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Jennifer LaFond

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# The Private Enforcement of Public Laws in *Armendariz v. Foundation Health Psychcare Services*

## I. INTRODUCTION

“We are a nation of employees.”<sup>1</sup> For many of us, work is the most important activity of our lives, and whether by choice or not, we often spend the majority of our waking hours at the office.<sup>2</sup> In light of this reality, Congress and our state legislatures have granted us the right to work in an environment free from discrimination.<sup>3</sup> In recent years, lawmakers have enacted increasingly expansive laws to protect us at work, and employees are taking advantage of these laws.<sup>4</sup>

Like other litigation, employment litigation is an onerous and expensive process that employers would rather avoid.<sup>5</sup> Busy courts would also

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1. MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW: CASES AND MATERIALS* 2 (4th ed. 1998).

2. *See id.*

3. Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 420 (1999). Federal statutes include Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-7 (1994) (prohibiting discrimination on the basis of race, color, sex, national origin, and religion); Age Discrimination In Employment Act of 1967, 29 U.S.C. §§ 621-634 (1994 & Supp. II 1996) (prohibiting age discrimination); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994) (prohibiting discrimination on the basis of disability). The Fair Employment and Housing Act, CAL. GOV'T CODE § 12990-12996 (West 1992 & Supp. 2000) is the California statute governing discrimination.

4. *See* Marcella Noemi Siderman, Comment, *Compulsory Arbitration Agreements Worth Saving: Reforming Arbitration to Accommodate Title Protections*, 47 U.C.L.A. L. REV. 1885, 1887 (2000) (citing Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, *reprinted in* notes following 42 U.S.C. § 1981 (1994) (increasing remedies available to victims of discrimination)); *see also* Evan J. Spelfogel, *Mandatory Arbitration v. Employment Litigation*, DISP. RESOL. J., May 1999, at 78 (discussing the recent popularity of employment lawsuits). As of 1999, there were more than twenty-five thousand wrongful discharge and discrimination cases pending in state and federal courts nationwide. *Id.* The EEOC, state and local agencies are also busy investigating more than fifty thousand employment discrimination claims. *Id.*

5. *See generally* Moohr, *supra* note 3, at 401-04 (contrasting litigation and arbitration). The average duration of an employment case is three to five years, and the average award is \$700,000. Spelfogel, *supra* note 4, at 78. An award in excess of one million dollars would not be unusual. *Id.* An Orange County jury recently award \$5,219,020 to a victim of sex discrimination. *Rayburn v. Vons Co. Inc.*, 2000 WL 796869 (T.D. Cal. Jury).

appreciate seeing fewer employment discrimination cases.<sup>6</sup> Arbitration has surfaced as a favorable alternative to the litigation of employment discrimination claims.<sup>7</sup> Unfortunately, after a dispute has arisen, the parties are not inclined to agree to arbitration, employees in particular want their day in court.<sup>8</sup> Consequently, employers have begun to require that prospective employees sign mandatory employment arbitration agreements as a condition of employment.<sup>9</sup> These predispute arbitration agreements are very controversial, particularly when they encompass statutory discrimination claims.<sup>10</sup>

Arbitration agreements, frequently found in employment contracts, generally require that all disputes arising out of the employment relationship be decided through binding arbitration.<sup>11</sup> Employees typically disfavor compulsory arbitration, because it is often quite expensive, and they lose the rights and protections guaranteed in a judicial forum.<sup>12</sup> Employers, on the other hand, are generally quite fond of arbitration, because it provides confidentiality, is generally less expensive, more efficient, and more final than litigating in a judicial forum.<sup>13</sup> This is due to the relatively informal

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6. RICHARD A. BALES, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT* 8-9 (1997).

7. Spelfogel, *supra* note 4, at 78. “[A]rbitration is quickly becoming the primary source of workplace justice in America,” largely because it limits the employers exposure to liability in lawsuits arising out of the employment relationship. Katherine V.W. Stone, *Employment Arbitration Under the Federal Arbitration Act*, in *EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS 27-28* (Adrienne E. Eaton and Jeffery H. Keefe, eds., 1999) [hereinafter Stone, *Employment Arbitration*]. Furthermore, employers are more likely to prevail in an arbitration. *Id.* at 34.

8. Spelfogel, *supra* note 4, at 78.

9. BALES, *supra* note 7, at 2; *see also* Stone, *Employment Arbitration*, *supra* note 8, at 27-28; Lisa Bingham & Denise R. Charchere, *Dispute Resolution in Employment: The Need for Research*, in *EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS 99* (Adrienne E. Eaton and Jeffery H. Keefe, eds., 1999) (half of “large” private employers require agreements). The California Supreme Court defines such mandatory employment arbitration agreements as “an agreement by an employee to arbitrate wrongful termination or employment discrimination claims rather than filing suit in court, which an employer imposes on a prospective or current employee as a condition of employment.” *Armendariz v. Found. Health Psychcare Serv., Inc.*, 6 P.3d 669, 674 (Cal. 2000).

10. *See, e.g.*, Moohr, *supra* note 3 (arguing that arbitration of statutory employment claims compromises their public policy goals of eliminating discrimination in the workplace); Stone, *Employment Arbitration*, *supra* note 8, at 28 (criticizing mandatory employment arbitration agreements because they may deprive employees of their rights under employment discrimination laws and statutes).

11. *See* Stuart L. Bass, *What the Courts Say About Mandatory Arbitration*, *DISP. RESOL. J.*, Nov. 1999, at 26; Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 *DENV. U. L. REV.* 1017, 1036-37 (1996) [hereinafter Stone, *Yellow Dog*].

12. For example, they lose the protections provided by legal rules of procedure and evidence, as well as the right to a jury trial and judicial review. *See* Andrea Fitz, *The Debate Over Mandatory Arbitration in Employment Disputes*, *DISP. RESOL. J.*, Feb. 1999, at 78.

13. “From management’s point of view, a mandatory arbitration program speeds up the dispute resolution process, minimizes the expense of discovery, reduces internal and legal costs, ensures the preservation of confidentiality (thereby minimizing the risks of adverse publicity), and avoids the possibility of runaway jury verdicts.” Spelfogel, *supra* note 4, at 81.

nature of arbitration, where damage awards tend to be low and judicial review is rare.<sup>14</sup> However, in California at least, this may be less true now than it was prior to August 24, 2000, when the California Supreme Court decided *Armendariz v. Foundation Health Psychcare Services, Inc.*<sup>15</sup>

In *Armendariz*, the California Supreme Court held that employers can mandate an agreement to arbitrate as a condition of employment, subject to certain conditions.<sup>16</sup> These conditions make employment arbitration more fair, but it also makes arbitration more expensive, time intensive, and less final.<sup>17</sup> The court has imposed procedural safeguards on mandatory employment arbitrations, circumscribing the employer's advantage in arbitration, and making this particular type of arbitration look more like traditional litigation.<sup>18</sup>

This Note will analyze the court's decision and its influence on employment arbitration in California. Part II will briefly describe the arbitration process.<sup>19</sup> Part III will review the statutory and case law governing employment arbitration.<sup>20</sup> Part IV will analyze the court's decision in *Armendariz v. Foundation Health Psychcare Services, Inc.*<sup>21</sup> Part V will consider the consequences of this decision.<sup>22</sup> Part VI will briefly conclude.<sup>23</sup>

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14. See Shane Anderies, Note, *Mandatory Arbitration Clauses in Individual Employment Contracts After Duffield v. Robertson Stephens & Co.: A Note on Armendariz v. Foundation Health Psychcare Services, Inc.*, 34 U.S.F. L. REV. 765, 795-96 (2000).

15. 6 P.3d 669 (Cal. 2000).

16. The court held that an arbitration agreement will be binding if the arbitration permits the employee to vindicate statutory rights. Safeguards required to meet this end include a neutral arbitrator, adequate discovery, the availability of all remedies that would be available in court, a written agreement to facilitate judicial review, and limitations on the employee's cost to bring claims in an arbitral forum. *Id.* at 674.

17. See *infra* Part V.A-B.

18. See Fitz, *supra* note 13, at 78; Michael Z. Green, *Debunking the Myth of Employer Advantage From Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 426-27 (2000) (discussing procedural safeguards similar to those imposed by the *Armendariz* court, adopted by the Taskforce on Alternative Dispute Resolution in Employment in a document entitled *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship* [hereinafter *Due Process Protocol*], reprinted in Arnold M. Zack, *Agreements to Arbitrate and the Waiver of Rights Under Employment Law*, in EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS 67, 90-94 (Adrienne E. Eaton and Jeffery H. Keefe, eds., 1999).

19. See *infra* Part II.

20. See *infra* Part III.

21. See *infra* Part IV.

22. See *infra* Part V.

23. See *infra* Part VI.

## II. EMPLOYMENT ARBITRATION

A mandatory employment arbitration agreement typically arises when an employer requires an employee to “agree” to reconcile future employment disputes by arbitration.<sup>24</sup> Arbitration is a “private dispute resolution procedure, designed by the parties to serve their particular needs.”<sup>25</sup> The parties select the arbitrator, determine the issues which will be arbitrated, the procedure which will govern the arbitration, the amount of money in controversy, the remedies available, and how the costs will be apportioned.<sup>26</sup> The arbitrator, who may not even be familiar with employment law,<sup>27</sup> will proceed to hear arguments, review evidence, and then render a decision.<sup>28</sup> A formal written record and court reporters are typically not present in arbitration, and legal rules of evidence do not usually apply.<sup>29</sup> Despite the absence of these procedural safeguards, most arbitrations are definite and final as to the matters submitted.<sup>30</sup>

For the employer especially, there are several benefits associated with arbitration.<sup>31</sup> First, there is no sympathetic jury to grant a large punitive damage award in an arbitration.<sup>32</sup> Second, arbitration, unlike litigation, is

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24. BALES, *supra* note 7, at 3. “Agree” is probably not a properly descriptive word. Employers require that employees “agree” to arbitrate future disputes. If employees refuse, they will likely lose their jobs. *See* Zack, *supra* note 19, at 67.

25. STEPHEN B. GOLDBERG, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 199 (1992).

26. JOHN W. COOLEY, *THE ARBITRATOR’S HANDBOOK* 2-5 (1998).

27. There is no requirement that the parties select a qualified arbitrator. One study reveals that 16% of employment arbitrators have never read a judicial opinion about Title VII and 40% do not read labor advance sheets to keep up with developments under Title VII, yet half of these arbitrators believe they are professionally competent to decide the cases before them. Julian J. Moore, Note, *Arbitral Review (or Lack Thereof): Examining the Procedural Fairness of Arbitrating Statutory Claims*, 100 COLUM. L. REV. 1572, 1589-90 (2000) (citing Harry T. Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in Proceedings of the Twenty-eighth Annual Meeting of the National Academy of Arbitrators 59, 71-72 (1975)).

28. COOLEY, *supra* note 27, at 2.

29. *Id.* at 4.

30. *Id.* Professional associations have recommended minimum procedural safeguards that should be present when employees are compelled to arbitrate employment claims as a condition of employment. *See, e.g.*, American Bar Association, *Due Process Protocol*, *supra* note 19; JAMS/*Endispute Issues Minimum Standards for Employment Arbitration*, 6 WORLD ARB. & MEDIATION REP. 50, 50 (1995); Commission on the Future of Labor-Management Relations, U.S. Dept. of Labor and U.S. Dept. of Commerce, Report and Recommendations: Executive Summary 30-31 (1994) [hereinafter *Dunlop Report*]. The *Armendariz* court adopted many of the recommended safeguards including provisions for neutral arbitrator(s), discovery, statutory remedies, written awards, limited judicial review, and minimal forum fees for the employee. *Armendariz v. Found. Health Psychare Serv., Inc.*, 6 P.3d 669, 674 (Cal. 2000).

