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ADA AND ADR: APPROACHING AN ADEQUATE ADJUDICATORY ALLOCATION

Jeffrey P. Ferrier

The Americans With Disabilities Act of 1990¹ (ADA or the Act) has been hailed as the most comprehensive federal civil rights statute ever enacted.² Its stated purpose is to eradicate the discrimination disabled individuals face, giving them legally enforceable rights.³ Two problems that have emerged under the ADA are the time and expense involved in pursuing an employment discrimination claim through the federal court system.⁴

As litigation costs continue to escalate and the federal court docket becomes increasingly crowded,⁵ it can take years and thousands of dollars to get an employment discrimination case from the complaint stage

1. 42 U.S.C. §§ 12101-12213 (1994).

2. James C. Harrington, *Taking Liberties*, TEX. LAW., July 18, 1994, at 18.

3. 42 U.S.C. § 12101(b) (1994). The Congress found that unlike those who have faced discrimination because of other physical characteristics, disabled individuals have had "no legal recourse to redress such discrimination." *Id.* at § 12101(a)(4); see R. Gaull Silberman et al., *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1533, 1537 (1994) (explaining that although "a complaint is cognizable under the antidiscrimination laws, burgeoning case loads at the EEOC [Equal Employment Opportunity Commission] and other agencies can cause long delays").

4. 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, 992 (1993) (predicting that an already taxed federal judiciary will become swamped with litigation made possible by ADA); see also Michael Schachner, *Suits Send Employers Running For Cover: New Statutes, Same Old Attitudes Create Liability Woes*, BUS. INS., Nov. 21, 1994, at 57 (noting the tremendous increase in employment-related litigation at state and federal levels).

5. See Schachner, *supra* note 4, at 57 (noting that in the past twenty years, the federal court docket is up 125%, while employment cases are up 2,166%); see also Evan J. Spelfogel, *Legal and Practical Implications of ADR and Arbitration in Employment Disputes*, 11 HOFSTRA LAB. L.J. 247, 248 (1993) (noting that more than eighteen million new lawsuits are filed each year, a growing number of which are employment discrimination suits).

through discovery and finally to trial.⁶ This quagmire has forced individuals, employers, lawmakers, and the judiciary to search for, and endorse, other methods of resolving employment discrimination claims.⁷ One method that has been examined by the judiciary over the past decade is alternative dispute resolution (ADR).⁸ ADR is a generic term for a number of dispute resolution techniques, all of which are less drastic than litigation. The term ADR generally includes negotiation,⁹ mediation,¹⁰ conciliation,¹¹ arbitration,¹² mini-trials,¹³ and a variety of other problem

6. See Loren K. Allison & Eric H.J. Stahlhut, *Arbitration and the ADA: Do the Two Make Strange Bedfellows?*, 37 RES GESTAE 168, 168 (1993) (noting time, money, and other costs of litigation); see Skrainka, *supra* note 4, at 991 (observing that to litigate a "simple" discrimination claim costs anywhere from \$50,000 to \$80,000). "On average, companies find they can arbitrate between 15 and 20 cases for the cost of one wrongful discharge lawsuit, and the process takes, on the average, one or two days and can be completed within six months from the time of the incident." *ADR Techniques Gaining Favor in Non-Traditional Settings*, Daily Lab. Rep. (BNA) No. 48, at 2 (Mar. 15, 1993).

7. See Stephen L. Hayford & Michael J. Evers, *The Interaction Between the Employment-at-Will Doctrine and Employer-Employee Agreements to Arbitrate Statutory Fair Employment Practice Claims: Difficult Choices For At-Will Employers*, 73 N.C. L. REV. 443, 455-56 (1995) (mentioning congressional endorsement of ADR in both the ADA and The Civil Rights Act of 1991); Silberman et al., *supra* note 3, at 1536 (noting congressional and judicial approval of ADR). For a discussion of judicial acquiescence to arbitration see *infra* notes 16-22 and accompanying text.

8. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638-40 (1985). *Mitsubishi* was the first of what has become known as the *Mitsubishi* trilogy, a series of three cases which recognized a presumption of arbitrability. See Heidi M. Helleson, Note, *Taking the "Alternative" Out of the Dispute Resolution of Title VII Claims: The Implications of a Mandatory Enforcement Scheme of Arbitration Agreements Arising Out of Employment Contracts*, 70 N.D. L. REV. 435, 438-42 (1994) (discussing the history of Title VII Arbitration); see also R. Bales, *A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 HOUS. L. REV. 1863, 1884-85 (1994) (discussing the *Mitsubishi* trilogy).

9. Robert B. Fitzpatrick & Marlissa S. Brigitte, *Current Developments in Employment Law, Alternative Dispute Resolution—Types of ADR Mechanisms*, 30 A.L.I.-A.B.A. CONTINUING LEGAL EDUC. 259, 266 (1995). The authors state that negotiation should be the first approach to resolve any dispute because the approach is designed to achieve a comprehensive, immediate, and candid discussion. *Id.*

10. *Id.* (defining mediation as "negotiation with a third party where the third party actively promotes a mutually acceptable settlement"). The third party, often referred to as the neutral, must have no binding authority and should coax the parties towards their own settlement. *Id.* at 266-67.

11. See *id.* at 266 (explaining that conciliation is negotiation involving a third party that facilitates the conflict resolution but plays no active role).

12. *Id.* at 268-72. Some of the advantages that arbitration provides over litigation include: a faster resolution of the conflict; a less expensive solution using fewer procedural rules; and a more predictable outcome. *Id.*; see *infra* notes 175-76 and accompanying text (discussing the fact that juries frighten employers because of their random decision-making).

13. Fitzpatrick & Brigitte, *supra* note 9, at 273 (discussing that mini-trials are like full trials in that they entail trial strategies and persuasive arguments but differ in that the holdings are normally confidential and lack precedential value).

solving techniques.¹⁴ ADR, while presently growing in popularity, has not always been a preferred method of solving potential litigation.¹⁵

While the Federal Arbitration Act (FAA) has existed since 1925,¹⁶ federal courts historically have been wary of ADR's ability to reach proper decisions.¹⁷ This is especially true where complex statutory rights, such as those afforded by Title VII or the ADA, are involved.¹⁸ In 1985, however, the Supreme Court expressed qualified acceptance of arbitration in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,¹⁹ when it approved of arbitration in an international commercial context.²⁰ By 1991, when the Court decided *Gilmer v. Interstate/Johnson Lane Corp.*,²¹ the seeming hostility towards arbitration was all but reversed.²² In addition, regarding the judicial adoption of arbitration and the problems of litigation, Congress has recently authorized the use of ADR "where appropriate."²³

14. See WILLIAM F. FOX, JR., *INTERNATIONAL COMMERCIAL AGREEMENTS: A PRIMER ON DRAFTING, NEGOTIATING AND RESOLVING DISPUTES* 183-202 (2d ed. 1992) (discussing techniques for problem solving in alternative dispute resolution).

15. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (noting the judicial hostility to arbitration agreements, dating back to early English common law).

16. Act of February 12, 1925, ch. 213, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-14 (1994)) [hereinafter FAA]; see *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985) (noting that the FAA's purpose was to make arbitration agreements the legal equivalent of other contracts); 9 U.S.C. § 2 (1994) (stating that § 2 of the FAA says that if a contract evidences that a dispute in a commercial transaction should settle by arbitration, that means of settlement will be enforceable).

17. *Gilmer*, 500 U.S. at 24.

18. See *Alexander v. Gardner-Denver*, 415 U.S. 36, 56-58 (1974) (noting that arbitration procedures make it an inappropriate forum for the final resolution of Title VII rights because the arbitrator's focus is upon party intent rather than legislative requirements).

19. 473 U.S. 614 (1985).

20. *Id.* at 638-40.

21. 500 U.S. 20 (1991).

22. The Court, responding to *Gilmer's* arguments that arbitration did not ensure the procedural safeguards of his Age Discrimination in Employment Act (ADEA) rights, stated,

Such generalized attacks on arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."

Id. at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477, 481 (1989)); *infra* notes 88-107 and accompanying text (describing in detail the factual basis underlying *Gilmer*, and the Court's reasoning); see *Mitsubishi*, 473 U.S. at 638-40 (exemplifying the beginning of the Court's trust in arbitration as a method of dispute settlement); see also *Hayford & Evers, supra* note 7, at 443 (discussing the Court's shift in attitude on the issue of arbitration).

