EMPLOYMENT LAW—AGE DISCRIMINATION—JUDICIAL RESOLUTION OF CLAIMS ARISING UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT IS NOT PRECLUDED BY A PROSPECTIVE AGREEMENT TO ARBITRATE—*Nicholson v. CPC International*, 877 F.2d 221 (3d Cir. 1989)

Court efforts to compel arbitration of claims arising under federal statutes have essentially focused on resolving the inherent conflicts between judicial acceptance and approval of arbitration, and the legal protection of federal statutory rights.[1] Traditionally, the judiciary rejected enforcement of arbitration agreements on the grounds that arbitration "oust[ed] the jurisdiction" of the courts.[2] In response to such uncompromising sentiment, Congress enacted the Federal Arbitration Act of 1925 (FAA).[3] Subsequent to the passage of the FAA, court decisions have affirmed arbitration as an effective alternative for dispute

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1 *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985); McDonald v. City of West Branch, 466 U.S. 284 (1984); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

2 Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 984 (2d Cir. 1942) (citing Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874)). The early judicial hostility toward arbitration in this country was largely derived from English common law. *Id.* The English courts, as early as the 17th century, did virtually nothing to enforce the executory arbitration agreement. *Id.* at 982. Lord Coke, in 1609, espoused the inherent revocability of an arbitrator's authority within the dictum of Vynior's Case, 8 Co. Rep. 81b (1609), 77 Eng. Rep. 597, 597-601 (K.B. 1907). This dictum had a lasting effect on the English courts' views toward arbitration agreements. *Kulukundis*, 126 F.2d at 982. By the mid-18th century, English courts had adopted the "ouster of jurisdiction" doctrine to rationalize their refusal to enforce such agreements. *Id.* at 983. *See also* Kill v. Hollister, 1 Wils. 129 (1746), 24 Eng. Rep. 532 (1909).

3 9 U.S.C. § 1-15 (1988). The House Report accompanying the Act provides in part:

> The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it. The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.

Kulukundis, 126 F.2d at 985 (quoting H.R. REP. No. 96, 68th Cong., 1st Sess., 1-2 (1924)).

resolution.[4] In recent years, however, the widespread acceptance of arbitration has been accompanied by the observation that arbitration is inappropriate for resolving certain types of disputes.[5] In *Nicholson v. CPC International*,[6] the United States Court of Appeals for the Third Circuit addressed the validity of a prospective agreement to arbitrate claims arising under the Age Discrimination in Employment Act (ADEA).[7]

In 1957, CPC International (CPC) hired James Nicholson as an attorney.[8] He was subsequently promoted to Vice President of Corporate Financial Services in 1981.[9] In January of 1986, CPC presented Nicholson with an executive employment agreement, which he signed.[10] The agreement contained a provision stipulating that any future disputes arising out of the agreement would be settled by arbitration.[11]

Approximately one year later, Nicholson was notified that his position was to be terminated.[12] He consequently filed charges with the Equal Employment Opportunity Commission (EEOC) based on age discrimination.[13] He thereafter brought

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[4] *See, e.g.*, Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983). The Supreme Court in *Moses* set forth the basic rule that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ." *Id.* at 24-25.

[5] Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 482 (1981). *See also* Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728 (1981) (rights under the FLSA best protected in judicial forum); Alexander v. Gardner-Denver Co., 415 U.S. 36, 56 (1974) (arbitration not appropriate for final resolution of Title VII claims).

[6] 877 F.2d 221 (3d Cir. 1989).

[7] *Id.* at 222 (citing 29 U.S.C. § 621-34 (1985 & Supp. V 1988)).

[8] *Id.*

[9] *Id.*

[10] *Id.* The agreement delineated, *inter alia*, job title, compensation, benefits, and termination procedures. *Id.* at 222-23. It was presented to approximately 30 corporate officers. *Id.* at 222.

[11] *Id.* at 223. The clause provided:

> Any dispute or controversy arising under or in connection with this Agreement shall be settled exclusively by arbitration, conducted before a panel of three arbitrators in New York City in accordance with the rules of the American Arbitration Association then in effect. Judgment may be entered on the arbitrators' award in any court having jurisdiction. The expense of such arbitration shall be borne by the Company.

Id.

[12] *Id.* CPC claimed that Nicholson's termination was due to the elimination of his job position through a corporate restructuring program. *Id.*

[13] *Id.* Upon Nicholson's request, the EEOC administratively terminated the original charge, thereby enabling him to file suit in New Jersey Superior Court. *Id.*

suit in New Jersey Superior Court against CPC and its president, alleging violations of the ADEA and state anti-discrimination law, as well as common law breach of contract.[14] CPC subsequently removed the case to federal court, seeking an order to compel arbitration of Nicholson's claims, pursuant to the arbitration provision of the employment agreement.[15]

The district court denied CPC's motion with regard to the ADEA claim, but ruled that Nicholson's state law claims were arbitrable.[16] In denying the motion, the court declared that the text and legislative history of the ADEA demonstrate Congress' intent to render ADEA claims nonarbitrable.[17] Upon CPC's request, the district court certified for interlocutory appeal the portion of its order denying the motion to compel arbitration of the ADEA claim.[18] The United States Court of Appeals for the Third Circuit then granted CPC's petition for leave to appeal.[19] In addition, the court granted the EEOC's motion to intervene on behalf of Nicholson.[20]

The Age Discrimination in Employment Act was enacted in 1967, in response to overwhelming evidence and concern that employers were discriminating against workers based on age.[21]

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14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.* The district court relied in part on its previous decision in Steck v. Smith Barney, Harris Upham & Co., 661 F. Supp. 543 (D.N.J. 1987). The court further stressed that its opinion would not be altered by the Supreme Court's decision in Shearson/American Express v. McMahon, 482 U.S. 220 (1987). *Nicholson*, 877 F.2d at 223.

18 *Nicholson*, 877 F.2d at 223. In certifying the order pursuant to 28 U.S.C. § 1292(b) (1988), the district court determined that "the arbitrability of an action under the ADEA is a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.*

19 *Id.* The court of appeals denied Nicholson's request to extend its review to that part of the district court's interlocutory order finding the state law claims subject to arbitration. *Id.* at 231. The Third Circuit held that because the analysis required to consider the arbitrability of the state law claims is different from that of the ADEA claim, concurrent review would be inappropriate. *Id. See* Sperling v. Hoffman-La Roche Inc., 862 F.2d 439, 443-44 (3d Cir. 1988) (concurrent review inappropriate where certified and noncertified portions of order not closely related).

20 *Nicholson*, 877 F.2d at 223.

21 *Employment Problems of Older Workers: Hearings on H.R. 10634 and Similar Bills Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 89th Cong., 1st Sess. 201, 225-26 (1966). The Secretary of Labor's report depicted employment discrimination against older workers as "persistent and widespread" and determined that the problem needed to be eradicated by legislation. *Id. See also* Note, *Waivers Under the Age Discrimination in Employment Act: Putting the Fair Labor*

The ADEA prohibits various age-based discriminatory employment practices by employers, employment agencies, and labor organizations.[22] The enforcement scheme of the statute was the subject of extensive congressional debate.[23] The statute, as ultimately enacted, embodies enforcement procedures similar to those of the Fair Labor Standards Act (FLSA).[24] The text of the ADEA expressly states that enforcement is to be made in accordance with the "powers, remedies, and procedures" provided in the FLSA.[25] Specifically, the Act authorizes

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Standards Act Criteria to Rest, 55 GEO. WASH. L. REV. 382, 384 n.18 (1987) (legislation necessary to combat "persistent and widespread" discrimination against older workers). The enactment of the legislation was also strongly supported by President Lyndon B. Johnson, who stated in his Older American message of January 23, 1967, that "[h]undreds of thousands, not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination." H.R. REP. No. 805, 90th Cong., 1st Sess. 2, *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 2213, 2214 [hereinafter *House Report No. 805*].

