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Privatizing Antidiscrimination Law with Arbitration: The Title VII Proof Problem

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PRIVATIZING ANTIDISCRIMINATION LAW WITH ARBITRATION: THE TITLE VII PROOF PROBLEM

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I. INTRODUCTION

Despite compelling arguments by litigators, policy-makers, and scholars that employees should not, as a condition of employment, be required to waive their statutory antidiscrimination forum rights in favor of arbitration, the United States Supreme Court continues to support waiver.[1] The Court's latest decisions reflect a complete turnaround, since the Supreme Court itself had advocated against waiver in *Alexander v. Gardner-Denver Co.*[2] Opposition to waiving statutory forum guarantees is mainly grounded in the belief that civil rights laws are unique and deserve particularized judicial attention to achieve congressional goals.[3]

No-waiver advocates argue, for example, that Title VII provides special congressional guarantees that unions and employers

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1. David E. Feller, *Putting* Gilmer *Where It Belongs: The FAA's Labor Exemption*, 18 Hofstra Lab. & Empl. L.J. 253, 253–54 (2000) (arguing that almost everyone regards mandatory arbitration as undesirable and unfair); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (holding that an employee could waive his statutory forum rights unless he could prove that Congress intended those rights to be non-waivable); *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998) (suggesting that a union can waive an employee's statutory forum rights in a collective bargaining contract as long as the waiver is clear and unmistakable).

2. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974). The Court ruled "there can be no prospective waiver of an employee's rights under Title VII." The Court added that Title VII rights are statutory, not contractual, and waiver of such rights would defeat important congressional policy and goals. *Id.*

3. Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the* Steelworkers Trilogy *to* Gilmer, 44 Hastings L.J. 1187, 1189 (1993) (there is a sentiment that public officers should enforce public values); *see also* Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 Denv. U. L. Rev. 1017, 1019 (1996) (statutory rights are intended and designed to protect workers who can't protect themselves); Patrick O. Gudridge, *Title VII Arbitration*, 16 Berkeley J. Empl. & Lab. L. 209, 210 (1995) (arbitration permits employers to avoid statutory damages provisions); Elizabeth A. Roma, *Mandatory Arbitration Clauses in Employment Contracts and the Need for Meaningful Judicial Review*, 12 Am. U. J. Gender Soc. Policy & L. 519, 531–41 (2004) (arbitrators may lack legal training, yet they are called upon to decide legal issues, and their decisions are essentially unreviewable).

should be barred from waiving by contract.[4] Specifically, general statutory rights—such as the right to jury trial, appellate review, compensatory and punitive damages, and attorney fees—are generally unavailable in arbitration.[5]

It is further argued that employees often lack bargaining power or the ability to consent to waivers, thereby making waiver agreements contractually deficient.[6] Even the presumption that arbitration is quick, cheap and easy has been challenged.[7] And implicit in the arguments against waiver is a judgment that employees can better realize their statutory guarantees through traditional judicial processes.

Supporters of waiver and arbitration point to the difficulties of obtaining a lawyer, difficulties in proving discrimination and surviving appellate review,[8] and the enforcement limitations of the Equal Employment Opportunity Commission (EEOC).[9] Further, they note that there is not much chance of employer over-

4. Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration, and the Case against Union Waiver of the Individual Worker's Statutory Right to a Judicial Forum*, 49 Emory L.J. 135, 200 (2000) (because unionized employees are not parties, but merely beneficiaries of the collective bargaining contract, principles of contract law do not support union waivers of statutory rights); *see* Van Wezel Stone, *supra* n. 3, at 1036 (waiver agreements are contracts of adhesion because employees have no bargaining power). *But see* Theodore J. St. Antoine, *Labor and Employment Law in Two Transitional Decades*, 42 Brandeis L.J. 495, 523–24 (2004) [hereinafter St. Antoine, *Labor and Employment Law*] (union waiver is less of an adhesion contract because unions have bargaining power).

5. Gudridge, *supra* n. 3, at 210 (arbitration allows employers to avoid compensatory and punitive damages); Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. Pa. J. Lab. & Empl. L. 685, 711–13, 717 (2004); *see* Malin & Ladenson, *supra* n. 3, at 1188 (employers like arbitration because it helps them avoid costly statutory processes); *see also* Rebecca K. Beerling, *Left Out of the Balance—The Public's Need for Protection against Workplace Discrimination:* Waffle House *and* Kidder Peabody *Attempt to Limit the Remedies Available to the EEOC by Balancing Policies Not in Conflict*, 25 Hamline L. Rev. 296, 299 (2000) (arguing that the deterrence effect of public adjudication is lost in the arbitral forum).

6. Van Wezel Stone, *supra* n. 3, at 1036.

7. Summers, *supra* n. 5, at 718.

8. Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?* 15 Thomas M. Cooley L. Rev. 1, 7 (1998) [hereinafter St. Antoine, *Mandatory Arbitration*]; Michael Z. Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U. Pa. J. Lab. & Empl. L. 55, 66–67 (2004) (this argument recognizes that in some cases one may have a legal right that is not beneficial to exercise). *See also* Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. Rev. 478, 488 (1981) (sometimes waiver is desirable because one may be better off forfeiting a right).

9. Vaseem S. Hadi, *Ending the 180 Day Waiting Game: An Examination of the Court's Duty to Short-Circuit the EEOC Backlog through the Power of Judicial Review*, 27 U. Dayton L. Rev. 53, 87 (2001) (the EEOC is incapable of resolving the multitude of cases filed every year); Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Com-*

reaching when unions execute waivers on behalf of their members because unions are strong and experienced bargainers.[10] Waiver supporters conclude that if the statutory remedial guarantees are available in arbitration, employees may be better off than in court.[11]

This Article will examine the *bona fides* of the competing claims for and against waiver. The Article's first part demonstrates how Title VII lost its pedigree and concomitant judicial attention over time. This part shows the Supreme Court's shift from its liberal interpretation/employee-protectionist model that limited the role of non-judicial players such as arbitrators. This interpretive shift, narrowing statutory guarantees, was part of the foundation of waiver jurisprudence.

The second part shows that, as the Court limited its own ability to grant statutory protection and relief, it increasingly prioritized private contractual rights, which inured to the benefit of employers.

The third part looks at the effect of private contractual ordering, i.e., the proliferation of waiver agreements,[12] and shows that arbitrators become contractually bound to apply the law of Title VII. This means that arbitrators must use the judicially-created proof structure that places heavy emphasis on direct evidence of discrimination,[13] which is usually unavailable.[14] This part shows that, like the judiciary, arbitrators give circumstantial proof of

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mission, 50 U. Kan. L. Rev. 1, 106 (2001) (with its limited resources and changing priorities, the EEOC cannot investigate and advocate at an effective level).

