

No. S-13064

IN THE SUPREME COURT OF THE STATE OF ALASKA

LARRY GIBSON,

Petitioner/Plaintiff,

vs.

NYE FRONTIER FORD, INC., and
NYE FRONTIER LINCOLN
MERCURY, INC.,

Respondents/Defendants.

***AMICUS CURIAE* BRIEF OF THE
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
IN SUPPORT OF PETITIONER**

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STATEMENT OF INTEREST

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA has filed numerous *amicus curiae* briefs in both federal and state courts on a wide range of issues affecting employees, including the enforceability of mandatory pre-dispute arbitration provisions.

In their practice, NELA attorneys regularly encounter employers that unilaterally impose arbitration requirements on their employees in an effort to avoid the enforcement of the civil rights and employment laws of this nation. NELA members' clients will be significantly harmed, as will the public, if employers are permitted to require that employees share the costs of any employer-imposed arbitration proceeding.

SUMMARY OF ARGUMENT

Amicus curiae NELA adopt Petitioner's Jurisdictional Statement, Statement of Issues, and Statement of the Case *in toto*. As set forth in Petitioner's Statement of the Case, Respondent Nye does not dispute that if this Court were to enforce the arbitration clause at issue in this appeal, Mr. Gibson would be required to pay half of the costs of arbitrating his Alaska Wage and Hour Act claims against Nye. Petitioner has identified in his Opening Brief the various federal and state courts which have adopted the rule of law that it is substantively unconscionable for an employer to require an employee to split the costs of arbitration, and NELA does not intend to rehash those cases here. Rather, NELA writes to emphasize why adopting a bright-line rule against cost-splitting makes good sense as a matter of public policy.

Specifically, numerous authorities illustrate again and again across the country that individuals forced to raise their employment claims in arbitration because of a pre-dispute, binding, mandatory arbitration program have been required to pay thousands (and often tens of thousands) of dollars to private arbitrators for adjudication services that would have been available in the public courts for a nominal filing fee. And in far too many cases, the threat of such fees has been enough to deter individuals from pursuing their claims in arbitration. This deterrent effect contravenes the purpose of those statutes designed to protect employees from discrimination and other unfair employment practices, such as the wage and hour laws Petitioner Gibson invokes in the instant matter.

As such, this Court should adopt a bright-line rule that it is substantively unconscionable for an employer to require an employee pursuant to a pre-dispute,

binding arbitration program to share the costs of arbitration. The alternative—*i.e.*, a case-by-case approach requiring the employee to demonstrate that arbitration of that employee’s particular case would be prohibitively expensive—would effectively require employees to litigate the allocation of arbitration fees. The cost of that judicial process on top of the cost of the arbitration forum will add a second layer of deterrence, further undermining the goal of making employers accountable for unfair employment practices. Because of the effects of this double-layered deterrence, a rational individual seeking to invoke important statutory rights—even the employee with a strong case who deserves to win—is unlikely to pursue those claims if she or he believes that the cost of obtaining arbitration services could be prohibitively high.

ARGUMENT

I. THIS COURT SHOULD HOLD THAT ANY PRE-DISPUTE, BINDING, MANDATORY ARBITRATION PROGRAM THAT REQUIRES THE EMPLOYEE TO SHARE THE COSTS OF ARBITRATION IS SUBSTANTIVELY UNCONSCIONABLE.

A. Individuals Forced To Raise Their Employment Claims In Arbitration And To Share The Costs Of Arbitration Must Pay Exorbitant Forum Fees For Arbitration Services That Could Be Available In The Public Courts For A Nominal Filing Fee.

An oft-made claim in favor of pre-dispute, binding, mandatory arbitration programs (“BMA programs”) is that arbitration purportedly costs less than litigation. *See, e.g.*, Public Citizen’s Congress Watch, “The Costs of Arbitration” at 1 (Public Citizen April 2002) (available at <http://www.citizen.org/documents/ACF110A.PDF>, last visited July 10, 2008) (citing various sources making that claim). While that might be an open—though empirically dubious—question, it is difficult to dispute that where the

BMA program requires its employees to share the costs of any arbitration, an individual with an employment dispute will spend far more, and sometimes thousands of times more, initiating and proceeding in arbitration instead of instituting a lawsuit.