The stated purposes of the Act are "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (1982).

22 The ADEA provides:

> It shall be unlawful for an employer—
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> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
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> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
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> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a) (1982). In addition, the Act prohibits such behavior by employment agencies and labor organizations. *Id.* at § 623(b)-(c). Furthermore, an employer, employment agency, or labor organization is prohibited from discriminating against an employee for opposing any actions made unlawful by the Act, or asserting a claim or joining in an action under the ADEA. *Id.* at § 623(d).

23 *See* Lorillard v. Pons, 434 U.S. 575, 577-78 (1978). Several proposed bills were considered by Congress which suggested enforcement schemes similar to those found in the National Labor Relations Act (NLRA), 29 U.S.C. § 160(c) (1982); the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1977); and Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e-4, 2000e-5 (1982). *Lorillard*, 434 U.S. at 578.

24 *Lorillard*, 434 U.S. at 578.

25 29 U.S.C. § 626(b) (1982) provides:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section

the EEOC[26] to investigate ADEA claims, and if necessary, institute court action to enforce its provisions.[27] If the EEOC brings suit, the right of the aggrieved employee to commence a private action is terminated.[28]

The provisions and legislative history of the ADEA do not address the issue of whether prospective agreements to arbitrate claims arising under it are enforceable.[29] In the absence of explicit congressional guidance regarding this subject, resolution of the issue must emanate from an analysis of judicial precedent regarding the arbitrability of claims under analogous statutes.[30]

The United States Supreme Court's early view toward the arbitrability of federal statutory claims was exemplified by the 1953 decision of *Wilko v. Swan*.[31] In *Wilko*, the Court determined that a predispute agreement to arbitrate controversies arising

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623 of this title shall be deemed to be a prohibited act under section 215 of this title.

Id. See also 113 CONG. REC. 31254 (1967) (remarks of Sen. Javits). In interpreting the enforcement scheme eventually adopted in the ADEA, Senator Javits stated, "[t]he enforcement techniques provided by [the ADEA] are directly analogous to those available under the Fair Labor Standards Act; in fact [the ADEA] incorporates by reference, to the greatest extent possible, the provisions of the Fair Labor Standards Act." *Id.*

26 It should be noted that enforcement of the ADEA was initially vested in the Department of Labor. Administration and enforcement, however, was transferred to the EEOC effective July 1, 1979, pursuant to § 2 of the Reorgan. Plan No. 1 of 1978, 3 C.F.R. 321 (1978).

27 29 U.S.C. § 626(b) (1982). The EEOC must first attempt to effect voluntary compliance with the Act through "informal methods of conciliation, conference, and persuasion." *Id.* If these efforts fail, the EEOC may then commence a court action to enforce the rights of the aggrieved employee. *Id.* In 1978, Congress amended the Act to toll the statute of limitations for filing suit for up to one year pending completion of efforts to effect voluntary compliance. *Id.* at § 626(e)(2). The Senate Committee on Human Resources stated that the purpose of the recommended amendment was to ensure that "[t]he claim of discrimination . . . be decided on the merits through litigation in the event the conciliation process fails," and "to prevent those who have violated the Act from delaying and postponing conciliation and thereby possibly avoiding liability." S. REP. No. 493, 95th Cong., 1st Sess. 13 (1977).

28 29 U.S.C. § 626(c)(1) (1982). If the EEOC fails to bring suit, the aggrieved individual may then personally seek "such legal or equitable relief as will effectuate the purposes of [the Act]." *Id.*

29 Nicholson v. CPC Int'l, 877 F.2d 221, 225 (3d Cir. 1989).

30 *See id.*

31 346 U.S. 427 (1953). It should be noted that the *Wilko* decision was subsequently overruled by the Supreme Court in Rodriquez De Quijas v. Shearson/American Express, 109 S. Ct. 1917 (1989). The *Rodriquez* Court opined that the *Wilko* decision was inconsistent with the current uniform construction of other congressional statutes controlling arbitration agreements in the business transactions arena. 109 S. Ct. at 1919-20.

under section 12(2) of the Securities Act of 1933[32] could not be enforced to compel arbitration of these claims.[33] The majority's conclusion in *Wilko* was substantially based on the belief that a judicial forum was needed to protect the substantive rights created by the Securities Act.[34] In the Court's view, effective application of the Act's provisions would be best achieved through judicial, not arbitral, proceedings.[35] Specifically, the *Wilko* majority expressed concern that arbitrators were compelled to arrive at legal conclusions absent any judicial guidance on the law, and that arbitrators may issue awards without explaining their reasons or providing a thorough account of the arbitration proceedings.[36] Additionally, the Court observed that the judiciary is limited in its power to vacate an arbitration award.[37]

Two decades later, in *Alexander v. Gardner-Denver Co.*,[38] the Supreme Court was forced to confront its previous resistance to arbitration in the context of claims arising under Title VII of the Civil Rights Act of 1964.[39] The *Alexander* Court considered

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32 15 U.S.C. § 77a (1952).

33 *See Wilko*, 346 U.S. at 438. The Court specifically held the agreement void under section 14 of the Securities Act, as a stipulation "binding any person acquiring any security to waive compliance with any provision." *Id.* at 430 (quoting 15 U.S.C. § 77n (1952)).

34 *Id.* at 437-38.

35 *Id.* at 435.

36 *Id.* at 436. The Court specifically expressed concern over the fact that courts are not given the opportunity to examine the arbitrators' interpretation of such statutory requirements as "material fact," "burden of proof," or "reasonable care." *Id.* In addition, the court observed that the FAA does not provide for judicial review of legal issues. *Id.* at 437.

37 *Id.* at 436. The power of the courts to vacate an arbitration award is limited to the following circumstances:

> (a) Where the award was procured by corruption, fraud, or undue means.
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> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
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> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
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> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
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> (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Id. at 436 n.22 (quoting 9 U.S.C. § 10 (1952)).

38 415 U.S. 36 (1974).

39 *Id.* Title VII provides:

whether an employee's statutory right to a judicial forum under Title VII was precluded by prior submission of his claim to arbitration.[40] The majority unanimously held that an employee's right to adjudicate Title VII claims was not subject to prospective waiver.[41] The Court noted that the objectives and procedures of Title VII illustrate Congress' intent to place final responsibility for enforcement of these rights in the federal courts.[42] The Court further observed that the statutory scheme of Title VII does not suggest that an individual's right to sue is foreclosed by prior submission of a claim to arbitration.[43] Rather, the Court recognized that this legislation manifests a palpable intent to sanction parallel or overlapping remedies aimed at abolishing

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> [i]t shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1970 & Supp. IV 1974). The Act similarly proscribes such discriminatory practices by employment agencies and labor organizations. *Id.* at § 2000e-2(b)-(c).