31. *See* Zack, *supra* note 19, at 67.

32. *See* BALES, *supra* note 7, at 32. Employers find the jury system unpredictable as jurors are likely to be peers of the employees, and decide cases on sympathy rather than legal merit. *Id.* at 9 (citing Richard A. Bales and Reagan Burch, *The Future of Employment Arbitration in the Non-Union Sector*, 45 LAB. L.J. 627, 633 (1994)).

private, shielding the parties from public scrutiny.<sup>33</sup> Arbitration also gives the parties control over the dispute resolution process, and as the party with superior bargaining power, the employer will probably control the process.<sup>34</sup> The parties are free to select a qualified neutral with specific expertise relevant to their dispute, and grant the arbitrator flexibility in tailoring an award to the specific circumstances of the dispute.<sup>35</sup> Perhaps the greatest advantage of arbitration is that the process is relatively inexpensive because it is reasonably expeditious, informal, and final.<sup>36</sup>

Of course, there are also limitations associated with arbitration.<sup>37</sup> For example, there is no guarantee that the privately selected arbitrator will be a competent decision maker,<sup>38</sup> and despite his competence, he is likely to favor the employer as a potential source of future business.<sup>39</sup> Arbitrators are also not bound by precedent, leading to lack of uniformity in the enforcement of employment laws.<sup>40</sup> Additionally, arbitrations typically have limited discovery, relaxed rules of evidence, and no opportunity for meaningful judicial review of legal issues.<sup>41</sup> Listed above as an advantage, the finality of an arbitration can also be a disadvantage, because even clearly erroneous decisions cannot be overturned by courts.<sup>42</sup> Finally, because arbitration is a private affair, there is no way to ensure that public interests are being respected.<sup>43</sup>

33. Spelfogel, *supra* note 4, at 81.

34. See Stone, *Employment Arbitration*, *supra* note 8, at 52.

35. COOLEY, *supra* note 27, at 5. Consequently, an arbitrator will be more knowledgeable, and perhaps better qualified to settle the dispute than an Article III judge. See *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960) (“[t]he ablest judge cannot be expected to bring the same experience and competence” as an arbitrator). While this is true with respect to collective bargaining agreements, it is questionable whether arbitrators are qualified to resolve public, statutory claims. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 78-79 (1998) (statutory claims not presumed to be arbitrable).

36. COOLEY, *supra* note 27, at 5.

37. The Supreme Court has recognized the limitations of arbitration. It has noted:

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

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

38. See *supra* note 28.

39. Fitz, *supra* note 13, at 78 (the employer is more likely to participate in future arbitrations). The majority of arbitrators are male. Moore, *supra* note 28, at 1590.

40. See Moohr, *supra* note 3, at 403 (“arbitrators neither create nor apply precedent.”).

41. COOLEY, *supra* note 27, at 5.

42. GOLDBERG, *supra* note 26, at 201.

43. Moore, *supra* note 28, at 1591. The discrimination statutes reflect the public’s interest in

Employees generally stand to lose more than employers when they “agree” to arbitrate future disputes.<sup>44</sup> By agreeing to arbitrate, they are waiving procedural rights and protections available in litigation.<sup>45</sup> Employees sacrifice their right to adjudicate claims in a federal court under the Federal Rules of Civil Procedure and the Federal Rules of Evidence by an Article III judge.<sup>46</sup> They may also lose their right to discovery and cross-examination.<sup>47</sup> Finally, damage awards will likely be less than a jury would award, and there is a reduced deterrent effect because the proceeding is confidential.<sup>48</sup>

Nonetheless, public policy generally encourages the use of arbitration as a mechanism for relieving court congestion.<sup>49</sup> Consequently, both federal and California courts are likely to interpret arbitration agreements in favor of arbitration.<sup>50</sup> In fact, the *Armendariz* court relied on this policy in holding that mandatory employment arbitration agreements were enforceable.<sup>51</sup> However, this policy favoring arbitration developed in the context of commercial and labor disputes.<sup>52</sup> Many have questioned whether this policy is applicable to public laws enacted by Congress to protect our right to labor in an environment free from discrimination and other workplace evils.<sup>53</sup>

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eliminating workplace discrimination. Moohr, *supra* note 3, at 399.

44. See Zack, *supra* note 19, at 67-68.

45. See *id.* In arbitration, employees may sacrifice their rights under Article I and Article III of the Constitution, and under the Fifth, Seventh, and Fourteenth Amendments. Fitz, *supra* note 13, at 74.

46. *Id.* Likewise, they lose similar rights and protections that would be available in state courts as well.

47. Stone, *Yellow Dog*, *supra* note 12, at 1046.

48. Fitz, *supra* note 13, at 78.

49. See Norris Case, *Arbitration of Workplace Discrimination Claims: Federal Law and Compulsory Arbitration*, 14 *TOURO L. REV.* 839, 863 (1998).

50. GOLDBERG, *supra* note 26, at 201; *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Moncharsh v. Heily & Blase*, 832 P.2d 899, 902 (Cal. 1992).

51. *Armendariz v. Found. Health Psychcare Serv., Inc.*, 6 P.3d 669, 678-79 (Cal. 2000).

52. See BALES, *supra* note 7, at 19-20 (discussing labor), 23-26 (discussing commerce).

53. See Moohr, *supra* note 3, at 437-439; Matthew W. Finkin, *Modern Manorial Law*, *INDUS. REL.*, Apr. 1999, at 132-33. Examples of statutes designed to protect workers include Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1994) (prohibiting discrimination on the basis of race, color, religion, sex or national origin); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1994) (prohibiting discrimination on the basis of age); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-213 (1994) (prohibiting discrimination on the basis of disability); Civil Rights Act of 1991, 42 U.S.C. § 1981a (providing for damages where there has been intentional discrimination); and the Family Medical Leave Act of 1993, 29 U.S.C. §§ 2601-19 (1994) (allowing employees to take leave for family and medical emergencies). State legislatures have enacted statutes which parallel federal statutes, in addition to whistle-blower and other statutes which provide even greater protection. See, e.g., Fair Employment and Housing Act, CAL. GOV'T CODE §§ 12900-12996 (West 1992 & Supp. 2000) (paralleling Title VII).

### III. HISTORICAL BACKGROUND

The popularity of mandatory employment arbitration agreements followed the United States Supreme Court's apparent endorsement of employment arbitration in *Gilmer v. Interstate/Johnson Lane Corp.*, where it held that a predispute agreement to arbitrate all employment related claims, including statutory age discrimination claims, was enforceable.<sup>54</sup> The Court reasoned that the social policies reflected in the statute would not be compromised by private resolution "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum."<sup>55</sup> Although *Gilmer* did not involve an employment contract, many lower courts, including the *Armendariz* court, interpret the decision broadly and apply it to employment contracts.<sup>56</sup> This section will outline the legal support courts frequently rely on to enforce mandatory arbitration agreements found in employment contracts.

#### A. *The Federal Arbitration Act*

Since the early colonial period, American business communities have valued arbitration as a method of quickly resolving commercial disputes, and for more than one hundred years have regularly included arbitration provisions in standard form contracts.<sup>57</sup> Prior to the passage of the Federal Arbitration Act ("FAA"), however, courts refused to enforce these agreements.<sup>58</sup> In 1925, Congress enacted the FAA,<sup>59</sup> section 2 of which requires courts to find arbitration agreements involving interstate commerce and maritime transactions "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>60</sup> Courts could no longer refuse to enforce arbitration agreements, unless those equitable and legal defenses available to challenge the validity

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

55. *Id.* at 28 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

56. Stone, *Employment Arbitration*, *supra* note 8, at 33-34. *Gilmer* involved an individual's arbitration agreement with the New York Stock Exchange, not his employer. *Gilmer*, 500 U.S. at 25 n.2.

57. Stone, *Employment Arbitration*, *supra* note 8, at 35-37.

58. *Id.* at 37-38.

59. 9 U.S.C. §§ 1-16 (1994); *Gilmer*, 500 U.S. at 24 (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985)). For a more detailed discussion of the FAA see BALES, *supra* note 7, at 1-59; Stone, *Employment Arbitration*, *supra* note 8.

60. 9 U.S.C. § 2 (1994).



of a contract were also available to challenge the enforcement of a particular arbitration agreement.<sup>61</sup>

The Sixty-eighth Congress passed the FAA, expecting that it would apply primarily to voluntary agreements to arbitrate commercial disputes.<sup>62</sup> In the 1980s, the Supreme Court began expanding the use and significance of the FAA in the context of commercial disputes, and by extension, employment disputes as well.<sup>63</sup> Finally, in 2001, the Supreme Court definitively declared that the FAA does apply to employment disputes.<sup>64</sup>

The Court's modern progression to this most recent holding is interesting. First, the Court adopted a policy favoring arbitration, meaning that courts will enforce an arbitration agreement in borderline cases.<sup>65</sup> Then the Court held that the FAA applies in state courts, and that it preempts any conflicting state law.<sup>66</sup> The parties may, however, agree to be bound by state law that differs from the FAA, so long as the state law does not undermine the goals and policies of the FAA.<sup>67</sup> Consequently, any state law seeking to restrict the use of arbitration will be preempted by the FAA.<sup>68</sup> Next, the Court found the FAA applicable to a variety of statutory disputes, including the federal age discrimination statute.<sup>69</sup> Finally, the Supreme Court held that most employment contracts fall within the scope of the FAA's coverage.<sup>70</sup>

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61. Anderies, *supra* note 15, at 776.

62. See Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 400-01 & n.16 (1998).

63. Supreme Court jurisprudence of the 1980s primarily concerned commercial disputes. See BALES, *supra* note 7, at 23-25. Lower courts have extended the rationales underlying those decisions to the employment setting. See *id.* at 49-59.

64. Circuit City Stores, Inc., v. Adams, 121 S. Ct. 1302 (2001).

65. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

66. Southland Corp. v. Keating, 465 U.S. 1, 12 (1984); Perry v. Thomas, 482 U.S. 483, 492 (1987); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272 (1995); Doctor's Assocs. Inc., v. Casarotto, 517 U.S. 681, 684-85 (1996).

67. See Volt Info. Sci., Inc., v. Bd. of Trustees, 489 U.S. 468 (1989). This is true even when following state law will require a different result. Harding, *supra* note 63, at 412.

68. See, e.g., Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996). In *Doctor's Associates*, the Supreme Court found that the FAA preempted a Montana statute requiring that contracts containing arbitration clauses provide notice of the commitment to arbitrate in typed underlined capital letters at the bottom of the first page of the contract. *Id.* The state law was contrary to the FAA's presumption of enforceability. *Id.* at 687. Furthermore, the FAA requires that arbitration agreements be on "equal footing" with contracts, so states seeking to protect citizens from arbitration clauses must do so under "generally applicable" contract defenses. *Id.*

69. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (ADEA); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (antitrust laws); Shearson/American Exp. Inc. v. McMahon, 482 U.S. 220 (1987) (RICO and 1933 Securities Act).

70. Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302 (2001). Section 2 provides an exclusion for transportation workers, directly engaged in interstate commerce only. See *id.* at 1306. Previously, the Ninth Circuit held that the § 2 exclusion applies to all employment contracts. Craft v. Campbell Soup Co., 177 F.3d 1083 (1998), *rev'd*, Circuit City Stores, 121 S. Ct. 1302 (2001). All other circuits applied the exclusion only to those directly engaged in interstate commerce. Dickstein v. DuPont, 443 F.2d 783, 785 (1st Cir. 1971); Erving v. Va. Squires Basketball Club, 468 F.2d 1064,

In *Circuit City v. Adams*, a heavily divided Court forced the renegade Ninth Circuit's alignment with the other eleven circuits regarding the FAA's applicability to compulsory employment arbitration agreements.<sup>71</sup> The debate centered around section 1 and section 2 of the Act. Section 2 of the FAA states that all arbitration agreements involving interstate commerce are enforceable.<sup>72</sup> Section 1 however, creates an exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."<sup>73</sup> Relying on canons of statutory interpretation<sup>74</sup> rather than legislative or jurisprudential history,<sup>75</sup> the Court rejected the view that section 1 excludes *all* contracts of employment from coverage under the FAA.<sup>76</sup> Instead, the Court held that only those directly involved in the interstate movement of goods would be excluded from coverage under the FAA.<sup>77</sup> Interestingly, the Court did note that the Sixty-eighth Congress may have chosen alternative language for its

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1069 (2d Cir. 1972); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3d Cir. 1997); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 53 n.3 (7th Cir. 1995); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998); *Paladino v. Avnet Computer Techs.*, 134 F.3d 1054, 1060-61 (11th Cir. 1998); *Cole v. Burns Int'l Sec. Serv.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997).

71. *Circuit City*, 121 S. Ct. 1302 (2001). This was a 5-4 decision. The majority Justices were Kennedy, Rehnquist, O'Connor, Scalia and Thomas. The dissenting Justices were Stevens, Ginsburg, Breyer, and Souter.

72. 9 U.S.C. § 2 (1994).

73. 9 U.S.C. § 1 (1994).

74. *Circuit City*, 121 S. Ct. at 1308-09. The maxim *ejusdem generis*, directing that general words following specific words should be construed to embrace terms similar to the specific terms, led the Court to its conclusion. The general term "any other class of workers engaged in . . . commerce" follows the specific enumeration of "seamen" and "railroad employees." According to this canon, the exclusion for other workers engaged in commerce contemplates only those directly involved in commerce, like seamen and railroad workers. *Id.*

75. The dissenting Justices focus on the Act's legislative history. Congress intended that the FAA would apply to commercial and maritime contracts, not employment contracts. *Id.* at 1314-15 (Stevens, J., dissenting). Furthermore, section 1 was included to appease labor organizations fearing that federal courts might use the FAA to enforce arbitration clauses in employment contracts. *Id.* at 1315. The dissenters also note that at the time of enactment, Congress' commerce clause power reached only employees "actually engaged in interstate commerce." *Id.* at 1320 (Souter, J., dissenting). By limiting the scope of the FAA so as to exclude from coverage all employment contracts over which it had power to regulate, Congress illustrated its intent that the FAA should not apply to any employment contracts. *Id.*

76. This was the construction adopted by the Ninth Circuit. See *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1998).

77. *Circuit City*, 121 S. Ct. at 1311.

legislation if it could have predicted that the Supreme Court's commerce clause jurisprudence would lead to this construction.<sup>78</sup>

### B. *The California Arbitration Act*

The California Arbitration Act ("CAA") is modeled after the FAA.<sup>79</sup> It also presumes an agreement is arbitrable, and enforces arbitration agreements according to state contract law.<sup>80</sup> In *Moncharsh v. Heily & Blase*, the California Supreme Court noted that by enacting a comprehensive scheme regulating private arbitration, the California legislature has expressed a "strong public policy in favor of arbitration."<sup>81</sup> Thus, the courts should "indulge every intendment to give effect to such proceedings."<sup>82</sup>

### C. *Labor Arbitration*<sup>83</sup>

The Supreme Court recognizes that labor arbitration is essential for maintaining industrial peace.<sup>84</sup> Accordingly, it encourages arbitration of disputes regarding the interpretation and enforcement of collective bargaining agreements.<sup>85</sup> The courts are happy to defer to labor arbitrators because they "have a special expertise in applying the 'law of the shop.'"<sup>86</sup> That is, labor arbitrators are often better qualified than judges to resolve industrial disputes.<sup>87</sup>

Arbitrators do not have "special expertise in interpreting the law of the land," thus the Supreme Court has been more critical of allowing arbitrators

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78. *Id.*

79. See *Armendariz v. Found. Health Psychcare Serv., Inc.*, 6 P.3d 669, 678-79 (Cal. 2000); *Anderies*, *supra* note 15, at 777.

80. "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." CAL. CIV. PROC. CODE § 1281 (West 1997); see also *Anderies*, *supra* note 15, at 777 (citing *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903, 915 (Cal. 1997)).

81. *Moncharsh v. Heily & Blase*, 832 P.2d 899, 902 (Cal. 1992).

82. *Id.*

83. Labor arbitration refers to arbitration involving collective bargaining agreements.

84. *Moohr*, *supra* note 3, at 406. Labor agrees not to strike in exchange for the promise to arbitrate. *Id.*

85. See *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960) (requiring courts to enforce promises to arbitrate); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (holding that collective bargaining agreements were presumptively arbitrable); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (holding that arbitral awards are enforceable with minimum judicial review). These three cases are collectively known as the *Steelworkers Trilogy*. However, these cases are arbitrable under federal labor laws, not the FAA. *Moohr*, *supra* note 3, at 405-406.

86. *Stone*, *Yellow Dog*, *supra* note 12, at 1036. For a historical discussion of arbitrability of union worker employment claims, see *id.* at 1022-1029.

87. *Enterprise Wheel*, 363 U.S. at 596 (finding arbitrators indispensable in collective bargaining process because of their specialized knowledge).

to resolve statutory claims.<sup>88</sup> In *Alexander v. Gardner-Denver Co.*, the Supreme Court held that an employee could not be required to arbitrate Title VII claims, despite the presence of a mandatory arbitration clause in the collective bargaining agreement.<sup>89</sup> The Court gave four reasons illustrating why arbitration was an inferior forum for the resolution of Title VII claims: (1) the arbitrator is hired to serve “the intent of the parties rather than the requirements of [the] legislation;”<sup>90</sup> (2) the comparatively lax fact finding process in arbitration makes it a less appropriate forum than the federal courts;<sup>91</sup> (3) arbitrators do not have to issue written opinions;<sup>92</sup> and (4) the union has exclusive control over the presentation of the individual’s statutory claim.<sup>93</sup> Following *Gardner-Denver Co.*, most lower courts held that antidiscrimination laws could not be the subject of a mandatory arbitration agreement.<sup>94</sup>

#### D. Arbitration of Statutory Claims

Until the 1980s, a “public policy defense” precluded a party from being compelled to arbitrate any statutory claims under the FAA.<sup>95</sup> In *Wilko v. Swan*, the Supreme Court created the “public policy defense” when it recognized that the judicial forum was superior to the arbitral forum for resolving statutory claims, that compulsory arbitration violated public policy because it constituted waiver of the statutory right to a judicial forum, and that the informality of arbitration made it difficult for courts to correct errors in statutory interpretation.<sup>96</sup>

Thirty years later, after finding that the FAA creates a presumption in favor of arbitrability,<sup>97</sup> the Supreme Court reversed *Wilko* and laid the “public policy defense” to rest through what has become known as the

88. See Stone, *Yellow Dog*, *supra* note 12, at 1036 (“arbitrators may not be conversant with the public law considerations underlying (statutory claims).”) (quoting *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 743 (1981)).

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

90. *Id.* at 56-57.

91. *Id.* at 57-58.

92. *Id.* at 58.

93. *Id.* at 58 n.19.

94. Stone, *Employment Arbitration*, *supra* note 8, at 49-51. This was true until 1991, when the Court decided that a federal age discrimination statute claim could be the subject of compelled arbitration. Spelfogel, *supra* note 4, at 79.

95. Stone, *Employment Arbitration*, *supra* note 8, at 49.

96. *Wilko v. Swan*, 346 U.S. 427 (1950), *rev'd*, *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477 (1989) (enforcing a predispute arbitration agreement with respect to claims arising under the 1933 Securities Act).

97. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1953).

*Mitsubishi Trilogy*.<sup>98</sup> The *Mitsubishi Trilogy* created a new presumption: that statutory rights are arbitrable, unless the text and history of a particular statute demonstrates Congress' intent to preclude enforcement of the statute in arbitration.<sup>99</sup> In announcing this presumption, the Court assumes that arbitration does not require the waiver of any substantive rights,<sup>100</sup> and that arbitrators are competent to resolve complex statutory issues.<sup>101</sup> Although the *Mitsubishi Trilogy* allows courts to compel arbitration of statutory claims arising from commercial disputes, it did not overrule *Gardner-Denver Co.*, or its suggestion that Title VII claims cannot be the subject of a compelled arbitration.<sup>102</sup>

### E. Arbitrability of Statutory Employment Discrimination Claims

#### 1. *Gilmer v. Interstate/Johnson Lane Corp.*

Pursuant to an agreement with the New York Stock Exchange ("NYSE"), the Supreme Court compelled Robert Gilmer to arbitrate his Age Discrimination in Employment Act claims with his employer, Interstate/Johnson Lane Corporation.<sup>103</sup> The Court reconsidered its distrust of the arbitral forum expressed in *Gardner-Denver* in light of its recently discovered presumption in favor of arbitration.<sup>104</sup> As required by *Mitsubishi*,

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98. The Supreme Court found statutory claims were arbitrable under the FAA in *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (Sherman Antitrust Act); *Shearson/American Exp. v. McMahon*, 482 U.S. 220, 232 (1987) (1934 Securities and Exchange Act and RICO); *Rodriguez de Quijaas v. Shearson/American Exp. Inc.*, 490 U.S. 477 (1989) (1933 Securities Act).

99. *Mitsubishi Motors*, 473 U.S. at 626.

100. *Id.* at 628.

By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

*Id.*

101. The parties can select an arbitrator with statutory expertise, and may also employ experts to assist. "[W]e are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Id.* at 626-27.

102. See *supra* text accompanying notes 86-94.

103. *Id.*

104. *Gilmer v. Interstate/Johnson Corp.*, 500 U.S. 20, 25-26 (1991) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) ("liberal federal policy favoring arbitration"); *Mitsubishi Trilogy*, *supra* notes 92-99 and accompanying text (discussing arbitrability of statutory claims)). The Court relied on the recently decided commercial arbitration cases rather than *Gardner-Denver* to find the ADEA claims arbitrable. *Moohr*, *supra* note 3, at 415-416. The Court suggests that the arbitrability of statutory claims will depend upon whether the employee is represented by a union or not. See generally, John E. Taylor, Note, *Helping Those Who Help Themselves: The Fourth Circuit's Treatment of Agreements to Arbitrate Statutory Employment Discrimination Claims in Brown v. ABF Freight Systems, Inc. and EEOC v. Waffle House, Inc.*, 79

Gilmer would have to demonstrate that Congress intended to preclude arbitration of ADEA claims to overcome the presumption of arbitrability.<sup>105</sup> Gilmer failed to meet this burden, and the Court concluded that the arbitral forum was adequate to both address individual grievances, and to further the social policy goals of the ADEA (to prohibit age discrimination).<sup>106</sup>

Despite Gilmer's protest, the Court found that he could effectively vindicate his statutory rights in an arbitration.<sup>107</sup> Gilmer's concerns regarding biased arbitrators,<sup>108</sup> limited discovery,<sup>109</sup> the lack of written opinions,<sup>110</sup> and equitable relief<sup>111</sup> were characterized as "far out of step with [the Court's] current strong endorsement" of arbitration.<sup>112</sup> In any event, Gilmer's concerns were adequately protected by NYSE arbitration rules.<sup>113</sup> However, the Court did not require that NYSE-like safeguards be present whenever statutory rights are being vindicated, leaving future employees vulnerable to arbitrations with far fewer procedural protections.<sup>114</sup>

Strictly speaking, *Gilmer* only requires the enforcement of arbitration agreements in non-employment contracts entered into as a condition of employment, and only compels arbitration of ADEA claims.<sup>115</sup> It does not necessarily apply to employment contracts or other antidiscrimination claims. This leaves room for courts to find that employees should not be

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N.C. L. REV. 239 (2000) (comparing union and individual arbitration agreements).

