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Gilmer Revisited: The Judicial Erosion of Employee Statutory Rights

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GILMER REVISITED: THE JUDICIAL EROSION OF EMPLOYEE STATUTORY RIGHTS*

In 1991, the United States Supreme Court announced a new rule governing individual relations between employers and employees.[1] In a departure from its previous policy of disfavoring compelled arbitration of statutory claims, the Court held in *Gilmer v. Interstate/Johnson Lane Corp.*[2] that an employer could enforce an agreement to submit employee grievances to binding arbitration.[3] Although the Court appeared to limit its holding in *Gilmer* to its specific facts, lower courts have, in the few years since the decision, greatly enlarged its teachings.[4] By expanding the application of the *Gilmer* holding, post-*Gilmer* lower court rulings have used *Gilmer* as a launching point to abrogate statutorily-created employment rights.

THE PRE-*GILMER* LAW OF ARBITRATION

Gilmer marked a clear transition in the law of arbitration. Prior to *Gilmer*, the Supreme Court, in a series of cases,[5] had generally disfavored

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1. This comment only addresses individual employer-employee interactions. Collective bargaining agreements and the rules governing them, therefore, are beyond the present scope of discussion. It is interesting to note, however, that *Gilmer* did not affect employees working under a collective bargaining agreement. There the possibility to seek redress for violations of statutory rights presumably survived intact the holding, because of the narrowness of the issue as articulated by the Court in *Gilmer*. *See generally* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Tran v. Tran, 54 F.3d 115, 117 (2nd Cir. 1995) (stating that the line of cases exemplified in part by Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981) are not diminished by the *Gilmer* ruling: "There is nothing in *Gilmer* which appears to throw anything but favorable light upon the continuing authority of *Barrentine*."). *See also* Claps v. Moliterno Stone Sales, Inc., 819 F. Supp. 141, 146 (D. Conn. 1993); Block v. Art Iron, Inc., 866 F. Supp. 380 (N.D. Ind. 1994); Randolph v. Cooper Indus., 879 F. Supp. 518 (W.D. Pa. 1994). For a discussion of *Barrentine*'s precursor, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), *see infra* note 8 and accompanying text.

Because *Gilmer* did not overrule *Alexander*, the employees most affected by Gilmer and its progeny are those who are the weakest in their bargaining power, i.e., those whom a collective bargaining agreement does not cover, and who do not benefit from the strength of the group in their dealings with employers. *See* John A. Gray, *Have the Foxes Become the Guardians of the Chickens? The Post-Gilmer Legal Status of Predispute Mandatory Arbitration as a Condition of Employment*, 37 VILL. L. REV. 113, 115 (1992). At present, only about 15% of the American workforce as a whole is unionized, with less than 10% of private sector employees being represented by unions. NATIONAL PUBLIC RADIO, Oct. 25, 1995. It follows that at least 85% of working Americans are not protected by the *Alexander* holding, and are vulnerable to enforced arbitration under *Gilmer*.

2. 500 U.S. 20 (1991).

3. *Id.*

4. *See Gilmer*, 500 U.S. at 23. *See also* Gray, *supra* note 1, at 119; Stuart H. Bompey & Michael Pappas, *Is There a Better Way? Compulsory Arbitration of Employment Discrimination Claims After Gilmer*, 19 EMPL. REL. L. J. 197, 201 (1993-94).

5. *See* Gray, *supra* note 1, at 123 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974);

binding arbitration[6] as a vehicle for settling non-contractual disputes between an employer and employee.[7] The most telling example of this reluctance to enforce employer-employee arbitration of statutory claims was *Alexander v. Gardner-Denver Co.*[8]

Alexander involved a grievance for unjust discharge, within the framework of a collective bargaining agreement, that resulted in compulsory arbitration.[9] In the final stages of the grievance process and before binding arbitration, the aggrieved employee, Harrel Alexander, raised for the first time a claim of racial discrimination.[10] Proceeding to arbitration, Alexander also filed a charge with the Colorado Civil Rights Commission,[11] and upon losing in the arbitral forum and receiving a right-to-sue notice from the Equal Employment Opportunity Commission,[12] initiated proceedings in federal court, alleging a Title VII violation.[13] The district court responded by granting summary judgment in favor of the Gardner-Denver Company, holding that rules of preclusion prevented Alexander from bringing his claim, already heard in binding arbitration, to court.[14] The Tenth Circuit Court of Appeals, in a per curiam opinion, affirmed.[15]

The Supreme Court reversed, basing its holding on the distinction between relief for a claim sought through arbitration and the relief permitted by Title VII.[16] While the Court confirmed that judicial review of arbitration is limited,[17] the Court nevertheless did not limit its review and expressly stated that "in instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process."[18] This distinction allowed the Court to fully examine the case. More

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Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981); McDonald v. City of West Branch, 466 U.S. 284 (1984)).

6. One crucial aspect to binding arbitration is, of course, the standard of review that federal courts will apply to the process. In binding arbitration, courts have only limited powers to vacate or modify an arbitration award. *See* 9 U.S.C. §§ 10, 11 (1990); Salt Lake Pressmen & Platemakers, Local Union No. 28 v. Newspaper Agency Corp., 485 F. Supp. 511, 515 (D. Utah 1980); John T. Brady & Co. v. Form-Eze Sys., Inc., 623 F.2d 261 (2d Cir. 1980), *cert. denied*, 449 U.S. 1062 (1980).

7. Although one reading of these cases might choose to limit the Court's disfavor of arbitration to collective bargaining cases, the fact remains that until *Gilmer*, commentators thought the Court generally unreceptive to arbitration of employment disputes. *See* Gray, *supra* note 1, at 123 n.9; Note, *Statutory Rights and Predispute Agreements to Arbitrate in Contracts of Employment*, 66 ST. JOHN'S L. REV. 1067, 1072-73 (1993).

8. 415 U.S. 36 (1974).

9. *See id.* at 42.

10. *See id.*

11. *Id.*

12. *Id.* at 43.

13. *Id.*

14. *Alexander*, 415 U.S. at 43.

15. *Id.*

16. *See id.* at 43.

17. *Id.* at 54 (citing the *Steelworkers* trilogy, United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)).

18. *Alexander*, 415 U.S. at 54.

important to this article, however, is the Court's choice of language when it looked to arbitration as a vehicle for resolving employee grievances.

The *Alexander* Court found arbitration ill-suited to resolve Title VII claims.[19] The Court noted that an arbitrator's authority is limited to giving effect to the intent of the parties to the arbitration, and that an arbitrator has no general mandate to interpret laws that might be in conflict with the bargain between the parties.[20] Aside from discussing the inherent tension in the arbitration of individual claims when a collective bargaining agreement is in force, the Court also specifically commented on the unsuitability of arbitration as a forum for the resolution of Title VII claims.[21] In short, the Court refused to allow the arbitration of a Title VII claim to limit judicial review of the claim's merits.[22]

GILMER V. INTERSTATE/JOHNSON LANE

Seventeen years later, the Court revisited the issue in *Gilmer v. Interstate/Johnson Lane Corp.*[23] and embarked on a clear departure from its *Alexander* reasoning, ruling that agreements to arbitrate statutory claims were enforceable unless Congress had precluded such waivers of

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19. Because of the scope of this comment, this analysis does not include the Court's reasoning as to its specific objections to arbitration of individual statutory claims in the collective bargaining agreement context. Rather, the discussion here limits itself to the Court's general views on the appropriateness of arbitration of employment discrimination claims.

20. *See Alexander*, 415 U.S. at 53.

21. *See id.* at 56-58. In his opinion for a unanimous court, Justice Powell devoted considerable space to listing the comparative inadequacies of arbitration where the dispute is a Title VII claim:

> Arbitral 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. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Where the collective bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement. To be sure, the tension between contractual and statutory objectives may be mitigated where a collective-bargaining agreement contains provisions facially similar to those of Title VII. But other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-83 (1960). . . . On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.
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> Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. . . . Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.

Id.

22. *See id.* at 60.