23. See, e.g., Americans With Disabilities Act of 1990, Pub. L. No. 101-336, title V, § 513, 104 Stat. 377 (codified as amended at 42 U.S.C. § 12212 (1994)); Civil Rights Act of 1991, Pub. L. No. 102-166, title I, § 118, 105 Stat. 1071 (enacting 42 U.S.C. § 1981a and

In passing the Americans With Disabilities Act, Congress included section 513 which authorized the use of alternative means of dispute resolution.²⁴ The question that remains unresolved, however, is whether it is "appropriate," under the ADA, for ADR agreements to be a disabled individual's sole remedy for alleged acts of discrimination.²⁵

In order to answer this question, this Comment will first examine the enactment and workings of the ADA, and then briefly discuss the history of ADR in relation to Fair Employment Practice claims. Next, this Comment will discuss two lines of cases that address the arbitration of statutory rights, the *Gardner-Denver* line and the *Gilmer* line. The Comment will then discuss the important distinctions between these two lines of cases and will illustrate how and when each applies. The Comment will next discuss the interaction between the ADA and agreements to arbitrate statutory claims. Next, the Comment will examine recent case law, in both the union and non-union context, that helps determine whether a disabled individual must arbitrate an ADA claim. The Comment will conclude by analyzing the advantages and disadvantages of arbitrating ADA claims, discussing the options of waiver and voluntary non-binding arbitration, and will suggest a future course for employers and employees.

I. THE AMERICANS WITH DISABILITIES ACT AND ALTERNATIVE DISPUTE RESOLUTION: THE BASICS

A. *The ADA*

President George Bush signed the Americans with Disabilities Act into law on July 26, 1990 after the Act garnered an overwhelming majority in Congress.²⁶ The Act, which some have called the "Emancipation Proclamation"²⁷ for individuals with disabilities, is expected to affect, and im-

amending 42 U.S.C. §§ 1988, 2000e, 2000e-1, 2000e-2, 2000e-4, 2000e-5, 2000e-16, 12111, 12112, and 29 U.S.C. § 626 (1994)).

24. See 42 U.S.C. § 12212 (1994). This section, entitled "Alternative means of dispute resolution" states, "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter." *Id.*

25. See *infra* notes 150-95 and accompanying text (discussing the appropriateness of union and non-union agreements to arbitrate ADA claims).

26. OGLETREE ET AL., AMERICANS WITH DISABILITIES ACT: EMPLOYEE RIGHTS AND EMPLOYER OBLIGATIONS §1.01 (Jonathan R. Mook ed., release no. 5, 1996) [hereinafter RIGHTS AND OBLIGATIONS]. The Act passed the Senate by a vote of 91-6 and the House by a vote of 377-28. 101 CONG. REC. S9695 (daily ed. July 13, 1990); 101 CONG. REC. H4629-30 (daily ed. July 12, 1990).

27. 136 CONG. REC. S9689 (daily ed. July 13, 1990) (statement of Senator Tom Harkin).

prove the lives of, approximately forty-three million disabled persons in the United States.²⁸ The ADA is sweeping legislation that greatly expands upon the Rehabilitation Act of 1973,²⁹ which was limited to federal employees and programs.³⁰ The ADA protects not only presently disabled individuals, but also individuals who have been disabled in the past, and even those who have never been disabled, but are regarded as being such.³¹ The reason Congress enacted such broad legislation was to remedy the historical isolation and segregation of individuals with disabilities.³² In fact, one of the Act's stated purposes is to provide a mandate for the elimination of countless years of discrimination against the disabled.³³

It is important to gain an understanding of some of the ADA's basic aspects before discussing the Act in conjunction with ADR.³⁴ Under Title I of the ADA, discrimination against a qualified individual with a disability is prohibited.³⁵ This means that discrimination is prohibited against individuals who either presently have,³⁶ have a record of,³⁷ or are regarded as having,³⁸ a mental or physical impairment that substantially limits one or more major life activities,³⁹ but who can, with or without

28. 42 U.S.C. § 12101(a)(1) (1994). Congress found that 43 million individuals have one or more physical or mental disabilities, and that this number is growing. *Id.*; see also RIGHTS AND OBLIGATIONS, *supra* note 26, at 1-2.

29. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat 355 (codified as amended at 29 U.S.C. §§ 701-797 (1994)).

30. 29 U.S.C. §§ 791-794 (1994) (covering only federal departments and agencies, federal contractors, and programs conducted by private entities receiving federal financial assistance).

31. 42 U.S.C. § 12102(2)(A)-(C) (1994).

32. *Id.* § 12101(a)(2).

33. See *id.* § 12101(b)(1).

34. What follows is a very cursory glance at the main provision (Title I) of the ADA. In order to gain a full grasp of this comprehensive statute see generally RIGHTS AND OBLIGATIONS, *supra* note 26; GARY PHELAN & JANET B. ARTERTON, DISABILITY DISCRIMINATION IN THE WORKPLACE (1995); and JOHN J. COLEMAN, III, DISABILITY DISCRIMINATION IN EMPLOYMENT (1995).

35. The Act states, "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (1994). This article focuses on Title I of the ADA.

36. *Id.* § 12102(2)(A).

37. *Id.* § 12102(2)(B).

38. *Id.* § 12102(2)(C).

39. What constitutes a major life activity under the ADA was adopted from section 504 of the Rehabilitation Act. See RIGHTS AND OBLIGATIONS, *supra* note 26, § 3.02[3][a]. The list, although not exhaustive, includes walking, speaking, caring for oneself, seeing, standing, lifting, and working. 29 C.F.R. § 1630.2(i) (1995). To be substantially limited in the ability to work, the EEOC has determined that an individual must be unable to per-

reasonable accommodations, perform the essential functions of the employment position in question.⁴⁰ Under the Act, an employer⁴¹ is required to make reasonable accommodations for qualified individuals with a disability.⁴² An accommodation is reasonable under the ADA if it does not impose an undue hardship on the employer.⁴³ In order to determine whether an action presents an undue hardship, the Act asks whether performing the action would entail "significant difficulty or expense" on the part of the employer.⁴⁴

B. *Alternative Dispute Resolution*

At English common law, the judicial system exhibited a strong distrust for arbitration agreements.⁴⁵ This hostility crossed the ocean from England and became deeply rooted in the early American judicial system.⁴⁶ In an effort to put arbitration agreements on more solid ground, Congress, in 1925, passed the Federal Arbitration Act (FAA).⁴⁷ Since its passage, application of the FAA has remained unclear.⁴⁸ Section 2 of the FAA, which clearly endorses the binding nature of arbitration agreements, states that an agreement to arbitrate shall be "valid, irrevocable, and enforceable" unless law and equity dictate otherwise.⁴⁹ The language contained in section 1 of the FAA, on the other hand, has resulted in

form a broad class of jobs, not just one particular job. See *Ditcher v. Ingalls Shipbuilding*, 53 F.3d 723, 727 (5th Cir. 1995) (stating that an impairment that affects only a narrow range of jobs can be regarded as not substantially limiting a major life activity).

40. 42 U.S.C. § 12111(8) (1994).

41. *Id.* § 12111(5) (exempting from the definition of employer: the federal government; Indian tribes; private clubs; and businesses with less than 15 employees for the majority of a calendar year).

42. A "reasonable accommodation" may include making facilities accessible or restructuring jobs, schedules, equipment, etc. in order to fit the needs of a qualified individual. *Id.* § 12111(9). In fact, much of the litigation under the ADA deals with reasonable accommodations.

43. 42 U.S.C. § 12111(10).

44. *Id.* The statute lays out the factors that are to be considered in assessing whether an action requires "significant difficulty or expense." The factors are the nature and cost of the accommodation, the financial resources of the facility called upon to make the accommodation, the overall size of the "covered entity," and the type of operation that the entity is engaged in. *Id.*

45. See H.R. REP. NO. 96, 68th Cong., 1st Sess. 1-2 (1924) (noting the "jealousy of the English courts for their own jurisdiction").

46. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

47. United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-16 (1994)) [hereinafter Federal Arbitration Act or FAA].

48. *Gilmer*, 500 U.S. at 24-25. The Supreme Court expressly decided not to deal with the exclusionary clause of § 1 of the FAA. *Id.* at 25 n.2; see also Wendy S. Tien, Note, *Compulsory Arbitration of ADA Claims: Disabling the Disabled*, 77 MINN. L. REV. 1443, 1444 (1993) (noting that the breadth of the FAA has yet to be determined).

49. 9 U.S.C. § 2 (1994).

much debate. A clause in that section implies that the FAA does not apply to employment contracts for workers engaged in interstate commerce.⁵⁰ This “exclusionary clause” has caused debate because it is unclear what a “contract of employment” is, and who workers “engaged in commerce” are under the FAA; as yet, the Supreme Court has not defined these terms and therefore the scope of the FAA is still somewhat unclear.⁵¹

The FAA has gone a long way towards judicial acceptance of arbitration agreements.⁵² As the United States Supreme Court pointed out in *Gilmer*, “It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.”⁵³ The Court went on to cite a number of cases that have held arbitration agreements enforceable when statutory claims were at issue.⁵⁴ The *Gilmer* Court recognized that by agreeing to arbitrate a statutory claim, an individual is not giving up his statutory right; he is simply submitting the claim to a different forum for enforcement.⁵⁵ But, the Court concluded that not all statutory claims are appropriate for ADR.⁵⁶ In the wake of this state-

50. *Id.* § 1 (stating that “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”).

