

## THE CIRCUMVENTION OF COMPULSORY ARBITRATION: TWO BITES AT THE APPLE, OR A RESTORATION OF EMPLOYEES' STATUTORY RIGHTS?

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### INTRODUCTION

A successful advertising company hires Jackie on a full-time basis. She quickly establishes herself as a quality employee and her performance evaluations are excellent. Six months after beginning work, Jackie faints on the job and subsequently takes a two-day medical leave of absence. Apparently, Jackie has lupus<sup>1</sup> and suffered a negative reaction to a change in medication she was taking to control and prevent arthritis. During day two of Jackie's doctor recommended leave, her manager telephones and fires her. He explains that the company cannot employ someone who, due to repeated absence, could potentially threaten the efficiency of the workforce.<sup>2</sup>

Believing she was wrongfully discharged, Jackie files a lawsuit against her employer under the Americans with Disabilities Act of 1990 ("ADA").<sup>3</sup> It appears, however, that Jackie's employer requires all prospective employees to sign a company arbitration agreement whereby all employee claims are submitted to arbitration. Based on the precedent established by the Supreme Court in *Gilmer v.*

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<sup>1</sup> Lupus is a chronic inflammatory disease that affects various parts of the body, especially the skin, joints, blood, and kidneys. LUPUS FOUNDATION OF AMERICA, INC., *Definition of Lupus*, at <http://www.lupus.org/education/definition.html> (last visited Feb. 28, 2003) (on file with author). It is an autoimmune disorder that causes the immune system to lose its ability to tell the difference between harmful substances and its own cells and tissues. *Id.* The immune system then makes antibodies that fight against itself causing a wide range of complex medical problems, including death. *Id.* More than 16,000 Americans develop lupus each year. *Id.* It is estimated that 500,000 to 1.5 million Americans have been diagnosed with lupus. *Id.*

<sup>2</sup> This fact pattern mirrors an actual case. *See infra* notes 148-161 and accompanying text (discussing *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002)).

<sup>3</sup> The ADA prohibits discrimination in the hiring, firing, or treatment of a qualified individual with a disability. *See* 42 U.S.C. §§ 12101-213 (2003).

*Interstate/Johnson Lane Corp.*,<sup>4</sup> Jackie's employer invokes the arbitration agreement and the trial court dismisses the claim. Under *Gilmer*, the Supreme Court held that such an agreement is not only enforceable regarding disputes arising out of an employment contract, but also to federal statutory employment claims.<sup>5</sup> As a result of being forced into arbitration, Jackie may not pursue her claim in court and, therefore, is not afforded the benefits of a jury trial, complete discovery, or the protections of the ADA.

In the wake of *Gilmer*, employees like Jackie who sign arbitration agreements often find themselves with no ability to enforce their federal statutory rights in court.<sup>6</sup> The Civil Rights Act of 1991<sup>7</sup> ("1991 CRA"), which amended Title VII of the Civil Rights Act of 1964<sup>8</sup> ("Title VII") and the ADA,<sup>9</sup> is meant to grant victims of intentional discrimination the right to punitive damages and a jury trial.<sup>10</sup> Despite Congress's efforts to strengthen enforcement of Title VII and the ADA, courts have upheld *Gilmer* and remained loyal to enforcing arbitration agreements.<sup>11</sup>

Whether arbitration effectively resolves civil rights claims, however, is a contentious subject.<sup>12</sup> As compared to litigation,

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<sup>4</sup> 500 U.S. 20 (1991).

<sup>5</sup> *Id.* at 26.

<sup>6</sup> In *Gilmer*, for example, the Supreme Court affirmed the dismissal of plaintiff Robert Gilmer's discrimination claim against his employer because Gilmer signed an arbitration agreement. *Id.* at 26-27. The Court held that a claim under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (2003) ("ADEA"), could be subject to compulsory arbitration pursuant to an arbitration agreement. *Id.* at 23.

<sup>7</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

<sup>8</sup> Title VII of the Civil Rights Act of 1964 is codified at 42 U.S.C. § 2000e-2 (2003). See *infra* note 60 for further discussion.

<sup>9</sup> 42 U.S.C. §§ 12101-213 (2001).

<sup>10</sup> Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-74 (1991).

<sup>11</sup> See *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 4 (1st Cir. 1999) (stating that "application of pre-dispute arbitration agreements to federal claims arising under Title VII . . . is not precluded . . . by Title VII as amended by the 1991 CRA").

<sup>12</sup> For analysis and discussion on the various characteristics of arbitration, both good and bad, as they relate to statutory claims, see *Alexander v. Gardner-Denver Corp.*, 415 U.S. 36, 56-58 (1974) (discussing the unsuitability of arbitration for the resolution of statutory claims); See also RICHARD A. BALES, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT* 126-52 (1997) (comprehensively discussing the differences between arbitration and litigation, and addressing the potential pitfalls of arbitration); see generally Julian J. Moore, *Arbitral Review (Or Lack Thereof): Examining the Procedural Fairness of Arbitrating Statutory Employment Claims*, 100 COLUM. L. REV. 1572 (2000); Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443 (1998); Leona Green, *Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution*, 12 NOTRE DAME

employees can benefit from arbitration because of its comparatively low cost and faster resolution time.<sup>13</sup> Others, however, argue that Congress granted specific protections for employee rights and the court system is the intended forum for the exercise of those rights.<sup>14</sup> If arbitration is not well-suited to handle statutory discrimination claims, the arbitral forum could represent a substantial erosion of Congress's important anti-discrimination initiatives.<sup>15</sup>

Part I of this Comment examines the history and development of labor arbitration, which shows that arbitration is a favored and important method of dispute resolution. Part II addresses the historical status of arbitration, revealing that although arbitration was once voluntary, both Congress and the courts now enforce agreements to arbitrate. Part II also traces the emergence of workplace statutory rights and demonstrates how courts—even when these important rights are at issue—enforce arbitration agreements. This discussion focuses on the Supreme Court's decisions in *Alexander v. Gardner Denver Co.*<sup>16</sup> and *Gilmer*.<sup>17</sup>

Next, Part III analyzes the arbitral process, explaining the potential pitfalls employees face when arbitrating statutory rights, and ultimately concluding that the arbitral forum is unbalanced in favor of employer interests and is not well-suited for the resolution of statutory claims. Part IV then details two recent Supreme Court decisions, *EEOC v. Waffle House, Inc.*,<sup>18</sup> and *Wright v. Universal Maritime Service Corp.*,<sup>19</sup> that elucidate the potential unfairness of employees'

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J.L. ETHICS & PUB. POL'Y 173 (1998).

<sup>13</sup> BALES, *supra* note 12, at 153, 157. Professor Bales reports that litigating employment discrimination claims could take up to several years, while arbitration can sometimes be resolved in a matter of months. *Id.* at 153. Professor Bales also cites to a Bureau of National Affairs report revealing that companies have reported being able to arbitrate between fifteen and twenty cases for every wrongful discharge lawsuit. *Id.* at 157.

Other forms of alternative dispute resolution, such as arbitration, mediation, mediation-arbitration, dispute review boards, fact-finding, and partnering have been adopted to facilitate settlements and resolve lawsuits more quickly and less expensively. *Id.* AMERICAN ARBITRATION ASSOCIATION, *AAA Glossary of Dispute Resolution Terms*, at <http://www.adr.org/index2.1.jsp?JSPssid=15784> (last visited Feb. 28, 2003) (on file with author).

<sup>14</sup> See *Gardner-Denver*, 415 U.S. at 53-54.

<sup>15</sup> Bales phrases the issue as whether "such arbitration should be encouraged, or whether it should be banned as yet another employer encroachment on employees' rights." BALES, *supra* note 12, at 3.

<sup>16</sup> 415 U.S. 36 (1974).

<sup>17</sup> 500 U.S. 20 (1991).

<sup>18</sup> 534 U.S. 279 (2002).

<sup>19</sup> 525 U.S. 70 (1998).

waiving their rights to a judicial forum through arbitration.

Finally, Part V surveys possible methods employees can utilize to circumvent arbitration agreements in order to get their statutory claims into court. This is especially important in light of the dangerous reality of employers *requiring* employees to sign arbitration agreements as a condition of employment.<sup>20</sup> Rather than mount a direct challenge to *Gilmer*, this Comment argues that courts should at least empower employees to refuse to sign over-inclusive arbitration agreements. Using the anti-retaliation provision of the ADA as a model, employees should not be placed in situations where they must choose between waiving their statutory right to a judicial forum or foregoing employment. This model will permit the continuing use and popularity of the arbitration agreement while ensuring that employees are not manipulated into signing away their civil rights.

#### I. LABOR ARBITRATION DEFINED: AN HISTORICAL PERSPECTIVE

Arbitration is a “simple proceeding voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding.”<sup>21</sup> Arbitration is viewed as a highly effective dispute resolution process because it offers a quicker, less expensive, and less formal alternative to litigation.<sup>22</sup>

Due to these benefits, arbitration first gained popularity in the 1920s among business merchants who chose arbitration rather than litigation to handle contractual disputes.<sup>23</sup> The most significant use of arbitration in the twentieth century, however, occurred in the labor context.<sup>24</sup> Participants in the labor and employment setting

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<sup>20</sup> FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 2 (Edward P. Goggin & Alan Miles Ruben eds., 5th ed. Supp. 1999) [hereinafter ELKOURI & ELKOURI SUPP.]. *Gilmer*, for instance, was required to sign the New York Stock Exchange’s arbitration agreement in order to work for Interstate/Johnson Lane Corp. *Gilmer*, 500 U.S. at 23. The use of private arbitration by employers increased from one percent in 1979, to ten percent in 1995, to nineteen percent in 1997. LEWIS L. MALTBY, *PRIVATE JUSTICE: EMPLOYMENT ARBITRATION AND CIVIL RIGHTS*, IN *ARBITRATION NOW: OPPORTUNITIES FOR FAIRNESS, PROCESS RENEWAL AND INVIGORATION* 1, 4 (Paul H. Haagen ed., 1999).

<sup>21</sup> BALES, *supra* note 12, at 3 (quoting Matthew N. Chappell, *Arbitrate . . . and Avoid Stomach Ulcers*, 2 *ARB. MAG.*, Nos. 11-12, 6, 7 (1944)).

<sup>22</sup> Margaret M. Harding, *The Redefinition of Arbitration by Those With Superior Bargaining Power*, 1999 *UTAH L. REV.* 857, 857 (1999) [hereinafter Harding, *Redefinition of Arbitration*].

<sup>23</sup> BALES, *supra* note 12, at 5; *see also* Harding, *Redefinition of Arbitration*, *supra* note 22, at 858.

<sup>24</sup> *See* BALES, *supra* note 12, at 5; *see also* Paul H. Haagen, *New Wineskins for New*

chose arbitration as an alternative to litigation because it offers a convenient and informal method of dispute resolution in which an employer and a union can quickly resolve disputes.<sup>25</sup> Arbitration, therefore, serves as a “substitute for industrial strife” by avoiding costly, hostile, and unpredictable work stoppages.<sup>26</sup> To achieve these desirable ends, labor arbitrators are essentially charged with the role of “peacemaker,”<sup>27</sup> serving as neutral parties to interpret and apply employment and collective bargaining agreements.<sup>28</sup>

The advantages of arbitration make it an attractive and viable forum for the resolution of disputes in the employment relationship. Despite its utility, however, arbitration traveled a rocky path towards judicial acceptance.

## II. THE LEGAL STATUS OF ARBITRATION

### A. *The Federal Arbitration Act and Early Legal Precedent*

At common law, agreements to arbitrate were voluntary<sup>29</sup> and revocable by either party.<sup>30</sup> Courts did not favor arbitration early in its development, believing that “an agreement to arbitrate operated to divest courts of legislatively-granted jurisdiction and, therefore, was illegal and void.”<sup>31</sup> Congress finally voiced its approval of arbitration

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*Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1052 (1998) (indicating that the legal development of arbitration is most advanced in the context of collective bargaining). Labor arbitration truly emerged at the forefront of labor-related dispute resolution during World War II when the National War Labor Board decided approximately 20,000 labor disputes. BALES, *supra* note 12, at 6.

<sup>25</sup> See FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 10 (Marlin M. Volz & Edward P. Coggin eds., 5th ed. 1997).

<sup>26</sup> See *id.* at 7 (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960)). In arbitration agreements, unions would explicitly surrender the right to strike and employers would forgo the right to resolve a dispute through unilateral action. *Id.*

<sup>27</sup> *Id.* at 1.

<sup>28</sup> See *Gardner-Denver*, 415 U.S. at 53-54 (alluding to the traditional role of the labor arbitrator); see also, ARNOLD M. ZACK & RICHARD I. BLOCH, *LABOR AGREEMENT IN NEGOTIATION AND ARBITRATION* 8 (2d ed. 1995) (indicating that the objective of the arbitrator was to interpret and enforce the terms of the parties' agreement).

<sup>29</sup> This piece refers to arbitration in the voluntary sense, meaning that the contracting parties agree to arbitration. See ELKOURI & ELKOURI, *supra* note 25, at 2 (distinguishing voluntary arbitration from compulsory arbitration). To contrast, compulsory arbitration is required by law, even if neither party desires arbitration. *Id.* at 19.

<sup>30</sup> See BALES, *supra* note 12, at 16.

<sup>31</sup> *Id.*

in 1925, when it passed the Federal Arbitration Act (“FAA”).<sup>32</sup> Section 2 of the FAA renders arbitration agreements “valid, irrevocable, and enforceable.”<sup>33</sup> Section 3 provides that a party to an arbitration agreement can move to stay any court proceedings<sup>34</sup> if the issue is covered by an arbitration agreement, and Section 4 permits that party to obtain an order to compel arbitration if the other party refuses to honor the agreement.<sup>35</sup> The FAA, therefore, transformed arbitration from a voluntary dispute resolution tool to a legally binding agreement backed by Congress.<sup>36</sup>

Despite its enactment, courts did not apply the FAA until nearly thirty-five years later, in *Wilko v. Swan*.<sup>37</sup> In *Wilko*, a securities

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<sup>32</sup> See 9 U.S.C. §§ 1-16 (2003) (original version at 43 Stat. 883 (1925)).

