

COMMENTS

Lack of Meaningful Choice Defined: Your Job vs. Your Right to Sue in a Judicial Forum

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I. INTRODUCTION

Employees today face a challenging job market, at best. According to Alan Greenspan, “[N]early 2 million of our workforce have been unemployed for more than a year.”¹ Couple unemployment rates with a slow economic recovery,² add in slow job growth,³ rising benefit costs,⁴ increases in outsourcing and offshoring,⁵ and a job market emerges wholly unlike the relative boom of the 1990s. Employers have replaced less than a tenth of the jobs cut since 2001 and have reigned in wage growth.⁶ Some workers are even losing their employment battle to robots.⁷ Employers receive piles of resumes and applications for each opening and are able to hire overqualified workers who have been unable

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1. Daniel McGinn, *Help Not Wanted: Jobs: Where Did They Go? Offshoring's a Problem, But There's a Bigger Culprit*, NEWSWEEK, Mar. 1, 2004, at 31.

2. Kathleen Lynn, *More Tough Sledding for Job Seekers; Health Care and Education Are Among Growth Areas*, THE RECORD, Feb. 8, 2004, at Special Section.

3. *Id.*

4. Jon E. Hilsenrath, *Wages Remained Under Pressure in Fourth Quarter*, WALL ST. J., Jan. 30, 2004, at A2.

5. McGinn, *supra* note 1.

6. Hilsenrath, *supra* note 4.

7. James M. Pethokoukis, *Meet Your New Coworker*, U.S. NEWS & WORLD REP., Mar. 15, 2004, at ee2–ee5 (noting that a \$40,000 robot does not require an employer to pay health care costs).

to find work elsewhere. Those lucky enough to be employed have fewer coworkers but are expected to output the same amount of work, and yet real hourly wages are falling.⁸ It is, as they would say in real estate, a buyer's market. Companies hold all the cards and employees feel lucky to not be drawing on dwindling unemployment benefits. In this employment landscape, the employer has a larger than usual bargaining advantage when it comes to the terms of an employment contract. The employer can decide on the terms of employment, and if an employee or prospect is not willing to sign on the dotted line, one of the country's many long-term unemployed would be happy to do so.

One such term that confronts new and existing employees is perhaps unfamiliar: a mandatory arbitration clause.⁹ The parties agree to this clause prior to the time any dispute arises, indicating prospective agreement to arbitrate any claims that may arise between them. Mandatory arbitration in this context must be distinguished from post-dispute or voluntary arbitration, in which the parties may elect, after a dispute arises, to settle the dispute through binding or non-binding arbitration.

Since the United State Supreme Court decided *Circuit City v. Adams*, which made it clear that arbitration clauses should be enforced in employment contracts, academics and judges have argued over the fairness of this decision.¹⁰ This Comment contributes to the ongoing argu-

8. David Moberg, *Jobs NOT Well Done; Employment Issues May Make or Break Campaigns*, IN THESE TIMES, Mar. 15, 2004, at 22.

9. The language of such clauses can be confusing, and contributes to the ambiguity of the statutory and case law in this area. While most existing statutes refer to "arbitration," e.g., Civil Rights Act of 1991 § 118, 42 U.S.C. § 1981 (2000), it is not clear if legislators intended to include all of the various methods of agreeing to arbitration, ranging from mandatory, pre-dispute arbitration to post-dispute voluntary arbitration, without an inquiry into the specific legislative history.

Most frequently, this type of clause is called a "mandatory" or "compulsory" arbitration clause. See, e.g., Lucy T. France & Timothy C. Kelly, *Mandatory Arbitration of Civil Rights Claims in the Workplace: No Enforceability Without Equivalency*, 64 MONT. L. REV. 449, 450 (2003); see also Kelly Burton Beam, *Administering Last Rites to Employee Rights: Arbitration Enforcement and Employment Law in the Twenty-First Century*, 40 HOUS. L. REV. 499, 501 (2003). The dictionary defines "compulsory arbitration" as arbitration that is "required by law or forced by law on the parties." BLACK'S LAW DICTIONARY 100 (7th ed. 1999) (implying that the "forcing" comes from outside of the relationship between the two parties). This Comment focuses on situations where the force was unilateral, upon the employee, by the employer, and therefore uses the term "mandatory arbitration" to mean mandatory pre-dispute arbitration. For another commentator's take on the language, see Mara Kent, *"Forced" vs. Compulsory Arbitration of Civil Rights Claims*, 23 LAW & INEQ. 95, 98-100 (2005).

10. See Thomas B. Metzloff, *Mandatory Arbitration: Forward*, 67 LAW & CONTEMP. PROB. 1, 2 (2004) (stating, in introduction to a symposium issue on the topic, "[i]t is hard to escape the conclusion that the large majority of academic experts on dispute resolution have serious and significant doubts about the wisdom of the Supreme Court's strongly pro-arbitration stance. Many of the articles in this Symposium reflect this deep-felt concern that the Supreme Court has guided us down the wrong track . . ."); Matthew T. Bodie, *Questions About the Efficiency of Employment Arbitration Agreements*, 39 GA. L. REV. 1, 6 (2004); Laura Kaplan Plourde, *Analysis of Circuit City Stores, Inc.*

ment that mandatory arbitration agreements should not be enforced in the employment context for federal statutory claims and highlights possible defenses to such contracts for employee plaintiffs.

Mandatory arbitration agreements subvert an employee's constitutional right to a judicial forum and generally place unfair burdens on plaintiffs. An employee faced with the option of either signing a mandatory arbitration agreement or losing a job often has no meaningful choice. The Supreme Court, however, has failed to recognize first that Congress did not intend for mandatory arbitration to extend to Title VII claims and second, that employers often leave employees with no meaningful choice regarding mandatory arbitration. Nonetheless, state and federal judges are increasingly recognizing that arbitration agreements may be the product of procedural unconscionability. Accordingly, when employees are forced to sign mandatory arbitration agreements and express reservations about being forced to do so, courts examine the doctrine of procedural unconscionability to determine whether such agreements are enforceable.