The most comprehensive analysis on the costs of arbitration is the Public Citizen report, *supra*, which compares forum costs of initiating and proceeding through a variety of hypothetical arbitrations among major arbitration providers. *Id.* at 40-51. Public Citizen hypothesized that a typical employment claim might seek \$60,000 in damages and might require three days of arbitration time, resolution of one discovery dispute, and resolution of one dispositive motion filed by the employer. Using those rather conservative estimates (and 2002 rates), Public Citizen found that the employee's forum costs for this hypothetical typical employment dispute range from \$3,950 to \$10,925 for arbitration providers that permit fee-splitting arrangements, as compared to the nominal fees for filing civil claims in the public court system (\$221 in the county surveyed by Public Citizen). *Id.* at 48.

Moreover, as the Public Citizen report recognized, employment arbitrations can be—and often are—much longer and more expensive than the hypothetical case it uses. *Id.* at 49 and Ex. J thereto (citing bills for \$18,260 in a sexual harassment case, \$24,500 in an age discrimination case, and \$41,400 in a wrongful termination/retaliation/age and sex discrimination case). And the \$60,000 estimate of damages sought is probably too low; many (if not most) employment cases—including Mr. Gibson's here—will exceed

\$75,000 in damages,¹ a threshold over which many arbitration providers increase their fees.² Based on a compilation of its members' vast experiences, NELA estimates³ that where employees are required by BMA programs to share the costs of arbitration, those arbitrations typically will cost the employee between \$14,750 and \$38,300: initial filing fees between \$150 and \$6,000, depending on the provider and the amount in dispute; administration fees between \$300 and \$500; room rental fees, which can cost up to \$600 per day; and typical fees for the arbitrator's time range from approximately \$2,500 to as

¹ See Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 697 (2004) ("Most discrimination cases include compensatory and punitive damages which may range from \$50,000 to \$300,000; thus, the total claim, including front pay and backpay [which typically ranges from \$25,000 to \$100,000], will frequently range from \$75,000 to \$400,000.").

² In arbitrations administered by the National Arbitration Forum, for example, where an employee claimant has a claim exceeding \$75,000, the employee's half of the fees will include at a minimum a \$300 filing fee, a \$300 commencement fee, a \$500 administrative fee, plus of course, half of the arbitrator's hourly rate. National Arbitration Forum, Fee Schedule to Code of Procedure, <http://www.arb-forum.com/resource.aspx?id=604> (last visited July 1, 2008). This does not include additional fees for requests, objections to requests, findings of fact or conclusions of law, and the like. See *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1177 (Ohio Ct. App. 2004) ("Based upon a review of the NAF Code of Procedure. . . we agree with Ms. Eagle and find that these arbitration costs and fees are prohibitive, unreasonable and unfair as applied to Ms. Eagle.") (citing NAF's filing fees, fees for subpoena requests, fees for discovery orders, fees for continuance requests, fees for a request for reopening or reconsideration, and other procedural fees that may be assessed by NAF, stating that "[s]uffice it to say that for virtually every piece of documentation requested by a party, a corresponding fee exists").

³ NELA submitted these estimates to the U.S. Senate Judiciary Committee, Subcommittee on the Constitution, in a statement in support of the Arbitration Fairness Act, S. 1782, submitted for the record at the Dec. 12, 2007 hearing on that topic.

much as \$6000 per day.⁴ A single arbitration can involve a number of days of an arbitrator's time, which typically will be five days' worth for a preliminary conference (1/2 day), a discovery dispute (1/2 day), three days for the arbitration hearing itself, and a day for the arbitrator to write the decision. Of course these costs are multiplied if the BMA program calls for more than one arbitrator, if there is more than one discovery dispute, if the employer files any dispositive motions, if the hearing lasts more than three days, or if the arbitrator takes longer than one day to write the decision. These costs are all *in addition to* the parties' fees for their own attorneys.