51. See Bales, *supra* note 8, at 1901-06. In the Bales article, various ideas are proposed as to the meaning of these two phrases. *Id.* One debate examines whether “engaged in commerce” was meant to focus on transportation workers, or all workers who affect interstate commerce. *Id.*; see Michael G. Holcomb, Note, *The Demise of the FAA’s “Contract of Employment” Exception?* *Gilmer v. Interstate/Johnson Lane Corp.*, 1992 J. DISP. RESOL. 213, 219-20 (asserting that courts narrowly construe the exclusion to apply only to employees involved in interstate commerce despite congressional intent indicating that § 1 was not intended for employee/employer disputes); Jenifer A. Magyar, Comment, *Statutory Civil Rights Claims in Arbitration: Analysis of Gilmer v. Interstate/Johnson Lane Corp.*, 72 B.U. L. REV. 641, 652-53 (1992) (stating that the choice of “interstate commerce” indicates Congress’s intent that the exception be construed broadly since courts have read this phrase expansively). See *infra* note 102 and accompanying text (discussing the Court’s failure to address the meaning of the exclusionary clause in *Gilmer*). But see James A. King, Jr. et al., *Agreeing to Disagree on EEO Disputes*, 9 LAB. LAW. 97, 114 (1993) (interpreting § 1 to exclude only employees of the transportation industry or those engaged in interstate or foreign commerce); Gerard Morales & Kelly Humphrey, *The Enforceability of Agreements to Arbitrate Employment Disputes*, 43 LAB. L.J. 663, 669 (1992) (arguing that restricting § 1 to employers in the transportation industry is in accord with congressional intent).

52. Arbitration and grievance procedures that began under the labor laws shortly after World War I have also had a significant impact on judicial and legislative acceptance of ADR. See Silberman, *supra* note 3, at 1534.

53. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

54. See, e.g., *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (deciding an arbitration agreement claim under the Securities Exchange Act of 1934).

55. See *infra* notes 83-86 and accompanying text (discussing this issue further in the context of *Gilmer*).

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

ment, the question, as far as the ADA is concerned, is whether alleged discrimination on the basis of a disability is appropriate for arbitral resolution.⁵⁷

II. ARBITRATION OF STATUTORY CLAIMS: TWO DIFFERENT APPROACHES?

A. Gardner-Denver and its Progeny: ADR and Collective Bargaining Agreements

The seminal case in statutory civil rights law on the issue of enforcement of arbitration clauses in collective bargaining agreements (CBA) is *Alexander v. Gardner-Denver Co.*⁵⁸ In *Gardner-Denver*, the Supreme Court faced the task of discerning the proper relationship between arbitration and an individual's statutory rights under Title VII.⁵⁹ Harrell Alexander, an African-American employee and member of the United Steelworkers Union, was discharged for poor job performance.⁶⁰ Alexander filed a grievance pursuant to the union's CBA claiming that he was wrongfully discharged.⁶¹ The company denied the grievance and it proceeded through the CBA mechanism to arbitration.⁶² The arbitrator ruled that Alexander had been dismissed for just cause.⁶³ Alexander disagreed with the decision and filed suit in federal district court alleging unlawful discrimination on the basis of race.⁶⁴ His claim proceeded to the Supreme Court which reversed both the district court and court of appeals holdings that an arbitrator's resolution of a claim under a CBA is dispositive of a Title VII statutory claim.⁶⁵

The Supreme Court stated various reasons for reaching this decision.⁶⁶ The Court first noted that Title VII protects individual rights, unlike the majoritarian rights which are protected by collective bargaining agree-

57. See *id.* (placing the burden on Gilmer to show that arbitration was not intended by Congress to be a forum for resolving discrimination claims).

58. 415 U.S. 36 (1974).

59. *Id.* at 38.

60. *Id.* (alleging that as a drill operator, Alexander was making too many defective parts).

61. *Id.* at 39. Alexander did not claim that he was racially discriminated against until the final step of the grievance process. *Id.* at 42. It was at that point that he filed a charge with the EEOC through the Colorado Civil Rights Commission. *Id.*

62. *Id.* at 40-42.

63. *Id.* at 42.

64. *Id.* at 43.

65. *Id.* at 46 n.6.

66. *Id.*

ments.⁶⁷ The Court explained that the rights Title VII confers cannot be part of the collective bargaining process, because waiver of those rights would “defeat the paramount congressional purpose behind Title VII.”⁶⁸ The Court also expressed concern that individuals who are called upon to arbitrate conflicts under a CBA are confined to determining the intent of the parties and applying “the industrial common law of the shop” and that they cannot invoke public laws that conflict with the bargain the parties struck.⁶⁹

The Court also rejected the lower courts’ reasoning that it would be unfair to the employer to allow the employee to submit a claim to arbitration and then, if not satisfied with the outcome, to file suit in court.⁷⁰ The Court reasoned that by bringing a Title VII action, the employee is not seeking another review of the CBA, but rather, he is “asserting a statutory right, independent of the arbitration process.”⁷¹ In addition, the Court noted that the Civil Rights Act of 1964⁷² vests federal courts with the plenary power to enforce Title VII.⁷³ In sum, the Court held that an individual may pursue his grievance through arbitration without being precluded from bringing a subsequent federal court action.⁷⁴

1. Does Gardner-Denver Apply to the Fair Labor Standards Act?

In what has become known as *Gardner-Denver*’s progeny, the Supreme Court heard two cases that raised factually similar issues, but were brought under different statutes. In *Barrentine v. Arkansas-Best Freight System, Inc.*,⁷⁵ the petitioners submitted a grievance citing a violation of

67. *Id.* at 51; see *infra* note 103 and accompanying text (noting the Court’s fear that in the collective bargaining context the interests of the individual employee may get subordinated to the collective interest).

68. *Id.* The Court did note that unions have the right to waive statutory rights that are related to collective activity, such as the right to strike. *Id.*

69. *Id.* at 53. The Court borrowed from the *Steelworkers* trilogy stating, “[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.” *Id.* at 59-60 (quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

70. *Id.* at 54. The district court and the court of appeals both reasoned that it would be unfair to allow an employee to have his claim considered in both forums. *Id.* The district court summarized this by saying that it could not “accept a philosophy which gives the employee two strings to his bow when the employer has only one.” *Id.* (quoting *Alexander v. Gardner-Denver*, 346 F. Supp. 1012, 1019 (D. Colo. 1971)).

71. *Id.*

72. 42 U.S.C. § 2000e (1994).

73. *Id.* at § 2000e-6(b).

74. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49 (1974).

75. 450 U.S. 728 (1981).

the Fair Labor Standards Act.⁷⁶ After losing an arbitration decision, petitioners filed suit in federal court.⁷⁷ The district and appellate courts held that by submitting the claim to arbitration, the plaintiffs had waived their right to sue.⁷⁸ The Supreme Court, following *Gardner-Denver*, ruled otherwise, finding that petitioners' claim was not barred by its prior submission to, and subsequent resolution through, the grievance arbitration procedure of the CBA.⁷⁹ In so holding, the Court reiterated the major concern expressed in *Gardner-Denver*, that a CBA is not necessarily protective of individual rights and, therefore, being party to a CBA does not restrict individual statutory protections.⁸⁰

2. Section 1983 Actions

Three years after *Gardner-Denver*, in *McDonald v. City of West Branch*,⁸¹ the Court reached the same conclusion, this time in the context of a claim under 42 U.S.C. § 1983.⁸² The petitioner, a discharged police officer, filed a grievance pursuant to his CBA claiming that there was no cause for his dismissal.⁸³ The arbitrator ruled against the petitioner who then filed suit in federal court.⁸⁴ The Supreme Court, after examining the arbitration proceeding, stated that in a § 1983 proceeding, arbitration cannot provide an adequate substitute for a judicial enforcement of individual rights.⁸⁵ Therefore, the Court ruled that an employee does not waive his right to judicial enforcement of § 1983 by first submitting the claim to arbitration.⁸⁶

76. *Id.* at 729-30. The petitioners were truck drivers and members of Teamsters Local 878. *Id.* at 730. The union pursued their grievance through the joint grievance committee pursuant to the CBA. *Id.* at 731. See Fair Labor Standards Act of 1938 § 6, 29 U.S.C. § 206 (1994) (establishing the compensation level and terms of the national minimum wage).

