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Pre-Dispute Mandatory Arbitration Agreements and Title VII: Promoting Efficiency While Protecting Employee Rights

*EEOC v. Luce, Forward, Hamilton & Scripps*¹

I. INTRODUCTION

While the United States Supreme Court has repeatedly held that claims based on statutory rights may be vindicated by arbitration, the Court has yet to determine the validity of a pre-dispute mandatory arbitration agreement (“MAA”) that covers Title VII of the Civil Rights Act of 1964 (“Title VII”). The United States Court of Appeals for the Ninth Circuit, contrary to every other district court of appeals to have considered the matter, has held that Title VII claims may not be subjected to arbitration under an MAA. The instant case once again addresses the question of whether the Ninth Circuit will allow an employer to require its employees to sign an MAA covering Title VII claims as a condition of employment.

II. FACTS AND HOLDING

In 1997, Donald Scott Lagatree (“Lagatree”) received a conditional offer of employment from Luce, Forward, Hamilton & Scripps LLP (“Luce Forward”).² Luce Forward admittedly declined to hire Lagatree solely because Lagatree refused to sign an MAA requiring Lagatree to submit all “claims arising from or related to his employment” to binding arbitration.³ Lagatree filed a wrongful termination complaint with the Equal Employment Opportunity Commission (“EEOC”), which subsequently sued Luce Forward on behalf of Lagatree and the public interest.⁴ The EEOC sought make-whole relief for Lagatree, as well as a permanent injunction forbidding Luce Forward from enforcing existing MAAs and from retaliating against individuals who refuse to sign the MAA.⁵

The EEOC argued that applicants could not be forced to waive the right to a judicial forum as a condition of employment.⁶ The EEOC further claimed that

1. *EEOC v. Luce, Forward, Hamilton & Scripps*, 303 F.3d 994 (9th Cir. 2002)

2. *Id.*

3. *Id.* at 997.

4. *Id.* at 998.

5. *Id.* Make-whole relief includes “rightful place employment,” back wages and benefits, and compensatory and punitive damages. *Id.*

6. *Id.* at 998. See also 42 U.S.C. § 2000e-2(a)(1) (2002) (Title VII) (prohibiting employment discrimination based on race, color, religion, sex, or national origin); 42 U.S.C. § 12112(a) (2002) (ADA) (prohibiting discrimination based on disabilities); 29 U.S.C. § 623(a)(1) (2002) (ADEA) (prohibiting discrimination based on age); 29 U.S.C. § 215(a)(3) (2002) (Fair Labor Standards Act) (prohibiting discrimination against an employee for filing a complaint).

Luce Forward unlawfully retaliated against Lagatree in two ways.⁷ First, the EEOC claimed Lagatree's refusal to waive his right to a judicial forum was protected opposition conduct under the Americans with Disabilities Act ("ADA").⁸ Second, the EEOC argued that denying employment to those who refuse to sign the MAA constituted a "preemptive strike against future participation conduct afforded absolute protection under each of the federal anti-retaliation provisions."⁹

The United States District Court for the Central District of California refused the EEOC's request for make-whole relief and an injunction under the federal anti-discrimination acts.¹⁰ However, considering itself bound by its decision in *Duffield* prohibiting Title VII MAAs,¹¹ the District Court issued "an injunction prohibiting Luce Forward from requiring its employees to agree to arbitrate their Title VII claims as a condition of employment and from attempting to enforce any such previously executed agreements."¹² The District Court did not expressly rule on the EEOC's retaliation theory.¹³

The Ninth Circuit vacated the District Court's *Duffield*-based permanent injunction against enforcement of the MAAs.¹⁴ The Court of Appeals overturned *Duffield* as being irreconcilable with the language and reasoning of the United States Supreme Court in *Circuit City*, the decisions of the Ninth Circuit and other circuits, and Title VII.¹⁵ The Court of Appeals held that "an employer may require employees to arbitrate Title VII claims as a condition of employment," so long as the MAAs "comply with the principles of traditional contract law, including the doctrine of unconscionability."¹⁶

III. LEGAL HISTORY

The Federal Arbitration Act ("FAA") was enacted to eliminate judicial hostility towards arbitration agreements, and to place arbitration agreements on equal footing with other contracts.¹⁷ Section 2 of the FAA states that "[a] written [arbi-

7. *Luce*, 303 F.3d at 998.

8. *Id.* at 1006 (quoting 42 U.S.C. § 12203(b) (2002) (making it "unlawful to coerce . . . or interfere with any individual in the exercise or enjoyment of . . . any right granted or protected by this chapter.")).

9. *Id.* at 1007.

10. *Id.* at 997.

11. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998).

12. *Luce*, 303 F.3d at 998.

13. *Id.*

14. *Id.* at 1008.

15. *Id.* at 1003-04. See *Circuit City Stores v. Adams*, 532 U.S. 105 (2001) (implicitly rejecting *Duffield*); *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 935 (9th Cir. 1992) (holding Congress did not intend to preclude arbitration of Title VII claims); *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994) (holding Title VII claims subject to arbitration where the parties have knowingly and voluntarily so agreed); Pub.L. No. 102-166, 105 Stat. 1071 § 118 (2002) (reprinted in notes to 42 U.S.C. § 1981 (2002) (stating arbitration is recommended)).

16. *Luce*, 303 F.3d at 1004.

17. 9 U.S.C. § 2 (2000). Section 2 provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall

tration] provision in any . . . contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."¹⁸ The FAA exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."¹⁹ Under the FAA, a federal district court is empowered to issue stays of proceedings subject to arbitration, as well as orders compelling arbitration when one party has violated an MAA.²⁰ These provisions manifest a "liberal federal policy favoring arbitration agreements."²¹

Title VII was passed to prevent employment discrimination due to "race, color, religion, sex, or national origin."²² Title VII prohibits intentional discrimination toward individuals, as well as disparate treatment of protected classes.²³ Because Title VII protects employees as individuals and in the aggregate, Title VII rights are "relational and systematic," and therefore "necessarily inalienable."²⁴

A. *Gilmer*: Approving Mandatory Arbitration Agreements

In 1991, the Supreme Court held that a discrimination claim under the Age Discrimination in Employment Act ("ADEA") is subject to compulsory arbitration under an MAA.²⁵ In *Gilmer*, the employee executed a securities registration application which contained an agreement to arbitrate "[a]ny controversy between a registered representative [i.e. employee] and any member or member organization [i.e. employer] arising out of the employment or termination of employment of such registered representative."²⁶ The employee, then 65 years old, brought an ADEA claim in district court after the employer discharged him.²⁷ The employer subsequently filed a motion to compel arbitration.²⁸

The Supreme Court reasoned that because the right to a judicial forum is not a substantive right, a waiver thereof in favor of arbitration does not hinder an em-

be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

18. *Id.* [hereinafter "FAA Exemption Clause"].