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

106. *Id.* at 26-28.

107. *Id.* at 30-32.

108. *Id.* at 30. The Court said the parties were free to select impartial arbitrators. *Id.* Furthermore, the NYSE rules allowed employees to inquire into the arbitrators ability to render an impartial decision, and allowed them one peremptory challenge and unlimited challenges for cause. *Id.*

109. *Id.* at 31. Limited discovery is sufficient for ADEA claims. *Id.* Furthermore, NYSE rules provided for document production, deposition, subpoenas, and information requests. *Id.*

110. *Id.* at 31-32. Gilmer argued that the lack of written opinions would prevent the public from knowing of an employer's discriminatory practices, render appellate review ineffective, and stifle the development of law. *Id.* The Court responded that courts would continue to hear a sufficient number of ADEA claims to address his concerns. *Id.* Furthermore, NYSE arbitration decisions are written and available to the public. *Id.*

111. *Id.* Arbitrators can fashion equitable relief, and the EEOC is not precluded from seeking equitable and class-wide relief. *Id.*

112. *Id.* at 30.

113. *Id.* at 30-32.

114. However, the Court did suggest that minimum safeguards must be present. *See id.* at 33 ("claimed procedural inadequacies . . . [are] best left for resolution in specific cases."). Lower courts, including *Armendariz*, have enumerated minimum procedural safeguards required for the arbitration of statutory claims. *See supra* notes 18-19 and accompanying text.

115. BALES, *supra* note 7, at 49.

compelled to arbitrate Title VII and Fair Employment and Housing Act (“FEHA”)<sup>116</sup> claims.<sup>117</sup>

## 2. Title VII and Parallel State Statutes<sup>118</sup>

Following *Gilmer*, it seems that an employee will be compelled to arbitrate Title VII claims unless she can demonstrate that Congress intended to preclude arbitration of the statutory rights at issue.<sup>119</sup> This intention would be discoverable in the text or legislative history of the statute, or through an inherent conflict between arbitration and the statute’s underlying purpose.<sup>120</sup> Ambiguity best describes Congress’ intent with respect to the arbitration of Title VII claims.<sup>121</sup>

Title VII seeks to promote equality of employment opportunities by outlawing discrimination on the basis of race, color, religion, sex, or national origin.<sup>122</sup> Although federal courts are ultimately responsible for the enforcement of Title VII,<sup>123</sup> Congress has recognized that alternative forms of dispute resolution might play a role in enforcing the federal discrimination laws.<sup>124</sup> Section 118 of the Civil Rights Act of 1991 provides that “[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.”<sup>125</sup> While most courts have interpreted this as a reflection of Congress’ intent to encourage even mandatory arbitration,<sup>126</sup> commentators and the Ninth Circuit understand section 118 as an endorsement of only voluntary arbitration.<sup>127</sup>

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116. The FEHA is California’s version of Title VII. CAL. GOV’T CODE § 12990-12996 (West 1992 & Supp. 2000).

117. See BALES, *supra* note 7, at 49. However, only the Ninth Circuit has refused to apply *Gilmer* to Title VII and FEHA cases. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1188-89 (1998).

118. California’s parallel statute, the Fair Employment and Housing Act is “explicitly made part of the Title VII enforcement scheme.” *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 477 (1982).

119. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

120. *Id.*

121. Ellwood F. Oakley, III & Donald O. Mayer, *Arbitration of Employment Discrimination Claims and the Challenge of Contemporary Federalism*, 47 S.C. L. REV. 475, 489-90 (1996).

122. 42 U.S.C. §§ 2000e-e17 (1994).

123. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974).

124. Mark L. Adams, *Compulsory Arbitration of Discrimination Claims and the Civil Rights Act of 1991: Encouraged or Proscribed?* 44 WAYNE L. REV. 1619, 1620 (1999) (citing Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1081, *reprinted in* notes to 42 U.S.C. § 1981 (1994)).

125. Pub. L. No. 102-166, § 118, *reprinted in* notes following 42 U.S.C. § 1981 (1994).

126. See Ryan D. O’Dell, *Does Title VII Preclude Enforcement of Compulsory Arbitration Agreements? The Ninth Circuit Says Yes.*, 1999 J. DISP. RESOL. 83, 94 (1999).

127. See, e.g., *id.*; Adams, *supra* note 125; *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1193 (9th Cir. 1998). Arbitration cannot honor the public interest in enforcing Title VII. *Id.* at

In *Duffield v. Robertson Stephens & Co.*, the Ninth Circuit held that compulsory arbitration of Title VII and FEHA claims were not “appropriate” within the terms of section 118, and that compulsory arbitration agreements were not “authorized by law” when Congress drafted section 118.<sup>128</sup> *Duffield* reasoned that the term “where appropriate” must be considered in the context of the statute’s purpose, which is to strengthen employee rights.<sup>129</sup> The Act sought to give employees flexibility in choosing a forum for resolving employment discrimination claims, not limit them to one non-judicial option imposed by the alleged civil rights violator.<sup>130</sup> Thus, agreements that make arbitration compulsory are not appropriate alternative forums.

The *Duffield* court went on to interpret the phrase “to the extent authorized by law.”<sup>131</sup> In doing so, the court considered the law as Congress understood it when section 118 was drafted.<sup>132</sup> After reviewing legislative history, the court concluded that Congress intended to codify *Gardner-Denver’s* rule prohibiting enforcement of mandatory pre-dispute agreements

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1188. The Ninth Circuit is the renegade circuit with respect to this view. Every other court to consider the issue has found that employees can be compelled to arbitrate statutory claims. *See, e.g.*, *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361 (7th Cir. 1999) (Title VII and state law claims); *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175 (3d Cir. 1998) (Title VII claims); *McWilliams v. Logicon, Inc.*, 143 F.3d 573 (10th Cir. 1998) (ADA claim); *Cole v. Burns Int’l. Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997) (Title VII claim); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50 (7th Cir. 1995) (ADEA claims); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991) (state law sex discrimination claim). State courts have also rejected *Duffield’s* view. *See e.g.*, *Rembert v. Ryan’s Family Steak Houses, Inc.*, 596 N.W.2d 208 (Mich. Ct. App. 1999); *DeCaminada v. Coopers & Lybrand, L.L.P.*, 591 N.W.2d 364 (Mich. App. 1998); *Alamo Rent A Car, Inc., v. Galarza*, 703 A.2d 961 (N.J. Super. Ct. App. Div. 1997); *Gunby v. Equitable Life Assur. Soc’y of the United States*, 971 S.W.2d 7 (Tenn. Ct. App. 1997); *Freeman v. Minolta Bus. Sys., Inc.*, 699 So. 2d 1182 (La. Ct. App. 1997); *Gaffney v. Powell*, 668 N.E.2d 951 (Ohio Ct. App. 1995).

128. *Duffield*, 144 F.3d at 1194-1200. Nor does the court believe they were authorized when the statute was passed because Congress intended to codify *Gardner-Denver*, not *Gilmer*. *Id.* at 1194-95. “Where appropriate” limits what is “authorized by law,” so even if the Act is interpreted to codify *Gilmer’s* finding that compulsory arbitration may be authorized by law, it is not appropriate with respect to Title VII claims. *Id.* at 1198.

129. *Id.* at 1194.

130. *Id.*; *see also Adams, supra* note 125, at 1639.

Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens.

*Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting).

131. *Duffield*, 144 F.3d at 1194.

132. *Id.*



to arbitrate Title VII claims.<sup>133</sup> Among other things, the court cited committee findings that all circuit courts prohibit compulsory arbitration of Title VII claims,<sup>134</sup> the President's statement that "'section 118 encourages voluntary agreements,'"<sup>135</sup> and congressional rejection of a Republican proposal that would have allowed the use of arbitration as a *substitute* for judicial resolution.<sup>136</sup>

Other courts have reviewed the legislative history of the Civil Rights Act of 1991, and concluded it does not preclude compulsory arbitration of Title VII claims.<sup>137</sup> These courts often rely on the plain meaning of the statute, which on its face, seems to encourage arbitration.<sup>138</sup> Of particular importance to these courts is the fact that the 1991 Act, passed six months after *Gilmer*, established that compulsory arbitration of ADEA claims was acceptable, thus suggesting that Congress intended to codify *Gilmer*.<sup>139</sup>

#### *F. The Treatment of Arbitration Agreements in California State Courts*

Unlike the Ninth Circuit, California state courts will enforce mandatory employment arbitration agreements reaching statutory claims, provided that the *Armendariz* requirements are satisfied.<sup>140</sup> However, these agreements will be struck down if they are found to be procedurally and substantively unconscionable.<sup>141</sup> If the contract or a provision of the contract is not within the reasonable expectations of the adhering party, or the contract is unduly oppressive, the agreement will be unconscionable and unenforceable.<sup>142</sup>

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133. "The legislative history of the Act makes it absolutely clear that Congress intended § 118 to codify the *Gardner-Denver* approach to compulsory arbitration agreements and to preclude the enforceability of such agreements with respect to Title VII claims." *Id.* at 1198. Committees did not even discuss *Gilmer*. See Oakely & Mayer, *supra* note 122, at 489.

134. *Duffield*, 144 F.3d at 1194.

135. *Id.* at 1197.

136. *Id.* at 1196.

137. See cases cited *supra* note 128; Oakely & Mayer, *supra* note 122, at 489-92 (discussing legislative history).

138. Pub. L. No. 102-166, § 118, *reprinted in* notes following 42 U.S.C. § 1982 (1994) ("[A]lternative means of dispute resolution . . . is encouraged."). Anderies, *supra* note 15, at 775 (citing *Seus v. John Nuveen & Co.*, 146 F.3d at 182).

139. See, e.g., *Armendariz v. Found. Health Psychcare Serv., Inc.*, 6 P.3d 669, 677-78 (Cal. 2000).

140. See *infra* Part IV.B.3a-e.

141. See *Kinney v. United Healthcare Servs., Inc.*, 70 Cal. App. 4th 1322, 1329-32 (1999).

142. *Id.* at 1328.

## IV. COURT'S ANALYSIS

A. *Facts of the Case*

In the summer of 1995, Foundation Health Services, Inc. hired Marybeth Armendariz and Dolores Olague-Rodgers into the "Provider Relations Group."<sup>143</sup> They were subsequently promoted to supervisory positions, but less than a year later those positions were eliminated and Armendariz and Olague-Rodgers were fired.<sup>144</sup> The employees claimed they were wrongfully terminated because of their "perceived and/or actual sexual orientation (heterosexual)."<sup>145</sup> Accordingly, they filed a complaint for wrongful termination, alleging that their supervisors and co-workers had subjected them to sexually based harassment and discrimination, in violation of the Fair Employment and Housing Act ("FEHA").<sup>146</sup>

Their employment application forms included an arbitration clause pertaining to future claims arising out of the employment relationship.<sup>147</sup> The clause mandated that employees (1) arbitrate all disputes arising out of the employment; (2) submit to arbitration under the CAA;<sup>148</sup> and (3) limit their claims for damages to lost wages up to the date of the arbitration award.<sup>149</sup>

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143. *Armendariz*, 6 P.3d at 674.

