

Comments

A CRITICAL LOOK AT THE EEOC'S POLICY AGAINST MANDATORY PRE-DISPUTE ARBITRATION AGREEMENTS

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The popularity of arbitration as an alternative to formal adjudication of employment disputes has grown exponentially in recent years, particularly because “[e]mployment litigation has grown at a rate many times greater than litigation in general . . . almost one thousand percent greater than the increase in all other types of civil litigation combined.”¹ Employers are usually attracted by the costs of arbitration, which are typically much less than those of litigation. Employee-claimants may prefer arbitration for the sake of privacy, both within their current employment and with respect to their reputation throughout the workforce at large. However, on July 10, 1997, the Equal Opportunity Employment Commission (“EEOC”) issued a policy statement against the use of mandatory binding arbitration of employment discrimination disputes as a condition of employment. The Commission fears that employees will be offered contracts with pre-dispute arbitration clauses on a mandatory “take it or leave it” basis. Effectively, such employees would be forced to choose between their jobs and their right to a judicial forum for employment claims. According to the EEOC, such agreements are, quite simply, contrary to the fundamental principles of modern employment law.

The EEOC’s decision to address the intense and long-standing debate over the utility of mandatory arbitration in individual employment contracts is not surprising. As early as 1983, the Supreme Court declared, and has

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1. Evan J. Spelfogel, *Legal and Practical Implications of ADR and Arbitration in Employment Disputes*, 11 HOFSTRA LAB. L.J. 247, 248 (1993) (discussing the recent increase in employment-related litigation).

continued to declare, that employment contracts fall within the scope of the Federal Arbitration Act.² This statute does not exempt claims based upon federal statutes, nor is the issue espoused in the drafters' intent. However, a split in the circuits, the EEOC, and the legal and mainstream press have kept the debate alive.³ Critics continuously resurrect their distrust of arbitration as a vehicle for attacking mandatory arbitration clauses in employment contracts. In contrast, supporters of the plan often focus on how such agreements can be used effectively and without bias or abuse.

This Comment will examine the reasoning set forth by the EEOC in support of its broad policy against all mandatory arbitration agreements. Although many of the Commission's arguments are compelling and were perhaps justified at one time in our judicial and arbitration history, the arguments are no longer sufficient to warrant a general ban against all mandatory agreements. Part I of this Comment will summarize the history of the current dispute over the arbitration of individual employment disputes, particularly with respect to statutorily created rights. Part II will outline the EEOC's policy statement and briefly summarize the level of deference historically afforded to the EEOC and its policy statements. Part III will demonstrate why the EEOC's position against mandatory agreements is overzealous and thinly justified in this era, when relatively few companies are using such agreements, when the courts have consistently rejected many of the arguments set forth by the Commission, and when the obvious benefits of arbitration, mandatory or not, outweigh any potential sources of bias or abuse. Finally, Part IV will conclude with some suggestions for employers and the EEOC to ensure fair mandatory arbitration agreements.

2. 9 U.S.C. §§ 1-206 (1994). The Supreme Court denied certiorari in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir.), cert. denied, 119 S. Ct. 445 (1998), in which the Ninth Circuit held that a female securities broker did not have to arbitrate her sex discrimination claims under Title VII pursuant to her U-4 agreement. However, the justices denied certiorari without comment, and, therefore, this decision does not qualify as a "declaration" from the Supreme Court. Moreover, in *Wright v. Universal Maritime Service Corp.*, 119 S. Ct. 391, 397 (1998), a unanimous Court held that an employee covered by a collective bargaining agreement requiring mandatory arbitration of employment disputes could bypass the contractual process and pursue his Americans with Disabilities claim in court because the union-negotiated waiver of judicial forum was not "clear and unmistakable." However, the Court explicitly declined to consider the applicability of the FAA in this context. See *id.* at 395 n.1.

3. See, e.g., Martin J. Oppenheimer & Cameron Johnstone, *A Management Perspective: Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation*, 52 DISP. RESOL. J. 19 (1997).

I. THE PATH TO THE PRESENT DEBATE

A. *What Are Mandatory Arbitration Agreements?*

Typically, employers use two types of arbitration agreements in the nonunion context. The first type is the post-dispute agreement, in which both employer and employee contractually agree to arbitration after a dispute has arisen. These agreements do not raise particularly challenging issues because the law has been relatively clear on such knowing and voluntary waivers.⁴ The second type is the pre-dispute or “mandatory” agreement. These agreements are programs which “require, as a term and condition of employment, that all disputes arising from employment or the termination of employment, including statutory employment discrimination claims, be resolved through mandatory, binding arbitration.”⁵ Mandatory agreements can be inserted into contracts, often as stand-alone agreements, or even incorporated by reference. Regardless of the form, these agreements must be signed as a condition of employment.⁶

B. *The Enforceability of Agreements to Arbitrate Statutory Employment Claims*

The current debate regarding the use of mandatory arbitration in the employment context can be traced to the 1925 enactment of the Federal Arbitration Act (“FAA”).⁷ The explicit purpose of the FAA was to manifest a federal policy in favor of arbitration. Pursuant to section 2 of the FAA, written arbitration agreements “shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁸ Thus, the FAA made agreements to arbitrate both future and existing disputes equally as enforceable as all other contracts.⁹

4. See *infra* Part II.B.

5. Robert J. Lewton, Comment, *Are Mandatory, Binding Arbitration Requirements a Viable Solution for Employers Seeking to Avoid Litigating Statutory Employment Discrimination Claims?*, 59 ALB. L. REV. 991, 993 (1996).

6. See Robert Belton, *Developments in the Law: Employment Discrimination*, 109 HARV. L. REV. 1568, 1671 (1996).

7. See 9 U.S.C. §§ 1-206 (1994).

8. *Id.* § 2 (1994).

9. See David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 89 (1997) (discussing the essence of the exception). Note, however, that section 1 of the FAA contains an exception to the general acceptance of agreements to arbitrate: “nothing herein contained shall 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 (1994).

Despite the clear endorsement of arbitration by the legislature, the judiciary was very unreceptive to the new national policy favoring arbitration. In fact, for nearly thirty years after the enactment of the FAA, the courts consistently applied a broad "public policy exception" to the statutory rule of presumptively enforcing arbitration agreements.¹⁰ First, in *Wilko v. Swan*,¹¹ the Court denied enforcement of an arbitration clause in a brokerage contract where the customer claimed damages for misrepresentation under the Securities Act of 1933. The Court based its decision on the terms of the Act, which explicitly banned any stipulation to waive compliance with the substance of the statute. Specifically, the Court reasoned that the Securities Act "was drafted with an eye to the disadvantages under which buyers labor."¹² The Court effectively held that the Act explicitly gives a securities fraud plaintiff special rights to choose the venue and forum that could not be surrendered contractually.

The reasoning applied in *Wilko* gained prompt and widespread acceptance by the lower courts. For example, in *American Safety Equipment Corp. v. J.P. Maguire & Co.*,¹³ the Second Circuit concluded that claims under the Sherman Antitrust Act could not be compelled into arbitration by a contractual arbitration clause. The court expanded the "public policy exception" set forth in *Wilko* and reasoned that antitrust claims, clearly issues of considerable public import, were best determined in a public forum.¹⁴ Ultimately, all lower courts accepted the *American Safety* pronouncement that Sherman Antitrust Act claims could not be compelled into arbitration.¹⁵ The reasoning underlying this line of cases was subsequently applied to reject compelled arbitration under a number of other federal statutes.¹⁶

Despite this limitation, most courts construe this clause very narrowly and apply it only to contracts covering those in the transportation industry. See, e.g., *Miller Brewing Co. v. Brewery Workers Local No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984), cert. denied, 469 U.S. 1160 (1985); *Ewing v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Dickstein v. DuPont*, 443 F.2d 783, 785 (1st Cir. 1971); *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., Local 437*, 207 F.2d 450, 452 (3d Cir. 1953).

10. See Schwartz, *supra* note 9, at 89.

11. 346 U.S. 427 (1953).

12. *Id.* at 435.

13. 391 F.2d 821 (2d Cir. 1968).

14. See *id.* at 827.

15. See, e.g., *NPS Communications v. Continental Group, Inc.*, 760 F.2d 463, 466 (2d Cir. 1985); *Lake Communications v. ICC Corp.*, 738 F.2d 1473, 1477-80 (9th Cir. 1984); *University Life Ins. Co. v. Unimarc Ltd.*, 699 F.2d 846, 850-51 (7th Cir. 1983); *Lee v. Ply*Gem Indus., Inc.*, 593 F.2d 1266, 1274-75 (D.C. Cir. 1979); *N.V. Maatschappij Voor Industriële Waarden v. A.O. Smith Corp.*, 532 F.2d 874, 876 (2d Cir. 1976) (*per curiam*); *Helfenbein v. Int'l Indus.*, 438 F.2d 1068, 1070 (8th Cir. 1971).

