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Judge Finds Merrill Lynch Can't Force Ex-Consultant to Arbitrate Bias Claim

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A federal judge found that Merrill Lynch & Co. can't require a former financial consultant to arbitrate a sex discrimination claim because the industry's arbitration system is unfair.

In a closely watched case, U.S. District Judge Nancy Gertner in Boston cleared the way for the former consultant, Susan Rosenberg, to take her claim to court. The judge found that Merrill couldn't force her to take her case to a New York Stock Exchange arbitration panel because the Big Board's arbitration system is dominated by the industry.

The 56-page opinion is expected to reverberate beyond Ms. Rosenberg's case. In reaching her conclusion, the judge found that Congress never intended to prevent plaintiffs from taking sex and race discrimination claims, both of which fall under Title VII of the Civil Rights Act, to court.

A spokesman for Merrill Lynch said the company was "reviewing the decision" and hadn't decided whether to appeal. Last week, people familiar with the company said it was considering allowing all of its employees to take employment discrimination claims to court rather than to arbitration. The National Association of Securities Dealers also has proposed that its rules be changed to no longer require mandatory arbitration of employment claims, leaving the decision to impose arbitration to individual brokerage firms.

With few exceptions, securities firms

have succeeded in getting cases like Ms. Rosenberg's ordered to arbitration since 1991, when the Supreme Court upheld the industry's mandatory arbitration system in a case known as *Gilmer vs. Interstate/Johnson Lane Corp.* But that system has proven controversial and Judge Gertner found that the *Gilmer* decision, which involved a claim under the federal age discrimination law, didn't apply to claims brought under Title VII. Congress wouldn't have provided for public jury trials for alleged victims of sex and race discrimination as part of the 1991 amendments to Title VII if it had intended that employers could force workers to privately arbitrate the same claims, she said.

The judge also said she was "deeply troubled" by the "structural bias" in the Big Board's arbitration system, including its rules. Most disturbing, she found, was that the chairman of the Big Board also recommends and appoints the pools from which individual arbitrators are chosen.

Though the decision directly covers the Big Board, Judge Gertner noted several times that many of the same problems exist at the NASD, which handles the majority of industry arbitrations and has similar rules. Judge Gertner said her decisions didn't apply to customer cases.

Boston lawyer Marc Redlich, who represents Ms. Rosenberg, praised the decision. It "vindicates the rights of women in the securities industry to have a jury trial on discrimination and civil rights claims," he said.