

EEOC Determinations and Other “Expert” Evidence:

**What Is Admissible In
Employment Discrimination Cases Today?**

Presented By
Jonathan C. Wilson

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**Haynes and Boone, LLP
901 Main Street
Suite 3100
Dallas, Texas 75202
Telephone: (214) 651-5646
Facsimile: (214) 200-0381**

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I. Introduction.

Under the statutory schemes of almost every major federal anti-discrimination employment law, the Equal Employment Opportunity Commission (“EEOC”) has initial responsibility for discovering and examining the facts leading to an allegedly discriminatory adverse employment action. Once the EEOC examines the matter it has several options: (1) issue a right to sue letter; (2) issue an administrative finding supporting the conclusion that discrimination existed; (3) issue a finding supporting the conclusion that discrimination did not exist. Similarly, most states have administrative agencies comparable to the EEOC, which exist to enforce state and federal anti-discrimination statutes. The EEOC and analogous state agency administrative roles in discrimination cases highlights a significant evidentiary problem: To what extent can such “expert” opinions that discrimination did or did not exist in a given case be admitted to support the ultimate legal conclusion of discrimination *vel non*?

Of course, this problem is not limited to EEOC and state agency discrimination determinations. Litigants also seek to introduce determinations by unemployment compensation agencies, workers’ compensation agencies and the Social Security Administration to support their cases. Furthermore, litigants frequently attempt to introduce arbitration decisions to support their arguments. This paper will address how courts have dealt with these various “expert” conclusions that embrace the ultimate legal conclusion of discrimination *vel non*. It will also offer practical guidance to practitioners faced with the prospect of attempting to introduce or exclude such evidence.

II. Admissibility of Agency Determinations.

One source of evidence litigants frequently tap or attempt to seal off, depending on their position in the lawsuit, is the potential plethora of administrative determinations involving an employment discrimination plaintiff. Such determinations include EEOC determinations, unemployment compensation determinations, and workers’ compensation determinations.

A. EEOC Determinations.

In the course of investigating a complaint, the EEOC can issue any number of determinations. These determinations include: (1) reasonable cause determinations; (2) letters of violation; and (3) determinations that there is insufficient evidence to support the finding of a violation.¹ Reasonable cause determinations are issued by the agency when an EEOC

¹ Most state agencies follow similar procedures.

investigator has concluded that “it is more likely than not” that there has been discrimination.² Moreover, what was formerly called “no reasonable cause” determinations are now called dismissals “without particularized findings.”³

As an initial matter, each of these determinations must satisfy the requirements of the public records exception to the hearsay rule, Rule 803(8)(C). Once this hurdle is cleared, most courts engage in a balancing test under Federal Rule of Evidence 403 in deciding whether to admit these determinations.

1. Admissibility Under Rule 803(8)(C).

As a general rule, EEOC findings and analogous state agency reports are admissible as an exception to the hearsay rule under Rule 803(8)(C). Rule 803(8)(C) permits introduction of public agency reports containing findings of fact of the reporter/investigator without requiring them to appear at trial. Rule 803(8)(C) provides:

The following are not excluded by the hearsay rule, even though the declarant is not available as a witness... (8) records, reports, statements of data compilations, in any form, of public offices or agencies, setting forth... (C) in civil actions and proceedings... factual findings results from and investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

The rationale behind Rule 803(8)(C) is that there is a presumption of reliability of government records. The Advisory Committee’s note explains that it is “assumed that a public official will perform his duty properly.” FED. R. EVID. 803(8)(C) Advisory Committee note.

² One EEOC Compl. Man. (BNA) § 40.2, at 40:0001. However, this policy standard was rescinded by the EEOC in April 1995, see DAILY LAB. REP. (BNA) at E-5 (Apr. 20, 1995), and the EEOC has not set a new reasonable cause standard. Accordingly, the agency has continued to follow the rescinded standard.

³ One EEOC Compl. Man. (BNA) § 22.15, at 22:0012; *Id.* § 27, at 27:0001-02. Where no reasonable cause was found to support a charge of discrimination, the charge should be dismissed “without particularized findings.” DAILY LAB. REP. (BNA) at E-5 (Apr. 20, 1995). In the place of no cause determinations, the EEOC provides the following uniform language: “Based upon the Commission’s investigation, the Commission is unable to conclude that the information obtained established violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issue that might be construed as having been raised by this charge.” Priority Charge Handling Procedures, *reprinted in* 1 FEP Man. 405: 7311 (June 20, 1995). It is not yet clear “what effect courts will give to the EEOC’s current practice of issuing dismissals ‘without particularized findings’ instead of ‘no cause’ findings.” BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1267 (3d ed. 1996).

a. Trustworthiness Requirement.

The findings of an administrative agency are admissible “unless the sources of information or other circumstances indicate lack of trustworthiness.” FED. R. EVID. 803(8)(C). *But see United States v. Oates*, 560 F.2d 45, 65 (2d Cir. 1977) (finding that “the exceptions to the hearsay rule are ... not designed to insure the admissibility of evidence”). Opponents of the proffered evidence have the burden of rebutting the presumption that 803(8)(C) materials are trustworthy and admissible. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 505 F. Supp. 1125, 1147 (E.D. Pa. 1980) *aff’d in part rev’d in part sub nom. In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev’d sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *cert denied*, 481 U.S. 1029 (1987). The Advisory note sets forth at least four factors to test the trustworthiness of a record:

Factors which may be of assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation; (2) the special skill or experience of the official; (3) whether a hearing was held and the level at which conducted; (4) possible motivation problems...Others no doubt could be added.

Case law has followed the note’s suggested factors and added to the list of trustworthiness considerations. For example, in *Zenith Radio Corp.*, an additional seven factors were employed to test the trustworthiness of the investigative/evaluative process of agency determinations. *See Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1342 (3d Cir. 2002) (citing *Zenith Radio Corp.*, 505 F. Supp. at 1147).⁴

Administrative reports are assumed trustworthy unless a party can produce evidence showing bias or another reason that such evidence should not be trusted. For example, where a report is issued without a hearing and there was no opportunity to cross examine witnesses the report may be untrustworthy. *See Denny v. Hutchinson Sales Corp.*, 649 F.2d 816, 821 (10th Cir. 1981). In *Denny*, the Tenth Circuit concluded that the district court did not abuse its discretion by refusing to admit the Colorado Civil Rights Commission probable cause

⁴ Such factors include: (1) The finality of the agency findings, i.e., the state of the proceedings at which the findings were made (whether they were subject to subsequent proceedings or *de novo* review), and the likelihood of modification or reversal of the findings; (2) The extent to which the agency findings are based upon or are the product of proceedings pervaded by receipts of substantial amounts of material which would not be admissible in evidence (e.g., hearsay, confidential communications, *ex parte* evidence), and the extent to which such material is supplied by persons with an interest in the outcome of the proceedings; (3) If the findings are products of hearings, the extent to which appropriate safeguards were used (Administrative Procedure Act, due process), and the extent to which the investigation complied with all applicable agency regulations and procedures; (4) The extent to which there is ascertainable record on which the findings are based; (5) The extent to which the findings are a function of an executive, administrative, or legislative policy judgment (as opposed to a factual adjudication) or represent an implementation of policy; (6) The extent to which the findings are based upon findings of another investigative body or tribunal which is itself vulnerable as a result of trustworthiness evaluation; (7) Where the public purports to offer expert opinion, the extent to which the facts or data upon which the opinion is based are of a type reasonably relied on by experts in a particular field.

determination in favor of the plaintiff. The court noted that the district court had properly concluded that the report was untrustworthy because the CCRC findings “were made pursuant to an *ex parte* investigation,” “there was a lack of formal procedures,” and there was “no opportunity to cross examine witnesses.” *Id.*

Similarly, a report is likely to be untrustworthy if the report itself, or underlying findings, appear to be based on suspect motivations. As one court noted, “if the public official or body who prepared the report has an institutional or political bias, and the final report is consistent with that bias” then it is untrustworthy and inadmissible. *Coleman*, 3306 F.3d at 1342; *see also Pearce v. E.F. Hutton Group, Inc.*, 653 F.Supp. 810, 814 (D.D.C. 1987) (holding that findings made in the congressional report should be excluded because of “the obvious political nature of Congress, it is questionable whether any report by a committee or subcommittee of that body could be admitted under Rule 803(8)(C) against a private party. There would appear to be too great a danger that political considerations might affect the findings of such report”). In particular, an EEOC report may be untrustworthy if it was made in contemplation of pending litigation. *See Harris v. Birmingham Bd. of Educ.*, 537 F.Supp. 716, 721-22 (N.D. Ala. 1982), *aff’d in part & rev’d in part*, 712 F.2d 1377 (11th Cir. 1983) (holding that the EEOC determination was untrustworthy when it was made *six months* after litigation had been filed and “the trustworthiness of the determination is further eroded by the obvious disregard of the affidavit submitted by the defendant to the EEOC. The Court is appalled by the numerous erroneous and obviously slanted statements contained in the determination, the list of which is too lengthy to be set out”). (emphasis added).⁵ Issues of trustworthiness may also arise when the investigator is inexperienced, (holding that a JAG report on the causes of a Navy airplane accident untrustworthy and therefore inadmissible because it “was prepared by an inexperienced investigator in a highly complex field of investigation”) or has made “unfounded determinations of discrimination.” *See Fraley v. Rockwell Int’l Corp.*, 470 F.Supp. 1264, 1267 (S.D. Ohio 1979); *see also Bynum v. Fort Worth Independent School District*, 41 F.Supp.2d 641, 658 (N.D. Tex. 1999) (“as a matter of law the EEOC determinations against FWISD have such a ‘lack of untrustworthiness’ that they should not play a role in determining the outcome of FWISD’s motion for summary judgment” because the “EEOC investigator has made unfounded determinations of discrimination” and “must not have applied the proper legal standards”). Litigants in employment lawsuits often do not contest the trustworthiness of administrative agency findings. *See Coleman*, 306, F.3d at 1343 (assumed that the EEOC determinations were trustworthy because the defendant did not contest them); *Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 201 (5th Cir. 1992) (same); *McClure v. Mexia Independent School District*, 750 F.2d 396, 400 (5th Cir. 1985) (same). Where a litigant offers nothing more than bare allegations that admission of the report would cause unfair prejudice and delay, courts will find the EEOC materials and analogous state agency findings do not suffer from any defect in trustworthiness. *Barfield*, 911 F.2d at 651 (plaintiffs did not overcome the presumption of trustworthiness under Rule 803(8)(C) when they offered nothing more than bare allegations that the admission of the EEOC no reasonable cause determination would cause unfair prejudice and delay).