23. 500 U.S. 20 (1991).

judicial remedies.[24] Interstate/Johnson Lane hired Robert Gilmer as Manager of Financial Services in 1981.[25] As a condition of employment, Interstate compelled Gilmer to register as a securities representative with the New York Stock Exchange (NYSE).[26] In its registration application, the NYSE had included a clause, Rule 347, whereby the applicant agreed to submit any dispute arising out of his employment with or termination from Interstate/Johnson Lane to binding arbitration.[27] In 1987, when Gilmer was 62 years old, Interstate fired him.[28] Gilmer responded by first filing a complaint with the Equal Opportunity Employment Commission, and then bringing his case to federal court, alleging violations of the Age Discrimination in Employment Act (ADEA).[29] Interstate moved to compel arbitration, relying on Gilmer's registration application and the Federal Arbitration Act (FAA).[30] When the case reached the Supreme Court, the Court ruled that Gilmer could not seek judicial relief until he had arbitrated the dispute.[31]

The Court outlined several grounds for its holding.[32] First, the Court noted the liberal federal policy favoring arbitration,[33] then stated that Gilmer's arbitration agreement was not exempt from FAA coverage.[34] Next, the Court declared the principle that statutory claims may be arbitrated to be clearly established,[35] and proceeded to examine the ADEA to determine whether Congress had expressed an intent to preclude arbitration of ADEA claims,[36] finding nothing in the act "or its legislative history [to] preclude arbitration."[37] Third, the Court also declared that the enforcement of binding arbitration would not undermine the role of the EEOC, since that agency was vested with "independent authority to investigate age discrimination."[38] Fourth, in keeping with its implied

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24. *Id.* at 35.
25. *Id.* at 23.
26. *Id.*
27. *Id.* In essence, then, the employer is the third-party beneficiary of the arbitration agreement.
28. *Id.*
29. *Id.* at 23-24. The ADEA is codified at 29 U.S.C. §§ 621-634 (1994).
30. *Id.* at 24. The FAA is codified at 9 U.S.C. §§ 1-307 (1994).
31. *Id.* at 35. This comment only summarizes *Gilmer*, concentrating instead on the new directions the decision has taken the courts. For able and complete discussions of *Gilmer*, see Gray, *supra* note 1; Bompey & Pappas, *supra* note 4; Maria C. Whittaker, *Gilmer v. Interstate: Liberal Policy Favoring Arbitration Trammels Policy Against Employment Discrimination*, 56 ALB. L. REV. 273 (1992).
32. This comment does not attempt to retread the beaten path with respect to *Gilmer*, instead it sketches out *Gilmer*'s holding and focuses on its effects on lower courts. Accordingly, the reader should consult other sources to explore more details of the Court's reasoning. *See supra* note 31.
33. *See Gilmer*, 500 U.S. at 25. The Court had earlier clearly signaled this favoritism in a case centering around commercial arbitration. *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).
34. The Court sidestepped the whole issue of the possibility of exemption of the arbitration agreement from FAA coverage. *Gilmer*, 500 U.S. at 25 n.2.
35. *Gilmer*, 500 U.S. at 26 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)); Shearson/Amer. Express, Inc. v. McMahon, 482 U.S. 220 (1987), *reh'g denied*, 483 U.S. 1056 (1987); Rodriguez de Quijas v. Shearson/Amer. Express, Inc., 490 U.S. 477 (1989).
36. *Gilmer*, 500 U.S. at 26-27.
37. *Id.* at 26-29.
38. *Id.* at 28.

presumption of arbitrability absent contrary congressional intent, the Court asserted that the non-judicial forum did not deprive a claimant of substantive rights. The Court reaffirmed that "[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."[39] Finally, the Court rejected Gilmer's argument that arbitration was inferior to the judicial process.

The Court quickly dismissed each of the arguments that Gilmer raised in his challenge "to the adequacy of arbitration procedures."[40] Rejecting the claim that arbitration panels could be biased, the Court also discounted Gilmer's assertion that discovery in arbitration was more limited than in adjudication,[41] further adding that even if discovery were more limited, the expediency of arbitration compensated for any procedural loss or opportunity for review.[42] The Court squarely reaffirmed that arbitration agreements are, at their core, contracts,[43] and held that even assuming unequal bargaining power between employers and employees, "[m]ere inequality in bargaining power . . . [was] not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."[44] Yet, while continuing its deference toward the arbitration process, the Court stopped short of finding arbitration appropriate under all circumstances.

The Court indicated two areas where it would not uphold binding arbitration. Fraud vitiates an agreement.[45] In addition, overwhelming economic power, which could lead a court to revoke any contract, would also invalidate the bargain to arbitrate.[46] While declining to find either fraud or coercion in Gilmer's case,[47] the Court nevertheless left open an avenue, however slim, for employees to contest the validity of arbitration agreements.

Although arguably *Gilmer* overruled *Alexander sub silentio*, the *Gilmer* court took pains to distinguish rather than expressly overrule *Alexander*, thus creating a new line of analysis for employer-employee arbitration agreements. *Alexander* applied specifically to instances where an employee was covered by a collective bargaining agreement.[48] Because *Gilmer* sidestepped *Alexander*'s reasoning, the *Gilmer* court could weigh in for arbitration without upsetting stare decisis. In the process, the Court opened the door to the use of binding arbitration in resolving statutory claims for employees not covered by a collective bargaining agreement.

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39. *Id.* at 26 (quoting *Mitsubishi*, 473 U.S. at 628).
40. *Gilmer*, 500 U.S. at 30.
41. *Id.* at 30-31.
42. *Id.* at 31.
43. *Id.* at 33.
44. *Gilmer*, 500 U.S. at 33.
45. *Id.* at 33 (citing *Mitsubishi*, 473 U.S. at 627).
46. *See id.*
47. *Id.* at 33.
48. *See generally*, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1979); *Gilmer*, 500 U.S. at 33-35.

THE POST-*GILMER* DECISIONS

Lower courts lost no time in extending *Gilmer*'s holding, first to cases with similar facts. *Alford v. Dean Witter Reynolds, Inc.*[49] came to the Supreme Court at about the same time as *Gilmer*. There Joan Alford, fired by Dean Witter Reynolds from her job as a stockbroker, sued for Title VII violations.[50] Like Gilmer, Alford had executed, as a condition of employment, an application and agreement with the New York Stock Exchange, subject to the Exchange's Rule 347 which compelled the submission of employment disputes to arbitration.[51] In the district court, Dean Witter Reynolds had moved to compel arbitration, citing for support the Supreme Court trend favoring arbitration, as exemplified by *Mitsubishi*.[52] The trial court declined to follow this reasoning and instead held, consistent with *Alexander*, that an agreement to arbitrate could not preclude a judicial determination of Title VII claims.[53]

The Fifth Circuit Court of Appeals affirmed the trial court, relying on *Alexander* and its strong language favoring the judicial resolution of Title VII claims.[54] Acknowledging that it was inclined to be influenced by the several recent Supreme Court decisions to rule in favor of arbitration,[55] the court nevertheless looked to *Alexander* for guidance.[56] The court's entire discussion revolved around the teachings of *Alexander* and the recognition that "*Alexander*'s rationale [w]as broad enough to speak to any arbitration of Title VII claims."[57]

The Supreme Court, in a memorandum opinion, vacated the judgment of the court of appeals and remanded to the Fifth Circuit in light of the *Gilmer* holding announced seven days earlier.[58] Because of *Gilmer*'s departure from *Alexander*, the Fifth Circuit, on remand, compelled arbitration of Alford's Title VII claim.[59] In doing so, the *Alford* court of appeals' decision extended the *Gilmer* holding beyond the ADEA to Title VII.[60] What was unacceptable in 1974 had become reality by 1992.

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49. 500 U.S. 930 (1991). *Alford* has several cites to its credit. Listed chronologically, they are: 712 F. Supp. 547 (S.D. Tex. 1989); 905 F.2d 104 (5th Cir. 1990); 500 U.S. 930 (1991); 939 F.2d 229 (1991); 975 F.2d 1161 (5th Cir. 1992).

50. Alford v. Dean Witter Reynolds, Inc., 712 F. Supp. 547, 548 (S.D. Tex. 1989).

51. *Id. See supra* note 26 and accompanying text.

52. *See Alford*, 712 F. Supp. at 548.

53. *Id.* at 549.

54. *See* Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104, 106-108 (5th Cir. 1990).

55. In view of its later caution concerning employer-employee arbitration, the court of appeals here could have been more concerned with the trend in the law, rather than signaling its willingness to rule in favor of compelling arbitration. *See infra* note 59.

56. *Alford*, 905 F.2d at 106 (citing Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1 (1985)); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985); Shearson/Amer. Express, Inc. v. McMahon, 482 U.S. 220 (1987), *reh'g denied*, 483 U.S. 1056 (1987).

57. *Alford*, 905 F.2d at 106.

58. Dean Witter Reynolds, Inc. v. Alford, 500 U.S. 930 (1991).

59. Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991). *See supra* note 48.

60. The court of appeals may have signified a reluctance to have its ruling set a wide precedent, cautioning on the further extension of the *Gilmer* holding:

> The FAA's coverage excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

Arbitration, not adjudication, was now the preferable forum for Title VII claims.

Where *Alford* began the expansion of the *Gilmer* holding, other courts have followed. For example, in *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[61] the Tenth Circuit heeded both *Gilmer* and *Alford* in ruling that Title VII claims are subject to compulsory arbitration.[62] When Merrill Lynch fired Kelli Lyn Metz, she alleged Title VII violations for unlawful termination due to pregnancy.[63] In a now familiar pattern, Metz's employment as a stock broker required her to sign an arbitration agreement in connection with her registration as a broker, in this case with the National Association of Securities Dealers (NASD).[64] Although Metz prevailed for procedural reasons in her effort to stay in court and out of arbitration,[65] the *Metz* decision clearly confirms the rule that in the Tenth Circuit, Title VII claims are subject to compulsory arbitration.[66]

Courts have also compelled arbitration to cases arising outside of the securities industry, where there existed a direct agreement to arbitrate between an employer and employee. Relying on *Gilmer*, a federal district court in *DiCrisci v. Lyndon Guaranty Bank of New York*[67] compelled Mary Lou DiCrisci to arbitrate her Title VII claim, pursuant to an arbitration clause in her written employment contract.[68] Similarly, the court in *Scott v. Farm Family Life Insurance Co.*,[69] citing *Gilmer*, com-

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> 9 U.S.C. § 1. In both this case and *Gilmer*, the arbitration clause was contained in the employee's contract with a securities exchange, not with the employer . . . Courts should be mindful of this potential issue in future cases.

Id. at 230 n.1.