10. St. Antoine, *Labor and Employment Law*, *supra* n. 4, at 523–24; Rubin, *supra* n. 8, at 489–90 (when the parties are evenly matched there is little chance of overreaching). *Contra* Janet McEneaney, *Arbitration of Statutory Claims in a Union Setting: History, Controversy and a Simpler Solution*, 15 Hofstra Lab. & Empl. L.J. 137, 158–60 (1997) (you cannot entrust two majority entities—unions and employers—with the rights of minorities). The Supreme Court expressed a similar sentiment in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (to permit waiver of Title VII rights is equivalent to allowing the fox to guard the chickens).

11. St. Antoine, *Mandatory Arbitration*, *supra* n. 8, at 2.

12. *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1367 (11th Cir. 2005) ("Indeed, compulsory arbitration agreements are now common in the workplace, and it is not an unlawful employment practice for an employer to require an employee to arbitrate, rather than litigate, rights under various federal statutes, including employment-discrimination statutes."), *cert. denied*, 126 S. Ct. 2020 (2006).

13. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 514–15 (1993) (holding that employees must provide direct evidence of employer's discriminatory motives). The Court held that "nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable." *Id.*

bias little or no weight.[15] As a result, employees arbitrating Title VII cases lose at an alarming rate.[16] And in cases when employees have prevailed, arbitrators have often found it necessary to abandon Title VII's proof structure or rely heavily on circumstantial evidence.[17]

The Article concludes that neither forum is advantageous to employees as long as Title VII's proof structure governs. Even if statutory guarantees—such as compensatory and punitive damages plus attorney fees—are preserved in waiver agreements, these benefits remain elusive when an arbitrator is contractually required to utilize stringent burden of proof requirements. The real benefit of traditional labor arbitration is its informality and the flexibility granted arbitrators to work with the contract and around the law.[18] Because arbitrators handle Title VII cases exactly as judges would, proving intent continues to present a major hurdle to discrimination victims. Requiring an employer to prove a legitimate, nondiscriminatory reason for discharge is a far lighter burden than requiring an employee to prove an employer's discriminatory motivation. Until arbitrators appreciate the im-

14. *In re VRN Intl. and Intl. Bhd. of Elec. Workers, Loc. 1978*, 74 Lab. Arb. 806, 809 (1980) ("Where racial discrimination exists, it is an insidious evil, difficult to demonstrate, and direct evidence is often virtually impossible to produce.") (citation omitted).

15. *See infra* nn. 86–87 and accompanying text.

16. *See infra* n. 87. Of course some losses are expected because, in some cases, employees may be mistaken about employer motivation, and in others, employees may abuse their statutory rights. *See* David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 Berkeley J. Empl. & Lab. L. 1, 17 (2003) (employees take advantage of the many antidiscrimination laws by filing meritless claims); *see also Edwards v. Interboro Inst.*, 840 F. Supp. 222, 231 (E.D.N.Y. 1994).

> [Title VII] has, however, also unquestionably served to embolden disgruntled employees, who have been legitimately discharged because they were incompetent, insubordinate, or dishonest, to file suits alleging that they have been the victims of discrimination. The motives prompting those baseless filings may be inferred to be harassment or intimidation with a view towards being rehired. Whatever the motives, the frequency with which such cases are filed unduly burdens the federal courts and subjects innocent employers to incredible expense which they cannot recoup . . . .

Id. See also Hicks, 509 U.S. at 520–21 ("[T]here is no justification for assuming . . . that those employers whose evidence is disbelieved are perjurers and liars. . . . Undoubtedly some employers (or at least their employees) will be lying."); *Vargas v. Peltz*, 901 F. Supp. 1572, 1578 (S.D. Fla. 1995) (plaintiff's sexual harassment claim was based on a "litany of lies").

17. *See generally infra* nn. 90–92 and accompanying text.

18. *See United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596–97 (1960) (arbitral awards must be enforced as long as they draw their essence from the contract).

portance of circumstantial proof in Title VII cases, a survey of arbitral awards shows that arbitrators will almost always credit employer explanations over an employee's circumstantial evidence of discrimination.

II. TITLE VII IS NO LONGER SPECIAL

Early in its history, Title VII was placed on a pedestal by the Court. Concerned about the harms workplace bias had on blacks, other minorities, and women, the Court pursued the statute's goals of deterrence and compensation through liberal interpretations.[19] The Court created disparate impact theory to combat facially neutral practices that have discriminatory effects,[20] assigned great weight to circumstantial proof that an employer was motivated by illicit considerations,[21] interpreted the statute to permit affirmative action,[22] and guaranteed statutory protection by making the statute non-waivable.[23]

By the late 1980s, the orientation of the law, national attitudes towards Title VII, and the Court had changed. These changes were reflected in Court decisions that equated antidiscrimination mandates with ordinary torts. In 1989, the Court embarked on a campaign to reorient employment civil rights laws in general and Title VII in particular. For example, in *Patterson v. McLean Credit Union*,[24] the Court limited the reach of U.S. Code section 1981, a civil rights statute having roots in post civil war black reconstruction.[25] The Court determined that a black woman alleging employment discrimination could not ground her claim in a statute prohibiting discrimination in the "making and enforcement" of contracts.[26] Although section 1981 was an important part of a national equal rights scheme providing for jury trials and

19. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34 (1971) (Title VII is remedial and should be liberally construed); *see* Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 Hastings L.J. 1301, 1304 (1990) ("In its first round of statutory interpretation during the early 1970s, the Supreme Court made clear that it would insist on a broad construction of Title VII.").

20. *Griggs*, 401 U.S. at 432.

21. *Tex. Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981).

22. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 206 (1979) (Title VII permits voluntary affirmative action plans).

23. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974).

24. *Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989).

25. 42 U.S.C. § 1981 (2000).

26. *Patterson*, 491 U.S. at 171.

more comprehensive damages than Title VII, the Court ruled that the statute did not prohibit on-the-job discrimination.[27]

Justice Brennan's response to this interpretation highlights the degree of the Court's retreat. He wrote, "[w]hen it comes to deciding whether a civil rights statute should be construed to further our Nation's commitment to the eradication of racial discrimination, the Court adopts a formalistic method of interpretation antithetical to Congress' vision of a society in which contractual opportunities are equal."[28]

Further signals of retreat came from *Price Waterhouse v. Hopkins*.[29] In *Price Waterhouse*, the Court ruled that "[c]onventional rules of civil litigation generally apply in Title VII cases."[30] The application of conventional rules meant that employers who rely on illegitimate considerations in making employment decisions could meet their burden of proof responsibilities by a preponderance of the evidence.[31]

Price Waterhouse dealt with the delicate and elusive issue of employer motivation when illicit and legitimate factors go into an employment decision. In *Price Waterhouse*, the Court prioritized employer prerogatives and devalued the statute's general prohibition of sex discrimination. Although Title VII prohibits decision-making grounded in an employee's sex, the Court concluded that, in some instances, an employer can avoid liability even though it considered and relied on this impermissible factor.[32] Rather than elevate the employer's proof responsibility when sex played a role in its decision, the Court treated the case as an ordinary civil lawsuit and rejected a more demanding "clear and convincing evidence" proof responsibility for employers.[33]

More evidence of Title VII's loss of pedigree came in *Lorance v. AT&T Technologies, Inc.*[34] In *Lorance*, the Court confronted the issue of facially neutral policies that discriminate without the employee's awareness. In early interpretations of the statute, lower courts were particularly sensitive to policies that blindsided employees. Instead of continuing the tradition of interpreting Title

27. *Id.* at 179 (the statute only prohibits pre-employment discrimination).