Part II of this Comment provides some background on the problems employees face with respect to mandatory arbitration agreements. Part III introduces relevant federal statutes, the Federal Arbitration Act, and Title VII of the Civil Rights Act of 1964. Part IV looks at the intersection of arbitration and employee Title VII claims in federal courts, paying particular attention to the Supreme Court and the Ninth Circuit Court of Appeals. Part V examines these courts' repeated misinterpretations of congressional intent and the legislative attempts to remedy the problem, and argues that employee plaintiffs should scrutinize recent state court decisions that have found arbitration agreements substantively and procedurally unconscionable for potential assistance in defending against the enforcement of arbitration clauses. Part VI concludes with the recommendations that courts should reexamine Congress' intent with respect to mandatory arbitration clauses and scrutinize the enforcement of such clauses under the state law doctrine of unconscionability.

II: UNDERSTANDING THE PROBLEM

Imagine this scenario:¹¹ After a long, arduous, and stress-filled interview process, a college graduate receives an offer to work as a teller at

v. Adams in *Light of Previous Supreme Court Decisions: An Inconsistent Interpretation of the Scope and Exemption Provisions of the Federal Arbitration Act*, 7 J. SMALL & EMERGING BUS. L. 145, 174 (2003); Nicole Karas, *EEOC v. Luce and the Mandatory Arbitration Agreement*, 53 DEPAUL L. REV. 67, 102-104 (2003).

11. Other than the use of a based-on-true arbitration clause, see *infra* note 12, this scenario is completely fictional.

a regional bank. She begins working at the bank, and after a few months of positive performance reviews, she is feeling good about her decision to accept the job.

After her first year, she is called into the human resources office and handed a piece of paper titled "Arbitration Agreement." The human resources manager explains that she has to sign the form and return it before her next shift. The teller scans the paperwork marked with a "sign here" tab at the bottom of the page. One of the clauses catches her attention:

I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Regional Bank, exclusively by final and binding arbitration before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract, and the law of tort.¹²

She re-reads the clause and vaguely wonders what Title VII is. She asks the human resources manager, "If the company breaks the law, I still have the right to sue, right?" The human resources manager explains that as a condition of continued employment, she has to agree to the contract, and tells her that if she does not agree to the company's terms of employment, he has a pile of resumes stacked a foot high from which he can choose another employee.

Like most individuals signing these types of contracts, she does not take the contract to an attorney for scrutiny. She does not appreciate the ultimatum approach taken by the human resources manager, but she needs to keep her job. The human resources manager has made it clear that she has no room to negotiate. The teller thinks to herself, "I'm sure nothing is going to happen to me—the last year has gone so well—and surely, if anything should happen, the clause cannot really mean what it says." She initials next to the clause, signs the rest of the contract, hands it back to the human resources manager, and returns to work.

Several months later she is unexpectedly terminated. Her supervisor tells her that she has had some cash drawer irregularities and management is just following their written policies by terminating her. The teller knows that other employees have had cash drawer irregularities, but she

12. This example is based on one version of the arbitration clause included in the Circuit City Stores Dispute Resolution Agreement. *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109–10 (2001).

has observed different treatment of such episodes depending upon whether the teller is male or female. She mentions this to the supervisor, who tells her that his mind is made up and that she needs to clear out her desk.

The young teller just wants her job back. She tries to talk to the human resources manager, who says there is nothing he can do. Angry and frustrated, she points out the disparate treatment between male and female tellers with cash drawer irregularities. She tells the human resources manager that if there is nothing he can do, perhaps she will just have to call an attorney. He says, "Good luck. You signed an arbitration clause. You'll never see the inside of a courtroom."

Employees in a number of industries face variations of this scenario.¹³ Specifically, employees of Credit Suisse First Boston, Anheuser-Busch, and Halliburton were required, under such clauses, to waive their right to sue in court for claims including wrongful firing, harassment, and discrimination.¹⁴ Stockbrokers may have signed such clauses when joining the major exchanges.¹⁵ Approximately 60,000 Circuit City employees agreed to such a clause upon accepting employment.¹⁶ Thousands of employers and hundreds of thousands of employees may potentially be affected by such clauses.¹⁷

Arbitration clauses vary. They range from agreements to arbitrate all contractual claims arising specifically out of the employment relationship to agreements to arbitrate for any and all claims. These latter agreements generally encompass federal law claims such as anti-discrimination statutes. Such agreements are particularly important to legislators, courts, employees, and arbitration advocates, because an em-

13. See, e.g., *Circuit City*, 532 U.S. at 105 (retail workers); *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 745 (9th Cir. 2003) (employees of a law firm); *Penn v. Ryan's Family Steakhouses, Inc.*, 95 F. Supp. 2d 940, 941 (N.D. Ind. 2000) (restaurant workers); *Credit Suisse First Boston Corp. v. Pitofsky*, 768 N.Y.S.2d 436, 437 (2003) (bank employees); *24 Hour Fitness, Inc. v. Super. Ct.*, 78 Cal. Rptr. 2d 533, 535 (Cal. Ct. App. 1998) (fitness company worker); *Tjart v. Smith Barney, Inc.*, 107 Wash. App. 885, 889, 28 P.3d 823, 825 (2001) (stockbrokers); *Young v. Ferrellgas*, 106 Wash. App. 524, 526, 21 P.3d 334, 335 (2001) (transportation workers).