⁵ As a practical matter, all such reports are arguably made in contemplation of litigation because of the requirement to exhaust administrative remedies but in *Harris* the report was made and issued six months after the filing of the suit.

b. The Ninth Circuit's Rule of Admissibility.

Not all circuits conduct a trustworthiness analysis when proffered agency findings are contested. The Ninth Circuit has adopted the position that EEOC and analogous state agency reasonable cause determinations are *per se* admissible. See *Bradshaw v. Zoological Society of San Diego*, 569 F.2d 1066 (9th Cir. 1978). The court has held that “a Title VII plaintiff has an absolute right to introduce the EEOC’s reasonable cause determination into evidence.” *Gifford v. Atchinson, Topeka & Sante Fe Ry. Co.*, 685 F.2d 1149, 1156 (9th Cir. 1982). Accordingly, the reasonable cause determination will be admitted notwithstanding the finding may lack sufficient trustworthiness.

The Ninth Circuit relied on *Smith v. Universal Services, Inc.*, 454 F.2d 154 (5th Cir. 1972)⁶ in adopting the *per se* admissibility rule. In *Smith*, the Fifth Circuit held that a trial court had committed reversible error in failing to admit the EEOC reasonable cause determination. See *id.* at 156. The court reasoned that the expertise of the agency investigators made the determinations “highly probative” and the report, which was clearly hearsay, was admitted pursuant to the business records hearsay exception which is the current Rule 803(6). This exception also has a trustworthiness requirement but the Fifth Circuit quickly concluded that “[t]here is no reason to suspect any lack of trustworthiness.” *Id.* at 158.⁷

The Ninth Circuit’s *per se* admissibility rule appears inconsistent with Supreme Court precedent regarding Rule 803(8)(C), however. In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988) the Supreme Court held that the trial judge “has the discretion, and indeed the obligation, to exclude an entire report or portions thereof – whether narrow ‘factual’ statements or broader ‘conclusions’ – that she determines to be untrustworthy.” *Id.* at 167-68. The Ninth Circuit’s *per se* rule impermissibly relieves the trial judge of the “obligation” to determine the trustworthiness of agency determinations.

Ninth Circuit precedent setting forth and sustaining the rule of *per se* admissibility relies on *Chandler v. Roudebush*, 425 U.S. 840, 863, 96 S.Ct. 1949 (1976) for support that EEOC

⁶ In *Smith*, the Fifth Circuit adopted a *per se* rule of admission of employment agency determinations. 454 F.2d at 156-158. Subsequently, the Fifth Circuit has distinguished *Smith* and adopted the position that the trial court should conduct a Rule 403 analysis, but there remains a strong presumption favoring the admissibility of such reports. See *Cortes v. Maxus Exploration Company*, 977 F.2d 195, 201 (5th Cir. 1992) (noting that “none of these decisions [citations including *Smith*] should be read as leaving district courts without discretion under Rule 403 to exclude such reports if their probative value is substantially outweighed by prejudicial effect or other considerations”). *But see*, *Dickerson v. Metropolitan Dade County*, 659 F.2d 574, 579 (5th Cir. 1981) (holding “that the district court was obligated to admit into evidence the EEOC investigative report and findings because the probative value outweighed any possible prejudice to the employer”); *Smith*, 454 F.2d at 157 (finding that the probative value of EEOC determinations “at least outweighs any possible prejudice to the defendant”).

⁷ However, the public records exception is generally broader and easier to satisfy than the business records exception. Michael D. Moberly, *The Admissibility of EEOC and Arizona Civil Rights Division Determinations in State Court Employment Discrimination Litigation*, 33 ARIZ. ST. L.J. 265, 287 (2001).

reasonable cause determinations should be admitted as an exception to hearsay. *See Bradshaw*, 569 F.2d at 1069. The court noted that in *Chandler*, the Supreme Court stated, “prior administrative findings made with respect to an employment discrimination claim, may, of course, be admitted as evidence at a federal-sector trial de novo. See Fed. R. Evid. 803(8)(C).” *Id.* (citing *Chandler*, 425 U.S. at 863). However, this statement does not support the position that agency determinations are *per se* admissible. The Supreme Court merely commented that such reports *may* be admissible. The Ninth Circuit has failed to reconcile *Beech Aircraft Corp.*, the Supreme Court’s subsequent Rule 803(8)(C) decision wherein the Court determined it was the obligation of the trial judge to conduct a trustworthiness analysis. *See Beech Aircraft Corp.*, 488 U.S. at 167-68. When read together it is clear that an EEOC determination is admissible subject to a trustworthiness review.

2. Balancing Under Rule 403.

Once the report passes muster under Rule 803(8)(C), courts analyze the determinations under Federal Rule of Evidence 403. Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Relevance alone does not insure admissibility under the Federal Rules of Evidence. The relevance of these determinations are rarely challenged. Rule 403 is an “umbrella rule spanning the whole of the Federal Rules of Evidence.” *Coleman*, 306 F.3d at 1343; *see also* STEPHEN A. SALTZBURG, et al. eds., FEDERAL RULES OF EVIDENCE MANUAL 251 (7th ed. 1998) (“[T]he trial judge must apply Rule 403 in tandem with other federal rules under which evidence would be admissible”). Consequently, Rule 403 is generally applied to all evidence, even evidence that would otherwise be admissible under Rule 803(8)(C). *See, e.g., Paolitto v. John Brown E. & C., Inc.*, 151 F.3d 60, 65 (2d Cir. 1998); *Hall v. Western Prod. Co.*, 988 F.2d 1050, 1057-1058 (10th Cir. 1993); *Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 201 (5th Cir. 1992) *Barfield v. Orange City*, 911 F.2d 644, 650-51 (11th Cir. 1990); *Smith v. Massachusetts Institute of Technology*, 877 F.2d 1106, 1113 (1st Cir. 1989); *Johnson v. Yellow Freight Sys., Inc.*, 734 F.2d 1304, 1309 (8th Cir. 1984); *McCluney v. Jos. Schlitz Brewing Co.*, 728 F.2d 924, 929-30 (7th Cir. 1984); *Walton v. Eaton Corp.*, 563, F.2d 66, 75 & n. 12 (3d Cir. 1997) (en banc).

Rule 403 recognizes that a cost benefit analysis must be conducted in determining whether to admit evidence. “Evidence may be excluded if its probative value is not worth the problems that its admission may cause.” *Coleman*, 306, F.3d at 1343.⁸ There is a presumption,

⁸ The Third Circuit noted, “it is worth stressing that the term unfair prejudice as a fact against the probative value of evidence as weighed under Rule 403 is often misstated as mere prejudice. Indeed, any evidence that tends

however, that relevant evidence should be liberally admitted and for evidence to be excluded under Rule 403 “the probative value of evidence must be *substantially outweighed* by the problem in admitting it.” *Id.* at 1344 (emphasis in original). Consequently, highly probative evidence is difficult to exclude. *Id.*; see e.g., *United States v. Krenzelok*, 874 F.2d 480, 482 (7th Cir. 1989) (“its probative value was...great.” It’s prejudicial effect may well have been great too. But when the trial judge is in doubt, Rule 403 requires admission (this is the force of ‘*substantially outweighed*’)) (emphasis in original). The purpose of the Rule 403 balancing test is to ensure, to the extent possible, that the finder of fact will not be presented with evidence that is far less probative than is prejudicial. *Coleman*, 306 F.3d at 1344. As alluded to above, the analysis under Rule 403 is different from the analysis under 803(8)(C). Under Rule 803(8)(C) investigative reports and findings made by governmental agencies are exceptions from the rule against hearsay unless circumstances indicate untrustworthiness. Given this presumption that agency reports are not to be excluded, the party opposing admission of such reports under Rule 803(8)(C) generally must prove the report’s lack of trustworthiness. In contrast, Rule 403 gives trial courts discretion to exclude relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice...” However, the Fifth Circuit noted that the balancing test of Rule 403 should not be used in such a way that “would end the presumption that evaluative reports are admissible hearsay under Rule 803(8)(C).” *Cortes*, 977 F.2d at 201.

a. Reasonable Cause of Determinations: Admissible *Per Se*?