16. See, e.g., *McMahon v. Shearson/Am. Express, Inc.*, 788 F.2d 94 (2d Cir. 1986), *rev'd*, 482 U.S. 220 (1987) (rejecting compelled arbitration of a RICO claim); *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 431 F. Supp. 271, 276-77 (E.D. Pa. 1977)

Twenty-one years after *Wilko*, a separate line of civil rights cases emerged to rein in the national policy favoring arbitration. In 1974, the Supreme Court reviewed a lower court's ruling that an arbitrator's binding decision regarding an unlawful, discriminatory discharge pursuant to a collective bargaining grievance procedure barred a plaintiff-employee's Title VII claim.¹⁷ The Supreme Court reversed the lower court's decision, allowing the petitioner, an African-American member of the Steelworkers' Union, to pursue his claim of racial discrimination in the courts despite the collective bargaining agreement's mandatory grievance procedure. According to the Court, despite the federal policy favoring arbitration, "Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration."¹⁸ Even more broadly, the Court stated that "there can be no prospective waiver of an employee's rights under Title VII."¹⁹

Ultimately, the Court extended the principle in *Alexander* to other federal civil rights claims. In *Barrentine v. Arkansas-Best Freight System, Inc.*,²⁰ the Court held that an employee's wage claim under the Fair Labor Standards Act was not barred by a prior binding grievance arbitration on the same issue.²¹ In *McDonald v. City of West Branch*,²² the Court held that a labor arbitrator's decision did not restrict an employee from litigating a wrongful discharge claim. Courts also extended the *Alexander* reasoning to private contractual arbitration in addition to union-negotiated collective bargaining agreements.²³ Thus, at least for a period of time, pre-dispute arbitration agreements, whether by collective bargaining agreements or private contracts, could not be enforced to preclude litigation of statutory civil rights claims.

C. The Downfall of the "Public Policy Exception"

The combination of the reasoning applied in *Wilko*, *American Safety*, and especially *Alexander* could have provided a strong front against enforcement of any pre-dispute agreement to arbitrate statutory claims.

(rejecting compelled arbitration of an ERISA claim).

17. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

18. *Id.* at 49.

19. *Id.* at 51.

20. 450 U.S. 728 (1981).

21. See *id.* at 740 (citing a previous Supreme Court holding that "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute.") (citation omitted).

22. 466 U.S. 284 (1984).

23. See, e.g., *Nicholson v. CPC Int'l*, 877 F.2d 221 (3d Cir. 1989); *Swenson v. Management Recruiters Int'l*, 858 F.2d 1304, 1309 (8th Cir. 1988); *Bierdeman v. Shearson Lehman Hutton, Inc.*, 744 F. Supp. 211, 213-14 (N.D. Cal. 1990), *rev'd*, 963 F.2d 378 (9th Cir. 1992).

However, courts chose not to create a blanket policy against arbitration of these claims; rather, they determined each case on a statute-by-statute basis. At the same time, the general arguments against arbitration in *Wilko*, *American Safety*, *Alexander*, and their progeny were highly susceptible to attack because of their primary emphasis on concerns about arbitral competence and neutrality.²⁴ Soon after *Wilko*, the legal profession became increasingly comfortable with arbitration. Trained lawyers and judges appeared on arbitration rosters instead of, or at least in addition to, retired industry leaders and current executives. Additionally, private arbitration entities overcame the fear of bias created by industry-specific bodies.²⁵ Thus, as the attack on the arbitration system itself was rebuffed by the profession at large, the justifications for denying enforcement of arbitration agreements became increasingly tenuous.

In fact, the "public policy exception" created in *Alexander* was first attacked the same year in which the case was decided. In *Scherk v. Alberto-Culver Co.*,²⁶ the Court declined to apply *Wilko* to a claim under federal securities law for alleged fraud in connection with the sale of businesses by the Swiss national defendant. According to the Court, strict enforcement of a contractual arbitration clause in the purchase agreement was beneficial and necessary in international transactions.²⁷ However, because its international component made this case distinguishable, lower courts confidently continued to apply *Wilko* to domestic contracts. Still, the seed for invalidating the "public policy exception" to the FAA had been planted by *Scherk*, where the Court observed in dicta that "a colorable argument could be made"²⁸ that *Wilko*, which involved a claim under the Securities Act of 1933, would not apply to a claim under the Securities Exchange Act of 1934.

The dicta of *Scherk* eventually materialized eleven years later in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*²⁹ Although this

24. For example, the Court in *Alexander* placed primary emphasis on the shortcomings of arbitration with respect to the implementation and enforcement of statutory policies. These shortcomings included: (1) the absence of a complete record; (2) the inapplicability of normal rules of evidence; (3) the lack of a requirement to set forth reasons for the decision; (4) the arbitrator's focus on party intent, not legislative requirements; and (5) inferior procedures. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974).

25. See Schwartz, *supra* note 9, at 95 (describing the two flaws in the analyses used by post-*Wilko* courts with respect to arbitration of statutory claims as the improved arbitration system and the mistaken focus on the character of the statutory right at issue rather than the effects of the waiver of the right to judicial access).

26. 417 U.S. 506 (1974).

27. See *id.* at 516 (explaining that enforcement of arbitration clauses is "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction").

28. *Id.* at 513.

29. 473 U.S. 614 (1985).

case arose out of an international transaction, the Court applied a broader federal policy in favor of arbitral dispute resolution regardless of the site of the underlying transaction.³⁰ The Supreme Court found no reason to create or continue the presumption against arbitrability of statutory claims. In fact, the Court created a presumption that compelled arbitration of statutory claims has no impact on statutory rights:

By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.³¹

Moreover, in *Mitsubishi Motors*, the Court expanded its attack on the *Wilko*, *American Safety*, and *Alexander* doctrines. Specifically, with respect to *American Safety*, the Court expressed a strong disdain for the presumption that a broad arbitration agreement could be negated due to adhesion or unconscionability without specific evidence of such offenses.³² Additionally, the Court addressed the *Alexander* Court's fear of the complexity of arbitration and the bias of arbitrators. The *Mitsubishi Motors* Court concluded that a pre-dispute arbitration agreement indicates that the parties to a contract opted for simpler procedures and that the courts are required to defer to those wishes.³³ Similarly, because the arbitrators are typically "drawn from the legal as well as the business community," the fears of incompetence or bias were no longer sufficient to support a presumption against arbitration.³⁴

Several major arbitration decisions following *Mitsubishi Motors* solidified the Supreme Court's policy favoring the enforcement of pre-dispute arbitration agreements by focusing on general questions of enforcement independent of any international aspect. First, in *Shearson/American Express, Inc. v. McMahon*,³⁵ two customers sued their broker under the Securities Exchange Act of 1934 and the Racketeer Influenced Corrupt Practices Act ("RICO") for alleged excessive trading and fraudulent investment advice. However, the customer agreements included an industry-standard arbitration clause covering any controversy arising out of or related to the accounts. The Supreme Court, again invoking the "federal policy favoring arbitration," enforced the arbitration

30. *See id.* at 632.

31. *Id.* at 628.

32. *See id.* at 632-33.

33. *See id.* at 633.

34. *Id.* at 634.

35. 482 U.S. 220 (1987).

clause.³⁶ The Court acknowledged that the presumption of enforceability laid down in *Mitsubishi Motors* could be overruled by contrary congressional intent, but noted that the party opposing arbitration carried the burden of showing this legislative limitation or prohibition.³⁷ As construed by the Court in *McMahon*, *Mitsubishi Motors* suggested that most statutory rights would be found arbitrable, or at the least, that factors such as the complexity of the underlying statute, public interest, or even the importance of the statutory claim would not, even in the aggregate, be sufficient to overcome the policy in favor of arbitration.³⁸

In *Rodriguez de Quijas v. Shearson/American Express, Inc.*,³⁹ the Court took the opportunity to invalidate the last hope of the “public policy exception” to the enforceability of pre-dispute arbitration agreements that had been established in *Wilko*, *American Safety*, and *Alexander*. In this case, the Court addressed the enforceability of arbitration agreements covering claims arising from the Securities Act of 1933⁴⁰ and provided its clearest statement yet on the nature of the right to proceed in a judicial forum. According to the Court, the right to a judicial forum is a “procedural” right that can be altered or amended by an arbitration agreement, much like a forum selection clause.⁴¹

D. *Gilmer v. Interstate/Johnson Lane Corp. and Its Progeny: The Current State of the Law*

After *McMahon* and *Rodriguez de Quijas*, it seemed unlikely that a pre-dispute arbitration agreement would be deemed unenforceable, even with respect to a statutory claim. Indeed, when the issue of whether age discrimination claims could be subject to compulsory arbitration pursuant to a mandatory arbitration agreement arose, the Court answered in the affirmative in *Gilmer v. Interstate/Johnson Lane Corp.*⁴²

The plaintiff in *Gilmer* was required to register with a stock exchange as a condition of his employment with a large brokerage house. He complied, agreeing in the contract with the stock exchange “to arbitrate any

36. *Id.* at 226 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Credit Corp.*, 460 U.S. 1, 24-25 (1983)).