The *Alford* case made one further appearance before the Fifth Circuit. *See* Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161 (5th Cir. 1992). There the plaintiff argued that she had been "fraudulently induced to enter into employment with Dean Witter and that the arbitration clauses contained within the brokers registration agreements constitute[d] adhesion contracts." *Id.* at 1163. The court, however, declined to address these issues since Alford had not raised them before the trial court. *Id.*

61. 39 F.3d 1482 (10th Cir. 1994).

62. *Id.* at 1487.

63. *Id.* at 1485 (citing the Pregnancy Discrimination Act of 1978, codified at 42 U.S.C. § 2000e(k)).

64. *Id.* at 1485-86.

65. *See id.* at 1488-90.

66. *Metz*, of course, does not stand alone. A host of lower court decisions have followed *Gilmer* and applied its holding to other statutes at issue in securities industry litigation. *See* Bompey & Pappas, *supra* note 4, at 200 (citing Haviland v. Goldman Sachs & Co., 947 F.2d 601 (2d Cir.), *cert. denied sub nom*, J. Aron & Co. v. Haviland, 504 U.S. 930 (1992) (RICO); Bird v. Shearson Lehman/Amer. Express, Inc., 926 F.2d 116 (2d Cir. 1991), *cert. denied*, 501 U.S. 1251 (1991); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991) (Title VII); Saari v. Smith Barney, Harris Upham & Co., Inc., 968 F.2d 877 (9th Cir. 1992), *cert. denied*, 506 U.S. 986 (1992) (Federal Employee Polygraph Protection Act)). *See also* Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 700 (11th Cir. 1992); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 935 (9th Cir. 1992) (finding that the ADEA was sufficiently like Title VII to compel arbitration of Title VII claims, pursuant to *Gilmer*). Even Prudential Insurance Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995), where the court refused to compel arbitration based upon lack of consent, nevertheless stated that Title VII claims are arbitrable. *Id.* at 1303.

67. 807 F. Supp. 947 (W.D.N.Y. 1992).

68. *Id.* at 949-50.

69. 827 F. Supp. 76 (D. Mass. 1993).

pelled arbitration pursuant to a clause in the employment contract of an insurance agent.[70]

Hull v. NCR Corp.[71] shows how *Gilmer* changed the law in the Eighth Circuit. When Norma Hull, who had agreed to arbitration in a signed at-will employment contract,[72] sued for alleged violations of Title VII, the district court had to address Eighth Circuit precedent which held that "Title VII and parallel state statutes were exempt from the FAA."[73] According to the court, the precedent in question, *Swenson v. Management Recruiters International, Inc.*,[74] relied heavily on *Alexander*.[75] Because of *Gilmer*'s treatment of *Alexander*, however, the district court ruled that *Gilmer* undermined *Swenson*, and declined to follow the *Swenson* court of appeals holding.[76] Finding Title VII (at issue in *Hull*) and the ADEA (at issue in *Gilmer*) "similar in their aims and their substantive provisions,"[77] the *Hull* court compelled arbitration of Hull's claims.[78] *Hull*, then, used *Gilmer* to squarely reverse the Eighth Circuit law of non-arbitrability of Title VII claims.

THE ENFORCEMENT OF UNILATERALLY IMPOSED ARBITRATION

Courts have gone beyond compelling arbitration in situations where an express agreement between an employer and employee exists. Following the nation-wide trend that favors arbitration, in recent times courts have compelled binding arbitration of statutory claims even when employers unilaterally imposed such arbitration.

An early appearance of this issue was *Mago v. Shearson Lehman Hutton Inc.*[79] Shearson acquired E.F. Hutton while Dana Mago was an E.F. Hutton employee.[80] Mago subsequently completed an employment application for Shearson which required the arbitration of "any controversy concerning compensation, employment or termination of employment with Shearson."[81] When Mago later filed a Title VII sexual harassment and gender discrimination lawsuit, Shearson moved to compel arbitration and stay the judicial proceedings.[82] The trial court denied the motion, and Shearson appealed under the FAA.[83]

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70. *Id.* A recent example of compelled arbitration in light of an employment contract is Maye v. Smith Barney Inc., 897 F. Supp. 100 (S.D.N.Y. 1995) (sexual harassment in derogation of Title VII).
71. 826 F. Supp. 303 (E.D. Mo. 1993).
72. *Id.* at 304.
73. *Id.* at 305.
74. 858 F.2d 1304 (8th Cir. 1988).
75. *See Hull*, 826 F. Supp. at 305.
76. *Id.* at 305-06.
77. *Id.* at 306.
78. *Id.* at 307.
79. 956 F.2d 932 (9th Cir. 1992).
80. *Id.* at 933.
81. *Id.* at 933-34.
82. *Id.* at 934.
83. *Id.* at 933.

The Ninth Circuit Court of Appeals reversed, despite Mago's claims that the arbitration clause was a contract of adhesion.[84] The trial court had not reached the factual underpinnings of the adhesion issue, ruling as a matter of law.[85] Therefore, the court of appeals was not free to decide the adhesion question and remanded for a factual determination.[86] The court noted, however, that *Gilmer* had left open the matter of adhesion in an arbitration clause.[87] In essence, the procedural posture of *Mago* did not allow the Ninth Circuit to rule on the propriety of an employer's unilateral imposition of an arbitration clause.[88]

A direct confrontation between unilaterally imposed arbitration and statutory rights edged closer in a Minnesota federal district court a year later. In *Lang v. Burlington Northern Railroad Company*[89] the district court compelled Larry Lang to arbitrate his tort claim of wrongful termination. After hiring on with the railroad in 1965, Lang had received promotions until he became a senior computer instructor, a non-union exempt position.[90] Upon Lang's return from an approved medical leave in 1992, Burlington terminated his employment as an instructor, effectively also terminating his exempt status.[91] Exercising his seniority rights, Lang returned to work in a lower paying post but sued Burlington, alleging the wrongful termination of both his instructor position and his status.[92] In response, Burlington moved to compel arbitration pursuant to an arbitration clause announced to its employees and inserted in the railroad's employee manual on January 1, 1991.[93]

The court ruled in Burlington's favor, dismissing Lang's action without prejudice.[94] Lang had advanced that the arbitration clause, unilaterally

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84. *Id.* at 934-35. Presumably, adhesion entered this case through the employment application that Shearson requested Mago to complete. Although Mago probably seamlessly made the transition from being an E.F. Hutton employee to working for Shearson, not completing an application could have resulted in her termination.

85. *See id.*

86. *Mago*, 956 F.2d at 934.

87. *See id.* (citing *Gilmer*, 500 U.S. at 25). The citation here is perplexing, since the court refers to the part of *Gilmer* reasoning that discusses the scope of the FAA. Nevertheless, in *Gilmer* the Supreme Court does address adhesion when it states:

> There is no indication in this case, however, that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application. As with the claimed procedural inadequacies discussed above, this claim of unequal bargaining power is best left for resolution in specific cases.

Gilmer, 500 U.S. at 33.

88. The court of appeals left no doubt that absent adhesion, Shearson would have prevailed in its motion to compel arbitration of Mago's Title VII claims. Citing pre-*Gilmer* law favorably comparing the ADEA and Title VII, the court "conclude[d] that Mago ha[d] not met her burden of showing that Congress, in enacting Title VII, intended to preclude arbitration of [Title VII] claims . . . ." *Mago*, 956 F.2d at 935; *accord* Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1554 (10th Cir. 1988).

89. 835 F. Supp. 1104 (D. Minn. 1993).

90. *Id.* at 1105.

91. *Id.*

92. *Id.*

93. *Id.*

94. *See id.* at 1107. The Court left open the possibility that Lang could come back to the court if the arbitration should "prove unfair, dishonest, or a sham." *Id.* at 1106.

imposed after he started work, was a contract of adhesion because it left him "with only two options—to quit his job, or to maintain his employment with the clause in place."[95] The court rejected that argument, citing *Gilmer* for the proposition that mere inequality of bargaining power will not invalidate arbitration agreements.[96] Sitting in diversity, the court found "under Minnesota law that clear and definite policy language in employee manuals may constitute a binding unilateral contract."[97] Such contracts could only be void if unconscionable, and without elaborating on Lang's adhesion claim, the court rejected the argument that Burlington Northern's arbitration clause was inherently unfair.[98] The *Lang* court expressly held that by continuing to work after Burlington had adopted its arbitration agreement, Lang had supplied the necessary consideration, in Minnesota, for the creation of a binding contract between him and Burlington.[99]

Where *Lang* left off, *Kinnebrew v. Gulf Insurance Company*[100] continued, enforcing the unilaterally imposed binding arbitration of statutory claims. Sharon Kinnebrew, a claims administrative manager who believed that Gulf Insurance paid her less than her male predecessor, filed a federal action alleging violation of the Texas Commission on Human Rights Act[101] and the Equal Pay Act of 1963.[102] Gulf successfully moved for an order to compel arbitration.[103]

Gulf prevailed despite its unilateral imposition of binding arbitration as a condition of employment after Kinnebrew was hired.[104] Gulf had inserted its arbitration clause in the employee handbook, also mailing a copy of the policy and an explanatory memorandum to each employee.[105] Kinnebrew urged the district court not to defer to the arbitration agreement, contending that it required her to forego substantive rights and was not applicable to her without her express consent.[106]

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95. *Lang*, 835 F. Supp. at 1105.