As noted above, the Ninth Circuit, has staked out a minority position and adopted a rule of *per se* admissibility of reasonable cause determinations in discrimination cases. See *Plummer v. Western Int’l Hotels Co.*, 656 F.2d 502, 505 (9th Cir. 1981). Thus, it is held that the “highly probative value” of EEOC reasonable cause determinations necessarily outweighs the evidentiary problems in Rule 403. *Id.* at 505. The court noted that civil rights plaintiffs have a difficult burden of proof and should not be deprived “of what may be persuasive evidence.” *Id.* (Footnote omitted). The plaintiff has a right to introduce the EEOC reasonable cause determination regardless of whether “the case is tried before a judge or a jury.” *Id.* Accordingly, agency findings create an issue of fact as to whether discrimination has occurred and therefore summary judgment is not likely to be an appropriate disposition of a discrimination case where an agency has issued a reasonable cause determination. See *Gifford*, 685 F.2d at 1156 (holding that it was improper to resolve the issue of discrimination on summary judgment because the EEOC report was sufficient at least to create an issue of fact as to whether there had been discrimination).

As with the Supreme Court’s precedent regarding Rule 803(8)(C), the Ninth Circuit’s *per se* admissibility rule appears inconsistent with Supreme Court precedent regarding Rule 403. In *Beech Aircraft Corp.*, 488 U.S. 153 (1988) the Supreme Court recognized that trial judges have the obligation to utilize safeguards such as Rule 403 which are built into the Federal Rules of Evidence to insure that questionable evidence is not admitted “such as those dealing with relevance and prejudice, provide the court with additional means of scrutinizing, and where

to hurt a party’s case could be said to be prejudicial. Thus, the prejudicial effect of admitting the evidence must rise to the level of creating an unfair advantage for one of the parties for the evidence to be excluded under Rule 403.

appropriate, excluding evaluative reports or portions of them.” *Id.* at 167-68. Once again, it is apparent that the Ninth Circuit’s *per se* rule of admissibility is in direct contravention to the Federal Rules of Evidence and Supreme Court precedent to the extent that it relieves the trial court judges of this obligation.

b. The Majority Approach.

All other circuit courts considering the issue have given less deference to the probative value of the agency reasonable cause determinations than the Ninth Circuit, and have refused to categorically require admission of agency findings. In fact, the Ninth Circuit’s rule is limited to reasonable cause determinations and does not include letters of violation or the like. *See Beachy v. Boise Cascade Corporation*, 191 F.3d 1010, 1015 (9th Cir. 1999) (holding that the Oregon Bureau of Labor in industries determination that insufficient facts existed to continue an investigation was not *per se* admissible in the same manner as an agency’s determination of probable cause); *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1500-1501 (9th Cir. 1986) (holding that the *per se* rule of admissibility of agency reasonable cause determinations does not apply to EEOC letters of violation and the district court judge should have exercised his discretion to admit or exclude such a letter); *accord EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1095 (5th Cir. 1994).

The Ninth Circuit determined that a letter of violation was substantially different from a reasonable cause determination because a letter of violation concludes that a violation has occurred, whereas a reasonable cause determination determines only that there is probable cause to conclude that a violation of has occurred. *See Gilchrist*, 803 F.2d at 1500. Consequently a letter of violation results “in a much greater possibility of unfair prejudice because a jury may find it difficult to evaluate independently evidence of violations of Title VII after being informed that the EEOC has already found a violation.” *Id.*; *Cf. Hairston v. Washington Metropolitan Area Transit Authority*, No. Civ. 93-2127, 1997 WL 11946 at *2, *4 (D.D.C. April 10, 1997) (holding that an EEOC letter stating “the preponderance of the evidence gathered in EEOC’s investigation did not prove [plaintiff’s] claim that she was retaliated against when dismissed from her position” was “more than a probable cause determination”). Agency no reasonable cause determinations or determinations “that insufficient fact exist” to continue an investigation are not *per se* admissible for the same reason. *See Beachy*, 191 F.3d at 1015.

Most circuits have left the question of whether to admit any EEOC or analogous state agency findings to the discretion of the trial court. *See, e.g., Paolitto v. John Brown E. & C., Inc.*, 151 F.3d 60, 65 (2d Cir. 1998); *Hall v. Western Prod. Co.*, 988 F.2d 1050, 1057-1058 (10th Cir. 1993); *Barfield v. Orange City*, 911 F.2d 644, 650-51 (11th Cir. 1990); *Smith v. Massachusetts Institute of Technology*, 877 F.2d 1106, 1113 (1st Cir. 1989); *Johnson v. Yellow Freight Sys., Inc.*, 734 F.2d 1304, 1309 (8th Cir. 1984); *McCluney v. Jos. Schlitz Brewing Co.*, 728 F.2d 924, 929-30 (7th Cir. 1984); *Walton v. Eaton Corp.*, 563, F.2d 66, 75 & N. 12 (3d Cir. 1997) (en banc). Accordingly, in the majority of circuits, trial judges conduct a Rule 403 balancing test with regard to EEOC findings, and the findings of their state counterparts. Additionally, in all circuits the finder of fact must determine the probative value, if any, to grant

such findings if admitted into evidence. *See e.g., Price v. Federal Express Corp.*, 283 F.3d 715, 725 (5th Cir. 2002) (finding that district court did not error for failing to “give proper credence” to an EEOC reasonable cause determination that was not well investigated and conclusory). Thus, in the majority of circuits a court may grant summary judgment even where an agency has issued a reasonable cause determination that a violation of the law has occurred. *See Simms v. Oklahoma ex rel. Dep’t of Mental Health*, 165 F.3d 1321, 1331 (10th Cir.1999) (holding that a reasonable cause determination regarding discrimination will not defeat a motion for summary judgment filed by the employer when there are no other issues of fact); *Williams v. Alabama Indus. Dev’t Tr’g*, 146 F.Supp.2d 1214, 1224 (M.D.Ala. 2001) (“Article III of the Constitution vests the judicial power in judges appointed by the President and confirmed by the Senate. EEOC investigators usually are kindly people. But there should be no confusion that they cannot usurp the judiciary’s role in determining whether there is a genuine issue of material fact.”); *Bynum v. Fort Worth Independent School District*, 41 F. Supp.2d 641, 657 (N.D. Tex. 1999) (finding the EEOC’s determination did not, by itself, create an issue of fact).

In engaging in 403 balancing, courts have recognized that not all EEOC or state agency reports have the same probative weight, nor do they all have the same potential for unfair prejudice. Thus, as the Eighth Circuit noted, “EEOC determinations are not homogeneous products; they vary greatly in quality and factual detail.” *Johnston v. Yellow Freight System, Inc.*, 734 F.2d 1304, 1309 (8th Cir. 1984).

i. Cases Admitting EEOC and Similar State Agency Determinations.

Smith v. Universal Services, Inc., 454 F.2d 154 (5th Cir. 1972) is the seminal case admitting a EEOC reasonable cause determination. In *Smith*, the Fifth Circuit held that a trial court had committed reversible error in failing to admit the EEOC reasonable cause determination. *See id.* at 156. The court reasoned that the expertise of the agency investigators made the determinations “highly probative” and the report which was clearly hearsay was admitted pursuant to the business records hearsay exception which is the current Rule 803(6). The court justified its conclusion by reasoning “the fact that an investigator, trained and experienced in the area of discriminatory practices and the various methods by which they can be secreted, has found that it is likely that such an unlawful practice has occurred, is highly probative of the ultimate issue.” *Id.* In other words, the court was relying on the agency’s expertise in investigating discrimination claims, and to ignore “the manpower and expertise” of the investigators “would be wasteful and unnecessary.” *Id.*

More recently, the Eleventh Circuit refused to find that a district court abused its discretion in admitting a “no reasonable cause” determination, when the plaintiff merely asserted that it would prejudice him but did not specify how he would be prejudiced. *Barfield*, 911 F.2d at 650-51. The *Barfield* court cited *Smith* and summarily concluded that agency reports were “highly probative.” *See id.* at 649. The only argument the plaintiff asserted was that the report would prejudice a jury. The Eleventh Circuit however upheld the district court’s conclusion because the case was a bench trial, and potential prejudice of a jury was therefore, not an issue.

Id. at 651. Although, the court did recognize the heightened potential for prejudice of such evidence in jury trials. *See id.*

ii. Cases Excluding EEOC and State Agency Determinations Based on Rule 403 Factors.