37. *See id.* at 227.

38. *See id.* at 239.

39. 490 U.S. 477 (1989).

40. *Wilko* was decided under the Securities Act of 1933, while *McMahon* was decided under the Securities Exchange Act of 1934. Therefore, where Congress intended the two securities acts to be read together, the Court acknowledged the inconsistency of *Wilko* and *McMahon*. Thus, *Rodriguez de Quijas* was simply the “second step” in overruling *Wilko*. *See Schwartz, supra* note 9, at 101.

41. *See Rodriguez de Quijas*, 490 U.S. at 482.

42. 500 U.S. 20 (1991).

dispute, claim or controversy” arising out of his employment.⁴³ When his employer discharged him at age sixty-two, he filed a claim with the EEOC under the Age Discrimination in Employment Act (“ADEA”)⁴⁴ instead of submitting the issue to arbitration. Interstate/Johnson Lane moved to compel arbitration. The trial court granted the motion, but the Fourth Circuit reversed.⁴⁵

The Supreme Court followed *McMahon*, placing on the plaintiff-employee the burden of proving congressional intent to negate mandatory arbitration clauses with respect to statutorily created employment rights. Because neither the text of the ADEA nor its legislative history explicitly precluded mandatory arbitration, the Court enforced the arbitration clause.⁴⁶ The Court rejected both the “important social issue” argument and the challenges to the adequacy of arbitration procedures once accepted in *Wilko* and *Alexander*.⁴⁷ As the final departure from precedent, the Court limited *Alexander* to the labor law setting, rendering it inapplicable to private contracts subject to the FAA.⁴⁸

However, because *Gilmer* did not involve an employment contract, opponents to mandatory arbitration agreements, including some circuit courts, argued that the enforcement of arbitration agreements in employment contracts remained an open question. Employment law scholars and practitioners, in addition to businesses and their employees, optimistically anticipated a finer articulation of the Court’s posture towards mandatory arbitration agreements in employment contracts in the November 1998 decision in *Wright*. In fact, the Court acknowledged the peculiar tension between *Alexander* and *Gilmer*.⁴⁹ Nonetheless, it explicitly avoided any resolution of the issue of the validity of waiver of a federal forum for statutory employment claims because “on the facts . . . no such waiver occurred.”⁵⁰ The Court so held not only because the agreement’s purported waiver was not “clear and unmistakable,”⁵¹ but also in part because the union, rather than the individual, attempted to waive the right to judicial forum. Thus, the Court’s pronouncements in *Gilmer* evidencing some favor of mandatory arbitration agreements remain; so too

43. *Id.* at 23.

44. 29 U.S.C. §§ 621-634 (1994).

45. *See Gilmer*, 500 U.S. at 24.

46. The requirement that contrary congressional intent must be explicit, either in the statute’s text or legislative history, was an increased burden, even from *Mitsubishi Motors*, which only required that congressional intent be “deducible” from the legislative history. *See Mitsubishi Motors*, 473 U.S. 614, 628 (1985). The *Gilmer* Court acknowledged this increased burden. *See* 500 U.S. at 29.

47. *See id.* at 27, 30.

48. *See id.* at 35.

49. *See Wright v. Universal Maritime Serv. Corp.*, 119 S. Ct. 391, 394 (1998).

50. *Id.* at 344.

51. *Id.* at 396.

does the debate.

II. THE EEOC'S POLICY AGAINST MANDATORY PRE-DISPUTE ARBITRATION AGREEMENTS

In accordance with its longstanding opposition to the use of mandatory arbitration in employment disputes, the EEOC issued a detailed policy statement outlining its position and justifications. This statement, in addition to reiterating the Commission's opposition, is intended primarily to serve as internal guidance for EEOC field offices. However, given the history of the attitudes of both the legislative and judicial branches towards the Commission, the level of deference to this policy is questionable. Due to the EEOC's role as an independent executive agency and as the processor of a majority of the employment discrimination claims, its positions do not have to simply reiterate the stance of the judiciary. However, employers look to the EEOC for education about, and guidance in applying, the employment discrimination laws. Given the EEOC's position in stark opposition to the judiciary, the rift between the courts and the EEOC is troublesome for employers and employees alike.

A. *The Interplay Between the Judiciary and the EEOC*

"The EEOC is the sole arm of the federal government with an exclusive focus on eradicating job discrimination."⁵² The Supreme Court has acknowledged "that agency interpretations of silent or ambiguous statutes are controlling on the courts if Congress has delegated law-interpreting power to th[at] agency,"⁵³ whether expressly or implicitly.⁵⁴ However, the Supreme Court has not applied the supposition that Congress delegated this law-interpreting power to the EEOC. Instead, the Court has suggested a lesser deference to the EEOC with respect to employment law interpretation in comparison to the deference afforded other executive or independent agencies.⁵⁵ This position is not necessarily an affront to the EEOC; rather, Congress itself failed to give the Commission real enforcement power at its inception. While the EEOC's

52. Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 53 (1995) (footnote omitted).

53. *Id.* at 54 (emphasis omitted).

54. *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984).

55. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248-51, 258 (1991) (refusing to defer to the EEOC's construction of Title VII that allowed extraterritorial application of the law).

powers have increased,⁵⁶ it still lacks the cease-and-desist powers afforded other agencies. The authority to enforce the employment discrimination laws is thereby channeled to the courts through private litigation.⁵⁷

Nonetheless, the Court is not immune to or ignorant of the suggestions and recommendations of the EEOC. In *EEOC v. Commercial Office Products*,⁵⁸ the Court explicitly examined and deferred to an EEOC procedural regulation interpreting Title VII.⁵⁹ However, three years later, in *EEOC v. Arabian American Oil Co.*,⁶⁰ the Court stated that the EEOC's interpretation of Title VII was of limited persuasive value because it was not issued contemporaneously with the statute and because it reflected a change in the agency's position.⁶¹ Additionally, the contested EEOC interpretation at issue in *Arabian American Oil* was not an interpretive guideline as in *Commercial Office Products*. Instead, the EEOC's position in *Arabian American Oil* was reflected in less formal documents: a policy statement, a letter from the EEOC's general counsel, a 1985 decision by the EEOC, and testimony by the EEOC's Chairman.⁶² Therefore, although the EEOC is unquestionably fulfilling its duties in presenting its policy against mandatory arbitration agreements, the level of deference that the courts must afford the EEOC is quite limited.

Additionally, the EEOC recognizes the deference it must show to the judiciary. Certainly, the policy against mandatory arbitration agreements was issued partly in response to the Court's reasoning in *Gilmer*. The policy statement is "published as *internal guidance* for EEOC personnel . . . instruct[ing] commission investigators to 'closely scrutinize each charge involving an arbitration agreement to determine whether the agreement was secured under coercive circumstances.'"⁶³ The statement is not a refusal to accept *Gilmer*.⁶⁴ The Commission simply intended to express its belief that *Gilmer* cannot be extended to individual employment contracts. The Commission's statement of its position and its justifications

56. For example, Title VII was amended to provide the EEOC with the power to sue in federal court on behalf of the victims of discrimination, and also to bring claims on its own behalf. See 42 U.S.C. § 2000e-5(f) (1994).

57. See, e.g., Robert Belton, *Developments in the Law: Employment Discrimination*, 109 HARV. L. REV. 1568, 1573-74 (1996).

58. 486 U.S. 107 (1988).

59. See *id.* at 114-15.

60. 499 U.S. 244 (1991).

61. See *id.* at 257.

62. See *id.* at 256-57.

63. *EEOC Commission Policy Guidance Reaffirms Long-Standing Opposition to Mandatory Arbitration*, 133 Daily Lab. Rep. (BNA) at AA-1 (July 11, 1997).