96. *Id.* at 1106 (citing *Gilmer*, 500 U.S. at 33).

97. *Id.* (citing Pine River State Bank v. Mettille, 333 N.W.2d 622, 626-27 (Minn. 1983)). In *Pine River State Bank*, the Minnesota Supreme Court ruled that a bank's distribution of an employee handbook outlining termination procedures constituted an employment contract, despite the at-will status of an employee. *Pine River State Bank*, 333 N.W.2d at 627. A linchpin of the holding was that assuming an employee handbook formed an offer of employment conditions,

> [t]he employee's retention of employment constitute[d] acceptance of the offer of [the] unilateral contract; by continuing to stay on the job, although free to leave, the employee supplie[d] the necessary consideration for the offer.

Id. at 627. Ironically, the *Pine River State Bank* decision, which was pro-employee, was persuasive in the pro-employer *Lang* holding. *See Lang*, 835 F. Supp. at 1106.

98. *See Lang*, 835 F. Supp. at 1106. While the clause may not have been unfair, the court completely missed the thrust of Lang's argument. Lang objected not to the clause itself, but the manner of its applicability to his case. *Id.* at 1105.

99. *Id.* at 1106.

100. CA No. 3:94-CV-1517-R, 1994 WL 803508 (N.D. Tex. Nov. 28, 1994).

101. TEXAS CIVIL CODE § 5221k, *repealed by* Acts 1993, 73rd. Leg., ch. 269, § 5(1) (effective Sept. 1, 1993).

102. *Kinnebrew*, 1994 WL 803508 at *1.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at *1, *2.

The arbitration agreement at issue in *Kinnebrew* provided a prevailing employee limited relief. The clause limited compensatory damages to "direct injury as the arbitrator determines the party has suffered."[107] In addition, reinstatement after termination was permissible only if money damages proved an insufficient remedy.[108] Moreover, the agreement precluded punitive damages, attorney's fees, and equitable relief.[109] Clearly, then, Gulf's arbitration agreement did not furnish Kinnebrew the same remedies that she would enjoy under applicable statutes or equity.[110]

Nevertheless, the court rejected all of Kinnebrew's claims. The court first explicitly compared Kinnebrew's statutory claims with Title VII when it cited *Alford* for the proposition that both the Texas and federal law claims could be "subjected to compulsory arbitration."[111] Next, the court found that the arbitration procedure did not deprive Kinnebrew of her substantive rights, stating that a substantive right was limited to the "right to the equal enjoyment of fundamental rights, privileges, and immunities, [as] distinguished from procedural rights."[112] By separating the right from the remedy, the court had no trouble finding that Kinnebrew did "not forego 'substantive rights' when compelled to arbitrate under a more limited remedial scheme, for Gulf's Arbitration Policy fully protect[ed] Plaintiff's right to be free from discrimination."[113] Next, the court invoked the *Gilmer* presumption that statutory claims were arbitrable unless Congress had "evinced an intention to preclude waiver of judicial remedies for the statutory rights at issue,"[114] ruling that Kinnebrew had not met her burden of showing such intentions.[115] The court then turned its attention to Kinnebrew's coercion argument.

Kinnebrew also lost on her coercion claim. She had argued that Gulf's imposition of the arbitration agreement, without explanation to or express consent from employees, voided its applicability.[116] Citing *Lang*, and without distinguishing possible differences between Texas and Minnesota law,[117] the Texas court dismissed the adhesion claim because Kinnebrew

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107. *Kinnebrew*, 1994 WL 803508 at *1.

108. *Id.*

109. *Id.*

110. There is precedent for arguing that by limiting relief in the arbitral forum, Gulf Insurance left itself open to the possibility of court action for the rest of otherwise available remedies. In Davis v. Chevy Chase Financial Ltd., 667 F.2d 160 (D.C. Cir. 1981), the court stated:

> A party who consents to the inclusion in a contract of a limited arbitration clause does not thereby waive his right to a judicial hearing on the merits of a dispute not encompassed within the ambit of the clause.

Id. at 165. It would seem possible, therefore, to argue that an employer could have to defend an action seeking in court the relief precluded by an arbitration clause. *See also* DiCrisci v. Lyndon Guaranty Bank of New York, 807 F. Supp. 947 (W.D.N.Y. 1992).

111. *Kinnebrew*, 1994 WL 803508 at *1 (citing Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991)). For a discussion of *Alford*, *see supra* note 59 and accompanying text.

112. *Kinnebrew*, 1994 WL 803508 at *2 (quoting Black's Law Dictionary 1429 (6th ed. 1990)).

113. *Id.* at *2.

114. *Id.* (quoting *Gilmer*, 500 U.S. at 26).

115. *Id.* at *2.

116. *Id.*

117. Generally, the determination of whether the parties agreed to arbitrate is made under *state*

had "continued her employment after receiving a copy of the [a]rbitration [p]olicy."[118] The court buttressed its reasoning by relying on Fifth Circuit precedent for the proposition that the adhesion claim was an attack on the arbitration contract as a whole, and therefore "subject to arbitration itself."[119]

The *Kinnebrew* decision is remarkable for its implications. If courts follow *Kinnebrew*, employers in Texas will be free to unilaterally insert an arbitration agreement in an employee manual, significantly limit available statutory remedies, and prevail in the face of an employee judicial challenge. Moreover, because of *Kinnebrew*'s reliance on *Alford*, nothing in current Fifth Circuit law prevents this scenario from applying to Title VII claims. Even though Congress in 1991 strengthened Title VII's broad remedial scheme by providing for compensatory damages and jury trials in instances where none had been available before,[120] the current state of case law could allow employers to take away Title VII claims from a jury, contrary to the explicit intent of Congress.

THE CIVIL RIGHTS ACT OF 1991

The text and legislative history of the 1991 amendments show that Congress wanted to provide claimants with the right to a jury trial where a court, and not an arbitrator, would decide the issue of damages. A great deal of effort went into the passage of the Civil Rights Act of 1991, resulting in significant changes to discrimination law.[121] Of particular interest here, however, is the congressional decision to allow claimants the right to seek compensatory and punitive damages, expressly providing for jury trials. One of Congress's concerns was the inequity of allowing compensatory and punitive damages for race discrimination under section

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law. *See* Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela, 991 F.2d 42, 45 (2d. Cir. 1993) (citing Perry v. Thomas, 482 U.S. 483 (1987)). Thus, in *Kinnebrew* an analysis of whether Texas law would have found the agreement to arbitrate to be a valid contract would have been helpful.

118. *Kinnebrew*, 1994 WL 803508 at *2.

119. *Id.* (citing R.M. Perez & Assoc. v. Welch, 960 F.2d 534, 538 (5th Cir. 1992)). In *Kinnebrew*, the court misapplied the holding in *R.M. Perez*. *R.M. Perez* was a securities case alleging fraud in securing customer and option agreements, which contained an arbitration clause. The court there merely found that fraud, if any, related not only to the arbitration clause, but to the agreements as a whole. Therefore, the court ruled that "the Federal Arbitration Act require[d] that the fraud claim be decided by an arbitrator." *R.M. Perez*, 960 F.2d at 538 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)).

In Kinnebrew's case, her argument was essentially that she should not be deemed to have waived her statutory rights and remedies. The court should have determined the waiver issue, rather than deferring to the arbitral forum. *See* Prudential Ins. Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995); Int'l Union of Operating Engineers, Local 150, AFL-CIO v. Flair Builders, Inc., 406 U.S. 487, 491 (1972); Summer Rain v. Donning Co./Publishers, 964 F.2d 1455, 1459 (4th Cir. 1992); Apollo Computer, Inc. v. Berg, 886 F.2d 469, 472 (1st Cir. 1989).

120. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

121. *See* Roger Clegg, *Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459 (1994) (providing a concise summary of the negotiations leading to the 1991 amendments).

1981 of Title 42 of the United States Code, while precluding such relief under Title VII for other discrimination claims. Accordingly, Congress expressly wished to provide the same remedies to victims of gender and religious discrimination as to victims of race discrimination.[122] The House Education and Labor Committee report on the 1991 amendments is replete with evidence of Congress's intention to provide damages as a means of making victims whole and of enforcing the statute.[123] The committee also mentioned deterrence as a legislative goal,[124] and discussed the need to have victims of discrimination act as "'private attorneys general' by enforcing the statute for the benefit of all Americans."[125] Similarly, the House Judiciary Committee intended the amendments to strengthen civil rights remedies and to provide more effective deterrence against discrimination.[126] The Judiciary Committee echoed its sister panel in stating that the 1991 amendments were an attempt to provide parity in remedies where discrimination other than race exists.[127]

In section 118 of the 1991 amendments, Congress expressly included language encouraging the arbitration of discrimination claims.[128] This

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122. H.R. REP. No. 40(I), 102d Cong., 1st Sess. 15, 18, 64-65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 553, 556, 602-03, 612 (report of the House Committee on Education and Labor) (stating that in providing for damages the House of Representatives applied the "same standards courts have applied under Section 1981").

123. The Education and Labor Committee discussed many cases of egregious discrimination where courts could not award damages, and expressed multiple reasons for allowing damages:

> Strengthening Title VII's remedial scheme to provide monetary damages for intentional gender and religious discrimination is necessary to conform remedies for intentional gender and religious discrimination to those currently available to victims of intentional race discrimination. Monetary damages are also necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity. Such relief is also necessary to encourage citizens to act as private attorneys general to enforce the statute. Monetary damages simply raise the cost of an employer's engaging in intentional discrimination, thereby providing employers with additional incentives to *prevent* intentional discrimination in the workplace before it happens.