19. *Id.* at § 1 (2000) [hereinafter "FAA Coverage Clause"].

20. *Id.* at §§ 3,4.

21. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

22. 42 U.S.C. 2000e-2(a)(1) [hereinafter "Title VII"].

23. See *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998, 1001 (1998) ("We have held that [employment practice] . . . evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment." (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

24. *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 253 (1998) ("Title VII was enacted to benefit all of society by eliminating systemic labor market inequality, which limits alienability of its protections because "rights that are relational and systemic are necessarily inalienable; individuals cannot waive them because individuals are not their sole focus." (quoting Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable rights, Affirmative Duties, and the Dilemma of Dependence*, 100 Harv. L. Rev. 1849, 1863 (1987)).

25. *Gilmer*, 500 U.S. at 20.

26. *Id.*

27. *Id.*

28. *Id.* at 24.

ployee's ability to vindicate her statutory rights.²⁹ The Supreme Court found that statutory claims were subject to arbitration absent evidence that Congress "inten[ded] to preclude a waiver of judicial remedies for the statutory rights at issue."³⁰ Such congressional intent could be found "in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes."³¹ The Supreme Court concluded that because the employee had failed to establish that Congress intended to exempt ADEA claims from arbitration, such claims were arbitrable.³²

B. Civil Rights Act of 1991 – Qualified Approval of Arbitration

The Civil Rights Act of 1991 ("CRA 1991") expanded the judicial remedies available to victims of discrimination. Section 118 of CRA 1991 grants qualified approval to arbitration of Title VII claims "where appropriate."³³ The legislative history of CRA 1991 indicates that Section 118's provision for "the use of alternative dispute resolution mechanisms [was] intended to *supplement*, not supplant, the remedies provided by Title VII."³⁴ Congress did "not intend for the inclusion of [Section 118 to] be used to preclude rights and remedies that would otherwise be available."³⁵ Furthermore, Section 118 "contemplates the use of voluntary arbitration to resolve specific disputes *after they have arisen*, not coercive attempts to force employees in advance to forego statutory rights."³⁶ In passing Section 118, "no approval whatsoever [was] intended of the Supreme Court's . . . decision in *Gilmer* [approving mandatory arbitration of ADEA discrimination claim], or any application or extension of it to Title VII."³⁷

C. Judicial Approaches to Prospective Arbitration Agreements

Following the Supreme Court's decision in *Gilmer*, four approaches developed in the circuits for the treatment of MAAs purporting to cover Title VII claims (hereafter referred to as a Title VII MAA). The first approach was only taken by the Ninth Circuit in *Duffield*, which held Title VII MAAs invalid.³⁸ The majority of circuits follow the second approach, which allows arbitration under Title VII MAAs if doing so effectively vindicates their statutory claims.³⁹ In the

29. *Id.* at 26; see *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (stating that a party who agrees to arbitrate its statutory claims "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration," but the "party does not forego the substantive rights afforded by the statute").

30. *Gilmer*, 500 U.S. at 26.

31. *Id.*

32. *Id.* at 20.

33. Pub. L. No. 102-166, 105 Stat. 1071 § 118 (reprinted in notes to 42 U.S.C. § 1981). "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration is encouraged to resolve disputes arising under this chapter." *Id.*

34. H.R. Rpt. 102-40, at 41 (May 17, 1991) (emphasis added).

35. *Id.*

36. 137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991) (emphasis added).

37. *Id.*

38. See *Duffield*, 144 F.3d 1182.

39. See e.g. *Cole v. Burns Intl. Sec. Svcs.*, 105 F.3d 1465 (D.C. Cir. 1997) (allowing compulsory arbitration for Title VII claims where the arbitration clause provides procedural fairness, does not

third approach, a minority of circuits have held that *Gilmer* creates a *nonrebuttable presumption* that Title VII MAAs are valid.⁴⁰ Finally, the fourth approach holds that *Gilmer* creates a *rebuttable presumption* that Title VII MAAs are valid.⁴¹

In 1992, prior to *Duffield*, the Ninth Circuit followed the fourth approach.⁴² In *Mago*, the Court of Appeals held Title VII created a *rebuttable presumption* that MAAs are valid.⁴³ This presumption was held rebuttable by evidence of congressional intent indicating otherwise, as found in “the text of Title VII, its *legislative history*, or [in] an ‘inherent conflict’ between arbitration and the underlying purposes of Title VII.”⁴⁴ Because the ADEA and Title VII are “similar in their aims and substantive provisions,” the Court of Appeals extended *Gilmer’s* approval of MAAs for ADEA claims to Title VII claims.⁴⁵ The Ninth Circuit, without considering Section 118, found the employee failed to meet her burden of producing evidence that Congress intended to prohibit Title VII MAAs.⁴⁶

In 1994, the Ninth Circuit again presumed Title VII claims were subject to arbitration absent evidence of congressional intent to the contrary.⁴⁷ In *Lai*, the court, citing *Mago* and *Gilmer*, found that compulsory arbitration was only appropriate where the employee alleging discrimination under Title VII “has knowingly agreed to submit such disputes to arbitration.”⁴⁸ The Ninth Circuit noted Section 118 and its legislative history, which set forth the “concern that Title VII disputes be arbitrated only “where appropriate,” and only when such a procedure was knowingly accepted.”⁴⁹ Because the MAA did not reference any type of dispute subject to arbitration (including employment disputes), the court held the employees did not knowingly agree to forego their statutory rights and remedies in favor of arbitration.⁵⁰

In 1998, contrary to its decisions in *Mago* and *Lai*, the Ninth Circuit Court of Appeals in *Duffield* held that CRA 1991 prohibited employers from forcing employees to waive their right to a judicial forum for claims arising under Title VII (or parallel state statutes) as a condition of employment.⁵¹ While acknowledging

impose financial burdens on plaintiff’s access to the arbitral forum, and allows for those remedies that are central to the statutory scheme). “*Gilmer* cannot be read as holding that an arbitration agreement is enforceable no matter what rights it waives or what burdens it imposes.” *Id.* at 1482.