Reports such as reasonable cause determinations and similar analogous state agency findings are often deemed inadmissible by trial court judges based on a Rule 403 cost benefit analysis. Factors courts consider in determining whether the probative value of such reports outweighs potential problematic evidentiary issues include the length and comprehensiveness of the report, whether the report is conclusory, and whether the adverse party had an opportunity to present the investigating agency evidence. *See e.g., Johnson*, 734 F.2d at 1309 (holding that district court did not abuse its discretion in excluding an EEOC determination of reasonable cause where it was only supported factually by two highly conclusory statements); *Cortes v. Maxus Exploration Co.*, 758 F.Supp. 1182, 1184 (S.D. Tex. 1991) (finding factors such as the length of the EEOC no reasonable cause determination and its comprehensiveness are relevant in conducting a 403 balancing), *aff'd*, 977 F.2d 195 (5th Cir. 1992). For example, reports that contain mere legal conclusions are often excluded because they simply lack probative value when compared with potential evidentiary problems. *See e.g., Johnson*, 734 F.2d at 1309 (holding that district court did not abuse its discretion in excluding an EEOC determination of reasonable cause where it was only supported factually by two highly conclusory statements); *Cortes*, 977 F.2d at 202. (5th Cir. 1992) (the district court did not abuse its discretion when it found that the reasonable cause determination consisted of bare conclusions and therefore had little if any probative value); *Lee v. Executive Airlines, Inc.*, 31 F.Supp.2d 1355, 1358 (S.D. Fla. 1998) (holding that the EEOC letter of determination that was highly conclusory in nature had little probative value yet may substantially prejudice the defendants).

There are a number of factors listed under Rule 403 whereby courts have concluded that the probative value of EEOC and analogous state agency determinations are substantially outweighed by potential problems to the court and adverse party such as unfair prejudice, undue delay, waste of time, and misleading and/or confusing the jury.

a) Unfair Prejudice.

Courts often find that the admission of an EEOC or analogous state agency report would be unduly prejudicial to the party challenging the evidence. The courts rarely provide a detailed explanation how the reports would prejudice the party other than citing undue delay, wasted time, or misleading the jury, all of which are independent factors under Rule 403. However, the Tenth Circuit in *Denny* determined that a district court had not abused its discretion in refusing to admit the Colorado Civil Rights Commissions probable cause determination because of unfair prejudice. *Denny*, 649 F.2d at 820-821. The district court determined that the report and findings were based on second and third level hearsay and it “thought it fundamentally unfair to

place upon [the Defendant] the onus of disproving such hearsay when the burden of establishing a *prima facie* case was upon the plaintiffs.” *Id.*

Two district court cases are instructive of the Rule 403 balancing test between the probative value and potential unfair prejudice resulting from the admission of EEOC and state agency findings. In *Lee v. Executive Airlines*, the court found that an EEOC reasonable cause determination was highly conclusory and possessed very little probative value because the letter did not outline, even summarily, the evidence it relied on for its conclusions. 31 F.Supp.2d at 1356. The court noted that the inability to determine the factual findings providing the basis for the EEOC letter could well prejudice the defendant, both in terms “of the fact that rebuttal of the conclusion specific facts is impossible and cross examination of the determination is unavailing.” *Id.* The court also concluded that the letter could confuse the jury because it would be difficult for the jury to exercise the responsibilities as “the finders of fact in evaluating the evidence before them” when the letter of determination concluded with the statement “I have determined that the evidence obtained during the investigation establishes that there is a reasonable cause to believe that a violation of the statute occurred.” *Id.* at 1358. The court concluded that the jury could attach undue weight to the authoritative and personalized conclusions of the EEOC inspector, thus creating unfair prejudice. *Id.*

Similarly, in *Hairston*, the defendants tried to introduce an EEOC letter declaring that the preponderance of evidence gathered in the EEOC investigation did not prove the plaintiff’s claim. 97 WL 411946, at *4. The court likewise noted that the letter was highly conclusory and discussed no facts of the case. The court found that the danger of unfair prejudice was high because the letter asserted that it was a “determination on the merits of the charge” and this statement, combined with the legal conclusion that followed and the fact that the letter came from the EEOC, created unfair prejudice for the plaintiff. *Id.* Additionally, the court noted that additional grounds of undue delay existed for exclusion of the letter would because it was likely that the plaintiff would have to spend a great deal of time at trial attempting to explain the significance of the letter to the jury. *See Id.* Accordingly, the EEOC determination was excluded.

b) Undue Delay / Waste of Time.

Similarly, in *Coleman*, the Third Circuit found that the admission of an EEOC reasonable cause determination would have resulted in undue delay.” *See Coleman*, 306 F.3d at 1346. The EEOC determination had low probative value and the rebuttal of the allegations of systematic discrimination contained in the EEOC report would have resulted in undue delay. If the determination was admitted, the defendant would have had to present evidence showing that it did not discriminate when it placed former employees in cashier positions or fired them, and this would have required “a great deal of testimony, in fact a trial within a trial, about the employment histories of a large number of former employees.” *Id.* In addition to the undue delay imposed by rebutting an adverse administrative agency determination, the Eighth Circuit has noted that “the trial judge may properly give weight to the hearsay nature of the EEOC report

and to the inability of the defendant to cross examine the report in the same way that a party can cross examine an adverse witness.” *Johnston*, 747 F.2d at 1309.

c) Misleading / Confusing the Jury.

The Second Circuit has recognized that an attempt by a party to expose the weakness of an adverse EEOC report “may well confuse or mislead the jury.” *Paolitto*, 151 F.3d at 65. Similarly, other circuit courts have considered the potential negative impact of agency reports on the jury and excluded them. *See Paolitto*, 151 F.3d at 65 (noting that the district court is in the best position to consider the quality of the report and its potential impact on the jury). For example, in *Hall v. Western Production Co.*, the Tenth Circuit found that the district court did not abuse its discretion by excluding a Wyoming Fair Employment Commission’s report that found no age discrimination. *Hall v. Western Production Co.*, 988 F.2d 1050, 1058 (10th Cir. 1993). In *Hall*, the district court had concluded that all the evidentiary matter before the WFEC could be presented to the jury and therefore “the only purpose to be served by admitting into evidence the WFEC report would be to suggest to the jury that it should reach the same conclusion as the WFEC.” *Id.* Accordingly, the report was excluded because of the negative influence it would have upon jury decision making.

c. EEOC Investigation Files.

Furthermore, judges may apply Rule 403 balancing to each item from an EEOC file when offered into evidence, assuming of course the material passes the trustworthiness standard under Rule 803(8)(C). *Tulloss v. Near North Montessori School, Inc.*, 776 F.2d 150, 154 (7th Cir. 1985). Courts have generally refused to admit the underlying documents in EEOC files, unless documents are independently admissible. *See, e.g., Watford v. Birmingham Stove & Range Co.*, 14 FEP 626, 629 (N.D. Ala. 1976) (excluding plaintiff’s statements taken by EEOC investigator in the EEOC investigative report); *Kinsey v. Legg, Mason & Co.*, 10 FEP 1013, 1015, (D.D.C. 1974 excluding the admission of the entire EEOC file, but admitting the EEOC report), *rev’d and remanded on other grounds sub. nom. Kinsey v. First Regional Sec., Inc.*, 557 F.2d 830 (D.C. Cir. 1977). *But see Peters v. Jefferson Chem. Co.*, 516 F.2d 447, 450-451 (5th Cir. 1975) (holding that the EEOC investigative files should have been admitted). Because, as the Second Circuit noted, the EEOC file is a “mish-mash of self-serving hearsay statements and records;...justice requires that the testimony of the witnesses be given in open court, under oath, and subject to cross examination.” *Gillin v. Federal Paper Board Co.*, 479 F.2d 97, 99 (2d Cir. 1973).

In *McClure*, the Fifth Circuit held that it was erroneous for a district court to admit the entire EEOC file because some the documents “were highly prejudicial” under Rule 403, and they did not satisfy the trustworthiness standard in Rule 803(8)(C). *See McClure*, 750 F.2d at 401. Similarly, in *Tulloss*, the Seventh Circuit held “the district court’s decision not to admit the entire file was within its discretion and hardly constitutes error.” *Tulloss*, 776 F.2d at 154. The EEOC file contained personal statements by the plaintiff, newspaper articles, statements by

plaintiff's professional and personal supporters, opinions of the EEOC investigator, and letters relating to settlement negotiations. *Id.*

d. Organizing Principles Regarding Admissibility of EEOC Determinations.

There are some general patterns that emerge from the cases dealing with the admissibility of EEOC and analogous state agency determinations. First, courts generally admit them as an exception to hearsay under Rule 803(8)(C). Admission occurs, in large part, because the adverse party does not challenge the trustworthiness of the report, and the courts may be unclear as to what constitutes trustworthiness. *See* Stephen P. Grossman & Stephen J. Shapiro, *The Admission of Government Fact Findings Under Federal Rule of Evidence 803(8)(C): Limiting the Dangers of Unreliable Hearsay*, 38 U. KAN. L. REV. 767, 779-85 (1990). Parties adversely affected by agency determinations should more readily challenge their trustworthiness.

In the majority of courts, agency determinations require a case-by-case analysis to determine if the probative value is substantially outweighed by evidentiary problems listed in Rule 403. With the exception of the Ninth Circuit, conclusory reasonable cause determinations and other EEOC findings are generally excluded by the trial court, particularly in jury trials. Determinations that are not firmly based in the facts, and are conclusory will likely be excluded because the probative value of such determinations is very low when balanced against potential problems.

e. Evidentiary Concerns About the Admission of Agency Determinations.