[40] *Alexander*, 415 U.S. at 38. The employee in *Alexander* submitted to arbitration a claim of discharge without cause based on racial discrimination. *Id.* at 42. The claim was submitted to arbitration in accordance with a broad arbitration provision contained within the collective bargaining agreement. *Id.* at 39-40. The arbitrator denied the claim and the employee then filed suit in district court, alleging racial discrimination in violation of Title VII. *Id.* at 42-43. The district court ruled, and the United States Court of Appeals for the Tenth Circuit affirmed, that the employee "was bound by the prior arbitral decision and thereby precluded from suing his employer under Title VII." *Id.* at 43.

It should be noted that prior to the arbitration hearing, the petitioner also filed a charge of racial discrimination with the EEOC, which determined that "there was not reasonable cause to believe that a violation of Title VII of the Civil Rights Act of 1964 had occurred." *Id.* at 42-43 (citation omitted). The Commission then notified petitioner of his right to sue in federal court. *Id.* at 43.

[41] *Id.* at 51. In reversing both lower courts, the Court specifically found that the "strictures" of Title VII manifest a congressional command that employees be free from discriminatory practices, and that waiver of rights under Title VII would frustrate this purpose. *Id.*

[42] *Id.* at 56. Specifically, the Court observed that "[t]he Act authorizes courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effects of unlawful employment practices." *Id.* at 44 (citing 42 U.S.C. § 2000e-5(f)-(g) (1970 & Supp. IV 1974) (commission or aggrieved employee may file civil action and Court may issue injunctive relief)). The Court found that "[t]aken together, these provisions make plain that federal courts have been assigned plenary powers to secure compliance with Title VII." *Id.* at 45.

[43] *Id.* at 47.

age discrimination in the work place.[44] The *Alexander* majority concluded that while arbitration may be appropriate for the reconciliation of contractual disputes, it would not be well suited for final resolution of Title VII rights.[45]

The Supreme Court next addressed the issue of waiver of the right to a judicial forum for claims arising under the FLSA.[46] In *Barrentine v. Arkansas Best-Freight System*,[47] the Court was faced with the issue of whether prior arbitration of an FLSA claim precluded an employee from judicial redress.[48] Justice Brennan, writing for the majority, relied on the reasoning of the *Alexander* decision and concluded that the FLSA claim was not barred from judicial consideration.[49] The Justice specifically stated that, notwithstanding the national policy favoring arbitration, not all employment disputes are properly resolved in the arbitral tribunal.[50] The majority reasoned that where the employee's claim is

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[44] *Id.* The Court observed that Title VII lists several forums for consideration of employment discrimination claims: the EEOC, state and local agencies, and the federal courts. *Id.* at 47. *See* 42 U.S.C. § 2000e-5(b),(c),(f) (1970 & Supp. IV 1974). The Court further noted that "submission of a claim to one forum does not preclude a later submission to another." *Alexander*, 415 U.S. at 47-48. Rather, "consideration of the claim by [several] forums may promote the policies underlying each." *Id.* at 50-51. *See also* Note, *To Arbitrate or Not to Arbitrate? The Protection of Rights Under the Age Discrimination in Employment Act*, 1988 J. DISPUTE RESOLUTION 199, 209-10 (submission of claim to more than one forum intended to supplement policies of Act).

[45] *Alexander*, 415 U.S. at 56-58. The Court based much of its conclusion on its prior findings in *Wilko v. Swan*. *Id.* at 58. For a discussion of *Wilko*, see *supra*, notes 31-37 and accompanying text. In addition, the Court focused on the "special role of the arbitrator, whose task it is to effectuate the intent of the parties rather than the requirements of enacted legislation." *Alexander*, 415 U.S. at 56-57. The Court further pointed to the arbitrator's lack of authority to apply public laws that conflict with the agreement between the parties. *Id.* at 53. Other factors considered by the court included: the inadequacy of the arbitral factfinding process; the limited application of the usual rules of evidence, and; the frequent absence of the "rights and procedures common to civil trials," such as discovery, rules of evidence, cross-examination, and testimony under oath. *Id.* at 57-58.

[46] Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728 (1981) (interpreting § 6(a) of the FLSA, 29 U.S.C. § 201(a) (1976 & Supp. IV 1980), in the context of employee's wage claim).

[47] *Id.*

[48] *Id.* at 729-30. Prior to commencing the court action, the petitioners had unsuccessfully submitted the claim to arbitration pursuant to an arbitration provision within the collective-bargaining agreement. *Id.* at 730-31. The district court refused to address the petitioners' FLSA claims and the court of appeals affirmed the decision, finding that petitioners were precluded from asserting their statutory wage claims in federal court, having voluntarily submitted the grievance to arbitration. *Id.* at 733-34.

[49] *Id.* at 737-38, 744-46.

[50] *Id.* at 737.

based on statutory rights intended to provide "minimum substantive guarantees" to individual employees, arbitration provides an inadequate forum.[51] Recognizing that the FLSA's enforcement scheme affords employees broad access to a judicial forum, the majority asserted that rights under the FLSA cannot be diminished by contract or otherwise relinquished, because this would annul the objectives of the Act.[52] The Court cited to *Alexander* for the proposition that because the arbitrator lacks the authority to evoke common law in executing the private agreement of the parties, FLSA rights are best protected in a judicial rather than an arbitral forum.[53] Finally, the Court emphasized the arbitrator's lack of authority to grant the aggrieved employee the broad range of relief offered by judicial proceedings.[54]

In *McDonald v. City of West Branch*,[55] the Supreme Court applied the reasonings of *Alexander* and *Barrentine* in the context of claims arising under section 1983 of the Civil Rights Acts of 1964.[56] In *McDonald*, the petitioner unsuccessfully submitted to arbitration a claim alleging discharge without cause.[57] Attempts by the petitioner for federal court reversal of the arbitration decision were rejected on the grounds that the prior arbitrable proceedings precluded subsequent adjudication of the claim.[58] Rejecting the reasoning of the lower courts, the Supreme Court held that to accord an arbitrator's award preclusive effect in a

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51 *Id.*

52 *Id.* at 740. Section 216(b) of the Act "permits an aggrieved employee to bring his statutory wage and hour claim 'in any Federal or State court of competent jurisdiction.' " *Id.* (quoting 29 U.S.C. § 216(b) (1976 & Supp. IV 1980)).

53 *Id.* at 744 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974)). Specifically, the *Barrentine* Court noted that "arbitrators may not be conversant with the public law considerations underlying the FLSA," as these claims "typically involve complex mixed questions of fact and law." *Id.* at 743.

54 *Id.* at 744-45. The FLSA provides courts with the options of awarding liquidated and actual damages, reasonable costs, and attorney's fees. 29 U.S.C. § 216(b) (1976 & Supp. IV 1980). By contrast, an arbitrator merely grants relief as specifically provided by the bargaining agreement. *Barrentine*, 450 U.S. at 745. The *Barrentine* majority posited that "it is most unlikely that [the arbitrator] will be authorized to award liquidated damages, costs, or attorney's fees." *Id.*

55 466 U.S. 284 (1984).

56 *Id.* at 288-89.

57 *Id.* at 285-86. Petitioner contended that he was discharged for "exercising his First Amendment rights of freedom of speech, freedom of association, and freedom to petition the government for redress of grievances." *Id.* at 286.