40. See *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); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991).

41. See e.g. *Mago*, 956 F.2d 932.

42. *Id.*

43. *Id.* at 935 (emphasis added).

44. *Id.* (emphasis added) (quoting *Gilmer*, 500 U.S. at 26).

45. *Id.*; *Lorillard v. Pons*, 434 U.S. 575, 584 (1978); see also *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1554 (10th Cir. 1988) (Title VII arbitration decisions should apply to ADEA cases because both statutes are similar).

46. *Mago*, 956 F.2d at 935 (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987)).

47. *Lai*, 42 F.3d 1299.

48. *Id.* at 1305.

49. *Id.* (quoting § 118). See 137 Cong. Rec. S15472, S15478 (daily ed. Oct. 30, 1991, statement of Sen. Dole) (declaring that § 118 encourages arbitration only “where the parties knowingly and voluntarily elect to use these methods”).

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

51. *Duffield*, 144 F.3d at 1199.

Congress's intent to encourage voluntary arbitration agreements, the court found that reading Section 118 to permit Title VII MAAs was "at odds with Congress's directive to read Title VII broadly so as to best effectuate its remedial purposes."⁵²

According to the court, Section 118's inclusion of the phrases "where appropriate" and "to the extent authorized by law" provided separate and distinct limitations on Title VII arbitration.⁵³ "Where appropriate" evidenced Congress's intention to allow arbitration where it provides "victims of discrimination an *opportunity* to present their claims in an alternative forum . . . that *they* find desirable — not by forcing an unwanted forum upon them."⁵⁴ "To the extent authorized by law" codified the law prior to *Gilmer*, which held that an MAA in a collective bargaining agreement did not bar an employee from pursuing Title VII remedies in federal court.⁵⁵ Among other pieces of legislative history, the court pointed to the report of the House Committee on Education and Labor, which stated that "the committee believes that any agreement to submit disputed issues to arbitration, whether in the context of collective bargaining or in an employment contract, *does not preclude the affected person from seeking relief under the enforcement provisions of Title VII.*"⁵⁶ The Ninth Circuit Court of Appeals noted that Congress specifically rejected a proposal that would have allowed MAAs to be enforced.⁵⁷ Finding the context, language, and legislative history of CRA 1991 clearly indicated Congress's intention to deny enforcement of MAAs covering Title VII claims, the court held it "inescapable" that Title VII claims were not subject to compulsory arbitration under an MAA.⁵⁸

D. Circuit City: The Supreme Court Implicitly Overturns Duffield

In 2001, the United States Supreme Court addressed the question of whether the FAA applied to all employment contracts.⁵⁹ In *Circuit City*, the plaintiff signed an employment application which included an MAA covering all claims arising out of his employment.⁶⁰ The Court stated that the Ninth Circuit's conclusion that all employment contracts were excluded from the FAA was contrary to every other district court of appeals that had addressed the question.⁶¹ If all contracts of employment were beyond the scope of the FAA, the separate exemption for specific classes of workers in the FAA exemption clause would be pointless.⁶²

52. *Id.* at 1192-93.

53. *Id.* at 1193.

54. *Id.* at 1194.

55. *Id.* at 1194-95. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

56. *Id.* at 1195 (quoting H.R. Rep. 102-40(I) at 97).

57. *Id.* at 1198 (citing H.R. Rep. 102-40(I), at 104).

58. *Id.* at 1197; 137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards) ("[Section 118] contemplates the use of voluntary arbitration to resolve specific disputes after they have arisen, not coercive attempts to force employees in advance to forego statutory rights. No approval whatsoever is intended of the Supreme Court's recent decision in *Gilmer* . . . or any application or extension of it to Title VII.")

59. *Circuit City*, 532 U.S. 105.

60. *Id.* at 109-10.

61. *Id.* at 110-11.

62. *Id.* at 113-14 ("Construing the residual phrase ['any other class of workers engaged in . . . commerce'] to exclude all employment contracts fails to give independent effect to the statute's enumeration of the specific categories of workers which precedes it; there would be no need for Congress to

The Supreme Court stated that because *Gilmer* held that the right to a judicial forum was not a substantive right, MAAs *could* be enforced under the FAA without contravening the policies of statutory protections against discrimination.⁶³

In 2002, the United States Court of Appeals for the Ninth Circuit in *Luce* overturned *Duffield*, holding *Circuit City* approved the use of Title VII MAAs.⁶⁴

IV. INSTANT DECISION

In the instant case, the Ninth Circuit reasoned that the United States Supreme Court's decision in *Circuit City* undermined *Duffield* to such a degree as to render it invalid.⁶⁵ The court noted *Gilmer* held arbitration did not hinder the employee's ability to effectively vindicate her rights.⁶⁶ The court then criticized the *Duffield* court for selectively choosing portions of legislative history that supported the proposition that Title VII MAAs were prohibited.⁶⁷ While *Duffield* cited *Mago* and *Lai*, it did not address the earlier panel's express statements that *Gilmer* (in *Mago* and *Lai*) and Section 118 (in *Lai*) authorized compulsory arbitration of Title VII claims.⁶⁸ Finally, the court noted that other circuits and the Supreme Courts of California and Nevada had repudiated *Duffield*.⁶⁹

The court enumerated four reasons for allowing an employer to require its employees to arbitrate Title VII claims as a condition of employment. First, it was consistent with the Supreme Court's decision in *Circuit City*.⁷⁰ Second, doing so unified the Ninth Circuit's case law, and brought it in line with other circuits.⁷¹ Third, the court pointed to Section 118's encouragement of arbitration as a means

use the phrases 'seamen' and 'railroad employees' if those same classes of workers were subsumed within the meaning of the 'engaged in . . . commerce' residual clause.).
See 9 U.S.C. § 1 (FAA Exemption Clause).

63. *Circuit City*, 532 U.S. at 123 (emphasis added); see *Gilmer*, 500 U.S. at 26 ("[B]y 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 judicial, forum.").

64. *Luce*, 303 F.3d at 994.

65. *Luce*, 303 F.3d at 1002 (citing *Circuit City*). See *United States v. Gay*, 967 F.2d 322, 327 (9th Cir. 1992) ("As a general rule, one three-judge panel of this court cannot reconsider or overrule the decision of a prior panel. An exception into this rule arises when an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit")

66. *Id.* at 999 (citing *Gilmer*, 500 U.S. at 26 ("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 forum, rather than a judicial forum." (quoting *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985))).

