08.

[18] SEC Release No. 34-42061, October 27, 1999.

[19] Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1 (1st Cir. 1999); see generally, Assault on Arbitration, Rosenberg v. Merrill Lynch, 9 SAC 8 (March, 1998). The SIA's study in Rosenberg is available as part of SAC's Discrimination Award Package.

Survey of 1998 Employment Discrimination Awards

Introduction

When the General Accounting Office conducted its survey, at the request of Congress, to assess just how employment discrimination claims fared in securities arbitration, it searched the period from August 1990 to December 1992 and came up with just 18 Awards that dealt with discrimination claims (see 6 SAC 3(1)). What is remembered by most from the conclusions of this Study, since the GAO was not about to be pushed into making generalized findings on the strength of an obviously inadequate sample, was the notion that arbitrator pools were "manned" primarily by white males with an average age of 60.

If that notion were ever true about discrimination cases, it is not true today. Panels on discrimination cases have, as the SIA study referenced in Bill Nelson's feature article reflects, most commonly had at least one woman on the three-person Panel (about 79% of the time in NYSE arbitrations). Not valid, either, was the Congressional assumption which instigated that Study; that is, arbitration is the resting place for denied claims of hordes of securities industry workers who have sought the protections of federal statutes and failed. First, there were only 18 Awards that might be criticized and, in ten instances, the employee received a monetary award.

1998 Survey Results

Even in more modern days, after the highly publicized Merrill Lynch and Smith Barney discrimination battles, securities arbitrators are called upon to adjudicate only a relative handful of these very visible and highly-charged disputes. In 1998, we found 52 Awards decided by arbitration Panels at the SRO forums, which disclosed a discrimination claim. All but one of those cases were decided by NASD or NYSE Panels. Relative to all claims filed during 1998, that was less than 1% of the whole. Relative to all Awards rendered, it was still less than 3% of the whole.

Nevertheless, those 52 Awards are more than we have found in the years prior to 1997. They are also special in other ways. Eighteen of the 52 Awards involved claims of well over $1 million. Eleven of the Awards resulted in monetary assessments in the six figures or greater. Whereas six hearing sessions is the average length of arbitration "trials," in this group the number of hearing sessions ranged from 1 to 62 and only 16 of the cases finished in fewer than 6 hearing sessions. While adjudicated arbitrations are generally completed in 15 months or less, only 15 of the 52 cases took less than 450 days to complete. Some ranged into the thousands of days, with *Sobol v. Kidder Peabody*, a highly visible and contentious case, taking the record at 2,036 days. *(ed: That case led to pitched post-Award battles as well, see 10 SAC 11&12(27), but ultimately the Panel's decision dismissing all claims was confirmed.)*

Three of the 52 Awards disclosed discrimination claims as counterclaims to loan default actions brought by former employing broker-dealers. None of those counterclaims was sustained, although one broker received an offset on an unpaid bonus. The brokerage firms in each case won virtually complete recovery on the defaulted notes. Of the remaining 49 Awards brought by employees voicing discrimination charges, 21 of the Claimants (43%) won a monetary award. In a couple of the cases, the Arbitrators specifically state that the discrimination aspect of the Claimant's allegations was denied. In at least 16 of the 21 matters (33% minimum "win" rate), though, the discrimination claim is expressly sustained or the Award is silent about the outcome on that issue.

These statistics tend to demonstrate a continuing "win" rate for discrimination-based claims in arbitration that is superior to those found in federal court, at least in the one comparison survey of which we are aware (the SIA Survey, referenced in Bill Nelson's feature article, this issue, found a 19% "win" rate in court cases that went to verdict. See also, 9 SAC 8(3)). That Survey, it must be added, excluded litigated matters that settled – or were tossed out on motion.

In arbitration, filed claims that do not reach Award are settled, meaning, presumably, that the parties reached an amicable resolution. The same favorable conclusion cannot be assumed about court claims that are filed and do not reach a jury, particularly in this genre of disputes, where motion practice looms large as a barrier to ultimate success for the Plaintiff.

Summaries of Specific Awards

Certain of these 1998 Awards bear specific mention. The largest monetary award occurred in *D'Andrea v. PruBache*, SAC ID No. 9811077N (NY), in which a single individual, charging defamation and age discrimination, won $1.4 million. *Staz v. Smith Barney*, SAC ID No. 9801173Y (CA), reflected charges of sexual harassment by a male employee against his former employer and an individual Respondent (male). Mr. Staz was awarded $759,600, of which $201,500 was an attorney fee award (one indicium of a discrimination finding).