There are numerous evidentiary dangers posed by the admission of EEOC and analogous state agency determinations. First, such determinations issued by agency investigators are not subject to cross-examination. Agency determinations are admitted and so the investigator does not have to appear in court. The rationale behind this rule is that the investigator will perform the job properly and objectively. *See* FED. R. EVID. 803(8)(C) Advisory Note. However, it does not provide the adverse party the opportunity to question the investigator about their background, training, techniques and experience which would let the fact finder more effectively assess the reliability of the investigator and report. *See* Grossman & Shapiro, at 771. As some cases noted, this problem has a tendency to create unfair prejudice for the adverse party. Additionally, admission of these determinations will pose specific problems for juries, and will undoubtedly result in the adverse party attempting to explain the significance, or lack thereof, of the agency determination thereby increasing the time needed and also increasing the potential for confusing the jury and/or confusion of the issues.

A related problem with the admission of agency determinations is that such reports rely on third party information, which the adversely affected party did not have the opportunity to

cross-examine. *See* Grossman & Shapiro, at 771. The Federal Rules of Evidence 702-03 permit expert opinion to be based on information learned from others or outside sources. EEOC determinations and expert testimony are arguably the same. In fact, in *Smith*, the seminal case on admitting EEOC reports, the Fifth Circuit admitted the EEOC determination on the basis of the expertise of the agency in finding discrimination. *See Smith*, 454 F.2d at 156.

However, EEOC determinations under Rule 803(8)(C) are not treated with the same scrutiny as expert testimony. Under Rule 702 expert testimony is subject to heightened admissibility standards, *See infra*, at Sec. IV, A, 1 and the expert and their underlying evidence is subject to cross examination by the adverse party. Rule 803(8)(C), as it is being applied, particularly in the Ninth Circuit, allows the report in without the safeguards required for similar expert testimony. As one commentator noted:

If a person normally employed as an EEOC hearing examiner were to sit through a Title VII trial and be asked on the stand for an opinion as to whether discrimination had taken place, that person would most likely not be allowed to give it. Why then, should that opinion be considered more reliable and admissible under Rule 803 if the person heard the same testimony, not at trial, but an earlier hearing? Grossman & Shapiro, at 798.

The commentator offered a different standard of admissibility for EEOC determinations: “if the agency hearing officer would be not have been permitted to give an opinion in person, as an expert, [pursuant to Rule 702] the officers opinion should not be admitted under Rule 803(8)(C).” *Id.* at 799-800. Admittedly, this problem is mitigated somewhat by the trial court’s application of Rule 403. However, in the Ninth Circuit, where Rule 403 balancing is prohibited the determination will get in.

B. Admissibility of Unemployment Compensation Rulings.

The issue of admissibility of unemployment compensation rulings generally arises when one party is trying to use the administrative ruling to show the reason why the plaintiff was terminated or left employment. As with EEOC determinations, state unemployment compensation rulings must be relevant under Rule 401 and must satisfy the requirements of Rule 803(8)(C). Assuming these requirements are satisfied, unemployment compensation determinations are subject to the balancing of Rule 403.⁹ *See Chandler*, 425 U.S. at 863, n. 39, (1976) (prior EEOC or agency administrative findings are admissible in federal court trial on unemployment discrimination claims).

⁹ State administrative decisions that have not been judicially reviewed do not have a preclusive effect in court on subsequent proceedings relating to the same issues or parties. *See University of Tennessee v. Elliott*, 478 U.S. 788, 796, 106 S.Ct. 3220 (1986) (“[u]nreviewed stated administrative proceedings do not have preclusive effect with respect to claims brought under Title VII”).

Courts are more wary of admitting state unemployment compensation rulings than employment discrimination agency findings because unemployment rulings are often rendered pursuant to different statutory standards including, in many states, a construction favoring claimants. Charles C. Warner, *Motions in Limine in Employment Discrimination Litigation*, 29 U. MEM. L. REV. 823, 837 (1999). *See e.g., Baldwin v. Rice*, 144 F.R.D. 102, 106 n.5 (E.D. Cal. 1992) (noting that employers in California carry the burden of proof in the unemployment appeals process because they are the ones with the best access to the pertinent information) (citations omitted). Both plaintiffs and defendants seek exclusion of unfavorable unemployment compensation rulings on the grounds that they are irrelevant and prejudicial. *See Kelly v. Municipal Courts*, 93 F.3d 902, 913 (7th Cir. 1996) (affirming exclusion of determination that plaintiff was not terminated for just cause because of lack of relevance and collateral estoppel). *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1357-58 (4th Cir. 1995) (affirming exclusion of report denying unemployment benefits because plaintiff left her job voluntarily based on the report's prejudicial effect on the jury). *Barfield v. Orange County*, 911 F.2d 644, 651 (11th Cir. 1990) (affirming denial of plaintiff's motion in limine to exclude unfavorable ruling by a state agency); *Blumensadt v. Standard Products Co.*, 744 F.Supp. 166, 169 (N.D. Ohio 1989) (affirming the exclusion of evidence that was related to plaintiff's claim, and noting that determinations by state agencies often lack probative value), *aff'd*, 911 F.2d 731 (6th Cir. 1990).

The unemployment compensation cases fit roughly into three lines of cases. The first line of cases takes the position that unemployment compensation determinations are relevant and admissible in discrimination suits subject to the "trustworthiness" standard of Rule 803(8)(C) and to Rule 403 balancing. *See Barfield v. Orange County*, 911 F.2d 644, 49-650 (11th Cir. 1990) (noting that factors relating to the admission of unemployment compensation rulings included whether the ruling raised questions of trustworthiness under Rule 803(8)(C) and whether it presented problems cognoscible under Rule 403"); *Baldwin v. Rice*, 144 F.R.D. 102, 104-105 (E.D. Cal. 1992) (holding that the decision of the administrative law judge of the California Unemployment Appeals Board was relevant in plaintiff's discrimination case and was not unduly prejudicial nor would it have a tendency to confuse the trier of fact under Rule 403). The second, finds that such rulings may be admissible but are generally excluded under Rule 403 because the rulings probative value is substantially outweighed by the evidentiary problems. *See Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1357-58 (4th Cir. 1995) (upholding district court's exclusion of a report prepared by the Virginia Employment Commission because of the "prejudicial effect such an official report might have on the jury"); *Arroyo v. West LB Admin., Inc.*, 54 F. Supp.2d. 224, 230 (S.D.N.Y. 1999) (admitting an unemployment compensation ruling as summary judgment evidence but giving it no probative value); *Bradshaw v. Golden Road Motor Inn*, 885 F.Supp. 1370, 1375 (D.Nev. 1995) (holding that unemployment compensation rulings should generally not be admitted). The third line summarily rejects state unemployment compensation rulings on the ground that such rulings are simply irrelevant in employment discrimination suits when the specific issue of discrimination was absent from the administrative hearings. *Kelly*, 97 F.3d. at 913 (holding that the unemployment compensation ruling was properly excluded because the issue "in the proceeding before the Indiana Department of Employment and Training Services was whether, under Indiana law, the plaintiff had been fired for just cause and this question differed" from the federal discrimination claims); *Blumensadt*, 744 F.Supp. at 163 (holding that the administrative decision based on state statutes was "totally unrelated to the issues presently before the court"). In other words, if the unemployment

administrative hearings did not deal with the issue of employment discrimination, then such rulings are irrelevant for the purposes of discrimination suits.

1. Unemployment Compensation Rulings Admitted.

In upholding a trial court's determination to admit an EEOC report, as well as a Florida Unemployment Appeals Commission decision, the Eleventh Circuit set forth three factors to assist district courts in deciding "whether and what parts" of unemployment compensation rulings should be admitted. *Barfield*, 911 F.2d at 650. The first factor is whether the report contains legal conclusions in addition to its factual content. *Id.* citing *Beech Aircraft Corp.*, 48 U.S. 153, 109 S.Ct. 439, 450 n.13 (1988). Most courts, however, weigh this factor under a 403 analysis as a measure of the report's probative value. Second, district courts should consider whether the report or ruling raises questions of trustworthiness under Rule 803(8)(C). *Id.* Finally, district courts should consider whether the ruling presents problems recognizable under Rule 403. *Id.*

The Eleventh Circuit applied this three-part test and held that a district court did not abuse its discretion in admitting the Florida Unemployment Appeals Commission ruling. The plaintiff alleged that admission of the administrative finding would cause unfair prejudice and delay. The court quickly rejected the plaintiff's untrustworthiness allegations with respect to Rule 803(8)(C) because the plaintiff offered no evidence that the administrative materials suffered from any defects in trustworthiness. *Id.* at 651. Unfair prejudice and delay are not factors indicating the lack of trustworthiness under 803(8)(C), but instead are factors to be balanced under Rule 403.

The court recognized, however that a change from a bench trial to a jury trial may "very well affect the analysis under Rule 403." *Id.* The court reasoned that admission of an administrative ruling "may be much more likely to present the danger of creating unfair prejudice in the minds of the jury than in the mind of the trial judge, who is well aware of the limits and vagaries of administrative determinations and better able to assign the report appropriate weight and no more." *Id.* Notwithstanding the court's recognition of the potential of unfair prejudice created by the admission of administrative rulings, it rejected the plaintiff's allegations of unfair prejudice because both parties had equal opportunities to submit their evidence to the relevant administrative bodies and the trial was before a judge not a jury. Therefore "the danger of unfair prejudice was too little to overcome the highly probative nature of this evidence." *Id.* at 651.