144. *Id.* at 674-75.

145. *Id.* at 675. Employees claimed that their supervisor was gay and discriminated against them because they were heterosexual. Resp't Brief at 11, *Armendariz v. Found. Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000) (No. S075942).

146. *Armendariz*, 6 P.3d at 675. Employees also alleged wrongful termination causes of action based on tort and contract theories of recovery. *Id.*

147. *Id.* The text of the arbitration clause stated that:

I agree as a condition of my employment, that in the event my employment is terminated, and I contend that such termination was wrongful . . . I and Employer agree to submit any such matter to binding arbitration pursuant to the provisions of title 9 of Part III of the California Code of Civil Procedure, commencing at section 1280 et seq. or any successor or replacement statutes. I and Employer further expressly agree that in any such arbitration, my exclusive remedies for violation of the terms, conditions or covenants of employment shall be limited to a sum equal to the wages I would have earned from the date of any discharge until the date of the arbitration award. I understand that I shall not be entitled to any other remedy, at law or in equity, including but not limited to reinstatement and/or injunctive relief.

*Id.* They subsequently executed another agreement containing this same clause. *Id.*

148. CAL. CIV. PROC. CODE §§ 1280-1294.2 (West 1997 & Supp. 2000).

149. *Armendariz*, 6 P.3d at 675; *see also supra* note 148 (setting forth the text of the arbitration agreement).

Relying on the arbitration agreement, Foundation Health filed a motion to compel arbitration.<sup>150</sup> The trial court held the arbitration agreement was unfair and therefore unenforceable.<sup>151</sup> It specifically noted that the agreement lacked mutuality in that only employees were required to arbitrate claims (employers were free to seek judicial resolution of any claims it may have against employees), it did not provide for adequate discovery, and the limitation on damages precluded recovery under the FEHA, as well as contract and torts causes of action.<sup>152</sup>

The Court of Appeal reversed, holding that the agreement was enforceable, minus the unconscionable remedy provision.<sup>153</sup> The Court of Appeal also found that employees were afforded adequate discovery by the CAA.<sup>154</sup>

The California Supreme Court affirmed the trial court decision, concluding that the agreement was unenforceable because it was permeated with unconscionability.<sup>155</sup> Although the court found this particular mandatory employment arbitration agreement unenforceable, it did hold that other such agreements will be enforced in the future if they permit employees to vindicate their statutory rights.<sup>156</sup>

## B. Court's Analysis

### 1. Arbitrability of statutory antidiscrimination claims

The court begins its analysis by concluding that statutory antidiscrimination claims, the FEHA specifically, can be the subject of a mandatory arbitration agreement.<sup>157</sup> This is contrary to current precedent in the Ninth Circuit evidenced by its decision in *Duffield v. Robertson Stephens & Co.*<sup>158</sup> The *Armendariz* court thoughtfully considered and categorically

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150. *Armendariz*, 6 P.3d at 675.

151. *Id.* It found the arbitration provision to be "so one-sided as to shock the conscience." *Id.* (internal quotations omitted).

152. *Id.*

153. *Armendariz v. Found. Health Psychcare Serv.*, 80 Cal. Rptr. 2d 255 (Ct. App. 1998).

154. *Id.* at 267. The arbitration agreement incorporated the CAA, which provides that:

[T]he parties to the arbitration shall have the right to take depositions and to obtain discovery regarding the subject matter of the arbitration, and, to that end, to use and exercise all of the same rights, remedies, and procedures . . . as if the subject matter of the arbitration were pending in a civil action before a superior court of this state . . .

CAL. CIV. PROC. CODE § 1283.05(a) (West 1997).

155. *Armendariz*, 6 P.3d at 699.

156. *Id.* at 674.

157. *Armendariz*, 6 P.3d at 675-78. The court would find Title VII claims equally arbitrable. *Id.* at 678.

158. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998) (prohibiting the enforcement of mandatory employment agreements to arbitrate Title VII or equivalent state

rejected the Ninth Circuit's view that employees cannot be compelled to arbitrate statutory discrimination claims.<sup>159</sup>

The holding in *Duffield* is based on what the *Armendariz* court would call a peculiar interpretation of section 118 of the Civil Rights Act of 1991 which provides that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged."<sup>160</sup> While most courts have interpreted this as a reflection of Congress' intent to encourage arbitration,<sup>161</sup> the *Duffield* court understood it to be "indicative of a congressional intent to outlaw compulsory arbitration of employee civil rights claims."<sup>162</sup>

The *Armendariz* court reasoned that if Congress intended to "ban mandatory employment arbitration by means of a clause that encourages the use of arbitration," it could have explicitly "proscribed mandatory employment arbitration of Title VII claims."<sup>163</sup> Furthermore, *Duffield* mistakenly believes that compulsory arbitration of Title VII claims was illegal when the Civil Rights Act of 1991 was drafted, leading it to a flawed analysis of "to the extent authorized by law."<sup>164</sup> The Civil Rights Act of 1991 was passed six months after the Supreme Court decided in *Gilmer* that an employee could be compelled to arbitrate ADEA claims.<sup>165</sup> The *Armendariz* court assumes that *Gilmer* applies to employment contracts, and concludes that because *Gilmer* was the law when the Civil Rights Act of 1991 was passed, Congress was aware of *Gilmer* when it used the phrase "to the extent authorized by law."<sup>166</sup>

Unlike *Duffield*, the *Armendariz* court found "nothing in the [Civil Rights Act of 1991] prohibit[ing] mandatory employment arbitration

antidiscrimination claims). See *supra* text accompanying notes 125-134.

159. *Armendariz*, 6 P.3d at 675-78.

160. Pub. L. No. 102-166, § 118, reprinted in notes following 42 U.S.C. § 1981 (1994).

161. See *supra* note 128.

162. *Armendariz*, 6 P.3d at 676 (citing *Duffield*, 144 F.3d at 1191).

163. *Id.* at 677.

164. *Id.*

165. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The *Gilmer* Court did not hold that Title VII claims are arbitrable. *Armendariz*, 6 P.3d at 677. In any event, the law did not clearly prohibit the arbitration of Title VII claims when the Civil Rights Act of 1991 was enacted, as the *Duffield* court states. *Id.* at 677-78.

166. *Armendariz*, 6 P.3d at 678. See Stone, *Yellow Dog*, *supra* note 12, at 1033 (citing the following cases that apply *Gilmer* to Title VII suits: *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994); *Albert v. NCR*, 874 F. Supp. 1328 (S.D. Fla. 1994); *Scott v. Farm Family Life Ins. Co.*, 827 F. Supp. 76 (D. Mass. 1993); *DiCrisci v. Lyndon Guaranty Bank*, 807 F. Supp. 947 (W.D.N.Y. 1992); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592 (6th Cir. 1995)).

agreements that encompass state and federal antidiscrimination claims.”<sup>167</sup> The next step for the court was to examine the applicability of the FAA and the CAA to the arbitration agreement in dispute.<sup>168</sup>

## 2. *Applicability of The FAA and The CAA*

The court observes that the FAA “incorporates a strong federal policy of enforcing arbitration agreements, including agreements to arbitrate statutory rights,” but declines to apply the FAA to this dispute.<sup>169</sup> Recognizing that the United States Supreme Court may find employment contracts unenforceable under the FAA,<sup>170</sup> the court opts to analyze the agreement under the CAA.<sup>171</sup> Unlike the FAA, the CAA does not provide an exclusion for any employment contracts.<sup>172</sup> In fact, the CAA specifically applies to “agreements between employers and employees.”<sup>173</sup> The court states that it can apply California’s state statute without being preempted by the FAA in this situation, because it is consistent with the federal policy favoring arbitration.<sup>174</sup>

So long as the employment arbitration agreement does not contemplate arbitration of a statutory claim that the legislature did not intend to be arbitrated, the agreement can be enforced under the CAA.<sup>175</sup> The court finds that the legislature did not intend to prohibit the arbitration of FEHA claims,<sup>176</sup> and concludes that the arbitral forum can adequately protect the employees’ statutory rights.<sup>177</sup>

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167. *Armendariz*, 6 P.3d at 678.

168. *Id.*

169. *Id.*

170. At the time *Armendariz* was decided, the Supreme Court had not issued its decision in *Circuit City Stores, Inc., v. Adams*, 121 S. Ct. 1302 (2001) (holding that the FAA does apply to employment contracts).

171. *Armendariz*, 6 P.3d at 679-80. Like the FAA, the CAA finds arbitration agreements “valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract.” CAL. CIV. PROC. CODE § 1281 (West 1997).

172. *Armendariz*, 6 P.3d at 679 n.5 (noting that former exemption for labor contracts has been repealed).

173. CAL. CIV. PROC. CODE § 1280(a) (West 1997).

174. *See Armendariz*, 6 P.3d at 679. If the CAA restricted the enforcement of arbitration agreements, it would be preempted. *Id.* (citing *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687-88 (1996)); *see also supra* note 69, and accompanying text.

175. *Armendariz*, 6 P.3d at 679.

176. *Id.*

177. *Id.* “[B]y agreeing to arbitrate a statutory 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.” *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)).

### 3. Arbitration of statutory antidiscrimination claims

An employer cannot curtail or require employees to waive FEHA claims.<sup>178</sup> It is a violation of public policy for an employer to avoid responsibility for his or her violations of law by contract.<sup>179</sup> Furthermore, a person cannot waive public laws such as the FEHA, because the statute aims to protect the public at large from discrimination in the workplace.<sup>180</sup> Thus, the *Armendariz* court held that if FEHA claims are arbitrated, they must provide claimants with an adequate forum for vindicating statutory rights.<sup>181</sup>

The court engages in an extensive analysis of *Cole v. Burn Int'l Sec. Serv.*,<sup>182</sup> in which the D.C. Circuit Court of Appeal formulated five minimum requirements for the compelled arbitration of nonwaivable Title VII claims as a condition of employment.<sup>183</sup> The *Cole* court requires that the arbitration agreement provide for: (1) neutral arbitrators; (2) more than minimal discovery; (3) a written award; (4) all types of relief that would be available in court; and (5) only minimal fees to access the arbitral forum.<sup>184</sup> Ultimately, the *Armendariz* court examines and adopts these provisions as minimum requirements for mandatory employment arbitrations in California.<sup>185</sup>

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178. *Id.* at 680-81.

179. *Id.* at 681 (citing CAL. CIV. CODE § 1668 (West 1985)).

180. *Id.* 680-81 (citing *In re Marriage of Fell*, 64 Cal. Rptr. 2d 522, 526 (1997)). The FEHA is a reflection of California's public policy against employment discrimination. *See id.*

181. *Armendariz*, 6 P.3d at 681. These problems do not arise when the arbitration contemplates contractual rights, for example under collective bargaining agreements. Contractual rights are created by the parties. Statutory rights, on the other hand, are created by Congress. They are public laws, entitled to the rights and protections provided by the law; parties cannot agree to modify statutory rights. *Id.* (citing *Cole v. Burns Int'l Sec. Serv.*, 105 F.3d 1465, 1476 (D.C. Cir. 1997); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)). Several other jurisdictions have found compelled arbitration of statutory claims acceptable. *See, e.g.*, cases cited *supra* note 128.