28. *Id.* at 189 (Brennan, J., dissenting).

29. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

30. *Id.* at 253.

31. *Id.*

32. *Id.* at 258 (employing the "same decision" test, i.e., that the employer's decision would have been the same in the absence of prohibited conduct).

33. *Id.* at 253–54.

34. *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 903 (1989).

VII to allow employees to capture its protections, the Court ruled that the employer's facially neutral, but discriminatory seniority policy triggered the statute of limitations when it was adopted.[35] The Court focused on insulating employers from employees' "stale" claims, instead of accommodating employee debility stemming from lack of notice.[36]

This trend is also depicted in the Court's *Wards Cove Packing Co. v. Atonio* decision.[37] In *Wards Cove*, the Court confronted neutral practices that produced a racially stratified workplace. Instead of buttressing the principles outlined in *Griggs v. Duke Power Co.*,[38] the Court essentially overruled *Griggs* by loading proof responsibilities on employees and reducing proof responsibilities on employers.[39] Although the disparate impact model was designed to relieve employees of proof responsibilities, the Court nonetheless added proof responsibilities by requiring employees to identify all discriminatory practices and prove how they caused a disparate impact.[40] At the same time, the Court reduced employers' proof responsibilities by imposing the light obligation to produce evidence of a business justification for the challenged practice.[41] In the face of significant employee hurdles in challenging facially neutral, but discriminatory practices, the Court determined that its "rule conform[ed] with the usual method for allocating persuasion and production burdens in the federal courts."[42]

Another decision relegating Title VII to the status of ordinary torts is *Martin v. Wilks*,[43] which elevated the status of reverse discrimination suits through the use of basic civil procedure.[44] The Court applied traditional procedural rules that give parties hostile to consent decrees ample ammunition to undo settlements of discrimination claims. Although in personam jurisdiction and mandatory joinder procedural rules place heavy burdens on discrimination plaintiffs, the Court held that the rules cannot be bent or interpreted to accommodate voluntary efforts at settling discrimination disputes.[45]

35. *Id.* at 911.
36. *Id.*
37. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).
38. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
39. *Wards Cove Packing Co.*, 490 U.S. at 656.
40. *Id.*
41. *Id.* at 659.
42. *Id.* at 659–60.
43. *Martin v. Wilks*, 490 U.S. 755 (1989).
44. *Id.* at 761.
45. *Id.* at 761–68.

The Court's elevation of procedural rules harmful to substantive guarantees continued in the 1990s. The Court's decision in *St. Mary's Honor Center v. Hicks* is illustrative.[46] In *Hicks*, a black employee sued his employer contending that his discharge violated Title VII.[47] The employee established his prima facie case and subsequently proved that his employer's defense was a lie. Nonetheless, the *Hicks* Court ruled that he was not entitled to judgment as a matter of law.[48]

Although it is well known that employees face great difficulty in obtaining direct evidence of discriminatory motivation, the Court undervalued circumstantial proof that would further Title VII's goals. The Court determined that dishonest employers in Title VII cases should be able to benefit from their lies the same way they may benefit in other civil cases.[49] In the case of Title VII, the employer can use a lie to rebut the employee's prima facie case, and stand on that lie to win, unless the employee can show the lie was intended to cover up prohibited conduct.[50]

The *Hicks* decision indicated that the Court's orientation had not changed even after Title VII was expanded and strengthened in 1991.[51] In *Hicks*, the Court continued its pre-1991 use of procedural rules that operate as barriers to achieving the substantive guarantees of the statute. In *Hicks*, the Court decided that evidence of employer dishonesty must be handled in the same procedural way as in any civil case.[52] More troubling, however, was the Court's failure to emphasize the negative inferences to be drawn from such standards of proof.[53] Instead, the Court focused on the

46. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 505 (1993).

47. *Id.* at 505.

48. *Id.* at 510–11.

49. *Id.* at 520–21. The Court found that

> there is no justification for assuming . . . that those employers whose evidence is disbelieved are perjurers and liars. . . .
>
> . . . But even if we could readily identify these perjurers, what an extraordinary notion, that we "exempt them from responsibility for their lies" unless we enter Title VII judgments for the plaintiffs! . . .
>
> . . . The books are full of procedural rules that place the perjurer (initially, at least) in a better position than the truthful litigant who makes no response at all.

Id.

50. *Id.* at 510–11. The Court ruled that "nothing in [the] law would permit us to substitute . . . the employer's explanation [that] its action was not believable" for the "required finding that the employer's action was the product of unlawful discrimination." *Id.* at 514–15.

51. *Id.* at 506. Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (1991).

52. *Hicks*, 509 U.S. at 509–11.

53. *See generally* Stephen Plass, *Truth: The Lost Virtue in Title VII Litigation*, 29 Seton Hall L. Rev. 599 (1998).

employee's responsibility to find mental-state evidence in an environment where it is generally unavailable.[54]

Having switched from employee-friendly liberal interpretations to harmful conventional civil litigation rules, the Court has now expanded its labor and employment jurisprudence by adopting common law contract rules as an effective regulatory device. This move has placed employer and employee contractual freedoms on a par with statutory rights, thereby giving the parties great powers to privately order their antidiscrimination affairs.

III. REBIRTH OF THE PRIVATE CONTRACT

By 1991, when the Court decided *Gilmer v. Interstate/Johnson Lane Corp.*,[55] the Court had already built a substantial body of case law treating Title VII like any other common law. Despite congressional efforts strengthening and expanding Title VII in 1991, the Court's orientation did not change. The Court continues to advance and extend a theory of employment law grounded in private contractual freedom and reduced judicial protectionism.[56]

In *Gilmer*, the Court was called upon to determine whether an employee may waive his statutory forum rights granted by the Age Discrimination in Employment Act (ADEA) by agreeing to arbitrate all claims arising out of the employment relationship.[57] Instead of emphasizing the personal and special nature of statutory civil rights and congressional preference that the judiciary guard such rights, the Court focused on waiver's contractual nature and employees' freedom to relinquish employment rights.[58] The Court ruled that the ADEA's goals of deterrence and compensation could be achieved in the arbitral forum, and the statute did not need to be specially guarded by the courts.[59] On this basis, the Court ruled that waiver must be judged, if challenged, by ordinary

54. Smoking gun evidence is generally unavailable in employment discrimination cases because such discrimination is subtle and sophisticated. *See Conn. v. Teal*, 457 U.S. 440, 447 n. 8 (1982); *see also Gen. Bldg. Contractors Assn. v. Pa.*, 458 U.S. 375, 412 (1982) ("Today, although flagrant examples of intentional discrimination still exist, discrimination more often occurs on a more sophisticated and subtle level . . . .").