<sup>33</sup> Section 2 of the FAA states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2003).

<sup>34</sup> 9 U.S.C. § 3 (2003). If the court is “satisfied that the issue involved in [a] suit or proceeding is referable to arbitration under such an agreement,” it “shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.” *Id.* A “stay” is defined as the “temporary suspension of the regular order of proceedings in a cause, by direction or order of the court, usually to await the action of one of the parties in regard to some omitted step or some act which the court has required him to perform as incidental to the suit . . . .” BLACK’S LAW DICTIONARY 1413 (6th ed. 1990).

<sup>35</sup> 9 U.S.C. § 4 (2003) (also allowing for judicial enforcement of arbitration awards).

<sup>36</sup> There was also confusion as to the scope of the FAA, an issue not considered in this Comment. Section 2 of the FAA defines its coverage, stating “[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration . . . shall be valid, irrevocable, and enforceable . . . .” 9 U.S.C. § 2 (2003). The Supreme Court interpreted the “involving commerce” language as “implementing Congress’s intent ‘to exercise [its] commerce power to the full.’” *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001) (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1991)). Therefore, the FAA’s coverage is extremely broad. A major issue, however, is whether employment contracts may be excluded under the FAA’s exclusionary clause, which states that the Act does not apply “to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1 (2003). While the Ninth Circuit took the view that § 1 excludes all employment contracts from the reach of the FAA, *Circuit City Stores v. Adams*, 194 F.3d 1070 (9th Cir. 1999), the Supreme Court recently held that the exclusion is limited to “transportation workers” only. *Circuit City Stores*, 532 U.S. at 109.

<sup>37</sup> 346 U.S. 427 (1953).

brokerage firm attempted to compel arbitration of a customer's claim under the Securities Act of 1933.<sup>38</sup> Rather than compel arbitration under the FAA, the Supreme Court declared the arbitration agreement invalid, holding that the right to a judicial forum for enforcement of the Securities Act preempted the enforceability of arbitration agreements under the FAA.<sup>39</sup> The *Wilko* Court stated that the Securities Act conferred a right to recover in a court of law, and compelling arbitration would not adequately enable Wilko to enforce his rights.<sup>40</sup> The decision in *Wilko* represented the first time the Supreme Court addressed the conflict between the FAA's mandate to enforce arbitration agreements and a statutorily conferred right to a judicial forum.<sup>41</sup>

The Supreme Court effectively overruled *Wilko* when it decided the "*Mitsubishi Trilogy*."<sup>42</sup> While the *Wilko* Court refused to apply the FAA to a statutory claim, the Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* held that the FAA created a presumption of arbitrability favoring *all* arbitration agreements.<sup>43</sup> In the "*Mitsubishi*

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<sup>38</sup> *Id.* at 428-29. The claim was brought specifically under § 12(2) of the Securities Act of 1933 for the alleged misrepresentation of material information regarding a security. *Id.*

<sup>39</sup> *Id.* at 438.

<sup>40</sup> *See id.* at 436-37 (opining that arbitration will not ensure adequate enforcement of the statute, mainly because there is limited opportunity for judicial review of arbitrators' decisions).

<sup>41</sup> The Court phrased the clash of the FAA and the Securities Act of 1933 accordingly:

Two policies, not easily reconcilable, are involved in this case. Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment. On the other hand, it has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act.

*Id.* at 438.

<sup>42</sup> The trilogy consists of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987); and *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

<sup>43</sup> *Mitsubishi Motors Corp.*, 473 U.S. at 626 (stating that the FAA requires courts to rigorously enforce arbitration agreements, and "[t]here is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights"). The "presumption doctrine" was based on two assumptions: 1) an arbitration agreement does not waive substantive rights as the *Wilko* Court suggested, but rather submits those rights to an alternative forum; and 2)

Trilogy,” the Court enforced agreements to arbitrate statutory claims based on antitrust,<sup>44</sup> securities,<sup>45</sup> and racketeering laws.<sup>46</sup> In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, decided in 1985, the Court ruled that the FAA allowed for the arbitration of statutory claims unless Congress clearly indicated otherwise in the statutory language.<sup>47</sup> In *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, the last decision in the trilogy, the Court specifically overruled *Wilko*, holding that the arbitration agreement precluded a Securities Act claim from being heard in a judicial forum.<sup>48</sup>

While the FAA sat virtually dormant until the “*Mitsubishi Trilogy*,” industrial corporations and unions began incorporating arbitration clauses into collective bargaining agreements (CBAs).<sup>49</sup> For the first time, the Supreme Court officially endorsed arbitration in the labor setting in the “*Steelworkers Trilogy*” of 1960.<sup>50</sup> In all three cases, the Court enforced agreements to arbitrate contained in union-management negotiated CBAs and approved the arbitration process for the resolution of disputes arising under those CBAs.<sup>51</sup> In the “*Steelworkers Trilogy*,” the Court created an “irrebuttable presumption” that employer-union disputes were arbitrable and discouraged judicial intervention in employment disputes governed

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arbitrators are capable of deciding statutory issues. See BALES, *supra* note 12, at 24-25 (citing *Mitsubishi Motors Corp.*, 473 U.S. at 626-28).

<sup>44</sup> See *Mitsubishi Motors Corp.*, 473 U.S. at 638.

<sup>45</sup> *Rodriguez de Quijas*, 490 U.S. at 485.

<sup>46</sup> *McMahon*, 482 U.S. at 242.

<sup>47</sup> *Mitsubishi Motors Corp.*, 473 U.S. at 628.

<sup>48</sup> *Rodriguez de Quijas*, 490 U.S. at 485.

<sup>49</sup> For example, the “*Steelworkers Trilogy*,” discussed *infra* at notes 50-52 and accompanying text, all dealt with union-employer negotiated arbitration agreements in 1960.

<sup>50</sup> The trilogy consists of *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); and *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960).

<sup>51</sup> In *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960), the Court held that an arbitrator’s decision on the merits should not be disturbed by a reviewing court, and that arbitrators do not have to explain their reasoning for giving awards. 363 U.S. at 596-98. In *Warrior & Gulf Navigation*, the collective bargaining agreement provided for arbitration of differences relating to the meaning and application of provisions of the contract, but excepted from arbitration matters which were “strictly a function of management.” 363 U.S. at 576. The Court showed its strong preference for arbitration by holding that doubts as to the scope of arbitration should be resolved in favor of coverage. *Id.* at 582-83. In *American Manufacturing*, the circuit court upheld an employer’s refusal to arbitrate a grievance because the court found the complaint frivolous. 363 U.S. at 566. The Supreme Court, however, compelled arbitration of the complaint, noting that it is not the job of courts to review the merits of the claim, but rather to enforce the terms of the collective bargaining agreement, which called for arbitration. 363 U.S. at 567-68.



by an arbitration agreement.<sup>52</sup>

*B. The Development of Statutory Rights in the Workplace*

Aside from the National Labor Relations Act of 1935<sup>53</sup> (“NLRA”)—which developed a regulatory scheme for union activity and collective bargaining—federal and state government refrained from intervening in labor-management relations in the early twentieth century.<sup>54</sup> Accordingly, unions were the primary source of employees’ rights.<sup>55</sup> Union membership peaked in the mid-1950s, as many employees sought the protection of unions to ensure workplace benefits and rights.<sup>56</sup>

As the civil rights movement swept across America, the employer-employee relationship witnessed a substantial level of government intervention in the form of federal regulation.<sup>57</sup> The

<sup>52</sup> BALES, *supra* note 12, at 20.

<sup>53</sup> 29 U.S.C. §§ 151-69 (2003).

<sup>54</sup> See BALES, *supra* note 12, at 7 (examining the history of employment legislation and noting that statutory protection for nonunion workers did not really begin until 1963).

<sup>55</sup> See CHARLES B. CRAVER, CAN UNIONS SURVIVE? 36 (1993) (stating “unions were able to lobby successfully for statutes prohibiting employment discrimination, enhancing employment health and safety, and protecting employee pension and welfare funds”).

<sup>56</sup> In 1954, union membership constituted approximately thirty-five percent of the workforce. CRAVER, *supra* note 55, at 34-35. Although the absolute number of union members increased slightly from the mid-1950s to 1980, where it peaked at twenty-two million, the overall percentage of the unionized workforce declined to twenty percent by 1983. *Id.* at 35; see also HANDBOOK OF U.S. LABOR STATISTICS (Eva E. Jacobs ed., 4th ed. 2000). Union density continued to decline throughout the 1980s and 1990s, steadily dropping to 13.2 percent in 2002, representing approximately sixteen million workers. BUREAU OF LABOR STATISTICS, *Union Members Summary*, at [www.bls.gov/news.release/union2.nr0.htm](http://www.bls.gov/news.release/union2.nr0.htm) (last visited Mar. 5, 2003) (on file with author).

<sup>57</sup> See, e.g., the Equal Pay Act of 1963 (preventing wage discrimination on the basis of sex), 29 U.S.C. § 206(d) (2002); Title VII of the Civil Rights Act of 1964 (discussed *infra* note 60), 42 U.S.C. § 2000e-2 (2002); the Age Discrimination in Employment Act (preventing workplace discrimination on the basis of age), 29 U.S.C. §§ 621-34 (2002); the Occupational Safety and Health Act of 1970 (setting guidelines for workplace safety), 29 U.S.C. §§ 651-78 (2002); the Rehabilitation Act of 1973 (setting guidelines for providing equal opportunities to individuals with disabilities), 29 U.S.C. §§ 701-961 (2002); the Employee Retirement Income Security Act of 1974 (protecting employee pension benefits), 29 U.S.C. §§ 1001-1461 (2002); the Pregnancy Discrimination Act of 1978 (proscribing workplace discrimination on the basis of childbirth, pregnancy, and related medical conditions), 42 U.S.C. § 2000e(k) (2002); the Civil Service Reform Act of 1978, 5 U.S.C. §§ 1101-8913 (2002); the Employee Polygraph Protection Act of 1988 (prohibiting, with limited exceptions, the use of lie detector and polygraph tests), 29 U.S.C. §§ 2001-09 (2002); the Americans With Disabilities Act of 1990 (discussed *supra* note 3), 42 U.S.C. §§ 12101-213 (2002); the Civil Rights Act of 1991 (providing victims of workplace

Equal Pay Act of 1963<sup>58</sup> marked the beginning of a congressional trend towards ending workplace discrimination and creating equal employment opportunities for all Americans.<sup>59</sup> The most influential anti-discrimination measure is Title VII of the 1964 Civil Rights Act,<sup>60</sup> which makes it unlawful for an employer to discriminate with respect to hiring, firing, or other aspects of employment on the basis of race, color, religion, sex, and national origin.<sup>61</sup> In addition, Congress enacted both the Age Discrimination in Employment Act<sup>62</sup> (“ADEA”) in 1967 to combat workplace discrimination on the basis of age, and the Americans with Disabilities Act<sup>63</sup> in 1990 to prohibit employment discrimination on the basis of a disability.

Before 1991, Title VII claimants were not entitled to jury trials.<sup>64</sup>

discrimination the right to a jury trial and for damages in the case of intentional discrimination), 42 U.S.C. § 1981a (2002); the Family and Medical Leave Act of 1993 (requiring employers to grant leave to their employees for family and medical emergencies), 29 U.S.C. § 2601 (2002).; *See also* BALES, *supra* note 12, at 7.

<sup>58</sup> 29 U.S.C. § 206 (1994). The Equal Pay Act, for instance, created the concept of equal pay for equal work by prohibiting wage discrimination on the basis of gender. *See id.*

<sup>59</sup> Employment legislation actually began in 1908 with the Federal Employers’ Liability Act, 45 U.S.C.S. §§ 51-60 (2003), a workers’ compensation statute regulating the remedies available for employees of common carriers. BALES, *supra* note 12, at 7. The Fair Labor Standards Act was passed in 1938, also prior to the civil-rights inspired federal regulation of the workplace. 29 U.S.C. §§ 201-19 (2002). Despite some federal intervention prior to 1963, the Equal Pay Act represented the first of many anti-discrimination statutes which regulate employer activities in many areas that were previously untouched. BALES, *supra* note 12, at 7 (stating that statutory protection for nonunion workers began “in earnest” in 1963).

<sup>60</sup> *See* 42 U.S.C. § 2000e-2 (2001); *see also* BALES, *supra* note 12, at 7 (referring to Title VII of the CRA of 1964 as the “watershed” event for Congress in federal employment legislation). Title VII states:

Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (2001).

<sup>61</sup> 42 U.S.C. § 2000e-2 (2001).

<sup>62</sup> 29 U.S.C. §§ 621-34 (2001).

<sup>63</sup> 42 U.S.C. §§ 12101-213 (2001); *see also supra* note 3.

<sup>64</sup> HENRY H. PERRITT, JR., *CIVIL RIGHTS IN THE WORKPLACE* 109 (3d ed. 2001). Victims of racial discrimination could be heard before a jury pursuant to 42 U.S.C. §

Title VII was silent on the issue and in subsequent years, the Supreme Court assumed that the right to a jury trial did not exist.<sup>65</sup> After deciding that Title VII needed a damages remedy, Congress passed the 1991 CRA.<sup>66</sup> Under the Act, victims of discrimination under both Title VII and the ADA have the right to a jury trial, compensatory damages, and punitive damages.<sup>67</sup>

*C. The Arbitration of Statutory Law Revisited: Post Civil Rights Movement*

The “*Steelworkers Trilogy*” placed a presumption of arbitrability on all claims arising under collective bargaining agreements, thus validating the use of arbitration for employment disputes.<sup>68</sup> The modern development of statutory protections for civil rights in the workplace represents a new class of individual rights which exist regardless of whether an employee is unionized, and without regard to what is contained in any union-negotiated collective bargaining agreement. The “*Steelworkers Trilogy*,” however, did not consider whether these rights were arbitrable.