77. *Barrentine*, 450 U.S. at 731.

78. *Id.* at 734.

79. *Id.* at 736-37. The respondent claimed that because the CBA required that "any controversy" between the parties be subject to binding arbitration, the petitioners should be barred from bringing a statutory claim in federal court. *Id.*

80. *Id.* at 740-41; see *infra* note 86 (discussing the Court's reasoning in support of its decisions).

81. 466 U.S. 284 (1984).

82. *Id.* at 285.

83. *Id.* at 285-86.

84. *Id.* at 286.

85. *Id.* at 290-91.

86. *Id.* at 292. The Court gave various reasons for its decision: (1) an arbitrator's experience "pertains primarily to the law of the shop, not the law of the land," (2) the arbitrator may be exceeding his scope if he decides a § 1983 action, (3) where the union has exclusive control over the presentation of the grievance, they may present it less vigorously than the employee himself would, and finally, (4) the degree of diligence in arbitral fact-finding is inferior to that of judicial fact-finding. *Id.* at 290-91 (citations omitted).

With its decisions in *Gardner-Denver*, *Barrentine*, and *McDonald*, the Court made a strong statement: An employee does not waive his or her statutory right to sue by agreeing to submit, or submitting a dispute to binding arbitration. This statement was interpreted broadly by lower courts until the Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*⁸⁷

B. *Gilmer: The Court Examines Employee Waiver in A
Non-Union Context*

In the years following *Gardner-Denver* and its progeny, courts recognized that parties were becoming more interested in arbitrating discrimination claims.⁸⁸ This recognition led a number of courts to find enforceable individual agreements to arbitrate statutory claims.⁸⁹ Other courts continued to adhere to the *Gardner-Denver* principle that discrimination claims were not subject to compulsory arbitration, regardless of whether a CBA was involved.⁹⁰ To resolve this issue, the Supreme Court granted certiorari in *Gilmer*.

The issue in *Gilmer* was whether an Age Discrimination in Employment Act (ADEA)⁹¹ claim by a non-union employee, pursuant to an arbitration agreement that the employee signed, can be subjected to compulsory arbitration.⁹² The Respondent, Interstate/Johnson Lane Corp. (Interstate), hired Petitioner Gilmer as Manager of Financial Services.⁹³ As conditions of employment, he registered as a securities representative with several stock exchanges and signed an application for the New York Stock Exchange (NYSE) that contained an agreement to arbitrate any dispute between himself and Interstate.⁹⁴ Interstate discharged

87. 500 U.S. 20 (1991).

88. See *supra* notes 4-6 and accompanying text (describing the pitfalls that accompany litigation); see also *infra* notes 175-80 and accompanying text (showing some of the positive benefits of ADR).

89. See Silberman, *supra* note 3, at 1542 (citing *Garfield v. Thomas McKinnon Sec., Inc.*, 731 F. Supp. 841 (N.D. Ill. 1988), to support this proposition).

90. The First, Third, Fifth, Seventh, Eighth, and Tenth Circuits all adhered to this view. See, e.g., *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989), *cert. denied*, 493 U.S. 1045 (1990); *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221 (3d Cir. 1989); *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, 493 U.S. 848 (1989); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544 (10th Cir. 1988); *Johnson v. University of Milwaukee*, 783 F.2d 59 (7th Cir. 1986); Silberman, *supra* note 3, at 1542 n.65 (citing *Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104 (5th Cir. 1990)).

91. Age Discrimination Employment Act of 1967, 29 U.S.C. §§ 621-634 (1994).

92. *Gilmer*, 500 U.S. at 23.

93. *Id.*

94. *Id.* The NYSE, one of the groups with which he was registered, had a rule that provided for arbitration of "any controversy . . . arising out of employment." *Id.*

Petitioner at the age of sixty-two.⁹⁵ Gilmer, in turn, filed suit in the United States District Court for the Western District of North Carolina alleging that Interstate had violated the ADEA.⁹⁶ Respondent filed a motion to compel arbitration, relying on the arbitration agreement and the FAA.⁹⁷ The district court denied the motion relying on *Gardner-Denver*, but the Fourth Circuit reversed, stating that “nothing in the text, legislative history, or underlying purposes of the ADEA indicat[es] a congressional intent to preclude enforcement of arbitration agreements.”⁹⁸ The Supreme Court affirmed the court of appeals⁹⁹ and, in so doing, muddled the entire issue of arbitrability of statutory claims.

At first glimpse the *Gilmer* decision appears to directly oppose the Court’s holding in *Gardner-Denver*, but upon further analysis, this is not true. In fact, the Court went to great lengths to distinguish the two cases.¹⁰⁰ The first distinguishing feature is that the *Gilmer* Court decided the case under the FAA, which strongly favors arbitration.¹⁰¹ The Court applied the FAA because the section 1 exclusionary clause regarding “contracts of employment” did not apply to Gilmer’s agreement with the NYSE, as Gilmer was not an employee of the NYSE.¹⁰² A second distinction the Court made was that the *Gardner-Denver* line of cases involved union employees covered by CBAs, while *Gilmer* involved an individual employee. Therefore, unlike the petitioner in *Gardner-Denver*, Gilmer raised no concern that “the interests of the individual employee [would] be subordinated to the collective interests.”¹⁰³ This distinction made the Court more comfortable in binding the petitioner to his agreement to arbitrate because in this case, unlike the union situation, the individual has a full opportunity to assert and argue his claim at the arbitration stage. One court, in summarizing this distinction, stated that

95. *Id.*

96. *Id.*

97. *Id.* at 24.

98. *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 297 (4th Cir. 1990), *rev'd*, 500 U.S. 20 (1991); *see Gilmer*, 500 U.S. at 24.

99. *Gilmer*, 500 U.S. at 23.

100. *See Bales*, *supra* note 8, at 1886-94 (discussing the ways in which the Court distinguished *Gilmer* from *Gardner-Denver*).

101. *See supra* notes 47-49 and accompanying text (describing the FAA’s approval of arbitration).

102. *Gilmer*, 500 U.S. at 25. In a footnote, the Court stated that “[Section] 1’s exclusionary clause does not apply to Gilmer’s arbitration agreement,” and therefore the Court chose to “leave for another day” the issue of the FAA exclusionary clause. *Id.* at 25 n.2; *see William M. Howard, Arbitrating Employment Discrimination Claims: Do You Really Have To? Do You Really Want To?*, 43 *DRAKE L. REV.* 255, 264 (1994) (noting that the Court addressed but did not answer the FAA exclusionary issue).

103. *Gilmer*, 500 U.S. at 34-35.

"*Gilmer* does not alter the protection established in *Gardner-Denver* against waiver of individual statutory rights through collective bargaining agreements."¹⁰⁴

With these distinctions in mind, the Court stated that "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."¹⁰⁵ The Court then mentioned that if such a congressional intention exists, it would likely be found in the text, legislative history, or in an inherent conflict between the Act in question and arbitration.¹⁰⁶ Having found no such intention in the ADEA, the Court compelled *Gilmer* to adhere to the arbitration agreement.¹⁰⁷

C. *What Gilmer Left Unanswered*

In the wake of *Gilmer*, many issues have been left undetermined, and future decisions will need to address these concerns. The first issue that *Gilmer* left unanswered is whether its rationale applies to other civil rights statutes or simply to the ADEA.¹⁰⁸ It is safe to say that if the Court had intended to limit its holding strictly to the ADEA, it would have made that explicit. Instead, the Court constructed a test to determine whether *Gilmer's* command to arbitrate applies to other statutes.¹⁰⁹

The *Gilmer* test requires a reviewing court to closely examine the text, legislative history, and purpose of a particular statute in deciding whether an agreement to arbitrate is appropriate.¹¹⁰ Some lower courts have applied this test in Title VII actions and have concluded that *Gilmer's* command of arbitrability applies to Title VII claims.¹¹¹ Other courts have

104. See *Claps v. Moliterno Stone Sales, Inc.*, 819 F. Supp. 141, 146-47 (D. Conn. 1993). In *Claps*, the plaintiff brought a claim of sexual harassment under Title VII. *Id.* at 143-44. The defendant asserted that *Claps* was barred from bringing her claim in federal court because her union's CBA mandated that all disputes be submitted to grievance arbitration. *Id.* at 144. The court relied on *Gardner-Denver* and stated that the CBA did not require the employee to arbitrate her claim. *Id.* at 143-47.

105. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

106. *Id.* ("Questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.") (citations omitted).

107. *Id.* at 35.