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

56. Discrimination today is often "sophisticated and subtle" so proving motivation remains a daunting task. *See* Michael A. Zubrensky, Student Author, *Despite the Smoke, There Is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law after* Price Waterhouse v. Hopkins, 46 Stan. L. Rev. 959, 959 (1994).

57. *Gilmer*, 500 U.S. at 33.

58. *Id.* at 33.

59. *Id.* at 27–28.

contract principles.[60] In that regard, a waiver should be knowing and voluntary.[61]

In *Gilmer*, the Court moved from emphasizing the procedural and substantive guarantees of statutory civil rights laws to promoting alternative options in arbitration as consistent with legislative goals.[62] Although employees do not get jury trials, appellate review, and statutory compensation guarantees when arbitrating, the Court concluded that it was the employee's responsibility to show that Congress intended those rights to be non-waivable.[63] The reality however, is that such proof is unavailable to employees because Congress's only pronouncement on this issue arguably favors waiver.[64]

Since *Gilmer*, the Court has expanded and strengthened the foundation for contractual waivers and arbitral resolution of discrimination disputes. In *Wright v. Universal Maritime Service Corp.*, the Court suggested that a union could waive an employee's statutory forum rights, provided that the collective bargaining agreement had "clear and unmistakable" waiver language.[65] Subsequent to *Wright*, the Court ruled that the Federal Arbitration Act's (FAA) broad support for arbitration applies to employment contracts, thereby adding statutory support to arbitral resolution of employment disputes.[66]

In *Wright*, the Court confronted the issue of third party or union waiver of employees' statutory judicial-forum rights.[67] Although *Gardner-Denver* made it clear that waiver is not permitted,[68] *Gilmer* distinguished *Gardner-Denver* and held that waiver

60. *Id.* at 33 (holding Gilmer was bound to his arbitration agreement unless he could cite contractual grounds for revocation of the agreement).

61. *Id.* at 29 n. 3. The Court also noted that issues such as fraud or unconscionability can be reviewed on a case-by-case basis. In *Gilmer* there was no evidence that the waiver agreement was the product of contractual wrongdoing by the employer. *Id.* at 33.

62. *Id.* at 25–27.

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

64. In 1991, Congress amended Title VII and added a provision for alternative dispute resolution. That provision encourages the use of arbitration to resolve employment disputes. Civil Rights Act of 1991, Pub. L. No. 102–166, § 118, 105 Stat. 1071, 1081 (1991).

65. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998) ("[W]hether or not *Gardner-Denver*'s seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer*, *Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a [collective bargaining agreement].")

66. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

67. *Wright*, 525 U.S. at 80.

68. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51–52 (1974) (holding that employees cannot prospectively waive Title VII rights because this would defeat congressional intent).

is possible.[69] In *Wright*, the Court expanded the *Gilmer* principles by suggesting that a union could waive employees' judicial-forum rights.[70] The Court found that the arbitration clause in the collective bargaining contract did not incorporate antidiscrimination law or address the relinquishment of statutory rights.[71] However, the Court concluded that nothing less than a clear and unmistakable waiver would satisfy the *Gilmer* holding.[72] In effect, the Court implicitly approved union waivers, or at least indicated that a properly executed waiver provision would not be repugnant to the goals of antidiscrimination laws. If unions can contractually agree to final resolution of Title VII disputes in arbitration, this is a significant departure from *Gardner-Denver*'s declaration that

> Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.[73]

Two years after *Wright*, the Court virtually foreclosed an employee's chance to set aside an arbitral award or contractual agreement on public policy grounds.[74] The Court ruled that in order to vacate awards on public policy grounds, lower courts must identify a public policy evidenced by laws and conclude that the award itself, not the employee's conduct, violates such policy.[75] This stringent test manifests strong support for freedom of contract principles because it insulates the private bargain and award from court review when an arbitrator decides what the private contract means. In effect, an arbitrator deciding a grievance stemming from discrimination misconduct could render an award repugnant to Title VII, but consistent with the contract.[76] For ex-

69. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33–34 (1991). The Court found that *Gardner-Denver* addressed whether arbitration of a contractual right precluded the litigation of the same right protected by statute, not whether an employee had contracted to waive his statutory forum rights. *Id.*

70. *Wright*, 525 U.S. at 80–82 (holding that general contract clauses in a collective bargaining agreement will not be sufficient to waive employee's statutory rights).

71. *Id.*

72. *Id.*

73. *Gardner-Denver*, 415 U.S. at 51–52.

74. *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 61–62 (2000).

75. *Id.* at 62–63.

76. *See e.g. In re City of Boston and AFSCME, Loc. 804*, 116 Lab. Arb. 906 (2001). In this case an employee was discharged because he unfastened and grabbed a co-worker's

ample, an arbitrator could reinstate an employee discharged for sexual harassment because there is no explicit Title VII policy that requires discharge or prohibits reinstatement of a sexual harasser.[77]

Support for private bargains was further boosted in *Circuit City Stores, Inc. v. Adams*,[78] thereby making statutory protection against discrimination more susceptible to private ordering. After a long avoidance, the Court in *Circuit City* decided the question whether the FAA's pro-arbitration mandate was narrowly reserved for commercial disputes.[79] Specifically, the Court addressed the FAA's exclusion of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[80] The Court settled on a narrow construction of this provision by limiting its reach to transportation workers.[81] As a result, employers requiring mandatory arbitration now have a national policy to support private ordering in addition to the statutes and decisional precedents supporting arbitration in the collective bargaining context.[82]

The Court's elevation of common law rules and deemphasis of congressional prescriptions create a concern for the potential loss of civil rights protection in employment. The prevailing sentiment is that this jurisprudence robs employees of sacred statutory rights.[83] However, the loss of statutory protection is not as closely tied to the change from judicial to arbitral forum as it is to the arbitral forum's law.

IV. Arbitrators and Title VII's Proof Structure

A system of privatized adjudication in which arbitrators strictly follow Title VII's proof structure appears to hold little promise for employees. As one commentator noted, "most labor

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bra, hung the bra on a van's mirror and teased her about it. The arbitrator found that discharge was too severe a response because the collective bargaining agreement called for progressive discipline as a general rule. *Id.* at 907–09.

77. *See id.* at 909. The arbitrator noted that there was no public policy which mandated the firing of an employee engaged in sexually harassing behavior. *Id.*

78. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

79. *Id.* at 112.

80. *Id.* (quoting 9 U.S.C. § 1).

81. *Id.* at 109.

82. *See EEOC v. Luce, Forward, Hamilton, & Scripps*, 303 F.3d 994, 997 (9th Cir. 2002) (holding that *Circuit City* supports a conclusion that predispute agreements to arbitrate Title VII claims are enforceable).