1991 U.S.C.C.A.N. at 602-03 (emphasis added).

124. The Committee specifically referred to the pre-1991 back pay remedy as inadequate:

> Making employers liable for all losses—economic and other wise—which are incurred as a consequence of prohibited discrimination, and which are proved at trial, will serve as a necessary deterrent to future acts of discrimination, both for those held liable for damages as well as the employer community as a whole . . . .

Id. at 607 (citing Riverside v. Rivera, 477 U.S. 561, 575 (1986)).

> Back pay as the exclusive monetary remedy under Title VII has not served as an effective deterrent, and, when back pay is not available, as is the case where a discrimination victim remains on-the-job or leaves the workplace for other reasons other than discrimination, there is simply no deterrent.

Id. (citing Albermarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975)).

125. 1991 U.S.C.C.A.N. at 617.

126. *See* H.R. REP. No. 40(II), 102d Cong., 1st Sess. 1, *reprinted in* 1991 U.S.C.C.A.N. 694 (report of the House Committee on the Judiciary).

127. *Id.* at 717-23.

128. Section 118 of the Civil Rights Act of 1991 states:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Act or provisions of Federal law amended by this title.

Pub. L. No. 102-166, § 118, 105 Stat. 1081 (1991) (codified as amended in scattered sections of 42 U.S.C.).

clause could be construed as reinforcing the *Gilmer* presumption that directs courts to compel arbitration, where Congress itself has not precluded arbitration in a statute providing a cause of action.[129] Yet there is another, less simplistic, statutory analysis of the 1991 amendments.

On its face, the language of the amendments cautions against broadly applying the *Gilmer* presumption. First, section 118 is not a mandate, but an encouragement. While Congress would undoubtedly appreciate a lessening of the burden on federal courts, Congress refused, by omission, to compel arbitration under this section. Second, it would be absurd for Congress to have created specific rights to jury trials and damages while at the same time sanctioning unilaterally imposed arbitration schemes that diminished those very remedies. A more harmonious interpretation of the whole of the 1991 amendments shows that Congress intended for arbitration and jury trials to co-exist, with the right to a jury trial, if not paramount, then at least fully available to claimants.

In addition, the legislative history accompanying this section clearly explains the congressional creation, without compromise, of a right to a jury trial. In discussing section 118, both House committees stated that

> the use of alternative dispute resolution mechanisms is 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 an employment contract*, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). *The Committee does not intend this section to be used to preclude rights and remedies that would otherwise be available.*[130]

The committee reports do not mention *Gilmer*. Discussions in Congress reveal, however, that individual members of the House knew of the case.[131] It is telling, therefore, that those responsible for the Act chose to highlight *Alexander* and ignore *Gilmer*. Moreover, the Education and Labor Committee further elaborated on its opposition to arbitration clauses imposed as a condition of employment. In addressing proposed Republican minority substitute legislation to the 1991 House bill, the Committee stated that the majority version of the legislation

> includes a provision encouraging the use of alternative means of dispute resolution to supplement, rather than supplant, the rights and remedies provided by Title VII. The Republican substitute, however, encourages the use of such mechanisms "in place of judicial resolution." Thus, under the latter proposal employers could refuse to hire workers unless

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129. *See* Bompey & Pappas, *supra* note 4, at 200.

130. H.R. REP. No. 40(I), 102d Cong., 1st Sess. 97, *reprinted in* 1991 U.S.C.C.A.N. 635 (report of the House Committee on Education and Labor) (emphasis added). Compare with identical language found in the report from the Judiciary Committee, 1991 U.S.C.C.A.N. at 735.

131. *See* 137 CONG. REC. H9548 (Nov. 7, 1991) (statement of Rep. Hyde).

> they signed a binding statement waiving all rights to file Title VII complaints. Such a rule would fly in the face of Supreme Court decisions holding that workers have the right to go to court, rather than being forced into compulsory arbitration, to resolve important statutory and constitutional rights, including employment opportunity rights. *American workers should not be forced to choose between their jobs and their civil rights.*[132]

The House majority, then, did not intend for arbitration of Title VII claims to preclude judicial remedies.

Finally, even arbitration's champions in Congress stopped short of suggesting a *Kinnebrew* type result. The Republican minority was much more supportive of arbitration than the Democrats in power at the time,[133] yet Republican legislators refused to endorse unilaterally imposed arbitration. The minority took pains to show that its version of the bill was also protective of employee consent, where it specifically provided that any agreement to arbitrate must be "knowing and voluntary."[134] Of course, under a *Lang* and *Kinnebrew* analysis, a court could construe a unilaterally imposed arbitration clause as being knowing and voluntary on the part of an employee. Such a construction, however, would seem to go against the plain intent even of arbitration's earnest supporters in Congress. Based on the language of the statute, as well as both the majority and minority legislative history, courts should not give effect to an employer's unilateral imposition of a binding arbitration clause where Title VII rights are at issue.

THE AMERICANS WITH DISABILITIES ACT EXCEPTION

Courts have not completely extended *Gilmer* to all statutory prohibitions on discrimination; there is a reluctance to compel arbitration of Americans with Disabilities Act (ADA) claims. A typical case is *Riley v. Weyerhaeuser Paper Co.*,[135] where the court denied compulsory arbitration, *Gilmer* notwithstanding.[136] Weyerhaeuser had terminated Eldon Riley after he was diagnosed with multiple sclerosis and could not continue operating

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132. H.R. REP. No. 40(I), 102d Cong., 1st Sess. 104, *reprinted in* 1991 U.S.C.C.A.N. 642 (report of the House Committee on Education and Labor) (citations omitted) (emphasis added).

133. *See id.* The minority members of the Education and Labor Committee stated in the committee's report:

> Both H.R. 1375 [the minority version of the 1991 Civil Rights Act] and H.R. 1 [the House version] contain provisions for encouraging the use of alterative dispute resolution mechanisms. Given the well-known litigation crisis pervading the judicial system, which will be immeasurably worsened by H.R. 1, there is a desperate need for greater use of [alternative dispute resolution mechanisms.]

H.R. REP. No. 40(I), 102d Cong., 1st Sess. 156, *reprinted in* 1991 U.S.C.C.A.N. 685.

134. H.R. REP. No. 40(I), 102d Cong., 1st Sess. 156, *reprinted in* 1991 U.S.C.C.A.N. 685.

135. 898 F. Supp. 324 (W.D.N.C. 1995). The plaintiff in this case was covered by a collective bargaining agreement; thus this case considered facts beyond the scope of this comment. It is important to recognize, however, that in its reasoning the *Riley* court did not rely on *Alexander*'s distinction from *Gilmer*. Rather, the court stayed within the *Gilmer* language where Justice White, speaking for the Court in *Gilmer*, recognized that "not all statutory claims may be appropriate for arbitration." *Riley*, 898 F. Supp. at 326 (quoting *Gilmer*, 500 U.S. at 26).

136. *Riley*, 898 F. Supp. at 326-27.

a rotary die cutter.[137] As a defense to Riley's lawsuit, Weyerhaeuser put forth the mandatory arbitration procedures of the controlling collective bargaining agreement.[138] The court ruled against Weyerhaeuser, relying on the language in *Gilmer* that left open the possibility of showing Congress's intent to preclude a waiver of a judicial forum.[139] The court found the necessary intent in the legislative history of the ADA:

> While the text of the [ADA] statute in [42 U.S.C.] § 12112 does encourage the use of alternative means of dispute resolution where appropriate, including arbitration, the legislative history of the Act is unequivocal in expressing Congress's intent to preclude a waiver of judicial remedies.[140]

Other decisions have addressed the relationship between compulsory arbitration and the ADA. For example, the *Block v. Art Iron, Inc.*[141] court found that Congress did not intend to preclude judicial remedies under the ADA.[142] More recently, in the Sixth Circuit, an Ohio federal court followed *Block* in refusing to compel arbitration of an ADA claim.[143] For ADA claims, then, federal courts hesitate to extend *Gilmer* and enforce binding arbitration agreements.

Such hesitation should also apply to post-1991 Title VII claims, particularly where an employer has acted coercively by unilaterally imposing arbitration, since the reasoning with respect to ADA claims is fully applicable to Title VII claims. The ADA legislative history referred to

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137. *Riley*, 898 F. Supp. at 326.

138. *Id.*

139. *See id.* In finding that the burden was on Gilmer to show Congress's intent to prevent a waiver of statutory remedies, the *Gilmer* Court stated:

> Although all statutory claims may not be appropriate for arbitration, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."

Gilmer, 500 U.S. at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)). This quote goes to the heart of this comment's argument. Federal courts now allow the unilateral imposition of arbitration of Title VII claims. This is doubly wrong in light of *Gilmer*, both because the 1991 amendments to Title VII provide for the right to a jury trial, and because such unilateral imposition is coercive. Therefore, an employee has not "made the bargain to arbitrate."