58 *Id.* The district court returned a jury verdict in favor of all but one of the defendants. The United States Court of Appeals for the Sixth Circuit then ruled in favor of all of the defendants, reasoning that the doctrines of collateral estoppel and res judicata barred McDonald from subsequently adjudicating his claim. *Id.* at 286-87.

subsequent section 1983 action would refute the statute's efficacy in safeguarding federal rights.[59] The *McDonald* Court concluded that while arbitration is proper for the resolution of contractual disputes, it cannot provide an adequate forum for claims based on federal statutory rights.[60]

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth[61] signaled an important shift in the Supreme Court's evaluation of the arbitrability of federal statutory claims.[62] In *Mitsubishi*, the Court was faced with the issue of whether a statutory claim arising under the Sherman Act[63] was subject to compulsory arbitration pursuant to an arbitration agreement.[64] The Court announced a federal policy favoring arbitration, and promulgated a two-part test for determining whether federal statutory claims could be compelled to undergo arbitration.[65] The Court determined that an initial inquiry must be made as to whether the parties agreed upon arbitration of the dispute.[66] Further, the Court posited that the federal statute in question must be examined to determine whether Congress has evinced an intent to preclude waiver of the right to a judicial forum.[67] The majority found that the agreement to arbitrate claims arising under the Sherman Act was enforceable in accordance with the policy provisions of the FAA.[68] In so holding, the Court rejected the petitioner's contention that,

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59 *Id.* at 292. Specifically, the Court found the doctrines of collateral estoppel and res judicata inapplicable in § 1983 actions. *Id.* at 289.

60 *Id.* at 290. The Court referred to its prior considerations in *Alexander* and *Barrentine* in support of its conclusion. *Id.*

61 473 U.S. 614 (1985).

62 *See id.*

63 15 U.S.C. § 1 (1982 & Supp. III 1985).

64 *Mitsubishi*, 473 U.S. at 616.

65 *Id.* at 626-28.

66 *Id.* at 626. The Court observed that this determination should be made in light of the principles espoused in Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983). The Court in *Moses* counseled:

> [Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Id. at 24-25.

67 *Mitsubishi*, 473 U.S. at 628. The Court further declared: "[I]f Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history." *Id.*

68 *Id.* at 625-26 (quoting *Moses*, 460 U.S. at 24-25).

because the arbitration clause made no express mention of the statute in question, the clause could not be properly read to anticipate arbitration of these statutory claims.[69] The majority noted that while not all disputes involving federal statutory rights are appropriate for arbitration,[70] the FAA manifests a liberal policy favoring arbitration which should not be abandoned when the claim is based upon a federal statutory right.[71]

The United States District Court for the District of New Jersey, in *Steck v. Smith Barney, Harris Upham & Co.*,[72] encountered its first opportunity to apply the *Mitsubishi* test to claims arising under the ADEA.[73] In *Steck*, the petitioner commenced suit against his former employer, alleging wrongful termination in violation of the ADEA.[74] Smith Barney sought to compel arbitration pursuant to the FAA.[75] The district court denied Smith Barney's motion, despite Judge Sarokin's finding that the ADEA claim was within the scope of the employment contract's arbitration provision.[76] In an effort to resolve the remaining issue of

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69 *Id.* at 624-25. Petitioner Soler's position would require that the parties expressly agree to arbitrate the specific claims in question, and that the agreement expressly mention the relevant statute(s). *Id.*

70 *Id.* at 627.

71 *Id.* at 625-26. Referring to its recent holding in Dean Witter Reynolds v. Byrd, 470 U.S. 213 (1985), the Court observed that, " '[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that we rigorously enforce agreements to arbitrate.' " *Mitsubishi*, 473 U.S. at 625-26 (quoting *Dean Witter*, 470 U.S. at 221). Moreover, the Court declared, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Id.* at 626-27. The Court reasserted its earlier position enunciated in Wilko v. Swan where it "expressed 'hope for [the Act's] usefulness both in controversies based on statutes or on standards otherwise created.' " *Id.* at 626 (quoting Wilko v. Swan, 346 U.S. 427, 432 (1953)).

72 661 F. Supp. 543 (D.N.J. 1987).

73 *See id.*

74 *Id.* at 544. The complaint, in addition to alleging violations of the ADEA, claimed infractions of the New Jersey Law Against Discrimination, N.J. STAT. ANN. § 10:5-1 (West 1976), as well as New Jersey public policy. *Steck*, 661 F. Supp. at 544.

75 *Steck*, 661 F. Supp. at 544. Section 2 of the FAA provides in part that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1986). In addition, Smith Barney moved to compel arbitration of plaintiff's related state claims. *Steck*, 661 F. Supp. at 544.

76 *Steck*, 661 F. Supp. at 545. The agreement between the parties expressly mandated arbitration of any controversy precipitated by an employee's termination. *Id.* The court noted that the broad language of the agreement did not distinguish be-

whether Congress intended to prevent a waiver of a judicial forum for ADEA claims, the court reviewed the text and legislative history of the ADEA and statutes upon which it was modeled.[77] The majority relied most heavily on the *Barrentine* decision, recognizing that Congress clearly intended enforcement of the ADEA to conform with the enforcement scheme of the FLSA.[78] Based on this observation, the court deduced that the text and legislative history of the Act evince a congressional intent to proscribe a waiver of judicial remedies.[79] The *Steck* court then extended its holding to implicitly render nonarbitrable all claims arising under the ADEA.[80]

Within days after the *Steck* decision, the Supreme Court, in *Shearson/American Express v. McMahon*,[81] reaffirmed the principles espoused four years earlier by the *Mitsubishi* Court.[82] The Court endorsed the desirability of arbitration, and placed a duty upon the courts to enforce agreements to arbitrate.[83] In *Shearson*, the Court determined that claims arising under the Securities Exchange Act of 1934 (Exchange Act),[84] and the Racketeer Influenced and Corrupt Organizations Act (RICO),[85] were arbitrable

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tween the arbitrability of wrongful termination claims based on contractual rights, and those based on statutory rights. *Id.*

77 *Id.* at 545-46. Specifically, the court relied on the Supreme Court's prior decisions in McDonald v. West Branch, 466 U.S. 284, 293 (1984) (civil rights claims under § 1983 are inappropriate for arbitration); Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 740 (1981) (claims under FLSA should not be deferred to arbitration); Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) (Title VII rights not susceptible to prospective waiver). *Id.* at 546. *See also* Horne v. New England Patriots Football Club, 489 F. Supp. 465, 470 (D. Mass. 1980) (prospective waiver of statutory claims with respect to the ADEA are nonwaivable by any employee).

78 *Steck*, 661 F. Supp. at 546.

79 *Id.*

80 *Id.* at 547. The court again relied on *Barrentine* for this holding inasmuch as the *Barrentine* Court ruled that claims arising under the FLSA would be inappropriate for arbitration. The *Steck* court further relied on the Third Circuit's decision of Zipf v. American Tel. and Tel. Co., 799 F.2d 889 (3d Cir. 1986) (ERISA claims nonarbitrable based on Congress' intent to have claims resolved judicially "for the purpose of providing a consistent source of law to help . . . predict the legality of proposed actions"). *Steck*, 661 F. Supp. at 547. The court in *Steck* maintained that Congress had similar intentions in enacting the ADEA; such concerns thus required the "development of a consistent body of judicial precedent to guide employer actions." *Id.*

81 482 U.S. 220 (1987).