14. Joanne Gordon, *Here Come Da Judge*, FORBES, Dec. 9, 2002, at 60.

15. Nonetheless, some Wall Street firms have eliminated mandatory arbitration as a condition of employment, and the NASD and the New York Stock Exchange have removed the mandatory arbitration requirement from their registration forms, despite the litigation against Solomon Smith Barney and the fact that courts have held such clauses valid. Mary Stowell & Linda Friedman, Letter to the Editor, *BUS. WEEK*, Dec. 19, 2002, at 15. See also *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1186 n.1 (9th Cir. 1998) (citing Press Release, NASD, NASD Proposes Eliminating Mandatory Arbitration of Employment Discrimination Claims for Registered Brokers (Aug. 8, 1997)); Deborah Lohse, *NASD Votes to End Arbitration Rule in Cases of Bias*, *WALL ST. J.*, Aug. 8, 1997, at B14.

16. *Petition for Writ of Certiorari at 13, Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109-10 (No. 99-1379) (2001).

17. *Id.* at 10.

ployee who has been discriminated against has certain statutory rights and remedies under Title VII of the Civil Rights Act of 1964.¹⁸ However, when an employee's claim is relegated to arbitration, a private process that is not required to follow our statutory law to the letter, the employee may not receive the remedies Congress intended.

Employees agree to these arbitration clauses for a variety of reasons. Many do not read the clause or understand that they are potentially waiving their right to a jury trial.¹⁹ Most do not accurately evaluate the likelihood that the employment relationship could sour²⁰ or feel they have no other choice.²¹ At least in the case of pre-dispute agreements, employees cannot obtain the information they need to appropriately examine such risks and make a truly knowledgeable decision about whether to sign such an agreement.²² Upon objecting to the clause, the employee may be told that the employment offer is contingent upon agreement to the employer's terms, without negotiation.²³

The law regarding arbitration clauses has substantially shifted twice since 1974, when the United States Supreme Court stated that Title VII discrimination claims were not subject to this type of mandatory arbitration clause.²⁴ The first shift came when Congress passed the Civil Rights Act of 1991,²⁵ which for the first time specifically mentioned alternative dispute resolution as one of the available resolution methods for Title VII claims.²⁶ The second shift came when the Supreme Court held, in *Circuit City Stores v. Adams*, that the Federal Arbitration Act's liberal policy of enforcing arbitration agreements extends to all employees who sign mandatory arbitration clauses, except transportation workers.²⁷

18. 42 U.S.C. § 2000e-2 (2000).

19. See generally Katherine Eddy, *To Every Remedy a Wrong: The Confounding of Civil Liberties Through Mandatory Arbitration Clauses in Employment Contracts*, 52 HASTINGS L.J. 771, 772 (2001).

20. See Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration*, 90 CAL. LAW. REV. 1203, 1229 (2002).

21. See Beam, *supra* note 9, at 532.

22. See Bodie, *supra* note 10, at 6 (stating that "the information necessary to determine the efficiency of pre-dispute agreements is likely to be unavailable to employees who contemplate such agreements" and that "the cost-benefit analysis that employees can make about post-dispute agreements to arbitrate is more likely to be accurate, and thus more likely to produce an efficient result, than the analysis that employees can make about a pre-dispute agreement").

23. See, e.g., *EEOC v. Luce*, Forward, Hamilton & Scripps, 345 F.3d 742, 745 (9th Cir. 2003).

24. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53-54 (1974) ("[T]he arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights guaranteed by Title VII.").

25. 42 U.S.C. § 1981 (2000).

26. *Id.*

27. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

Until recently, the Ninth Circuit Court of Appeals had been the lone voice of dissent against the enforcement of some mandatory arbitration clauses.²⁸ The Ninth Circuit had consistently held that enforcement of mandatory arbitration clauses is perfectly appropriate in contractual disputes, but that Title VII cases are different.²⁹ However, in 2002, the Ninth Circuit, sitting en banc, reversed itself and fell in line with the rest of the circuits, holding that arbitration clauses may be enforced even in Title VII cases.³⁰

Because the previously conflicting judicial decisions caused confusion as to the enforceability of arbitration clauses, some employers have removed such clauses from their employment contracts as a precondition to employment,³¹ and Democrats in Congress have proposed legislation that would outlaw mandatory pre-dispute arbitration agreements.³² The Equal Employment Opportunity Commission³³ ("EEOC") has even adopted a mediation-based alternative dispute resolution ("ADR") program to encourage parties to voluntarily mediate their discrimination issues.³⁴ Nonetheless, courts still hold mandatory pre-dispute arbitration agreements to be both legal and enforceable, disregarding Congress' intent and failing to acknowledge that the resolution of statutory discrimination claims and arbitration are incompatible.³⁵

28. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1185 (9th Cir. 1998); *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1071 (9th Cir. 1999); see also, e.g., *Anthony Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1998).

29. See, e.g., *Duffield*, 144 F.3d at 1185.

30. See *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 745 (9th Cir. 2003).

31. See *Stowell & Friedman*, *supra* note 15, at 15.

32. See *infra* notes 223–237 and accompanying text.

33. The EEOC is a bipartisan commission, created in 1964 to enforce the employment aspects of civil rights legislation including Title VII. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC PERFORMANCE AND ACCOUNTABILITY REPORT FY 2004: EEOC AT A GLANCE, at http://www.eeoc.gov/abouteeoc/plan/par/2004/eeoc_at_a_glance.html (last modified Nov. 18, 2004).