Two influential Supreme Court cases addressed the issue of whether statutory employment claims can be compelled to arbitration, and an analysis of both cases frames the debate that still exists today.<sup>69</sup> The arbitrability of statutory claims arose for the first time in the employment context in *Alexander v. Gardner Denver Company*.<sup>70</sup> Harrell Alexander, Sr., employed by Gardner-Denver Co. as a drill operator, believed the company fired him because he was black.<sup>71</sup> After unsuccessfully pursuing a grievance for wrongful

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1981 (2002), but all other victims of discrimination did not have the right to a jury trial before 1991. *Id.*

<sup>65</sup> *Id.* at 110.

<sup>66</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991); *see also* PERRITT, JR., *supra* note 64, at 110-11 (discussing the various committee reports that Congress relied on when drafting the amendment, which indicate the main focus of the act was to strengthen Title VII remedies).

<sup>67</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071 § 1072-74 (1991). Section 102 states: “If a complaining party seeks compensatory or punitive damages under this section-(1) any party may demand a trial by jury.” *Id.*; *see also* Karen Halverson, *Arbitration and the Civil Rights Act of 1991*, 67 U. CIN. L. REV. 445, 471-72 (1999) (breaking down in a very cohesive manner the various ways in which the Civil Rights Act of 1991 strengthened both Title VII and the ADA).

<sup>68</sup> *See supra* notes 50-52 and accompanying text.

<sup>69</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

<sup>70</sup> 415 U.S. 36 (1974).

<sup>71</sup> *Id.* at 43.

discharge in arbitration,<sup>72</sup> Alexander brought a claim for unlawful discrimination under Title VII.<sup>73</sup> The United States Court of Appeals for the Tenth Circuit affirmed the district court's dismissal of the claim, holding Alexander bound by the arbitral decision and therefore precluded from pursuing a Title VII claim in court.<sup>74</sup>

The Supreme Court granted *certiorari* and reversed in favor of Alexander.<sup>75</sup> The Court noted that the consequence of the lower courts' decisions was to "deprive [Alexander] of his statutory right to attempt to establish his claim in a federal court."<sup>76</sup> The Court held that Title VII provides an individual with independent statutory rights, enforcement of which is vested with the federal courts.<sup>77</sup> The Court observed that the individual private right of action was "an essential means of obtaining judicial enforcement of Title VII . . ."<sup>78</sup> and that "there can be no prospective waiver of an employee's rights under Title VII."<sup>79</sup>

The Court stated that the arbitral forum was designed to resolve contract rights and was not appropriate for the resolution of federal statutory rights guaranteed by Title VII.<sup>80</sup> Although *Gardner-Denver* addressed a Title VII claim, the Court has broadly interpreted the decision, applying it to other federal anti-discrimination statutes as well.<sup>81</sup>

The "*Mitsubishi Trilog*y" cases, handed down in 1985, 1987, and

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<sup>72</sup> *Id.* at 39-40, 42-43. Alexander's grievance was based on a provision in the CBA stating that an employee could only be discharged for "proper cause." *Id.* at 39. The arbitrator ruled against Alexander, deciding that he had been discharged for "just cause," namely the production of too many defective parts. *Id.* at 42.

<sup>73</sup> *Id.* at 42.

<sup>74</sup> *Id.* at 43.

<sup>75</sup> *Id.*

<sup>76</sup> *Gardner-Denver*, 415 U.S. at 56.

<sup>77</sup> *Id.* at 44.

<sup>78</sup> *Id.* at 45.

<sup>79</sup> *Id.* at 51.

<sup>80</sup> *Id.* at 53-54. In reconciling this holding with the prevailing congressional attitude favoring arbitration, the Court said:

the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII.

*Id.* at 59-60.

<sup>81</sup> See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 745 (1981) (holding that arbitration of an employee grievance pursuant to the CBA did not preclude a claim under the Fair Labor Standards Act); see also *McDonald v. City of West Branch*, 466 U.S. 284, 289 (1984) (extending *Gardner-Denver* to claims under 42 U.S.C. § 1983).

1989, represented a strong shift by the court in its views concerning arbitration and the role of the FAA. In the trilogy, the Supreme Court interpreted the FAA as creating a presumption of arbitrability—even when it results in statutory claims being compelled to an arbitral forum.<sup>82</sup> In *Gardner-Denver*, however, the Court conclusively identified the judicial forum, and *not* the arbitration process, as the appropriate forum for the resolution of statutory employment discrimination claims.<sup>83</sup> It was, thus, unclear whether the Supreme Court effectively carved out its own exception to the FAA for statutory employment claims.

The Supreme Court resolved its apparent conflict in the 1991 landmark decision in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>84</sup> Gilmer, fired at age sixty-two, filed a lawsuit in federal court alleging he had been unlawfully discharged based on his age in violation of the ADEA.<sup>85</sup> In response, Interstate filed a motion to compel arbitration.<sup>86</sup> Prior to beginning employment, Interstate required Gilmer to register as a securities representative with several stock exchanges.<sup>87</sup> Importantly, the New York Stock Exchange's ("NYSE") application required Gilmer to arbitrate "any dispute, claim, or controversy" arising out of his employment with Interstate.<sup>88</sup> The United States Court of Appeals for the Fourth Circuit, finding "nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements," dismissed Gilmer's suit in favor of arbitration.<sup>89</sup>

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<sup>82</sup> See *supra* notes 42-48 and accompanying text.

<sup>83</sup> See Robert J. Lewton, *Are Mandatory, Binding Arbitration Requirements a Viable Solution for Employers Seeking to Avoid Litigating Statutory Employment Discrimination Claims?*, 59 ALB. L. REV. 991, 1010 (1996) (stating that *Gardner-Denver* and its progeny stand for the proposition "that binding arbitration is inferior to the judicial process for resolving statutory employment discrimination claims"); see also *Gardner-Denver*, 415 U.S. at 56 (stating that arbitration is an "inappropriate forum for the final resolution of rights created by Title VII").

<sup>84</sup> 500 U.S. 20 (1991).

<sup>85</sup> *Id.* at 23-24.

<sup>86</sup> *Id.* at 24.

<sup>87</sup> *Id.* at 23.

<sup>88</sup> *Id.* To clarify the connection between the NYSE arbitration agreement and how it applied to Gilmer's relationship with Interstate, NYSE Rule 347 is instructive. *Gilmer*, 500 U.S. at 23. The Rule required arbitration of "any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative." *Id.*

<sup>89</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 197 (4th Cir. 1990). The circuit decision reversed the district court, which originally denied the motion to compel arbitration in reliance on *Gardner-Denver*, holding that ADEA claimants cannot waive a judicial forum. *Gilmer*, 500 U.S. at 24.

The Supreme Court affirmed, extending the “presumption of arbitrability” announced in the “*Mitsubishi* Trilogy” to include statutory employment discrimination claims, specifically ADEA claims.<sup>90</sup> This decision represented the first time the Supreme Court “held that a statutory civil rights claim can be subjected to mandatory arbitration.”<sup>91</sup>

The *Gilmer* decision departs from the *Gardner-Denver* policy against enforcing mandatory arbitration agreements as applied to statutory claims. The Court, however, did not expressly overrule *Gardner-Denver*.<sup>92</sup> The Court instead distinguished the case because *Gardner-Denver* involved a collective bargaining agreement, while *Gilmer* enforced an arbitration clause in an individual employment contract.<sup>93</sup> In light of that important difference, *Gilmer* sent a clear message to employers that arbitration agreements in individual employment contracts will result in the arbitration of all claims, even those based on federal statutes.

*Gilmer* indicates that the Court is comfortable with the resolution of statutory claims in the arbitral forum.<sup>94</sup> A brief analysis of the inner-workings of the arbitral process, however, reveals that arbitration may not be well-suited to carry out statutory law in a fair manner.

### III. THE ARBITRATION PROCESS: AN APPROPRIATE FORUM FOR CIVIL RIGHTS?

The numerous benefits of the arbitral process, such as quicker resolution of disputes at lower costs, validate the congressional policy embodied in the FAA favoring arbitration as a legitimate means of alternative dispute resolution.<sup>95</sup>

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<sup>90</sup> *Gilmer*, 500 U.S. at 26-27.

<sup>91</sup> See Green, *supra* note 12, at 173.

<sup>92</sup> *Gilmer*, 500 U.S. at 33-35 (distinguishing the cases on various grounds).

<sup>93</sup> *Id.* at 35. Apparently, the *Gilmer* Court found merit in the *Gardner-Denver* Court's concern that unionized claimants are represented by their union representatives in arbitration proceedings, which may result in the pursuit of union interests rather than vindicating the interests of the individual employee. *Id.*

Furthermore, *Gilmer* distinguished the cases because *Gardner-Denver* was not decided under the FAA. *Id.*; see also Theodore St. Antoine, *The Changing Role of Labor Arbitration*, 76 IND. L.J. 83, 87 (2001).

<sup>94</sup> *Gilmer*, 500 U.S. at 26 (“[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”) (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628).

<sup>95</sup> Among the most important is the speed and efficiency with which arbitration is conducted, especially when compared to the slow progression of employment

Nevertheless, despite the advantages of arbitration, it may come at too substantial a cost to employees.<sup>96</sup> Courts continue to debate the adequacy of the arbitration process for the resolution of statutory employment claims.<sup>97</sup> The *Gardner-Denver* Court, for example, voiced its skepticism of arbitration when it stated that “[a]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII.”<sup>98</sup> The *Gilmer* Court responded, however, by stating “such generalized attacks on arbitration” are “far out of step with our current strong endorsement of [arbitration].”<sup>99</sup> *Gilmer*, therefore, rejected the challenges “as insufficient to preclude arbitration of statutory claims.”<sup>100</sup> The *Gilmer*

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disputes through the overburdened court systems. ELKOURI & ELKOURI, *supra* note 25, at 10-13. According to Elkouri & Elkouri, arbitration can resolve cases in just a few days. *Id.* at 13. A statistical report from the Federal Mediation and Conciliation Service, however, reveals that the average length of time between the filing of a grievance and an arbitrator’s decision in 1994 was 342.88 days. *Id.* at 13 n.48.

Arbitration is also inexpensive, a quality that provides a great benefit to employees who may not be able to afford litigation or attract counsel. See BALES, *supra* note 12, at 9, 157, 169 (discussing various disincentives attorneys face when deciding to represent employees). The quick and informal arbitral process can require substantially less time and money than litigation, thus providing employees access to attorneys that would otherwise not take the case. *Id.* at 9; see also Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration, and the Case Against Union Waiver of the Individual Worker’s Statutory Right to a Judicial Forum*, 49 EMORY L.J. 135, 203 (2000) (suggesting that, despite the danger of waiving one’s right to a judicial forum, there are benefits to arbitration that may lead to employees opting to sign pre-dispute arbitration agreements).

Furthermore, arbitration is not an adversarial process, but rather an informal one that encourages the maintenance of the current employment relationship between the parties. See BALES, *supra* note 12, at 9-10; see also Patrick A. Lynd, *Recent Developments Regarding Mandatory Arbitration of Statutory Employment Disputes*, 77 OR. L. REV. 287, 288 (1998) (identifying as benefits of arbitration the ability to circumvent the backlog of the courts and keep costs such as attorney fees and discovery expenditures to a minimum).

<sup>96</sup> Haagen, *supra* note 24, at 1053.

<sup>97</sup> See *Gardner-Denver*, 415 U.S. at 56-58; *Gilmer*, 500 U.S. at 30-32.

<sup>98</sup> *Gardner-Denver*, 415 U.S. at 56. The Court based its conclusion on the inadequacies between the judicial and arbitral forum. *Id.* at 57-58. Specifically, the Court voiced its concern for the lack of discovery in arbitration, the possibility of biased arbitration panels, the incompleteness of the record in arbitration proceedings, the inapplicability of the Federal Rules of Civil Procedure and Evidence, the limited grounds for appeal, the absence of written opinions, and the unavailability of broad equitable relief. *Id.*

<sup>99</sup> *Gilmer*, 500 U.S. at 30 (quoting *Rodriguez de Quijas*, 490 U.S. at 481 (internal quotations omitted)).

<sup>100</sup> *Id.* The Court stated that “procedural inadequacies . . . [are] best left for resolution in *specific* cases.” *Id.* at 33 (emphasis added). By rejecting “generalized attacks” on arbitration, the *Gilmer* Court inferred that individualized claims of inadequacy in the arbitration process could be addressed should future

court's dismissal of *Gardner-Denver's* apprehensions, however, fails to allay the specific concerns surrounding the arbitration process as an appropriate forum for employees' statutory claims. *Gilmer* aside, a closer analysis reveals important differences between the judicial and arbitral forums, many of which weigh heavily against employee interests.<sup>101</sup>

One of the Supreme Court's principal concerns in *Gardner-Denver* was that arbitrators may lack the competency that courts have to understand and apply statutory law.<sup>102</sup> Many arbitrators are not judges, or even lawyers, and although they may be experts in a given business area, arbitrators lack the requisite training to handle statutory claims.<sup>103</sup> Furthermore, arbitrators are not bound by the rules of *stare decisis*, which may result in the overwhelming interjection of an arbitrator's business judgment into a purely legal decision.<sup>104</sup>

Another concern regarding the arbitration process is that there

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circumstances arise. See BALES, *supra* note 12, at 127-28. Therefore, it seems that the *Gilmer* Court implicitly acknowledged that inadequacies do exist in the arbitration of statutory employment rights. *Id.* at 128.