64. See *EEOC Policy Statement on Mandatory Arbitration*, reprinted in 133 Daily Lab. Rep. (BNA) at E-4 (July 11, 1997) ("The Commission is not unmindful of the case law enforcing specific mandatory arbitration agreements, in particular, the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.* . . .").

did not, however, refer to the reasoning in *Gilmer, Mitsubishi Motors*, or any other decision permitting mandatory arbitration agreements. Therefore, until the Supreme Court decides specifically whether *Gilmer* applies to employment contracts, the EEOC certainly has the right to stand opposed to the trend of the courts.

B. A Summary of the EEOC's Policy Against Mandatory Arbitration Agreements

The EEOC was clearly concerned about the effects of *Gilmer* and its progeny with respect to mandatory arbitration agreements in employment contracts.⁶⁵ Accordingly, the Commission chose not to establish guidelines to ensure the fairness of mandatory arbitration and instead asserted its opposition to any mandatory arbitration of workplace statutory claims.

In general, the EEOC has characterized mandatory arbitration as "contrary to the fundamental principles" of employment law.⁶⁶ In addition, the Commission has offered two other justifications for its policy against mandatory arbitration agreements. First, according to the statement, the federal employment laws were established by the federal government with the clear intention that the federal government would be responsible for enforcing and interpreting these laws.⁶⁷ If private employers were permitted to use mandatory arbitration agreements, the Commission argues that the lack of public accountability—whether by the arbitrators or the parties—and the lack of establishing precedent and doctrine would completely undermine the goals of federal employment law.⁶⁸ According to the EEOC, "there might be no discrimination claims today based on . . . the adverse impact of neutral practices . . . or sexual harassment" without the role of the federal judiciary in employment disputes.⁶⁹ Second, the EEOC views the arbitration process as fraught with structural biases against employees when arbitration agreements are imposed as a condition of employment.⁷⁰ As a repeat customer with a deep pocket, an employer has an advantage in the arbitrator selection process, or at the very least, is more knowledgeable of the intricacies of the system than an individual

65. The EEOC is one of the opponents to mandatory arbitration agreements that believes *Gilmer* is not dispositive of whether mandatory arbitration agreements in employment contracts are enforceable because the agreement at issue in *Gilmer* was a registration agreement, not an employment contract. See *EEOC Policy Statement on Mandatory Arbitration*, *supra* note 64.

66. *Id.*

67. See *id.*

68. See *id.*

69. *Id.*

70. See *id.*

claimant.⁷¹ Based on these two primary justifications, the EEOC strongly opposes mandatory arbitration agreements and has directed its investigators to scrutinize closely all charges involving such agreements.

III. REFUTING THE ARGUMENTS OF THE EEOC

While the justifications offered by the EEOC against the enforcement of mandatory arbitration agreements appear facially compelling, further inquiry shows that they are overzealous, unsubstantiated, or at the least, questionable. The EEOC obviously has a right, and in fact, an executive duty to promulgate rules, guidelines, and policies with respect to the state of employment law. However, when the Commission forwards a policy as generic and as sweeping as one that presumptively opposes any and all mandatory arbitration agreements, it should support its declaration with compelling arguments. In the case of mandatory arbitration agreements, the EEOC's justifications are not sufficiently persuasive.

A. *The Enforcement of Mandatory Arbitration Agreements Is Not Contrary to Fundamental Principles of Employment Law*

According to the EEOC, “[t]he private right of access to the judicial forum to adjudicate claims is an essential part of the statutory enforcement scheme.”⁷² The EEOC then uses this “essential part” to construct a policy against mandatory arbitration agreements without discussing an individual's access to the judicial forum. The EEOC's policy instead focuses on the notion that an individual claimant should serve as “the chosen instrument of Congress to vindicate” the policies underlying employment discrimination law in addition to serving her own interests.⁷³ In effect, the EEOC views an employee both as an extension of itself and as a “private attorney[] general.”⁷⁴ However, the Commission's view that individual claimants must have immediate access to the courts in order to fully benefit from employment discrimination laws fails for two reasons: (1) the goals of the individual claimant in pursuing statutory claims, and (2) the lack of any waiver of substantive rights.

First and foremost, mandatory arbitration agreements, if obtained through informed consent and reasonable methods, can actually achieve the goals that most individual claimants would cite as fundamental to employment law—restoring, retaining, and revitalizing employee power and dignity in the workplace—better than court adjudication. While user

71. *See id.*

72. *EEOC Policy Statement on Mandatory Arbitration*, *supra* note 64.

73. *Id.*

74. *Id.*

reaction to arbitration has not been thoroughly researched, some evidence suggests that parties, both employer-defendants and plaintiff-employees, are at least as satisfied with arbitration as they are with judicial adjudication.⁷⁵ Some employee-participants even perceive arbitration to be more understandable and satisfactory than the courts.⁷⁶ Therefore, while the EEOC may view judicial review of employee claims as fundamental to employment law, the Commission may be neglecting the concerns and opinions of the people it was created to protect and represent.

In fact, an in-depth survey of worker attitudes found that fifty-five percent of employees who had gone to court over workplace rights would prefer an alternative to the court system.⁷⁷ In response to the alternatives offered, ninety-five percent of respondents said they would choose an arbitration system involving both employers and employees.⁷⁸ Understandably, many workers fear the "mandatory" label of pre-dispute agreements and believe it should be illegal to make arbitration agreements a condition of employment.⁷⁹ However, as long as the elements necessary for contract formation are present, and assuming an absence of fraud and unconscionability, employees should be competent to make personal decisions regarding the nature of their workplace, including the manner in which disputes are resolved.⁸⁰

Apparently, however, the EEOC and other pre-dispute agreement opponents view the unequal bargaining power between employers and employees as a strong justification for their position. Some commentators suggest that mandatory agreements should not be permitted in employment contracts because the courts are necessary to shift "the balance of power more equitably in favor of those who ha[ve] long possessed far less bargaining power."⁸¹ However, this reasoning neglects the fact that

75. See Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, in CONSUMER DISPUTE RESOLUTION: EXPLORING THE ALTERNATIVES 313, 344 (Larry Ray & Deborah Smolover eds., 1983) (stating that "evidence suggests litigants and attorneys experiencing arbitration are at least as satisfied as those experiencing adjudication").

76. See *id.* at 351.

77. See Joseph G. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1, 50 (1996) (citing a study by Richard Freeman and Joel Rogers).

78. See *id.*

79. See *id.* (citing 75% as the minimum survey response).

80. See Jeffrey Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1413-14 (1991) (stating that there appears to be no judicially recognized adhesion defense; rather, courts only invoke the doctrine of adhesion in arbitration agreements to support a finding of unconscionability or public policy).

81. Maria C. Whittaker, *Gilmer v. Interstate: Liberal Policy Favoring Arbitration Trammels Policy Against Employment Discrimination*, 56 ALB. L. REV. 273, 276 (1992); see also John A. Gray, *Have the Foxes Become the Guardians of the Chickens? The Post-Gilmer Legal Status of Pre-dispute Mandatory Arbitration as a Condition of Employment*, 37 VILL. L. REV. 113 (1992) (discounting benefits of arbitration because of the

inequality of bargaining power alone does not necessarily make a contract unconscionable. The doctrine of unconscionability seeks to prevent substantial unfairness or deplorable contracting practices.⁸² Employment contracts with clear notice of mandatory arbitration clauses certainly do not satisfy this criteria because an employee is given the choice to accept or not accept based on the conditions of arbitration and the fact that the system, although mandatory, does not leave the employee without recourse.⁸³ In fact, at least one commentator compares the use of mandatory arbitration agreements to an employer's decision to provide health insurance, which is also of great importance to employees.⁸⁴ A similar analogy may be drawn to workers' compensation laws. Before workers' compensation statutes, workers with serious injuries were able to command substantial recoveries before a jury. However, with the workers' compensation system, workplace safety is promoted while injured workers are adequately compensated.⁸⁵ Finally, calling a mandatory arbitration agreement a contract of adhesion would be inconsistent with the FAA's explicit "intent of making arbitration agreements as valid and enforceable as any contract."⁸⁶

Additionally, most employees simply want the discriminatory practices or harassment to stop.⁸⁷ Individuals litigate only after years of being denied relief. Arbitration, even if it is mandatory, provides employees with a chance to achieve the relief they desire without having to spend \$50,000 to \$80,000⁸⁸ and four to five years⁸⁹ litigating a "simple" discrimination claim.⁹⁰ Through arbitration, an investigation and resolution

inequality of bargaining power).