82 *See id.*

83 *Id.* at 226. The Court noted, however, that this duty "may be overridden by a contrary congressional command." *Id.*

84 15 U.S.C. § 78a (1982).

85 18 U.S.C. § 1961 (1982).

under a predispute agreement to arbitrate.[86] In so holding, the Court recognized a strong presumption of arbitrability that may be overcome only by a contrary congressional command.[87] The majority further maintained that the duty of the courts to enforce arbitration agreements is not diminished when a claim is founded upon statutory rights.[88] In arriving at its decision, the Court departed from its earlier decision in *Wilko v. Swan.*[89] Dismissing the import of *Wilko*, the *Shearson* Court stressed that the general mistrust of arbitration, as espoused by the *Wilko* Court, is outmoded and ill-conceived in light of the Court's subsequent decisions.[90]

From the foregoing foundation of judicial precedent emanated the Third Circuit Court of Appeals' decision in *Nicholson v. CPC International.*[91] In *Nicholson*, the court relied upon the *Mitsubishi* analysis to evaluate CPC's contention that an employee may prospectively waive the right to a judicial forum for claims arising under the ADEA.[92] In attempting to discern whether Congress intended to prevent a relinquishment of judicial remedies for resolution of ADEA claims, the court first examined the text and legislative history of the Act.[93] Judge Sloviter, writing for the ma-

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86 *Shearson*, 482 U.S. at 238-42.

87 *Id.* at 226. The Court additionally articulated that arbitration may be denied upon a showing that the agreement to arbitrate resulted from fraud or duress, which would precipitate the revocation of any contract. *Id.* The FAA likewise recognizes the fraud exception by providing that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1988).

88 *Shearson*, 482 U.S. at 226. The Court posited: " 'we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals' should inhibit enforcement of the Act" in disputes based on statutes. *Id.* (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 627 (1985)).

89 *Id.* at 229-33. The Court interpreted the *Wilko* decision as precluding waiver of a judicial forum only where arbitration is insufficient to protect the substantive rights in question. *Id.* at 229. The *Shearson* Court, however, rejected the contention that rights under the Exchange Act would not adequately be protected by the arbitration process. *Id.* at 229-33 (discussing Scherck v. Alberto-Culver Co., 417 U.S. 506 (1974)).

90 *Id.* at 231-32. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985); Dean Witter Reynolds v. Byrd, 470 U.S. 213 (1985); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

91 877 F.2d 221 (3d Cir. 1989).

92 *See id.* at 224. The majority refused to interpret the Supreme Court's decisions in *Mitsubishi* and *Shearson*, as overruling its earlier holdings in *Alexander*, *Barrentine*, and *McDonald*. *Id.* Rather, the *Nicholson* court cited *Mitsubishi* for the proposition that "not all controversies implicating statutory rights are suitable for arbitration." *Id.* (quoting *Mitsubishi*, 473 U.S. at 627).

93 *Id.* at 224-26. The court recognized that absent express language in the text or legislative history addressing the arbitrability of ADEA claims, inferences must

jority, recognized that the requirement that the ADEA be administered in accordance with the enforcement scheme of the FLSA was still viable and continued to regulate enforcement proceedings under the ADEA.[94] Thus, the majority advanced the Court's construction of the FLSA in *Barrentine* as determinative of an ADEA claimant's right of access to a judicial forum.[95] In addition, the *Nicholson* court perceived both the original statutory power of the EEOC to file an ADEA suit on behalf of an aggrieved employee, and the Act's 1978 amendment, tolling the statute of limitations, as indicative of Congress' intent to preserve an individual's right to court access.[96]

The majority next addressed the issue of whether the ADEA's objectives were inherently incompatible with the displacement of a judicial forum by arbitration of these claims.[97] The court began by observing that the congressional scheme of the ADEA mandates a broad range of EEOC investigatory and

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be drawn from Congress' actions in establishing a particular enforcement scheme. *Id.*

94 *Id.* at 225. The court pointed out that, "Congress made a deliberate policy choice in favor of enforcement of ADEA claims in court proceedings" when it chose to pattern enforcement of the ADEA on that of the FLSA, rather than the NLRA. *Id.* at 226. *See* H.R. REP. No. 805, 90th Cong., 1st Sess. 5-6, *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 2213, 2218. The NLRA would have provided for resolution of claims of age discrimination through administrative proceedings. *Nicholson*, 877 F.2d at 226 (citing 113 CONG. REC. 2795 (1967)).

95 *Nicholson*, 877 F.2d at 225. The court interpreted the "right of access" provision of 29 U.S.C. § 216(b) as equally applicable to ADEA actions. *Nicholson*, 877 F.2d at 225.

96 *Nicholson*, 877 F.2d at 226. The 1978 amendment to the Act provides, in pertinent part:

> For the period during which the [EEOC] is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation, conference, and persuasion pursuant to subsection (b) of this section, the statute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year.

29 U.S.C. § 626(e)(2) (1982).

The Senate committee recommending the amendment stated that the purpose of the 1978 amendment was to guarantee that "[t]he claim of discrimination . . . be decided on the merits through litigation in the event the conciliation process fails." SEN. REP. No. 493, 95th Cong., 1st Sess. 13 (1977). The committee further set forth that "[i]t is the intent of this amendment to prevent those who have violated the Act from delaying and postponing conciliation and thereby possibly avoiding liability." *Id.* From this, the majority determined that when extrajudicial methods of resolving age discrimination claims prove inadequate, final resolution of those claims in a judicial forum should not be inhibited. *Nicholson*, 877 F.2d at 226.

97 *Nicholson*, 877 F.2d at 227. The court recognized the need for review of the ADEA's purported objectives in light of the inconclusiveness of the text and legislative history regarding arbitration of the Act's claims. *Id.*

regulatory measures to ensure compliance with the Act's provisions.[98] On the basis of this observation, the majority contended that because arbitration does not require an individual to file a charge with the EEOC at any stage of the proceedings, the arbitral process enables an employer to bypass the scrutiny of an EEOC investigation.[99] In this respect, the court asserted that arbitration would thwart Congress' objective to eliminate discrimination in the work place.[100] Moreover, Judge Sloviter noted that the ADEA does not contain a provision granting the EEOC authority to affect arbitration proceedings.[101] The court indicated that absent such a provision, the EEOC does not have the opportunity to ensure the adequacy of the arbitration process.[102]

The *Nicholson* majority next determined that the inadequacy of arbitration, in effectively enforcing the provisions of the ADEA, further demonstrated the Act's incompatibility with the arbitration process.[103] The court emphasized that arbitrators do not have the power to grant broad equitable relief to an ag-

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98 *Id.* The court noted that the "EEOC's obligation to enforce the ADEA goes beyond its authority to investigate and redress a particular employee's complaint." *Id.* Specifically, the EEOC may "investigate and gather data, inspect establishments and records, interview employees, and impose recordkeeping and reporting requirements." *Id.* (citing 29 C.F.R. § 1626.15 (1988)). In addition, it is the EEOC's responsibility to issue "interpretive regulations" in order to guide employers. *Id.* (citing 29 U.S.C. § 628 (1982)). The agency must also "advise[] employers, employment agencies and labor organizations of their obligations under the Act and any necessary changes in their policies as employers." *Id.* (quoting 29 C.F.R. § 1626.15. (1980)). The EEOC is further obligated to report annually to Congress and propose recommendations for additional legislation. *Id.* (citing 29 U.S.C. § 632 (1982)).