83. *See supra* nn. 4–7 and accompanying text.

arbitrators do resort to federal Title VII precedent in deciding the employment discrimination claims presented to them."[84] On the specific issue of proving discrimination, arbitrators routinely utilize the Title VII precedents outlining the proof responsibilities of the parties.[85] A review of twenty-nine arbitral awards reveals that employees have particular difficulty proving employer discrimination.[86] Of the twenty-nine cases reviewed, twenty-two, or

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84. Frank Elkouri & Edner Asper Elkouri, *How Arbitration Works* 123 (Alan M. Ruben ed., 6th ed., BNA Books 2003). *See also In re S. Cal. Gas Co. and Util. Workers Union of Am.*, 91 Lab. Arb. 100, 104 (1988).

> Although the authority of the Board of Arbitration is limited to the interpretation and application of the parties' Collective Bargaining Agreement, both parties have cited external law to give meaning to Section 18.01 of the Agreement. It is therefore not only appropriate but necessary to consider applicable employment discrimination law in this case; it is the apparent mutual intent of the parties that the requirements of Section 18.01 be applied in a manner consistent with the provisions of federal law.

Id. See also In re Mich. Dept. of Mental Health and Mich. St. Employees Assn., 82 Lab. Arb. 1311, 1315 (1984).

> Some have taken the view that the arbitrator's sole function is to interpret the terms of the Collective Bargaining Agreement. Others have argued that the provisions of [the contract] must be interpreted in accordance with applicable statutory provision, including relevant judicial authority. In this instance, Article 25 refers to "illegal discrimination" and therefore it is evident that the parties intended the external law to apply.

Id.

85. *E.g. McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (setting out the requirements for a prima facie case); *Tex. Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981) (detailing the three-step proof process which requires the employee plaintiff to establish a prima facie case, the employer to produce a legitimate nondiscriminatory reason, and the employee to prove that the employer's reason is pretextual); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (holding that showing employer's reasons are false is not conclusive proof that employer was motivated by illicit considerations).

86. *In re Vt. St. Colleges and Vt. St. Colleges Faculty Fedn., AFT Loc. 3180*, 91 Lab. Arb. 1347 (1989); *In re Reynolds Elec. & Engr. Co. and Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Loc. 631*, 91 Lab. Arb. 1289 (1988); *In re S. Cal. Gas Co. and Util. Workers Union of Am.*, 91 Lab. Arb. 100 (1988); *In re Heublein, Inc. and Individual Grievant*, 84 Lab. Arb. 836 (1985); *In re Mich. Dept. of Mental Health and Mich. St. Employees Assn.*, 82 Lab. Arb. 1311 (1984); *In re Arb. between Owens-Brockway Glass Container, Inc. and Glass, Molders, Pottery, Plastics & Allied Workers Intl. Union*, 1998 WL 1033371 (CLC Arb. June 12, 1998); *In re Arb. between Mid-Am. Energy Co. and Intl. Bhd. of Elec. Workers, Loc. Union No. 109*, 1997 WL 572913 (Arb. Mar. 31, 1997); *In re Arb. between Loc. Union 160, Intl. Bhd. of Elec. Workers and N. States Power Co.*, 1995 WL 735271 (Arb. July 19, 1995); *In re Henkel Corp. and United Food & Com. Workers Union, Loc. 354*, 104 Lab. Arb. 494 (1995); *In re Aerojet Liquid Rocket Co. and Intl. Assn. of Machinists & Aerospace Workers, Loc. 946*, 75 Lab. Arb. 255 (1980); *In re Ga. P. Corp. and S. Council of Indus. Workers, Loc. 3181*, 112 Lab. Arb. 317 (1999); *In re Lawrence Berkeley Natl. Laboratory and Individual Grievant*, 108 Lab. Arb. 376 (1996); *In re N.W. Publications, Inc. and Newsp. Guild of Twin Cities Loc. 2*, 104 Lab. Arb. 91 (1994); *In re Chi. Transit Auth. and Amalgamated Transit Union Loc. 308*, 95 Lab. Arb. 753 (1990); *In re Arb. between Foseco, Inc. and Intl. Assn. of Machinists & Aerospace Workers, Dist. 54*, 1993 WL 801341 (Arb. Feb. 11, 1993); *Griev-*

76%, found no discrimination.[87] These arbitrators found no discrimination because the complaining employees presented no direct evidence that the employer was motivated by illicit considerations.[88] Further, arbitrators finding no discrimination gave little or no weight to circumstantial evidence of bias.[89]

By contrast, the seven arbitrators who found discrimination either abandoned Title VII's proof regime in favor of a more unstructured formula, or relied heavily on circumstantial evidence.[90] With no direct evidence of discrimination, these arbitrators relied heavily on inferences drawn from general comments or differential treatment to find that employers' decisions were motivated by discrimination.[91] One arbitrator expressly addressed the direct evidence problem stating, "[t]he courts have, therefore, permitted an inferential method of establishing civil rights violations which relies heavily on circumstantial evidence."[92]

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ances of C, 1992 WL 717410 (Arb. May 19, 1992); *In re Arb. between U.S. Nuclear Reg. Commn. and Natl. Treas. Employees Union*, 1994 WL 853844 (Arb. Mar. 7, 1994); *In re United Parcel Serv. and Intl. Bhd. of Teamsters Loc. 554*, 103 Lab. Arb. 1143 (1994); *In re Arb. between S and Los Alamos Natl. Laboratory*, 1996 WL 915352 (Am. Arb. Assn. Dec. 16, 1996); *In re Arb. between U. of Cincinnati and Am. Assn. of U. Profs., U. of Cincinnati Chapter*, 2002 WL 1767601 (Arb. May 22, 2002); *In re Toledo Edison Co. and Intl. Bhd. of Elec. Workers Loc. 245*, 94 Lab. Arb. 905 (1990); *In re City of Berkeley and Intl. Bhd. of Elec. Workers Loc. 1245*, 94 Lab. Arb. 1198 (1990); *In re Weyerhauser Co., Okla. & Ark. Regions and Intl. Woodworkers of Am., Loc. 5–15*, 78 Lab. Arb. 1109 (1982); *In re Farmers Union C. Exch., Inc. and Intl. Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers, Loc. 975*, 82 Lab. Arb. 799 (1984); *In re S.F. Unified Sch. Dist. and S.F. Classroom Teachers Assn.*, 87 Lab. Arb. 750 (1986); *In re City of Grand Rapids and AFSCME, Loc. 1061*, 86 Lab. Arb. 819 (1986); *In re Natl. Weather Serv. and Natl. Weather Serv. Employees Org., FCMS*, 83 Lab. Arb. 689 (1984); *Grievance of Jean Lowell*, 1992 WL 726291 at *15 (Vt. Lab. Rel. Bd. Aug. 20, 1992); *Arb. between Intermountain Gas Co. and United Assoc. of Journeymen & Apprentices of the Plumbing & Pipefitting Ind.*, 1996 WL 785388 (Am. Arb. Assoc. Aug. 29, 1996).