67. *Id.* at 1001.

68. *Id.* at 1002.

69. *Id.* at 1002; See e.g. *Desiderio v. Natl. Assoc. of Sec. Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 7 (1st Cir. 1999); *Kovaleskię v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 365 (7th Cir. 1999) ("We respectfully disagree with the Ninth Circuit on this issue . . ."); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 182 (3d Cir. 1998); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997); *Cole v. Burns Intl. Sec. Servs.*, 105 F.3d 1465, 1482-83 (D.C. Cir. 1997); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 882 (4th Cir. 1996); *Metz*, 39 F.3d at 1487; *Bender*, 971 F.2d at 700; *Alford*, 939 F.2d at 230; *Willis*, 948 F.2d at 307; see also *Armendariz v. Found. Health Psychcare Servs.*, 6 P.3d 669, 754 (2000) (stating "[a]side from the fact *Duffield* is a minority of one, we find its reasoning unpersuasive."); *Kindred v. Second Jud. Dist.*, 996 P.2d 903, 906 (2000).

70. *Luce*, 303 F.3d at 1004.

71. *Id.*

to resolve Title VII claims.⁷² Fourth, the court noted that employees have protection against unfair arbitration clauses under the principles of traditional contract law.⁷³

The Equal Employment Opportunity Commission (“EEOC”) argued its ability to carry out its mission would be hindered if Title VII MAAs were allowed.⁷⁴ An employee is free to file a claim with the EEOC even under a Title VII MAA.⁷⁵ Because the EEOC is able to bring a judicial action on behalf of the employee in order to seek specific relief, the court found that allowing Title VII MAAs did not impede the EEOC’s ability to carry out its mission.⁷⁶

The court next addressed EEOC’s claim of unlawful retaliation against Lagatree.⁷⁷ The federal discrimination laws make it unlawful for an employer to retaliate against an applicant or employee because she has engaged in a protected activity, which includes both opposing an unlawful employment practice, and participating in a statutorily authorized proceeding.⁷⁸ It was undisputed that Lagatree suffered an adverse employment decision when Luce Forward refused to hire him because of his refusal to sign the arbitration agreement.⁷⁹ The court stated that Lagatree’s refusal would have been protected if it was based on a reasonable belief that the Title VII MAA was unlawful.⁸⁰ Because all relevant legal authority up to the time of Lagatree’s refusal to sign the MAA permitted compulsory arbitration of Title VII claims, the court found that Lagatree’s refusal could not be considered reasonable.⁸¹ The court accordingly held that Luce Forward did not unlawfully retaliate against Lagatree.⁸²

The EEOC next argued that Luce Forward preemptively denied employment to Lagatree in response to his refusal to waive his right to bring a civil action in a judicial forum.⁸³ Citing the decisions of the Supreme Court in *Gilmer* and *Circuit City*, the court defeated EEOC’s argument by stating that the right to a judicial forum was not a substantive right.⁸⁴ Lagatree’s refusal to agree to Luce Forward’s terms of employment was instead found to be a “rational economic decision [by Lagatree] that Luce Forward was asking too much and offering too little in re-

72. *Id.* (quoting Congress’s declaration in § 118 that “arbitration is encouraged to resolve disputes arising under [Title VII].”).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 1004-05; see 42 U.S.C. § 2000e-3(a) (2000) (Title VII) (prohibiting discrimination for an employee’s refusal to follow an unlawful employment practice or for assisting in, participating in, or bringing a challenge against such an unlawful employment practice); 42 U.S.C. § 12203(a) (ADA) (prohibiting discrimination for participating in an investigation, complaint, or proceeding under the ADA); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act) (prohibiting discrimination against an employee for filing a complaint).

79. *Luce*, 303 F.3d at 1005.

80. *Id.*

81. *Id.* at 1006 (“Lagatree could not have reasonably interpreted the ADA’s pronouncement that ‘arbitration is encouraged’ to mean that ‘compulsory arbitration as a condition of employment is forbidden.’”).

82. *Id.*

83. *Id.* at 1006-07.

84. *Id.* at 1007.

turn.”⁸⁵ The court concluded that there was no unlawful retaliation because no federal statute afforded absolute protection to Lagatree’s right to a judicial forum.⁸⁶

The court in the instant case ultimately held that employers could require and enforce mandatory arbitration of Title VII claims as a condition of employment, so long as the Title VII MAA complied with traditional principles of contract law.⁸⁷ The court accordingly vacated the district court’s “*Duffield*-based” permanent injunction, and expressly overturned *Duffield*.⁸⁸

A. The Dissent

Judge Pregerson strongly dissented in the instant case, arguing *Duffield* should remain good law.⁸⁹ Judge Pregerson first argued that it was entirely compatible to hold in *Circuit City* that non-transportation workers who consent to arbitration agreements were subject to the FAA, and to hold in *Duffield* that employers cannot require arbitration of Title VII claims as a condition of employment.⁹⁰ Judge Pregerson further argued that even though mandatory arbitration agreements *can* effectuate the purposes of the federal anti-discrimination statutes, a court could still find that MAAs *do not* promote the policies of Title VII.⁹¹ Judge Pregerson noted *Duffield*’s discussion of the phrase “where appropriate” in Section 118 indicated Congress only sought to permit arbitration of Title VII claims where the arbitration agreement was signed voluntarily.⁹² Judge Pregerson further argued that *Duffield* relied on Title VII’s text, legislative history, and context, rather than on the right to a judicial forum being a substantive right as asserted by the majority.⁹³

Judge Pregerson noted *Duffield* specifically found the language from *Gilmer* quoted in *Circuit City* did not contradict the *Duffield* decision.⁹⁴ *Circuit City* did not implicitly overrule *Duffield* by quoting language which the majority in *Duffield* found compatible with its holding.⁹⁵ Judge Pregerson maintained that the majority’s criticism of *Duffield* was merely a disagreement with the court’s *own* earlier decision, and was thus insufficient to allow the court to reconsider the issue.⁹⁶ Finally, Judge Pregerson argued the benefits of arbitration did not outweigh the loss of the right to a judicial forum.⁹⁷

85. *Id.*

86. *Id.*

87. *Id.* at 1004.

88. *Id.* at 1004, 1008.

89. *Id.* at 1008.

90. *Id.* at 1009; see *Circuit City*, 535 U.S. at 1311; *Duffield*, 144 F.3d at 1202-03.