140. *Riley*, 898 F. Supp. at 326-27 (citing H.R. REP. No. 485(III), 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 499-500 (report of the House Committee on the Judiciary)). In analyzing similar provisions of the ADA and Title VII, it is important to note that in examining the ADA's legislative history, the *Riley* court did not rely on the even stronger language found in the second House Conference Report on the ADA, where the language of the Committee of Conference unequivocally rejected mandatory arbitration. *See, e.g.*, H.R. REP. No. 596, 101st Cong., 2d Sess. 89 (1990), *reprinted in* 1990 U.S.C.C.A.N. 598.

141. 866 F. Supp. 380 (N.D. Ind. 1994).

142. *Id.* at 386 (stating that "the ADA's legislative history very strongly suggests that ADA claims may not be arbitrated in the absence of an express, voluntary waiver of the right to assert the claim in the courts").

143. DiPuccio v. United Parcel Serv., 890 F. Supp. 688 (N.D. Ohio 1995). There is no doubt that an important component of both this case and *Block* was the fact that the employees in both were covered by a collective bargaining agreement. Nevertheless, the language of each opinion with respect to the ADA is broad enough to support the proposition put forth here regarding the ADA's relationship to arbitration.

in *Riley* contains strikingly similar language to the committee reports for the Title VII amendments.[144] Or rather, the 1991 Title VII amendments are similar to the ADA in their views of arbitration, since the ADA became law in 1990.[145] The close relationship between the ADA and the 1991 Title VII amendments show that Congress took the same approach to examining the arbitration issue. Congress intertwined the remedies available under both measures,[146] and courts should adjudicate those rights consistently, while at the same time respecting the will of the legislature. Yet under current jurisprudence, an employee discriminated against on the basis of a disability *can* get a jury trial, while an employee discriminated for other, non race-related reasons cannot, particularly if an employer requires the signing of an arbitration agreement before a prospective employee can start working. As the 1991 legislation shows, there are no grounds for the dichotomy in the approaches to arbitration that courts have taken. The 1991 Civil Rights Act, just as much as the ADA, expresses Congress' intent to encourage, but not enforce, arbitration.

RECENT DECISIONS CONSTRUING THE 1991 AMENDMENTS

Courts ruling on pre-1991 claims established precedents for post-1991 holdings which hinder a clearer appreciation of the 1991 legislative changes. Several circuits expressly recognize that compulsory arbitration is allowable under pre-1991 Title VII.[147] Accordingly, it would be difficult for a court to rule that the 1991 Civil Rights Act, seen merely as an amendment to

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144. The House Committee on the Judiciary, reporting on the Alternated Dispute Resolution provision of the ADA, section 513, stated:

> The Committee adopted this section during its consideration of the bill. This section encourages the use of alternative means of dispute resolution, where appropriate and to the extent authorized by law. These methods include settlement negotiations, conciliation, facilitation, mediation, factfinding, mini-trials and arbitration.
>
> This amendment was adopted to encourage alternative means of dispute resolution that are already authorized by law. The Committee wishes to emphasize, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by this Act. 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 from seeking relief under the enforcement provisions of this Act.

H.R. REP. No. 485(III), 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 499-500. Compare with the legislative history of the 1991 Civil Rights Act, *supra* notes 120-135, and accompanying text.

145. President Bush signed the ADA on July 26, 1990. 26 Weekly Compilation of Presidential Documents 1165, *reprinted in* 1990 U.S.C.C.A.N. 601-02.

146. The Civil Rights Act of 1991 expressly extends the availability of compensatory and punitive damages, as well as jury trials, to actions under the ADA. Pub. L. No. 102-166, 105 Stat. at 1072-73.

147. *See, e.g.*, Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992); Mago v. Shearson Lehman Hutton Inc., 956 F.2d 932 (9th Cir. 1992); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991).

Title VII, precludes compulsory arbitration.[148] This reasoning prevails despite the fact that most decisions creating stare decisis and favoring arbitration of Title VII claims were either handed down before the 1991 amendments applied[149] or followed *Alford* without considering the 1991 amendments.[150] Courts have recently spoken to the issue of whether Congress, in including provisions for damages and jury trials in the 1991 Civil Rights Act, intended to protect claimants against waiver of the right to a judicial forum.[151]

The extensive committee reports discussing new rights to damages and jury trials under the 1991 amendments failed to convince courts to distinguish cases arising under the legislation. In several federal and state opinions, courts to date have steadfastly held that in enacting the 1991 Civil Rights Act, Congress did not intend to preclude arbitration.

The Fifth Circuit Court of Appeals made a passing reference to section 118 of the 1991 Civil Rights Act in a case involving arbitration of Title VII claims under the Railway Labor Act (RLA).[152] The extent of the court's comment, in ruling that the plaintiff was required to arbitrate her employment related dispute under the RLA, noted that "[section] 118 of the 1991 Civil Rights Act encourages the use of alternative means of dispute resolution, including arbitration, to resolve disputes arising under Title VII."[153]

New York's highest court came to the same conclusion, albeit giving section 118 more attention. In *Fletcher v. Kidder, Peabody & Co.*,[154] the court examined the familiar arbitration clause of the securities industry, where two plaintiffs had sued their respective employers under New York's State Human Rights Law, one claiming race, and the other gender-based, discrimination.[155] Both defendants responded by seeking to compel arbitration under the FAA.[156] When the cases reached the court of appeals, the court mandated arbitration, extensively discussing the 1991 amendments.

Speaking through Judge Titone, the majority first analogized the state law claims with federal law[157] and then discussed Title VII, concluding

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148. Indeed, although a few lower courts have been inclined to see in the 1991 amendments' legislative history sufficient language to prevent court-ordered arbitration, appellate courts have not agreed. *See infra* notes 165-174 and accompanying text.

149. Alford v. Dean Witter Reynolds, Inc., 500 U.S. 930 (1991), was decided on August 2, 1991.

150. *See, e.g.*, Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1487.

151. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29 (1991).

152. Hirras v. Nat'l R.R. Passenger Corp., 10 F.3d 1142 (5th Cir.), *vacated on other grounds*, 114 S. Ct. 2732 (1994).

153. *Id.* at 1146. There is not clear indication from this opinion or the ruling on this case in the district court, Hirras v. Nat'l R.R. Passenger Corp., 826 F. Supp. 1062 (W.D. Tex. 1992), if Hirras's claims arose before the enactment of the 1991 amendments. Given the dates of the opinions, this is likely to be the case. Note, however, that when the court ruled in *Hirras*, the Supreme Court had not yet held that the 1991 amendments did not apply retroactively. *See* Rivers v. Roadway Express, 114 S. Ct. 1510 (1994).

154. 619 N.E.2d 998 (N.Y. Ct. App.), *cert. denied*, 114 S. Ct. 554 (1993).

155. *Id.* at 1000-01.

156. *Id.*

157. The *Fletcher* court applied the *Gilmer* ruling to New York case law, holding that a 1979

that "there is nothing in the legislative history of either that Federal statute itself or the recently adopted amendments to that statute . . . that would suggest the existence of a congressional intent to override the general rule that anticipatory contracts to arbitrate are enforceable under the FAA."[158] In that legislative history, the court looked to the statement of Congressman Edwards, cosponsor of section 118, recognizing the intent there to preclude enforced arbitration of Title VII claims, yet also finding that one individual's statement could not evince congressional intent. Similarly, the court refused to read into the amendments' committee reports Congress' intention to forbid courts to compel mandatory arbitration of statutory claims.[159] Judge Smith wrote a lengthy dissent in *Fletcher*, focusing the argument both on the race discrimination at issue and on the continued vitality of *Alexander*.[160] The dissent found that the 1991 legislative history showed Congress' intent "to preclude the com-

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decision disfavoring arbitration of discrimination claims would no longer be followed. *Id.* (citing Matter of Wertheim & Co. v. Halpert, 397 N.E.2d 386 (1979)). The court then explained that

> [w]here the [asserted] right is predicated on a State or local statute rather than on a congressional enactment, it is undisputed . . . that the courts are obliged to draw an analogy to the equivalent Federal law, where possible, and to consider Congress' intentions with regard to the rights created by that law.

Fletcher, 619 N.E.2d at 1002.

158. *Id.* (citations omitted).

159. The court devoted much space to this question. The majority's reasoning regarding section 118 stated:

> The amendment that the dissent cites, which authorizes the use of alternative dispute resolution methods for controversies arising under Title VII . . . merely adds to the existing, statutorily created right to seek relief in judicial and administrative forums . . . That amendment does not shed any light on Congress' intentions with regard to anticipatory agreements to use arbitral forums in the event of a future dispute. It is true that the amendment's cosponsor, Congressman Edwards, stated in the Congressional Record that the amendment was "intended to be consistent with decisions such as [*Alexander*], which protect employees from being required to agree in advance to arbitrate disputes" and that "[n]o approval whatsoever is intended of the Supreme Court's recent decision in *Gilmer* . . . or any application or extension of it." However, this statement cannot be viewed as indicative of the intentions of Congress as a whole, since it expresses only the position of the individual legislator who made it.
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> Similarly, the [two House reports] on which the plaintiff . . . relies, are not useful indicators of congressional intent with regard to the enforceability of arbitration contracts in Title VII disputes. While those reports have more persuasive value than do Representative Edwards' personal remarks in terms of their ability to reflect Congress' intent, they are not particularly helpful to plaintiffs' position here, because they merely set forth the committees' *understanding* of the enforceability of arbitration agreements in discrimination disputes under the then-existing Supreme Court precedent. Indeed, the section of the committee report on which the dissent relies states only that the committee "*believes* that any agreement to submit disputed issues to arbitration . . . does not preclude the affected person from seeking relief under the enforcement provisions of Title VII . . . ." This section, of course, says nothing about what Congress actually *intended*.