87. *Supra* n. 86 (first twenty-two cases).

88. *Supra* n. 86 (first twenty-two cases).

89. *E.g. In re Lawrence Berkeley Natl. Laboratory*, 108 Lab. Arb. at 380 (no weight given to black employee's statistical proof that whites were paid more, that the company had a history of discriminating against blacks, and that blacks were treated unfavorably compared to whites); *In re Ga. P. Corp.*, 112 Lab. Arb. at 319 (no weight given to black employee's proof that the company implemented an anti-nepotism policy that resulted in only black employees being fired, and that the company made an exception to policy for a white employee); *In re City of Berkeley*, 94 Lab. Arb. at 1205 (despite having significant concerns about a promoted junior white employee's qualifications, and having circumstantial evidence of uneven treatment, arbitrator concluded that senior black employee did not have sufficient proof of discriminatory motivation).

90. *E.g. In re Weyerhauser Co.*, 78 Lab. Arb. 1109; *In re Farmers Union C. Exch.*, 82 Lab. Arb. 799; *In re S.F. Sch. Dist.*, 87 Lab. Arb. 750; *In re City of Grand Rapids*, 86 Lab. Arb. 819.

91. *Id.*

92. *In re City of Grand Rapids*, 86 Lab. Arb. at 825.

Employees alleging discrimination must establish a prima facie case.[93] Then the burden shifts to the employer to produce evidence of a legitimate nondiscriminatory reason for its action.[94] Once an employer articulates a non-prohibited reason, the employee must prove pretext.[95] To prove pretext, the employee must first prove that the employer gave a false reason to mask a discriminatory motive.[96] Merely proving that the employer's explanation is dishonest is generally insufficient to prove pretext,[97] but discriminatory intent may be inferred from circumstantial evidence such as an employer's false explanations.[98]

The seven cases holding that discrimination occurred demonstrate that when Title VII's proof structure is narrowly implemented, the affected employees generally cannot meet their burden of proof. The first example of this appears in the *Weyerhauser* case.[99] An employee was discharged for stealing company property.[100] The employee grieved the discharge and argued that it was motivated by racial animus.[101]

The arbitrator found, without analysis, that the employee had "made out a prima facie case of discrimination on the basis of disparate treatment and the Company [had] not advanced a legitimate nondiscriminatory basis for such treatment."[102] But application of Title VII's three-step proof regime does not support such a result. Even if the grievant established a prima facie case, the employer met its burden to produce evidence of a legitimate nondiscriminatory reason when it produced credible evidence that the grievant stole company property.[103] The company provided witnesses to the theft, and the arbitrator found that "the Company's

93. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

94. *Tex. Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

95. *Id.* at 256. The *Burdine* Court ruled that plaintiffs could win in one of two ways: "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256.

96. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 516 (1993).

97. *Id.* at 524 ("That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct.").

98. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000).

99. *In re Weyerhauser Co., Okla. & Ark. Regions and Intl. Woodworkers of Am. S. States Regl. Council, Loc. 5–15*, 78 Lab. Arb. 1109 (1982).

100. *Id.* at 1110.

101. *Id.*

102. *Id.* at 1112.

103. *Id.* at 1111. It appears that the grievant was also prosecuted and convicted for the theft and the company also relied on this fact. *Id.* at 1114.

assessment of the facts rings more true than that of the Union."[104] This meant that the prima facie case was rebutted and the grievant now had the responsibility to prove pretext.

The grievant offered evidence of a prior incident in which three white employees had set aside some company plywood, which they undervalued in order to purchase later at a discount.[105] For this theft the white employees were given a three-day suspension, which was eventually expunged from their records following a grievance hearing.[106] The company distinguished the two cases by noting that nobody observed the white employees committing the wrongful act, and the plywood never left company property. In contrast, the grievant in the second incident was observed stealing company property, and the stolen property was taken off the premises.[107] Company representatives claimed that the plywood incident was at best "attempted theft," which was not prohibited by company rules, and the white employees were treated leniently because the union had insisted that no theft occurred.[108] If this company testimony is credited, then no differential treatment occurred. However, even if the testimony were discredited, it only constitutes limited circumstantial proof of uneven treatment. The grievant would still retain the burden of proving that the employer was motivated by race in discharging him.

Finally, the union offered statistical evidence to show that black employees were disproportionately charged with serious offenses for which they were discharged.[109] The company challenged the statistics as unreliable because the sample was very small and included offenses other than theft.[110] The arbitrator found the company's interpretation of the statistics more persuasive than the union's.[111] In any event, even if the statistics were reliable and compelling, they would only qualify as "circumstantial evidence of discrimination."[112] Statistics alone would not es-

104. *Id.* at 1112.
105. *In re Weyerhauser Co.*, 78 Lab. Arb. at 1110.
106. *Id.* at 1110–11.
107. *Id.* at 1111–12.
108. *Id.*
109. *Id.* at 1111.
110. *Id.*
111. *In re Weyerhauser Co.*, 78 Lab. Arb. at 1113 ("Here, both because of the small sample involved as well as the inclusion of a number of different offenses in an arguably selective fashion, I find the Company's position to be slightly more persuasive.").
112. *E.g. Davis v. Califano*, 613 F.2d 957, 962 (D.C. Cir. 1979) ("Statistical evidence is merely a form of circumstantial evidence from which an inference of discrimination may be

tablish that the employer was motivated by racial concerns when it discharged the grievant.[113]

Boiled down to its essence, the proofs consisted of evidence of theft, which was credited, and evidence of differential treatment, which was unreliable. The grievant presented no direct evidence that race motivated his discharge, and the circumstantial evidence of uneven treatment was weak and unreliable. Such a record generally provides no basis for a finding of disparate treatment under Title VII. Nonetheless, the arbitrator side-stepped the issue by failing to evaluate the final two steps of a differential treatment case: the employer's legitimate nondiscriminatory reason for discharging the grievant, and the grievant's proof of pretext.[114]

The second case finding that discrimination occurred, *Farmers Union Central Exchange*,[115] also shows that an arbitrator must avoid Title VII's proof structure in order to find discrimination. In that case, a black employee claimed that race motivated his employer to rate him unqualified for a job he desired.[116] The arbitrator did not mention Title VII's proof requirements until the end of his decision.[117] And even then, he did not apply the three-step process.[118] Here again, assuming the employee established a prima facie case, the employer offered credible testimony and work records showing that the employee could not do the job.[119] During a sixty-day trial period, the employee was observed and evaluated by management officials, who determined that he was unable to perform the job.[120] Such proof easily qualifies as a legitimate nondiscriminatory reason for denying the employee the job.