<sup>101</sup> See *infra* notes 102-28 and accompanying text. The statistics discussed *supra* note 20, which reveal a nine percent increase in the use of arbitration from 1995-1997, suggest that employers may perceive arbitration as being a much more favorable forum for the resolution of statutory claims. Furthermore, one commentator even characterizes the increase in arbitration as a "stampede" by employers in reaction to the *Gilmer* holding. William M. Howard, *Arbitrating Employment Discrimination Claims: Do You Really Have To? Do You Really Want To?*, 43 DRAKE L. REV. 255, 255 (1994).

<sup>102</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-58 (1974); see also Moore, *supra* note 12, at 1589-90 (citing a study indicating that sixteen percent of arbitrators never read a judicial opinion involving a Title VII claim; forty percent did not read labor advance sheets on new Title VII developments; and of those arbitrators who fit both categories, fifty percent nevertheless felt competent to preside over employment discrimination claims). History supports this concern, as arbitrators traditionally presided over contract disputes and collective bargaining agreements. See ZACK & BLOCH, *supra* note 28, at 39, 97.

<sup>103</sup> See ZACK & BLOCH, *supra* note 28, at 106-07.

<sup>104</sup> See Miriam A. Cherry, *Not-So-Arbitrary Arbitration: Using Title VII Disparate Impact Analysis to Invalidate Employment Contracts That Discriminate*, 21 HARV. WOMEN'S L.J. 267, 304 (1998). Aside from the questionable qualifications of arbitrators, commentators also question the selection procedures. See BALES, *supra* note 12, at 126-30; ELKOURI & ELKOURI SUPP., *supra* note 20, at 3. For example, employers will sometimes both select and pay an arbitrator. *Id.* (citing to a 1997 statement made by the Chairman of the NLRB in which he questioned why the NLRB should be deferential to an arbitral system that is set up and paid for by employers). Also, employers are often repeat players in the arbitration process, so there may exist an institutional bias for arbitrators to issue employer-friendly decisions. See Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPL. RTS. & EMPLOY. POL'Y J. 189 (1997) (discussing the "repeat player effect" in arbitration).



is no uniform law requiring arbitrators to issue written opinions.<sup>105</sup> Professor Leona Green points out two major problems that arise when arbitrators do not provide opinions.<sup>106</sup> First, the absence of opinions hinders any development of certainty and precedent.<sup>107</sup> Without an arbitrator's reasoning, neither employers nor employees receive guidance as to what behavior is actionable.<sup>108</sup> Similarly, other arbitrators have no precedent to rely upon when deciding cases, undoubtedly leading to inconsistent results.<sup>109</sup>

Second, Professor Green posits that the absence of written opinions makes judicial review nearly impossible.<sup>110</sup> Arbitration awards can be vacated for a "manifest disregard of the law," but courts have difficulty deciding whether an arbitrator exercised such disregard without a written opinion to review.<sup>111</sup> Furthermore, arbitrators can avoid being held accountable for their decisions because there are no written opinions to scrutinize.<sup>112</sup>

Although the absence of written opinions serves as one barrier

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<sup>105</sup> See *Gardner-Denver Co.*, 415 U.S. at 57-58 (pointing out that a major drawback of arbitration is that arbitrators are not required to issue written opinions); see also Hayford, *supra* note 12, at 445 ("[W]hen arbitrators do not provide substantive written awards revealing their mode of decision, judicial vacation of the award is virtually precluded."); Moore, *supra* note 12, at 1576; Green, *supra* note 12, at 202-03 (acknowledging the potential problems derived from the absence of written opinions of arbitrator's decisions).

<sup>106</sup> See Green, *supra* note 12, at 202-03 (assessing the potential pitfalls of the absence of written opinions).

<sup>107</sup> *Id.* at 202.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* Gilmer argued that the lack of a written opinion would disadvantage him in the exercise of his statutory rights. *Gilmer*, 500 U.S. at 31. The Court dismissed this contention by pointing to the NYSE rules which required arbitration awards to be in writing. *Id.* Professor Bales astutely observes, however, that the *Gilmer* Court erred in this respect, as the NYSE rules only required written *awards* which are to be distinguished from written *opinions*. BALEs, *supra* note 12, at 133. Therefore, Professor Bales concludes that the Court used a mistaken analysis to refute Gilmer's argument. *Id.*

<sup>110</sup> Green, *supra* note 12, at 203.

<sup>111</sup> *Id.*

<sup>112</sup> Moore, *supra* note 12, at 1594. Additionally, employers may also avoid public accountability keeping the potentially damaging publicity of discriminatory behavior below the public radar. See *Gilmer*, 500 U.S. at 31; see also Moore, *supra* note 12, at 1594. Green observes that civil rights statutes thrive on social vindication, but the private nature of arbitration prevents such vindication from occurring. Green, *supra* note 12, at 204. Therefore, Green concludes that avoiding the negative publicity of a civil rights dispute is an essential feature of arbitration for employers whose businesses are in competitive markets and rely heavily on goodwill. *Id.*; see also Sarah Johnston, *Alternative Dispute Resolution Symposium: Current Public Law and Policy Issues in ADR: ADR in the Employment Discrimination Context: Friend or Foe to Claimants*, 22 HAMLIN J. PUB. L. & POL'Y, 335, 379 (2001).

to judicial review of an

arbitrator's decision in a civil rights case,<sup>113</sup> a much larger concern is the extremely narrow grounds on which losing parties may appeal arbitration decisions. The FAA, unsurprisingly given its arbitration-friendly genesis, only allows a court to vacate or modify an arbitral award under very limited circumstances.<sup>114</sup> Appeals are not allowed, however, when an arbitrator misinterprets the law, fails to follow *stare decisis*, or is confronted with a novel legal issue.<sup>115</sup>

There is a common law ground for *vacatur* of arbitral decisions, known as the "manifest disregard of the law" standard,<sup>116</sup> which has been termed "a judicially-created addition to the statutory grounds set forth in the FAA."<sup>117</sup> According to the United States Court of Appeals for the Second Circuit, a decision should be overturned under the "manifest disregard" standard when the arbitrator "appreciates the existence of a clearly governing legal principle but decided to ignore it or pay no attention to it."<sup>118</sup> Lower courts have consistently identified "manifest disregard" as a severely limited doctrine,<sup>119</sup> and case law reveals that very few arbitration awards have ever been overturned based on this standard.<sup>120</sup> Accordingly, a

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<sup>113</sup> See Green, *supra* note 12, at 202-03.

<sup>114</sup> See Monica J. Washington, *Compulsory Arbitration of Statutory Employment Disputes: Judicial Review Without Judicial Reformation*, 74 N.Y.U. L. REV. 844, 850 (1999) (listing and analyzing the grounds for judicial review under the FAA). Under the FAA, modification of an arbitral award is only available: (1) when the award was "procured by corruption, fraud, or undue means"; (2) when evidence exists of "partiality or corruption in the arbitrators"; (3) when evidence of specific misconduct by the arbitrators exists; or (4) when "the arbitrators exceeded their powers." 9 U.S.C. § 10(a) (2002).

<sup>115</sup> Washington, *supra* note 114, at 850.

<sup>116</sup> The Supreme Court first identified the standard in *dicta* in *Wilko v. Swan*, discussed *supra* Part II.A. See Harding, *Redefinition of Arbitration*, *supra* note 22, at 926 (stating that the manifest disregard of the law standard finds its origin in *Wilko*); Washington, *supra* note 114, at 853-54.

<sup>117</sup> BALES, *supra* note 12, at 136; see also Washington, *supra* note 114, at 853-54 (pointing out the *Wilko* decision's "manifest disregard for the law" standard came twenty-seven years after the passage of the FAA).

<sup>118</sup> *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986); see also Washington, *supra* note 114, at 853-55 (discussing the manifest disregard standard and its limits).

<sup>119</sup> In a 1997 Policy Statement regarding mandatory arbitration, the EEOC cited a report identifying the "manifest disregard" standard as a "virtually insurmountable" hurdle. See THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *EEOC Notice No. 915.002, July 10, 1997*, at <http://www.eeoc.gov/docs/mandarb.html> (last visited Mar. 5, 2003) (on file with author).

<sup>120</sup> In his 1997 book, Professor Bales states that *no* arbitration award had ever been overturned based on the "manifest disregard" standard. BALES, *supra* note 12, at 136. Since Professor Bales's observation, the Second Circuit vacated an arbitration award

reviewing court cannot overturn or modify an arbitral award where the arbitrator merely misinterpreted, misapplied, or misunderstood clear principles of law.<sup>121</sup>

Commentators also voice concerns about the adequacy of arbitration for statutory claims because of the limited opportunity for discovery in arbitration.<sup>122</sup> The speed and efficiency of the arbitration process often results in abbreviated periods of discovery,<sup>123</sup> yet full discovery is often needed to pursue claims under Title VII and other anti-discrimination statutes.<sup>124</sup> Additionally, employees are disadvantaged by a limited opportunity for discovery because the relevant information and documentation sought by the employee in the discovery process is, quite often, already in the hands of the employers.<sup>125</sup> In the court system, victims of discrimination may compel the production of such information through the Federal Rules of Civil Procedure.<sup>126</sup> In the arbitral forum, however,

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denying an ADEA claim based on the “manifest disregard” standard. *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998). One commentator heavily criticized the decision as being a departure from precedent and argued that the decision was really overturned because the court disagreed with the arbitrator’s application of the evidence. See Norman S. Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 BROOK. L. REV. 471, 478-79 (1998).

<sup>121</sup> See *U.S. Energy Corp. v. Nukem Inc.*, Nos. 96-1532 & 97-1332, 1998 U.S. App. LEXIS 26878, at \*7-8 (10th Cir. Oct. 22, 1998) (stating “[t]he review of an arbitrator’s award is among the narrowest known to law,” and indicating that an arbitrator’s errors or misunderstanding of the law is not sufficient to overturn an award).

<sup>122</sup> See Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 PEPP. L. REV. 1, 23 (1999); Green, *supra* note 12, at 201.

<sup>123</sup> Bales, *supra* note 123, at 23.

<sup>124</sup> See Green, *supra* note 12, at 201 (explaining that access to information is especially important today because discrimination is much subtler than in the past; more information is therefore needed to prove the existence of discrimination). For example, pursuit of a disparate impact claim under Title VII often requires a complainant to provide statistical analysis based on workplace demographics; lack of access to this crucial information could potentially defeat an employees’ claim. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (defining a disparate impact claim as a theory of discrimination that makes it unlawful for an employer to utilize an employment practice—although facially neutral with no intention to discriminate—that has a significantly adverse impact on a protected group of employees). Therefore, “[m]ore restrictive discovery may leave a plaintiff with a meritorious claim unable to prove it.” Haagen, *supra* note 24, at 1053.

<sup>125</sup> See Green, *supra* note 12, at 220 (explaining that employees need the procedural safeguards offered in court to conduct discovery because employers usually control the information relevant to employment-related disputes).

<sup>126</sup> The rules of discovery safeguard the parties in the information sharing process. FED. R. CIV. P. 26-37. Main opponents to the mandatory arbitration of statutory claims, such as the EEOC and NLRB, are significantly concerned with losing the protection of the rules. See ELKOURI & ELKOURI SUPP., *supra* note 20, at 3.

employees are not guaranteed the fairness ensured by the Federal Rules.<sup>127</sup> Accordingly, abbreviated and informal discovery can be dangerously unfair to employees.

Generally, parties to an agreement choose arbitration because it is less expensive and often timelier than court proceedings.<sup>128</sup> The preceding analysis, however, suggests that arbitration may not be appropriate when important civil rights statutes are at stake. Although the informality of the arbitral forum aids the peaceful collective bargaining process between unions and management, that same informality can undermine important Congressional protections for employees' individual rights.

#### IV. POST-GILMER DECISIONS AND THE RESTORATION OF EMPLOYEE RIGHTS

Despite the pro-arbitration climate, modern jurisprudence indicates that the use of mandatory arbitration clauses in employment contracts may be susceptible to attack. The focus of this Comment now turns toward two potentially influential Supreme Court rulings.<sup>129</sup>

##### A. *Challenging the Arbitration Clause Itself*

In *Wright v. Universal Maritime Service Corp.*,<sup>130</sup> the United States Court of Appeals for the Fourth Circuit affirmed a district court ruling and dismissed an ADA claim, compelling the parties to arbitrate pursuant to an arbitration clause contained in the collective bargaining agreement.<sup>131</sup> When the Supreme Court granted *certiorari* to review the case, the circumstances seemed ripe for the Court to resolve the existing conflict between *Gardner-Denver* and *Gilmer*.<sup>132</sup>

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<sup>127</sup> See BALES, *supra* note 12, at 151 (stating "the absence of formal rules may favor the employer because, as with discovery, procedural rules help level the playing field").

<sup>128</sup> *Id.* at 10; see also Harding, *Redefinition of Arbitration*, *supra* note 22, at 857.

<sup>129</sup> Subsection A analyzes the decision in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), and subsection B addresses the Supreme Court's holding in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

<sup>130</sup> 525 U.S. 70 (1998).

<sup>131</sup> *Wright v. Universal Maritime Serv. Corp.*, No. 96-2850, 1997 U.S. App. LEXIS 19299, at \*5-6 (4th Cir. July 29, 1997).

