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Trading Substantive Values for Procedural Values: Compulsory Arbitration and the Age Discrimination in Employment Act of 1967 (Gilmer v. Interstate Johnson Lane Corp., 111 S. Ct. 1647 (1991))

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TRADING SUBSTANTIVE VALUES FOR PROCEDURAL VALUES: COMPULSORY ARBITRATION AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967*

Gilmer v. Interstate Johnson Lane Corp., 111 S. Ct. 1647 (1991).

When hired by Respondent, Petitioner was required to register with the New York Stock Exchange.[1] The New York Stock Exchange compelled Petitioner to agree to arbitration of any controversy arising between himself and Respondent with regard to employment or termination of employment.[2] Pursuant to being fired at age 62,[3] Petitioner filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC),[4] followed by a suit in federal court.[5] Petitioner alleged that he was fired because of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA).[6] Respondent moved to compel arbitration of the ADEA claim.[7] The District Court denied respondent's motion on the basis that ADEA claimants have

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1. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991). Petitioner was hired by respondent as Manager of Financial Services in May 1981. *Id.* at 1650.

2. *Id.* at 1650. In signing the arbitration agreement, Gilmer "agreed to arbitrate any dispute, claim or controversy" arising between him and Interstate as required by the New York Stock Exchange (NYSE) rules. *Id.* Of relevance here, the NYSE rules required arbitration of "any controversy between a registered representative and any member organization arising out of employment or termination of employment of such registered representative." *Id.* at 1651.

3. *Id.*

4. *Id.* Before a claimant can file suit under the Age Discrimination in Employment Act, he must file an age discrimination charge with the EEOC and wait at least 60 days. *Id.* The EEOC must attempt to eliminate the discriminatory practice and effect voluntary compliance with the ADEA through informal methods of conciliation, conference, and persuasion. Age Discrimination in Employment Act, 29 U.S.C. §626(b) (1992). If the EEOC decides to bring action against the employer in federal court, the employee's right to sue is extinguished. *Gilmer*, 111 S. Ct. at 1653.

5. *Id.* at 1653. Petitioner filed suit in the United States District Court for the Western District of North Carolina pursuant to the ADEA. *Id.* at 1651.

6. *Id.* at 1652. The Age Discrimination in Employment Act of 1967, 29 U.S.C. §623(a)(1) (1992) makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *Id.*

7. *Id.* at 1651. Respondent based his motion to compel on the grounds that the arbitration agreement contained in the registration agreement compelled arbitration of the ADEA claim because the claim arose out of Respondent's termination. *Id.*

a right to a judicial forum.[8] Reversing the District Court, the Court of Appeals held that it could find no reason to declare the arbitration agreement unenforceable in the context of ADEA claims.[9] The United States Supreme Court granted certiorari to directly address the ability to arbitrate ADEA claims and HELD, an ADEA claim can be subjected to compulsory arbitration.[10]

The judicial attitude toward arbitration in general has been undergoing a radical shift from judicial hostility to judicial support. The seminal case addressing the ability to arbitrate statutory claims in the context of employment discrimination was *Alexander v. Gardner-Denver*.[11] In *Alexander*, Plaintiff, a black man, was fired after three years on the job.[12] After unsuccessfully contesting his termination in an arbitration hearing,[13] he submitted a discrimination claim to the Equal Employment Opportunity Commission[14] and filed suit in federal court under Title VII of the Civil Rights Act of 1964 (Title VII).[15] Although the case was dismissed in the lower courts,[16] the United States Supreme Court held that an employee's statutory right to a trial *de novo* under Title VII is not foreclosed pursuant to a collective bargaining agreement.[17] Because the text of Title VII did not directly

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8. *Id.* The United States District Court for the Western District of North Carolina based its decision on the precedent set by Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), wherein the Court stated that "Congress intended to protect ADEA claimants from the waiver of a judicial forum." *Id.*

9. *Gilmer*, 111 S. Ct. at 115. The United States Court of Appeals for the Fourth Circuit found "nothing in the text, legislative history, or underlying congressional intent to preclude enforcement of arbitration agreements." *Id.*

10. *Id.*

11. *Id.* at 36.

