

12-1-2004

Compulsory Pre-Dispute Arbitration Clauses in the Employment Context after *EEOC v. Luce, Forward, Hamilton & Scripps*

Maria Wusinich

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/drlj>



Part of the [Civil Law Commons](#), [Civil Procedure Commons](#), [Civil Rights and Discrimination Commons](#), [Contracts Commons](#), [Dispute Resolution and Arbitration Commons](#), [Jurisdiction Commons](#), [Jurisprudence Commons](#), [Labor and Employment Law Commons](#), [Legal Remedies Commons](#), and the [Other Law Commons](#)

Recommended Citation

Maria Wusinich, *Compulsory Pre-Dispute Arbitration Clauses in the Employment Context after EEOC v. Luce, Forward, Hamilton & Scripps*, 5 Pepp. Disp. Resol. L.J. Iss. 1 (2004)
Available at: <https://digitalcommons.pepperdine.edu/drlj/vol5/iss1/2>

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Dispute Resolution Law Journal by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Compulsory Pre-Dispute Arbitration Clauses In The Employment Context After *EEOC v. Luce, Forward, Hamilton & Scripps*¹

Maria Wusinich²

I. INTRODUCTION

In *EEOC v. Luce, Forward, Hamilton & Scripps*,³ decided in 2003, the Ninth Circuit Court of Appeals aligned its view with its sister circuits and with the Supreme Court regarding the enforceability of arbitration agreements in employment discrimination cases.⁴ The court held that an employee's agreement to arbitrate a claim arising under federal anti-discrimination law is enforceable.⁵ At first glance, it would appear that as far as the judicial branch is concerned, the longstanding issue of the validity of mandatory arbitration agreements in the employment context is now settled. This article, in contrast, posits that the courts will be called to revisit this issue as it becomes more apparent that compelled arbitration is not an appropriate method for resolving employment discrimination claims, and that enforcing agreements to arbitrate such claims undermines the goals of the anti-discrimination statutes found in Title VII of the Civil Rights Act of 1964 (the 1964 CRA) and the 1991 Civil Rights Act (the 1991 CRA)⁶. Likewise, albeit less obviously, enforcing compulsory pre-dispute arbitration clauses also contravene the purposes of the Federal Arbitration Act (FAA).⁷

1. 345 F.3d 742 (2003).

2. J.D. Candidate, Pepperdine University School of Law, 2005. Many thanks to my Mom and Dad and sisters, Nicole, Dana, Christa, Joanna, and Catherine for their love and support in all of my endeavors, and to Travis Daily, Kristen Morse, Melissa Niemann, and Demetra Edwards for their encouragement. Comments welcome at maria.wusinich@pepperdine.edu.

3. 345 F.3d 742.

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

5. *See Luce*, 345 F.3d at 750.

6. *See* Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2004); Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071.

7. 9 U.S.C. §§ 1-16 (2004).

The next section, Part II, discusses the FAA and the federal civil rights statutes which lie at the heart of the dispute. Part III presents the key Supreme Court holdings on enforcing mandatory arbitration clauses, and illustrates the evolution of the Court's view from one supporting the public resolution of statutory discrimination claims in a judicial forum, to its current view in favor of arbitrating employment disputes. Part IV analyzes the Ninth Circuit's decision in *Luce*. Part V presents arguments against enforcing mandatory arbitration agreements in the employment context. Part VI describes legislation pending in Congress which, if enacted, would reverse the trend towards enforcing compulsory arbitration clauses. In conclusion, Part VII reiterates the unsettled nature of the enforceability issue despite apparent agreement in the judiciary, and suggests ways to ensure appropriate procedures for the resolution of pending statutory employment discrimination claims.

II. THE STATUTORY LAW: BACKGROUND

The contrary goals of federal anti-discrimination statutes and the FAA have created a tension which underlies judicial decisions regarding the enforceability of mandatory arbitration agreements.⁸ As will be discussed below, the two sets of legislation conflict with each other to the extent that they address agreements to arbitrate causes of action created by Title VII and the 1991 CRA.⁹ It is therefore no surprise that in discrimination cases, the statutes' competing policies have resulted in a jurisprudence described by one commentator as "the Chinese puzzle of mandatory arbitration of employment discrimination claims."¹⁰

8. "A binding arbitration agreement is a prospective agreement between an employer and an employee to require some or all future employment disputes to be resolved by binding arbitration. Binding arbitration provisions can be created as stand-alone agreements" or they can be part of a broader, written employment agreement. Donna K. McElroy, *Compulsory Arbitration Agreements . . . Issues Concerning the Enforcement of Compulsory Arbitration Agreements Between Employers and Employees*, 31 ST. MARY'S L.J. 1015, 1025-26 (2000). Mandatory arbitration clauses in employment contracts often present a "take-it-or-leave-it" approach, and as such, are contracts of adhesion. Nicole Karas, *EEOC v. Luce and the Mandatory Arbitration Agreement*, 53 DEPAUL L. REV. 67, 105 (2003).

9. The FAA, according to the Supreme Court, was Congress's legislative pronouncement that arbitration is a preferred method of dispute resolution. McElroy, *supra* note 9, at 1019 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)). Conversely, the purpose of the 1991 CRA was to make it easier to bring lawsuits and provide increased judicial remedies in order to fully compensate plaintiffs for injuries caused by discrimination. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1191 (9th Cir. 1998), *overruled on other grounds by EEOC v. Luce*, Forward, Hamilton & Scripps, 345 F.3d 743 (9th Cir. 2003).

10. M. Lane Lowrey, *Arbitration or Adjudication?: The Trials and Tribulations of the Federal Circuit Split Over Mandatory Arbitration of Employment Discrimination Claims*, 40 S. TEX. L. REV. 993, 1021 (1999).

A. *The FAA*

Congress enacted the FAA¹¹ in 1925 to accomplish two purposes. First, it intended “to reverse the common law rule barring specific performance of arbitration agreements.”¹² Second, Congress wanted “to allow parties to avoid the costliness and delays of litigation by permitting a less expensive forum for the resolution of disputes.”¹³

In order to achieve these goals, provisions of the Act dictate that district courts stay litigation and compel arbitration when one party refuses to arbitrate.¹⁴ Thus, the FAA prevents federal courts from hearing disputes that the parties have agreed to arbitrate. Furthermore, since its enactment, the Supreme Court has interpreted the FAA to apply in state courts, and to preempt conflicting state anti-arbitration laws.¹⁵ Notwithstanding its broad application, however, the FAA is limited in that it is authorized by the Commerce Clause, and thus applies only to maritime transactions and transactions involving commerce.¹⁶

1. The Section 1 Exclusion

Section 1 of the FAA states, in the relevant part, “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”¹⁷ Before the Supreme Court decided *Circuit City Stores* in March 2001,¹⁸ there was disagreement as to whether this provision applied to (i) the employment contracts of all workers within the scope of Congress’s Commerce Clause power or (ii)

11. 9 U.S.C. §§ 1-16 (2004).

12. Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 404 (1999). “Traditionally, the common law courts had been hostile to the concept of private party arbitration as a means to resolve disputes. The [FAA] . . . was intended to overcome that hostility, and to place agreements to arbitrate on the same footing as any other contracts with regard to judicial enforcement.” Patrick J. Cihon & Elizabeth C. Wesman, *Arbitration of Title VII Disputes: Resolving the Conflicting Policies of Circuit City and Waffle House*, 16th Annual International Association for Conflict Management Conference Melbourne, Australia (2003), available at <http://ssrn.com/abstract=398180>.