A host of judicial opinions around the country appear to confirm NELA's estimations that arbitration fees in employment cases will typically amount to thousands (and upwards of tens of thousands) of dollars:

⁴ For example, fees charged by well-known "neutrals" offered on rosters of major arbitration organizations in Washington, D.C., Boston, and New York start at approximately \$350 per hour. M. Kasindorf, "Rent-a-judges forced out of California courts," USA TODAY (posted 4/24/03), http://www.usatoday.com/news/nation/2003-04-24-rentajudge-usat_x.htm. Some "big-name" arbitrators charge as much as \$800 per hour. *Id.* The Judicial Arbitrator Group (JAG), which publishes its arbitrators' rates on its website (<http://www.jaginc.com/Pages/Administration.html> (last visited June 24, 2008)), charges between \$290 and \$500 per hour for arbitrator time, plus travel time at half the arbitrator's hourly rate (*i.e.*, \$145-\$250 per hour), and additional fees for the arbitrator's expenses for lodging and meals, law clerk and/or paralegal support, when required. Our research reveals that these types of fees are consistent with local Alaska arbitration providers too: Just Resolutions, an Anchorage alternative dispute resolution provider which publishes its rates on-line, charges \$1,800 as an up-front pre-payment for the arbitrator's fees, \$150 per hour for review of settlement briefs, all the arbitrator's travel expenses as incurred, \$600 additional cost for arbitrator's travel on a workday, a \$750 per day cancellation fee, and finally, \$200 per hour for the arbitrator's time. <http://justresolutions.com/scheduling.html> (last visited July 10, 2008).

- The D.C. Circuit’s holding in *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997), was partly informed by the likelihood of exorbitant arbitration costs. Examining data then available (*i.e.*, using 1995-96 rates), the court found that the employee’s share of the arbitrators’ fees likely would range between \$500 and \$1,000 per day or more, plus administrative fees. *Cole*, 105 F.3d at 1480. The court also surveyed various providers’ arbitration fees and found that fees as high as \$500 or \$600 per hour were not extraordinary. *Id.* at 1480 n.8 (citing Margaret A. Jacobs, “Renting Justice: Retired Judges Seize Rising Role in Settling Disputes in California,” *WALL ST. J.*, July 27, 1996, at A1; David Segal, “Have Name Recognition, Will Mediate Disputes,” *WASH. POST*, Dec. 16, 1996, *Wash. Bus.* at 5). The court also cited documents from the CPR Institute for Dispute Resolution, reporting that its arbitrators charged \$250-\$350 an hour and billed 15-40 hours for the typical employment case, resulting in arbitrators’ fees ranging anywhere from \$3,750 to \$14,000. *Id.* at 1480 n.8 (citing CPR INST. FOR DISPUTE RESOLUTION, EMPLOYMENT ADR: A DISPUTE RESOLUTION PROGRAM FOR CORPORATE EMPLOYERS I-13 (1995)).
- In a Tenth Circuit case involving a Colorado arbitration, the employee was responsible under his BMA program for half of (a) \$250 per hour for the arbitrator’s time, (b) \$125 per hour for the arbitrator’s travel time, (c) \$45 per hour for paralegal support, and (d) a \$6,000 deposit. *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230, 1232 (10th Cir. 1999). Using the CPR Institute’s estimate that the typical employment dispute requires 15-40 hours of the arbitrator’s

time, the court calculated that the employee would have had to pay an arbitrator between \$1,875 and \$5,000 to resolve his claims. *Id.* at 1234-35 and n.5 (citing the CPR Institute’s estimate as given in *Cole*, 105 F.3d at 1480 n.8).

- The Third Circuit in *Spinetti v. Service Corporation International*, 324 F.3d 212 (3d Cir. 2003), found that the employee would have had to pay an initial, non-refundable filing fee of \$500 to the arbitration provider, an additional filing fee of \$2,750, a case-filing fee of \$1,000, an additional charge of \$150 for each day of the hearing, plus half the cost of an arbitrator. Evidence disclosed that a mid-range arbitrator in Western Pennsylvania charges approximately \$250 an hour with a \$2,000-per-day minimum.
- In *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778 (9th Cir. Cal. 2002), the Ninth Circuit noted that “[p]arties to arbitration are often charged two or three thousand dollars per day in arbitration ‘forum fees,’ since arbitrators typically charge \$300-400 per hour.” 298 F.3d at 785 n.7.
- In the commercial arbitration context, a California court found from a random sampling of 82 Northern California arbitrators that “(a) arbitrator compensation ranges from \$600 to \$3,850 per day; (b) the average (mean) daily rate of arbitrator compensation is \$1,899; (c) the median daily rate of arbitrator compensation is \$1,750.” *Ting v. AT&T*, 182 F. Supp. 2d 902, 917 (N.D. Cal. 2002), *modified*, 319 F.3d 1126 (9th Cir. 2003).