12. *Id.* at 38. Petitioner was hired by respondent to perform maintenance work at respondent's plant. The year before he was fired, he was promoted to a trainee position as a drill operator. Respondent claimed that petitioner was fired because he was producing too many defective or unusable parts that had to be thrown away. *Id.*

13. *Id.* at 39. Petitioner filed a grievance stating he felt he had been unjustly fired. *Id.* This grievance was filed pursuant to the collective-bargaining agreement in force between the company and petitioner's union. *Id.* The arbitrator found petitioner had been fired for cause. *Id.* at 42.

14. *Id.* Initially, petitioner filed a charge with the Colorado Civil Rights Commission, which referred the complaint to the Equal Employment Opportunity Commission. *Id.* at 43.

15. *Id.* at 44. The purposes of Title VII are to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. *Id.*

16. *Id.* The District Courts and Court of Appeals held that petitioner was bound by the prior arbitral decision and had no right to sue under Title VII. *Id.*

17. *Id.* at 36.

address the role of arbitration with respect to Title VII claims,[18] the Court based its ruling on consideration of the completeness of the procedures for enforcement of Title VII[19] and the inability of arbitration to properly address the purposes of Title VII.[20] In essence, the Court suggested that arbitration is not the appropriate forum to resolve statutory claims that involve employment discrimination.[21]

A decade after *Alexander*, however, the Supreme Court began to look more favorably upon arbitration of statutory claims.[22] *Shearson/American Express, Inc. v. McMahon*[23] marked the Court's most forceful ruling by establishing a rebuttable presumption[24] that arbitration agreements will be upheld with respect to statutory claims in the commercial context.[25] In *McMahon*, Plaintiffs brought claims in federal court against their brokers (Defendants), alleging violations of antifraud provisions in §10(b) of the Securities and Exchange Act of 1934 (SEC) and of the Racketeer Influenced and Corrupt Organizations Act (RICO).[26] Defendants moved to compel arbitration, relying on customer agreements[27] which provided for arbitration of any claims cus-

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18. *Id.* at 47. Title VII provides for consideration of employment-discrimination claims in several forums. *Id.*

19. *Id.*

20. *Id.* at 49; *see supra* note 16.

21. Michael Lieberman, *Overcoming the Presumption of Arbitrability of ADEA Claims: The Triumph of Substantive Over Procedural Values in* Nicholson v. CPC Int'l, Inc., 138 U. PA. L. REV. 1817 (1990). *Alexander* reached its conclusions without relying upon the fact that the arbitration agreement in question was pursuant to a collective bargaining agreement. In so doing, it forcefully suggested that the displacement of the judicial forum by arbitration of discrimination claims is inappropriate. *Id.* at 1833.

22. Comment, *Agreements to Arbitrate Claims Under the Age Discrimination in Employment Act*, 104 HARV. L. REV. 568 (1990). When the Court decided Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (an antitrust dispute brought under the Sherman Act was subject to compulsory arbitration pursuant to an arbitration agreement), it reversed a previous trend of judicial hostility toward arbitration in which courts often refused to enforce agreements to arbitrate statutory claims on public policy grounds. *Id.*

23. 482 U.S. 220 (1987).

24. *Id.* at 226. This presumption can be rebutted only if 1) Congress expressed its intent to prohibit a waiver of the judicial forum in the text of the statute or legislative history reveals such intent or 2) there is an inherent conflict between arbitration and the statute's underlying purpose. *Id.*

25. Lieberman, *supra* note 21, at 1826.

26. *McMahon*, 482 U.S. at 220. Petitioners also brought claims for fraud and breach of fiduciary duty. *Id.*

27. *Id.* at 223. The arbitration agreement read "Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration . . . ." *Id.*

tomers may have regarding their accounts.[28] The district court found that the SEC claims were arbitrable and the RICO claims were not.[29] The Court of Appeals reversed the SEC claim and affirmed the RICO claim.[30] The Supreme Court found that both the SEC and RICO claims were subject to compulsory arbitration.[31] The Court reasoned that by going through arbitration, the claimants, instead of sacrificing substantive rights afforded by the statute, merely agreed to resolve their disputes in an arbitral setting rather than a judicial setting.[32] Embracing a new confidence in the arbitral forum, the Court established the presumption that agreements to arbitrate statutory claims will be enforced.[33]