13. Moohr, *supra* note 12, at 404.

14. *Id.* at 404-05. The Act also authorizes interlocutory appeal of a trial court’s decision to refuse a stay of litigation. *Id.* at 405.

15. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001) (quoting *Southland Corp. v. Keating*, 465 U.S. 1 (1984)).

16. Moohr, *supra* note 12, at 404; U.S. Const. art. I, § 8, cl. 3.

17. 9 U.S.C. § 1 (2004).

18. *Circuit City Stores*, 532 U.S. at 105.

only to employment contracts of those workers engaged in the interstate shipment of goods.¹⁹ A court's interpretation of Section 1 as broad the first interpretation or as narrow as the latter view was significant because it impacted whether agreements to arbitrate employment discrimination claims were excluded from the reach of the FAA.²⁰ Furthermore, a court's interpretation of the exclusion determined whether the policy favoring arbitration should be considered. Nevertheless, the proper interpretation of Section 1 is no longer debatable. In *Circuit City Stores*,²¹ the Supreme Court held that the narrower interpretation was proper; only the contracts of workers involved in the interstate transportation of goods are exempt from the reach of FAA.²²

2. Section 2

Section 2, the "centerpiece"²³ of the FAA states, "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."²⁴ Significantly, the Supreme Court's holding that the FAA is applicable to employment contracts²⁵ imported the FAA policy urging the voluntary resolution of disputes through arbitration to the employment arena.²⁶

3. Title VII and the Civil Rights Act of 1991

Title VII of the Civil Rights Act of 1964²⁷ is one of the three main federal statutes which prohibit discrimination in employment.²⁸ Title VII was enacted

19. Paul H. Tobias, 1 Lit. Wrong. Discharge Claims § 2.9 (last updated July 2004). Specifically, the First, Second, Third, Seventh, Tenth, and D.C. Circuit Courts of Appeals have "explicitly held that the §1 exemption applies only to contracts of employment for workers involved in, or closely related to, the actual movement of goods in interstate commerce." Donna Meredith Matthews, *Employment Law After Gilmer: Compulsory Arbitration of Statutory Antidiscrimination Rights*, 18 BERKELEY J. EMP. & LAB. L. 347, 368 (1997). The Sixth Circuit held in dicta, but then later rejected, a broad interpretation of the exception. *Id.* at 369. Its district courts followed this interpretation. *Id.* The Fourth Circuit declined to adopt the narrow construction, and the Ninth Circuit characterized the question as "unresolved." *Id.*

20. Lowrey, *supra* note 10, at 995.

21. *Circuit City Stores*, 532 U.S. at 105.

22. *See id.* at 119.

23. Moohr, *supra* note 12, at 404.

24. Lowrey, *supra* note 10, at 1000. This clause provides for the challenging of arbitration agreements on the same principles used to avoid contracts: fraud, duress, and lack of consideration. *Id.* at 995.

25. *Circuit City Stores*, 532 U.S. at 119.

26. Cihon & Wesman, *supra* note 12, at 16.

27. 42 U.S.C. § 2000(e) (2004).

to end discrimination against employees on the basis of “race, color, religion, sex, or national origin.”²⁹ In order to effectuate this purpose, Congress created the Equal Employment Opportunity Commission (EEOC) to serve as the primary enforcement mechanism of the Civil Rights Act.³⁰ Congress invested the EEOC with broad powers under the original Act.³¹

In 1991, when more women and minority laborers were needed to maintain the health and vitality of the U.S. economy, Congress amended the Act to strengthen federal equal employment protection.³² The 1991 CRA

had two primary goals: (1) to ‘restore . . . civil rights laws’ by ‘overruling’ a series of 1989 Supreme Court decisions that Congress thought represented an unduly narrow and restrictive reading of Title VII . . . , and (2) to ‘strengthen’ Title VII by making it easier to bring and to prove lawsuits, and by increasing the available judicial remedies so that plaintiffs could be fully compensated for injuries resulting from discrimination.³³

The 1991 CRA provided claimants a right to damages and to trial by jury for the first time.³⁴ The effect of the Act was to expand employees’ rights and to increase the remedies available to plaintiffs claiming violations of their civil rights.³⁵

III. SIGNIFICANT SUPREME COURT DECISIONS

A. *Alexander v. Gardner-Denver Co.*³⁶

Several key cases illustrate the Supreme Court’s changed attitude towards mandatory arbitration agreements. First, in 1974, the Court decided a case in-

28. Lowrey, *supra* note 10, at 994. The other two statutes are the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA). *Id.* “The ADA prohibits discrimination against individuals who have impairments that substantially impede one or more major life activities, who have records of such disabilities, or who are perceived as being disabled.” *Id.* The ADEA “protects individuals who are forty years of age or older, from discrimination in hiring or terms of employment.” *Id.* at 995.

29. *Id.* at 994.

30. Marc A. Altenbernt, *Will EEOC v. Waffle House, Inc. Signal the Beginning of the End for Mandatory Arbitration Agreements in the Employment Context?*, 3 PEPP. DISP. RESOL. L.J. 221 (2003).

31. *Id.* at 221-22.

32. *Duffield*, 144 F.3d at 1190-91.

33. *Id.* at 1191 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 250-51 (1994), which enumerates some of those decisions, including *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

34. *Id.*

35. *Id.* at 1192.

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

volving an employee who was discharged and filed a grievance alleging that the discharge was racially motivated and thus violated Title VII.³⁷ The case was arbitrated pursuant to an arbitration clause contained in a collective bargaining agreement (CBA) to which the employee was a party.³⁸ The arbitrator in the case failed to specifically address the racial discrimination claim, but nonetheless found just cause for the employee's discharge.³⁹ The issue before the Court was whether, in the aftermath of the arbitration, the employee retained the right to bring a Title VII claim on his own behalf.⁴⁰

The Court held in the affirmative.⁴¹ It found that the purpose of the arbitration proceeding had been to enforce the employee's rights under the CBA.⁴² The Court then stated that Title VII claims serve a different purpose: to further the public policy of combating employment discrimination.⁴³ Thus, it would be inappropriate to hold that the arbitration proceeding, a private remedy, extinguished the employee's Title VII statutory rights.⁴⁴

*B. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*⁴⁵

Almost a decade later, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, a case which involved claims arising under the Sherman Anti-Trust Act, the Court held that the FAA's policy of enforcing arbitration agreements encompassed statutory claims.⁴⁶ Specifically, the Court stated that the presumption favoring arbitration would be trumped only if the statute at issue expressed a congressional intent that claims arising under it not be arbitrated.⁴⁷ The Court concluded that, without this express congressional intent, a judicial forum was not a substantive right.⁴⁸ Rather, "[b]y agreeing to arbitrate a statu-

37. *Id.* at 36.

38. *Id.*

39. *Id.* at 38.

40. *Id.*

41. *Alexander*, 415 U.S. at 47-52.

42. *Id.* at 49.

43. *Id.* at 48-49.

44. *Id.*

45. 473 U.S. 614 (1985).

46. *Id.* at 616, 628. In one commentator's view, the Court in 1985 began "radically interpreting the FAA. The Court announced an 'emphatic federal policy in favor of arbitral dispute resolution'" Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1039-1040 (1998) (quoting *Mitsubishi Motors Corp.*, *supra* note 56, at 631).

47. *Mitsubishi Motors Corp.*, 473 U.S. at 627-28 ("Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."); Rebecca Hanner White, *Arbitration and the Administrative State*, 38 WAKE FOREST L. REV. 1283, 1292 (2003).