Wherever any particular employment case might fall on the spectrum of dollar figures cited in the foregoing cases, in the Public Citizen’s study, or in NELA’s own

survey, the irrefutable conclusion is that an employee who has been subjected to an unfair employment practice can expect to pay thousands in forum fees, and risks having to pay tens of thousands, if the employee is forced to initiate his or her claim in arbitration because of a BMA program with a cost-sharing provision.⁵

B. The Threat Of Exorbitant Costs Deters Individuals From Pursuing Their Claims In Arbitration—A Deterrent Effect That Contravenes The Purpose Of Those Statutes Designed To Protect Employees Against Unfair Employment Practices.

In light of the reality and against the backdrop that the typical employee likely will encounter prohibitive forum fees as a condition of pursuing his or her claims in arbitration, the resulting concern is that the threat of such costs will deter individuals from pursuing their claims in arbitration—a deterrent effect that contravenes the purpose of those statutes designed to protect employees against discrimination, wage theft, or other unfair employment practices. Indeed, employees subjected to BMA programs that require them to share the costs of arbitration face two separate layers of deterrence:

First, and most obvious, is the deterrence effect of the employee’s cost-benefit analysis of pursuing a claim—however meritorious—in a forum where he or she will be

⁵ Moreover, the heretofore-cited estimates for the employee’s forum fee bill potentially could be doubled if the BMA program includes a “loser pays” provision—a practice that has become increasingly more common. *See, e.g., ADR – Organizations; Do An LRA: Implement Your Own Civil Justice Reform Program NOW*, THE METROPOLITAN CORPORATE COUNSEL (Aug. 2001) (interview of National Arbitration Forum Executive Director Anderson, who explains: “The rules of the National Arbitration Forum allow the arbitrator to award the prevailing party the cost of the arbitration. . . . The rules of the other major arbitration administrators have similar provisions.”). As such, any estimate of expected forum costs for employment arbitration must account for the possibility that the employee can be on the hook for the entire arbitration bill pursuant to these “loser pays” provisions.

hit with a bill for thousands of dollars, and very possibly tens of thousands of dollars, to proceed. That deterrence was the key consideration for the *Cole* court:

If an employee ... is required to pay arbitrators' fees ranging from \$500 to \$1000 per day *or more* . . . in addition to administrative and attorney's fees, is it likely that he will be able to pursue his statutory claims? We think not.

Cole, 105 F.3d at 1484 (emphasis in original). Other courts that have adopted a bright-line rule invalidating BMA programs that require fee-sharing also have focused on the deterrence aspect. *See Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 669 (6th Cir. 2003) (“[T]he cost-splitting provision in the Circuit City arbitration agreement would deter a substantial number of employees similarly situated to Morrison from seeking to vindicate their statutory claims and thus [we] hold that it is unenforceable.”); *Armendariz v. Foundation Health Psychare Services, Inc.*, 6 P.3d 669, 24 Cal. 4th 83, 111 (Cal. 2000) (“[I]t is not only the costs imposed on the claimant but the *risk* that the claimant may have to bear substantial costs that deters the exercise of the constitutional right of due process. . . . [A bright-line] rule will ensure that employees bringing [statutory discrimination] claims will not be deterred by costs greater than the usual costs incurred during litigation, costs that are essentially imposed on an employee by the employer.”) (emphasis in original); *Jones v. Fujitsu Network Communications, Inc.*, 81 F. Supp. 2d 688, 693 (N.D. Tex. 1999) (holding that in light of the expected size of the arbitration fees, “the prohibitive cost substantially limits the use of the arbitral forum”).