Through the Commission's Office of Federal Operations, Office of Field Programs, Office of General Counsel, and fifty-one field offices across the United States, the EEOC fulfills its purpose by counseling individuals about their rights under the civil rights laws, adjudicates administrative hearings on equal employment opportunity complaints, and provides education and outreach. *Id.*

34. The EEOC reports that the number of successful resolutions through voluntary mediation increased from 1631 in 1998 to 7438 in 2001. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: AN OVERVIEW, available at <http://www.eeoc.gov/abouteeoc/overview.html> (last modified July 25, 2001).

35. See, e.g., *Safrit v. Cone Mills Corp.*, 248 F.3d 306, 308 (4th Cir. 2001); *EEOC v. Luce, Forward, Hamilton & Scripps*, 303 F.3d 994, 997 (9th Cir. 2002); see also *Tjart v. Smith Barney, Inc.*, 107 Wash. App. 885, 887, 28 P.3d 823, 829 (2001).

A. Arbitration Is Not Merely a Change of Scenery

Arbitration, although perfectly suited to some types of disputes,³⁶ has its critics. Some of the general criticisms of arbitration apply profoundly to the challenges of employee plaintiffs in Title VII cases. Mandatory arbitration clauses are common in job applications and employment contracts for low-wage jobs,³⁷ where access to a judicial forum and to federal statutory remedies are especially critical because of the employee or applicant's potential lack of bargaining power. The primary criticisms of arbitration, when used to settle employee Title VII disputes, focus on disadvantages related to appeals, the potential cost-prohibitive nature of arbitration, limited discovery, and concerns about arbitrator bias.

1. A Judicial Forum Provides for Review on the Merits

Plaintiffs forced to arbitrate Title VII claims face two primary barriers to review of the arbitrator's decision. First, the grounds for review of arbitration decisions are extremely narrow. Second, even when a plaintiff is able to have a arbitrator's decision reviewed, review is hindered because arbitrators are not generally required to provide a detailed report of their findings to support their decisions.

The Federal Arbitration Act ("FAA") provides four grounds upon which an award may be vacated: (1) The award was obtained by corruption, fraud, or undue means; (2) the arbitrator was not impartial, or acted corruptly; (3) the arbitrator misbehaved procedurally by refusing to hear evidence or through other behavior that prejudiced the rights of a party; or (4) the arbitrator exceeded his powers or executed his power "so imperfectly . . . that a mutual, final, and definite award upon the subject matter submitted was not made."³⁸ Higher courts do not review arbitra-

36. See Sherwyn, *infra* note 61, at 99. Anecdotally, the author was quite satisfied with post-dispute, binding arbitration as a method to settle her claims stemming from a motor vehicle accident. Arbitration may be an ideal forum for resolution of disputes in situations where the parties are in roughly equal positions in terms of power, for example, between the merchants contemplated by the drafters of the Federal Arbitration Act. See *infra* Part III.A. One commentator has gone so far as to suggest the implementation of a separate Federal Arbitration Act that would specifically address the concerns introduced when the parties do not have roughly equal bargaining power. See Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 780 (2001).

37. See, e.g., Brief of Amici Curiae of Lawyers' Committee for Civil Rights Under Law et. al. at 3, *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (4th Cir. 1999) (No. 99-1823) (employee was a grill operator who earned \$5.50/hour); *Penn v. Ryan's Family Steakhouses, Inc.*, 95 F. Supp. 2d 940, 941 (N.D. Ind. 2000) (chain-restaurant waiter); *Sheller by Sheller v. Frank's Nursery & Crafts, Inc.*, 957 F. Supp. 150, 152 (N.D. Ill. 1997) (teenage cashiers).

38. 9 U.S.C. § 10(a) (2000).

tion judgments on the merits.³⁹ Arbitrators' judgments comport more with the contractual expectations of the parties and potentially less with the law because courts will not vacate an arbitration decision on the basis of the arbitrator's misunderstanding of the law.⁴⁰

While focusing on the parties' contractual expectations makes sense in conflicts related to wages, promotion schedules, and benefits that arise directly from the employment contract, this focus does not make sense once discrimination occurs. Litigants assert discrimination claims under statutory law, not under a breach of contract theory; for this reason, the parties should have the option of ensuring that their dispute is heard in a forum that requires compliance with the law and where both parties have the opportunity to pursue an appeal on the merits. When litigants take a Title VII case to court, judges apply long-standing precedent to reach a result that effectuates the policies of the Civil Rights Act.⁴¹ An arbitrator, however, is generally not bound to apply such law,⁴² and the arbitration plaintiff cannot appeal when the arbitrator fails to properly apply the law.

Although it is often asserted that arbitration merely changes the forum,⁴³ when the arbitrator misunderstands or misapplies the law, the implications for the parties can be much more than just a change of scenery. Although judges may also misinterpret or misapply the law, appellate courts are available to remedy the trial courts' errors.

Gaining an appeal is even more challenging for plaintiffs because arbitrators are generally not required to provide written explanations for

39. *Storer Broad. Co. v. Am. Fed'n of Television & Radio Artists*, 600 F.2d 45, 47 (6th Cir. 1979).

40. *See Coast Trading Co. v. Pac. Molasses Co.*, 681 F.2d 1195, 1198 (9th Cir. 1982); *see also Marion Mfg. Co. v. Long*, 588 F.2d 538, 540 (6th Cir. 1978) ("[E]ven if the result reached by an arbitration panel were not 'equitable' it must be upheld by courts unless clearly erroneous. 9 U.S.C. §§ 10, 11. The federal courts do not sit to review arbitrator's award de novo or to instruct an arbitrator in computation of damages."). *But see Luong v. Circuit City Stores, Inc.*, 368 F.3d 1109, 1112 (9th Cir. 2004). The court found that a substantial federal question was presented and that federal courts have jurisdiction to entertain a petition where an employee plaintiff claimed that the arbitrator manifestly disregarded federal case law in reaching the arbitration award. *Id.* Ultimately, however, the court upheld the arbitration award, reasoning that the arbitrator did not ignore federal case law and thus did not act in manifest disregard of federal law. *Id.*

41. *See, e.g., Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1065–70 (9th Cir. 2003) (analyzing an employment discrimination claim under thirty years of Supreme Court and Ninth Circuit precedent, from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) to *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003)).