48. *Mitsubishi Motors Corp.*, 473 U.S. at 628.

tory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”⁴⁹

C. *Gilmer v. Interstate/Johnson Lane Corp.*⁵⁰

Gilmer v. Interstate/Johnson Lane Corp., decided in 1991, solidified the Court’s new position favoring the arbitration of employment disputes.⁵¹ *Gilmer* involved a claim under the Age Discrimination in Employment Act (ADEA) rather than Title VII.⁵² The plaintiff, a brokerage employee, submitted a licensing/registration application to the New York Stock Exchange (NYSE) to become a registered securities representative.⁵³ The application contained an arbitration clause.⁵⁴ The plaintiff, instead of submitting to arbitration, brought suit in federal court alleging that his employer discharged him in violation of his rights under the ADEA.⁵⁵

The Court ruled that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.”⁵⁶ The Court reiterated its view that a plaintiff’s choice of forum did not affect his or her substantive rights,⁵⁷ and expressed that arbitration was a proper forum for causes of action created by the anti-discrimination statutes.⁵⁸ Before it held that the agreement was enforceable, the Court rejected the plaintiff’s argument that compulsory arbitration of ADEA claims was inconsistent with the ADEA’s framework and would frustrate its purpose.⁵⁹ The Court found there was no contradiction between addressing the individual’s grievances in arbitration and the policies behind the ADEA.⁶⁰

49. *Id.*; White, *supra* note 47, at 1292. Likewise, in two cases decided after *Mitsubishi Motors Corp.*, the Court treated “the right to a judicial forum as merely procedural.” *Id.* at 1293 (citing *Shearson/Am. Express v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.* 490 U.S. 477 (1989)).

50. 500 U.S. 20 (1991).

51. Matthews, *supra* note 19, at 363 (stating, “In 1991, the judicial metamorphosis from the presumption against arbitration to one in favor of arbitration was virtually complete.”).

52. *Cihon & Wesman*, *supra* note 12, at 5.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Gilmer*, 500 U.S. at 26 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

58. *Id.* at 28.

59. *Id.* at 26-27.

60. *Id.* at 27-28.

The Court further stated that it was not overturning its earlier holding in *Alexander v. Gardner-Denver*.⁶¹ *Alexander* was distinguishable, in part, because it involved a disparity of interests between the union and the employee.⁶² In other words, because the employee himself had not agreed to arbitrate his claims, and because the arbitrators were not authorized to resolve Title VII claims, subsequent statutory actions were not precluded.⁶³

As the Ninth Circuit later noted,⁶⁴ *Gilmer* was clearly a shift from the Court's position in *Alexander*.⁶⁵ Accordingly, employers did not expect the Court to rule as it did.⁶⁶ Based on the Court's previous holdings, employers assumed employment contracts requiring compulsory arbitration of discrimination claims were illegal because such contracts denied employees claiming discrimination the right to a public forum, which was viewed as a necessary means of ensuring employers' compliance with the law.⁶⁷

D. *Circuit City Stores, Inc. v. Adams*⁶⁸

The Supreme Court's holding in *Circuit City Stores, Inc. v. Adams* resolved the conflicting circuit court interpretations regarding the exclusion in Section 1 of the FAA.⁶⁹ The Court interpreted the FAA to apply to certain employment contracts, signaling its continuing regard for arbitration as a means of resolving employment disputes.⁷⁰ The Court found that the text of the FAA foreclosed the Ninth Circuit's construction of Section 1, which excluded all employment contracts from the FAA.⁷¹ The Court stated, "there are real benefits to the enforcement of arbitration provisions. We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context."⁷² Finally, the Court foresaw a slippery slope

61. *Alexander*, 415 U.S. at 34-35.

62. *Id.*

63. *Id.*

64. *Luce*, 345 F.3d at 748.

65. *Alexander*, 415 U.S. at 36 (holding that a unionized employee's earlier exercise of the compulsory arbitration provision in a collective bargaining agreement did not preclude him from later pursuing a Title VII discrimination claim in a judicial forum.).

66. *White*, *supra* note 47, at 1295.

67. *Id.*

68. 532 U.S. 105 (2001).

69. *Id.* at 114.

70. *Id.*

71. *Id.* at 119.

72. *Id.* at 122-23. The Court further touted the benefits of arbitration in resolving employment disputes:

[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts. These litigation costs to parties (and the accompanying burden to the courts) would be compounded by the difficult

with regards to adopting the Ninth Circuit's interpretation.⁷³ In particular, the Court stated that following the Ninth Circuit "would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers, in the process undermining the FAA's proarbitration purposes and 'breeding litigation from a statute that seeks to avoid it.'"⁷⁴

*E. EEOC v. Waffle House, Inc.*⁷⁵

The Court in *EEOC v. Waffle House, Inc.*⁷⁶ addressed the scope of the EEOC's power to litigate an employee's discrimination claim where an employee signed a mandatory arbitration agreement.⁷⁷ In *Waffle House*, Baker, a grill operator, suffered a seizure shortly after being hired; his employment was promptly terminated.⁷⁸ Baker filed an action with the EEOC, and the EEOC then sued Waffle House for violating Baker's rights under the ADA. Specifically, the EEOC claimed that Waffle House intentionally terminated Baker based on his disability and had done so "with malice or reckless indifference to his federally protected rights."⁷⁹

The Fourth Circuit Court of Appeals held that the EEOC possessed the independent ability to bring the claim, but, in order to give some effect to the arbitration agreement, only allowed the EEOC to seek injunctive relief.⁸⁰ Victim-specific or "make-whole" relief, according to the court, was precluded.⁸¹ The Supreme Court, however, after taking a close look at the EEOC's grant of authority under Title VII, determined that the EEOC was expressly empowered to seek monetary relief.⁸² Further, the Court found no language in Title VII suggesting that the EEOC's power to bring suit should be limited by the existence

choice-of-law questions that are often presented in disputes arising from the employment relationship.

Id. at 123.

73. *Id.* at 123.

74. *Id.* (quoting *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 272-273 (1995)).

75. 534 U.S. 279 (2002).

76. *See id.*

77. *Id.*

78. *Altenbernt*, *supra* note 30, at 236-37.

79. *Id.* at 237.

80. *Id.* at 238.

81. *Id.*

82. *Id.* Both the 1964 CRA and the 1991 CRA contained authorization for the EEOC to pursue monetary damages. *Id.* The 1991 CRA enabled plaintiffs to recover compensatory as well as punitive damages. *Id.*

of an arbitration agreement, thereby emphasizing the strength of the EEOC's powers under the statute.⁸³

In particular, held the court, the EEOC its capacity as a public agency, rather than the individual claimant or the court, has the right to decide what relief is appropriate and what would best serve the public interest.⁸⁴ Allowing a court to decide what relief is appropriate for serving the public interest would violate the enforcement scheme implemented by Congress.⁸⁵ "Ultimately, the Court held that whenever the EEOC chooses to file an action against an employer, it may seek to vindicate the public interest by pursuing all types of relief granted it by statute."⁸⁶

IV. SIGNIFICANT FEDERAL CIRCUIT COURT DECISIONS

Many courts interpreted the *Alexander* decision as precluding the mandatory arbitration of Title VII claims.⁸⁷ Even as arbitration became increasingly popular in the 1980's, every circuit court that addressed the issue refused to enforce any agreement (in the collective bargaining context or otherwise) that required employees to resolve discrimination claims in binding arbitration.⁸⁸ For a time, "[t]he circuit courts read [*Alexander*] as sending a simple message: Title VII is different,"⁸⁹ and due to the "unique nature of Title VII claims . . . it was the congressional intent that arbitration is unable to pay sufficient attention to the transcendent public interest in the enforcement of Title VII."⁹⁰ Nonetheless, in 2003, at the time *Luce* was decided, the federal circuit courts were split regarding the arbitrability of statutory employment claims.⁹¹ The Ninth Circuit was in the minority, holding that mandatory arbitration agreements in the employment context were not enforceable.⁹² This position is illustrated in the case of *Duffield v. Robertson Stephens & Co.*,⁹³ discussed below. Not until the Ninth

83. *Altenbernt*, *supra* note 30, at 239.