In *Gibbs v. Engemann & Assocs.*, SAC ID No. 9803081 (CA), Claimant Gibbs alleged, among other things, sex, race and age discrimination. She requested injunctive relief initially, but withdrew that request before the case was concluded. The Panel awarded her $100,000 in compensatory damages and assessed another $76,000 in attorney fees. The Award states that damages for the infliction of emotional distress

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SURVEY DISCRIMINATION AWARDS *cont'd from page 8*

are included in the $100,000 lump-sum amount. Damages for emotional distress in the amount of $100,000 were awarded in *Rhodes v. MetLife Insurance,* SAC ID No. 9805038N (FL), and Claimant received as well $700,500 in "economic damages for past and future wages." MetLife was also ordered to pay Mr. Rhodes' attorney fees, to be determined by a court of competent jurisdiction.

Podsiadlo v. Deutsche Morgan, SAC ID No. 9805148A (NY) concerned claims of discrimination based upon sex and marital status and defamation. The Panel granted damages of $444,200 and made Deutsche Morgan and two individuals liable, jointly and severally, for $36,700 of that amount on the Claimant's claim of sex discrimination. $50,000 in attorney fees was also part of the awarded sums. Attorney fees were awarded in another case and actually constituted the bulk of the Award. Numerous claims of defamation, whistleblowing, race discrimination, and unpaid compensation, alleged in *Garrido v. Merrill Lynch,* SAC ID No. 9808036N (IN), wrought an assessment of $6,800 in compensatory damages, while the attorney fee award was $89,000.

The issue of attorney fees was reserved for a separate hearing in *Kahalnik v. John Hancock Funds,* SAC ID No. 9810144N (IL). The Panel issued an Interim Award in a case involving claims of age discrimination, finding John Hancock liable for $400,000 in compensatory damages and scheduled another hearing to consider attorney fees and other costs and relief. The parties reported a settlement of the remaining issues at the follow-up hearing, leaving only the issue of forum fees for Panel determination in the final Award. Finally, punitive damages were part of the relief ordered in *Morrison-Russo v. H.J. Meyers & Co.*, SAC ID No. 9812025N (NY), a sex discrimination case. Claimant won $25,000 in compensatory damages against H.J. Meyers and one individual, plus $17,000 in attorney fees. Meyers itself was assessed $25,000 in punitive damages.

Conclusion

We do not intend, by focusing on these special cases, to argue that, for those who win, arbitration is necessarily as lucrative as the results of a jury verdict. We do think, though, that these recent Awards reflect a growing acclimatization of arbitrators with the technical and legal aspects of this complex dispute sector and a heightened sensitivity to the available remedies and relief alternatives. The outcomes may also reflect the special efforts of the two major SRO forums to deal with these matters, in terms of training, diversity efforts, recruitment of employment-sophisticated Panelists, and a willingness to pay travel expenses to ensure the best-qualified Panels.

It may be that arbitration itself has not received a "fair trial" on this issue. The forces that feared the process have waged a highly effective campaign, some think prematurely, to move discrimination cases back to the courts. The possibilities that remain may be assessed by defense counsel, as we saw in Mr. Nelson's conclusion, as too slim to warrant fighting an uphill battle to arbitrate. It is difficult to argue with defense counsel who have at the ready so many tactical weapons and generally greater resources to fight in court. Where else than in arbitration, though, can a claimant move from filing to adjudication in about a year, avoid lengthy appeals, and be generally assured of getting his/her case before a Panel, without the excessive psychic and economic costs of depositions, dispositive motions, and interminable delays? Not in court and not even at the EEOC!

Water over the dam, perhaps, but it seems to us those prospects were worth greater exploration and investment of time and effort than has been the case. We conclude with an excerpt we favor from the SIA *amicus* Brief (presented to the Court by Bingham Dana, LLP, Boston, MA) in the *Rosenberg* case, for which the 1997 SIA Survey was prepared and in which it is summarized: "To the contrary, if, in arbitration, there are lower judgments at the high end, that must be balanced against the fact that employees in arbitration do not face any serious risk of being dismissed on summary judgment, and, once they reach the finder of fact, they have a greater chance of prevailing. *Plaintiffs' lawyers* may benefit more from a system which dismisses many cases, but which holds out more hope of a million dollar verdict; *plaintiffs* benefit more from a system which gives them a better shot at having their 'day in court' and at obtaining a reasonable judgment in their favor." *(emphasis in original)*