108. See *Silberman*, *supra* note 3, at 1546 (discussing the various issues that were left unresolved in *Gilmer*).

109. See *Gilmer*, 500 U.S. at 26.

110. *Id.* The Court noted that "all statutory claims may not be appropriate for arbitration." *Id.*

111. See *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992) (holding that a Title VII claim was arbitrable); *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932 (9th Cir. 1991) (finding no evidence that Congress intended to preclude arbitration of Title VII claims). Various commentators have argued that *Gilmer* should not be applied to

maintained the pre-*Gilmer* thinking and held that *Gardner-Denver* applies to all Title VII claims, even those outside of the collective bargaining context.¹¹² One court reasoned that because eliminating discrimination is of such a high priority, employees cannot prospectively waive, at any time, their right to a judicial forum for Title VII claims.¹¹³ This will become important in the next section of this paper, which determines whether compulsory arbitration is appropriate under the ADA.

A second issue *Gilmer* left unresolved is the scope of judicial review of the arbitration decision. *Gilmer* involved only the narrow issue of whether an agreement to arbitrate could be enforced. While the Court did not explicitly speak to the issue of appealability of the arbitrator's decision,¹¹⁴ it did use language indicating its view that the arbitration decision should be final. For instance, the Court stated that by agreeing to go to arbitration, a party submits his rights to resolution in that forum, rather than through the judicial system.¹¹⁵

To clarify the issues that *Gilmer* left unresolved, the Court may need to hear another case involving arbitration of statutory employment discrimination claims. If it does, some unresolved issues may be answered, but until then, each claim will have to be analyzed on the basis of the statute upon which it is brought. This Comment will now examine what might occur if arbitration cases are brought under the auspices of the ADA.

other statutes. See Mark D. Klimek, Note, *Discrimination Claims Under Title VII: Where Mandatory Arbitration Goes Too Far*, 8 OHIO ST. J. ON DISP. RESOL. 425 (1993) (arguing that arbitration is an inappropriate forum for settling individual Title VII claims); Tien, *supra* note 48, at 1460-76 (making a similar argument, for ADA claims).

112. See *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988) (finding Title VII and Minn. Human Rights Act violations not subject to arbitration), *cert. denied*, 493 U.S. 848 (1989).

113. *Utlely v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989), *cert. denied*, 493 U.S. 1045 (1990).

114. See Silberman, *supra* note 3, at 1549 (noting that the court did not have to and consequently, did not discuss this issue).

115. See *Gilmer*, 500 U.S. at 29. Other language in the opinion also indicates that the court intended for the arbitration to be final. The Court at one point stated that in a recent amendment to the ADEA, Congress did not preclude arbitration or other non-judicial resolution of claims. *Id.* at 26.

III. THE INTERACTION OF STATUTORY CLAIMS AND ARBITRATION AGREEMENTS UNDER THE AMERICANS WITH DISABILITIES ACT

A. Union-Collective Bargaining Context

To date, six courts have addressed the issue of whether ADA claims must be arbitrated.¹¹⁶ Of those six, five litigants have raised the issue in the context of an agreement to arbitrate contained in a CBA. Previous Supreme Court case law dictates that when dealing with cases of this nature, the appropriate starting point is *Gardner-Denver*.¹¹⁷ Of the five courts addressing this issue, four relied on *Gardner-Denver* in reaching their decision, while one applied *Gilmer*.

1. Relying on Gardner-Denver

In *Block v. Art Iron, Inc.*,¹¹⁸ the United States District Court for the Northern District of Indiana contemplated an alleged violation of the ADA.¹¹⁹ Plaintiff Kenneth Block was an employee of Art Iron until he developed carpal tunnel syndrome and was terminated.¹²⁰ As a member of the Shopmen's Local Union No. 726, Block was covered by the union's CBA.¹²¹ The CBA contained an arbitration clause that mandated that all disputes go through a grievance procedure and then to arbitration.¹²² Block's union initiated, but later withdrew, its request to arbitrate Block's claim.¹²³ Consequently, he brought his claim in federal court alleging violation of his "civil and statutory rights" as provided in the ADA.¹²⁴

116. See *infra* notes 118-49 and accompanying text (describing these cases and their outcome).

117. See *Block v. Art Iron, Inc.*, 866 F. Supp. 380, 383 (N.D. Ind. 1994) (stating that *Gardner-Denver* is the leading Supreme Court case on this issue and serves as an appropriate starting point); *Claps v. Moliterno Stone Sales, Inc.*, 819 F. Supp. 141, 145 (D. Conn. 1993) (stating that when an arbitration agreement case involves a CBA, the "line of authority begins" with *Gardner-Denver*).

118. 866 F. Supp. 380 (N.D. Ind. 1994).

119. *Id.* at 383.

120. *Id.* The company's stated reason for the termination was that Block had not been able to work for twelve months. *Id.*

121. *Id.*

122. *Id.* The arbitration clause stated that "[a]ny grievance or dispute between the Company and the Union or between the company and an employee(s) . . . shall, upon the written request of either party to this agreement, be submitted to arbitration by an impartial arbitrator." *Id.*

123. *Id.*

124. *Id.*

Defendant Art Iron moved for summary judgment relying on *Gilmer*.¹²⁵ The court rejected defendant's motion and stated, "Block's ADA claim is not governed by the arbitration clause of the CBA and Block is not precluded from pursuing his claim in federal court."¹²⁶ After discussing both *Gardner-Denver* and *Gilmer* at length, the court affirmed the notion that "*Gilmer* did not establish a grand presumption in favor of arbitration"¹²⁷ and decided that in order for the CBA to support compulsory arbitration of statutory claims, it would have to explicitly provide that employees' statutory ADA rights are subject to compulsory arbitration.¹²⁸

Three other courts have reached the same conclusion as *Block*.¹²⁹ In those cases the courts generally relied on the distinction drawn in *Gilmer* between cases involving collective bargaining agreements and cases involving individual employment agreements.¹³⁰ An employee seeks to vindicate his contractual rights when he submits a grievance to arbitration under the CBA, but when he files a Title VII action, he is asserting an independent statutory right.¹³¹ One court added, "The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence."¹³²

2. *The Western District of Virginia—Adopting Gilmer*

In *Austin v. Owens-Brockway Glass Container, Inc.*,¹³³ the United States District Court for the Western District of Virginia reached the op-

125. *Id.* The company also relied on *Austin v. Owens-Brockway Glass Container*, 844 F. Supp. 1103 (W.D. Va. 1994). *Id.*; see *infra* notes 133-142 and accompanying text (discussing *Austin* in greater detail).

126. *Block*, 866 F. Supp. at 387.

127. *Id.* at 386 (quoting *Farrand v. Lutheran Bhd.*, 933 F.2d 1253, 1255 (7th Cir. 1993)).

128. See *id.* at 387 (inferring that the only way that such an agreement will be upheld is if it is bargained over and expressly put into the CBA).

129. See, e.g., *Bates v. Long Island R.R. Co. (LIRR)*, 997 F.2d 1028, 1034 (2d Cir. 1993) (deciding a case under the Rehabilitation Act and holding that arbitration procedures prescribed under the Railway Labor Act are not an individual's sole forum for resolution of discrimination claims); *Bruton v. Southeastern Pa. Transp. Auth.*, 3 A.D. Cases 117, 1994 W.L. 470277, *3 (E.D. Pa. 1994) (holding that union contractual agreements cannot preclude a statutory claim, especially "in the cases of collective bargaining agreements, as there is a potential disparity in the interests of a union and the interests of an individual employee"); *Schmidt v. Safeway Inc.*, 864 F. Supp. 991, 995 (D. Or. 1994) (holding that employees' ADA claims were not barred by their failure to arbitrate them pursuant to the CBA).

130. See *Schmidt*, 864 F. Supp. at 995; see also *supra* notes 103-04 and accompanying text (discussing this distinction).

131. *Schmidt*, 864 F. Supp. at 995.

132. *Id.* (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, (1974)).

133. 844 F. Supp. 1103 (W.D. Va. 1994).

posite conclusion of the four cases above. The plaintiff, Linda Austin, a unionized employee, worked as an equipment cleaner/oiler-greaser for the defendant.¹³⁴ During her course of employment, she was injured on the job and became disabled.¹³⁵ She alleged that the defendant skirted its duty under the ADA to reasonably accommodate her by offering her light duty work until she could return to her former position.¹³⁶ The defendant moved to dismiss the action claiming, in part, that Austin was barred from bringing suit because she failed to utilize the grievance arbitration procedure available under the CBA.¹³⁷ The court agreed with the defendant and granted its motion for summary judgment.¹³⁸

Chief Judge Kiser determined that because the CBA mandated that all disputes be settled by arbitration, the plaintiff was forced to use the grievance-arbitration mechanism, not the courts, to remedy her ADA claim.¹³⁹ The *Austin* court never cited, or even referenced, *Gardner-Denver* or its progeny. In fact, *Gilmer* was the only case the court cited. It appears that the *Austin* court was not mindful of the distinctions that the Supreme Court carefully delineated between *Gardner-Denver* and *Gilmer* with regard to collective bargaining agreements.¹⁴⁰ *Block v. Art Iron*,¹⁴¹ decided a few months after *Austin*, confirmed that *Austin* may have been incorrectly decided by stating that the Seventh Circuit "would not approve of the *Austin* court's ruling insofar as it holds that ADA claims may be waived by way of general arbitration clauses in collective bargaining agreements."¹⁴²

B. What Happens In the Non-Union Context?

Only one decision has been rendered in a case involving an individual employee's agreement to arbitrate statutory claims. In *Solomon v. Duke University*,¹⁴³ the plaintiff, Betty Solomon, was discharged by the University for making personal phone calls from work.¹⁴⁴ She alleged that a

134. *Id.* at 1103.