91. *Luce*, 303 F.3d at 1010; see *Circuit City*, 535 U.S. at 1313.

92. *Luce*, 303 F.3d at 1011; see *Duffield*, 144 F.3d at 1194.

93. *Luce*, 303 F.3d at 1012 (“Indeed, our statement in *Duffield* that the Civil Rights Act of 1991 ‘increased substantially the procedural rights and remedies available to Title VII plaintiffs’ . . . suggests . . . that [the Ninth Circuit Court of Appeals] perceived the right to a jury trial as a procedural right.”); see *Duffield*, 144 F.3d at 1189.

94. *Luce*, 303 F.3d at 1013; see *Circuit City*, 532 U.S. at 1313.

95. *Luce*, 303 F.3d at 1013.

96. *Id.*

97. *Id.* at 1014.

V. COMMENT

A. Relation of *Luce* to Precedent

Prior to *Gilmer*, there was notable confusion in the circuits as to whether Congress intended to authorize arbitration of statutory claims.⁹⁸ *Gilmer* led every circuit but the Ninth to approve the arbitration of Title VII claims.⁹⁹ Prior to *Luce*, the Ninth Circuit Court of Appeals had stated that *Circuit City* weakened the strength of its decision in *Duffield*.¹⁰⁰ By overturning *Duffield*, *Luce* solidified the Ninth Circuit's approval of Title VII MAAs.¹⁰¹

The decision in the instant case respects the proclamation of *Circuit City* that "arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments," including Title VII, by "giving employees specific protection against discrimination prohibited by federal law."¹⁰² *Duffield* had been rejected by the Supreme Court of California.¹⁰³ *Luce* brings the Ninth Circuit in line with every other Circuit which has addressed the issue of whether employees may be forced to agree to arbitrate Title VII claims as a condition of employment.¹⁰⁴

98. See Douglas E. Abrams, *Arbitrability in Recent Federal Civil Rights Legislation: The Need for Amendment*, 26 Conn. L. Rev. 521, 545-46 (1994).

99. See *Willis*, 948 F.2d at 307 (compelling arbitration of Title VII claims subsequent to MAA); *Koveleskie*, 167 F.3d at 365; *Metz*, 39 F.3d at 1487-88 (holding Title VII claims subject to MAAs, extending *Gilmer* to Title VII based on its similarity with the ADEA); *Desiderio*, 191 F.3d at 205.

100. See *Circuit City Stores v. Najd*, 294 F.3d 1104, 1106-1107 (9th Cir. 2002) (questioning the validity of *Duffield* in light of *Circuit City*). But see *Circuit City Stores, Inc. v. Banyasz*, 2001 WL 1218406 at *3 (N.D. Cal. Oct. 11, 2001) (approving *Duffield*); *Melton v. Philip Morris, Inc.*, 2001 WL 1105046 at *3 (D. Or. Aug. 9, 2001) ("Since the *Duffield* limitation applied to a FEHA claim, and *Circuit City* ordered arbitration of a FEHA claim in a similar agreement without acknowledging the Ninth Circuit prohibition against doing so, there may be some question whether the Ninth Circuit will continue to adhere to *Duffield*."); *Ferguson v. Countrywide Credit Industries, Inc.*, 2001 WL 867103 at *2 (C.D. Cal. April 23, 2001) (noting the other Circuit's questioning of *Duffield's* validity).

101. See *Farac v. Permanente Medical Group*, 186 F.Supp.2d 1042, 1045 (N.D. Cal. 2002) (holding "*Circuit City* implicitly overruled *Duffield*"); *Eftekhari v. Peregrine Fin. & Sec., Inc.*, 2001 WL 1180640 at *9 (N.D. Cal. Sep. 24, 2001) (stating "*Circuit City* reverses *Duffield*"); *Olivares v. Hispanic Broad. Corp.*, 2001 WL 477171 at *1 (C.D. Cal. April 26, 2001) ("in light of . . . *Circuit City* . . . *Duffield* should not preclude arbitration").

102. *Circuit City*, 532 U.S. at 123.

103. See *Armendariz*, 6 P.3d at 754.

104. See *Rosenberg*, 170 F.3d at 7 ("Title VII of the Civil Rights Act of 1964, as amended by the 1991 [Civil Rights Act], does not, as a matter of law, prohibit pre-dispute arbitration agreements."); *Alford*, 975 F.2d at 230 (United States Supreme Court reversed district court's decision not to compel arbitration, remanded for reconsideration in light of *Gilmer*; on remand the 5th Cir. concluded that Title VII claims are subject to compulsory arbitration); *Desiderio*, 191 F.3d at 205 (rejecting *Duffield*); *Koveleskie*, 167 F.3d at 365 (explicitly disagreeing with *Duffield* and holding Congress did not intend Title VII to preclude enforcement of pre-dispute arbitration agreements); *Scott v. Burns Intl. Sec. Serv. Inc.*, 165 F.Supp. 2d 1133, 1137 (D. Haw. 2001) (stating *Circuit City* implicitly overruled *Duffield*). See also *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1315 (11th Cir. 2002) (stating that the viability of *Duffield* has been called into question by *Circuit City*); *Borg-Warner Protective Serv. Corp. v. E.E.O.C.*, 245 F.3d 831, 835 (D.C. Cir. 2001) ("We cannot say whether the Ninth Circuit will continue to adhere to *Duffield* in the face of the Supreme Court's *Circuit City* decision.").

B. Suitability of Title VII to Mandatory Arbitration Agreements

1. Disadvantages to Employees

The court's decision in *Luce* raises concerns as to whether employees will have adequate protection from discrimination after signing an MAA. Title VII was passed in order to protect employees, both individually and as a whole, from employment discrimination due to race, color, religion, sex, or national origin.¹⁰⁵ The primary purpose of Title VII is to avoid harm to employees by discrimination, not to redress harm to individual employees.¹⁰⁶ However, the procedural framework of arbitration presents a challenge to effectuating the purposes of Title VII. Arbitration's costly forum fees can result in arbitration becoming much more expensive, and hence prohibitive, for the employee than litigation.¹⁰⁷ Forum fees in discrimination cases in the security industry are routinely over \$20,000, with several in excess of \$40,000, \$60,000, and \$80,000.¹⁰⁸ For example, a \$60,000 employment discrimination claim in Cook County (Ill.) Circuit Court would cost \$221 in court, whereas the forum fee for arbitration of the same claim would be over \$10,000.¹⁰⁹ Individuals facing financial insecurity as a result of a termination of employment face difficult decisions in determining whether to pursue their discrimination claim.¹¹⁰

The potentially prohibitive costs of arbitration take on added significance because arbitration bars class actions. Company policies that cause company-wide discrimination may result in relatively small harm to individual employees. The potentially prohibitive costs of arbitration could make it impractical to pursue a discrimination claim outside of a class action.¹¹¹ Accordingly, "the prohibition on class actions thereby provides legal immunity for corporations who may have

105. 42 U.S.C. 2000e-2(a)(1) (2000) [hereinafter "Title VII"].