42. *See, e.g., AMERICAN ARBITRATION ASSOCIATION, THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES* (Mar. 1, 2004), available at <http://www.adr.org/sp.asp?id=21958> (identifying the obligations to preserve the integrity and fairness of the arbitral process, disclose interests or relationships, and make decisions in a just, independent, and deliberate manner, but including no mention of any requirement to apply relevant law to the determination of the case).

43. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

their decisions, unless a rule or agreement by the parties specifies that the arbitrator will issue complete findings of fact and law.⁴⁴ Even if the contract calls for application of a specific set of arbitration rules, the arbitrator may not be required to enter full findings of fact and law. Less stringent rules may permit the arbitrator simply to enter “written reasons for the award.”⁴⁵

If employees were actually able to negotiate the terms of their arbitration clauses, they could condition acceptance of the clause on a requirement that the arbitrator issue complete, written findings of fact and conclusions of law to preserve the proceedings for appeal. However, most employees do not have the bargaining power or the foresight to negotiate the terms of these contracts, so they must be accepted as drafted.

2. Arbitration Can Be Cost Prohibitive

The cost of arbitration can be very high.⁴⁶ Costs may be so high that employees drop their complaints because they cannot afford to pursue them.⁴⁷

Although courts have held agreements unconscionable that require employees to pay potentially exorbitant arbitration costs,⁴⁸ plaintiffs still face challenges to establishing a cost-prohibitive defense sufficient to satisfy a court.⁴⁹ Even courts that are willing to accept a cost-prohibitive defense perform their analysis on a case-by-case basis, which may benefit low-income employees, but may not assist higher or middle income employees.⁵⁰

44. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 245 n.4 (1962) (“Arbitrators generally have no obligation to give their reasons for an award.”); *see also* *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 204 n.4 (1956) (“[A]rbitrators need not disclose facts or reasons behind award.”) (quoting *Shirley Silk Co. v. Am. Silk Mills, Inc.*, 13 N.Y.S.2d 309, 311 (1939)); *Campbell v. Cantor Fitzgerald & Co.*, 21 F. Supp. 2d 341, 345 (S.D.N.Y. 1998).

45. Rule 34(c), National Rules for the Resolution of Employment Disputes, *available at* <http://www.adr.org/sp.asp?id=22075#n34> (last visited Feb. 18, 2005).

46. *See, e.g.*, Brief for Appellee at 45–46, *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998) (No. 97-15687) (acknowledging that record established that securities arbitrators charged fees starting at \$1000 per half day, which totaled \$82,000 in a complex case); *Campbell*, 21 F. Supp. 2d at 343 (arbitrators ruled against employee without written explanation and assessed \$45,000 in hearing fees).

47. PUBLIC CITIZEN, ARBITRATION MORE EXPENSIVE THAN COURT – SO COSTLY THAT MANY VICTIMS OF CONSUMER FRAUD, EMPLOYMENT DISCRIMINATION GIVE UP, <http://www.citizen.org/pressroom/release.cfm?ID=1098> (May 1, 2002).

48. *See, e.g.*, *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 654–55 (6th Cir. 2003).

49. *See, e.g.*, *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000) (“The ‘risk’ that [a plaintiff] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.”).

50. *See Morrison*, 317 F.3d at 669 (holding that employee salary is relevant to determining whether a cost-splitting rule would deter a substantial percentage of similarly situated potential litigants from bringing their claims).

The cost of arbitrating an employment dispute can easily exceed the cost of a lawsuit.⁵¹ A plaintiff forced to arbitrate a \$60,000 employment discrimination claim will incur costs ranging from three to nearly fifty times the cost of litigating in a judicial forum.⁵² These costs are potentially so high because the arbitration provider is often agreed upon in the terms of the contract⁵³ and there is no price competition among arbitrators.⁵⁴ A more sinister, perhaps accurate, charge is that companies use mandatory arbitration clauses to prevent employees from asserting their legal rights. As such, employers have no incentive to arrange low-cost arbitration because a high-cost arbitrator may deter employees from filing claims.⁵⁵

In addition, arbitration providers charge extra fees that claimants would not be charged if they were litigating their claims in court. For example, arbitration participants must pay \$75 for the National Arbitration Forum (NAF) to issue a subpoena, but courts issue them for free.⁵⁶ Moreover, while courts do not charge for discovery requests and continuances, in arbitration, participants must pay the NAF \$150 for a discovery request and \$100 for a continuance.⁵⁷ Additionally, the parties do not actually pay the judge's salary in the course of in-court litigation, but an American Arbitration Association arbitrator charges a rate consistent with the arbitrator's stated rate of compensation.⁵⁸ Nonrefundable filing fees may cost arbitration participants up to \$125.⁵⁹ In order to postpone a hearing, the postponing party must pay \$150.⁶⁰ Over the course of an extended arbitration, these additional fees can amount to one very expensive "alternative forum."

Advocates of arbitration praise the efficiency and cost-effectiveness of the process.⁶¹ However, prior to a Public Citizen study, no research had been undertaken and no studies had been completed to substantiate

51. *Id.*

52. See PUBLIC CITIZEN, COST OF ARBITRATION: EXECUTIVE SUMMARY, <http://www.citizen.org/congress/civjus/arbitration/articles.cfm?ID=7546> (last visited Mar. 4, 2005).