135. *Id.* at 1103-04.

136. *Id.* at 1104. The plaintiff's doctor had released her to engage in light duty work.
Id.

137. *Id.* The defendant also contended that the plaintiff's suit was barred because she did not obtain a right to sue letter from the EEOC. *Id.* Plaintiff claimed that the EEOC "administratively rejected" her complaint, therefore she had exhausted the EEOC administrative avenues of redress. *Id.* at 1104 n.2.

138. *Id.* at 1107.

139. *Id.* at 1106-07.

140. *See id.* (citing only *Gilmer* in its resolution of this issue).

141. 886 F. Supp. 380 (N.D. Ind. 1994).

142. *Id.* at 387.

143. 850 F. Supp. 372 (M.D.N.C. 1994).

144. *Id.* at 372.

disability caused memory lapses such that she did not remember making the calls.¹⁴⁵ The University denied her request for medical leave, and she submitted a grievance through the grievance-arbitration procedure that covered non-exempt employees of the University.¹⁴⁶ The arbitrator ruled against Ms. Solomon, who then brought an ADA action in federal court.¹⁴⁷ The district court, in a short opinion,¹⁴⁸ stated that because Ms. Solomon had voluntarily submitted her grievance to binding arbitration, she was precluded from subsequently litigating the claims that were adjudicated in the arbitration.¹⁴⁹

IV. NON-UNION AGREEMENTS TO ARBITRATE ADA CLAIMS: APPLYING THE *GILMER* TEST

Other than *Solomon*, there is no authority that speaks to the issue of whether an employer can make compulsory arbitration a requirement for all employees. Since there is no case law and this situation involves individual employees, we must return to *Gilmer* to determine whether a statutory claim under the ADA may be subject to compulsory arbitration. *Gilmer* states that while all statutory claims are not appropriate for arbitration, if a party makes the voluntary bargain to arbitrate they should be held to that agreement unless Congress, in the text, legislative history, or underlying purposes of the Act, has evinced an intent to preclude waiver of the statutory rights.¹⁵⁰ In order to discern whether such a congressional intent exists in the ADA, we must begin with textual examination of the ADA.

A. *The Text*

The text of the ADA is unclear as to whether arbitration is an appropriate means of settling disputes under the Act.¹⁵¹ On the one hand, sec-

145. *Id.*

146. *Id.* The court does not make it clear, but it seems that any non-exempt employee, as a condition of employment, can agree to arbitrate any disputes. *Id.*

147. *Id.*

148. Before the court addressed the agreement to arbitrate, it granted the defendant's motion to confirm the arbitration decision. *Id.* at 373. The court did this because under the FAA, the plaintiff had not moved to vacate or modify the decision of the arbitrator in a timely manner. *Id.*; see also 9 U.S.C. § 12 (1994) (noting that any motion to modify or vacate must be made within three months of the arbitration decision).

149. *Solomon*, 850 F. Supp. at 373 (citing *Rainwater v. National Home Ins. Co.*, 944 F.2d 190 (4th Cir. 1991); see also *Central Transp., Inc. v. Four Phase Sys., Inc.*, 936 F.2d 256 (6th Cir. 1991)). In *Central Transport*, the court added, "The arbitrator's decision that Plaintiff was terminated for cause prevents Plaintiff from alleging that her employment was terminated in violation of statutory or common law." *Id.*

150. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

151. See 42 U.S.C. § 12212 (1994) (codifying Section 513 of the ADA).

tion 513 of the Act clearly states that the use of alternative dispute resolution is encouraged to resolve disputes arising under the Act.¹⁵² In this section, the Act approves the use of settlement negotiations, conciliation, mediation, arbitration, and other ADR techniques.¹⁵³ The text of the Act thereby appears to allow employers to enter into binding arbitration agreements with their employees or unions. Along these lines, one commentator has asserted that the use of the word "encourage" connotes "permission," and that language alone should be sufficient to overcome any argument that Congress meant to exclude arbitration as a means of resolution.¹⁵⁴

A contrary position can be espoused by looking at the stated purposes of the Act. Congress mandated that one purpose of the Act is "to ensure that the Federal Government plays a central role in enforcing the standards established in this [Act] on behalf of individuals with disabilities."¹⁵⁵ This language clearly implies that Congress intended the federal court system to be involved in enforcement of the ADA. Commentators have opined that this language demonstrates Congress's fundamental mistrust of compulsory binding arbitration as a means of resolving ADA claims.¹⁵⁶ Because the text of the Act is contradictory, *Gilmer* commands that we consult the legislative history.

B. Legislative History

Congress carefully considered and thoroughly discussed the ADA before it became law.¹⁵⁷ This wealth of legislative history is remarkably clear on the issue of whether an employer can require employees to submit to arbitration instead of bringing their ADA claim in court.¹⁵⁸ Congress continually underscored the fact that it did not approve of binding, final arbitration as a remedy under ADA but rather, approved of ADR to

152. *Id.*; see *supra* note 24 (outlining the text of this section).

153. 42 U.S.C. § 12212 (1994).

154. Douglas E. Abrams, *Arbitrability in Recent Federal Civil Rights Legislation: The Need For Amendment*, 26 CONN. L. REV. 521, 552 (1994).

155. 42 U.S.C. § 12101(b)(3) (1994).

156. See Tien, *supra* note 48, at 1469-70 (arguing that arbitration should be supplemental to other methods of enforcement available under the Act).

157. For a sampling of the Act's legislative history, see RIGHTS AND OBLIGATIONS, *supra* note 26, § 1.04[3]. Compare the amount of ADA legislative history with the dearth of legislative history accompanying the sex discrimination provisions of Title VII. See 42 U.S.C. § 2000e (1994).

158. See Robert E. Stein, *The Americans With Disabilities Act of 1990: A New 'Bill Of Rights' for Millions*, 46 ARB. 6, 15 (1991) (discussing alternative dispute resolution issues in the ADA).

“supplement, not supplant” judicial remedies.¹⁵⁹ The Judiciary Committee carefully examined predispute arbitration agreements before drafting its report on the Act.¹⁶⁰ In that report, the Committee ultimately adopted the rationale of *Gardner-Denver* by stating that any agreement to submit claims to arbitration, whether in the context of a CBA or an individual employment contract, does not prohibit the individual from seeking judicial relief.¹⁶¹ The Conference Committee Report added that the use of ADR is totally voluntary, and that “[u]nder no condition would an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their rights under the ADA.”¹⁶²

The legislative history clearly indicates that compulsory arbitration is not an option under the ADA in either the union or non-union context. The legislative language demonstrates that binding arbitration was not intended to be an individual’s exclusive remedy under the ADA. One commentator appropriately characterized the congressional intent concerning the role of ADR under the ADA as an “overlapping remedy.”¹⁶³

The real question, however, is whether the legislative history satisfies the *Gilmer* test. Under *Gilmer*, for an individual not to be bound by an agreement to arbitrate, that individual must show a congressional intent to preclude the waiver of judicial remedies.¹⁶⁴ While the text of the Act is ambiguous, the ADA’s legislative history evinces just such a congressional intent. By mandating that any agreement to arbitrate not preclude traditional judicial remedies,¹⁶⁵ Congress was, in essence, stating that an individual cannot prospectively waive his or her rights to judicial enforcement of the ADA. The rationale, in part, was that the ADA, like Title VII, not only protects individual rights, but also serves a public function

159. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 3, at 76, *reprinted in* 1990 U.S.C.C.A.N. 445, 499.

160. Abrams, *supra* note 154, at 553.

161. See H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 3, at 76-77 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 499-500.

162. See Report of the Conference Comm. on Americans With Disabilities Act: Joint Explanatory Statements, H.R. CONF. REP. NO. 596, 101st Cong., 2d Sess., *reprinted in* 136 CONG. REC. H4582, H4606 (daily ed. July 12, 1990) (citing the remarks of Representative Glickman). The Conference Committee adopted, by reference, the report of the House Judiciary Committee. Abrams, *supra* note 154, at 554; see also *Block v. Art Iron, Inc.*, 866 F. Supp. 380, 386 (N.D. Ind. 1994) (quoting the relevant language).