182. 105 F.3d 1465.

183. *Armendariz*, 6 P.3d at 682.

184. *Cole*, 105 F.3d at 1482

185. *Armendariz*, 6 P.3d at 682-89. The court does note that these minimum safeguards are not required where employer and employee freely negotiate an arbitration agreement. *Armendariz*, 6 P.3d at 682 n.8. These requirements attach where the arbitration forum is imposed on an employee, to ensure that the agreement is not used to curtail FEHA rights. *Id.*

*a. Neutrality of the arbitrator*

In *Graham v. Scissor-Tail, Inc.*,<sup>186</sup> the California Supreme Court held that a neutral arbitrator is essential for the integrity of the arbitration system.<sup>187</sup>

*b. Limitation of remedies*

*Armendariz* also held that employees cannot be compelled to arbitrate statutory claims unless the full range of statutory remedies is made available to them.<sup>188</sup> The agreement in *Armendariz* unlawfully limited employee remedies to backpay.<sup>189</sup> A judicial forum would have provided employees the opportunity to recover punitive damages and attorney fees for their FEHA claims.<sup>190</sup> The court concluded this provision limiting damages was contrary to public policy, hence arbitration was an inadequate forum for the vindication of the employees' statutory rights.<sup>191</sup>

*c. Adequate discovery*

Employees often do not have access to the information they need to vindicate their statutory rights.<sup>192</sup> Employers generally have relevant documents and employees under their control.<sup>193</sup> Without access to such documents, employees may be unable to present their discrimination case.<sup>194</sup> *Armendariz* recognized this, and held that when an employer agrees to arbitrate FEHA claims, the employer impliedly consents to discovery sufficient for employees to vindicate their FEHA claims.<sup>195</sup> The court leaves the determination of what constitutes "adequate discovery" up to the

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186. 623 P.2d 165 (Cal. 1981).

187. *Graham v. Scissor-Tail, Inc.* 623 P.2d 165 (Cal. 1981).

188. *Armendariz*, 6 P.3d at 682-83.

189. *Id.* The arbitration clause expressly provided that "my exclusive remedies . . . shall be limited to a sum equal to the wages I would have earned from the date of any discharge until the date of the arbitration award. I understand that I shall not be entitled to any other remedy, at law or in equity." *Id.*

190. *Id.* at 683 (citing *Commodore Home Sys. Inc. v. Sup. Ct.*, 649 P.2d 912 (Cal. 1982); (CAL. GOV'T CODE § 12965(b)).

191. *Id.*

192. *Id.* at 683.

193. *See id.*

194. *Id.* at 683-84.

195. *Armendariz*, 6 P.3d at 684 (citing *Dunlop Report*, *supra* note 31).

arbitrator, stating only that employees must have access to “essential documents and witnesses.”<sup>196</sup>

The court warns employers that the CAA’s discovery provisions may be inadequate for statutory discrimination claims.<sup>197</sup> The CAA guarantees discovery equivalent to that available in a superior court for disputes arising out of injury or death caused by wrongful or negligent acts.<sup>198</sup> Arguably, employment discrimination claims do not fall within this category of disputes, in which case the statutory right to discovery would not attach.<sup>199</sup> The court also notes that an employee may be able to adequately vindicate her FEHA rights with less discovery than provided for under the CAA.<sup>200</sup> The court concludes that employees are simply entitled to whatever discovery is “sufficient to adequately arbitrate their statutory claim.”<sup>201</sup>

*d. Written arbitration award and judicial review*

To facilitate judicial review, the court held that “an arbitrator in an FEHA case must issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based.”<sup>202</sup> Although arbitration awards are generally not reviewable,<sup>203</sup> where statutory rights are involved limited review is necessary to ensure that the arbitrator does not disregard the law.<sup>204</sup> However, the court refused to articulate what this standard of review will be.<sup>205</sup>

*e. Employee Not to Pay Unreasonable Forum Costs*

The court further held that a mandatory employment arbitration agreement encompassing FEHA claims “impliedly obliges the employer to

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196. *Id.*

197. *Id.* (citing CAL. CIV. PROC. CODE § 1283.05; 1283.1).

198. *Id.* at 683-84 n.19 (citing CAL. CIV. PROC. CODE § 1281.3(a)).

199. *Id.* at 684 & n.10 (citing CAL. CIV. PROC. CODE § 1283.05).

200. *See id.* at 684.

201. *Id.*

202. *Id.* at 685. The CAA does not require a written arbitration decision. *See* CAL. CIV. PROC. CODE § 1283.4 (West 1997); *Baldwin Co. v. Rainey Constr. Co.*, 280 Cal. Rptr. 499 n.3 (1991).

203. “[A]n arbitration award may not be vacated for errors of law on the face of the decision, even if these errors would cause substantial injustice.” *Armendariz*, 6 P.3d at 684 (citing *Moncharsh v. Heily & Blase*, 832 P.2d 899 (Cal. 1992)).

204. *Id.* at 685 (citing *Shearson/American Exp. Inc., v. McMahon*, 482 U.S. 220, 232 (1987); *Moncharsh v. Heily & Blase*, 832 P.2d 899 (Cal. 1992); *Bd. of Educ. v. Round Valley Teachers Ass’n*, 914 P.2d 193 (Cal. 1996)). If the arbitrator is allowed to disregard the law, arbitration is not an adequate forum for vindicating FEHA claims. *Id.* at 684-85.

205. *Id.* at 685.



pay all types of costs that are unique to arbitration.”<sup>206</sup> Relying heavily on *Cole*, the court found that if employees had to pay the often substantial costs and fees associated with arbitration, many would find themselves financially unable to pursue their statutory claims.<sup>207</sup> Because the employer has mandated that claims be resolved through arbitration, the court concluded that the employer must also bear any costs over and above what the employee would be responsible for if he or she were free to bring the action in court.<sup>208</sup> Otherwise, the costs of arbitration may deter employees from bringing discrimination claims, thereby undermining the public policy goals of the FEHA.<sup>209</sup>

The court was very clear that with respect to fee sharing, the CAA’s default position directing each party to pay its *pro rata* share of costs would not apply where statutory claims are involved.<sup>210</sup> Any arrangement which imposes substantial forum fees on employees violates public policy, and is cause for invalidating an arbitration agreement.<sup>211</sup> The legislature did not intend that an employee would pay for what is the “equivalent of [a] judge’s time and the rental of [a] courtroom” in order to resolve antidiscrimination claims.<sup>212</sup> Accordingly, the court construes the FEHA as implicitly prohibiting such costs.<sup>213</sup>

The court rejected arguments that an arbitrator might be biased towards the employer simply because the employer is paying her. It is more likely instead, that the employer will enjoy favorable treatment as a “repeat player” in the arbitration system; but the court is not concerned, because it expects that institutional safeguards, such as the plaintiff’s bar, will protect against corrupt arbitrators.<sup>214</sup>

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206. *Id.* at 689. The court cites *Cole*, which reported arbitration fees could range from \$500 to \$1,000 per day; *Shankle*, which reported arbitration would cost the employee between \$1,875 to \$5,000; and *Rosenberg*, which reported forum fees could be as high as \$3,000 per day. *Id.* at 686-87. Many employees, those that have been terminated in particular cannot afford these fees. This holding is in conflict with the CAA, which directs each party to pay its pro rata share of arbitration expenses. CAL. CIV. PROC. CODE § 1284.2 (West 1997).

207. *Armendariz*, 6 P.3d at 685-86 (quoting *Cole*, citing *Gilmer*). Costs unique to arbitration may include arbitrator time, room rental, and court reporter fees. *Id.* at 685-87.

208. *Id.* at 688.

[U]nder *Gilmer*, arbitration is supposed to be a reasonable substitute for a judicial forum. Therefore, it would undermine Congress’s intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court.

*Id.* at 685 (quoting *Cole*, 105 F.3d at 1484).

209. *Id.* at 688.

210. *Id.* (discussing CAL. CIV. PROC. CODE § 1284.2 (West 1997)).

211. *Id.* at 688-89.

212. *Id.* at 688.

213. *Id.* at 689.

214. *Id.* at 687-88. *But see* Taylor, *supra* note 105, at 302 (pointing out that empirical research demonstrates that “repeat player” employers are more successful than “one shot player” employees,

#### 4. Unconscionability of the Arbitration Agreement

The court registers some concern that mandatory employment arbitration agreements have the potential to be used as “instrument[s] of injustice imposed on a ‘take it or leave it’ basis.”<sup>215</sup> To combat this unjust use, the court will refuse to enforce unconscionable arbitration agreements.<sup>216</sup> The court will find an unconscionable arbitration agreement in a contract of adhesion<sup>217</sup> with provisions not within the “reasonable expectations” of the adhering party, that are also “unduly oppressive.”<sup>218</sup> The court may sever unconscionable provisions of a contract, or the entire agreement may be invalidated.<sup>219</sup>

The court in *Armendariz* quickly found that the arbitration agreement was adhesive, because it was non-negotiable and mandated as a condition of employment.<sup>220</sup> Like most employees, *Armendariz* and *Olague-Rodgers* were economically unable to refuse the arbitration agreement, because that would have been tantamount to declining the offer of employment.<sup>221</sup> The agreement was also unconscionable because it was lacking in mutuality and limited the remedies available to employees.<sup>222</sup>

The arbitration agreement lacked mutuality because only employees were required to arbitrate claims, while the employer remained free to adjudicate any claims it might have against employees.<sup>223</sup> Thus, employees were required to waive significant benefits available in a judicial forum

presumably because they have more experience with arbitration, and because a business relationship develops between the arbitrator and the employer).

215. *Armendariz*, 6 P.3d at 690-91 (quoting *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903, 915 (Cal. 1997)).

216. *Id.* at 689-90.

217. “[A] standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” *Id.* at 689 (quoting *Neal v. State Farm Ins. Cos.*, 10 Cal. Rptr. 781 (1961)).

218. *Armendariz*, 6 P.3d at 689. Although the agreement must feature elements of both procedural and substantive unconscionability, they “need not be present in the same degree.” *Id.* at 690.

219. *Id.* at 689.

220. *Id.* at 690.

221. *Id.* (the court noted “few employees are in a position to refuse a job because of an arbitration requirement.”).

222. *Id.* at 691. Employees were precluded from recovering punitive damages and damages for future earnings. *Id.* at 694. Remedies available to the employer were not restricted. *Id.*

223. *Id.* California appellate courts had previously held that arbitration agreements lacking in mutuality would be found unconscionable. See *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138 (1997); *Kinney v. United HealthCare Serv., Inc.*, 83 Cal. Rptr. 2d 348 (1999) (finding such agreements unconscionable because the employee relinquishes the right to judicial review and the rights guaranteed by the federal and state Constitutions, including the right to a jury trial, while the employer maintains those rights).

while employers retained access to those benefits.<sup>224</sup> Unless legitimate “business realit[ies]” justify this lack of mutuality, such agreements are unconscionable.<sup>225</sup> Otherwise, arbitration might become a tool for maximizing employer advantage, rather than a neutral forum for resolving disputes.<sup>226</sup>

The court concluded that the arbitration agreement was “permeated by an unlawful purpose” because it contained two unlawful provisions.<sup>227</sup> Furthermore, short of reforming the contract, there is nothing the court could do to remove the unconscionable taint caused by the agreement’s lack of mutuality.<sup>228</sup> Thus, it was appropriate to void the entire agreement rather than sever the unlawful provisions.<sup>229</sup>

### C. Concurring Opinion

The concurrence takes issue with the majority’s “simplistic” approach of imposing all arbitral costs on the employer.<sup>230</sup> Justice Brown first points out that “arbitration is often far more affordable to plaintiffs and defendants alike than pursuing a claim in court,” suggesting that arbitral costs might not deter employees from exercising statutory rights.<sup>231</sup> Furthermore, not all arbitrations are expensive, and “not all employees are unable to afford the unique costs of arbitration.”<sup>232</sup> So long as the employee is not required to front the arbitration costs, Justice Brown would rather leave the issue of apportionment to the arbitrator.<sup>233</sup> In apportioning costs, the arbitrator should “consider the magnitude of the costs unique to arbitration, the ability of the employee to pay a share of these costs, and the overall expense of the arbitration as compared to a court proceeding.”<sup>234</sup>

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224. *Armendariz*, 6 P.3d at 691-92. For example, the right to a jury and judicial review. *Id.* at 691.