53. See, e.g., *Morrison*, 317 F.3d at 654.

54. PUBLIC CITIZEN, *supra* note 52.

55. *Id.*

56. *Id.*

57. *Id.*

58. Rule 40, National Rules for the Resolution of Employment Disputes, available at <http://www.adr.org/sp.asp?id=22075> (last visited Feb. 18, 2005).

59. *Id.*

60. *Id.*

61. See e.g., David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 99 (1999) (arguing that arbitration is "faster and less expensive than litigation in court").

those claims.⁶² Until research demonstrates that the benefits of mandatory arbitration apply equally to employees and employers, the cost-efficiency of arbitration should be considered a suspect justification.⁶³

3. Limited Discovery in Arbitration Hurts Plaintiffs

Although employers celebrate the limited discovery requirements of arbitration, limited discovery hurts plaintiffs⁶⁴ and presents a particularly difficult challenge to discrimination victims.⁶⁵ For example, in the case of a female employee who is denied a promotion, the employer may justify the denial on the basis that the employee's qualifications were unsatisfactory, despite the fact that the employee received satisfactory performance reviews and had comparable qualifications to a man promoted to the position. If this employee is lucky, she has copies of her performance reviews as evidence that the reason provided by her employer for the denial was pretextual. In arbitration, those documents may be all the evidence she has to prove her discrimination case.

If she were able to sue in court, discovery would allow her access to documents in her personnel file, information about the person promoted, and depositions from other employees and managers who may have evidence of the employer's bias. All this evidence would help support her case of discrimination and none of it is likely to be available to her in the arbitration proceedings.

4. Multiple Plaintiffs Means Repeat Business and Possible Bias Among Arbitrators

Arbitration does not resolve claims for multiple plaintiffs once and for all the way that class action lawsuits are designed to do. Employers, if Circuit City is any example, are likely dealing with multiple suits brought because of the same arbitration clause, especially when there is

62. PUBLIC CITIZEN, *supra* note 52.

63. Perhaps unexpectedly, problems are also present for employers, although employers benefit disproportionately. With the promise of substantial savings on litigation costs, more efficient resolution of disputes and the limited scope of discovery, fewer embarrassing trials and runaway jury awards, and no class actions, employers expected mandatory arbitration to be a panacea for the resolution of claims. See, e.g., Robert Leventhal & Howard Cohen, *Mandatory Arbitration Clauses—Powerful When Used Correctly*, at http://foley.com/publications/pub_detail.aspx?pubid=1724 (last visited Mar. 5, 2005). In reality, mandatory arbitration has its critics among those employers and industries that have used it in the past, as evidenced by the NASD dropping the arbitration clause from its applications. See sources cited *supra* note 15.

64. See generally David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 26 (2003).

65. *Id.* (recognizing that limited discovery may impede counsel's efforts to prove pretext or to find the proverbial "smoking gun" in discrimination and harassment cases).

merit to the plaintiffs' claims.⁶⁶ That means that the employer do repeat business with the same arbitration provider, which, studies show, results in smaller awards against employers.⁶⁷ In addition, plaintiffs with the same arbitration clause and similar claims may receive widely diverse remedies because different arbitrators may not apply the law uniformly and are not bound by judicial precedent or the decisions of other arbitrators.⁶⁸

5. Public Policy Demands That Discrimination Claims Be Heard in Public

In addition to the benefits to individual employees, public policy does not support forcing individual employees to arbitrate their discrimination claims. Rather, the public interest is served when violations of anti-discrimination laws are resolved through the judicial system, in public, and under the scrutiny of the industry, other plaintiffs, and the public.⁶⁹ Open, public litigation provides precedent for the resolution of future cases and helps ensure that similar cases are treated similarly under consistent law and are not the result of ad hoc decision making somehow rooted in the contractual expectations of the parties.

Finally, a public verdict, accessible in a public record that is subject to scrutiny by the community at large and the media, provides an educational opportunity for other employers. Judicial decisions help employment attorneys and their clients draft workplace policies and procedures, both to help prevent discrimination in the workplace and to protect employers from liability.

6. The Alternative Dispute Resolution Community Knows Best

Even segments of the ADR community have acknowledged that mandatory arbitration does not benefit the ADR industry⁷⁰ or employ-

66. See cases cited *infra* note 148.

67. *Armendariz v. Found. Heath Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000).

68. See Monica J. Washington, *Compulsory Arbitration of Statutory Employment Disputes: Judicial Review Without Judicial Reformation*, 74 N.Y.U. L. REV. 844, 850 (1999).

69. See, e.g., *Young v. Ferrellgas*, 106 Wash. App. 524, 527, 21 P.3d 334, 335 (2001); *infra* notes 245–251 and accompanying text (recognizing that when a claim is brought to vindicate the public interest and the employee's interest, and there is a conflict between the public policy favoring arbitration and that underlying a statutory tort, the conflict is resolved in favor of the tort action). Had the employees of Johnson Controls, Inc., been bound to arbitrate discrimination claims with their employer, the United States Supreme Court may never have ruled that employers cannot bar all fertile women from workplaces where they might be exposed to toxic substances and that the workplace must be made safe for all workers. See, e.g., *Auto. Workers v. Johnson Controls*, 499 U.S. 187, 211 (1991).