<sup>132</sup> Arguments on both sides addressed the two cases, inviting the Court to realign the status of agreements to arbitrate statutory claims. *Wright*, 525 U.S. at 77. *Wright* argued for the reaffirmation of *Gardner-Denver*, which would preclude his ADA claim from being compelled to arbitration; in contrast, the respondent argued that *Gilmer* has, over time, effectively nullified *Gardner-Denver*. *Id.*; see also Rosetta E. Ellis, *Mandatory Arbitration Provisions in Collective Bargaining Agreements: The Case Against*

Although acknowledging that “[t]here is obviously some tension between these two lines of cases,”<sup>133</sup> the Court found it “unnecessary to resolve the question of the validity of a union-negotiated waiver.”<sup>134</sup>

Instead, the *Wright* Court scrutinized the language of the arbitration agreement and refused to interpret an arbitration clause as mandating arbitration of a statutorily protected right unless the language included a “clear and unmistakable” waiver.<sup>135</sup> Regardless of the legality of a prospective waiver of a judicial forum for a civil rights claim, the Court ruled that, at the very least, such a waiver should be explicitly established.<sup>136</sup> In this case, the arbitration clause contained in the CBA, which covered “all matters affecting wages, hours, and other terms and conditions of employment,” did not explicitly include Wright’s federal statutory employment discrimination claim.<sup>137</sup> Accordingly, a unanimous Court vacated the Fourth Circuit’s decision.<sup>138</sup>

*Wright* is significant for a variety of reasons. It would have been easy for the *Wright* Court to cite developing circuit court precedent<sup>139</sup> and refuse to uphold any union waiver of individual rights. The Court’s failure to do so, however, suggests that the Court is hesitant to adopt the circuits’ view, thus shrouding those opinions in doubt.<sup>140</sup>

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*Barring Statutory Discrimination Claims From Federal Court Jurisdiction*, 86 VA. L. REV. 307, 319 (2000) (summarizing the parties’ arguments on appeal). The Court did, in fact, question whether *Gardner-Denver* survived *Gilmer*. *Wright*, 525 U.S. at 79-81. The Court remained neutral, however, and was hesitant to adopt or overrule either decision. *Id.*

<sup>133</sup> *Wright*, 525 U.S. at 76.

<sup>134</sup> *Id.* at 77. As to reconciling the two decisions, the Court observed that *Gilmer*’s presumption of arbitrability is strong, but at the same time, the presumption should only apply to an arbitrator’s interpretation of the terms of the CBA. *Id.* at 79.

<sup>135</sup> *Id.* at 80.

<sup>136</sup> *Id.* at 79-80.

<sup>137</sup> *Id.* at 81. The Court indicated that to satisfy the clear and unmistakable standard, it was looking for specific incorporation of statutory antidiscrimination claims in the arbitration clause. *Id.* at 80.

<sup>138</sup> *Id.* at 82.

<sup>139</sup> Quite a few circuits take the position that an individual’s statutory rights may not be waived through a CBA. See *Rogers v. N.Y. Univ.*, 220 F.3d 73, 75 (2d Cir. 2000); *Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 630 (6th Cir. 1999); *Air Line Pilots Ass’n, Int’l v. Northwest Airlines, Inc.*, 199 F.3d 477, 481 (D.C. Cir. 1999), *judgment reinstated en banc*, 211 F.3d 1312 (D.C. Cir. 2000); *Albertson’s, Inc. v. United Food & Commercial Workers Union*, 157 F.3d 758, 762 (9th Cir. 1998), *cert. denied*, 528 U.S. 809 (1999); *Brisentine v. Stone & Webster Eng’g Corp.*, 117 F.3d 519, 522 (11th Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1454 (10th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997); *Varner v. Nat’l Super Mkts., Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996).

<sup>140</sup> By ignoring the *Gilmer* and *Gardner-Denver* conflict and adding a new “clear and unmistakable” standard, the Court contributed to, rather than alleviated, the

Moreover, the *Wright* decision relies partly on the court's recognition of the importance of the right to a judicial forum, a right specifically discounted in *Gilmer*.<sup>141</sup> By scrutinizing the language of arbitration agreements, the Court is acknowledging the importance of employees' right to a judicial forum by protecting against unknowing or unclear waivers. Finally, *Wright* creates a new avenue of attack for employees seeking access to a judicial forum.

The Court, however, significantly limited the application of the "clear and unmistakable" standard by scrutinizing only those arbitration clauses contained in CBAs, and not individual employment contracts.<sup>142</sup> To be more effective, courts should extend the holding to situations involving individual employees. Individual employees need the protection offered by the "clear and unmistakable" standard because of their lack of bargaining power. To safeguard employees from forcibly signing an arbitration agreement as a condition of employment, at a minimum courts should require the waiver of substantive rights to be readily apparent to the employee. Accordingly, the potential force and impact of *Wright* will not be felt until a future court extends the "clear and unmistakable" principle to a non-unionized employee.

#### *B. The EEOC and the Circumvention of Mandatory Arbitration*

The Equal Employment Opportunity Commission ("EEOC") is the administrative body responsible for the enforcement of Title VII,

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continuing confusion. See Ellis, *supra* note 132, at 320-21 (stating that *Wright* failed to address the *Gilmer-Gardner-Denver* ambiguities and left behind "an equally ambiguous 'clear and unmistakable' standard.").

<sup>141</sup> *Wright*, 525 U.S. at 80. Another potential reason for the adoption of the "clear and unmistakable" standard is to prevent implicit or hidden presentation of an arbitration clause to a union negotiator, who would not expect to have the authority to bargain away employees' substantive rights. See John E. Taylor, *Helping Those Who Help Themselves: The Fourth Circuit's Treatment of Agreements to Arbitrate Statutory Employment Discrimination Claims in Brown v. ABF Freight Systems, Inc. and EEOC v. Waffle House, Inc.*, 79 N.C. L. REV. 239, 291 (2000).

Another proffered reason supporting the Court's position is the importance of union members clearly understanding the terms of the collective bargaining agreements for which they vote. *Id.* at 292. Read collectively, the "clear and unmistakable" standard will avoid a situation where "important employee rights might be waived without the awareness of either union negotiators or individual employees." *Id.*

<sup>142</sup> Justice Scalia clearly stated that the "clear and unmistakable" standard was not applicable in a *Gilmer* setting, which did not involve a collective bargaining agreement but rather an individual employment contract. *Wright*, 525 U.S. at 80-81.

the ADA, and the ADEA.<sup>143</sup> If the EEOC finds that reasonable cause<sup>144</sup> exists to believe that discrimination occurred, it may elect to pursue the claim in federal court.<sup>145</sup> The interplay between EEOC-led suits on behalf of aggrieved employees and mandatory arbitration agreements has placed the courts in a unique position. Questions exist as to how an arbitration agreement affects the EEOC's responsibilities to an individual employee.<sup>146</sup> In *EEOC v. Waffle House, Inc.*,<sup>147</sup> the Supreme Court sought to resolve the confusion.<sup>148</sup>

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<sup>143</sup> The EEOC was created by statutory authority under Title VII and is codified at 42 U.S.C. § 2000e-4 (1994). The EEOC is also the enforcing body of the ADA, 42 U.S.C. § 12117(a) (2003) (indicating that the powers, remedies, and procedures of the ADA are the same as those of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2 (2003)). The EEOC also enforces the Equal Pay Act and the Rehabilitation Act of 1973. See 42 U.S.C. § 12117(a) (2003).

To preserve the right to sue under the Act, aggrieved employees must file a complaint with the EEOC within 300 days of the alleged discrimination. 42 U.S.C. § 2000e-5(e)(1) (2003). If the EEOC finds that the charge is without merit, it will close the matter. See THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *EEOC Enforcement Activities*, at [www.eeoc.gov/enforce.html](http://www.eeoc.gov/enforce.html) (last visited Apr. 16, 2002) (on file with author). If, however, it determines that there is reasonable cause to believe that the discrimination took place, it will attempt to conciliate the charge through a voluntary resolution between the parties. *Id.*

The EEOC will issue a "right to sue" letter if it believes there is a valid claim but chooses not to pursue the claim. 42 U.S.C. § 2000e-5(f)(1) (2003). In 2000, the EEOC filed a mere 291 direct suits out of the 79,896 charges it received. See EEOC Homepage, at [www.eeoc.gov/stats/charges.html](http://www.eeoc.gov/stats/charges.html) (last visited Apr. 16, 2002) (on file with author). Therefore, of the approximately 79,600 individuals whose claims did not get picked up by the EEOC, all those whose claims had merit received right to sue letters. *Id.*

<sup>144</sup> After an investigation, if the EEOC determines that "there is reasonable cause to believe that the charge is true," the EEOC must use "informal methods of conference, conciliation, and persuasion" to end the unlawful employment practice. 42 U.S.C. § 2000e-5(b) (2003). If the EEOC's conciliation efforts are unsuccessful after 30 days, it may file a civil action in federal district court. 42 U.S.C. § 2000e-5(f) (2003).

<sup>145</sup> 42 U.S.C. § 2000e-5(f) (2002). As originally enacted, the EEOC had only investigative powers. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 286 (2002). To give the EEOC teeth and to ensure better compliance with the statute, Congress amended Title VII in 1972 and gave the EEOC the right to pursue claims in federal court in its own name. *Id.*

<sup>146</sup> The circuits are split on the issue of damages. In *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 460 (6th Cir. 1999), the Sixth Circuit allowed the EEOC to bring an action for injunctive relief, back pay, and damages—despite the existence of an arbitration agreement. Both the Second and Eighth Circuits, however, limit the EEOC to the pursuit of injunctive relief only, holding that monetary relief on behalf of the employee was precluded by the arbitration agreement. See *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 303 (2d Cir. 1998); *Merrill, Lynch, Pierce, Fenner and Smith, Inc. v. Nixon*, 210 F.3d 814, 818 (8th Cir. 2000), *cert. denied*, 531 U.S. 958 (2000).

<sup>147</sup> 534 U.S. 279 (2002).

<sup>148</sup> For a more detailed description about the circuit split, see Martin H. Malin,

Believing that Waffle House employee Baker was wrongfully discharged in violation of the ADA,<sup>149</sup> the EEOC filed suit seeking both broad injunctive relief against discriminatory employment practices and appropriate relief for Baker.<sup>150</sup> In response, Waffle House moved to compel arbitration pursuant to Baker's signed application form which contained an arbitration clause.<sup>151</sup> The United States Court of Appeals for the Fourth Circuit held that the EEOC may seek injunctive relief in the federal forum, but that the FAA policy favoring arbitration outweighs the EEOC's right to seek victim-specific relief on behalf of Baker.<sup>152</sup>

In a 6-3 decision, the Supreme Court reversed the Fourth Circuit and ruled that the existence of a mandatory arbitration agreement did not limit the remedies available to the EEOC.<sup>153</sup> The Court stated that the EEOC has the statutory authority to request compensatory

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*Privatizing Justice—But By How Much? Questions Gilmer Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589, 622-24 (2001).

<sup>149</sup> See 42 U.S.C. §§ 12101-213 (2003), discussed *supra* Part II.C.

<sup>150</sup> *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 807 (4th Cir. 1999), *rev'd*, 534 U.S. 279 (2002). Specifically, the EEOC sought injunctive relief “to eradicate the effects of [Waffle House’s] past and present unlawful employment practices.” *Waffle House*, 534 U.S. at 283. To make Baker whole, the EEOC requested back pay, reinstatement, compensatory damages, and punitive damages for what the EEOC termed as malicious and reckless conduct. *Id.* at 284.

<sup>151</sup> *Waffle House*, 193 F.3d at 807. The relevant provision required binding arbitration for “any dispute or claim concerning Applicant’s employment with Waffle House, Inc., or the terms, conditions, or benefits of such employment.” *Id.*

<sup>152</sup> *Waffle House*, 193 F.3d at 812. The district court denied Waffle House’s motion, ruling that the agreement was invalid because Baker signed the application at a different Waffle House location. *Id.* at 808. In disagreeing with the district court, the circuit court engaged in somewhat of a balancing act. *Id.* at 811-12. The court ruled that Congress invested in the EEOC independent authority to enforce the ADA’s ban on discrimination, and therefore its power to bring suit cannot be impaired by an individual’s agreement to arbitrate. *Id.* (“[T]he EEOC, when acting in its public role, is not bound by private arbitration agreements.”). The court also observed, however, that the role of the EEOC in vindicating individual interests “implicates the competing federal policy” of the FAA, and thus permitting the pursuit of Baker’s interests “would significantly trample this strong policy.” *Id.* at 812.

<sup>153</sup> *Waffle House*, 534 U.S. at 297-98. In reversing the Fourth Circuit, the Court also overturned the decisions of the Second Circuit in *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998), and the Eighth Circuit in *Merrill, Lynch, Pierce, Fenner and Smith, Inc. v. Nixon*, 210 F.3d 814 (8th Cir. 2000), *cert. denied*, 531 U.S. 958 (2000). The Court opined that the circuit court’s “compromise solution . . . turns what is effectively a forum selection clause into a waiver of a nonparty’s statutory remedies.” *Id.* at 295. Justice Stevens found the balancing act unworkable because it would deprive the EEOC of the right to pursue punitive damages. *Id.* at 294-95. The Justice determined that punitive damages serve both the victim’s interests and the public’s interest because punitive damages often act as the greatest deterrent against future unlawful behavior. *Id.*



and punitive damages, and there is no language suggesting that the presence of an employee arbitration agreement “materially changes” the EEOC’s statutory function or rights.<sup>154</sup> The Court concluded that the EEOC has independent statutory authority, is “the master of its own case,” and should, therefore, be unaffected by an arbitration agreement to which it is not a party.<sup>155</sup> Accordingly, the EEOC has the discretion to pursue both injunctive and victim-specific relief regardless of whether employees themselves may be precluded from seeking such relief.<sup>156</sup>

In a lengthy dissent, Justice Thomas, joined by Justice Scalia and Chief Justice Rehnquist, suggests that the majority opinion is unprincipled and lacks statutory support.<sup>157</sup> The Justice disagrees “that the EEOC may do on behalf of an employee that which an employee has agreed not to do for himself.”<sup>158</sup> Justice Thomas believes that allowing an employee “two bites at the apple—one in arbitration and one in litigation conducted by the EEOC”<sup>159</sup> is inappropriate and in contravention of the FAA.<sup>160</sup> The Justice observes that the end result of the majority’s opinion is to discourage the use of arbitration agreements, therefore contradicting the intent of Congress embodied in the pro-arbitration FAA.<sup>161</sup>

Despite the dissenters, the Supreme Court in *Waffle House* provides another limited avenue for employees with discrimination claims to avoid being compelled to arbitrate. While *Wright* and *Waffle House* evidence a growing concern among members of the Supreme

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<sup>154</sup> *Waffle House*, 534 U.S. at 288.