225. *Id.* at 691-92 (quoting *Stirlen*, 60 Cal. Rptr.2d at 148).

226. *Id.* at 692.

227. *Id.* at 697. (citing *Graham Oil Co. v. ARCO Prod. Co.*, 43 F.3d 1244, 1248-49 (9th Cir. 1994)). There was an unlawful damages provision, and the agreement was unconscionably unilateral.

228. *Id.* at 695-96 (explaining that courts are not allowed to reform contracts).

229. *Id.* at 696-97.

230. *Armendariz*, 6 P.3d at 699 (Brown, J., concurring). “Simplicity, however, is not a proxy for correctness.” *Id.* The majority would have employer pay all costs unique to arbitration, if arbitration is mandatory. See *supra* Part V.B.3.e.

231. *Armendariz*, 6 P.3d at 699 (quoting *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 16 (1st Cir. 1999)).

232. *Id.* (citing *Williams v. Cigna Financial Advisors Inc.*, 197 F.3d 752, 763-65 (5th Cir. 1999) (compelling arbitration because employee did not demonstrate that he could not afford arbitration, or that its cost would deter him from exercising statutory rights)).

233. *Id.* at 700. Any problems with the arbitrator’s determination could be resolved by judicial review. *Id.*

234. *Id.*

## V. IMPACT

A. *Provides Guidance*

*Armendariz* allows employers to avoid employment litigation. It instructs employers on how to structure enforceable predispute employment arbitration agreements.<sup>235</sup> These agreements will be upheld so long as they provide for a fair arbitration.<sup>236</sup> The arbitration will be considered fair if the *Armendariz* safeguards are satisfied.<sup>237</sup> The employer must agree to pay all costs unique to the arbitration, so that the prospective cost of arbitration will not deter employees from vindicating their statutory rights.<sup>238</sup> The employer must also ensure that the arbitration will be presided over by a neutral arbitrator.<sup>239</sup> This neutral arbitrator must draft a written award explaining her decision in sufficient detail, such that a reviewing judge can ensure that the employees statutory rights have been protected.<sup>240</sup> Those rights include access to the full range of remedies that would be available in a judicial forum, including attorney's fees and punitive damages.<sup>241</sup> The employee must also be afforded the opportunity to conduct adequate discovery, so that she can present a solid case.<sup>242</sup> Finally, the arbitration agreement must be mutual and bind both the employer and the employee.<sup>243</sup> The court also informed employers that the CAA does not adequately protect statutory rights, because it does not require a written award,<sup>244</sup> may not entitle employees to adequate discovery,<sup>245</sup> and may require employees to pay substantial forum fees.<sup>246</sup>

Noticeably absent from the court's recipe for a fair arbitration is the requirement that the compelled arbitration be pursuant to a clear and

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235. Employers must ensure employees their *Armendariz* rights, *see supra* Part IV.B.3, and ensure that both parties are equally bound by the arbitration agreement. *See supra* text accompanying notes 221-23.

236. Similar requirements have been described as fairness provisions. *See, e.g.*, Stone, *Yellow Dog*, *supra* note 12, at 1045.

237. *See supra* Part IV.B.3.

238. *Armendariz*, 6 P.3d at 685-89.

239. *Id.* at 682.

240. *Id.* at 684-85.

241. *Id.* at 682-83.

242. *Id.* at 683-84.

243. *Id.* at 690-94.

244. *Id.* at 685.

245. *Id.* at 684.

246. *Id.* at 688.

unmistakable waiver of the right to adjudicate, and the employee's right to representation. The absence of a "clear and unmistakable" waiver requirement means that an employee who signs an arbitration agreement, without understanding the ramifications of her consent, may be required to arbitrate discrimination claims she never imagined could be arbitrable.<sup>247</sup> And, she may be required to do so without the aid of an attorney.<sup>248</sup>

Though a step in the right direction, it is questionable whether the *Armendariz* safeguards will be enough to transform arbitration into an adequate forum for the resolution of statutory rights. Certainly, arbitration can provide redress for an injury suffered as a result of discrimination.<sup>249</sup>

However, it is far from certain whether arbitration can also further the public policy goals behind the statutes.<sup>250</sup> As the enforcement of statutory employment discrimination claims moves into the private realm of arbitration, arbitrators will find no precedent to follow in deciding cases, and will also create no precedent to guide others.<sup>251</sup> This could lead to inconsistent interpretation and application of the statutes.<sup>252</sup>

### *B. Expense to employer*

*Armendariz* makes arbitration fair at the employer's expense, most significantly because it requires employers to pay all costs and fees beyond that of a judicial forum.<sup>253</sup> The *Armendariz* promise of "adequate discovery" also comes at the employer's expense.<sup>254</sup> If adequate discovery means more discovery (which it probably does), it will prolong the life of arbitration, requiring more of the arbitrator's time, which translates into increased costs for the employer.<sup>255</sup>

The fiscal impact of the judicial review element of *Armendariz* is difficult to predict, as we do not know the standard of review for arbitral decisions.<sup>256</sup> We do at least know that it makes arbitration decisions less final, and will probably require the arbitrator to take more time to write a

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247. Cf. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80-81 (1998) (requiring "clear and unmistakable" waiver of statutory claims pursuant to a collective bargaining agreement); see also Taylor, *supra* note 105, at 282-96 (arguing that a "clear and unmistakable" waiver should be extended to individual arbitration agreements).

248. Scholars and government agencies generally agree that employees should have the right to be represented by counsel when required to arbitrate statutory claims. *Id.* at 303 (citing the *Dunlop Report* and the *Due Process Protocol*, *supra* note 19).

249. Moohr, *supra* note 3, at 418.

250. *Id.*

251. Stone, *Yellow Dog*, *supra* note 12, at 1042.

252. *Id.*

253. *Armendariz v. Found. Health Psychcare Serv., Inc.*, 6 P.3d 669, 689 (Cal. 2000).

254. See *id.* at 683-84.

255. See Moohr, *supra* note 3, at 401 (stating that judicial review necessarily increases the cost of arbitration).

256. *Armendariz*, 6 P.3d at 685.

well-reasoned decision for the reviewing court.<sup>257</sup> Also, the employer will probably want to provide a detailed record of the arbitration for the reviewing court, which means the additional expense of a court reporter to prepare a transcript of the proceedings.<sup>258</sup> All of these costs will be borne by the employer alone. In light of this, employers will need to perform a new “cost/benefit calculus and decide whether arbitration” continues to be “the most economical forum.”<sup>259</sup>

### C. Forum Shopping

The United States Supreme Court has said, “Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases.”<sup>260</sup> But the Ninth Circuit and the California Supreme Court have reached contrary conclusions regarding the validity of compulsory Title VII/FEHA arbitration.<sup>261</sup> Because the courts interpret the Civil Rights Act of 1991 differently, parties can be compelled to arbitrate claims in a California superior court that they would not be compelled to arbitrate in a California district court.<sup>262</sup> Consequently, employees with statutory claims hoping to avoid enforcement of arbitration agreements will prefer to file claims in federal court, where judges are more likely to interpret the law in a manner which is consistent with their position.<sup>263</sup> Until Congress or the United States Supreme Court steps in, this will encourage forum shopping.<sup>264</sup>

The Ninth Circuit, under *Duffield*, will not uphold any mandatory employment agreement to arbitrate Title VII or FEHA claims.<sup>265</sup> The California Supreme Court, on the other hand, has said such claims are

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257. *See id.*

258. Moohr, *supra* note 3, at 454.

259. *Armendariz*, 6 P.3d at 688.

260. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 272 (1995).

261. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998) (holding that such agreements are invalid); *Armendariz*, 6 P.3d at 677-78 (holding that such agreements are valid).

262. *Id.* (holding that the Act encourages arbitration of statutory claims); *Duffield*, 144 F.3d at 1199 (holding that the Act proscribes arbitration of statutory claims).

263. Parties can bring FEHA claims in federal court with diversity jurisdiction. *See, e.g., Couveau v. Am. Airlines, Inc.*, 218 F.3d 1078, 1081 n.2 (9th Cir. 2000) (using diversity jurisdiction to litigate state FEHA claims in federal court). Otherwise parties can acquire federal question jurisdiction by appending FEHA claims to Title VII claims. *See, e.g., Bouman v. Block*, 940 F.2d 1211, 1230 (9th Cir. 1991) (allowing pendent jurisdiction for FEHA claims).

264. “‘Forum shopping’ typically refers to the act of seeking the most advantageous venue in which to try a case.” Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 79 (1999).

265. *Duffield*, 144 F.3d at 1185, 1187 n.3 (9th Cir. 1998).

arbitrable.<sup>266</sup> Although the California Supreme Court should be the final authority on state law issues,<sup>267</sup> the Ninth Circuit has suggested that it will not yield to the state rule regarding the arbitrability of FEHA claims.<sup>268</sup> Despite *Armendariz*, the Ninth Circuit will probably refuse to compel arbitration of FEHA claims, because the FEHA is “explicitly made part of Title VII’s enforcement scheme,” and is therefore arbitrable only to the extent that Title VII claims are arbitrable.<sup>269</sup> The bottom line is that the same exact case, arising out of identical facts, will be resolved differently depending on whether the case is before a state or federal court.

#### *D. Threats to mandatory employment arbitration agreements*

##### 1. The Equal Employment Opportunity Commission (“EEOC”)

Congress created the EEOC to interpret and enforce federal employment discrimination laws designed to ensure equal opportunity in employment.<sup>270</sup> In a 1997 Policy Statement, the EEOC publicly announced its contention that mandatory employment arbitration agreements encompassing statutory claims are inconsistent with the fundamental principles evinced in federal discrimination laws.<sup>271</sup> In the EEOC’s view, arbitration undermines the public policies behind these federal discrimination laws by privatizing the enforcement of these statutes.<sup>272</sup>

Congress entrusted the federal government with the responsibility of protecting and enforcing the public values embodied in Title VII, the ADEA,

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266. *Armendariz*, 6 P.3d at 674.

267. *Supreme Lodge, K.P. v. Meyer*, 265 U.S. 30, 32 (1924) (“Under the settled rule of this Court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the state fixing the meaning of the state legislation, as though such meaning had been specifically expressed therein.”).

268. *See Duffield*, 144 F.3d at 1187 n.3. Bound by *Duffield*, a California district court apologetically refused to compel arbitration of FEHA claims pursuant to a predispute arbitration agreement. The court noted that “although the FEHA is a California statute, *Duffield*’s holding with respect to both Title VII and FEHA claims is an interpretation of federal law . . . [which] this court must follow, rather than the California Supreme Court’s contrary view.” *Circuit City Stores, Inc. v. Banyasz*, No. C-01-3106 WHO, 2001 WL 1218406 (N.D. Cal. Oct. 11, 2001) at \*4.