70. See, e.g., Brief of Amicus Curiae National Academy of Arbitrators ("NAA") in Support of the Respondent at 4, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (No. 99-1379).

ees.⁷¹ In May 1997, the National Academy of Arbitrators (“NAA”) responded to concerns that enforcement of mandatory arbitration clauses would be detrimental to the arbitration process.⁷² The NAA adopted a policy statement opposing mandatory employment arbitration as a condition of employment when employees are required to waive their statutory rights or their direct access to a judicial or administrative forum.⁷³

Although judicial resolution remains the best method to address the fairness concerns in employment disputes, even voluntary, post-dispute arbitration provides a better solution than mandatory arbitration.⁷⁴ Despite the inherent concerns about the arbitration process,⁷⁵ an employee should have the opportunity to opt-in to voluntary arbitration, especially upon the advice of an attorney. In the words of Patricia Ireland, President of the National Organization for Women, “If proponents of arbitration are correct in their belief that it is faster, cheaper, and better than the judicial system, then surely employees and their attorneys will opt for arbitration in a voluntary system.”⁷⁶

Commentators repeatedly raise the preceding arguments to refute the notion that arbitration is merely a change of scenery from the traditional judicial forum for the resolution of statutory claims. Although courts refuse to acknowledge that subjecting employee claims to arbitration is overly harsh and burdensome to the employee, continued criticism by scholars, civil rights activists, employees, and some judges has led to efforts at legislative reform and the application of state law defenses such as procedural unconscionability.

At this point, the reader is familiar with the problems faced by employees forced to arbitrate their employment-related claims. The follow-

71. Some say that any ADR method other than arbitration is a better solution. *See generally* Richard R. Ross, *The Pros and Cons of Mandatory Company Employment Programs*, 20 ALTERNATIVES TO HIGH COST LITIG. 183, 201 (2002) (discussing the proposition that “arbitration is the most controversial part of any employment ADR program . . . without this step, there is almost no controversy or opposition to the use of employment ADR”).

72. Brief of Amicus Curiae NAA, *supra* note 70, at 3.

73. *Id.*

74. The best solution for all parties involved is a situation where employees are able to knowingly and voluntarily enter into a process where decades of carefully crafted civil rights statutes and case law are applied to the facts of a given case, in a public forum and with the opportunity for judicial review. If courts continue to enforce arbitration agreements in the employment context, then it is up to the ADR industry to work to make changes to ensure fairness for plaintiffs. Written opinions, subject to judicial review, should be issued for any cases involving a statutory claim. This would help ensure that judicial precedent is applied and that the remedies comport with those provided by statutory law.

75. *See supra* notes 37–69 and accompanying text.

76. *See* Patricia Ireland, Testimony of the National Organization for Women Before a Committee of the National Association of Securities Dealers (June 1997), available at <http://www.now.org/issues/wfw/nasd-testimony.html> (last visited Mar. 6, 2005).

ing section explores both the statutory foundations for the current conflict—the Federal Arbitration Act and Title VII of the Civil Rights Act of 1991—and the development of the current federal approach permitting such agreements to be enforced against employees.

III. FEDERAL LAW BOTH ENCOURAGES ARBITRATION AND DISCOURAGES DISCRIMINATION

A. The Federal Arbitration Act: Establishing a Federal Policy in Favor of Arbitration

Congress enacted the FAA⁷⁷ in 1925 to overcome a history of judicial reluctance to enforce arbitration agreements.⁷⁸ Trade associations and lawmakers believed that arbitration was a good solution for resolving contractual disputes between merchants.⁷⁹ The FAA established a federal policy in favor of arbitration⁸⁰ and created federal common law, which preempts any state law disfavoring arbitration.⁸¹ Section 2 of the FAA states the following:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.⁸²

Congress intended this section to make arbitration agreements enforceable to the same extent as other contracts, but not more so.⁸³ Section 2 does not apply unless the arbitration clause is determined to be part of the formed contract.⁸⁴

Even at the time of the proposal of the FAA, members of industry expressed concern over its potential impact on employees.⁸⁵ Because of

77. 9 U.S.C. §§ 1–16 (2000).

78. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995).

79. *Id.* at 279.

80. *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

81. *See Allied-Bruce*, 513 U.S. at 281; *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

82. 9 U.S.C. § 2 (2000).

83. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

84. *Supak & Sons Mfg. Co. v. Pervel Indus., Inc.*, 593 F.2d 135, 137 (1979).

85. Andrew Furuseth, President of the International Seaman's Union of America, said in opposition to the Act as originally proposed: "Will such contracts be signed? Esau agreed [to give up his first birthright] because he was hungry With the growing hunger in modern society, there will

these concerns,⁸⁶ Congress added an additional clause to § 1 of the FAA exempting “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”⁸⁷ Courts have interpreted § 2 broadly to encompass all contracts, including employment contracts not specifically made exempt by § 1.⁸⁸

Litigation related to the FAA was rare until the 1950s, and even then the United States Supreme Court decided only a handful of cases.⁸⁹ When anti-discrimination legislation came out of the civil rights movement in the 1960s, judicial decisions suggested both that employment contracts were exempt from the FAA, and that discrimination claims occupied an area of the law especially entitled to judicial resolution.⁹⁰

B. Title VII: Federal Statutory Remedies Enacted to Discourage Discrimination

During the civil rights movement of the 1960s, Congress implemented several federal statutes to eliminate discrimination in the workplace, including Title VII of the Civil Rights Act of 1964,⁹¹ the Age Discrimination in Employment Act of 1967,⁹² the Equal Pay Act of 1963,⁹³ and the Rehabilitation Act of 1973.⁹⁴ These statutes provide remedies to employees who have been discriminated against in the workplace.⁹⁵

In particular, Title VII provides that when an employer has intentionally engaged in an unlawful employment practice, the court may en-

be but few that will be able to resist.” EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 754 (9th Cir. 2003) (Pregerson, J., dissenting) (quoting *Proceedings of the 26th Annual Convention of the International Seaman’s Union of America*, 203–04 (1923)).

86. Brief of Amicus Curiae National Employment Lawyers Association in Support of Respondent Saint Clair Adams at 5, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (No. 99-1379).

87. 9 U.S.C. § 1 (2000).