Likewise, in *Baldwin v. Rice*, 144 F.R.D. 102 (E.D. Cal. 1992) the court admitted a decision of the California Unemployment Insurance Appeals Board against a defendant, and provided a more detailed list of factors weighing in favor of admitting the unemployment compensation rulings than *Barfield*. The court reasoned that while the unemployment ALJ did not adjudicate discrimination issues, the ALJ made a decision on the facts that was "directly pertinent to the issues" in the discrimination case. *Id.* at 105. Any disadvantage to the defendant

could be addressed “by referring to deficiency in the record or other evidence which discredits the administrative findings.” *Id.* Additionally, the defendant had “participated fully in the unemployment appeals process” so the administrative ruling was “not occasioned by the absence” of the defendant’s input. *Id.* Furthermore, the fact that employers had the burden of proof in the unemployment appeals process was “inconsequential as it relates to the admissibility of the report” because the ALJ found that “the weight of the evidence” was in favor of the plaintiff’s version of the facts.” *Id.* Finally, the court reasoned that it was proper to admit the unemployment compensation ruling because the parties had an ample incentive to litigate the unemployment claim, the unemployment decision was part of the EEO file (which itself would be admissible), and the unemployment hearing appeared to have been more extensive and reliable than the EEO investigation. *Id.* at 106-107.

2. Unemployment Compensation Rulings Excluded Under 803(8)(C) or 403.

By contrast, in *Bradshaw v. Golden Road Motor Inn*, the court held that an “unemployment hearing officer’s decision, though it may be admitted in a federal discrimination suit, normally should not be.” 885 F.Supp. 1370, 1375 (D.Nev. 1995). In *Bradshaw*, the district court applied the “relevant factors” from *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 (1974). The admissibility of arbitration decisions is discussed *infra* at Sec. III which the Supreme Court used in determining the admissibility of arbitration decisions to unemployment compensation rulings and determined that such rulings, should generally not be admitted into evidence. The relevant factors in *Gardner-Denver* include: (1) the existence of provisions in the collective bargaining agreement that conform substantially with Title VII; (2) the degree of procedural fairness in the arbitral forum; (3) adequacy of the record with respect to the issue of discrimination; and (4) the special competence of a particular arbitrator. “Where an arbitral determination gives full consideration to an employee’s Title VII rights, a court may properly accord it great weight.” *See id.* at n. 21. Nonetheless, the court conceded that a finding by an unemployment board that an employee “was or was not fired for misconduct, will usually be relevant to an employment discrimination suit.” *Bradshaw*, 885 F.Supp. at 1374.

The court disagreed with *Barfield* and *Baldwin* for two reasons. First, unemployment compensation hearings normally fail to meet the four *Gardner-Denver* criteria. The court concluded that state unemployment statutes are even less likely than collective bargaining agreements to contain provisions that “conform substantially” to Title VII. *Id.* Furthermore, the issue at the unemployment compensation hearing is “whether the employee is entitled to compensation under state statutes, not whether the employee was discriminated against in violation of federal law.” *Id.* Additionally, the administrative hearing officer “will typically have no special competence in deciding claims of discrimination.” *Id.* The second reason for rejecting *Barfield* and *Baldwin* was policy based: “Unemployment benefit hearings are designed to be quick and inexpensive” and if the “parties knew the decision would be admitted” they would have a greater incentive to “turn the hearing itself into a full blown lawsuit.” *Id.* at 1375. Accordingly, the ruling was excluded, and the court set forth a broad rule that generally unemployment compensation rulings should not be admissible in discrimination cases.

Similarly, a district court in the Southern District of New York analyzed some of the *Gardner-Denver* factors outlined in *Bradshaw* and admitted the decision of the New York State Unemployment Insurance Appeals Board but found “that the decision is entitled to minimal or no probative value.” *Arroyo v. West LB Admin., Inc.*, 54 F. Supp.2d. 224, 230 (S.D.N.Y. 1999). The court granted the defendant’s motion for summary judgment because the plaintiff had failed to raise an issue of fact, notwithstanding the unemployment compensation ruling in favor of the plaintiff. *Id.* The court explained that the issues before the New York State Unemployment Insurance Appeals Board were different from the issues raised in the case at bar. The question before the administrative board was “whether or not Arroyo was entitled to unemployment benefits because he resigned with good cause, not whether the bank created a hostile work environment in violation of Title VII, which undoubtedly involves different legal standards.” *Id.*

The *Arroyo* court, on a motion for summary judgment, admitted the ruling but accorded it no probative value. It is very likely that if the case would have been before a jury the report would have been excluded for the reasons the court set forth. In *Martin v. Cavalier Hotel Corp.*, 48 F.3d at 1357-58 the Fourth Circuit noted the potentially bad impact that such rulings may have on juries. There, the Fourth Circuit, held that the district court did not abuse its discretion by excluding the Virginia Employment Commission’s report concluding that the plaintiff was not entitled to unemployment benefits because of the potential prejudicial effect it would have on the jury. *See Arroyo*, 54 F.Supp. 2d at 230.

As in *Bradshaw*, the *Arroyo* court noted that unemployment benefit hearings were designed to be quick and inexpensive. *Id.* The unemployment decision in this case consisted of just two pages, and was based on a hearing involving testimony taken from two witnesses, namely the plaintiff and an unidentified representative of the bank. *Id.* Additionally, the court noted that the hearing officer for the board had no special competence in deciding discrimination claims. *Id.* Therefore, while the court admitted the unemployment compensation decision as summary judgment evidence, it accorded it no probative value.

One key difference between *Barfield* and *Baldwin* on one hand and *Bradshaw* and *Arroyo* on the other is the probative value of the reports. In *Barfield*, the court noted that the Florida Unemployment Commission determination was more detailed than the EEOC’s. The *Baldwin* court outlined the extensive nature of the California Board proceeding. By contrast, both the *Bradshaw* and *Arroyo* courts highlighted the conclusory nature of the reports. *Bradshaw*, 885 F.Supp. at 1374. The court recognized that there may be cases in which, as in *Baldwin*, an unemployment compensation hearing is “unusually complete, with each party given a chance to participate fully and afforded the full complement of procedural protections.” Notwithstanding this distinguishing characteristic, the policy views of the court make it clear that the *Barfield* and *Baldwin* position is much more accepting of unemployment compensation rulings than the *Bradshaw* and *Arroyo* position.

3. Unemployment Compensation Ruling Excluded As Irrelevant.

A few courts outright reject state unemployment compensation rulings because they are irrelevant in employment discrimination suits. In *Kelly v. Municipal Courts of Marion County, Indiana*, 97 F.3d 902, 913 (7th Cir. 1996) the Seventh Circuit found that the district court did not abuse its discretion by concluding that the Indiana Division of Employment and Training Services determination that the plaintiff was not terminated for just cause was not relevant to the discrimination case at bar. *Id.* The court noted that the issues before the Indiana Department of Employment and Training Services “was whether, under Indiana law, Kelly had been fired for just cause. This question differed from the federal constitutional issues of discrimination presented in this case.” *Id.* Accordingly, the report was properly excluded.

Similarly, in *Blumensaadt v. Standard Products Co.*, a district court concluded that two State of Ohio Unemployment Compensation Board of Review reports concluding that the plaintiff was not discharged for just cause were inadmissible because they were unrelated to the discrimination alleged in the complaint. 744 F.Supp. 160, 163 (N.D. Ohio 1989). The court noted that the issue of discrimination had been absent from the CBR hearings, and that the administrator’s decision was based on state statutes which were “totally unrelated to the issues presently before the court.” *Id.* Accordingly, the court “[did] not believe that the CBR reports are sufficiently probative to raise a genuine issue of fact as to whether plaintiff was fired for just cause under standards policies.” *Id.*

Few courts have followed the approach of summarily finding that unemployment compensation rulings are irrelevant to issues of employment discrimination. Even *Bradshaw* noted “that a finding by an unemployment board or officer that, say, an employee was or was not fired for ‘misconduct,’ will usually be relevant to an employment discrimination suit.” FED. R. EVID. 401; *see also Bradshaw*, 885 F.Supp. at 1374. In employment disputes an issue that arises is the whether the employee was discharged for misconduct, a legitimate business reason or discrimination or retaliation. Accordingly, an unemployment compensation ruling as to the reason of the employee’s termination would therefore be highly relevant because it has a “tendency to make the existence of any fact...more probable or less probable[.]” *Baldwin*, 144 F.R.D. at 105.

To the extent that the *Bradshaw* position holding that unemployment compensation rulings should generally be excluded in discrimination cases is conceived of as a *per se* rule it is contrary to the policy of liberal admission of evidence underlying the Federal Rules of Evidence. As the Fifth Circuit recognized, “[t]he *per se* exclusion of whole categories of evidence is disfavored by the Federal Rules of Evidence.” *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) (noting that “with few exceptions, ‘all relevant evidence is admissible,’ Fed. R. Evid. 402”).