82. See Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 349-50 (1996).

83. See *id.*

84. See Stempel, *supra* note 80, at 1314.

85. See Samuel Estreicher, *Pre-dispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1351 (1997).

86. R. James Filiation, Comment, *Enforcing Mandatory Arbitration Clauses in Employment Contracts: A Common Sense Approach to the Federal Arbitration Act's Section 1 Exclusion*, 26 SANTA CLARA L. REV. 559, 581 (1996) (footnote omitted).

87. See Donna Meredith Matthews, Note, *Employment Law After Gilmer: Compulsory Arbitration of Statutory Anti-discrimination Rights*, 18 BERKELEY J. EMP. & LAB. L. 347, 348 (footnotes omitted) (explaining why ADR in general is attractive to both employers and employees).

88. See *id.*

89. See Stephen W. Skrainka, *The Utility of Arbitration Agreements in Employment Manuals and Collective Bargaining Agreements for Resolving Civil Rights, Age and ADA Claims*, 37 ST. LOUIS U. L.J. 985, 991 (1993) (describing the typical situation which occurs when adjudicating employment claims).

90. See Richard A. Bales, *A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 HOUS. L. REV. 1863, 1906 (1994) (citing the high costs of discrimination claims).

can be completed within six to nine months from the time of the incident⁹¹ in a much less adversarial environment. Additionally, and perhaps most importantly, while the "successful" claimant may recognize a greater monetary gain through litigation than arbitration,⁹² an individual subject to a mandatory arbitration agreement can retain her current job without being branded a "troublemaker" by her current or future employer, thereby reducing the risk of conflict with coworkers after a jury award becomes public.⁹³

Finally, the arbitration system, whether mandatory or not, should be lauded, not rejected, by the EEOC for its ability to protect less sophisticated workers better than the court system. Because of their low salaries, low-income employees often do not have access to the judicial process. Further, low salaries make large damage awards highly unlikely and therefore make it quite difficult for low-income plaintiffs to attract resourceful, competent attorneys.⁹⁴

Thus, despite the EEOC's argument that arbitration cannot protect or achieve the fundamental goals of employment law, evidence exists that arbitration, whether mandatory or not, can serve the needs of claimants, particularly low-income employees, better than the current system of adjudication. Until the monetary and time expenditures necessary to pursue a claim in the court system decline significantly, the EEOC's position of prohibiting any and all mandatory arbitration agreements stands counter to the needs of employees. Under the EEOC's policy, an

91. See Garry G. Mathiason, *Evaluating and Using Employer-Initiated Arbitration Policies and Agreements: Preparing the Workplace for the Twenty-First Century*, Q227 A.L.I.-A.B.A. 23, 41 (1994).

92. Opponents of mandatory arbitration often cite the high jury awards received in employment suits compared to the relatively low awards in arbitration as an indication that arbitration cannot benefit employees. However, these comparisons can be highly misleading to a majority of workers, for only the high damage cases are likely to go to trial. See Cliff Palefsky, *Wrongful Termination Litigation: "Dagwood" & Goliath*, 62 MICH. BAR J. 776, 776 (1983) (citing high damage awards from juries). Additionally, the average employment discrimination claimant loses both his suit and most likely his job. Therefore, arbitration may offer recourse to an employee who would otherwise have none. See Steve Holmes, *Workers Find It Tough Going Filing Lawsuits Over Job Bias*, N.Y. TIMES, July 24, 1991, at A1.

93. See E. Patrick McDermott, *Survey of 92 Key Companies: Using ADR to Settle Employment Disputes*, 50 J. DISP. RESOL. 8, 8 (1995) (emphasizing that high monetary awards from litigation may be outweighed by nonmonetary gains via arbitration); see also Matthews, *supra* note 87, at 361 (mentioning potential for coworker conflicts).

94. Employment attorneys commonly reject 90% of the cases brought to them, regardless of the merits of the claim, because the economics of the court system with respect to employment law mandates that only the most valuable cases be pursued in litigation. In fact, discrimination claims have become so problematic, many attorneys refuse to represent plaintiffs who have been discriminated against. See Eric Schnapper, *Advocates Deterred by Fee Issues*, NAT'L L.J., Mar. 28, 1994, at C1.

individual claimant must become a “private attorney[[]-general”⁹⁵ to find relief, rather than permitting her to resolve the matter in an informal and less costly manner at the workplace.

A second reason why the EEOC’s policy against mandatory arbitration agreements is unjustifiable on the basis of the “fundamental principles” of employment law is that the agreements do not constitute waivers of any substantive rights or protection. The *Gilmer* Court clearly expressed that pre-dispute arbitration agreements are merely exchanges of forum, not a surrender of substantive rights or statutory remedies.⁹⁶ Thus, an arbitration agreement cannot direct or permit an arbitrator to apply rules of liability different from those mandated by the applicable statute.⁹⁷ For example, in *Graham Oil Co. v. Arco Products Co.*,⁹⁸ the Ninth Circuit refused to enforce an arbitration agreement because provisions of the agreement established a shorter statute of limitations than the statute allowed and precluded exemplary damages and attorneys’ fees where both were authorized by statute.

Additionally, in *Prudential Insurance Co. v. Lai*,⁹⁹ the same court addressed extrinsic factors presented by the plaintiff-claimants opposing enforcement of the same arbitration agreement involved in *Gilmer*. In this case, the court refused to compel arbitration because the plaintiffs were recent immigrants, had limited language skills when executing the agreement, were not informed of the arbitration provision, and lacked business experience.¹⁰⁰ The Seventh Circuit applied similar reasoning in its decision in *Gibson v. Neighborhood Health Clinics*.¹⁰¹ The court held that an arbitration clause in an employment contract was not enforceable because of lack of consideration in the form of any reciprocal employer promise with respect to the arbitration system.¹⁰² Finally, the Michigan Supreme Court declined to enforce a pre-dispute arbitration agreement in an employee handbook because the employer reserved the right to modify the handbook “at its sole discretion” and could alter the arbitration agreement without employee knowledge or input.¹⁰³ Thus, although a mandatory arbitration agreement may be presumptively enforceable, “waivers of judicial forum that reflect an employer’s fraudulent, misleading

95. *EEOC Policy Statement on Mandatory Arbitration*, *supra* note 64.

96. *See* 500 U.S. at 31-32.

97. *See* Grodin, *supra* note 77, at 27; *see also Gilmer*, 500 U.S. at 32 (indicating the change in the forum of resolution did not limit the arbitrator’s authority to grant equitable and legal relief in disputes regarding statutory rights).

98. 43 F.3d 1244 (9th Cir. 1994).

99. 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995).

100. *See id.* at 1305.

101. 121 F.3d 1126 (7th Cir. 1997).

102. *See id.* at 1130.

103. *Heurtebise v. Reliable Bus. Computers, Inc.*, 550 N.W.2d 243, 247 (Mich. 1996).

or retaliatory conduct are not valid, and arbitration will not be compelled under these circumstances."¹⁰⁴

Furthermore, regardless of the availability of mandatory arbitration agreements, the federal government still retains ultimate control over the protection and enforcement of the fundamental principles of employment law. First, section 10(b) of the FAA provides that the partiality or corruption of arbitrators provides a clear basis for withholding enforcement of an arbitrator's award. Additionally, the Court in *Gilmer* assured that the scope of review applied to arbitration awards, albeit limited, is sufficient to ensure compliance with the workplace discrimination statutes.¹⁰⁵ Finally, the *Gilmer* Court emphasized that arbitration cannot substitute for the filing of a claim with the EEOC and any subsequent investigations or action by the Commission.¹⁰⁶ Therefore, as one observer writes, "it would seem that mandatory arbitration in itself poses no real threat to employees as long as it is procedurally adequate and even may be advantageous to a claimant seeking recovery."¹⁰⁷

B. The EEOC's Argument That the Interpretation and Enforcement of Employment Laws Have Traditionally Been Left to the Federal Government Is Questionable

The EEOC's second justification for opposing mandatory arbitration agreements is that the federal government, not private employers, is responsible for the "interpretation, administration, and enforcement"¹⁰⁸ of these laws, with the judiciary charged with final authority for interpretation of ambiguous language. According to the EEOC, private arbitration cannot usurp the courts' role in adjudicating employment discrimination matters,

104. Lucille M. Ponte, *In the Shadow of Gilmer: How Post-Gilmer Legal Challenges to Pre-dispute Arbitration Agreements Point the Way Towards Greater Fairness in Employment Arbitration*, 12 OHIO ST. J. ON DISP. RESOL. 359, 374 (1997); see also *EZ Pawn Corp. v. Gonzalez*, 921 S.W.2d 320 (Tex. Ct. App. 1996) (refusing to compel arbitration pursuant to mandatory agreement because of fraudulent representation of the arbitration agreement's substantive provisions); *EEOC v. River Oaks Imaging & Diagnostic Servs.*, 67 Fair Empl. Prac. Cas. (BNA) 1243 (S.D. Tex. 1995) (rejecting arbitration under mandatory agreement because the agreement was required in retaliation for filing sexual harassment charges).