163. Tien, *supra* note 48, at 1470.

164. *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 26 (1991) (finding that the burden of showing this congressional intent is on the individual attempting to avoid being bound by the arbitration agreement).

165. See H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 3, at 76-77 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 499-500.

that would be lost without judicial enforcement of the Act.¹⁶⁶ Having concluded that compulsory arbitration may not be the exclusive remedy available under the ADA, the focus shifts to the merits of the rule.

V. PROS AND CONS OF ADR FOR EMPLOYERS AND EMPLOYEES

Congress recognized that the disabled are a "discrete and insular minority," who have been discriminated against for many years.¹⁶⁷ These individuals consistently have been denied the right to equal employment opportunities.¹⁶⁸ One of the ADA's primary goals is the eradication of this discrimination.¹⁶⁹

To accomplish this goal, employers must be aware that the Act will be judicially enforced. One commentator has asserted that allowing arbitration to settle ADA claims will not deter employees from engaging in future discrimination.¹⁷⁰ She argues that if arbitration becomes the mainstay of ADA claims, few legal opinions will be elicited, resulting in little judicial precedent.¹⁷¹ Employees, she argues, will become wary of filing an ADA suit because of the uncertainty surrounding judicial resolution.¹⁷² Conversely, some commentators argue that without ADR, public support for the ADA will be undermined.¹⁷³ They assert that without ADR, the cost and expense of litigation will render the Act meaningless for the average disabled employee.¹⁷⁴

A. *The Benefits of ADR*

If employers had their preference, many, if not most, would submit all of their discrimination claims to ADR because it is less costly and usually

166. See *infra* text accompanying notes 175-80 (discussing the positive aspects of ADR).

167. 42 U.S.C. § 12101(a)(7) (1994). The Act states:

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

Id.

168. Tien, *supra* note 48, at 1470-71.

169. 42 U.S.C. § 12101(b)(1) (1994).

170. Tien, *supra* note 48, at 1471.

171. *Id.*

172. *Id.*

173. See RIGHTS AND OBLIGATIONS, *supra* note 26, § 8.05[2] n.12 (arguing that without ADR, potential beneficiaries of the ADA may not be able to take advantage of the Act due to the burdensome nature of the judicial process).

174. This argument is flawed in that while it could be made about any civil rights statute, it has not proven true. See Schachner, *supra* note 4 (noting the huge backlog of ADA complaints presently at the EEOC).

arbitrators, unlike juries, do not render large punitive damages awards.¹⁷⁵ In addition, employers prefer arbitrators to juries because they tend to be more rational decision-makers.¹⁷⁶ Another benefit that ADR offers employers is the opportunity to sit down with the claimant and try to work things out. If a settlement can be devised, not only have both sides saved time and expense, but the employer may not have to hire and train a new employee.¹⁷⁷ Mediation, arbitration and other forms of ADR tend to be less adversarial than a traditional lawsuit, and often both parties emerge from the process feeling victorious.¹⁷⁸ One final and often overlooked benefit of ADR is its speed, which tolls the running of the backpay clock for an employer, instead of running it for several years if a case went to trial.¹⁷⁹

From an employee's perspective, arbitration can provide a quicker resolution, resulting in a more timely award of damages. ADR also offers workers a more expedient return to the workforce because if the claim is settled amicably, they can return to their jobs with less tension. ADR is equally beneficial for employers and the economy of the nation.¹⁸⁰ These benefits suggest that if arbitration is accepted as the sole remedy, both employers and employees may readily accept arbitration and effectively remove ADA claims from judicial scrutiny. Nonetheless, there are disadvantages to utilizing ADR from both an employer's and an employee's perspective.

B. *The Negative Side of ADR: What Each Side May Not Realize*

ADR, although seemingly a bed of roses, also contains some thorns. While it is true that since *Mitsubishi*, courts have endorsed ADR as a

175. Allison & Stahlhut, *supra* note 6, at 171 (noting that arbitration is beneficial to employers because they avoid the uncertainty of a jury trial which may involve juries biased in favor of the plaintiff); *see also* Silberman et al., *supra* note 3, at 1539.

176. Allison & Stahlhut, *supra* note 6, at 171. The authors explain that this is especially true when the litigation focuses on complex laws such as the ADA. *Id.*; *see also* Skrainka, *supra* note 4, at 992-93 (arguing that arbitration promises several advantages, such as better decisions, simpler procedures, lower costs, and greater predictability).

177. *See* Peter D. Blanck, *On Integrating Persons With Mental Retardation: The ADA and ADR*, 22 N.M. L. REV. 259, 275 (1992) (noting that ADR allows the employer and employee to meet face-to-face and work out flexible solutions to their problems).

178. While a few commentators have referred to these ideas in passing, no one has focused on these ideas in the context of the ADA. For support of this argument, *see* Ellen Yamshon, *Disabilities Act Doesn't Have To Be Bad News For Business*, THE SACRAMENTO BEE, Nov. 13, 1994, at F2.

179. *See* Schachner, *supra* note 4, at 57 (noting that the judicial system and the EEOC are so jammed, that by waiting to go to court, one is simply running the clock).

180. *See* RIGHTS AND OBLIGATIONS, *supra* note 26, § 1.02[3] n.30 and accompanying text (discussing the costs to fund federal programs for persons perfectly capable and willing to work).

valid method of settling disputes, many disadvantages for employers and employees exist. From the employer's point of view, the major negative in arbitration is the large number of individuals who are likely to come forward with claims of discrimination.¹⁸¹ In today's society, employees are aware of their statutory rights, and are more willing to challenge decisions their employers make.¹⁸² As one commentator notes, this combination means that employees may seek an inexpensive way to litigate their disputes, which arbitration can provide.¹⁸³ He asserts that employees will abuse the relatively inexpensive arbitration process, causing many more claims to be brought against employers.¹⁸⁴ Another potential dilemma is that many employers prefer other methods of ADR over arbitration because they do not like outsiders deciding their fate.¹⁸⁵ From an employer's standpoint, another disadvantage to arbitration is that protracted litigation often forces the employee into a settlement that is favorable to the employer.¹⁸⁶ On the other hand, ADR methods do not tend to induce employees to settle their claims.¹⁸⁷

From an employee's point of view, arbitration has its disadvantages as well. First, many persons have argued that arbitration panels are biased in favor of employers.¹⁸⁸ They assert that the lack of diversity with respect to gender, race, and social status among arbitrators can work against employees.¹⁸⁹ In *Olson v. American Arbitration Association*,

181. For a thorough discussion of the advantages and disadvantages of arbitration from an employer's perspective, see Stuart H. Bompey & Michael P. Pappas, *Is There A Better Way? Compulsory Arbitration of Employment Claims after Gilmer*, 19 EMPLOYEE REL. L.J. 197, 210-12 (1993); see also, Hayford & Evers, *supra* note 7, at 495-527 (arguing that by submitting claims to arbitration, employers are giving up the major shield of the employee-at-will doctrine).

182. Silberman et al., *supra* note 3, at 1536-37 (explaining why employees are increasingly adopting internal ADR methods).

183. *Id.* at 1537 (arguing that employees may prefer arbitration to the EEOC and other state employment agencies).

184. Arbitration is not wholly inexpensive, the arbitrator must be paid, there is discovery involved, albeit to a much more limited extent than in actual litigation, and attorneys are often called upon to argue the matters. See *id.* at 1539-40 (describing these and other issues concerning arbitration).

185. See *id.* This is especially true because many other ADR techniques are non-binding. *Id.*

186. See Allison & Stahlhut, *supra* note 6, at 172 (noting that individuals often "wear down" during trial preparation).

187. See *id.* (explaining why arbitration is not always preferable for the employer).

188. See Howard, *supra* note 102, at 273-77.

189. *Id.* at 276; see also UNITED STATES GENERAL ACCOUNTING OFFICE REPORT, EMPLOYMENT DISCRIMINATION: HOW REGISTERED REPRESENTATIVES FARE IN EMPLOYMENT DISCRIMINATION DISPUTES (1994); cf. Allison & Stahlhut, *supra* note 6, at 172 (noting that many employers view arbitrators as pro-employee).