106. *Kolstad v. American Dental Assn.*, 527 U.S. 526, 545 (1999).

107. Public Citizen, *Cost of Arbitration: Executive Summary* <<http://www.lawmemo.com/arb/res/cost.htm>> (May 1, 2002):

The cost to a plaintiff of initiating an arbitration is almost always higher than the cost of instituting a lawsuit. Our comparison of court fees to the fees charged by the three primary arbitration provider organizations demonstrates that forum costs. . . can be up to five thousand percent higher in arbitration than in court litigation. These costs have a deterrent effect, often preventing a claimant from even filing a case. . . [F]or example, the forum fee for a \$60,000 employment discrimination claim in the Circuit Court of Cook County, Illinois is \$221. The forum fees for the same claim before the National Arbitration Forum (NAF) would be \$10,925, 4,943% higher. An \$80,000 consumer claim brought in Cook County would cost \$221, versus \$11,625 at NAF . . . the American Arbitration Association (AAA) would charge the plaintiff up to \$6,650, and Judicial Arbitration and Mediation Services (JAMS) would charge up to \$7,950, amounting to a 3,009% and 3,597% difference in cost, respectively.

108. Cliff Palefsky, Natl. Empl. Laws.' Assn., Testimony, *Mandatory Arbitration in Securities Industry* (Sen. Banking Comm., July 28, 1998) (copy available at 1998 WL 12762695).

109. T. Shawn Taylor, *Employees Question Fairness of Arbitration*, *The Bradenton Herald* (Oct. 28, 2002) (available in WL, BRADHERALD database).

110. Joan Claybrook, President, Public Citizens Congress Watch, *Prepared Statement on the 2000 Fairness and Voluntary Arbitration Act* (H. Subcomm. on Com. & Admin. L., June 8, 2000) (copy available at <http://commdocs.house.gov/committees/judiciary/hju65871.000/hju65871_0f.htm> (accessed Mar. 3, 2003)).

111. *Id.*

gained a substantial benefit through small injuries to a large number of persons.”¹¹²

The choice of arbitrators also places an aggrieved employee at a disadvantage, even before the arbitration proceedings begin. Because arbitration organizations compete for contracts with employers, the repeat players in arbitration, the arbitration organizations, have an incentive to favor employers in its decisions.¹¹³ Employees are unable to review the arbitrator’s history of deciding disputes because there is no requirement of a public record in arbitration.¹¹⁴ The securities industry, however, is in a much different position, as it maintains an extensive database of each arbitrator’s prior awards.¹¹⁵

Once arbitration begins, the employee is further disadvantaged by the lack of formal discovery procedures, as discovery is left to the discretion of the arbitrator.¹¹⁶ While the burden of proof is on the employee, the employer is often in control of the majority of the relevant evidence in the case.¹¹⁷ Such evidence could demonstrate pretext on the part of the employer or discriminatory conduct.¹¹⁸ This discovery problem is compounded because “the ethical prohibition against lawyers’ ‘ex parte’ contacts with opposing parties (i.e., informal, and without opposing counsel present) extends to many current, and possibly some former, employees of a corporate defendant.”¹¹⁹

Employees are not only disadvantaged by inadequate discovery due to informality, but also face the possibility of excessive discovery of matters that would otherwise be excluded if the claim was brought in a judicial forum. One commentator has explained the discovery problem as follows:

In sexual harassment cases . . . consensual sexual activity by the plaintiff with persons other than the harasser is excluded under federal law and in many state jurisdictions as irrelevant and invasive of the plaintiff’s right to privacy. Yet an arbitrator in such a case, under no obligation to comply with such an evidentiary restriction, may allow the employer to forage where it desires in a plaintiff’s private conduct.¹²⁰

In resolving the dispute, the arbitrator is not obligated to follow the law or established precedent.¹²¹ The Supreme Court recognized that arbitration may lead to

112. *Id.*

113. *Id.*; Geraldine Szott Moehr, *Arbitration and the Goals of Employment Discrimination Law*, 56 Wash. & Lee L. Rev. 395, 420 (1999); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wisc. L. Rev. 33, 73-81, 122-123 (1997); Jean Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 647-52 (1996).

114. Claybrook, *supra* n. 110.

115. Palefsky, *supra* n. 108.

116. Schwartz, *supra* n. 113, at 46-47. “Arbitration generally eliminates pretrial motion and discovery practice, and the informality of arbitration means less time preparing for hearing and presenting evidence.” *Id.* at 60.

117. Palefsky, *supra* n. 108.

118. *Id.*

119. Schwartz, *supra* n. 113, at 61.

120. Palefsky, *supra* n. 108.

121. 9 U.S.C. § 10 (2000) [hereinafter “FAA Standard of Review”]:

a result that is “radically different” from that which would occur in a judicial proceeding.¹²² In order to overturn an arbitrator’s decision, the standard of review requires that the arbitrator (1) knew the law, (2) determined the law to be applicable under the circumstances of the dispute, and (3) specifically chose to ignore the law.¹²³ Additionally, an arbitration award that is contrary to “some explicit public policy” that is “well defined and dominant” may be overturned.¹²⁴ Courts may also vacate “irrational” awards.¹²⁵ However, the manifest disregard of the law standard is especially difficult considering arbitration does not require a written opinion or statement of law upon which the arbitrator relies.¹²⁶ Despite its potential for abuse, courts have reasoned that limited review of arbitration decisions is consistent with the “strong federal policy encouraging arbitration as a ‘prompt, economical and adequate’ method of dispute resolution for those who agree to it.”¹²⁷

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

See Moohr, *supra* n. 113, at 403; Mark A. Sponseller, Student Author, *Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators*, 44 *Hastings L.J.* 421, 435-36 (1993) (recognizing that arbitrators are not required to follow “precedent, rules of evidence,” or “rules of law,” keep a record of the proceedings, or answer to political constraints).