105. See 500 U.S. at 32.

106. See *id.* at 27; see also *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1089-90 (5th Cir. 1987) (holding employee waiver of right to file charge with EEOC void as against public policy).

107. Brian K. Van Engen, Note, *Post-Gilmer Developments in Mandatory Arbitration: The Expansion of Mandatory Arbitration for Statutory Claims and the Congressional Effort to Reverse the Trend*, 21 J. CORP. L. 391, 414 (1995).

108. *EEOC Policy Statement on Mandatory Arbitration*, *supra* note 64.

given its importance to the public and the legislature.¹⁰⁹ However, in making such statements, the EEOC curiously ignores the statements and actions made by both the legislative and judicial branches with respect to the role of arbitration and reasserts arguments that have been directly refuted by the courts and the legislature. Additionally, the EEOC's "protection" of the role of the federal government in employment law is potentially counterproductive to its own operations. For these reasons, the EEOC should reevaluate its position that the federal government must be the sole enforcer and protector of employment law rights.

First, beginning with *Mitsubishi Motors*, the Supreme Court made clear its preference for arbitration. "By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."¹¹⁰ Following *Mitsubishi Motors*, the Court continued to reject arguments critical of pre-dispute arbitration agreements while the EEOC supported them. For example, in *Rodriguez de Quijas*, the Court explicitly dismissed concerns that the deprivation of judicial access through pre-dispute agreements is effectuated at a time when the individual is least able to consider the consequences. Today, the EEOC considers this argument fundamental to its crusade against pre-dispute agreements.¹¹¹

Similarly, in *Gilmer*, the Court systematically refuted each of the "structural limitation" arguments set forth by the plaintiff, which the EEOC reasserts in its policy. For example, the plaintiff *Gilmer* asserted, as the EEOC contends, that the absence of written opinions would decrease public awareness of particular discriminatory policies. However, the Supreme Court retorted to *Gilmer* that this same concern applies to claims filed in court,¹¹² since so many cases result in a settlement rather than a published decision. The Court in *Gilmer* also dismissed the "adverse effect on the development of law" argument offered by the EEOC and *Gilmer*, by noting that not every claim will be subject to arbitration.¹¹³ Certainly, not every company will have prearranged agreements to arbitrate.¹¹⁴ Furthermore, these agreements will not be enforced when they are the result of fraud or threat of retaliation.¹¹⁵ In conclusion, the Court cautioned that the limited discovery and rules of evidence applied in arbitration proceedings

109. *See id.*

110. *Mitsubishi Motors*, 473 U.S. at 628.

111. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989).

112. *See* 500 U.S. at 31.

113. *See Grodin, supra* note 77, at 24 (noting only 8.3% of employers polled are considering using mandatory arbitration agreements).

114. *See Gilmer*, 500 U.S. at 32.

115. *See Heurtebise v. Reliable Bus. Computers, Inc.*, 550 N.W.2d 243, 247 (Mich. 1996).

beneficially increase efficiency and establish a less adversarial environment for addressing employment law issues.¹¹⁶ Because the Supreme Court has not specifically decided the issue, the EEOC may articulate its policy against mandatory arbitration agreements in employment contracts, but it undermines its cause by relying heavily on arguments that have been refuted by the Court in closely related issues.

Finally, the EEOC's argument that mandatory arbitration agreements allow private individuals to usurp the role of the federal government in employment discrimination cases is flawed. In fact, the federal courts are instituting their own system of arbitration for employment discrimination claims. Since 1991, federal courts may, without application of either party, require any discrimination cases involving claims under \$100,000 to be submitted to court-annexed arbitration.¹¹⁷ Given the courts' willingness to permit and encourage fair arbitration, the EEOC should not base its policy against mandatory arbitration on the argument that traditional courtroom trials are the only entities capable of enforcing and protecting employment rights.

The legislature has consistently endorsed arbitration, even though its position on pre-dispute agreements remains ambiguous. The ADA, Title VII, and the Civil Rights Act of 1991 have explicit provisions encouraging the resolution of disputes through various alternative methods, including arbitration.¹¹⁸ Additionally, the legislative histories of the employment laws suggest that the legislature may not be as clearly opposed to pre-dispute arbitration agreements as the EEOC asserts. For example, although the House Committee report on the Americans with Disabilities Act instructed that the *Alexander* approach be applied to the ADA,¹¹⁹ this report was compiled one year before the Supreme Court's decision in *Gilmer*. Therefore, as even opponents of mandatory arbitration agreements must admit, the Committee report can be viewed as "merely a statement of what the Committee 'believed' to then be the existing law as to the effect of an arbitration clause on a[n] . . . employment contract."¹²⁰ Similarly, with respect to the Civil Rights Act of 1991, because the law became effective

116. See *Gilmer*, 500 U.S. at 31.

117. See William M. Howard, *The Evolution of Contractually Mandated Arbitration*, 48 ARB. J. 61, 62 n.4 (1993).

118. For example, section 118 of the Civil Rights Act of 1991 recognizes alternative dispute resolution as a viable means for the resolution of employment conflicts, including "settlement negotiations, conciliator, facilitation, mediation, fact finding, mini trials, and arbitration." 42 U.S.C. § 1981 (1993). At least one court has relied on this section to compel arbitration of a Title VII claim pursuant to a pre-dispute agreement. See *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997).

119. See *Ponte*, *supra* note 104, at 379 (discussing the failed attempts by Congress to prohibit mandatory arbitration agreements).

120. *Fletcher v. Kidder, Peabody & Co.*, 619 N.E.2d 998 (N.Y.), *cert. denied*, 114 S. Ct. 554 (1993).

after *Gilmer*, it is plausible that *Gilmer* broadened the understanding of the limits on arbitration, and, therefore, any legislative history indicating a contrary intent is of limited significance.¹²¹ Therefore, “[g]iven the . . . broad acceptance of arbitration, and the holding and rationale of *Gilmer* and its progeny, it is probable . . . that compulsory arbitration agreements will be enforceable.”¹²²

In fact, ostensibly in recognition of the enforceability of mandatory arbitration agreements, several members of Congress have introduced bills seeking to limit their use in employment contracts. None of these bills advanced beyond committee, perhaps suggesting underlying support for *Gilmer* and pre-dispute arbitration agreements. The first version, introduced in the Senate on April 13, 1994, was known as the Protection from Coercive Employment Agreements Act.¹²³ The effect of this bill would have been to amend employment laws to virtually eliminate mandatory arbitration clauses from employment contracts. The most recent version of the same bill, introduced in August 1994, as the Civil Rights Procedures Protection Act of 1994,¹²⁴ would have amended employment laws as in the original plan. The bill was reintroduced on February 7, 1995, and failed again to rally sufficient support.¹²⁵ Therefore, although the EEOC has enough allies within Congress who also oppose mandatory arbitration agreements to keep those proposals on the agenda, the congressional support has never been sufficient to alter the course set by *Gilmer*.

Finally, the EEOC fears the weakening of its own role in enforcing employment discrimination laws if private employers were permitted to use mandatory arbitration agreements. They fail to recognize that the use of these agreements can both increase and strengthen its role in employment discrimination matters.¹²⁶ Instead of focusing its limited resources¹²⁷ on

121. See Donald R. Livingston, *The Civil Rights Act of 1991 & EEOC Enforcement*, 23 STETSON L. REV. 53, 93 (1993) (downplaying the importance of legislative history regarding arbitration written before *Gilmer*).

122. Joseph T. McLaughlin, *Arbitrability: Current Trends in the United States*, 59 ALB. L. REV. 905, 921 (1996).

123. S. 2012, 103d Cong. (1994).

124. H.R. 4981, 103d Cong. (1994); S. 2405, 103d Cong. (1994).

125. See Van Engen, *supra* note 107, at 410-11 (discussing congressional proposals to limit mandatory arbitration).

126. See White, *supra* note 52, at 101 (analyzing the EEOC's role and the deference afforded to the Commission in comparison to other executive agencies).