Inc.,¹⁹⁰ the United States District Court for the Northern District of Texas was confronted with this argument.¹⁹¹ The court rejected the assertion that arbitration panels are composed primarily of white males who do not represent a cross-section of society,¹⁹² stating that these allegations constituted mere speculation.¹⁹³

More importantly, the other negative aspect of compulsory arbitration is that it voids the employee's right to have his or her claim heard in court. The right to have one's claim litigated is a staple of the Civil Rights Acts.¹⁹⁴ Employees are particularly affected if, as some commentators have claimed, judges and juries prove "time and time again" to be friendly to the ADA plaintiff.¹⁹⁵

VI. IS IT EVER POSSIBLE TO USE ADR IN CONJUNCTION WITH THE ADA?

Having determined that the legislative history of the ADA does not permit binding compulsory arbitration as the sole remedy in either the collective bargaining or individual employee context,¹⁹⁶ what options exist for employers and employees who truly want to use ADR? One option commentators have proposed is the waiving of the right to judicial resolution of the statutory claims.¹⁹⁷ In *Gardner-Denver*, the Supreme Court implied that an individual could voluntarily waive his cause of action under Title VII, if this waiver was knowing and voluntary.¹⁹⁸ Other courts, adhering to the principle that the right of access to the courts is fundamental, have determined that the individual must have been aware of all material information about the arbitration procedure to constitute a knowing waiver.¹⁹⁹ In addition, he must have known that by waiving, he

190. 876 F. Supp. 850 (N.D. Tex.), *aff'd*, 71 F.3d 877 (5th Cir. 1995).

191. *Id.* at 850; see Nina Schuyler, *Expensive Cost Cutting*, CAL. LAW., Jan. 1995, at 37 (reiterating the argument made in *Olsen*).

192. *Olsen*, 876 F. Supp. at 852.

193. *Id.*

194. See Tien, *supra* note 48, at 1468-70 (discussing the underlying purpose of the ADA and other similar civil rights statutes such as Title VII).

195. See Schachner, *supra* note 4. One management lawyer recommends that employers explore ADR to avoid going into the judicial system. *Id.*

196. See *supra* notes 164-66 and accompanying text (discussing the Supreme Court's decision in *Gilmer* and how it comports with the legislative history of the ADA).

197. Tien, *supra* note 48, at 1472-73 (arguing that Congress did not intend to completely preclude arbitration of ADA disputes).

198. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974); see also Tien, *supra* note 48, at 1472-73 (citing *Gardner-Denver*).

199. See *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (holding that prisoners have a fundamental constitutional right to be assisted in legal preparation).

was giving up his right to judicial trial.²⁰⁰ In order to be voluntary, the court must look at “the circumstances surrounding the execution of each arbitration agreement in order to gauge the coercive potential of the setting.”²⁰¹

Subsequent decisions have stated that the waiver must be clear and unequivocal to be enforceable because the rights being waived go beyond the employee’s benefit—they are expressions of public policy.²⁰² In addition to being voluntary, courts have stated clearly that civil rights claims cannot be prospectively waived.²⁰³ This does not, however, foreclose the opportunity for employers and employees to agree to waive judicial resolution of a claim after that claim has arisen.²⁰⁴ If both parties voluntarily agree to this type of waiver,²⁰⁵ a court likely would bind the employee to his agreement. After-the-fact voluntary waiver is one option for parties who wish to partake in the benefits of ADR.

Another option for employers and employees is non-binding arbitration. This type of ADR would allow for the possibility of settling the dispute without denying the employee the right to file an ADA claim in court.²⁰⁶ Non-binding arbitration is similar to a settlement agreement in that if the individual feels the result of the claim is unsatisfactory, he

200. Moore v. Fragatos, 321 N.W.2d 781 (Mich. Ct. App. 1982).

201. *Id.* at 789.

202. See Howard, *supra* note 102, at 287 & 287 nn.312-13 (citing Matthew W. Finkin, *Commentary on “Arbitration of Employment Disputes Without Union,”* 66 CHI.-KENT L. REV. 799, 808-09 (1990) and Landgraf v. USI Film Prod., 114 S. Ct. 1483, 1497 (1994)).

203. Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974) (noting that in the context of collective bargaining, an employee’s rights cannot be waived prospectively under Title VII). Many portions of the ADA were modeled after Title VII, including the remedies; therefore, it is reasonable to conclude that the prospective waiver mandate applies to the ADA as well. See Block v. Art Iron Corp., 866 F. Supp. 380, 386-88 (N.D. Ind. 1994) (discussing the ADA’s legislative history and how other courts have interpreted it).

204. Tien, *supra* note 48, at 1473. The author states that once an ADA claim arises, “parties who wish to arbitrate should first attempt to agree on final and binding arbitration expressly conditioned on waiver of judicial resolution.” *Id.* It is important to note that this type of after-the-fact agreement could not be used where a collective bargaining agreement governed the workplace. The reason for this is that the NLRA commands the employer to deal with the union, not individuals, and by entering into this type of agreement with an individual employee, the employer would be subjecting himself to unfair labor practice charges under Sections 8(a)(1), 8(a)(5), and 9(a) of the NLRA. See Mary K. O’Melvany, *The Americans With Disabilities Act and Collective Bargaining Agreements: Reasonable Accommodations or Irreconcilable Conflicts?*, 82 KY. L.J. 219, 246 (1994) (noting that if the employer and the union agreed through collective bargaining that the employer would set up an ADA claim resolution process, then it would be authorized by law).

205. It is likely that a court would still examine whether the waiver was voluntary by looking at the particular facts. See *supra* notes 198-203 and accompanying text (describing the standard for voluntary waiver).

206. Tien, *supra* note 48, at 1473.

reserves the right to go to court.²⁰⁷ The problem with this type of voluntary arbitration, which has not been discussed extensively,²⁰⁸ is that common sense dictates that few employers will be willing to go through the time and expense of voluntary arbitration knowing that if they win, the employee may still file suit. The employer will still be liable for front and backpay as well as other remedies. Therefore, there is little incentive to participate in non-binding arbitration from an employer's perspective.

In order to give employers the necessary incentive to engage in voluntary arbitration, one option is the concept of quasi-binding arbitration. This middle road type of arbitration ensures that both sides gain some benefit from engaging in the process. In quasi-binding arbitration, an employer and employee would agree to voluntarily arbitrate a claim and the employer would gain something regardless of the outcome. One possibility is the tolling of the front and backpay clocks.²⁰⁹ If, as part of voluntary arbitration, the backpay clock was tolled from the date of the arbitration until final resolution of the issue, then the employer is offered some incentive to voluntarily arbitrate. This does not injure the employee to any great extent because if he wins his case, he will still get compensatory and possibly punitive damages.

Another option presently being experimented with is federal court-annexed arbitration. This idea allows federal courts to institute local rules requiring that any discrimination cases involving claims under \$100,000 be submitted to non-binding arbitration.²¹⁰ One commentator predicts that this program will continue to expand as judges feel the need to lighten their dockets.²¹¹

Voluntary arbitration sounds like a viable way to alleviate the cost and time of litigation, but in order for it to succeed, ideas like this one will have to be examined in greater depth. If successful, these types of ideas

207. *Id.*

208. *But cf. id.* at 1475. Tien argues that not all individuals who are dissatisfied with the arbitrator's decision will proceed to court. *Id.* She recognizes that some litigants will realize that the arbitrator was correct and will drop the charges, thereby saving the expense of filing a suit. *Id.* Tien states that this will help alleviate the present backup at the EEOC and in the judicial system. *Id.*

209. Front and backpay are remedies for a violation of the ADA. JAMES G. FRIERSON, EMPLOYER'S GUIDE TO THE AMERICANS WITH DISABILITIES ACT 405 (2d ed. 1995). Back pay is a more common remedy than front pay and is not granted for more than two years prior to the filing of the charge. *Id.* Generally, interim earnings or amounts that could be earned with reasonable diligence are deducted. *Id.* Front pay is lost future earnings, and is awarded only if it is unreasonable to order reinstatement or hiring because of animosity between the parties. *Id.*

210. Skrainka, *supra* note 4, at 987; see Spelfogel, *supra* note 5, at 249 (noting that this pilot program exists in the Southern and Eastern Districts of New York).

211. Skrainka, *supra* note 4, at 987.

would help employers and employees make use of the many positive aspects of ADR, and could begin alleviating the backlog at the EEOC and possibly lessen the burden on the judicial system.

VII. CONCLUSION

ADR is a method that can achieve the same result as a judicial trial without the unnecessary time and expense. As court dockets get more crowded and employees continue to file discrimination suits, ADR increasingly becomes a viable alternative to the court system. Congress recognized the benefits of ADR and included a clause in the ADA encouraging the use of ADR, but the legislative history of the Act indicates that employers cannot require compulsory binding arbitration. This leaves voluntary non-binding ADR and after-the-fact waiver as the only methods of alternative dispute resolution available under the ADA. Ideas have been proposed and experimented with, that, if accepted, could thrust ADR into the limelight of employment discrimination law, and allow it to take its place as a much needed aid to the judicial system.