84. *Id.*

85. *Id.* at 238.

86. *Id.* at 240.

87. *Luce*, 345 F.3d at 748.

88. *Duffield*, 144 F.3d at 1188.

89. *Id.*

90. *Id.*

91. *Lowrey*, *supra* note 10, at 1002.

92. *Id.* at 1005.

93. *Duffield*, 144 F.3d at 1182. Notably, however, *Duffield* was not the first case in which the Ninth Circuit challenged the *Gilmer* doctrine. In *Prudential Insurance Co. of America v. Lai*, the court refused to require an employee to arbitrate her Title VII claim pursuant to her arbitration agreement with her employer. 42 F.3d 1299 (9th Cir. 1995); *Karas*, *supra* note 9, at 88. Because the agreement did not specify the disputes subject to arbitration, there was no "knowing and voluntary" waiver of her right to a judicial forum. *Id.* Thus, compulsory arbitration of the claim was precluded. *Id.*

Circuit's decision in *Luce* would there be a consensus in the federal circuits regarding the arbitrability of employment disputes.

A. Duffield v. Robertson Stephens & Co.

In this case, plaintiff Duffield, a female broker-dealer, sued her employer for sex discrimination and sexual harassment in violation of Title VII.⁹⁴ Prior to bringing suit, Duffield signed an arbitration agreement waiving her right to a judicial forum in all employment-related disputes, agreeing instead to arbitrate such disputes pursuant to the stock exchange regulations her employer was required to follow.⁹⁵

In deciding the case, the Ninth Circuit conducted an in-depth analysis of the Supreme Court's decisions in *Gilmer* and *Alexander*, and also of the legislative history of Title VII and the 1991 CRA.⁹⁶ The court concluded that the 1991 CRA barred employers from compelling individuals to waive their Title VII right to a judicial forum.⁹⁷

B. EEOC v. Luce, Forward, Hamilton & Scripps

In September 2003, the Ninth Circuit reversed its view of mandatory arbitration agreements when it issued an *en banc* decision overturning *Duffield*.⁹⁸ This decision aligned its view of pre-dispute arbitration agreements with that of the other federal circuit courts.⁹⁹ The case arose as a result of defendant Luce Forward's refusal to employ Donald Lagatree as a legal secretary after Lagatree refused to sign an agreement mandating the arbitration of any claims stemming from his employment.¹⁰⁰ The EEOC sued on behalf of Lagatree for make-whole

94. *Duffield*, 144 F.3d at 1186.

95. *Id.* at 1185. Duffield's assent to the agreement was imposed as a condition of her employment and was mandated by the securities exchanges. Specifically, the agreement stated: "I agree to arbitrate any dispute, claim or controversy that may arise between me or my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register . . ." *Id.* The stock exchanges referred to in the case are the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD). *Id.*

96. Lowrey, *supra* note 10, at 1005. *Duffield* was one of the first opinions to adequately analyze the legislative history of Title VII and the Civil Rights Act of 1991.

97. *Duffield*, 144 F.3d at 1185.

98. *See Luce*, 345 F.3d 742.

99. Ctr. for Pub. Res., *Joining the Pack: En Banc Ninth Circuit Overturns Duffield*, 21 Alternatives to the High Cost of Litigating 176 (2003).

100. *See Luce*, 345 F.3d at 745. Lagatree stated that he couldn't sign the arbitration agreement because it "was unfair." *Id.* Specifically, he "believed he needed to retain his 'civil liberties, includ-

67

relief, lost wages, and benefits, and also sought emotional distress damages and punitive damages.¹⁰¹ In addition, the EEOC requested a permanent injunction forbidding the defendant from i) requiring employees to sign arbitration agreements as a condition of employment and ii) engaging in unlawful retaliation.¹⁰²

The District Court enjoined Luce Forward from requiring applicants to agree to arbitrate Title VII claims and from enforcing existing agreements to arbitrate those claims.¹⁰³ Luce Forward appealed, the EEOC cross-appealed, and the holding was reversed by a three-judge panel ("*Luce Forward I*") which held that "employers may require employees to sign agreements to arbitrate Title VII claims as a condition of their employment."¹⁰⁴ The panel ("*Luce Forward II*") reasoned that in *Circuit City* the Supreme Court implicitly overruled *Duffield*.¹⁰⁵ Citing the importance of the issue implicated, the court agreed to rehear the case.¹⁰⁶ The court then withdrew the panel's opinion, disagreeing with *Luce Forward II* that *Circuit City* overturned *Duffield*.¹⁰⁷ However, concluding that *Duffield* was wrongly decided, the court stated, "we therefore overrule it ourselves."¹⁰⁸

First, the Ninth Circuit explained that it was among the many courts which interpreted *Alexander* as precluding employers from mandating agreements to arbitrate Title VII claims.¹⁰⁹ Next, the court stated that *Gilmer* did not overrule *Alexander*, but rather, rejected a reading of *Alexander* as prohibiting the arbitration of employment discrimination claims.¹¹⁰ "In the post-*Gilmer* world," stated the court, "our decision in *Duffield* stands alone. All of the other circuits have concluded that Title VII does not bar compulsory arbitration agreements."¹¹¹

ing the right to a jury trial and redress of grievances through the government process." *Id.* Defendant told Lagatree that the arbitration agreement was a non-negotiable condition of employment; Lagatree still refused to sign it. *Id.* Luce Forward then withdrew its offer, and did not dispute the claim that the only reason Lagatree was refused the job was due to his failure to sign the agreement. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* The claim for make-whole relief was refused by the court on *res judicata* grounds. *Id.*

104. *Luce*, 345 F.3d at 744.

105. *Id.* at 744. The panel also rejected the EEOC's argument that Luce Forward's refusal to hire Lagatree because of his refusal to sign the agreement constituted illegal retaliation. *Id.*

106. *Id.*

107. *Id.* According to the court, *Circuit City Stores* did not address the question of whether Congress had demonstrated an intent to preclude arbitration of Title VII claims. In the view of the court, "*Circuit City* involved an entirely different issue: the reach of the exception in the FAA for 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce.'" The case did not involve a claim under Title VII or any other federal employment discrimination statute." *Id.*

108. *Id.* at 745.

109. *Luce*, 345 F.3d at 748.

110. *Id.*

111. *Id.* at 748-49. The court identified decisions of the Second, Third, Fifth, Seventh, Fourth, Eighth, Tenth, and Eleventh Circuits—all supporting the arbitrability of Title VII claims. *See e.g.*,

The court then reviewed its decision in *Duffield* and reconsidered its interpretation of the purpose and legislative history of the 1991 CRA and of the text of Section 118.¹¹²

V. ARGUMENTS AGAINST ENFORCING AGREEMENTS TO ARBITRATE EMPLOYMENT DISCRIMINATION CLAIMS

A. The Legislative History of Title VII and the 1991 CRA Counsel Against Enforcing Mandatory Arbitration Clauses

The Supreme Court has long recognized that Congress, in enacting Title VII, envisioned that the federal courts would play a key role in advancing the policy of deterring workplace discrimination on the basis of race, sex, and national origin.¹¹³ In *Alexander*, the Court stated, “the purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII.”¹¹⁴ The Court further stated that “deferral to arbitral decisions would be inconsistent with that goal.”¹¹⁵ In a subsequent case, the Court stated that *Alexander* “established that arbitration ‘cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory rights’ embodied in Title VII.”¹¹⁶ As a result, at the time the 1991 CRA was drafted¹¹⁷ and reported by the House Education and Labor Committee, the overwhelming weight of the law made compulsory arbitration agreements of Title VII claims unenforceable.¹¹⁸

In the final 1991 CRA legislation, Congress directly addressed the arbitration of Title VII claims.¹¹⁹ Specifically, Section 118 of the Act stated that “the

Sues v. John Nuveen & Co., 146 F.3d 175, 182 (3d Cir. 1998) (finding Title VII “entirely compatible with applying the FAA to agreements to arbitrate Title VII claims”).