99 *Id.* Under section 626(d) of the ADEA, the filing of a charge with the EEOC is a prerequisite to the commencement of a civil suit for alleged violations of the Act. *Id.* (citing 29 U.S.C. § 626(d) (1982)).

100 *Id.* at 227-28. The *Nicholson* majority opined that while aggrieved employees may still report a grievance to the EEOC, they are unlikely to do so if they are bound to arbitrate their claims and cannot ultimately proceed to a judicial forum. *Id.* at 227. Likewise, while the EEOC may continue to investigate claims, they are deprived of the charge as a triggering mechanism. *Id.*

101 *Id.* at 228. In this regard, the court contrasted the EEOC with the Securities Exchange Commission (SEC). *Id.* (discussing Shearson/American Express v. McMahon, 482 U.S. 220 (1987)). The court specifically observed that the SEC is given "expansive power to ensure the adequacy of the arbitration procedures employed." *Id.* (quoting *Shearson*, 482 U.S. at 233). This statutory distinction provided the *Nicholson* court with a basis for distinguishing the *Shearson* decision. *Id.*

102 *See id.* The ADEA does not grant the EEOC express authority to impose rules on arbitration associations by which they must consider age discrimination claims. *Id.* at 228 n.6. Additionally, the EEOC does not have the power to penalize the arbitration associations for noncompliance with the Act. *Id.*

103 *Id.* at 228.

grieved employee.[104] Judge Sloviter explained that because the power of arbitral boards does not extend beyond the specific grievance before them, arbitrators cannot effectuate the full purpose of the ADEA by prohibiting an employer from exercising future discriminatory practices.[105] As a final indication of Congress' intent to provide ADEA claimants with judicial redress, the court pointed to section 216(b) of the Act, which authorizes the maintenance of a collective action.[106]

The majority then rejected CPC's contention that because *Alexander*, *Barrentine*, and *McDonald* involved arbitration mandated by collective-bargaining agreements, those cases were distinguishable from the case at hand.[107] The court pointed out that the disparity in bargaining power which typifies a collective-bargaining agreement is likewise present when an individual employee negotiates a private arbitration agreement with an employer; thus, the ADEA's objectives are thwarted by arbitration in both instances.[108] The court also rejected CPC's assertion that most ADEA claimants are professional, managerial, upper-middle class employees who do not require protection from the ramifications of their well-informed, voluntary choices to sign employment agreements containing arbitration clauses.[109] Contrary to CPC's contention, the majority posited that many ADEA

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104 *Id.* The majority specifically noted that section 621(b) of the ADEA empowers the courts to issue injunctive relief in order to prevent future discriminatory acts by employers. *Id.*

105 *Id.* *See also* R. RODMAN, COMMERCIAL ARBITRATION 641 (1984) (American Arbitration Association rules maintain that remedies of arbitrator are restricted to scope of parties' agreement).

106 *Nicholson*, 877 F.2d at 228-29. Section 216(b) provides, in pertinent part:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

29 U.S.C. § 216(b) (1982).

107 *Nicholson*, 877 F.2d at 229. CPC maintained that in *Alexander*, the Supreme Court refused to hold labor unions responsible for protecting employees against racial discrimination because the unions may themselves have engaged in discriminatory practices. *See also* Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 742 (1981) (labor unions often pursue goals incompatible with those of individual employees).

108 *Nicholson*, 877 F.2d at 229. The court observed that "[o]lder employees who have invested many years of their career with a particular employer may lack any realistic option to refuse to sign a standard form arbitration agreement presented to them by their employers. New employees who need the job may be in a similar position." *Id.*

109 *Id.*

plaintiffs are not highly paid executives, and consequently no general rule should be fashioned based upon the attributes of a particular plaintiff.[110]

In conclusion, the majority refused to consider cases approving retroactive waivers of ADEA claims as persuasive on the issue of an employee's prospective waiver of a judicial forum.[111] The majority maintained that prospective waivers, unlike retroactive waivers, involve the relinquishment of an employees' rights with respect to unanticipated future disputes.[112]

In dissent, Judge Becker criticized the majority for ignoring the well-settled principles of the FAA.[113] In his view, the majority failed to demonstrate that the text, legislative history, or objectives of the ADEA justified ignoring the FAA's mandate.[114] The dissent began by rejecting the majority's interpretation and extrapolation of the Supreme Court's prior decisions in *Alexander*, *Barrentine*, and *McDonald*.[115] The dissent contended that the rationales underlying these cases were distinguishable from *Nicholson* and have been discarded by subsequent decisions of the

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110 *Id.* at 229-30. The court noted that where it was Congress' intent to exclude certain executive-level employees from the requirements of the ADEA, they enacted an express statutory exemption therefor. *Id.* (citing 29 U.S.C. § 631(c) (1982)). The majority further emphasized that the realities of the work place reveal that older workers in higher-paying positions are particularly vulnerable to job displacement. *Id.* at 230. Specifically, the court found that employers can realize the largest financial gain from placing younger, lower-paid employees in positions previously filled by older, higher-paid employees. *Id.* In addition, the court recognized that older employees will incur the most difficulty in attempting to find similar positions if they are displaced. *Id.* (citing 112 CONG. REC. 20,825 (1966)).

111 *Id.* (distinguishing Coventry v. United States Steel Corp., 856 F.2d 514 (3d Cir. 1988); EEOC v. Cosmair, Inc., 821 F.2d 1085, 1091 (5th Cir. 1987); Runyan v. National Cash Register Corp., 787 F.2d 1039, 1045 (6th Cir.) (en banc), *cert. denied*, 479 U.S. 850 (1986)).

112 *Nicholson*, 877 F.2d at 230.

113 *Id.* at 231 (Becker, J., dissenting).

114 *Id.* The dissent cited the Supreme Court's decision in *Shearson*, in which the mandate of the FAA was delineated as follows:

> The Arbitration Act, standing alone, . . . mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent "will be deducible from [the statute's] text or legislative history," or from an inherent conflict between arbitration and the statute's underlying purposes.

Id. at 233 (Becker, J., dissenting) (quoting Shearson/American Express v. McMahon, 482 U.S. 220, 226-27 (1987)).

115 *Id.* at 232 (Becker, J., dissenting).

Court.[116] Moreover, Judge Becker renounced the majority for erroneously assuming that the provisions of the ADEA should be enforced consistently with the enforcement scheme of the FLSA in all instances.[117] While the dissent acknowledged that the ADEA was derived in part from the FLSA, it noted that the Third Circuit has refused to interpret the ADEA consistently with the FLSA in areas where the ADEA's provisions are unclear.[118]

Judge Becker also disagreed with the majority's finding that the text and legislative history of the ADEA are suggestive of Congress' intent to forbid waiver of a judicial forum.[119] The dissenting judge rejected the majority's interpretation of the 1978 amendment to the Act as illustrative of a congressional intent to ensure judicial resolution of age discrimination claims where ex-

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116 *Id.* at 232-37 (Becker, J., dissenting). The dissent observed that the Court's decisions in *Barrentine* and *Alexander* were based on four justifications, as set forth in the *McDonald* decision:

> (1) "[a]n arbitrator may not . . . have the expertise required to resolve the complex legal questions that arise in § 1983 actions;" (2) "arbitral factfinding is generally not equivalent to judicial factfinding [because] . . . 'the record of the arbitration proceedings is not as complete . . . and rights and procedures common to civil trials . . . are often severely limited or unavailable' "[;] (3) the arbitrator's job is to enforce the agreement and, even if the public law is in conflict with the bargain, the arbitrator nonetheless must enforce the contract; and (4) in the case of arbitration pursuant to a collective bargaining agreement, "[t]he union's interests and those of the individual employee are not always identical or even compatible . . . ."