127. The EEOC faced a backlog of 110,000 claims in 1995, and funding has been sharply reduced since then. See Peter Eisler, *Waiting for Justice: Complainants Now Sit for at Least a Year*, USA TODAY, Aug. 15, 1995, at A1. However, by mid-1998, the Commission reduced its backlog to 58,000. However, the Commission admits that the twelve month lapse for a single claim to funnel through the system is still wholly unacceptable. See Watkins Ludlam Winter & Stennis, P.A., *Are Reforms Ahead for the*

strict opposition to mandatory arbitration, the EEOC could provide arbitrators with the necessary and appropriate statutory interpretations and guidelines to ensure fairness and neutrality according to the standards established by the EEOC.¹²⁸ For example, the Commission could establish guidelines and instructions for awards through a mandatory arbitration system. Any award inconsistent with the Commission's guidelines could be presumptively improper, and, thus, readily set aside by a reviewing court.¹²⁹ Additionally, the EEOC litigates only .5% of the claims received,¹³⁰ resulting in 99.5% of the claimants being denied recourse from the agency that was created to give employees a voice. Thus, the EEOC's pronouncement that mandatory arbitration agreements dangerously usurp the role of the federal government seriously fails to consider the significant input and influence the Commission itself could have on mandatory arbitration agreements, and therefore, the potential usefulness of such systems, if given proper guidance, to the furtherance of the EEOC's ultimate goals.¹³¹

C. The EEOC's Arguments Regarding the Inherent Limitations of a Mandatory Arbitration System Are Unsubstantiated and Premised on an Unfair View of Employers and Arbitrators

The EEOC's final argument against mandatory arbitration agreements is that any mandatory system offers limited benefits to employees because of bias in favor of employers in the arbitration system. The EEOC cites the employer's role as a "repeat customer" and a ready source of funds and power as significant sources of this bias.¹³² Additionally, the EEOC's policy reveals a certain mistrust of arbitrators as well. However, instead of focusing on improving the arbitration selection process or implementing requirements for a fair mandatory program, the EEOC instead confines its efforts to its unsubstantiated, unfair, and misguided opposition to mandatory arbitration agreements.

The presumption that employers can and will manipulate the mandatory arbitration system relies on an overly broad negative stereotype

EEOC?, 2 Miss. Emp. L. 1 (1998).

128. See White, *supra* note 52, at 101-02.

129. See *id.* at 102 (discussing role of EEOC in arbitration).

130. See U.S. GENERAL ACCOUNTING OFFICE, *EEOC'S EXPANDING WORKLOAD: INCREASES IN AGE DISCRIMINATION AND OTHER CHARGES CALL FOR NEW APPROACH*, GAO/HEHS 94-32 (Feb. 9, 1994).

131. The EEOC stresses the need for voluntary compliance by employers. The use of mandatory arbitration agreements reinforced by guidance and evaluation by the Commission can help achieve this goal better than forbidding employers to take advantage of a system that the EEOC itself uses.

132. *EEOC Policy Statement on Mandatory Arbitration*, *supra* note 64.

of employers. Employers are as diverse as their workforces. For example, in a General Accounting Office (“GAO”) survey¹³³ of twenty-six mandatory policies established before the EEOC’s current policy, the procedures utilized varied greatly, indicating that employers do not necessarily use pre-dispute arbitration agreements in the same way or for the same reasons.¹³⁴ Of the twenty-six employers surveyed, only one had unilateral designation of an arbitrator by the employer, and only one employer refused attorney participation (albeit for either side).¹³⁵ However, twenty-one employers clearly permitted claimants to be represented by attorneys. Additionally, four employees covered the entire cost of the arbitration proceedings while six others capped the employee’s share.¹³⁶ As commentators opposed to mandatory arbitration agreements have noted, “most employers have not been [anti-employee] . . . indeed some have been quite benign.”¹³⁷ Additionally, a significant majority of companies are not even willing to impose mandatory arbitration in their employment contracts.¹³⁸ Therefore, by justifying the policy against mandatory

133. See U.S. GENERAL ACCOUNTING OFFICE, *supra* note 130.

134. Consider Brown & Root, a Houston-based construction company which requires all 30,000 of its domestic employees to settle claims exclusively through its arbitration system. The system consists of four levels of dispute resolution, where the final step is outside arbitration. The company offers to pay all of the arbitrator’s fees and up to \$2,500 in attorneys’ fees for a claimant-employee. See Lewton, *supra* note 5, at 993-94. Only four out of 500 claims have ever had to go to outside binding arbitration (the final level), and fewer than 35 employees have used the outside counsel fund. See William T. D’Zurilla, *ADR: The Brown & Root Success Story*, 42 LA. BUS. J. 581, 581 (1995).

Also consider the peer review adjudication program maintained by Employment Dispute Resolution, Inc. This company operates as a contract company with employees and employers to provide binding arbitration of all workplace disputes. The program comes with a defense fund shared by participating employers and involves training of employees who eventually become adjudicators available for other companies. See Wade Lambert, *Employee Pacts to Arbitrate Sought by Firms*, WALL ST. J., Oct. 22, 1992, at B1. *But see* Shankle v. B-G Maintenance Management of Colo., 163 F.3d 1230, 1235 (10th Cir. 1999) (denying employer’s motion to compel arbitration of employee’s Title VII, ADA, and section 1981 claims because the employee was required to pay one half of the arbitrator’s fees which, according to the appellate court, “substantially limited [the employee’s] use of the arbitral forum”).

135. See U.S. GENERAL ACCOUNTING OFFICE, *supra* note 130.

136. See *id.* Employers capped employee shares of arbitration costs at \$250, two days’ pay, or a fraction of the cost—typically 20%.

137. Grodin, *supra* note 77, at 21 (opposing mandatory arbitration agreements regardless of the neutrality of the system).

138. See U.S. GENERAL ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: MOST PRIVATE-SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION (Pub. No. GAO/HEHS-95-150, July 5, 1995) available at <<http://fwebgate.access.gpo.gov/cgi..txt&directory=/diskb/wais/data/gao>> (Report to Congressional Requesters) (reporting that ten percent of firms used arbitration for non-union employees, yet in only one-fourth to one-half of those firms was arbitration mandatory). Additionally, the National Association of Securities Dealers (“NASD”) and the New York Stock Exchange eliminated from its U-4

arbitration agreements on the unsubstantiated generalizations that employers will insert mandatory arbitration agreements *en masse*, and purposefully manipulate arbitration proceedings and agreements, the EEOC is unnecessarily excluding every private employer, regardless of good faith or intention, from establishing a useful role in the implementation and furtherance of employment law principles.

Perhaps the EEOC fears that employers will use mandatory pre-dispute arbitration agreements as modern-day "yellow dog" contracts.¹³⁹ These contracts provided that the mere attempt by employees to organize, regardless of the level of peace, fairness, or success, could render organizers liable for tortious inducement of breach of contract. However, this analogy is inaccurate. "Yellow dog" contracts served no reciprocal function for the employers; they merely forbade unionization. By contrast, arbitration offers certain advantages to both employers and employees, as the EEOC itself recognizes. Furthermore, unlike the contracts in which workers were denied their statutory right to organize, mandatory arbitration agreements do not deny employees recourse.

The EEOC also bases its policy on the tacit assumption that juries are naturally biased in favor of employees and that arbitrators are biased in favor of employers.¹⁴⁰ However, neither the EEOC nor other strict opponents of pre-dispute arbitration clauses can cite reliable studies comparing the results of arbitration and litigation for cases arising out of the employment relationship.¹⁴¹ In fact, in one empirical study of nearly 1,000 employment cases decided by juries in federal and state courts in California from 1981 to 1995, employee-plaintiffs won one or more of their claims in 57.6% of the cases.¹⁴² In comparison, a study of the securities

registration forms (the form at issue in *Gilmer*) any requirement that the dealers must agree to arbitrate their statutory employment claims. Instead, arbitration is permitted only where both parties have agreed to arbitration after the claim has arisen. See *Arbitration: New York Stock Exchange Moves to End Mandatory Arbitration of Bias Claims*, Daily Lab. Rep. (BNA) No. 173, at A-2 (Sept. 8, 1998).

139. See Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996); Judith P. Vladeck, *Validity of ADR for Job Disputes; "Yellow Dog" Contracts Revisited*, N.Y. L.J., July 24, 1995, at 7.