112. *Id.* at 748.

113. *Duffield*, 144 F.3d at 1187 (citing *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 358 (1995)).

114. *Alexander*, 415 U.S. at 56.

115. *Id.*

116. *Duffield*, 144 F.3d at 1188 (quoting *McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984)).

117. *Id.* at 1194. The *Duffield* court noted that the time of the drafting of the Act was the relevant time to consider when determining Congress’s intent because by the time the 1991 CRA was enacted, the intent had become less clear. *Id.*

118. *Id.* The 1991 CRA was enacted almost simultaneously with the Supreme Court’s issuance of *Gilmer*. *Id.*

119. *Id.* at 1189.

parties could ‘where appropriate and to the extent authorized by law,’¹²⁰ opt to pursue alternative dispute resolution, including arbitration, to resolve their Title VII disputes.”¹²¹ However, Congress’s intent with this “polite bow to the popularity of alternative dispute resolution,”¹²² as noted in *Duffield*, must be considered in light of the Act’s overall purpose. As mentioned, the Act was designed to overrule hostile Supreme Court decisions and make discrimination claims easier to bring and to prove in the federal court system.¹²³ Congress exhibited this purpose by substantially increasing the procedural rights and remedies available to Title VII plaintiffs.¹²⁴ Thus, with regards to ADR and arbitration, it follows that any encouragement of arbitration of employment disputes was meant to apply to arbitrations that were *voluntarily* entered into by both the employer and the employee.¹²⁵

B. Arbitration is Not an Appropriate Method of Dispute Resolution for Resolving Statutory Claims

Congress’ plan for eliminating discrimination under Title VII was twofold. It sought both to deter potential employers from discriminatory actions and to

120. *Id.* The court stated that this phrase was the critical statutory language in laying out the Section’s substantive limitations. *Id.* at 1193. Since “the law” as Congress understood it at the time was to the effect that compulsory arbitration agreements were unenforceable, such agreements were not “authorized by law” within the meaning of the statute. *Id.* at 1194.

121. *Duffield*, 144 F.3d at 1189.

122. *Id.* at 1191 (quoting *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997)).

123. *Id.* at 1192-93. “When ‘examin[ing] the language of the governing statute,’ we must not be guided by a ‘single sentence or member of a sentence,’ but look[] to the provisions of the whole law, and to its object and policy.” *Id.* at 1193 (quoting *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993) (alteration in original)).

124. *Id.* “The Act provided for the first time a right to damages and to trial by jury and expanded Title VII’s fee-shifting provisions.” *Id.* at 1191.

125. *Id.* at 1193. The *Duffield* court stated,

It thus would be ‘at least a mild paradox’ to conclude that in the very Act of which the ‘primary purpose’ was to ‘strengthen existing protections and remedies available to employees, Congress encouraged the use of a process whereby employers condition employment on their prospective employees’ surrendering their rights to a judicial forum for the resolution of all future claims of race or sex discrimination and force those employees to submit all such claims to compulsory arbitration. It seems far more plausible that Congress meant to encourage voluntary agreements to arbitrate—agreements such as those that employees and employers enter into after a dispute has arisen because *both* parties consider arbitration to be a more satisfactory or expeditious method of resolving the disagreement.

Id. (citations omitted). The court further noted that it would also be at least a mild paradox to interpret Section 118 as encouraging compulsory arbitration, when the Section’s other encouraged types of alternative dispute resolution—‘settlement negotiations, conciliation, facilitation, mediation, fact-finding, [and] minitrials’—are all consensual.” *Id.* (citations omitted).

remedy individual acts of discrimination when deterrence failed.¹²⁶ By focusing solely on the statute's remedial purpose, the post-*Gilmer* cases have been criticized for failing to consider the broader goals of the laws.¹²⁷ "The *Gilmer* decision effectively modified the inquiry from considering public policy to considering the fairness of the arbitration forum in effecting remediation of the statutory injury."¹²⁸

In two subsequent cases, the Court applied this new analysis and enforced arbitration agreements addressing statutory claims.¹²⁹ While the Court did not entirely abandon public policy considerations, it redefined them by assuming that providing effective remedies to individuals satisfies the broader public goals of the law.¹³⁰ *Gilmer* assumed that deterring employment discrimination could be achieved as long as the individual claiming discrimination had a fair opportunity to remedy his employer's wrongs.¹³¹

The *Gilmer* assumption, however, is problematic for two reasons. First, for the reasons enumerated below, arbitration does not always provide a claimant a fair opportunity to prove discrimination by his employer.¹³² Second, as will be discussed in sub-part C, arbitration is an inherently unsuitable mechanism for achieving the civil rights statutes' broader public goals, such as deterrence.

Crucial differences between arbitration and litigation can substantially affect the resolution of a plaintiff's Title VII claim. First, employers tend to be at an advantage in an arbitration proceeding due to the fact that arbitrating a dispute is a profitable venture.¹³³ While arbitration has traditionally been conducted by non-profit firms and pro-bono neutrals, it is now dominated by private for-profit arbitration organizations.¹³⁴ Arbitrators are normally attorneys or retired judges who are paid by the organization to hear a particular dispute.¹³⁵ In what has been deemed the "repeat player syndrome,"¹³⁶ private arbitrators have

126. See Moohr, *supra* note 12, at 413.

127. *Id.* at 417-19.

128. *Id.*

129. *Id.* at 413.

130. *Id.* at 418.

131. Moohr, *supra* note 12, at 410; Joseph Z. Fleming and Greenberg Traurig, P.A., *Arbitration of Employment Disputes After Circuit City*, SJ037 ALI-ABA 623, 649 (2003) (noting that *Gilmer* held, "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."). *Id.*

132. Hai Jiang, *Do We Allow Contract Law to Administer Civil Rights Remedies? Casenote on Haskins v. Prudential Ins. Co.*, 2003 L. REV. MICH. ST. U. 251, 272-75 (2003).

133. *Id.* at 274.