The burden then shifted to the employee to prove pretext. There was no direct evidence of discrimination, and no allegation of racial bias during the job trial period.[121] However, the union

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drawn."); *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1285 (N.D. Ill. 1986) ("Statistics are an accepted form of circumstantial evidence of discrimination."); *Gomolka v. Quotesmith.com*, 2005 WL 2614850 at *3 (N.D. Ill. Oct. 7, 2005) (statistics as circumstantial proof are rarely sufficient to prove discrimination).

113. *In re Weyerhauser Co.*, 78 Lab. Arb. at 1113.

114. *Id.* at 1113–14.

115. *In re Farmers Union C. Exch., Inc. and Intl. Bhd of Teamsters, Chauffers, Warehousemen & Helpers, Loc. 975*, 82 Lab. Arb. 799 (1984).

116. *Id.* at 801.

117. *Id.* at 804.

118. *Id.*

119. *Id.* at 800–01.

120. *Id.*

121. *In re Farmers Union C. Exch.*, 82 Lab. Arb. at 801.

offered evidence that the grievant was the only black worker in the bargaining unit, that his past job bids were ignored, and that he was required to take a test to prove his qualification, a test required of no other employee.[122] That the employee was black and was not considered for other jobs were not by themselves probative of discrimination, but the allegation of differential treatment was. The employer responded that the required test—which the grievant refused to take—was a second opportunity to qualify for the job after the grievant failed to perform during the trial period.[123] The employer claimed that the test was a benefit to the grievant, not a discriminatory act against him.

Without applying Title VII's three-step proof process, the arbitrator found that the grievant was not objectively evaluated during the trial period because there were no criteria by which his performance was being judged.[124] The arbitrator found that subjective supervisory evaluations were insufficient proof that the grievant was evaluated fairly and impartially.[125] The arbitrator also found the test troubling because it was prepared specifically for the grievant, was not validated, and had never been required of other workers.[126]

The arbitrator seems to have sensed that the employer was not motivated by business concerns when it evaluated the grievant and denied him the job.[127] Because of this, the arbitrator seemed willing to infer that discrimination precluded the advancement of this minority employee, despite his minimal qualifications. The arbitrator ruled that "many of the actions of the Employer lacked a sound basis from which prudent judgments and

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122. *Id.* at 801–02.

123. *Id.* at 800.

124. *Id.* at 803.

> There has been no evidence presented to indicate what is expected of a maintenance mechanic in the matter of performance. . . . The question then is asked what was the standard for the grievant's evaluation as to his job performance since there is or was no objective criteria used by the employer during the trial period on which the Employer could form a justifiable or sound basis for its decision that he was not qualified to perform the work.

Id.

125. *Id.* at 804. There is no rule that requires an employer to use objective standards in evaluating an employee's fitness, however. And the award does not indicate that the employer did evaluations any other way.

126. *Id.*

127. *See In re Farmers Union C. Exch.*, 82 Lab. Arb. at 804 ("The decision and action of the Employer also perpetuates a longstanding practice not to promote employees from within the unit, including the grievant, who is a member of a minority group with a[t] least minimal qualifications for the position.").

decisions could be made. From other facts and circumstances one can only conclude the Employer's actions were racially motivated . . . ."[128]

The third case finding discrimination is a sex discrimination case involving the San Francisco Unified School District.[129] In this case, the grievant—a pregnant teacher—was not recommended for a position because her employer claimed that a substantial leave of absence would negatively affect the academic and emotional needs of pre-kindergarten children.[130] The arbitrator determined that the grievant was denied the job because of her pregnancy.[131] However, the arbitrator then determined that it was unnecessary to evaluate the case under the disparate treatment theory or the *bona fide* occupational qualification (BFOQ) defense.[132] The arbitrator found that a policy denying employment opportunity because of an employee's future need for maternity leave was discrimination per se, and more specifically, disparate-impact discrimination.[133]

The employer argued that there was no disparate treatment because its policy denied opportunities to all employees requiring substantial leaves.[134] And in any event, only women were seeking the job.[135] The arbitrator concluded that "even without considering whether some less discriminatory alternative policy might be available, it is found that the District did not prove a business necessity for its discrimination."[136]

To find a disparate impact, one typically needs a facially neutral policy which adversely affects a protected class of employees.[137] If the employee makes a prima facie case of adverse impact, the employer has the burden of proving business necessity.[138] If the employer meets its burden, the employee must then

128. *Id.* at 805.

129. *In re S.F. Unified Sch. Dist. and S.F. Classroom Teachers Assn.*, 87 Lab. Arb. 750 (1986).

130. *Id.* at 751.

131. *Id.* at 753.

132. *Id.* at 753–54.

133. *Id.* at 753.

134. *Id.* at 752.

135. *In re S.F. Unified Sch. Dist.*, 87 Lab. Arb. at 752.

136. *Id.* at 754.

137. *E.g. Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971).

138. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k) (2000) (amending Title VII and codifying *Griggs*'s business necessity standard).

show that less discriminatory, equally effective alternatives were available.[139]

In *San Francisco Unified School District*, the employer had a policy of not appointing anyone for the pre-kindergarten job who planned a substantial leave of absence soon after school started.[140] The policy was facially neutral because it appeared to affect both men and women equally. Therefore, the grievant had to show that the policy had a disparate effect on pregnant women. The grievant presented no such evidence.[141] The grievant provided no historical or statistical evidence to show disparate effect, because the two individuals considered for the position in question were both women.[142] Further, there was no evidence that men who planned substantial leaves were treated any differently.

Despite the absence of evidence proving disparate impact, the arbitrator ruled that the employer failed to prove business necessity.[143] The arbitrator cited cases holding that in a disparate impact case, the employer's reason must be compelling and effective to carry out its business purpose.[144] In this regard, the arbitrator found that "there is no evidence that totally regular attendance is required for a pre-kindergarten teacher to perform safely and efficiently."[145] The arbitrator concluded that it was not necessary to consider whether there was an effective, less discriminatory alternative because the employer's "educational purpose [was not] sufficiently compelling to override the discrimination caused by the policy."[146]

The fourth case evaluated involved the City of Grand Rapids.[147] In *City of Grand Rapids*, a female employee alleged sexual discrimination when her employer concluded she failed her probationary try-out for a promotion.[148] The arbitrator applied Title VII's three-step process and found no direct evidence of discrimination.[149] Although the grievant made a prima facie case, the employer articulated a legitimate nondiscriminatory reason

139. *Id.*
140. *In re S.F. Unified Sch. Dist.*, 87 Lab. Arb. at 752.
141. *Id.*
142. *Id.*
143. *Id.* at 754.
144. *Id.* at 753.
145. *Id.* at 754.
146. *In re S.F. Unified Sch. Dist.*, 87 Lab. Arb. at 754.
147. *In re City of Grand Rapids and AFSCME, Loc. 1061*, 86 Lab. Arb. 819 (1986).
148. *Id.* at 820.
149. *Id.* at 826.