Fletcher v. Kidder, Peabody & Co., 619 N.E.2d 998, 1002-03 (N.Y. Ct. App.), *cert. denied*, 114 S. Ct. 554 (1993) (citations omitted) (emphasis in original). While the author agrees with the *Fletcher* court's position regarding the statement of Congressman Edwards, the author finds the court's analysis of the committee reports to be remarkably short-sighted. Read as a whole, the reports clearly show congressional intent to provide not only for damages in Title VII actions, but for jury trials as well.

160. *Id.* at 1006-12.

pulsory arbitration of racial discrimination claims."[161] In addition, the dissent, in no uncertain terms, stated that an arbitration clause offered as a condition of employment was coercive.[162] As case law has repeatedly showed, however, Judge Smith is in the minority on this issue.

Other courts that have considered the issue have reached the same conclusion as the *Fletcher* majority. A Kansas federal court followed *Fletcher* in another securities industry case where the plaintiff alleged sex discrimination and harassment.[163] In ordering a stay of the proceedings pursuant to an arbitration clause in a standard U-4 form,[164] the court looked no further than the "plain language" of the 1991 Civil Rights Act. With an eye on *Fletcher*, it rejected the plaintiff's argument that the "committee report[s are] sufficient to establish Congressional intent to preclude a waiver of judicial remed[ies] in Title VII cases."[165] The District of Columbia Court of Appeals likewise refused a similar argument in *Benefits Communication Corp. v. Klieforth*.[166] The trial judge in *Benefits Communications* had specifically found that the legislative history of the 1991 amendments showed Congress' intent to overrule the *Gilmer* holding,[167] but the court of appeals, guiding itself only with the statutory text, reversed.[168] To date, not a single appellate court has upheld a lower court's decision that the 1991 amendments barred the enforcement of arbitration clauses where Title VII rights were at issue.

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161. *Id.* at 1010.

162. The dissent criticized the majority's reading of the 1991 committee reports:

> The majority's decision sanctions the involuntary waiver of the statutory right to judicial review of a claim of racial discrimination. The waiver is involuntary because it is a condition of employment—failure to register [with stock exchanges] precludes one from being a representative and registration requires agreement to arbitrate disputes with the employer. There is no negotiation of this term. Refusal means exclusion from the industry. Thus, this case arguably comes within the statement in *Gilmer* that "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds" for revoking a contract [citations omitted]. The involuntariness of this waiver is highlighted by the fact that it is prospective.

Id. at 1011. The dissent here seems to buttress its coercion argument by stating that refusal to sign a registration/arbitration agreement not only precludes one from being hired, but it precludes one from working in the securities industry altogether.

163. Lockhart v. A.G. Edwards & Sons, Inc., No. CIV.A.93-2418-GTV, 1994 WL 34870 (D. Kan. Jan. 25, 1994).

164. The U-4 form is an industry-wide standard form, which an employee signs when he or she registers with the New York Stock Exchange. The form contains an arbitration clause where the employee agrees to "arbitrate any dispute, claim or controversy that may arise between me and my firm," *id.* at *1, and is at issue in most, if not all, arbitration cases within the securities industry.

165. *Id.* at *4.

166. 642 A.2d 1299 (D.C. 1994).

167. *Id.* at 1301.

168. *Id.* at 1305. Arguably, much of the court's discussion is dictum, since the plaintiff only sued under the district's Human Rights Act, and not Title VII. But because as in New York, District of Columbia courts look to federal precedents for substantive guidance, and because both the lower and appellate courts in *Benefits Communication* based their rulings and reasonings on federal law, this opinion is highly significant as to the Title VII issue.

The Ninth Circuit Court of Appeals examined precisely this question in *Hurst v. Prudential Securities Inc.*[169] There Jeana Hurst had sued her employer, Prudential-Bache Capital Funding, alleging Title VII, Equal Pact Act, and RICO violations.[170] After procedural motions naming Prudential Securities, with which Hurst had signed a standard arbitration agreement, as a defendant, Prudential moved to compel arbitration.[171] The trial court initially denied the motion on the grounds that Prudential had waived its right to arbitrate.[172] In ruling on Prudential's motion for a stay pending appeal, the court added, among other reasons for denying the arbitration defense, that "the 1991 amendments to Title VII express a preference for the judicial forum."[173] The Ninth Circuit reversed, constrained by *Mago v. Shearson Lehman Hutton, Inc.*,[174] and unpersuaded that the 1991 amendments dictated a different result than previous Title VII arbitration cases.[175]

While the judicial enforcement of arbitration agreements presented as pre-hiring conditions of employment seems firmly entrenched, a closely-watched Ninth Circuit decision indicates that a court was willing to strike down arbitration clauses where employees did not consent to such arbitration prior to starting work. Two employees in *Prudential Insurance Co. of America v. Lai*,[176] Justine Lai and Elvira Viernes, sued the Prudential Company in state court, alleging rape by a supervisor, harassment, and sexual abuse.[177] Prudential sought relief in federal court, attempting to compel arbitration under a U-4 form that both plaintiffs had signed. The federal court ordered the case to proceed to arbitration.[178] On appeal, the Ninth Circuit reversed, focusing on the 1991 amendments to Title VII and their legislative history.

The central issue on appeal was whether Lai and Viernes, in signing the U-4 form when applying for work, had voluntarily consented to arbitration of statutory claims. The court accepted the plaintiffs' allegations that Prudential had not informed them of the U-4 forms' significance, or even given them an opportunity to read the forms.[179] Expressly acknowledging that it was not revisiting *Mago*, the court explained the focus of its inquiry:

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169. No. 93-15148, 1994 WL 118097 (9th Cir. Apr. 4, 1994). *Hurst* is an unpublished disposition which under Circuit Rule 36-3 is not precedential. Nevertheless, *Hurst* is worth discussing both because it is a case on point and because it illustrates the thinking of some of the judges of the Ninth Circuit Court of Appeals.

170. *Id.* at *1.

171. *Id.* at *1, *2.

172. *Id.* at *2.

173. *Id.*

174. 956 F.2d 932 (9th Cir. 1992).

175. *Hurst*, 1994 WL 118097, at *3, *6. The court refused to distinguish either *Gilmer* or *Mago*, and relegated to a footnote, albeit a long one, its discussion of the 1991 amendments. *See id.* at *6 n.2.

176. 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995).

177. *Id.* at 1301.

178. *Id.*

179. *Id.*

> The issue before us, however, is not whether employees may ever agree to arbitrate statutory employment claims; they can. The issue here is whether these particular employees entered into such a binding arbitration agreement, thereby waiving statutory court remedies otherwise available.[180]

Yet while presenting the issue in contract terms, the court did not limit its analysis to contract law.

The *Lai* court, influenced by the policies underlying Title VII, declined to enforce arbitration under the circumstances. Although *Gilmer* directed courts to examine whether Congress had precluded arbitration of statutory claims, the Ninth Circuit reached to *Alexander*, combined with the 1991 amendments and their legislative history, in discussing consensual waiver. The court first cited the *Alexander* language supporting multiple remedies for Title VII injuries.[181] Next, the court found that section 118 of the 1991 amendments and its legislative history, including a committee report and a statement by Senator Dole, stood for the proposition that Congress encouraged arbitration "only 'where the parties knowingly and voluntarily elect[ed] to use these methods.'"[182] The court discussed at length its understanding of the voluntary consent requirement:

> This congressional concern that Title VII disputes be arbitrated only "where appropriate," and only when such a procedure was knowingly accepted, reflects our public policy of protecting victims of sexual discrimination and harassment through the provisions of Title VII and analogous state statutes. *See Alexander*, 415 U.S. at 47. This is a policy that is at least as strong as our public policy in favor of arbitration. Although the Supreme Court has pointed out that plaintiffs who arbitrate their statutory claims do not "forego the substantive rights afforded by statute," *Mitsubishi Motors*, 473 U.S. at 628, the remedies and procedural protections available in the arbitral forum can differ significantly from those contemplated by the legislature. In the sexual harassment context, these procedural protections may be particularly significant. Thus, we conclude that a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration.[183]

Although the court could have rested its ruling strictly on a contract principle of lack of consent,[184] the court reasoned broadly, choosing to

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180. *Id.* at 1303.

181. *Id.* at 1304 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-48 (1974)).

182. *Id.* at 1304-05, (citing 137 CONG. REC. S15472, S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole).

183. *Id.* at 1305 (footnote omitted). The court took note that under California law, privacy rights of victims of sexual harassment are protected by discovery-limiting statutes, and that "in an area as personal and emotionally charged as sexual harassment and discrimination, the procedural right to a hearing before a jury of one's peers, rather than a panel of the National Association of Securities Dealers, may be especially important." *Id.*

184. *See, e.g., Gilmer*, 500 U.S. at 33 (stating that arbitration agreements are on the same footing as other contracts).

weigh the public policies supporting Title VII and arbitration and finding that in this instance, Title VII policies prevailed, because the parties, even if they were "aware of the nature of the U-4 form . . . could not have understood that in signing it, they were agreeing to arbitrate sexual discrimination suits."[185]

The *Lai* decision, while broad in its reasoning and seemingly supportive of resolution of Title VII claims in a judicial forum, nevertheless has a narrow holding, limited to the employee's lack of consent at the time of signing U-4 forms.[186] For this reason, *Lai* does not directly preclude a *Kinnebrew*-type result, where an employer would unilaterally impose an arbitration clause, describing in detail the possible claims at issue, and then argue that the employee's continuation of work represented knowing consent. *Lai* does show, however, that at least one federal circuit is concerned about forcing employees into giving up a judicial forum, particularly for Title VII claims.