134. *Id.*

135. *Id.*

136. Karas, *supra* note 8, at 108.

an incentive to favor institutional clients (usually large corporations) lest they risk losing repeat business.¹³⁷ In other words, “arbitrators are often reluctant to find against employers or award large damages for fear of not being invited back.”¹³⁸ In this regard, an arbitrator is less likely to be a neutral decision-maker than a judge or jury.¹³⁹

Second, claimants in an arbitration are less likely to have their claim heard by someone familiar with the laws pertinent to their case.¹⁴⁰ The competence of arbitrators in employment discrimination cases has been the source of much criticism because arbitrators are not always well-versed in the substantive law implicated by the dispute.¹⁴¹ In addition, even if the arbitrators have prior knowledge of the relevant statutes and cases, they are not required to follow them.¹⁴² This gives them wide latitude in interpreting the law and rendering an award,¹⁴³ often to the claimant’s disadvantage.¹⁴⁴

Next, the overall fact-finding process in an arbitration is not equivalent to that of judicial fact-finding.¹⁴⁵ “The record of the arbitration proceedings is not as complete . . . and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.”¹⁴⁶ The lack of formal discovery procedures in arbitration leaves discovery to the discretion of the arbitrator and often places the employee at a disadvantage.¹⁴⁷ For instance, employees may find themselves confronted with discovery matters that would be excluded if the claim were brought in a judicial forum.¹⁴⁸ It is also significant that the employer

137. Jiang, *supra* note 132, at 274.

138. Karas, *supra* note 8, at 109 (quoting T. Shawn Taylor, *More Employers Force Workers into Arbitration- But is it Fair?*, CHI. TRIB., Sept. 22, 2002, §5, at 5).

139. *Id.* at 108.

140. *See id.* at 110.

141. *Id.* at 110. In the securities context, for example, neither the NASD nor the NYSE necessarily considers whether arbitrators have expertise in the subject matter of the underlying dispute. Jiang, *supra* note 168, at 274. This is despite the recommendation by the Securities Industry Conference on Arbitration (SICA) that arbitrators should be knowledgeable in that area of the law. *Id.* Panels selected by the NASD or the NYSE have a tendency to consist of white males, sixty years old or older, with securities backgrounds and without any training in employment issues. *Id.* Some question whether these individuals will be impartial. *Id.*

142. *Id.* at 110.

143. Jiang, *supra* note 132, at 273.

144. *See id.* at 274-75.

145. Karas, *supra* note 8, at 112.

146. *Id.* at 112.

147. Steven S. Poindexter, Pre-Dispute Mandatory Arbitration Agreements and Title VII: Promoting Efficiency While Protecting Employee Rights, 2003 J. DISP. RESOL. 301, 312. *Id.*

148. *Id.* A prime example is sexual harassment cases, in which federal law and many state laws exclude evidence of a plaintiff’s consensual sexual activity with persons other than the harasser. *Id.* An arbitrator, however, is not required to abide by this evidentiary rule and can permit the employer to “forage where it desires in a plaintiff’s private conduct.” *Id.*

usually controls the majority of relevant evidence in the case, such as evidence showing pretext or discriminatory conduct.¹⁴⁹

But, perhaps the most significant difference between the forums is with respect to review of decisions. While a party dissatisfied with the decision rendered in an arbitration proceeding may bring an action to have the award vacated, “judicial review of an arbitration award under the FAA . . . has been described as ‘among the narrowest known to the law.’”¹⁵⁰ An award will be overturned only if there has been a “manifest disregard for the law” or if it conflicts with public policy by violating positive public law.¹⁵¹ “Manifest disregard” occurs when the arbitrator knows the law, yet refuses to apply it.¹⁵² This high threshold for overturning an arbitrator’s ruling increases the likelihood that procedural irregularities will go uncorrected.¹⁵³ If the irregularity is not gross enough to justify vacating the arbitration award on non-statutory or statutory grounds, the parties are left without a remedy.¹⁵⁴

149. *Id.*

150. White, *supra* note 47, at 1298.

151. *Id.* at 1299. Manifest disregard of the law and public policy are the nonstatutory grounds for vacating an award. *Id.* The FAA also provides grounds, albeit limited, for overturning an arbitrator’s award:

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

9 U.S.C. § 10(a)(1)-(4) (2002).

152. White, *supra* note 47, at 1300. “Manifest disregard” means more than error or misunderstanding of the law. *Id.* A number of courts have embraced a two-step approach to manifest regard: to modify or vacate an award on this ground, a court must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.

Id. (citing *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998)).

153. Jiang, *supra* note 132, at 275. In such cases, adjudication of discriminatory claims is unjust because the court will not have the discretion under FAA policy to deny enforcement of the arbitration agreement. *Id.*; *see also* 9 U.S.C. § 10 (2002).

154. Jiang, *supra* note 132, at 275.

C. Arbitration is Not a Proper Mechanism for Enforcing the Anti-Discrimination Laws.

Not only is the arbitral forum often inadequate for resolving individual employment discrimination disputes, it is also not a sound means of achieving the broader public goals of the civil rights statutes.¹⁵⁵ Three important mechanisms for enforcing the anti-discrimination laws (deterrence, development of the law, and education of the public) are sacrificed when an individual claimant is required to arbitrate his employment discrimination claim.¹⁵⁶

First, the deterrent function of resolving an employment discrimination claim can be achieved only as part of an open and public process.¹⁵⁷ In the civil adjudication system, both the process and the result are public.¹⁵⁸ On the other hand, arbitration is private both in the nature of the proceedings as well as the outcome.¹⁵⁹ Only the parties and their representatives may attend an arbitration,¹⁶⁰ and no public record of the parties' filings, the hearing, or the award is created.¹⁶¹ Courts, on the other hand, provide notice of the identity of the conduct of violators when they issue public decisions and orders.¹⁶² When a public judgment is rendered against a violator of the anti-discrimination laws, other employers are deterred from engaging in similar behavior.¹⁶³ Law-abiding employers, because they fear that they too might be stigmatized by consumers and potential employers who will observe practices that they oppose and take actions which affect the employer's profitability,¹⁶⁴ are motivated to continue following the law.¹⁶⁵ "As has been illustrated time and time again, the risks of negative publicity and blemished business reputation can be powerful influences on behavior."¹⁶⁶

The availability to the public of information on discrimination disputes is essential to this system;¹⁶⁷ potential violators made aware of sanctions imposed

155. See Moohr, *supra* note 12, at 426.

156. See *id.* at 426-27.

157. *Id.* at 432.

158. *Id.* at 402.

159. *Id.*

160. Moohr, *supra* note 12, at 402. Generally, arbitration awards are simple statements of the disposition of the claims, and do not enumerate the reason supporting the award. *Id.*

161. *Id.*

162. *Id.*

163. Moohr, *supra* note 12, at 431.

164. *Id.*

165. *Id.* at 430-431.

166. EEOC Notice 915.002, *supra* note 221, ¶ IV., C.

167. Moohr, *supra* note 12, at 438. Moohr offers a good example of how the law could be easily misunderstood, thus underscoring the need for an open process and dissemination of information and records to employers and the public.

For example, an employer may believe it did not discriminate against an employee if it made [an] adverse employment decision without racial animus. The law, however, does

on similarly situated employers can calculate the costs and benefits of engaging in prohibited conduct.¹⁶⁸ Conversely, private arbitration proceedings, which do not apprise similar entities or the public of who has violated the law and in what manner they have violated it, “effectively forfeit[] the enforcement mechanisms of spillover deterrence and stigmatization”¹⁶⁹ Thus, in addition to providing remedies for the particular discrimination victims,¹⁷⁰ the courts play a critical role in preventing future violations of the law.¹⁷¹

Second, when an employment discrimination case is arbitrated, the public is deprived of further development of the body of employment discrimination case law.¹⁷² Litigation occurs within a unified hierarchical system which utilizes past judgments to govern decisions in future cases.¹⁷³ This process, called *stare decisis*, guarantees deference to prior interpretations; decisions are not lightly reversed.¹⁷⁴ The litigation forum, *i.e.* the trial court, is constrained from the outset because the system allows an appellate court to review the legal bases of its decisions.¹⁷⁵ The arbitral forum, however, is “a unique, isolated event that is not subject to review . . . arbitrators neither create nor apply precedent.”¹⁷⁶ While judges in their decisions articulate general principles and rules to be used in deciding future disputes,¹⁷⁷ arbitrators do not formulate principles that are to be applied to anyone outside of the immediate dispute.¹⁷⁸ Arbitrators thus do not contribute to the development of a comprehensive body of employment law. Further, in arbitration, development of the law is stifled¹⁷⁹ because an arbitra-

not require a hateful motive . . . the action may have been a result of unconscious discrimination, [but] courts focus on the effect of the employer’s conduct.