<sup>155</sup> *Id.* at 291. In its statutory analysis, the Court also paid cursory attention to the FAA. *Id.* at 288-89. Justice Stevens acknowledged the liberal federal policy favoring arbitration, but also stated that the FAA does not mention its applicability to the EEOC: “[t]he FAA does not mention enforcement by public agencies; it ensures the enforceability of private agreements to arbitrate, but otherwise does not purport to place any restriction on a nonparty’s choice of a judicial forum.” *Id.* at 289.

<sup>156</sup> The Court did note that principals of *res judicata* apply, so the EEOC’s remedies may be limited by the out-of-court activity by the employee, such as the acceptance of an arbitration settlement. *Waffle House*, 534 U.S. at 296-97. In the instant situation, however, Baker immediately filed with the EEOC and took no individual steps to secure vindication. *Id.* at 297.

<sup>157</sup> Throughout his dissent, Justice Thomas attacks both the majority’s reasoning and the practicality of the decision. *Id.* at 298-315 (Thomas, J., dissenting). As to the reasoning, he finds an “utter lack of statutory support for the Court’s holding.” *Id.* at 315 (Thomas, J., dissenting). As to the practicality, Justice Thomas laments that the decision puts the Court on a slippery slope towards effectively invalidating arbitration agreements signed by employees. *Id.* at 311-12 (Thomas, J., dissenting).

<sup>158</sup> *Id.* at 298 (Thomas, J., dissenting).

<sup>159</sup> *Waffle House*, 534 U.S. at 310 (Thomas, J., dissenting).

<sup>160</sup> *Id.* at 308 (Thomas, J., dissenting).

<sup>161</sup> *Id.* at 312 (Thomas, J., dissenting).

Court, the modern landscape of mandatory arbitration has little room for change. For this reason, it is important to propose and examine other potential developments with the hope that employees get their “bite at the apple.”

#### V. EMPOWERING EMPLOYEES TO PRESERVE THEIR RIGHTS

The Supreme Court has taken few steps to alleviate the tension between the FAA’s pro-arbitration policy and the concern for proper enforcement of employment anti-discrimination statutes. The *Wright* decision safeguards employees from hidden and/or vague arbitration agreements, ensuring that such agreements are “clear and unmistakable.”<sup>162</sup> Although the “clear and unmistakable” standard is a step in the right direction, it is limited to the labor union context and has yet to be applied to individual employment contracts.<sup>163</sup>

In *Waffle House*, the Court ruled that the EEOC can pursue victim-specific relief on behalf of employees who have otherwise waived the right to a judicial forum through an arbitration agreement.<sup>164</sup> The *Waffle House* decision, however, has very little practical significance because of the EEOC’s limited resources.<sup>165</sup> Thus, even though *Waffle House* establishes an opportunity for an employee to circumvent an arbitration agreement, that opportunity is not readily available.

Other avenues exist that may also help employees get their “bite at the apple.” The FAA states that an arbitration clause is valid and enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>166</sup> Based on this language, courts may scrutinize arbitration clauses using common law contract principles without offending the purpose of the FAA. One such principle is the doctrine of unconscionability.<sup>167</sup>

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<sup>162</sup> See *supra* notes 130-142 and accompanying text.

<sup>163</sup> *Wright*, 525 U.S. at 80-81. For an example of the continuing vitality of the *Wright* distinction between collective bargaining agreements and individual employment contracts, see *Williams v. Imhoff*, 203 F.3d 758, 763 (10th Cir. 2000).

<sup>164</sup> See *supra* notes 147-161 and accompanying text.

<sup>165</sup> Statistics show that in 2000, the EEOC filed just 290 direct suits—less than one percent of the 79,896 charges it received. THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *EEOC Litigation Statistics, FY 1992 through FY 2002*, at <http://www.eeoc.gov/stats/litigation.html> (last visited Mar. 31, 2003) (on file with author); see also THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Charge Statistics FY 1992 through FY 2002*, at <http://www.eeoc.gov/stats/charges.html> (last visited Mar. 31, 2003) (on file with author).

<sup>166</sup> 9 U.S.C. § 2 (2003).

<sup>167</sup> The doctrine of unconscionability varies by state, but “has generally been recognized to include an absence of meaningful choice on the part of one of the

The most notable example of the unconscionability rationale comes from the United States Court of Appeals for the Ninth Circuit in *Circuit City Stores v. Adams*.<sup>168</sup> The court determined that Circuit City's arbitration clause was procedurally unconscionable because it was a form contract, was drafted by the party with superior bargaining power, and was presented to prospective employees on a take-it-or-leave-it basis.<sup>169</sup> The court also found the agreement substantively unconscionable for the following reasons: (1) the agreement was not bilateral;<sup>170</sup> (2) the agreement limited the relief available to aggrieved employees that was otherwise available under the state discrimination statutes; and (3) the arbitration clause required Adams to split the arbitration fees with Circuit City.<sup>171</sup> *Circuit City* shows that courts may closely scrutinize arbitration agreements for terms that unfairly skew arbitration in favor of the employer.<sup>172</sup>

Courts are responsible for determining whether or not a specific

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parties together with contract terms which are unreasonably favorable to the other party." CORBIN ON CONTRACTS § 5.15 (2002).

<sup>168</sup> 279 F.3d 889 (9th Cir. 2002), *cert. denied*, 535 U.S. 1112 (2002). As an employment policy, Circuit City requires prospective applicants sign its Dispute Resolution Agreement in order to apply for a job. *Id.* at 891. Adams' state sexual harassment claims were dismissed pursuant to the agreement, which Adams subsequently challenged as an unconscionable contract of adhesion. *Id.* at 891-92. The Ninth Circuit concluded that "Circuit City has devised an arbitration agreement that functions as a thumb on Circuit City's side of the scale . . . such an arrangement is unconscionable under California law." *Id.* at 892.

For a similar case finding an arbitration agreement unconscionable, see *Hooters of Am. v. Phillips*, 39 F. Supp. 2d 582 (D.S.C. 1998), *aff'd*, 173 F.3d 933 (4th Cir. 1999); *see also* Johnston, *supra* note 112, at 363-66 (analyzing *Hooters*).

<sup>169</sup> *Circuit City*, 279 F.3d at 893.

<sup>170</sup> While Adams agreed to pursue all claims through arbitration, Circuit City undertook no such obligation. *Id.* at 894.

<sup>171</sup> *Id.* The Circuit City agreement indicates that not only do some employers require employees to waive their statutory right to a jury trial, but they can also manipulate the arbitration process itself through the agreement. *See infra* notes 212-213 for another example of such manipulation.

<sup>172</sup> In addition to the specific terms the court found problematic in *Circuit City*, the court also identified an exhaustive list of unfair provisions in the Hooters arbitration agreement. *Hooters*, 39 F. Supp. 2d at 614-16. In *Gourley v. Yellow Transp., L.L.C.*, the disputed arbitration agreement contained a clause prohibiting the filing of post-trial briefs. 178 F. Supp. 2d 1196 (D. Colo. 2001). The court found the agreement unenforceable, because such a restriction would interfere with the ability to obtain attorney's fees under Title VII. *Id.* at 1204; *see also* DeGaetano v. Smith, Barney, Inc., 983 F. Supp. 459, 469 (S.D.N.Y. 1997) (declaring that an arbitration agreement is void for public policy if it denies a Title VII claimant the right to recover attorney's fees); *Malone v. Bechtel Int'l, Inc.*, Civil No. 2001/142, 2002 U.S. Dist. LEXIS 1112, at \*3-10 (Dist. V.I. Jan. 22, 2002) (granting motion to compel arbitration after conducting intensive, fact-specific inquiry in which the court created rather lofty hurdles for unconscionability claims).

dispute is within the scope of the agreement,<sup>173</sup> and they have used that authority when refusing to compel arbitration of statutory claims.<sup>174</sup> The *Wright* Court's development of the "clear and unmistakable" standard is an example of how courts may construe strictly the scope of an arbitration agreement.<sup>175</sup> New Jersey crafted a standard similar to *Wright* in *Quigley v. KPMG Peat Marwick, LLP*.<sup>176</sup> The arbitration clause in question required arbitration of "[a]ny claim or controversy . . . arising out of or relating to this Agreement or the breach thereof, or in any way related to the terms and conditions" of employment.<sup>177</sup> Although seemingly a broad and inclusive agreement, the court determined that when the waiver of the right to a jury trial<sup>178</sup> in favor of arbitration is involved, the arbitration clause should "clearly state its purpose" and "any waiver of a statutory right 'must be clearly and unmistakably established.'"<sup>179</sup>

A "clear and unmistakable" waiver standard will protect employees from signing an unsuspecting waiver and help them to better understand their rights regarding arbitration. This solution, however, is merely short-term patchwork. Employers can easily revamp their arbitration clauses to specifically include statutory

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<sup>173</sup> *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (stating that unless the agreement calls for an arbitrator to decide the scope of arbitrability, it is for the courts to decide which issues the parties agreed to arbitrate).

<sup>174</sup> *See Wright v. Univ. Maritime Serv. Corp.*, 525 U.S. 70, 82 (1998); *Quigley v. KPMG Peat Marwick, L.L.P.*, 330 N.J. Super. 252, 749 A.2d 405 (App. Div.), *cert. denied*, 165 N.J. 527 (2000).

<sup>175</sup> *Wright*, 525 U.S. at 82.

<sup>176</sup> In *Quigley*, the trial court dismissed the defendant's age discrimination claim under New Jersey's Law Against Discrimination (LAD), codified at N.J.S.A. § 10:5-1 to 49 (2001). *Quigley*, 330 N.J. Super. at 256, 749 A.2d at 407. The plaintiff argued that the arbitration clause was ambiguous and did not encompass claims of discrimination under LAD. *Id.* at 270, 749 A.2d at 415.

<sup>177</sup> *Id.* at 272, 749 A.2d at 416.

<sup>178</sup> The New Jersey Law Against Discrimination did not originally provide for a right to a judicial forum. *Id.* at 267, 749 A.2d at 414. In *Shaner v. Horizon Bancorp.*, the court dismissed an age discrimination claim brought under LAD, ruling that if the legislature intended to provide the right to a jury under LAD, it would have expressly indicated such intent. 116 N.J. 433, 561 A.2d 1130 (1989). In response to *Shaner*, the state legislature amended LAD in 1990 to grant a plaintiff the right to a jury trial. *See Quigley*, 330 N.J. Super. at 267, 749 A.2d at 414; N.J. S.A. § 10:5-13 (2003).

<sup>179</sup> *Quigley*, 330 N.J. Super. at 271, 749 A.2d at 415 (citing *Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Educ.*, 78 N.J. 122, 140, 393 A.2d 267, 276 (1978) (internal quotations omitted)). The court refused to read the contractual language expansively, stating that "[i]f defendant wanted to . . . bind plaintiff to arbitration under all circumstances, it should have written an inclusive arbitration clause." *Id.* at 273, 749 A.2d at 417. Apparently, the court was looking for the specific mention of discrimination claims or those involving statutory rights. *Id.* at 270, 749 A.2d at 415.

claims such as Title VII. A larger problem, however, still exists: even if faced with an explicit arbitration clause, employees must sign the agreement if they want a job.

As the number of employers requiring employees to sign mandatory arbitration agreements increases, the debate on the application of arbitration agreements to statutory claims continues with fervor.<sup>180</sup> A major concern is the conflict between the supposed “voluntary” nature of arbitration and the lack of employee leverage to refuse or renegotiate an arbitration clause.<sup>181</sup> Many courts cite *Gilmer* with approval as they enforce agreements to arbitrate Title VII and ADA claims.<sup>182</sup> It is important, however, to establish a middle ground where the pro-arbitration *Gilmer* policy can be preserved while ensuring that the arbitration process is truly “voluntary.” After all, “American workers should not be forced to choose between their jobs and their civil rights.”<sup>183</sup>

#### A. *The Retaliation Clause*

This Comment proposes that courts should empower employees to refuse to sign away their statutory right to trial for all potential future claims. This proposal does not directly conflict with *Gilmer*, but rather carves out an exception that protects employers from taking retaliatory action against employees who “voluntarily” choose not to sign an arbitration agreement. One possible avenue is for courts to invoke the anti-retaliation provisions contained in the federal employment discrimination statutes.<sup>184</sup>

Title VII, the ADEA, and the ADA all contain anti-retaliation clauses that prohibit discrimination against an individual for engaging in activity protected under the statute.<sup>185</sup> Specifically, the

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<sup>180</sup> See *supra* note 20; see also *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 8 n.4 (1st Cir. 1999) (citing to various law review articles that either criticize or support the use of mandatory arbitration).

<sup>181</sup> See *Rosenberg*, 170 F.3d at 9-10 (discussing the legislative history of the 1991 CRA in which committee members voiced concerns over preserving the voluntary nature of arbitration). Not only do employers include arbitration clauses in their standard employment agreements, but they can also be found in job applications, meaning that employees must submit to an arbitration provision before even being considered for the job. See *Waffle House*, 534 U.S. at 282-83 (example of employee signing agreement contained on job application).