269. *Duffield*, 144 F.3d at 1187 n.3.

270. 42 U.S.C. § 2000e-4 (1994). Originally created to administer Title VII, Congress has expanded its jurisdiction to include ADEA and ADA claims. Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 PEPP. L. REV. 1, 3-4 (1999) (citing 29 U.S.C. §§ 621-634 (1994); 42 U.S.C. §§ 12101-12213 (1994)).

271. EEOC Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, available at <http://www.eeoc.gov/docs/mandarb/html>. (last visited Jan. 30, 2002) [hereinafter *EEOC Policy Statement on Mandatory Arbitration*]. The National Labor Relations Board also opposes mandatory arbitration agreements. Zack, *supra* note 19, at 79 (citing *Great Western Bank*, Case No. 12-CA-16886 and *Bentley’s Luggage Corp.*, Case No. 12-CA-16658 (1995)).

272. *EEOC Policy Statement on Mandatory Arbitration*, *supra* note 272, at Part V.

and the ADA.<sup>273</sup> It did so by granting the EEOC authority to investigate and litigate discrimination claims, and also by creating a private right of action for victims of alleged discrimination in the federal courts.<sup>274</sup> The EEOC believes that federal courts must continue to hear statutory discrimination cases so that it can develop and interpret the law.<sup>275</sup> The public nature of discrimination litigation is critical also because it prevents and deters others from engaging in discriminatory practices.<sup>276</sup>

The EEOC finds arbitration to be an inadequate forum for the enforcement of public laws for several reasons.<sup>277</sup> First, arbitrators are not publicly accountable for their decisions.<sup>278</sup> Arbitration is also inappropriate because arbitrators are not required to issue written, reasoned opinions.<sup>279</sup> This stunts the development of law through precedent, and renders it impossible for the judiciary (or Congress) to correct mistakes in statutory interpretation or application.<sup>280</sup> Furthermore, mandatory arbitration is inherently biased against the employee, because the employer has a “repeat player” advantage.<sup>281</sup> As a “repeat player,” not only is the employer more experienced with the process, but the arbitrator will tend to favor the employer as a potential source of future business.<sup>282</sup>

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273. *Id.* at Part II-Part IV. “The basic rights protected by [Title VII] are rights which accrue to citizens of the United States; the Federal Government has the clear obligation to see that these rights are fully protected.” *Id.* at Part III (quoting statement of Sen. Humphrey, 110 Cong. Rec. 12725 (1964)).

274. *Id.* The Department of Justice also has authority to enforce discrimination laws through litigation. *Id.*

275. *Id.* at Part IV.A. Judicial and congressional review provide an additional protection for the public values embodied in the statutes. *Id.* at Part IV.B. The Supreme Court essentially rejected this argument in *Gilmer* when it said that courts will continue to see discrimination claims because some employees will not be precluded from litigating claims. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991).

276. *Id.* at Part IV.C. It also publicly exposes those who violate discrimination laws. *Id.*

277. *EEOC Policy Statement on Mandatory Arbitration*, *supra* note 272, at Part V.

278. *Id.* at Part V.A. The arbitrator is accountable only to the parties, and is only concerned with the immediate dispute she has been hired to resolve. She has no regard for the public values reflected in the federal laws. *Id.*

279. *Id.* at Part V.A.2. The Supreme Court rejected this argument in *Gilmer*. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991).

280. *EEOC Policy Statement on Mandatory Arbitration*, *supra* note 272, at Part V.A.2. The EEOC also finds arbitration inadequate, because it denies the right to a jury trial, limits discovery, and cannot resolve class, pattern, or practice claims of discrimination. *Id.* at Part V.C.3

281. *Id.* at Part V.B. The employee, in contrast, is a “one-shot player,” she will probably not arbitrate other disputes. Additionally, arbitration may be unfair because, as the party with superior bargaining power, the employer can manipulate arbitration procedures to its benefit. *Id.*

282. *Id.* But, as *Armendariz* illustrates, courts can refuse to enforce one-sided agreements. See *supra* note 226 and accompanying text.



The EEOC's final concern with mandatory arbitration is that its power to enforce civil rights laws will be compromised, as individuals will be less likely to report discrimination knowing that they will be unable to litigate their claims.<sup>283</sup> The Supreme Court rejected this argument in *Gilmer*, pointing out that an arbitration agreement does not preclude employees from filing claims with the EEOC.<sup>284</sup> It also noted that the EEOC is still free to investigate claims, even when a charge is not filed.<sup>285</sup>

The EEOC's criticisms may be well founded, but courts do not generally pay much deference to EEOC Policy Statements.<sup>286</sup> Courts have heard and rejected arguments supporting the EEOC's position that mandatory employment arbitration agreements are unenforceable.<sup>287</sup> In light of the Supreme Court's policy favoring arbitration, it is also unlikely to accept the EEOC's position.<sup>288</sup> The EEOC will need to convince Congress that it must take action to prohibit employers from stripping employees of a judicial forum as a condition of employment.

## 2. Proposed Legislation

Lawmakers have also expressed concern regarding mandatory employment arbitration. A bill introduced in the House of Representatives sought to amend the FAA, such that employees would have "the right to accept or reject the use of arbitration to resolve an employment controversy."<sup>289</sup> This bill would require that arbitration be voluntary, and would proscribe the practice of requiring employees to agree to arbitrate disputes as a condition of employment.<sup>290</sup> The Senate also proposed an amendment to the FAA which would "provide for greater fairness in the arbitration process for . . . employees."<sup>291</sup> Although this bill would not forbid the use of mandatory arbitration agreements, it would require fair disclosure

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283. *EEOC Policy Statement on Mandatory Arbitration*, *supra* note 272, at Part V.C. Employees must file discrimination charges with the EEOC prior to seeking judicial relief. See Julie L. Waters, Comment, *Does the Battle Over Mandatory Arbitration Jeopardize the EEOC's War in Fighting Workplace Discrimination?*, 44 ST. LOUIS U. L.J. 1155, 1160-61 (2000) (discussing procedure for filing a federal discrimination claim).

284. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

285. *Id.*

286. See generally Bales, *supra* note 271, at 26-35.

287. *Id.* at 50. The EEOC has sued employers who enforce arbitration agreements and has filed several amicus briefs opposing employment arbitration. *Id.* The Ninth Circuit is the only circuit to agree with the EEOC that Title VII is inconsistent with compulsory arbitration. *Id.* at 38.

288. In dicta, the Court recently noted that "arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law." *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1313 (2001).

289. H.R. 613, 106th Cong. (1999).

290. *Id.* at § 17.

291. Consumer and Employee Arbitration Bill of Rights, S. 3210 IS, 106th Cong. (2000).

and extensive procedural protections.<sup>292</sup> In addition to the *Armendariz* rights, among the procedural rights provided are the right to representation and cross-examination.<sup>293</sup> Legislation has also been introduced to amend Title VII, the FAA, and other civil rights statutes “to prevent the involuntary application of arbitration to claims that arise from unlawful employment discrimination.”<sup>294</sup>

The California legislature is also considering a bill that would prohibit enforcement of predispute mandatory arbitration agreements.<sup>295</sup> It would prohibit an employer from requiring employees to waive their right to a jury trial, to a judicial forum, and the rights guaranteed under the California Evidence Code.<sup>296</sup>

Elected officials recognize the controversy surrounding mandatory employment arbitration agreements.<sup>297</sup> They are troubled that employees are being required to waive important rights and protections as a condition of employment.<sup>298</sup> Hence, we should not be surprised to see Congress and the California legislature enacting legislation to settle this controversy soon.

## VI. CONCLUSION

Is compulsory arbitration, with the conditions imposed, still a better alternative than civil litigation in California? Employers will answer yes. Although *Armendariz* makes arbitration more expensive, more time intensive, and less final, employers will still find arbitration an attractive alternative to litigation, because it allows them to avoid the jury and keep allegations of discrimination from becoming a matter of public record.<sup>299</sup>

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292. *Id.*

293. *Id.* at § 2(c)(3), (6). The bill also includes provisions for a neutral arbitrator and administrative process, hearings, discovery, timely resolution, written decisions, and small claims opt out. *Id.* at § 2(c)(1)-(11).

294. Civil Rights Procedures Protection Act of 1999, S. 121, 106th Cong (1999); H.R. 872, 106th Cong. (1999). The amendments would “make it clear that the powers and procedures provided under those laws are the exclusive ones that apply only when a claim arises . . . [and] would prevent discrimination claims from being involuntarily sent to binding arbitration.” 145 CONG. REC. E 287 (1999) (statement of Hon. Edward J. Markey).

295. SENATE RULES COMM., PROHIBITION ON THE WAIVER OF RIGHTS IN EMPLOYMENT CONTRACTS, S. AB 858, Reg. Sess. (Cal. 1999-2000).

296. *Id.*

297. *See supra* Part III(E).

298. *See, e.g.* ASSEMBLY COMM. ON JUDICIARY, CONSUMER CONTRACTS: WAIVER OF FUNDAMENTAL RIGHTS, S. AB 858, Reg. Sess. (Cal. 1999). 145 CONG. REC. E 287 (1999) (statement of Hon. Edward J. Markey).

299. *See supra* text accompanying notes 32-37.

The employee will also answer yes, despite the fact that this may mean no large damage awards.<sup>300</sup> Employees are likely to find themselves unemployed if they refuse to sign an arbitration agreement,<sup>301</sup> hence reality may require that they submit to arbitration. If this is the case, these new rules represent a significant benefit in vindicating statutory rights.

The *Gardner-Denver* Court noted that “a standard that adequately insured effectuation of Title VII [and FEHA] rights in the arbitral forum would tend to make arbitration a procedurally complex, expensive, and time consuming process. And judicial enforcement of such a standard would almost require courts to make *de novo* determinations of the employees’ claims.”<sup>302</sup> *Armendariz*, in holding that employees may be required to arbitrate FEHA claims, has done exactly what the Court warned against in *Gardner-Denver*. The *Armendariz* safeguards are absolutely necessary to protect employees’ rights, but they do make arbitration more procedurally complex, expensive, and time consuming.

However, it is possible for plaintiffs to circumvent *Armendariz* and compelled arbitration of statutory claims. Plaintiffs can simply append FEHA claims to Title VII claims and file in federal court, thereby finding their way in front of a jury.<sup>303</sup> This inevitably will lead to forum shopping, until the Supreme Court or Congress conclusively determines the enforceability of predispute agreements to arbitrate statutory claims.<sup>304</sup>

Jennifer LaFond<sup>305</sup>

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300. Arbitration may actually make it easier for employees to vindicate their rights. High litigation costs may prevent some people from bringing FEHA and Title VII claims. *Armendariz* relieves the employee of most costs, and provides the protections that litigation provides. See BALES, *supra* note 7, at 3.

301. See *Lagatree v. Luce*, Forward, Hamilton & Scripps LLP, 88 Cal. Rptr. 2d 664 (Cal. Ct. App. 1999) (holding that an employer may fire employees who refuse to submit to binding arbitration).

302. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59 (1974). FEHA claims would be treated like Title VII claims because the Civil Rights Act encompasses parallel state antidiscrimination statutes. See *supra* text accompanying note 270.

303. See *supra* note 264 and accompanying text.

304. See *supra* Part V.

305. J.D. Candidate, Pepperdine University School of Law 2002.