Id.

168. *Id.* at 431.

169. *Id.* at 432.

170. Courts characterize individual litigants in employment discrimination cases as “private attorneys general.” EEOC Notice 915.002 (1997), available at <http://www.eec.gov/policy/docs/mandarb.html>. A civil rights plaintiff bringing his claim in court serves not only his or her private interest, but also functions as “the chosen instrument of Congress to vindicate ‘a policy that Congress considered of the highest priority.’” *Id.* (quoting *Christiansburg Garment Co. v. Equal Employment Opp’y Comm’n*, 434 U.S. 412, 418 (1978)).

171. EEOC Notice 915.002, *supra* note 221, ¶ IV., C. (“By awarding damages, back pay, and injunctive relief as a matter of public record, the courts not only compensate victims of discrimination, but provide notice to the community, in a very tangible way, of the costs of discrimination.”).

172. Moohr, *supra* note 12, at 432-33.

173. *Id.* at 403.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 436.

178. Moohr, *supra* note 12, at 435.

179. *Id.* at 436.

tor's award is rarely reviewed.¹⁸⁰ The public litigation system, on the other hand, provides a "correcting hierarchy,"¹⁸¹ because if a court misinterprets the law, its mistaken reasoning is evident in judicial opinions and the public record,¹⁸² allowing appellate courts to review the decision or Congress to change the law with legislation.¹⁸³ This correcting mechanism is unique to the judicial forum; no such system exists for arbitration.¹⁸⁴ Each arbitrator is independent, and his decision is often "not required to be written or reasoned."¹⁸⁵

Third, when a case is arbitrated, the public is deprived of a decision-maker who is accountable to it. This stems from the fact that the civil justice system derives its authority over civil disputes from the state's power to govern,¹⁸⁶ while arbitration is not authorized by state power.¹⁸⁷ Specifically, judges are selected by a process based on indirect public participation and consent.¹⁸⁸ They are public agents whose decisions are official acts.¹⁸⁹ Thus, with respect to their decisions, judges are accountable to the public, to courts above them, and to Congress.¹⁹⁰ In contrast, arbitrators are individuals acting in a private capacity; they are selected by the parties to render a judgment and are accountable only to those parties.¹⁹¹

In sum, even if the claimant is able to have his claim fairly adjudicated in an arbitration proceeding, the public's interest is not as effectively vindicated as it would be had the claim been decided in the court system.¹⁹² Thus, the Supreme Court's assumption, that "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function,"¹⁹³ is clearly flawed.

180. See Jiang, *supra* note 132, at 275.

181. Moohr, *supra* note 12, at 437.

182. *Id.*

183. *Id.*

184. *Id.*

185. American Arbitration Association, *EEOC Rejects Mandatory Binding Employment Arbitration*, 52 DISP. RESOL. J. 11, 12 (1997). Generally, arbitration awards are simple statements of the disposition of the claims, and do not enumerate the reason supporting the award. Moohr, *supra* note 17, at 402.

186. Moohr, *supra* note 12, at 402.

187. *Id.* (stating, "Arbitrators receive their authority to render a binding decision from the agreement of the parties to abide by that decision.")

188. *Id.* at 402.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 439.

193. *Gilmer*, 500 U.S. at 28 (alteration in original) (citing *Mitsubishi Motors Corp.*, 473 U.S. at 637).

D. Enforcing Compulsory Agreements to Arbitrate Employment Discrimination Claims Undermines the Goals of the Anti-Discrimination Statutes and the FAA

It has taken twenty-five years for alternative dispute resolution (ADR) to emerge as a quicker, less expensive, and in many instances, more effective means of resolving disputes.¹⁹⁴ ADR combines several methodologies, including “arbitration, mediation, conciliation, fact-finding, negotiation, dispute prevention, neutral experts . . . ombudsmen, and private judges.”¹⁹⁵ Although the public is more aware of ADR at present, for most citizens with a grievance, suing in court is a time-honored tradition.¹⁹⁶

In order for ADR to continue developing and for its benefits¹⁹⁷ to be fully realized, it must be embraced by the legal community and the public as “an alternative middle ground between the vagaries of the full-blown adversary system and the controlled flexibility of purely private settlement negotiations.”¹⁹⁸ To accomplish this, it is important that ADR methods are not perceived as a threat to individual rights.¹⁹⁹ Indeed, many perceive arbitration in this light. For example, the EEOC and the National Labor Relations Board (NLRB) have taken positions against compulsory pre-dispute arbitration clauses.²⁰⁰ Lawyers also have objected to binding arbitration for employment disputes on the grounds that arbitration in this context circumvents constitutional and statutory rights.²⁰¹ Some courts feel the same way; one court recently stated, “Given the sacredness . . . of the fundamental right to trial by jury, any contract provision that openly

194. Joseph T. McLaughlin, et al., *Alternative Dispute Resolution of Employment Disputes*, SJ034 A.L.I.-A.B.A. 559, 561 (2003) (noting how “ADR has grown from a dimly recognized concept to a variety of practices spurred by the desire to resolve legal battles outside the courtroom.”).

195. *Id.*

196. *Id.* See *infra* note 315.

197. McLaughlin, et. al. *supra* note 194, at 561. ADR is often a substitute for corporate litigation which consumes a disproportionate amount of judicial and other legal resources. *Id.* at 562.

198. *Id.* at 561.

199. See Thomas B. Metzloff, Ed., *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 *Law and Contemporary Problems* 279, 310 (2004) (stating,

[T]he importance to U.S. citizens of having their day in court [is] a fundamental tenet of the U.S. justice system The ‘right’ to one’s ‘day in court’ is a socially learned expectation and a powerful cultural norm. . . . U.S. citizens may expect to have a court decide the merits of their disputes according to the rules of law unless they agree otherwise . . . many are shocked and dismayed when they learn that they no longer have that right.

(citations omitted)).

200. Matthews, *supra* note 19, at 355-56.

201. McElroy, *supra* note 8, at 1036. For example, a group of California labor lawyers threatened to boycott any ADR firm that participates in binding arbitration of employment disputes. *Id.* Similarly, the National Employment Lawyers’ Association threatened a broad attack against ADR firms in order to inhibit the use of binding arbitration clauses. *Id.*

or subtly causes the forfeiture of the exercise of this right must be rigorously examined by the courts . . . Indeed, the use of such contractual provisions is . . . an ‘open attack’ on the right of jury trial . . .”²⁰² Most telling, however, is the fact that even ADR professionals debate about whether they should arbitrate employment discrimination claims.²⁰³

Likewise, avoiding the creation of misconceptions and a sense of mistrust about ADR methods is important to the FAA’s goal of placing arbitration agreements on “equal footing” with other contracts.²⁰⁴ Nevertheless, the Supreme Court, in its line of decisions starting with *Gilmer* seems to assume that broadening the subject matter of disputes to be resolved by arbitration, and favoring arbitration in any context (including statutory employment disputes) furthers the goals of the FAA. But, “[T]he Court’s lack of analysis is most unfortunate because it demonstrates a lack of appreciation of the different roles of arbitrators and courts and the impact of those differences on the policies which underlie most employment statutes.”²⁰⁵ In reality, mandating arbitration in a context which is perceived to deprive individuals of important procedural rights runs counter to the FAA’s goal of giving arbitration agreements the same status as other contracts.²⁰⁶

Also, in analyzing the Court’s pro-arbitration decisions, it is important to recall that the FAA was initially drafted to provide an alternative to litigation in the commercial environment.²⁰⁷ At common law, merchants were understood to possess equal bargaining power, hence arbitration was a swift and inexpensive means of resolving their disputes.²⁰⁸ However, employer-employee disputes were generally perceived as one-sided.²⁰⁹ Presumably, then, the FAA was not meant to apply to situations involving parties who were not bargaining on equal terms, such as in the employer-employee context.²¹⁰ For the aforementioned

202. Karas, *supra* note 8, at 111 (quoting *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1 (Mont. 2002) (Leaphart, J. concurring)).