Id. at 233-34 (Becker, J., dissenting) (quoting McDonald v. City of West Branch, 466 U.S. 284, 290-91 (1984)). The dissent noted that the first two justifications were conceded by the majority to be no longer viable, as they were rejected by the *Shearson* Court as an expression of " 'a general suspicion of the desirability of arbitration and the competence of arbitral tribunals,' and are 'difficult to reconcile . . . with [the] Court's subsequent decisions involving the Arbitration Act.' " *Id.* at 234 (Becker, J., dissenting) (quoting *Shearson*, 482 U.S. at 231-32). The dissent further emphasized the *Mitsubishi* and *Shearson* Courts' observations that "arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust [and securities] claims, notwithstanding the absence of judicial instruction and supervision." *Id.* (quoting *Shearson*, 482 U.S. at 231-32). The dissent further rejected the notion that an ADEA dispute presents more complexity than an antitrust dispute in terms of facts or law. *Id.* Judge Becker rejected the third justification as an impermissible assumption that arbitrators will not follow the law. *Id.* (quoting *Shearson*, 482 U.S. at 232). Finally, the dissent noted that the fourth justification is inapposite to this case because Nicholson was not a party to a collective-bargaining agreement, as were the individuals in *Barrentine*, *Alexander*, and *McDonald*. *Id.* at 235 (Becker, J., dissenting).

117 *Id.* at 233 (Becker, J., dissenting).

118 *Id.* (citing Coventry v. United States Steel Corp., 856 F.2d 514, 521 n.8 (3d Cir. 1988) (refusing to apply the precedent of the FLSA to entirely forbid individual waivers of ADEA substantive rights)).

119 *Id.* at 236 (Becker, J., dissenting).

trajudicial methods fail.[120] The dissent reasoned that Congress passed the tolling amendment not because informal mechanisms were inherently inferior to the judicial process, but in order to ensure that aggrieved parties achieve resolution of their claims in spite of delays.[121]

The dissent next attacked the majority's conclusion that the objectives of the ADEA were inherently incompatible with waiver of a judicial forum.[122] Judge Becker asserted that the majority inaccurately depicted the administrative scheme of the Act as requiring the EEOC to be involved in every incident of age discrimination.[123] The dissent observed that both the EEOC and the courts have rejected that view.[124] Further, Judge Becker disagreed with the majority's presumption that arbitration of Nicholson's claims would bypass EEOC procedures.[125] The dissent observed that an aggrieved party is not precluded from filing a claim with the EEOC despite the existence of a broad arbitration agreement.[126]

The dissent further criticized the majority's finding that arbitration of ADEA claims would be improper due to the EEOC's lack of power to oversee the proceedings and thereby ensure their accuracy.[127] Judge Becker rejected the notion that applicability of the FAA should be conditioned upon whether an administrative agency exists to regulate the proceedings.[128]

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120 *Id.*

121 *Id.*

122 *Id.* at 236-44 (Becker, J., dissenting).

123 *Id.* at 237 (Becker, J., dissenting). The dissent supported this contention by recognizing that although the SEC is heavily involved in the enforcement of the Securities Exchange Act of 1934, the Court in *Shearson* found that the administrative scheme of that Act would not preclude enforcement of private arbitration agreements. *Id.*

124 *Id.* The dissent noted that the EEOC has formally proposed that courts enforce voluntary nonprospective waivers of all substantive ADEA rights without EEOC supervision. *See* 29 C.F.R. § 1627.16(c) (1988). *See also* Coventry v. United States Steel Corp., 856 F.2d 514, 522 n.8 (3d Cir. 1988) ("an aggrieved party may voluntarily and knowingly settle his ADEA claims without the involvement of the EEOC").

125 *Nicholson*, 877 F.2d at 237-38 (Becker, J., dissenting).

126 *Id.* at 239 (Becker, J., dissenting). *See* EEOC v. Cosmair, Inc., 821 F.2d 1085, 1089-90 (5th Cir. 1987) ("waiver of rights to file charge with EEOC is void as against public policy").

127 *Nicholson*, 877 F.2d at 239 (Becker, J., dissenting).

128 *Id.* The dissent observed that no administrative agency oversees or issues regulations with respect to RICO or antitrust arbitration, yet the Supreme Court has found arbitration acceptable in those areas. *Id. See* Shearson/American Express v. McMahon, 482 U.S. 220, 238-42 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 632-37 (1985).

Additionally, the dissent posited that despite the absence of a specific ADEA provision granting the EEOC power to regulate arbitration proceedings, this power may be inferred from the existing broad range of regulatory powers expressly granted to the agency.[129]

With regard to the majority's contention that the arbitration process does not offer an ADEA claimant sufficient relief, the dissent pointed to the broad range of equitable remedies provided by FAA.[130] Judge Becker further asserted that contrary to the majority's finding, arbitration may proceed properly as a class action.[131]

The dissent concluded by scrutinizing the majority's view that due to the disparity of bargaining power between age discrimination claimants and employers, enforcement of arbitration agreements would undermine the purpose of the ADEA.[132] Judge Becker emphasized that by applying ordinary contract waiver principles to arbitration agreements, the goals of the ADEA are protected despite disparity in bargaining power.[133] In this respect, the dissent maintained that the majority's concern that employees may not fully anticipate future disputes should not be a factor in determining the enforcement of arbitration agreements.[134] Judge Becker set forth that an employee's inability to foresee subsequent disputes is more properly a factor concerning whether the waiver of a judicial forum was entered into voluntarily and knowingly.[135]

The *Nicholson* decision typifies the caution expressed by the

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129 *Nicholson*, 877 F.2d at 239 (Becker, J., dissenting). *See* 29 U.S.C. § 628 (1982) (the EEOC "may issue rules and regulations as it may consider necessary or appropriate for carrying out this chapter").

130 *Nicholson*, 877 F.2d at 240 (Becker, J., dissenting). *See* R. RODMAN, *supra* note 105, Rule 43, 641 ("[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties").

131 *Nicholson*, 877 F.2d at 240-41 (Becker, J., dissenting). *See* M. HILL & A. SINICROPI, REMEDIES IN ARBITRATION 240-41 (1981).

132 *Nicholson*, 877 F.2d at 242-43 (Becker, J., dissenting).

133 *Id.* at 241-44 (Becker, J., dissenting). The dissent posited that if an agreement to arbitrate was entered into "voluntarily and knowingly", in accordance with general contract principles, the goals of the ADEA would not be frustrated. *Id.* Moreover, the dissent argued that Congress intended that the aims of the ADEA be achieved by unsupervised bargaining between an employee and employer. *Id.* at 243 (Becker, J., dissenting). *See* Coventry v. United States Steel Corp., 856 F.2d 514, 522 n.8 (3d Cir. 1988) ("the Act should allow the employee to 'resolve the dispute himself or work out a compromise with an employer.' ") (quoting Sen. Church, 123 CONG. REC. 34299 (1977)).