Nevertheless, *Bradshaw* so ably highlights, there are multiple evidentiary problems with the admission of most unemployment compensation rulings in discrimination cases. For

example, such hearings are conducted pursuant to a different standard of proof, with the burden on the employer to prove why the employee was terminated. However, this point cuts both ways because when an employer prevails, when assigned the burden of proof, it is theoretically a greater indication that the plaintiff was discharged for lawful reasons. Additionally, the hearing officers have no special expertise in discrimination issues. Also, unemployment compensation hearings were meant to be efficient and inexpensive. If the findings and record of these proceedings will be admitted as evidence in a discrimination suit employers will have a strong interest in “turning the hearing itself into a full blown lawsuit.” *Bradshaw*, 885 F.Supp. at 1375.

C. Special Problems in ADA Cases.

ADA cases present some unique issues with regard to “expert” agency determinations, namely, what role should social security disability (“SSDI”) claims and workers’ compensation determinations play in subsequent ADA litigation?

1. SSDI Claims.

Although not an agency determination or expert opinion *per se*, an ADA plaintiff can create evidence adverse to his case by claiming SSDI benefits.¹⁰ In order to claim SSDI benefits, ADA plaintiffs frequently swear in their applications that they are completely disabled and unable to work. *See, e.g., Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 798 (1999) (ADA plaintiff claimed to SSA that she was “disabled” and “unable to work”); *Lee v. City of Salem, Inc.*, 259 F.3d 667, 672 (7th Cir. 2001) (ADA plaintiff claimed in his application for SSDI benefits that he was no longer able to work as a sexton). These statements are highly relevant to an ADA claim because they directly relate to whether the plaintiff could perform the essential functions of his job with or without reasonable accommodation and are routinely admitted into evidence, especially because such statements seemingly conflict with the ADA requirement that plaintiffs be able to perform the essential functions of their jobs with or without reasonable accommodation. *See Cleveland*, 526 U.S. at 805-06 (noting that such statements could raise an apparent contradiction because on the one hand the plaintiff is claiming that he is completely disabled and on the other hand he is claiming that he can work with or without reasonable accommodation); *Lee*, 259 F.3d at 672.

The Supreme Court directly addressed the issue of SSDI claims that appeared to conflict with ADA claims in *Cleveland v. Policy Management Systems*. There, the Court held that given the different statutory standards under the Social Security Act and the ADA, the fact that an ADA plaintiff claims that he is totally disabled and unable to work does not preclude him from asserting an ADA claim. *Id.* Even so, the Court recognized that certain sworn statements by ADA plaintiffs claiming SSDI benefits, such as “I am unable to work,” appear to raise a

¹⁰ In this regard, SSDI claims are similar to employers’ internal affirmative action analyses, discussed *infra* at Sec. V.

contradiction—either the plaintiff is unable to work, or he is able to work with a reasonable accommodation. *See id.* at 805-06. Plaintiffs cannot ignore this apparent conflict and, as a result, the *Cleveland* Court held that to defeat summary judgment, plaintiffs must reconcile the apparent conflict with an explanation sufficient to warrant a reasonable juror’s conclusion that, assuming the truth of or the plaintiff’s good faith belief in the SSDI statement, he could nonetheless perform the essential functions of his job with or without reasonable accommodation. *See id.* at 807.

2. Workers’ Compensation Determinations.

Workers’ compensation systems vary widely from state to state, but most systems involve some sort of administrative determination that an injured employee is or is not entitled to workers’ compensation benefits. Thus, the question becomes whether that administrative determination regarding benefits is admissible to show that the employee is disabled within the meaning of the ADA. Two recent circuit court cases have addressed aspects of this issue. *See Fox v. Gen. Motors Corp.*, 247 F.3d 169, 177-178 (4th Cir. 2001); *Failla v. City of Passaic*, 146 F.3d 149, 159-60 (3d Cir. 1998). First, in *Failla v. City of Passaic*, the plaintiff introduced evidence that he had received a workers’ compensation award for a partial permanent disability. *Failla*, 146 F.3d at 159. The employer argued that the district court committed reversible error by admitting the report because it was irrelevant and because it was highly prejudicial. *Id.* The Third Circuit held that the district court did not abuse its discretion. First, it found no error with the district court’s ruling that the award was relevant because it tended to show that Failla “had something wrong with him.” *Id.* The circuit cited cases admitting EEOC determination, noted that the test for relevance was low and noted that the report tended to show that the plaintiff was disabled or handicapped. *Id.* (citing *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1099 n. 12 (3d Cir. 1995); *Dickerson v. State of N.J. Dep’t of Human Serv.*, 767 F. Supp 605, 612 (D.N.J. 1991). The court did not reach the defendant’s Rule 403 argument because it was raised for the first time on appeal. *Failla*, 146 F.3d at 159. Similarly, the court refused to address the defendant’s arguments that were premised on giving collateral estoppel effect to the report because the district court expressly refused to give the report such effect. *Id.* at 160.

Second, in *Fox*, the Fourth Circuit considered a workers’ compensation claim by a plaintiff for total temporary disability benefits. *Fox*, 247 F.3d at 177. Even though this case arose under a state’s workers’ compensation scheme, it is exactly analogous to the SSDI cases discussed above, as the Fourth Circuit noted. *Id.* Thus, the Fourth Circuit followed the Supreme Court’s decision in *Cleveland* and held that to avoid summary judgment, a plaintiff who claimed total temporary disability under the workers’ compensation scheme would have to proffer a sufficient explanation for any apparent contradiction between the two claims sufficient to warrant a reasonable juror’s conclusion that the plaintiff could nonetheless perform the essential functions of her job with or without reasonable accommodation. *Id.* (citing *EEOC v. Stowe-Pharr Mills, Inc.*, 216 F.3d 373, 378 (4th Cir. 2000) and *Cleveland*, 526 U.S. at 807). *Fox* successfully made this showing through two explanations: First, the claims did not overlap temporally because the ADA concerned the period from October 1994 to mid-August 1995 and the workers’ compensation claim concerned the period from mid-August 1995 forward—after he

had left employment. *Fox*, 247 F.3d at 178. Second, he produced evidence that he would have continued to work at the GM plant but for the hostile work environment he suffered there. *Id.* In sum, workers' compensation determinations and representations made to workers' compensation agencies will be treated just like the determinations discussed above. They fall into the 803(8)(C) exception to the hearsay rule, but they must satisfy the requirements of Rules 401-403 and the plaintiff must adequately explain any apparent contradictions between his workers' compensation claims and his ADA claims in order to avoid summary judgment.

III. Arbitration Decisions.

In *Alexander v. Gardner-Denver*, the Supreme Court held that an employee could still file a lawsuit alleging discrimination under Title VII even though his discharge had been arbitrated pursuant to a collective bargaining agreement. *Gardner-Denver*, 415 U.S. at 60 n.21.¹¹ But the Court also held that trial courts could admit the arbitrator's decision into evidence in the Title VII case. *Id.* Even though the Court stated that it was not commenting on the weight to be afforded such decisions, it listed five factors to be considered in according weight to arbitral decisions: (1) whether the factual issues before the arbitrator and the court are identical; (2) whether the arbitrator had power under the collective bargaining agreement to decide the ultimate issue of discrimination; (3) whether the evidence presented to the arbitrator dealt adequately with all of the factual issues; (4) whether the arbitrator actually decided the factual issues presented to the court; and (5) whether the arbitration proceeding was fair and regular and free of procedural infirmities. *See id.* at n. 21. The *Gardner-Denver* decision and these factors were based, in part, on a mistrust of the arbitral forum. *See id.* at 57-58 n. 6. Specifically, the *Gardner-Denver* Court was suspicious of the arbitral fact finding process. Subsequently, in *Gilmer*, the Court rejected any challenge to arbitrability based on the adequacy of the forum because such suspicion was out of step with the current strong policy favoring arbitration. *See Gilmer*, 500 U.S. at 26. As a result, as indicated below, many recent cases have not necessarily applied the *Gardner-Denver* factors, but instead have looked to the procedural and substantive fairness of the proceedings that resulted in the decision at issue in determining the admissibility of, and the weight to be given to, arbitration decisions.

¹¹ The Supreme Court later held that employees could agree to arbitrate statutory claims against their employers. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). Finally, the Court has indicated that collective bargaining agreement might waive an employee's right to file lawsuits under the employment discrimination laws where that waiver is clear and unmistakable. *See Wright v. Universal Maritime Servs. Corp.*, 1525 U.S. 70, 82 (1998) (expressly reserving the question of whether such waivers are enforceable). Such agreements are beyond the scope of this paper, however, because they involve the replacement of the judicial forum with an arbitration forum. The paper is limited to the admissibility of arbitration decisions in discrimination lawsuits.