122. *Bernhardt v. Polygraph Co. of America*, 350 U.S. 198, 203 (1956):

The change from a court of law to an arbitration panel may make a radical difference in the ultimate result. Arbitration carries no right to trial by jury . . . Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial.

123. Palefsky, *supra* n. 108.

124. *Intl. Bhd. of Elec. Workers, Local 97 v. Niagara Mohawk Power Corp.*, 143 F.3d 704, 715 (2d Cir. 1998); see also *United Paperworkers Intl. Union v. Misco, Inc.*, 484 U.S. 29, 42-43 (1987); *Newsday Inc. v. Long Island Typographical Union*, 915 F.2d 840, 844 (2d Cir. 1990).

125. See *Honeywell, Inc. v. Firequench, Inc.*, 1997 WL 570514 (S.D.N.Y. 1997); *In re Andros Compania Maritima*, 579 F.2d 691, 704 (1978).

126. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) (stating arbitrators are under no obligation to give reasons for award); *McKesson Corp. v. Local 150 IBT*, 969 F.2d 831, 834 (9th Cir. 1999); Claybrook, *supra* n.110; Julian J. Moore, Student Author, *Arbitral Review (or Lack Thereof): Examining the Procedural Fairness of Arbitrating Statutory Claims*, 100 *Colum. L. Rev.* 1572, 1591 (2000) (arguing that because arbitrators typically conduct their affairs in private fora, the public has no way to guarantee that public interests are being vindicated).

127. *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1404, n. 2 (9th Cir. 1992), cert. denied, 506 U.S. 1050, (1993); *R.M. Perez & Assocs. v. Welch*, 960 F.2d 534, 540 (5th Cir. 1992).

2. Improving the Arbitration Process to Effectuate the Purposes of Title VII

Employers determine if arbitration is an appropriate and effective dispute resolution mechanism. Thanks to *Luce*, those employers which have chosen to adopt MAAs should be able to “sleep better at night.”¹²⁸ The decision in *Luce* secures the value of MAAs to employers, as the utility of MAAs would be greatly reduced were Title VII claims to be barred from them.¹²⁹ More employers will utilize MAAs, as they no longer face the threat of a court rejecting its validity in the context of Title VII disputes.¹³⁰

The Supreme Court has held that statutory rights and remedies should be equally available in both judicial and arbitral forums.¹³¹ In order to protect such rights, the FAA allows courts to invalidate MAAs under the principles of contract law, including breach of contract, public policy, and unconscionability.¹³² Courts must be vigilant to ensure MAAs merely change the forum for dispute resolution, rather than the rights and remedies guaranteed under Title VII.¹³³ For example, it would be unlawful for employers to set limits on the amount of damages recoverable below the limits set by Title VII.¹³⁴ It would also be unlawful to force employees to pay for greater than half of the arbitrator’s fees.¹³⁵

Employers must ensure the rights and remedies of Title VII are provided for in their MAAs in order “to preserve the principles of due process and fairness to ensure, to the extent possible, a ‘level playing field’ for employees.”¹³⁶ Unfortunately, employers have received mixed signals from the courts regarding what safeguards are necessary to ensure that an MAA is valid. One district court validated an arbitration agreement that reduced the statute of limitations to one year, granted the employer the sole right to modify or terminate the agreement on thirty days notice, and limited back-pay and punitive damages.¹³⁷

128. *Bar to Employers’ Use of Arbitration Lifted by Ninth Circuit*, 12 No. 15 Cal. Empl. L. Letter 3 (M. Lee Smith Publishers, LLC, Sep. 30, 2002) (available in WL, SMCAEMPLL database).

129. See Keith A. Becker & Dianne R. LaRocca, *Divided Court Crosses Wires over Circuit City Decision: Holding Casts Doubt on Ninth Circuit’s Duffield Decision*, 7 Harv. Negot. L. Rev. 403, 414 (2002) (noting that the removal of Title VII from arbitration agreements would remove a large percentage of complaints that serve as the basis for an employer’s choice of arbitration).

130. Shea Lukacsko & Ivan R. Novich, *Arbitration Makes More Sense than Suits*, Star-Ledger 018 (August 2, 2002) (available at 2001 WL 26104769).

131. Sidney Charlotte Reynolds, *Closing a Discrimination Loophole: Using Title VII’s Anti-Retaliation Provision to Prevent Employers from Requiring Unlawful Arbitration Agreements as Conditions of Continued Employment*, 76 Wash. L. Rev. 957, 971 (2001) (citing *Gilmer*, 500 U.S. at 26; *Mitsubishi*, 473 U.S. at 628; *Alexander*, 415 U.S. at 44).

132. *Id.* at 973 (citing 9 U.S.C. §2 (2000)).

133. *Id.*

134. *Id.*

135. *Id.* at 977.

136. Judith E. Harris, *The ABCs of ADR*, Employment and Labor Relations Law for the Corporate Counsel and the General Practitioner, SG060 ALI-ABA 185, 210 (Mar. 7-9, 2000). For a summary of how employees can ensure they craft valid arbitration following *Circuit City*, see *id.* at 213-21.

137. *Tupper v. Bally Total Fitness Holding Corp.*, 186 F. Supp. 2d 981 (E.D. Wis. 2002).

Another court severed a provision in an otherwise valid MAA that limited punitive damages under Title VII claims to five thousand dollars.¹³⁸ The United States Court of Appeals for the Eighth Circuit stated that:

[i]f we were to hold entire arbitration agreements unenforceable every time a particular term is held invalid, it would discourage parties from forming contracts under the FAA and severely chill parties from structuring their contracts in the most efficient manner for fear that minor terms eventually could be used to undermine the validity of the entire contract. Such an outcome would represent the antithesis of the “liberal federal policy favoring arbitration agreements.”¹³⁹

The United States Court of Appeals for the Eleventh Circuit found an arbitration agreement imposing fee-sharing requirements and requiring employee to waive substantive rights under Title VII to be unenforceable.¹⁴⁰ The court refused to sever the offending provision, reasoning that doing so would “reward the employer for its actions and fail to deter similar conduct by others.”¹⁴¹ With such diversity in court opinions, it is difficult to formulate an all-encompassing list that would ensure a pre-dispute MAA’s enforceability.¹⁴²

3. Pending Legislation

While the judicial system has determined that MAAs covering Title VII claims are valid, such a determination could be reversed by legislation. But even if such legislation is passed by both houses of Congress, it would, like all other legislation, face the threat of a veto. Such was the fate of two pieces of legislation passed by the California legislature concerning arbitration of consumer complaints, which was vetoed in October by Governor Gray Davis of California.¹⁴³ The first piece of legislation would have prevented companies from forcing workers to sign MAAs covering discrimination claims.¹⁴⁴ The other would give employees the right to reject an employer-designated arbitrator, and would have re-

138. *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 683 (8th Cir. 2001); For an insightful analysis of the issues raised in *Gannon*, see Michael K. Daming, Student Author, *To Sever or to Destroy?: The Eighth Circuit Allows Invalid Provisions*, 2002 J. Dis. Res. 425 (2002).