Case law addressing the ability to arbitrate statutory claims has thus followed two distinct routes. *Alexander* and its progeny[34] have refused to compel arbitration pursuant to an arbitration agreement when the claim asserted involves employment discrimination protected by a federal statute.[35] *McMahon* and its progeny[36] have established the presumption that statutory claims can be subject to compulsory arbitration in a commercial context.[37] The Third District Court of Appeals, in *Nicholson v. CPC International, Inc.*,[38] was the first appellate court to reconcile these divergent lines of cases.[39] *Nicholson*

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28. *Id.*

29. *Id.* at 224. The District Court found the §10(b) claims arbitrable under the agreement stressing the "strong national policy favoring the enforcement of arbitration agreements." *Id.* However, the RICO claims were not arbitrable because of the "important federal policies inherent in the enforcement of RICO by the federal courts." *Id.*

30. *Id.* at 224. The Court of Appeals reasoned that previous case law (which has since been overruled) held that claims raised under §10(b) of the Securities and Exchange Act are not arbitrable and public policy considerations make it inappropriate to arbitrate RICO claims. *Id.*

31. *Id.*

32. *Id.* at 229 (citing *Mitsubishi*, 473 U.S. 614, 628 (1985)).

33. *See* Comment, *supra* note 22, at 571 (describing the *McMahon* presumption and ground for rebuttal).

34. *See generally* Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) and McDonald v. City of West Branch, 466 U.S. 284 (1984) (holding that arbitration of employment discrimination claims pursuant to arbitration agreements is inappropriate). *Id.*

35. *See Alexander*, 415 U.S. at 36 (holding that the arbitral forum was not appropriate for a claim of employment discrimination under Title VII). *Id.*

36. *See generally* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (reiterating the Courts strong current endorsement of the federal statutes favoring arbitration and explicitly overruling Wilko v. Swan, 346 U.S. 427 (1953), which had held that arbitration of securities statutes was not allowed). *Id.*

37. *Id.*; Shearson American/Express, Inc. v. McMahon, 482 U.S. 220 (1987).

38. Nicholson v. CPC International, Inc., 877 F.2d 221 (3d Cir. 1989).

39. *Id.*

addressed whether an age discrimination claim based on a federal statute could be subjected to compulsory arbitration pursuant to an arbitration agreement.[40] The *Nicholson* court concluded that judicial fora should be reserved for age discrimination cases, which should be treated differently from cases arising in commercial contexts.[41]

In *Nicholson*, the Plaintiff had been working for the Defendant for 27 years[42] when he was fired.[43] One year before he was fired, the Plaintiff signed a contract[44] wherein he agreed to arbitrate any grievances he might have regarding his termination.[45] When Plaintiff was fired, he filed an age discrimination charge with the EEOC and initiated a lawsuit raising claims under the ADEA.[46] The District Court denied Defendant's motion to compel arbitration of the ADEA claim.[47] On interlocutory appeal, the Court of Appeals for the Third Circuit adopted the reasoning used in *Alexander*, affirmed the district court's decision, and refused to compel arbitration of Plaintiff's ADEA claim.[48]

Nicholson stands for the proposition that some statutory rights are important not only to the parties involved, but also to the public at large.[49] Statutes that protect workers from discrimination in the workplace embody crucial substantive rights.[50] In such a case, a conflict develops between the purposes of the statute and arbitration procedures.[51] In reconciling *Alexander* and *McMahon*, the District Court preserved the minimal substantive rights afforded an individual under

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40. *Id.* at 222.

41. Lieberman, *supra* note 21, at 1820.

42. *Nicholson*, 877 F.2d at 222. Plaintiff was hired by defendant as an attorney in 1957. *Id.* After years of promotions, he was appointed Vice-President for Corporate Financial Services in 1981. *Id.*

43. *Id.* at 223. Defendant told plaintiff he was fired due to corporate restructuring. *Id.*

44. *Id.* at 222. The arbitration clause in plaintiff's contract read, "Any dispute or controversy arising under or in connection with this Agreement shall be settled exclusively by arbitration . . . ." *Id.*

45. *Id.*

46. *Id.* at 223.