THE CURRENT STATE OF TITLE VII ARBITRATION

The Equal Employment Opportunity Commission (EEOC) has likewise looked with disfavor on mandatory arbitration clauses. EEOC commissioner Paul Miller has recently gone on record stating that while the agency favors arbitration,

> [t]he problem is mandatory arbitration clauses that are imposed on employees as a condition of employment or continuing employment. We basically see these as ways to circumvent a party's right to file in federal court and their civil rights as set out by Congress.[187]

The EEOC successfully sought an injunction, early in 1995, against River Oaks Imaging and Diagnostics, a Houston company that had wanted to unilaterally implement a binding arbitration clause and conditioned continued employment upon each employee's acceptance of the clause.[188] In two other cases, the EEOC has filed amicus briefs, urging courts to decline to enforce arbitration clauses.

The EEOC amicus brief in *Duffield v. Robertson Stevens & Company*[189] best exemplifies the agency's position, focusing on both the arbitration

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185. *Lai*, 42 F.3d at 1305.

186. It is interesting to note that in an earlier arbitration decision, Nghiem v. NEC Elec., Inc., 25 F.3d 1437 (9th Cir.), *cert. denied*, 115 S. Ct. 638 (1994), the court squarely held, in response to the claim that the 1991 amendments to Title VII provided for a jury trial, that "establishing a right to jury trial for Title VII claims does not evince a congressional intent to preclude arbitration; it merely defines those procedures which are available to plaintiffs who pursue the federal option, as opposed to arbitration." *Id.* at 1441. Note that the court in *Nghiem* was perhaps less willing to discuss the issue because the employee had initiated arbitration, fully participated, and came to court when dissatisfied with the results. *Id.* at 1440.

187. Margaret A. Jacobs, *Firms with Policies Requiring Arbitration Are Facing Obstacles*, WALL ST. J., Oct. 16, 1995, at B5.

188. Richard C. Reuben, *Two Agencies Review Forced Arbitration*, A.B.A. JOURNAL, August 1995, at 26. *See also* United States Equal Employment Opportunity Comm'n v. River Oaks Imaging & Diagnostic, No. CIV.A.H-95-75, 1995 WL 264003 (S.D. Tex. 1995).

189. Memorandum of Points and Authorities of the Equal Opportunity Commission as Amicus Curiae, Duffield v. Robertson Stephens & Co., No. C-95-0109-EFL (N.D. Cal. filed Aug. 4, 1995) [hereinafter *Memorandum*].

clause at issue and its imposition on an employee. In its brief, the EEOC urged the court to deny an employer's motion to compel arbitration.[190] Tonya Duffield sued Robertson Stevens, alleging Title VII violations involving denial of partnership on the basis of sex, sexual harassment, and retaliation. The EEOC argued two main points. First, the agency maintained that Robertson Stevens' requirement that Duffield sign a U-4 form was presented as a non-negotiable "take it or leave it" basis, thus constituting a contract of adhesion.[191] The EEOC's second argument is that the arbitration clause is unfair because under it arbitration pursuant to NASD and NYSE

> (1) is not governed by the statutory requirements and standards of Title VII; (2) is conducted by arbitrators given no training and possessing no expertise in employment law; (3) routinely does not permit plaintiffs to receive punitive damages and attorneys' fees to which they would otherwise be entitled under the statute; and (4) forces them to pay exorbitant "forum fees" in the tens of thousands of dollars, greatly discouraging aggrieved employees from seeking relief.[192]

Nevertheless, for all its opposition to arbitration in this case, the EEOC makes it quite clear at the outset that it encourages arbitration of labor disputes. Essential to the agency, however, is the need for arbitration to be fair and voluntary, while safeguarding statutory rights.[193]

Under the latest decisions addressing compulsory arbitration of Title VII claims, it appears possible that employers can completely divest employees of the explicitly granted congressional right to a judicial forum, and with it a jury trial. Even *Lai*'s seemingly anti-arbitration holding does not prevent the post-employment imposition of compulsory binding arbitration, so long as employers are careful to fully notify all their workers, and document such notification. Indeed, *Lai* teaches that only informed consent to sign a U-4 form stood in the way of the enforcement

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190. *See id.*

191. *Id.* at 5 (citing Standard Oil Co. of Calif. v. Perkins, 347 F.2d 379, 385 n.5 (9th Cir. 1965)).

192. *Id.* at 3.

193. The *Memorandum* brief could not have been clearer in expressing the agency's position:

> The Commission strongly favors the voluntary use of arbitration and other forms of alternative dispute resolution ("ADR"), and believes that properly used it can speed and simplify the process of adjudicating discrimination claims. However, arbitration that is not knowing and voluntary deprives individuals of substantial rights provided by Congress, especially where—as alleged here—the procedures are unfair and specifically designed *not* to safeguard statutory rights. Rather than improving the system, improper use of arbitration impairs it.

Memorandum at 1.

Certain states may protect statutory rights independently of federal laws. For example, the Colorado Supreme Court has ruled that the state's Wage Claim Act voids any agreement that restricts an employee's right to sue for the recovery of wages. *See* Lambdin v. District Court of Arapahoe County, 903 P.2d 1126 (Colo. 1995).

Likewise, the National Labor Relations Board (NLRB) is critical of arbitration clauses imposed as a condition of continued employment. The NLRB filed unfair labor charges against an employer who had fired an employee for refusing to sign an arbitration agreement. *See* Reuben, *supra* note 188; Jacobs, *supra* note 187.

of arbitration of civil remedies for claims of rape, harassment, and sexual abuse. While arbitration is theoretically not an inferior forum for Title VII claims, the fact remains that out of many cases in this active area of the law, research has uncovered only very few instances where it was an employee, and not an employer, who sought arbitration in a Title VII action.[194]

The reason is simple: employers prefer to keep Title VII claims from juries. Employers, as dominant parties in conflict with individual employees, gain by preferring arbitration.[195] There is little doubt that employers find arbitration more favorable than jury trials. For example, one commentator states that employers "stand a greater chance of success in arbitration rather than in court before a jury."[196] Arbitration awards are usually smaller than jury awards, and often do not include attorneys' fees.[197] In some instances, arbitrators are limited in the remedies they can provide.[198] Indeed, two management lawyers candidly admit that "[a]rbitration may be particularly desirable now that all employment discrimination plaintiffs are entitled by federal statute to a jury trial if the claim is filed in court."[199]

CONCLUSION

Because of the judicial forum's inherent ability to level the playing field in disputes between employers and employees, it is unfortunate that Congress has not seen fit to overturn *Gilmer* in explicit terms. Courts should not compound the injury of congressional inaction with the insult of allowing employers to coerce employees into foregoing important statutory employment rights. Title VII and its amendments are at the core of equal protection in our society, and the courts should diligently

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194. *See, e.g.*, Nghiem v. NEC Elec., Inc., 25 F.3d 1437 (9th Cir.), *cert. denied*, 115 S. Ct. 638 (1994).

195. For a thorough discussion of the advantages that arbitration offers dominant parties, as well as a cogent explanation of the superiority of litigation as a tool of social change, *see Whittaker, supra* note 31, at 306-11. In the civil rights context, litigation is an excellent mechanism for leveling the bargaining position of the parties. *Id.* at 322-23. Indeed,

> arbitration's simplicity, far from compensating victims [of civil rights violations] for its shortcomings, is yet another shortcoming. It is mostly the alleged wrongdoers are pleased [sic] by the decreased cost, time, and formality of the arbitral proceedings. Victims need the additional power that the cost and complexity of litigation give them.

Whittaker, *supra* note 31, at 322-23.

One commentator's greatest concern is that arbitration, by virtue of its private nature, prevents the development of employment and discrimination law at the appellate level:

> [I]t is the privacy and finality aspects of arbitration that are most troubling, rather than the neutrality or competency aspects. Such a systematic consequence may be desirable in the world of commercial relationships and securities investors, but may not be desirable for employer-employee relations.

Gray, *supra* note 1, at 134.

196. Bompey & Pappas, *supra* note 4, at 208.

197. *Id.* at 208, 211.

198. *Id.* at 208. *See also* Kinnebrew v. Gulf Ins. Co., No. 94-CV-1517R, 1994 WL 803508 (N.D. Tex. Nov. 28, 1994), *supra* notes 100-119 and accompanying text.

199. Bompey & Pappas, *supra* note 4, at 211.

exercise their responsibility to protect those democratically created rights. Perhaps *Lai*, which the Supreme Court declined to review, is the first step toward re-establishing a proper balance between employer and employee rights. However, a troubling possibility is that the reasoning of *Kinnebrew* will continue to prevail in federal courts, despite the opposition of the EEOC and the NLRB. Courts must guard against the erosion of statutory rights, and while encouraging arbitration, see to it that such arbitration is both fair and non-coercive. Most importantly, courts should not force employees to abandon their right to a jury trial of Title VII claims.

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