A. Arbitration Decisions Excluded.

Some courts have refused to admit or to give any weight to arbitration decisions and this refusal did not constitute an abuse of discretion. *See Costa v. Desert Palace, Inc.*, 299 F.3d 838, 863 (9th Cir. 2002); *Jackson v. Bunge Corp.*, 40 F.3d 239, 246 (7th Cir. 1994); *Truax v. City of Portsmouth*, Civ. No 00-63-B, 2001 U.S. Dist. LEXIS 9190 at *47 (D.N.H., June 18, 2001) (arbitrator's decision entitled to no weight on summary judgment because just cause provision of collective bargaining agreement did not conform substantially with Title VII and because it did not address issue of discriminatory animus); *Pollard v. Azcon Corp.*, No. 93-Civ.-3474, 1995 U.S. Dist. LEXIS 10407 (N.D. Ill., July 25, 1995); *Kramer-Navarro v. Bolger*, 586 F. Supp. 677, 682 n. 25 (S.D.N.Y. 1984). Courts have excluded arbitration decisions where the decision did not involve discrimination of the type at issue in the court case, on the grounds that the decision was hearsay and because the probative value of the decision was outweighed by the danger of unfair prejudice. *See Costa*, 299 F.3d at 863; *Jackson*, 40 F.3d at 246 (citing FED. R. EVID. 403). In *Jackson*, the Seventh Circuit agreed with the district court that the arbitrator's decision ran afoul of Rule 403 because (1) the arbitrator admitted that he was relying on hearsay testimony in reaching his decision; and (2) the arbitrator did not consider the issue before the court, namely retaliatory discharge, but instead only considered whether termination was proper under the collective bargaining agreement. *See Jackson*, 40 F.3d at 246.

Similarly, in *Blakely v. Continental Airlines, Inc.*, a sexual harassment case, the court used Rule 403 to exclude an arbitration decision involving sexual harassment issues where the decision did not involve the parties to the case at bar, the evidence would have been cumulative, the decision had a strong likelihood of confusing and inflaming the jury because the arbitration occurred under a collective bargaining agreement and involved inappropriate touching, and the most relevant portion of the arbitration decision was dicta. *See Blakely v. Continental Airlines, Inc.*, Civ. No. 93-2194, 1997 U.S. Dist. LEXIS 22074 at *23 - *26 (D.N.J., September 9, 1997). Clearly, the Supreme Court's statement that arbitration decisions could be admissible in subsequent employment discrimination claims does not guarantee their admissibility. Courts have the discretion to exclude the decisions pursuant to traditional analysis under the Federal Rules of Evidence. One of the benefits of excluding the decisions is that courts avoid deciding what weight to give the decisions.

In a slight variation on this theme, the Eight Circuit has held that a district court did not abuse its discretion in admitting evidence that an arbitration occurred and that the outcome favored one party or the other, but refusing to admit the text of the decision and the transcript. *See Wilmington v. J.I. Case Co.*, 793 F.2d 909, 919 (8th Cir. 1989). The Eight Circuit agreed with the district court that the arbitrator's findings and comments regarding the credibility of witnesses would usurp the jury's role in assessing credibility and/or would be unfairly prejudicial. *See id.* Highlighting these problems was the fact that the ultimate issues of just cause and race discrimination required similar elements of proof. *See id.* Finally, the Eight Circuit emphasized that because the district court had admitted the outcome of the arbitration, the defendant was able to use the arbitration decision to support its argument that it terminated the plaintiff for a legitimate, non-discriminatory reason. *See id.*

B. Arbitration Decisions Admitted.

On the other hand, courts routinely admit arbitration decisions despite the fact that the decisions have some of the same infirmities discussed above. *See, e.g., Collins v. New York City Trans. Auth.*, 305 F.3d 113, 119 (2d Cir. 2002) (admitting arbitration decision rendered pursuant to collective bargaining agreement in context of summary judgment even though arbitrator did not address issue of discrimination); *Graef v. Chemical Leaman Corp.*, 106 F.3d 112, 116-17 (5th Cir. 1997) (district court committed abuse of discretion by refusing to consider arbitrator's decision pursuant to collective bargaining agreement even though the court did not have a transcript of the hearing and, therefore, could not determine whether the arbitrator relied on hearsay); *Tomasino v. Mt. Sinai Med. Ctr.*, 97-Civ-5252, 2003 U.S. Dist. LEXIS 3766 at *35 - *36 (S.D.N.Y. March 13, 2003) (affording great weight to arbitration decision rendered under collective bargaining agreement on summary judgment); *Baker v. Union Pacific Railroad Co.*, 145 F. Supp.2d 837, 843 (S.D. Tex. 2001) (same). Several courts emphasized the completeness of the record and the fact that the parties presented witnesses to the arbitrator, thereby creating the need for the arbitrator to make credibility resolutions, in affording the arbitral decisions weight. *See Collins*, 305 F.3d at 119; *Graef*, 106 F.3d at 118; *Tomasino*, 2003 U.S. Dist. LEXIS at *35 - *36.

In fact, the Second Circuit has given an arbitrator's decision almost dispositive weight on summary judgment. *See Collins*, 305 F.3d at 119. In the recent *Collins* case, the court held:

A decision by an independent tribunal that is not itself subject to a claim of bias will attenuate a plaintiff's proof of the requisite causal link. Where, as here, that decision follows an evidentiary hearing and is based on substantial evidence, the Title VII plaintiff, to survive a motion for summary judgment, must present strong evidence that the decision was wrong as a matter of fact—e.g. new evidence not before the tribunal—or that the impartiality of the proceeding was somehow compromised. Here, however, the tribunal received all the available evidence in an evenhanded proceeding and rendered a decision consistent with the almost overwhelming evidence of appellant's assault on Badr. *Id.*

It is possible that the unique circumstances of the *Collins* case allowed the Second Circuit to go this far. The termination at issue in *Collins* was not final until reviewed by the arbitration panel, but the same is true for almost any termination grievance under a collective bargaining agreement because most agreements give the arbitrator the equitable power to return the grievant to work with back pay. *See id.* at 118-19 (noting that the plaintiff challenged the decision to fire him and that the decision was only final after the arbitration board made an independent inquiry and authorized the termination). Moreover, the arbitration decision was given this extraordinary amount of weight on summary judgment rather than in a jury trial. On the other hand, the same rules govern evidence admitted on summary judgment and evidence admitted at trial and this distinction is tenuous at best. Nonetheless, as noted in connection with the discussion of unemployment hearings, *supra* at section B, judges sometimes more liberally admit evidence in a

bench trial than in a jury trial because judges are better able to assess the proper weight to be given to certain evidence.

While the Fifth Circuit has not gone as far as the Second Circuit in enunciating the weight to be afforded arbitration decisions, it held in *Graef* that a district court abused its discretion in refusing to consider an arbitration decision in a workers' compensation retaliation case. *See Graef*, 106 F.3d at 119. After paying lip service to *Gardner-Denver*, the court held that its review of the record persuaded it that the arbitration decision excluded by the district court was "clearly relevant and highly probative of appellant's defense that it removed Graef from the seniority roster pursuant to ...[Department of Transportation regulations and the collective bargaining agreement]." *See id.* at 117. In reaching this conclusion, the court first noted that although neither party had tendered the entire transcript of the arbitration to the district court and that this failure was properly considered in determining admissibility, it was Graef's burden to prove that the arbitration was untrustworthy and he failed to point out any procedural or substantive defects. *See id.* at 118.¹² The court also held that the district court was not warranted in excluding the decision under Rule 403 because it was highly probative on the issue of whether Graef was removed from the seniority list for a non-retaliatory reason, and because Graef had failed to point out any prejudicial effects of the decision beyond the fact that it was "harmful" to his position in the case. *See id.* at 118-19. Although *Graef* does not sweep as broadly as *Collins*, it certainly stands for the proposition that district courts should admit and consider arbitration decisions in employment cases unless the party opposing admission can establish that they are untrustworthy or unfairly prejudicial.

C. Attempting To Order The Chaos: Some Guiding Principles Concerning The Admissibility Of Arbitration Decisions.

Although the Supreme Court has expressly held that arbitration decisions *may* be admitted and offered some factors to consider in affording those decisions weight, lower courts are anything but consistent in dealing with such decisions in subsequent employment litigation. Some courts are highly skeptical of arbitration decisions despite the strong national policy in favor of arbitrating employment claims. Other courts seem to require consideration of arbitration decisions and even afford them nearly dispositive weight as long as the proceedings were procedurally fair and unbiased while virtually ignoring the Supreme Court's suggested five-factor test. When read together, however, these cases have an organizing principle: arbitration decisions will be (and should be) admitted in subsequent employment litigation and afforded at least some weight where the tribunal was procedurally and substantively fair (*i.e.* both parties were present and had the opportunity to present evidence and examine witnesses) and where the arbitrator issued a reasoned decision. Furthermore, in light of the liberal evidentiary policies embodied in the Federal Rules of Evidence, courts should default to admitting prior arbitration decisions unless the party opposing admission can establish the lack of procedural or substantive unfairness. Finally, the mere fact that the arbitrator relied on some hearsay in reaching his

¹² The court specifically noted that *Graef* did not establish that the arbitrator relied on hearsay in reaching his decision.

decision should not preclude the admission of the decision. *See, e.g., Graef*, 106 F.3d at 118 (noting that the mere fact that an arbitrator relied in part on hearsay is not enough to warrant exclusion of his decision).

The liberal admission of arbitration decisions in subsequent employment litigation will serve a number of purposes. First, it will help reduce the number of employment discrimination cases currently clogging the federal court system as plaintiffs become aware that a prior adverse decision will be difficult to overcome on summary judgment. Second, it will also encourage employers and unions to engage in substantively and procedurally fair arbitrations, thereby increasing the protection of employees. Third, it will comport with the policy in favor of arbitrating employment claims.

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