47. *Id.* The district court reasoned that the text and legislative history of the ADEA demonstrated that Congress intended that ADEA claims be nonarbitrable. *Id.*

48. *Id.* at 224.

49. *Id.*

50. *Id.* at 227. *See* Comment, *supra* note 22, at 570 (stating that some statutory rights are important not only to the parties involved in the dispute, but also to the public at large and should be reserved to the courts).

51. Lieberman, *supra* note 21, at 1821 (expressing that when disputes involve core public concerns or unequal bargaining power, they are inappropriate for arbitration).

the ADEA rather than trading these rights for a national policy of procedure advocating that all statutory claims can be proper subjects for arbitration.[52]

In the instant case,[53] the Supreme Court addressed the issue raised in *Nicholson*,[54] thereby subjecting the issue of the ability to arbitrate ADEA claims to final resolution.[55] However, rather than directly addressing the *Nicholson* opinion, the instant court merely acknowledged the opinion in a footnote.[56] Furthermore, the instant court dismissed the *Alexander* prohibition against arbitration of employment discrimination claims as not controlling.[57] Instead, the instant court adopted the reasoning of *McMahon*,[58] which dealt with arbitration in a commercial context, and eagerly extended the presumption of arbitrability to reach employment discrimination claims pursuant to the ADEA.[59] Using the *McMahon* test, the instant court ultimately decided the ability to arbitrate ADEA claims on the basis of whether there was an inherent conflict between arbitration and the underlying purposes of the ADEA.[60]

The goals of the ADEA[61] are to prevent and eliminate age discrimination in employment and to compensate its victims.[62] The instant court did not address the conclusions of *Alexander* and *Nicholson* courts, which found that only the judicial forum was adequate to vindicate claims of age discrimination in employment thereby furthering these goals.[63] Instead, the instant court adopted *McMahon*'s con-

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52. *See generally* Lieberman, *supra* note 21, at 1822 (asserting that if discrimination claims were presumed nonarbitrable, this would allow substantive public values, such as nondiscrimination, to prevail over procedural values, such as arbitration).

53. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991).

54. *Id.* at 1650. The issue addressed was "whether a claim under the Age Discrimination in Employment Act of 1967 (ADEA). . . can be subjected to arbitration pursuant to an arbitration agreement in a securities registration application." *Id.*

55. *Id.* at 1651.

56. *Id.* at 1651 n.1.

57. *Id.* at 1656.

58. *See generally Gilmer*, 111 S. Ct. at 1652 (citing the *McMahon* test for arbitrability). *Id.*

59. *Id.* at 1657.

60. *Id.* at 1652.

61. 29 U.S.C. § 621(b) (1992).

62. *Id.* The goals of the ADEA are "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (1992).

63. *Supra* note 21; *supra* note 18.

fidence in arbitration and rejected the argument that arbitration would undermine the role of the EEOC in effectively promoting ADEA's goals.[64]

The instant court found that all further challenges to the adequacy of arbitration deserved only brief discussion because these challenges were sufficiently addressed and resolved in *McMahon* and its progeny.[65] The potential bias of the arbitrator,[66] limited discovery tools,[67] and unequal bargaining power[68] were not a concern to the instant court because these issues had already been resolved by a series of cases that dealt with them in the commercial context.[69] The instant court did not address the reasoning in *Alexander*, which advocated that these issues should be considered differently when they are faced in an employment discrimination context.[70] Instead, the instant court found that in the wake of *McMahon* and its progeny, age discrimination in employment claims can be subject to compulsory arbitration.[71]

The instant court underestimates the impact of its decision on the ability of the EEOC to act effectively to protect elderly employees from discrimination in the workplace.[72] When the judicial forum is displaced for the arbitral forum, it is unlikely that claimants will file a charge with the EEOC when their dispute is being handled by an arbitrator.[73] The instant court points out that the EEOC has independent authority to pursue any suspicion it might have of employment discrimination[74] and that charges by employees are not the only way they find out about discrimination.[75] However, the reality is that the EEOC has limited resources and does not exercise its independent

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64. *Gilmer*, 111 S. Ct. at 1653.

65. *Id.* at 1654.