<sup>182</sup> The First Circuit identified the numerous circuits that have followed *Gilmer* with respect to Title VII claims, including: the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits. *Rosenberg*, 170 F.3d at 10.

<sup>183</sup> H.R. REP. NO. 40(I)-102d Cong., pt. 1, at 104 (1991).

<sup>184</sup> See *infra* note 185.

<sup>185</sup> The anti-retaliation provision in Title VII can be located at 42 U.S.C. § 2000e-

provisions make it unlawful for an employer to discriminate against an individual because that individual has “opposed any practice made an unlawful employment practice by [this Act], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.”<sup>186</sup> These anti-retaliation statutes exist to enable employees to invoke their statutory rights without fear of employer retaliation.<sup>187</sup>

The ADA contains an additional anti-retaliation provision that may protect an employee who refuses to sign an arbitration agreement.<sup>188</sup> This provision, which “arguably sweeps more broadly than the first,”<sup>189</sup> reads: “It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of . . . any right granted or protected by this [Act].”<sup>190</sup> According to this language, an employer cannot “interfere” with an individual in the exercise of “any right” granted in the ADA.<sup>191</sup>

To utilize the ADA’s retaliation statute, a court must first determine whether the right to a jury trial in Title VII and ADA cases, passed as amendments to Title VII of the 1991 CRA, can co-exist with *Gilmer*. Second, that court needs to decide if the retaliation clause’s reference to “any right granted or protected by this Act” includes procedural rights and is not limited to the enumerated substantive rights.

### 1. The Jury Trial Right of the 1991 CRA Can Co-Exist With *Gilmer*

First, it is important to analyze whether *Gilmer* forecloses a court from considering the jury trial right as a basis for invalidating an

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3(a) (2003), for the ADA at 42 U.S.C. § 12203(a) (2003), and for the ADEA at 29 U.S.C. § 623(d) (2003). Other employment discrimination statutes mentioned in this Comment also have anti-retaliation provisions. See 29 U.S.C. § 158(a)(4) (2003) (National Labor Relations Act); 29 U.S.C. § 215(a)(3) (2003) (Fair Labor Standards Act); and 29 U.S.C. § 660(c)(1) (2003) (Occupational Safety and Health Act).

<sup>186</sup> 42 U.S.C. § 2000e-3(a) (2003). The language quoted is almost identical to the language found in the anti-retaliation provisions of the ADEA and ADA. See 42 U.S.C. § 12203(a) (ADA); 29 U.S.C. § 623(d) (ADEA).

<sup>187</sup> Melissa A. Essary & Terence D. Friedman, *Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts*, 63 MO. L. REV. 115, 118 (1998).

<sup>188</sup> See 42 U.S.C. § 12203(b) (2003). Title VII and the ADEA do not contain this additional provision.

<sup>189</sup> *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 570 (3d Cir. 2002) (quoting *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778, 789 (3d Cir. 1998) (distinguishing between § 12203(a) and § 12203 (b)).

<sup>190</sup> 42 U.S.C. § 12203(b) (2003).

<sup>191</sup> *Id.*

arbitration agreement. *Gilmer* decided that the right to a judicial forum does not alter an employee's substantive rights protected by a federal statute.<sup>192</sup> Because *Gilmer* predated the 1991 CRA, however, the Court could not consider Congress's explicit grant of the right to a jury trial contained in the Act.<sup>193</sup> In *Rosenberg v. Merrill Lynch*,<sup>194</sup> the United States Court of Appeals for the First Circuit sided with *Gilmer*, ruling that Title VII, as amended by the 1991 CRA, does not prohibit arbitration agreements.<sup>195</sup> The court relied on the *Gilmer* rule that "pre-dispute arbitration clauses should be enforced unless the plaintiff could show congressional intent to preclude arbitration."<sup>196</sup> The court, following *Gilmer*, found that the statute's text and legislative history did not reveal such intent, and, further, that there was no conflict between the goals of arbitration and the goals of Title VII.<sup>197</sup>

The First Circuit reasoned, in part, that *Wright* supported its reliance on *Gilmer*.<sup>198</sup> This conclusion is flawed because, first, the *Wright* court specifically refused to rule on the validity of a union-negotiated waiver of a jury right even though it could have invoked *Gilmer*.<sup>199</sup> Further, the *Wright* Court premised its adoption of the "clear and unmistakable" standard on the importance of the right to a judicial forum, an idea that contradicts the reasoning in *Gilmer*.<sup>200</sup>

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<sup>192</sup> *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

<sup>193</sup> BALES, *supra* note 12, at 52. In fact, *Gilmer* was decided six months before passage of the 1991 CRA. *Id.*

<sup>194</sup> *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999).

<sup>195</sup> *Id.* at 7.

<sup>196</sup> *Id.* at 8. *Gilmer* states: "[i]f Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history." *Gilmer*, 500 U.S. at 29 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628).

<sup>197</sup> *Rosenberg*, 170 F.3d 8, 11. In support of this conclusion, the circuit court pointed out that *Gilmer* endorsed arbitration in an ADEA case even though the ADEA provides for a judicial forum. *Id.* at 11. The First Circuit also articulated that the "statute will continue to serve both its remedial and deterrent function," whether in court or in arbitration. *Id.* (citing *Gilmer*, 500 U.S. at 28).

<sup>198</sup> *Id.* at 11-12. The First Circuit argues that *Wright* reinforces *Gilmer*, yet concludes its analysis weakly: "[b]ut nothing in the opinion suggests that *Gilmer* is not still good law; rather, the contrary is true." *Id.* at 12.

<sup>199</sup> *Wright*, 525 U.S. at 77.

<sup>200</sup> *Id.* at 80 (stating that whether or not *Gardner-Denver* survives *Gilmer*, it "at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected . . .").

Although the First Circuit in *Rosenberg* suggests that the right to a judicial forum is not protected under *Gilmer*, its argument stands on shaky ground due to both the post-*Gilmer* grant of a jury trial right in the 1991 CRA and the court's misguided reliance on *Wright*, which recognizes the importance of the jury right for victims of discrimination.

Despite its sweeping holding, *Rosenberg* stated “*Gilmer* does not mandate enforcement of *all* arbitration agreements,” thus leaving room for exceptions to be made.<sup>201</sup> The relevant portion of the 1991 CRA amendment to Title VII, Section 118, states: “where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.”<sup>202</sup> Even though the *Rosenberg* court followed *Gilmer*, it *refused* to enforce the arbitration clause at issue because, under Section 118, “agreements to arbitrate employment discrimination claims should be enforced only where ‘appropriate.’”<sup>203</sup>

While deciding not to enforce the arbitration clause because it would not be “appropriate,” the court failed to delineate a standard to determine whether an agreement is “appropriate” or not.<sup>204</sup> The court cited with approval to the *Wright* “clear and unmistakable” requirement imposed on union waivers of a federal judicial forum,<sup>205</sup> claiming it to be a proper use of the “where appropriate” language.<sup>206</sup> Thus, although *Rosenberg* holds that the 1991 CRA amendments do not preclude enforceability of mandatory arbitration agreements, the court indicates that there are certain situations where arbitration is not appropriate.<sup>207</sup> With such an undefined standard, the court left the door open to other situations where an agreement may be inappropriate, such as when an employer fires an employee for refusing to sign away the right to a judicial forum.

It is evident from the *Rosenberg* court's application of the “where

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<sup>201</sup> *Rosenberg*, 170 F.3d at 16 (emphasis added).

<sup>202</sup> *Id.* at 8 (citing Civil Rights Act of 1991, Pub. L. No. 102-166, 118, 105 Stat. 1071 (1991)).

<sup>203</sup> *Id.* at 19.

<sup>204</sup> *Id.* at 20-21 (stating that arbitration is not appropriate “under these circumstances,” without providing any legal analysis). The court conducted a fact specific analysis and determined that enforcing the agreement would not be appropriate because, although *Rosenberg* signed an arbitration clause, she was not given a copy of the rules regarding the intended scope of the agreement. *Id.*

<sup>205</sup> See *supra* notes 130-142 and accompanying text.

<sup>206</sup> *Rosenberg*, 170 F.3d at 21 (acknowledging that the Supreme Court in *Wright* gave teeth to the “where appropriate” language).

<sup>207</sup> *Id.* at 20-21.



appropriate” language that Section 118 of the 1991 CRA amendments *does* create situations where *Gilmer* is limited. A review of the text and legislative history of the 1991 CRA amendments<sup>208</sup> is instructive for determining where exceptions to *Gilmer* under the “where appropriate” language may exist. Notably, the legislative history strongly suggests that the jury trial right deserves some protection.

Finding a “compelling need” to strengthen Title VII’s enforcement measures, Congress’s emphasis on punitive and compensatory damages in the 1991 CRA is undeniably intertwined with the right to jury trial.<sup>209</sup> Furthermore, when discussing the purpose of Section 118, the House Committee on Education and Labor and the House Committee on the Judiciary stated that alternative means of dispute resolution,

[are] intended to *supplement, not supplant* the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person

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<sup>208</sup> As this section focuses primarily on the legislative history, it bears mentioning each side of the argument concerning whether or not the *text* of Section 118 precludes mandatory arbitration agreements. One commentator argues that the language “where appropriate and to the extent authorized by law” is at best a “limited endorsement” of arbitration. See Cherry, *supra* note 104, at 286-88 (breaking down the text of Section 118 to show that the 1991 CRA precludes pre-dispute mandatory arbitration contracts). Another commentator points out that if Congress intended to preclude such agreements, the language of Section 118 is hard to explain, because it both endorses arbitration and contains no language expressly prohibiting mandatory pre-dispute arbitration agreements. BALES, *supra* note 12, at 52.

<sup>209</sup> PERRITT, JR., *supra* note 64, at 112. The House Committee on the Judiciary found a “serious gap . . . in Title VII, one that leaves victims of intentional discrimination on the basis of sex or religion without an effective remedy for many forms of bias on the job . . . .” *Id.* at 111 (citing H.R. REP. NO. 40-102d Cong., 1st Sess., pt. 2, at 24-25 (May 17, 1991)). Perritt also cites to a House Judiciary Report that “went on to recount ‘disturbing testimony’ that was presented to the Subcommittee ‘regarding severe consequences of the lack of a damages remedy in Title VII for claimants who suffered severe sexual harassment on the job.’” *Id.* (citing H.R. REP. NO. 40-102d Cong., 1st Sess., pt. 2, at 25 (May 17, 1991)).

In addition to the various statements made by Congress in the legislative history of the 1991 CRA, the EEOC issued a policy statement stressing the importance of the 1991 CRA’s newly created jury right. See THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *EEOC Notice No. 915.002, July 10, 1997*, at <http://www.eeoc.gov/docs/mandarb.html> (last visited Mar. 30, 2003) (on file with author). The EEOC discourages the use of pre-dispute mandatory arbitration agreements, reasoning that the “ultimate responsibility to correct Title VII violations should rest with the federal judiciary . . . .” Cherry, *supra* note 104, at 291 (discussing the content of the EEOC policy statement).

from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in [*Gardner-Denver*].<sup>210</sup>

The Committee further stated that the inclusion of Section 118 is not intended "to preclude rights and remedies that would otherwise be available."<sup>211</sup> Moreover, when Congress rejected a proposed amendment that would have explicitly permitted arbitration agreements, the House Committee on Education and Labor stated that "'under the [proposed amendment] employers could refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints' in court and declared that 'American workers should not be forced to choose between their jobs and their civil rights.'"<sup>212</sup> Finally, according to Professor Bales, the legislative history reveals that Congress' primary concern was that "unequal bargaining power would allow an employer to coerce an otherwise unwilling employee to sign a compulsory arbitration agreement as a condition of employment."<sup>213</sup>

The foregoing analysis reveals that Congress intended to: 1) give effect to the 1991 CRA's new enforcement measures, and 2) preserve the voluntary nature by which employees and employers enter into arbitration agreements. Importantly, *Rosenberg* and *Wright* signify that the right to judicial proceedings granted under the 1991 CRA amendments can co-exist with the pro-arbitration stance of *Gilmer*. Moreover, there are no indications that these two examples are exclusive of the circumstances where "the right to a federal judicial forum [was] of sufficient importance to be protected."<sup>214</sup> When combining the fact that the 1991 CRA added a jury trial right to Title

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<sup>210</sup> BALES, *supra* note 12, at 51-52; *see also Rosenberg*, 170 F.3d at 9 n.5 (citing H.R. REP. NO. 102-40(II), at 41 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 735).

<sup>211</sup> BALES, *supra* note 12, at 52; *see also Cherry*, *supra* note 104, at 289 (citing to a statement made by Representative Edwards, Chair of the House Committee on Education and Labor, after *Gilmer* but prior to passage of the 1991 CRA: "no approval whatsoever is intended of the Supreme Court's recent decision in [*Gilmer*] . . .").

<sup>212</sup> *Rosenberg*, 170 F.3d at 9-10 (quoting H.R. Rep No. 102-40(I), at 104 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 642) (internal quotations omitted).

<sup>213</sup> BALES, *supra* note 12, at 52. Professor Bales's observation is especially telling in light of Congress's general assumption that it intended to support mandatory arbitration so long as the arbitration agreement was voluntarily signed. *Cherry*, *supra* note 104, at 289. Representative Henry Hyde believed that Section 118 encouraged binding arbitration "where the parties *knowingly* and *voluntarily* elect to use these methods." *Id.* (emphasis in original). Also, the strong pro-arbitration statements of former President Bush upon signing the 1991 CRA stressed that Section 118 encourages "voluntary" arbitration agreements. *Id.* at 290-91.