for denying the grievant a promotion because the grievant acknowledged that she made mistakes on the job.[150] Therefore, the burden shifted back to the grievant to prove the employer's stated reasons were merely a pretext. On the issue of pretext, the grievant presented evidence of one supervisor's sexist comments, evidence that a male employee was not rigorously scrutinized, and evidence that the employer failed to promptly provide the grievant with an explanation of her mistakes.[151]

The arbitrator concluded that the grievant's evidence created suspicion, but was insufficient to establish pretext, and therefore discrimination, under Title VII.[152] However, the arbitrator also concluded that the grievant's proof was sufficient to establish that the employer violated a contractual provision promising equal employment opportunities.[153] Since one of the grievant's evaluators made sexist comments, and the employer learned of this when the grievance was filed, the arbitrator ruled that the employer had a responsibility to investigate the comments before finalizing its decision that the grievant failed her probation.[154] The arbitrator concluded that the employer violated the contract "because it did not take any reasonable steps to insure that the decision to fail the grievant on probation was not 'tainted' by discrimination."[155]

The additional three cases further confirm the importance of working around the law and giving more weight to circumstantial proof. In these three cases in which arbitrators found sex discrimination, they relied heavily on evidence that the employers were relying on negative stereotypes of women when awarding opportunities. For example, in *National Weather Service*, the arbitrator ruled that a generalized assumption that pregnant employees could not do a particular job constituted disparate treatment.[156] In *Grievance of Jean Lowell*, the arbitrator found that the employer committed sex-stereotyping by "questioning the ability of

150. *Id.*

151. *Id.*

152. *Id.*

153. *In re City of Grand Rapids*, 86 Lab. Arb. at 826. The employment contract provides: "Management and the Union acknowledge their continuing responsibility to carry on equal employment practices whereby all employees will be given equal opportunity to be employed in positions which provide the greatest opportunity for use of their abilities." *Id.*

154. *Id.* The arbitrator interpreted the contract clause as requiring the employer "to take reasonable steps to insure that employees on promotional probation are given a fair opportunity to succeed regardless of sex." *Id.*

155. *Id.* at 827.

156. *In re Natl. Weather Serv. and Natl. Weather Serv. Employees Org.*, 83 Lab. Arb. 689, 701 (1984).

female employees to independently engage in complex intellectual and investigative work."[157] The arbitrator ruled that the employer's failure to similarly question men's abilities proved that the employer's explanation was pretextual, and also proved discriminatory motivation.[158] And finally in *Intermountain Gas Co.*, the arbitrator found discriminatory intent because cleaning tasks were assigned to a female employee but not to similarly situated males.[159] The arbitrator found proof of discriminatory intent in a comment that the employee spent too much time with her family, and the employer's unpersuasive explanations for its decision.[160]

A. *Judicial Direction on Circumstantial Proof*

Two recent decisions show that the United States Supreme Court has been warming up to the notion that judges can read between the lines to find discrimination. In *Reeves v. Sanderson Plumbing Products, Inc.*,[161] the Court retreated from its tough stance in *Hicks* that proof of employer dishonesty is generally insufficient to prove intentional discrimination.[162] Instead of affirming its position in *Hicks* that liars may routinely benefit from the rules of evidence in civil litigation,[163] the Court emphasized that employer dishonesty about a material fact is affirmative evidence of guilt.[164] The Court held that when an employee eliminates all legitimate reasons offered by an employer, or proves them false, a court can assume that discrimination was the real reason for the adverse employment action.[165] The Court thereby gave an employee's circumstantial proof great probative value when attempting to prove intentional discrimination.

Similarly, in *Desert Palace, Inc. v. Costa*,[166] the Court deployed conventional rules of civil litigation to help conclude that a Title VII plaintiff can meet her burden of proof in a mixed-mo-

157. *Grievance of: Jean Lowell*, 1992 WL 726291 at *15 (Vt. Lab. Rel. Bd. Aug. 20, 1992).

158. *Id.* at *16.

159. *Arb. between Intermountain Gas Co. and United Assoc. of Journeymen & Apprentices of the Plumbing & Pipefitting Ind.*, 1996 WL 785388 at *11 (Am. Arb. Assoc. Aug. 29, 1996).

160. *Id.* at **11–12.

161. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147–49 (2000).

162. *Id.*

163. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 524 (1993).

164. *Reeves*, 530 U.S. at 147.

165. *Id.*

166. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

tive case by relying solely on circumstantial evidence.[167] In *Costa*, the plaintiff offered proof that

> (1) she was singled out for "intense stalking" by one of her supervisors, (2) she received harsher discipline than men for the same conduct, (3) she was treated less favorably than men in the assignment of overtime, and (4) supervisors repeatedly "stacked" her disciplinary record and "frequently used or tolerated" sex-based slurs against her.[168]

The Court rejected the employer's contention that the Court's *Price Waterhouse* decision required plaintiffs to prove mixed-motives by direct evidence.[169] Without addressing the *Price Waterhouse* holding, the Court determined that nothing in the Civil Rights Act of 1991 commanded such a result.[170] The 1991 Act provides that a plaintiff must demonstrate that his or her employer considered and relied on an illegitimate factor, but does not impose a special evidentiary obligation on employee plaintiffs.[171] Since the statute is silent as to what evidence is required, the Court held that judges should default to conventional rules of civil litigation, which treat direct and circumstantial proof equally. The Court held that giving circumstantial evidence equal weight is a "clear and deep-rooted" tradition in both civil and criminal litigation.[172]

The Court's more positive outlook on circumstantial proof is an encouraging sign, even though the employee still shoulders the responsibility of proving the employer's intent. In addition, lower courts are also recognizing that discrimination can be found even without direct evidence in the record.[173] In the area of employment discrimination, arbitrators can satisfy the requirements of the law and still render fair awards, but only if circumstantial proof is given great weight. Arbitrators must now catch up with the law that permits them to do this.

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167. *Id.* at 99.

168. *Id.* at 96.

169. *Id.* at 93–94.

170. *Id.* at 98–99.

171. *Id.* at 100–01.

172. *Costa*, 539 U.S. at 100–01.

173. *E.g. Davis v. Wis. Dept. of Corrects.*, 445 F.3d 971, 976 (7th Cir. 2006) (holding there was sufficient proof of intentional discrimination even though the record contained no direct evidence and was controverted).

V. Conclusion

The right of employers to demand private arbitration as the mechanism to resolve their discrimination disputes is solidly in place. Increasingly, judicial involvement will be limited to enforcing private contractual terms, even when those terms do not mimic statutory mandates. To the extent that waiver agreements impose Title VII's proof requirements, or are interpreted to incorporate them, employees face the same proof hurdles they would otherwise encounter in court. The recent Supreme Court shift towards increasing the weight of circumstantial evidence holds great promise for discrimination victims arbitrating their cases. However, arbitrators must embrace the reality that proving discrimination, which is often complex and subtle, will require increasing reliance on circumstantial evidence.