66. *Id.* (addressing protections against bias).

67. *Id.* (discussing why the court dismisses limited discovery as not important).

68. *Id.* at 1655-56 (explaining why unequal bargaining power in employment context is comparable to that in an arms-length transaction).

69. *Id.* at 1654.

70. *See id.*

71. *Id.* at 1657. The Supreme Court held that Gilmer had not met his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act. *Id.*

72. *Compare* with *Nicholson*, 877 F.2d at 227 (speculating that any procedure that detracts from the EEOC charge requirement would undermine Congress' design).

73. Lieberman, *supra* note 21, at 1647. Displacing the judicial forum in favor of arbitration for discrimination claims may discourage claimants from filing a charge with the EEOC, thus undermining the purposes of the ADEA. *Id.*

74. *Gilmer*, 111 S. Ct. at 1653.

investigatory powers very often.[76] The charges by individual employees are the most effective means of identifying an employer that is discriminating and to take appropriate action to stop the discrimination.[77] The statutory scheme ensures the filing of charges because filing charges is a prerequisite to bringing a federal suit.[78] When individuals stop filing charges with the EEOC because their disputes are being settled outside the judicial forum, the ADEA's ability to stop discrimination in employment is severely impaired and the public's substantive rights are compromised.[79]

Faced with a case involving the ability to arbitrate an ADEA claim, the instant court chooses to rely upon case law that dealt with the arbitration of statutory claims involving commercial disputes rather than following the established precedent presented in case law dealing with employment discrimination under Title VII and ADEA.[80] The instant case stands for the proposition that statutory claims that arise in the employment discrimination context are equally as capable of being properly vindicated in the arbitral setting as those that arise in a commercial context.[81] However, the instant court ignores the analysis of *Alexander*, which strongly supports the proposition that Congress did not intend for employment agreements to preclude access to the judicial forum.[82]

Rather than presume all statutes to be proper subjects for arbitration, the instant court should recognize that employment discrimination statutes provide minimum substantive rights which apply to all persons, not just those involved in the immediate dispute.[83] As such,

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75. *Id.*

76. *Nicholson*, 877 F.2d at 227.

77. *Id.*

78. *Id.*

79. Comment, *supra* note 22, at 573. An arbitration agreement removes the possibility of a private lawsuit, thereby eliminating the incentive to file with the EEOC and denying the agency its independent right to discover and process age discrimination cases. *Id.*

80. *See generally Gilmer*, 111 S. Ct. at 1647 (choosing to follow *Mitsubishi* and progeny rather than *Alexander* and progeny).

81. *Id.*

82. Lieberman, *supra* note 21, at 1851. The analysis of *Alexander*, 415 U.S. at 36, lends strong support for the proposition that Congress did not intend federal judicial proceedings in discrimination cases to be preempted by enforceable employment arbitration agreements. *Id.*

83. Lieberman, *supra* note 21, at 1831, 1851. The Court noted the importance of the private right of action in the enforcement of Title VII, stating that "the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." *Id.* at 1831. "Certain statutes which provide minimum substantive

claims under these statutes can be properly addressed only in a judicial setting, not an arbitral setting.[84] Furthermore, all statutes dealing with elimination of discrimination in employment should be interpreted consistently with one another because they have similar goals founded on similar public policy grounds.[85] To treat one protected class differently from another may evoke the public sentiment that one class deserves more protection than another. Here, because Title VII claimants are protected from having their judicial forum precluded pursuant to an arbitration agreement, older people might feel that Congress has granted more protection through Title VII to racial minorities and women than they have been granted through the ADEA against exactly the same conduct, employment discrimination. Furthermore, by removing employment discrimination claims from a public to a private sector, the instant court has indicated that age discrimination in employment is no longer a public concern.[86]

The instant court quickly dismisses the challenges to the adequacy of arbitration as a reflection of the past distrust of arbitration which the Supreme Court has since abandoned.[87] Furthermore, the instant court reasons that since these issues were settled in the commercial context of *McMahon*, they need not be addressed in the employment discrimination context.[88] The court ignores the fact that legislation addressing discrimination has often been viewed differently than legislation addressed in purely economic disputes.[89]

The instant case fails to recognize that the inadequacies of arbitration can be seriously disadvantageous to an ADEA claimant.[90] Although not a concern when dealing with arbitration of a commercial statutory claim, the potential bias of the arbitrator should be a particu-

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guarantees . . . are to be treated differently for arbitration purposes." *Id.* at 1851 (citing *Alexander*, 415 U.S. at 36).