139. *Gannon*, 262 F.3d at 682.

140. *Perez v. Globe Airport Security Services, Inc.*, 253 F.3d 1280, 1287 (11th Cir. 2001), vacated, 294 F.3d 1275, 1276 (11th Cir. 2002) (vacated upon joint motion to dismiss by the parties).

141. *Id.*

142. However, the Practising Law Institute recommends the following provisions to protect enforceability of arbitration agreement: (1) signed written agreement, (2) provide for a neutral decision maker, (3) specify claims subject to arbitration, (4) exclude non-arbitral claims (e.g. claims for unemployment insurance or claims under the NLRB), (5) include explicit waiver of right to jury trial, (6) do not limit available remedies, (7) do not impose arbitration costs on employees, (8) do not shorten the applicable statute of limitations, (9) place reasonable limitations on discovery, and (10) provide for a written decision. Carroll E. Neesemann, Maren E. Nelson, Miriam Wugmeister & Lisa Klerman, *Securities Arbitration 2002: Taking Control of the Process*, The Law of Securities Arbitration, 1327 PLI/Corp 821 (PLI Order No. B0-01A6 2002).

143. Reynolds Holding, *Consumers get arbitration help / Breakthrough laws lift secrecy, root out conflicts of interest*, San Francisco Chronicle A1 (Oct. 2, 2002).

144. *Id.*

quired additional disclosure of the financial dealings of arbitration firms.¹⁴⁵ However, Governor Davis did sign into law legislation that requires arbitration firms to publicly disclose results and details of commercial disputes, and prohibits firms from charging consumers a winning opponent's fee.¹⁴⁶

While the legislation in California was limited to disputes between consumers, sellers, and manufacturers, similar legislation could be passed regarding employment discrimination complaints. The Preservation of Civil Rights Protections Act, introduced in the House of Representatives, would amend the FAA by prohibiting pre-dispute mandatory arbitration clauses covering statutory claims. However, parties would be permitted to voluntarily consent to arbitrate a statutory claim after it has arisen.¹⁴⁷ Another bill introduced in the United States House of Representatives would allow employees to enter into arbitration agreements only after an employment dispute arises, thus banning MAAs.¹⁴⁸ While similar legislation has been proposed in previous sessions of Congress, the increase in the pieces of legislation and the increase in co-sponsors suggest that support for such legislation is increasing.¹⁴⁹

4. Class Actions

Courts are divided as to whether an MAA precludes membership in a class action, and whether class action claims can be arbitrated. The prevailing view is that MAAs that prohibit class actions, both in court and in arbitration, are not *per se* unconscionable.¹⁵⁰ However, two recent California decisions found MAAs containing clauses barring class membership to be unconscionable.¹⁵¹ Absent other substantive unconscionability, courts generally will not invalidate clauses barring class membership.¹⁵² Additionally, it is unclear whether courts will ultimately require whether parties must expressly provide for consolidation in their arbitration agreement in order for the court to provide for class-action arbitration.¹⁵³

145. *Id.*

146. *Id.*

147. H.R. 2282, 107th Cong. (2001) (available in WL, CONG-BILLTXT). See H.R. 1489, 107th Cong. (2001) ("The Civil Rights Procedures Protection Act of 2001"); S. 163, 107th Cong. (2001).

148. Marcia Coyle, *Anti-arbitration Bills Set Off a Classic Brawl*, 47 Natl. L. J. A8 (Aug. 12, 2002).

149. *Id.*

150. See *Lloyd v. MBNA Am. Bank, N.A.*, 2002 WL 21932 at *2 (3d Cir. Jan. 7, 2002); *Doctor's Assns. v. Hollingsworth*, 949 F. Supp. 77, 80 (D. Conn. 1996); *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1107-09 (C.D. Cal. 2002); *Zawikowski v. Beneficial Natl. Bank*, 1999 WL 35304 (N.D. Ill. Jan. 11, 1999); *In Gray v. Conseco, Inc.*, 2000 WL 1480273 (C.D. Cal. Sept. 29, 2000); *In re RealNetworks, Inc., Privacy Litig.*, 2000 WL 631341 (N.D. Ill. May 8, 2000); *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909 (N.D. Tex. 2000).

151. See *Ting v. AT&T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002) (basing its finding that an AT&T directive imposing a binding-arbitration program on its long-distance customers was unconscionable partly on a provision barring membership in a class action); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862 (2002) (holding that a provision barring class membership was substantively unconscionable, against various aspects of public policy, and thus invalid).

152. See *Pick v. Discover Fin. Servs., Inc.*, 2001 WL 1180278 at *5 (D. Del. Sept. 28, 2001) (stating arbitration clauses are generally not unconscionable solely because they preclude class actions).

153. See *Champ v. Siegal Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (unless parties expressly provide for class actions in arbitration, court may only compel arbitration of plaintiff's individual claims). But see *Blue Cross v. Super. Ct. of L.A. County*, 78 Cal. Rptr. 2d 779, 790 (1998) ("[W]hen

VI. CONCLUSION

Because mandatory arbitration agreements to arbitrate Title VII claims are held enforceable across the circuits, the public should expect to see more employers utilize MAAs. Consequently, it is imperative that courts, or perhaps Congress, adequately lay out the provisions of MAAs that are required to ensure that procedural due process is served and that the rights and remedies of Title VII are vindicated.

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the arbitration agreement . . . is silent as to classwide arbitration and state law specifically authorizes it in appropriate cases, an order compelling classwide arbitration neither contradicts the contractual terms nor contravenes the policy behind the [Federal Arbitration Act].”), *cert. denied*, 527 U.S. 1003 (1999); *Bischoff v. DirectTV, Inc.*, 180 F. Supp. 2d 1097, 1107-08 (C.D. Cal. 2002) (finding arbitration clause not substantively unconscionable due to silence on the arbitrability of class actions).