Numerous academic and legal commentators explain the seriousness of this deterrence effect. In a recent law review article, Christopher Drahozal explains:

For a claimant in arbitration, the prospect of obtaining an award is an uncertain event: there is only a probability that the arbitrator will find in the claimant's favor, and then a range of possible amounts the arbitrator might award. By comparison, arbitration costs are a (relatively) certain amount that the claimant must pay upfront in order to bring the claim. To the extent claimants are risk averse, they may be unwilling to incur the certain upfront cost in an attempt to obtain an uncertain recovery. As a result, even if the claim otherwise is economically viable, the upfront costs of arbitration may deter a risk-averse claimant from asserting the claim. . . . If individuals face serious liquidity constraints in arbitrating their claims, then the upfront costs of arbitration might preclude them from filing a claim in the first place.

Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 Vand. L. Rev. 729, 765-66 (2006). The Public Citizen's study also cites the difficulty that many claimants would face in coming up with the upfront costs of arbitration and explains that the consequential deterrence effect is even greater than simply the result of a rational cost-benefit analysis:

'For a person or company of means, utilization of the courts involves simply an economic decision driven by net-worth-maximizing motives. That is, the decision will be controlled by an assessment whether the litigant's net worth will be greater or less if he goes to litigation For many people—including many who would not qualify under any traditional standard for measuring indigency—bearing the total cost of a decision to go ahead with litigation would probably preclude such a decision.' The hurdle posed by costs is heightened by the fact that most people in a situation requiring legal redress are financially distressed.

Public Citizen's "The Costs of Arbitration" at 52 (quoting former Solicitor General Rex Lee). Moreover, the Public Citizen report explains that even if the potential claimant does have the financial means to pay the up-front costs that nearly all arbitration providers require, he or she still is in an imperfect position to make a rational decision about whether to proceed with the claim because of the uncertainty about how much the

arbitration process ultimately will cost. *Id.* at 54. As discussed in the preceding section, those costs can vary widely, from several thousand dollars to tens of thousands of dollars. *See also* Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. Pa. J. Lab. & Emp. L. 685, 725-27 (2004) (advocating for a bright-line rule because of the “chilling effect of deterring a substantial number of similarly situated potential litigants from seeking to vindicate their statutory rights,” and arguing that the alternative case-by-case approach “does not reduce the deterrent effect of the employee's risk of substantial loss”); John F. Crawford, *Going Dutch: Should Employees Have to Split the Costs of Arbitration in Disputes Arising from Mandatory Employment Arbitration Agreements?*, 2004 J. Disp. Resol. 277, 280 (2004) (noting that arbitration costs “can add up to huge amounts that would most likely deter an individual, especially an unemployed former employee, from pursuing her statutory claims through arbitration,” and that as a result, courts should find that “cost-splitting provisions in which the employer does not pay all the costs will be *per se* invalid because it does not provide a reasonable substitute for a judicial forum”); Dennis Nolan, *Labor and Employment Arbitration: What's Justice Got to Do With It?*, 53 Disp. Resol. J. 40, 47-48 (1998) (“[S]haring the arbitrator’s fees and expenses might prove an insurmountable barrier for the putative grievant. Even a relatively simple case can cost several thousand dollars; a complicated case could easily run several times that. Few grievants can afford that much of a commitment, even if an arbitrator could order reimbursement in the event the grievant prevails.”); Beth E. Sullivan, *The High Cost of Efficiency: Mandatory Arbitration in the Securities Industry*, 26 Fordham Urb. L.J. 311,

331-33 (1999) (noting that when faced with a BMA program with a fee-sharing requirement, “an out-of-work plaintiff facing a ‘deep pocket’ [defendant] may be severely disadvantaged”).

C. A Second, Separate Deterrent Effect Would Be To Require Employers To Litigate The Arbitration Fee Allocation In Pre-Arbitration Litigation.

Adoption of a rule requiring a case-by-case adjudication of the actual effects of arbitration costs on the employee’s ability to vindicate his or her statutory rights also would have a second, separate layer of deterrence: that approach “effectively mandates pre-arbitration litigation over fee allocation.” Martin H. Malin, *Beyond the Protocol: The Future of Due Process in Workplace Dispute Resolution*, 11 *Empl. Rts. & Employ. Pol’y* J. 363, 370 (2007). In other words, not only is the employee deterred by the prospect of costly arbitration, but even if the fee-sharing provision might render the BMA program unenforceable, the employee will be deterred by the costly litigation—and its uncertain outcome—over the enforceability of the fee-sharing provision. *Id.* Prof. Malin points to the outcome in *Brooks v. Travelers Insurance Co.*, 297 F.3d 167 (2d Cir. 2002) as a perfect illustration of the potential impact of focusing on the particular plaintiff rather than on the systemic deterrence caused by that approach:

[T]he Second Circuit expressed concern that the arbitration agreement impeded plaintiff's ability to vindicate her statutory rights. In light of those concerns, the employer abandoned its efforts to compel the plaintiff to arbitrate. The Second Circuit vacated the district court's judgment and dismissed the appeal. . . . However, the court's decision left Travelers free to continue to impose the arbitration agreement on all of its other employees and to waive it whenever an employee challenged it in court. Meanwhile the agreement could continue to deter many employees from

bringing claims in the first instance. The failure to consider the potential systemic effects of the agreement permits such strategic behavior.”

Id. at 378.⁶ See also Dan O’Hearn, *Beyond “Let Them Eat Cake”: An Argument for the Armendariz Method of Cost Allocation in Mandatory Employment and Consumer Arbitration*, 2007 J. Disp. Resol. 541, 548 (2007) (explaining that “the second layer of deterrence stems from the attorneys fees and court costs associated with proving to a reviewing court that the first layer of costs are prohibitive”); Summers, 6 U. Pa. J. Lab. & Emp. L. at 725-26 (“Invalidating the cost-sharing provision does nothing to discourage an employer from including such a clause because it will deter others who lack the resources

⁶ In addition, Prof. Malin explains that results like *Books* also encourage defendants to “game the system” and negotiate with the court in response to the plaintiff’s evidence that arbitration costs would be prohibitive:

Allowing defendants to avoid the consequences of allocation of excessive fees to plaintiffs in the agreements that the defendants themselves drafted has at least two negative consequences. First, as other courts have observed, the matter will proceed to arbitration with the offensive provision remaining in the defendant's contracts thereby deterring others from bringing claims. Second, allowing defendants to game the system invites them to, in effect, negotiate with the court. For example, in *Livingston v. Associates Finance, Inc.*, [339 F.3d 553 (7th Cir. 2003)] . . . the defendant offered to pay all arbitration costs to the extent that they exceeded the costs of litigation. The district judge rejected the offer as too vague and denied the defendant's motion to compel arbitration. The defendant responded by offering to pay all arbitration costs and requested reconsideration. The district judge rejected the offer and denied the motion. The Seventh Circuit, however, reversed and effectively required the district judge to play these games with the defendant by holding that the offer to pay all arbitration costs mooted the objection that arbitration was too expensive for the plaintiffs. Similar evidence of defense negotiating with the court is evident in *Branco v. Norwest Bank*, [381 F.Supp.2d 1274 (D. Hawaii 2005),] where the court accepted the defendants' offer to pay whatever fees the court would find necessary to find the arbitration agreement enforceable.

Malin, 11 Empl. Rts. & Employ. Pol’y J. at 391-92.

to challenge it in court.”); Crawford, J. Disp. Resol. at 285 (“[C]ourts using the post hoc judicial review approach fail to consider that the claimant may never get the opportunity to have her claims heard because she will not want to risk losing the review and be responsible for the costs associated with the arbitration.”).

CONCLUSION

Pre-dispute, binding mandatory arbitration systems often require individuals to pay costs that are so prohibitive that reasonable employees would abandon their claims before resorting to arbitration. Further, a rule requiring case-by-case judicial review of the cost allocation, *i.e.*, one focusing on the effect on the individual plaintiff in the case at bar, would result in double-layered deterrence on employees subject to BMA programs with fee-sharing provisions. First is deterrence caused by the risk and uncertainty of substantial arbitration costs likely to number in the thousands of dollars and even tens of thousands of dollars. Second is deterrence caused by the litigation costs associated with and uncertainty of having to prove that the arbitration costs will be so prohibitive that it will harm the individual’s ability to vindicate his or her statutory rights. NELA urges this Court to reject this approach and adopt a bright-line rule that the cost-splitting provision of Nye’s arbitration provision is *per se* unconscionable and unenforceable.

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Respectfully submitted for the National Employment
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was prepared in Times Roman 13 pt font and was mailed on the 15th day of July, 2008.

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