84. *Id.*

85. Lieberman, *supra* note 21, at 1834. The public law concepts the Court identified in *Alexander* to support its holding that the judicial forum for Title VII claims is not subject to displacement logically extends to all discrimination statutes. *Id.* Discrimination statutes should be interpreted consistently to preserve access to the judicial forum for those the statute is trying to protect. *Id.* at 1839.

86. Comment, *supra* note 22, at 584. "Removing the entire field of ADEA law from the public eye may send a message that age discrimination is no longer a public issue." *Id.*

87. *Gilmer*, 111 S. Ct. at 1654.

88. *Id.*

89. Lieberman, *supra* note 21, at 1851 (noting that "discrimination and civil rights legislation have traditionally been viewed differently than purely private economic disputes").

90. *See Nicholson*, 877 F.2d at 221.

lar concern in an employment discrimination dispute.[91] Because the arbitration need be familiar only with the law of the shop, not the law of the land,[92] it is likely that the arbitrator will be involved in business and thus harbor subconscious prejudices against the employee. Furthermore, discrimination can be subtle, and proving discrimination can be very difficult.[93] The limited discovery tools permitted by arbitration can make it nearly impossible to prove discrimination.[94]

Moreover, the court barely acknowledges the unequal bargaining power issue.[95] The realities of the workplace are that new employees desperate for employment and older employees who have invested many years in their career may lack any real option to refuse to sign arbitration agreements.[96] As a result of the instant case, employers may use this superior bargaining power to induce employees to sign arbitration agreements, thereby displacing enforcement of ADEA claims from the federal courts to arbitration[97] and thereby cutting down their costs for resolving disputes with terminated employees.[98] This imbalance of bargaining power is much greater than that found in the arms-length transactions disputed in *McMahon* and its progeny.[99] Thus, the inadequacies of arbitration that were found to be inconsequential in commercial contexts are crucial to protecting the claimant's rights in the employment discrimination context and deserved more consideration by the instant court.[100]

With its decision, the instant court expands the presumption of arbitrability to cover statutory claims involving employment discrimi-

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91. *Alexander*, 415 U.S. at 57.

92. *Id.*

93. Comment, *supra* note 22, at 584. In discussing the discovery process, the article asserts that the broader discovery allowed in federal courts might be critical because "age discrimination is often of a peculiarly subtle character and this fact . . . may complicate the proof and require deeper probing than usual." *Id.*

94. *Id.*

95. *Gilmer*, 111 S. Ct. at 1661 (Stevens, J., dissenting).

96. *Nicholson*, 877 F.2d at 229.

97. Lieberman, *supra* note 21, at 1852 (speculating as to shift of enforcement of ADEA away from the federal courts).

98. Comment, *supra* note 22, at 584 (identifying arbitration as quick and less costly than a federal suit).

99. Lieberman, *supra* note 21, at 1844. The *Nicholson* court suggested that the disparity of bargaining power between employers and employees generally, and between employers and older employees specifically, discredited the argument that arbitration provisions in individual employment contracts were comparable to those found in an arm's length commercial contract. *Id.*

100. *See Nicholson*, 877 F.2d at 221.

nation.[101] It moves the enforcement of the ADEA from the public sector into the private.[102] In so doing, it sends a message to the public that discrimination against the elderly in the workplace is no longer a public concern.[103] The instant court places more value on establishing a policy of consistent procedure than on examining the impact of its decision on the future of discrimination in general.[104] In essence, the instant court trades the substantive rights of employees for procedural rights in general.

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101. Lieberman, *supra* note 21, at 1817. The Supreme Court has expanded the scope of arbitrability of private arbitration agreements, creating a general presumption of arbitrability and circumscribing the possibilities for rebutting this presumption. *Id.*

102. Comment, *supra* note 22, at 584.

103. *Id.*

104. *See Gilmer*, 111 S. Ct. at 1647.