203. Matthews, *supra* note 19, at 354-55. The American Arbitration Association (AAA), for example, has focused on developing employment dispute resolution systems that encourage greater use of voluntary methods. *Id.* at 354. Because one of the strongest criticisms against compulsory arbitration is the lack of due process protections, “the AAA has endorsed a ‘due process protocol’ setting out procedural protections” *Id.* Another organization, JAMS, has also “adopted a policy on arbitration ensuring an employee’s right to an attorney, discovery, statutory remedies, and participation in selecting the arbitrator.” *Id.*

204. *Gilmer*, 500 U.S. at 24 (citations omitted).

205. Karas, *supra* note 8, at 109 (commenting on the Court’s dismissal in *Gilmer* of the argument that allowing arbitrators to determine statutory rights would impede the development of the law, and quoting Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77, 99 (1996)).

206. *See id.*

207. *Id.* at 108.

208. *Id.* at 107-108.

209. *Id.* at 107-08.

210. *See id.* at 108.

reasons, requiring arbitration in employment disputes challenges the stated goals and original intent of the FAA.

VI. PENDING LEGISLATION

The uniform judicial determination after *Luce*, that mandatory agreements to arbitrate employment discrimination claims are enforceable, could be affected by legislation. The EEOC's vehement opposition to the enforcement of the agreements has the effect of pitting the executive branch against the judicial branch, and leaves Congress to resolve the dispute.²¹¹

During the first session of the 108th Congress, a bill was introduced proposing to amend the FAA to allow employees to accept or reject the use of arbitration to resolve an employment controversy.²¹² Specifically, H.R. 540 would require that notwithstanding an agreement to arbitrate, arbitration could be used to settle an employment dispute only (i) upon submission of a written request by one party to the other(s) *after* the dispute arises, and (ii) after the served party consents in writing within a 60-day response period.²¹³ Further, the bill would prohibit an employer from requiring arbitration as a condition of employment.²¹⁴ However, no action has been taken on H.R. 540 since early 2003 when the bill was referred to the House Judiciary Committee's Subcommittee on Commercial and Administrative Law for further review and comment.²¹⁵

More recently, during the current session of the 108th Congress, S. 2088 was introduced by Senator Edward Kennedy of Massachusetts.²¹⁶ A provision in this omnibus civil rights bill, entitled the "Civil Rights Act of 2004," would make arbitration clauses in employment contracts unenforceable unless the parties knowingly and voluntarily consent to arbitration after the dispute arises.²¹⁷ The bill was referred to the Senate Committee on Health, Education, Labor, and Pensions for further consideration. Shortly after the activity surrounding S. 2088, an identical measure, H.R. 3809, was introduced in the House and referred to the Subcommittee on Education Reform.²¹⁸

211. Matthews, *supra* note 19, at 357.

212. H.R. 540, 108th Cong. (2003).

213. *Id.* (emphasis added).

214. *Id.*

215. *Id.*

216. S. 2088, 108th Cong. (2004).

217. *Id.* § 513 (2004). Collective bargaining agreements are also excepted from the bill's prohibition on mandatory arbitration agreements between employers and employees. *Id.* at § 513(b).

218. H.R. 3809, 108th Cong. (2004).

While measures similar to these have been proposed in previous sessions of Congress only to die in committee,²¹⁹ it is worth noting that a significant number of Senators and Representatives, in naming themselves as cosponsors of S. 2088 and H.R. 3809, have already indicated their commitment to passing the legislation.²²⁰ This was not the case with the aforementioned legislation.²²¹

VII. CONCLUDING COMMENTS

The Ninth's Circuit Court of Appeals' decision in *Luce* signifies the judiciary's unified view regarding the issue of compulsory pre-dispute arbitration clauses in the employment discrimination context. Employers nationwide can now anticipate, with a degree of certainty, that contracts requiring an employee's waiver of the right to a judicial forum for claims arising under Title VII or other anti-discrimination statutes will be enforced. However, the issues which gave rise to the pre-*Luce* split persist; the arguments against enforcing mandatory arbitration provisions in employment contracts remain valid. As such, the courts will likely be asked to revisit the issue.

In the meantime, in order to further the goals of the civil rights statutes (i.e. to the extent that private forums are capable of furthering the one goal of making it easier for claimants to bring and prove discrimination actions), it is important that certain safeguards are currently incorporated into arbitration proceedings. Procedures such as those required by the Supreme Court of California in *Armendariz v. Foundation Psychare Services, Inc.*²²² provide a more appropriate means for resolving disputes because they protect important rights of employees bringing discrimination actions. As one commentator suggested, "The employee, at a minimum, should have the right to make an informed choice regard-

219. McLaughlin, et al., *supra* note 194, at 582. For instance, Rep. Kucinich introduced the Preservation of Civil Rights Act of 2001 in the aftermath of the Court's decision in *Circuit City Stores*. H.R. 2282, 107th Cong. (2001). The bill would have exempted all employment contracts from the scope of the FAA, thereby allowing parties to voluntarily consent to arbitration after a claim arises. *Id.* The bill was referred to the House Subcommittee on Employer-Employee Relations, but no further action was taken before that session of Congress adjourned. *Id.*

220. Currently, twenty-six Senators are cosponsors of S. 2088. S. 2088, 108th Cong. (2004). 102 Representatives are cosponsors of the companion bill. H.R. 3809, 108th Cong. (2004).

221. H.R. 540, 108th Cong. (2003). H.R. 540 had no House cosponsors. *Id.*

222. 99 Cal. Rptr. 2d 745 (Cal. 2000). In *Armendariz*, the court set forth five minimum requirements for the lawful arbitration of statutory civil rights in the workplace. *Id.* at 759. The arbitration agreement will be lawful if it:

- (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.

Id.

80

ing the use of arbitration *after* the dispute as arisen.”²²³ In short, such safeguards promote fairness to employees which is otherwise lacking when pre-dispute arbitration clauses are enforced to mandate arbitration of statutory discrimination claims.

In the alternative, other methods of ADR are appropriate and can play an important role in resolving employment discrimination disputes. Private companies which, in lieu of compulsory arbitration, have implemented ADR programs responsive to employee rights state that programs involving mediation, peer panels, and management review boards, resulted in the resolution of a large percentage of their employment disputes.²²⁴

Until actions such as these are taken, the FAA’s goal of placing arbitration agreements on equal footing with other contracts will not be accomplished. Also in the interim, employers’ and courts’ compelling the resolution of employees’ discrimination claims threatens the significant progress made by the ADR movement over the past decades.

223. Karas, *supra* note 8, at 106 (emphasis added). This would deal with the problem of the pre-dispute nature of the mandatory arbitration agreement, which results in an involuntary and unknowing waiver of the employee’s rights. *See id.*

224. McLaughlin, et al., *supra* note 194, at 566.