140. See *EEOC Policy Statement on Mandatory Arbitration*, *supra* note 64. Employers have an advantage as repeat customers, the policy states, whereas employees benefit from the public scrutiny/accountability of the courtroom. Yet, many employers actually view arbitrators as pro-employee. See Loren K. Allison & Eric H.J. Stahlhut, *Arbitration and the ADA: Do the Two Make Strange Bedfellows?*, 37 RES GESTAE 163, 172 (1993). For example, the relaxed evidence rules of arbitration allow arbitrators to hear and consider theories, arguments, and testimony that otherwise would not have been permitted. See Peter Blackman, *Defending Arbitration: Supporters Surface Among the Employment Bar*, N.Y. L.J., July 14, 1994, at 5 (highlighting differences between arbitrators and judges).

141. See Schwartz, *supra* note 9, at 64 (calling the lack of studies "unfortunate").

142. See *id.* (citing a 1995 study by Orrick, Herrington, & Sutcliffe of 949 actual jury

industry, which until recently required mandatory arbitration agreements as a condition of registration and brokerage accounts, found that employees won damages in 53.2% of their claims.¹⁴³ Opponents of mandatory agreements also cite the dramatic difference—\$575,000—between the mean monetary awards from juries and those from arbitrators.¹⁴⁴ Nonetheless, this comparison is relatively useless, for a comparison of mean damage awards fails to consider the expenses embodied in the relative proceedings. For example, such comparisons must take into account the frequency and amount of attorneys fee awards in trials, which presumably last significantly longer than an arbitration proceeding. Also relevant is the amount of the award that covers back pay. An arbitration proceeding can be completed within six to nine months after the incident occurred,¹⁴⁵ whereas an employee can be litigating a claim for nearly five years¹⁴⁶ in the civil system.

Furthermore, some evidence exists to indicate that litigation results do not significantly differ from arbitration results. According to a Philadelphia study of civil arbitration programs, arbitration award patterns were virtually identical for judge and jury awards on issues of both liability and damage assessment.¹⁴⁷ Other commentators have similarly concluded that arbitrators and judges are likely to decide the same way.¹⁴⁸ Given the absence of reliable statistics showing that mandatory employment arbitration decisions consistently favor employers and the existence of evidence indicating a lack of any difference between litigation and arbitration results, the EEOC appears to be relying on imperfect information as a primary justification for its policy of completely prohibiting mandatory arbitration agreements.

Finally, the general mistrust of the arbitration system evidenced in the EEOC policy should be criticized as misguided and unsubstantiated. In fact, the *Gilmer* Court explicitly denounced such broad, general attacks on the adequacy of arbitration procedures as contrary to the Court's

verdicts in employment-related cases).

143. See Stuart H. Bompey & Andrea H. Stempel, *Four Years Later: A Look at Compulsory Arbitration of Employment Discrimination Claims After Gilmer v. Interstate/Johnson Lane Corp.*, 21 EMPLOYEE REL. L. J. 21, 30-47 (1995) (summarizing a study of sixty-two securities industry arbitration proceedings).

144. See Schwartz, *supra* note 9, at 65. Mean verdict award is \$703,600 compared to \$124,500 for arbitration awards.

145. See Mathiason, *supra* note 91, at 30.

146. See Skrainka, *supra* note 89, at 989.

147. See Pearson, *supra* note 75. Of 296 cases ending in a verdict, 71% resulted in verdicts for plaintiffs, compared to 80% in arbitration.

148. See Mark Berger, *Can Employment Law Arbitration Work?*, 61 UMKC L. REV. 693, 714 (1993) (asserting that studies show judges and arbitrators are likely to decide the same way); Blackman, *supra* note 140, at 3 (quoting a plaintiff's attorney who sees no dramatic difference in a claimant's likelihood of success between arbitration and the courts).

endorsement of the method.¹⁴⁹ The Court noted that the argument that arbitration panels would be naturally biased is mere speculation.¹⁵⁰ Therefore, while the EEOC clearly should suggest ways to choose and implement a fair mandatory arbitration proceeding, the “biased arbitration system” argument is no longer sufficient to justify an outright policy against mandatory agreements to arbitrate. In fact, although at the “eleventh hour”¹⁵¹ the Dunlop Commission on the Future of Worker-Management Relations eschewed a recommendation in favor of outright enforcement of pre-dispute agreements satisfying certain quality standards, the Commission hailed many of the safeguards essential to the unbiased and effective operation of any pre-dispute mandatory arbitration agreement.

The American Bar Association, other private organizations which provide alternative dispute resolution services, plaintiffs’ bars, and union representatives all recognize the importance of promoting the fairness and neutrality of arbitrators. These institutions formed the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, which recommends specific procedural safeguards for arbitration, mandatory and otherwise.¹⁵² While this protocol is not law, it refutes the view that arbitrators are inherently biased in favor of employers.¹⁵³ Additionally, the American Arbitration Association (“AAA”) issued new rules for the resolution of employment disputes in June of 1996. The policy of this national organization is to “administer dispute resolution programs which meet the due process standards as outlined in these rules and the Due Process Protocol. This includes pre-dispute, mandatory arbitration programs, as a condition of employment.”¹⁵⁴ Similarly, JAMS/Endispute will serve under mandatory arbitration agreements so long as a “minimum set of procedures or standards of procedural fairness” are present.¹⁵⁵ At the very least, the Protocol and other policies aimed at ensuring employee rights within the mandatory arbitration

149. See 500 U.S. at 34.

150. See *id.*

151. Estreicher, *supra* note 85, at 1348.

152. See *Due Process Protocol for Mediation and Arbitration of Statutory Employment Disputes*, 142 INDIVIDUAL EMP. RTS. MANUAL 534:401 (1996). This group could not reach a consensus on whether pre-dispute agreements to arbitrate statutory employment claims could be required as a condition of employment and, therefore, did not ban them entirely.

153. In fact, some private arbitrators refused to service mandatory arbitration agreements even before the EEOC’s July 1997 policy statement. See *National Academy of Arbitrators’ Statement and Guidelines Adopted May 21, 1997*, Daily Lab. Rep. (BNA) No. 103, at E-1 (May 29, 1997).

154. *American Arbitration Association, National Rules for the Resolution of Employment Disputes* (visited Feb. 23, 1999) <http://www.adr.org/rules/employment_rules.html>.

155. *J.A.M.S./Endispute Arbitration Rules*, 142 INDIVIDUAL EMP. RTS. MANUAL 534:521 (1996).

setting should indicate to the EEOC that an alternative to an overly-prohibitive policy exists.

IV. CONCLUSION

The EEOC's policy against pre-dispute mandatory arbitration agreements is unwarranted and misguided. The primary justifications for this policy are either unsubstantiated or have been rejected consistently by the Supreme Court. Since the issuance of this policy statement, EEOC field workers must devote more of their already limited resources to fight these agreements, while employees continue to wait for their claims to be addressed.

Instead, the EEOC should offer guidelines with respect to mandatory arbitration agreements in the employment arena, as the potential for abuse may exist. Given the obvious benefits of a fair mandatory arbitration system, the EEOC should focus its efforts on ways to ensure and promote neutrality and efficiency via mandatory arbitration should an employer choose that method. Numerous commentators, whether strictly opposed to mandatory arbitration agreements or simply cautious of their potential for abuse, suggest relatively simple protections that can help ensure fairness to the individual employee, yet permit an employer to tailor an agreement as she desires.¹⁵⁶ In fact, the most essential safeguards to a mandatory system should mimic those suggested by the Dunlop Commission with respect to any private arbitration scheme, including: no restriction on the right to file with proper administrative agencies, a competent arbitrator, a fair and simple discovery, a right to representation, a range of remedies, and a written award explaining the arbitrator's rationale.¹⁵⁷

The EEOC must become cognizant of its own resource limitations and recognize that, with the proper guidance, mandatory arbitration agreements can supplement the EEOC's quest to achieve the fundamental goals and principles of employment law. Private arbitration should never, and will never, replace the EEOC or judicial resolution of statutory employment claims. However, private arbitration, even if mandatory, can complement enforcement goals and satisfy individual and public objectives with respect to employment arbitration.

156. The most common suggestions to ensure fairness are: (1) clear identification and notification to employees regarding the rights being waived and the disputes covered by the agreement; (2) education of employees about the arbitration process and the provision of explanatory materials; (3) avoidance of limitations on substantive rights; and (4) use of qualified, diverse arbitration panels. See, e.g., Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591, 605-18 (1995); Ponte, *supra* note 104, at 384-86.

157. See U.S. Dept's of Commerce and Labor, Commission on the Future of Worker-Management Relations, Report and Recommendations 31 (1994).