134 *Nicholson*, 877 F.2d at 244 (Becker, J., dissenting).

135 *Id.*

courts toward enforcement of prospective agreements to arbitrate employees' federal statutory claims. The crux of the decision involved the determination of whether Congress intended to preclude waiver of judicial redress for claims arising under the ADEA.[136] After meticulously examining the text, congressional history, and objectives of the Act, the court found that Congress did not intend for ADEA claimants to be precluded from commencing these actions in a judicial forum.[137]

The majority correctly noted that analogous Supreme Court cases dealing with prospective waivers of employees' federal statutory rights have refused to uphold such agreements.[138] The majority easily dismissed the judicial precedent relied upon by the dissent, on the grounds that those decisions concerned the enforceability of arbitration agreements within the business, as opposed to employment, context.[139] The *Nicholson* majority wisely recognized that despite the public policy favoring arbitration of federal statutory claims, arbitration cannot be expected to serve the congressional intent behind each and every federal statute.[140]

The arbitration agreement is a contractual device which affords parties freedom to bargain over a desirable forum in which to commence potential disputes.[141] In the employment context, however, the principles regarding freedom of contract are limited by the realities of the work place.[142] Because employees are likely to be more concerned with obtaining or maintaining an employment position than with discussing possible forums in which to assert their employment rights, the employer will have a coercive hand in formulating the details of the arbitration

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136 *Id.* at 224.

137 *Id.* at 230.

138 *Id.* at 231.

139 *Id.*

140 *Id.*

141 Sterk, *supra* note 5, at 489. It should be noted that once parties adopt the arbitration process, they are compelled to adhere to its more informal procedures. Tupman, *Discovery and Evidence in U.S. Arbitration: The Prevailing Views*, 44 ARB. J. 27, 28 (1989). As Judge Learned Hand stated: "they may not hedge it [arbitration] about with those procedural limitations which it is precisely its purpose to avoid. They must content themselves with looser approximations to the enforcement of their rights, than those that the law accords them, when they resort to its machinery." *Id.* (quoting American Almond Prods. Co. v. Consolidated Pecan Sales Co., 144 F.2d 448, 451 (2d Cir. 1944)).

142 *See* Blumrosen, *Exploring Voluntary Arbitration of Individual Employment Disputes*, 16 U. MICH. J.L. REF. 249, 254 (1983).

clause.[143] Under these circumstances, employers may attempt to unfairly constrict the legal rights of employees in the arbitration agreement.[144] The *Nicholson* court reasoned that because this inherent disparity in bargaining power circumvents the objectives of the Act, any individually negotiated agreement ordering arbitration of ADEA claims must be voided.[145] Arguably, the court's unqualified protection of the employee in the bargaining process ignores any good faith efforts by an employer to bring the employer and employee together in a mutually agreeable forum. From the employer's point of view, this absolute restriction on forum selection may produce a myriad of unanticipated problems.[146]

One puzzling aspect of the *Nicholson* decision is the court's failure to address the public policy issues concerning the enforceability of arbitration agreements in the employment context. Because the statutory provisions of the Act are silent as to arbitration of ADEA claims, the majority might have more properly taken the position that in the interest of public policy, ADEA claims must be adjudicated.[147] It is well settled that disputes involving strong public policy issues must be resolved by the courts, and not by arbitration.[148]

The court in *Nicholson* clearly stated that the ADEA was enacted not only to promote justice between the individual employ-

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[143] *Id.* It should be noted that in private sector nonunionized employment, there is no group analogous to the employee's union to represent his interests in establishing arbitration procedures. *Id.*

[144] *Id.* at 254-55.

[145] *See* Nicholson v. CPC Int'l, 877 F.2d 221, 229-30 (3d Cir. 1989).

[146] Blumrosen, *supra* note 142, at 252 (arbitration provides an alternative to time-consuming and costly litigation, and further avoids the problems inherent in administrative oversight).

[147] It has been noted that:

> "Public policy" should prevent enforcement of arbitration agreements . . . in those limited instances in which a statute is enacted to protect one class of contracting parties from imposition of contractual terms by another class of contracting parties with greater bargaining power . . . . Second, . . . public policy should prevent enforcement of arbitration agreements when the dispute involves statutes or other legal rules designed to achieve ends other than doing justice between the parties to a dispute.

Sterk, *supra* note 5, at 542-43.

[148] *Id.* at 482. The rules of law governing private agreements are principally designed to protect the various interests of the parties to the contract and not to affect the public at large. *Id.* at 491. Because an arbitrator is not bound by public law, but rather by the private agreement of the parties, arbitral resolution of the dispute with due fairness to the parties, may often contravene fundamental public policy. *Id.* at 490-91.

ees, but also to serve the general public's interest in having a work force free from discrimination.[149] Furthermore, as the district court noted in *Steck v. Smith Barney, Harris Upham & Co.*, the ADEA is designed to promote the long-term goals of creating a consistent source of judicial precedent to direct employers in future actions.[150] Because arbitral proceedings are necessarily tailored to the private agreement at hand, arbitration awards do not have the precedential effect of court judgments; no award is likely to have a significant effect on future employer practices.[151] The majority, however, neither seized the opportunity to address the public policy debate, nor acknowledged the necessity of doing so. By expressly adopting the *Mitsubishi* Court's "congressional intent" approach, the *Nicholson* court provides little guidance for employers, employees, and the courts as to whether a particular federal statutory claim is immune from arbitration by reason of public policy.

The majority does not clearly indicate whether *Nicholson* renders ADEA claims nonarbitrable in all instances,[152] or merely refuses to enforce prospective agreements to arbitrate ADEA claims. It is unclear if an employee's consent to abide by a prospective arbitration agreement would render the claim arbitrable. If the *Nicholson* court's reasoning is to be extended to its logical conclusion, there should be no distinction between compulsory or consensual arbitration of ADEA claims; arbitration of an ADEA claim under any circumstance would be incompatible with the congressional intent behind the statute.[153]

The *Nicholson* decision signifies a trend among the judiciary to curtail the FAA's applicability in the employment context.[154] When considered in light of the recent decisions espousing the widespread application of the FAA to federal statutory claims, the decision can be seen as a significant restraint on an employer's ability to shift enforcement of the ADEA from the courts to the arbitration table. The court in *Nicholson* wisely espoused the position that any alteration of the enforcement proceedings

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149 *Nicholson*, 877 F.2d at 228-29.

150 Steck v. Smith Barney, Harris Upham & Co., 661 F. Supp. 543, 547 (D.N.J. 1987).

151 Sterk, *supra* note 5, at 493 n.31.

152 *See Steck*, 661 F. Supp. at 547.

153 *Nicholson*, 877 F.2d at 227-29.

154 *See* McDonald v. City of West Branch, 466 U.S. 284 (1984); Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728 (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

of the Act must necessarily await legislative pronouncement.[155]

In conclusion, the subject of the arbitrability of ADEA claims is an area in need of immediate review. Legislative attention should be directed to the imprecise language in the Act regarding arbitration of these claims. A resolution is urgently needed in order to prevent courts from inconsistently interpreting the text, legislative history, and objectives of the Act, and subsequently handing down contradictory decisions.

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155 *Nicholson*, 877 F.2d at 231.