<sup>214</sup> *Wright*, 525 U.S. at 80.

VII and ADA claims with the 1991 CRA's persuasive legislative history, it is clear that the right to a jury trial should not be ignored.

## 2. The ADA's Jury Trial Right Granted by the 1991 CRA Is Protected by the ADA's Retaliation Clause

At the outset, it is important to distinguish the anti-retaliation statutes contained in Title VII, the ADEA, and Section 12203(a) of the ADA from the second anti-retaliation provision of the ADA, Section 12203(b).<sup>215</sup> The first three statutes proscribe retaliatory action against an individual "because he has opposed any practice made an unlawful employment practice by this subchapter . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."<sup>216</sup> These statutes require employees to engage in "protected activity," either by participating in the exercise of one's rights or opposing an unlawful employment practice.<sup>217</sup>

Section 12203(b) of the ADA, however, makes it unlawful to "coerce, intimidate, threaten, or interfere" with an employee's "exercise or enjoyment of . . . any right granted or protected by this [Act]."<sup>218</sup> Although Section 12203(a) requires an employee to engage

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<sup>215</sup> See *supra* note 188.

<sup>216</sup> See *supra* note 186. To establish a *prima facie* case of unlawful retaliation, a claimant must show: "(1) protected employee activity; (2) adverse action by the employer either after or contemporaneous with the employee's protected activity; and (3) a causal connection between the employee's protected activity and the employer's adverse action." *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 567-68 (3d Cir. 2002); see also *Selenke v. Med. Imaging of Colo.*, 248 F.3d 1249, 1264 (10th Cir. 2001).

<sup>217</sup> 42 U.S.C. § 2000e-3(a) (2003); see also *EEOC v. Luce, Forward, Hamilton & Scripps*, 303 F.3d 994, 1005-06 (9th Cir. 2002), *reh'g granted*, 319 F.3d 1091 (9th Cir. 2003). An employee must comply with either the "opposition clause," whereby an employee opposes an employment practice made illegal under the statutes, or the "participation clause," which requires an employee to make a charge, testify, assist, or participate in an investigation, proceeding, or hearing. 42 U.S.C. § 2000e-3(a) (2003).

<sup>218</sup> 42 U.S.C. § 12203(b) (2003) (emphasis added). The Ninth Circuit recently entertained a retaliation claim when employer Luce Forward withdrew plaintiff employee's conditional employment offer for objecting to and refusing to sign the company's arbitration clause. *Luce*, 303 F.3d at 997. The court ruled that the plaintiff could not satisfy the "opposition clause" because he "could not have reasonably believed that Luce Forward's policy of requiring arbitration was an unlawful employment practice." *Id.* at 1006. The EEOC argued that plaintiff met the "participation clause" because he refused to surrender his right to participate. *Id.* at 1007. The EEOC stated that the employer's "practice of refusing to employ any individual who will not sign a compulsory waiver . . . is effectively a preemptive strike against future participation conduct afforded absolute protection under [the statutes]." *Id.* The court found no merit in this argument, claiming that *Gilmer's*

in “protected activity,” Section 12203(b) contains no such requirement.<sup>219</sup> Instead, an employee may seek the protection of Section 12203(b) if an employer “interferes” with the employee’s exercise of rights.<sup>220</sup> Thus, an employee who is fired for refusing to sign away a statutory right undoubtedly falls within the scope of Section 12203(b).

Still undetermined, however, is whether “any right” includes the right to a jury trial. “The right to a jury trial is a procedural right,”<sup>221</sup> as compared to the right of a disabled individual to be free from discrimination in employment, which is a substantive right.<sup>222</sup> Section 12203(b), however, prevents employers from interfering with “any right,” whether substantive or procedural.<sup>223</sup> The right to a jury trial granted in the 1991 CRA is not merely a minor amendment to Title VII and the ADA; rather, it represents the means by which an employee can pursue damages.<sup>224</sup> A 1991 House Judiciary Committee report indicates that the whole purpose behind the jury trial right was to satisfy the “compelling need” to permit damage awards to Title VII claimants.<sup>225</sup> Thus, the procedural right at issue is one specifically granted by statute and is intertwined with the statute’s remedial scheme.<sup>226</sup> Therefore, it follows that prohibiting interference with the exercise of “any right,” would include the procedural rights needed to enforce the substantive rights.

By analogy, the ADEA also grants the right to a jury trial.<sup>227</sup> Congress amended the ADEA in 1990 to provide that “[a]n individual may not waive *any right or claim* under this Act unless the waiver is knowing and voluntary.”<sup>228</sup> When faced with deciding the scope of the waiver provision, some courts have ruled that “any right”

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refusal to recognize a judicial forum as a substantive right permits an employer to demand its waiver as a condition of employment. *Id.* On February 7, 2003, the Ninth Circuit vacated the opinion and granted a rehearing, *en banc*. *EEOC v. Luce*, Forward, Hamilton & Scripps, 319 F.3d 1091 (9th Cir. 2003).

<sup>219</sup> 42 U.S.C. § 12203(a)-(b) (2003).

<sup>220</sup> 42 U.S.C. § 12203(b) (2003).

<sup>221</sup> *Hammaker v. Brown & Brown, Inc.*, 214 F. Supp. 2d 575, 578 (E.D. Va. 2002).

<sup>222</sup> 42 U.S.C. § 12111-117 (2003).

<sup>223</sup> 42 U.S.C. § 12203(b) (2003).

<sup>224</sup> *See Ackerman v. The Money Store*, 321 N.J. Super. 308, 318, 728 A.2d 873, 878 (Law. Div. 1998) (using similar language to describe the importance of the procedural enforcement measures contained in the New Jersey Law Against Discrimination).

<sup>225</sup> PERRITT, JR., *supra* note 64, at 112.

<sup>226</sup> *See supra* note 209.

<sup>227</sup> 29 U.S.C. § 626(c)(2) (2003).

<sup>228</sup> 29 U.S.C. § 626(f) (2003) (emphasis added).

applies only to the ADEA's substantive rights.<sup>229</sup> Rather than rely on these previous circuit court decisions, the United States District Court for the Eastern District of Virginia in *Hammaker v. Brown & Brown, Inc.*<sup>230</sup> applied regular tools of statutory construction and determined that the waiver requirement applied to both substantive and procedural rights.<sup>231</sup> The court found that "any right" encompassed all rights under the ADEA, including the right to a jury trial.<sup>232</sup> *Hammaker* found the prior circuit courts' reliance on *Gilmer* misplaced because "*Gilmer* does not directly consider the effect of the [waiver amendment] to procedural rights because the contract in that case was executed prior to the [waiver amendment's] effective date."<sup>233</sup>

Additionally, a provision similar to Section 12203(b) of the ADA can be found in New Jersey's Law Against Discrimination ("LAD"),<sup>234</sup> the state's employment discrimination statute.<sup>235</sup> In *Ackerman v. The Money Store*,<sup>236</sup> an employee was fired from her job after refusing to sign an arbitration agreement which would have required the arbitration of all discrimination claims and claims for the violation of any state or federal statute.<sup>237</sup> The plaintiff argued that "conditioning employment on the execution of an agreement to arbitrate

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<sup>229</sup> See *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 660-61 (5th Cir. 1995); *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 181-82 (3d Cir. 1998); *Rosenberg*, 170 F.3d at 14-15.

<sup>230</sup> *Hammaker v. Brown & Brown, Inc.*, 214 F. Supp. 2d 575 (E.D. Va. 2002).

<sup>231</sup> *Hammaker*, 214 F. Supp. 2d at 580.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 579.

<sup>234</sup> N.J.S.A. § 10:5-1 to 49 (2003).

<sup>235</sup> The LAD is codified at N.J.S.A. § 10:5-1 to 49 (2003). The anti-retaliation provision, N.J.S.A. § 10:5-12(d) (2003), makes it unlawful to "coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by this act." Almost every state has a state equivalent to the federal employment discrimination statutes. See, e.g., Pennsylvania Human Relations Act, 43 PA. CONS. STAT. §§ 951-63 (2003); Washington's Law Against Discrimination, WASH. REV. CODE ANN. § 49.60 (2003); the West Virginia Human Rights Act, W. VA. CODE §§ 5-11-1 to 5-11-21 (2003); Iowa Civil Rights Act of 1965, IOWA CODE ANN. §§ 216.1-216.20 (2003); and Arizona's Civil Rights Act, ARIZ. REV. STAT. ANN. §§ 41-1461 to 41-1484 (2003).

<sup>236</sup> 321 N.J. Super. 308, 728 A.2d 873 (Law. Div. 1998).

<sup>237</sup> *Id.* Ackerman worked for two months as a mortgage funder/closer before her discharge. *Id.* at 311-12, 728 A.2d at 874-75. The Money Store's arbitration agreement contained the type of clear and explicit language that likely would have passed muster under the "clear and unmistakable" standard advocated by the New Jersey courts, had Ackerman chosen to sign it. *Id.* at 311, 728 A.2d at 875; see also *Quigley*, 330 N.J. Super. at 273, 749 A.2d at 417 (stating that if employer wants to bind employee to arbitration agreement, it "should have written an inclusive arbitration clause").

employment discrimination claims interferes with plaintiff's rights under the LAD," namely, the right to pursue claims of discrimination in a judicial forum.<sup>238</sup> Ackerman further contended that this right is essential to "achieve LAD's goal to eradicate discrimination."<sup>239</sup> The court agreed, holding that while the right to a jury trial for claims under the LAD "may be waived by an employee who chooses to do so," it "should not be withdrawn as a condition of employment."<sup>240</sup> The court ruled that The Money Store violated LAD's retaliation clause when it discharged Ackerman for refusing to give up her statutory right to a jury trial.<sup>241</sup>

The court in *Hammaker* held that the ADEA's provision requiring a clear and unmistakable waiver of *any right* contained in the ADEA included the right to a jury trial.<sup>242</sup> That logic can be equally applied to section 12203(b) of the ADA which prohibits an employer from interfering with *any right* granted in the ADA. Furthermore, the court in *Ackerman* ruled that the anti-retaliation provision of New Jersey's LAD, a provision strikingly similar to section 12203(b), prohibits an employer from firing an employee for his or her refusal to sign an arbitration agreement that would result in a waiver of the right to a jury trial for all employment discrimination claims.<sup>243</sup> The *Ackerman* reasoning should be extended to section 12203(b) such that when an employer fires an employee for refusing to sign an arbitration agreement, that employer is interfering with the employee's right to a jury trial granted under the ADA. Thus, section 12203(b) should offer protection to employees who attempt to preserve their statutory right to a judicial forum.

#### CONCLUSION

*Gilmer* and the 1991 CRA amendments granting Title VII and ADA claimants the right to a jury trial can co-exist. While upholding *Gilmer's* basic tenet that statutory employment discrimination claims

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<sup>238</sup> *Ackerman*, 321 N.J. Super. at 317, 728 A.2d at 878.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 325, 728 A.2d at 882.

<sup>241</sup> *Id.* at 318, 728 A.2d at 878. It is important to note, however, that the *Ackerman* decision stands on narrow ground. In *Quigley*, the plaintiff argued that the arbitration agreement was invalid because he signed it only upon being threatened with discharge. *Quigley*, 330 N.J. Super. at 262-63, 749 A.2d at 411. The plaintiff invoked the *Ackerman* holding to support his claim, but the court distinguished the case on the facts, reasoning that Ackerman never signed the arbitration agreement, while Quigley did. *Id.* at 265, 749 A.2d at 413.

<sup>242</sup> *Hammaker*, 214 F. Supp. 2d at 580.

<sup>243</sup> *Ackerman*, 321 N.J. Super. 308, 728 A.2d 873.

are arbitrable under the FAA, courts have also carved out exceptions under the “where appropriate” language. As its legislative history clearly exhibits, the 1991 CRA’s endorsement of arbitration is premised on the voluntary nature of the arbitration agreement, thus indicating that involuntary agreements are perhaps not “appropriate.” When individuals are either fired or refused employment for declining to sign an arbitration agreement, the process becomes involuntary: sign the agreement in order to work. The ADA’s anti-retaliation provision arguably restores the voluntary nature to the arbitration process by protecting employees in the exercise of their statutory rights.

By invoking the protection of section 12203(b) of the ADA, an employee may not be fired for refusing to waive his/her right to a judicial forum for statutory employment claims. The logical result is increased bargaining power for employees, who can reject broad, compulsory arbitration agreements and can instead negotiate the terms of an arbitration clause to reach a mutual agreement with the employer. Although Title VII and the ADEA do not contain similar provisions to that of the ADA, amending these statutes to insert a section 12203(b) counterpart could help Congress achieve a healthy balance between the pro-arbitration FAA and the adjudicatory goals of the employment discrimination statutes.

The ongoing scrutiny of the arbitration machinery offered throughout this analysis is not intended to cast doubt on its utility and value. When viewed in light of the important civil rights initiatives bestowed upon employers and employees by Congress, however, the potential drawbacks of arbitration appear costly. Congress clearly provided employees victimized by workplace discrimination an opportunity for vindication in federal court. This is not to say that arbitration is never a suitable alternative, but rather that barring the option of a judicial forum limits the overall effectiveness with which these important statutes can be enforced. Although it is impractical to preclude the use of arbitration agreements in employment contracts and CBAs across the board, it is important to tighten the reins on the commandeering use of such agreements by employers. Specifically, resort to arbitration with regard to civil rights claims should be the product of a mutual agreement rather than be forced upon employees as a condition of employment. A way to accomplish this is for courts to enforce anti-retaliation statutes against employers for taking action against an individual for refusing to sign away the statutory right to trial. A retaliation claim does not represent two bites at the same apple, but rather a sensible inroad to the restoration of employee rights

guaranteed by Congress.