88. See *Circuit City*, 532 U.S. at 113–14.

89. Three, to be exact: *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 450–51 (1957) (holding that the Taft-Hartley Act subsection gives federal district courts authorization to provide specific performance for promises to arbitrate grievances under collective bargaining agreements); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 (1956) (finding that state law dictates enforceability of contract provision for arbitration in a breach of employment contract case based on diversity jurisdiction); *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953) (ruling that pre-dispute “waivers” of judicial forum in favor of arbitration of future controversies is invalidated by the Securities Act), *overruled by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

90. See, e.g., *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.9 (1967) (noting that categories of contracts otherwise within the Arbitration Act are expressly excluded from the reach of the Act when one of the parties characteristically has little bargaining power); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56–60 (1974).

91. 42 U.S.C. § 2000e (2000).

92. 29 U.S.C. § 621 (2000).

93. § 201.

94. § 791.

95. See, e.g., 42 U.S.C. § 2000e-5(g).

join the employer from continuing the practice, and may also grant additional relief such as reinstatement or hiring of employees (with or without back pay) or other equitable relief.⁹⁶

Title VII specifically prohibits retaliation against employees for activity protected under federal anti-discrimination law.⁹⁷ To establish a claim of retaliation, the plaintiff must prove that (1) the employee engaged in protected activity under the federal anti-discrimination laws; (2) the employee suffered an adverse employment decision; and (3) there was a causal link between the employee's activity and the employment decision.⁹⁸ An employer violates the federal statutory prohibitions against retaliation if the adverse action (1) occurs because of the employee's opposition to unlawful employment practices or (2) is in retaliation to the employee's "participation in the machinery set up" by the statute to enforce its provisions.⁹⁹

The United States Supreme Court has recognized that the "anti-retaliation provisions" in Title VII and other fair employment statutes are intended to "[m]aintain unfettered access to statutory remedial mechanisms."¹⁰⁰ Congress has provided the right to bring "a civil action against any respondent" as one tool to protect employees' statutory rights when subjected to unlawful employment practices.¹⁰¹

Plaintiff-employees subject to arbitration clauses have made claims under Title VII for discrimination and more creative claims for retaliatory discharge.¹⁰² For example, in *EEOC v. Luce, Forward, Hamilton & Scripps*,¹⁰³ the plaintiff alleged that his refusal to sign a mandatory arbitration clause as a condition to employment was protected activity under Title VII, and that his subsequent discharge was therefore a retaliatory discharge under the statute.¹⁰⁴

The Supreme Court addressed the question of whether Congress intended such a "civil action" under Title VII to include arbitration in *Alexander v. Gardner-Denver Co.*,¹⁰⁵ which generated thirty years of disagreement and confusion about the arbitrability of Title VII claims and the enforceability of mandatory arbitration agreements under the FAA in employment contracts. In *Gardner-Denver*, the Court held that

96. *Id.*

97. § 2000e-3(a).

98. *Trent v. Valley Elec. Ass'n*, 41 F.3d 524, 526 (9th Cir. 1994).

99. *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978).

100. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

101. 42 U.S.C. § 2000e-5(f)(1), (3) (2000).

102. *See, e.g., EEOC v. Luce, Forward, Hamilton & Scripps*, 303 F.3d 994, 1004–05 (9th Cir. 2002).

103. *Id.*

104. *Id.* *See also* discussion *infra* notes 169–200 and accompanying text.

105. 415 U.S. 36 (1974).

an arbitration decision under a collective bargaining agreement did not preclude litigation of the same dispute as a Title VII claim.¹⁰⁶

Until 1991, courts widely interpreted *Gardner-Denver* "as prohibiting any form of mandatory arbitration of Title VII claims."¹⁰⁷ Despite the increasing popularity of arbitration in the 1980s, circuit courts consistently refused to enforce mandatory arbitration clauses in the employment discrimination context pursuant to their interpretations of *Gardner-Denver*.¹⁰⁸

IV. THE SUPREME COURT CHANGES THE COURSE

During the 1990s, the United States Supreme Court decided two cases that further defined federal law with respect to mandatory arbitration.¹⁰⁹ In both cases, the Supreme Court disregarded Congress' expressed intent in order to further the federal policy favoring arbitration.

Although the Supreme Court previously indicated that employment contracts were exempt from the FAA and that statutory discrimination claims were entitled to judicial resolution,¹¹⁰ in a stunning change of course, the *Gilmer v. Interstate/Johnson Lane Corp.* decision opened the door to increased application of arbitration clauses in employment contracts. Congress responded by passing the Civil Rights Act of 1991, which preserves employee rights to a judicial forum for the resolution of discrimination claims. Despite the abundant legislative history of the FAA indicating Congress' intent, the Supreme Court effectively sounded the death knell for employees' rights to judicial resolution of statutory claims with the *Circuit City* line of cases.

The Ninth Circuit remained the lone holdout throughout this process, until ultimately agreeing with the Supreme Court that what the Civil Rights Act says (or does not say) is more important than the intent with which it was drafted. The Supreme Court and the circuit courts now all agree that employers may force their employees to choose between their jobs and their right to bring future Title VII claims in court.

106. *Id.* at 53–54.

107. *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1303 (9th Cir. 1994).

108. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (collecting cases); *see, e.g., Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104, 105–08 (5th Cir. 1990); *Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 185–87 (1st Cir. 1989); *Swenson v. Mgmt. Recruiters Int'l, Inc.*, 858 F.2d 1304, 1305–07 (8th Cir. 1988); *Rosenfeld v. Dept. of Army*, 769 F.2d 237, 239 (4th Cir. 1985); *EEOC v. Children's Hosp. Med. Ctr.*, 719 F.2d 1426, 1431 (9th Cir. 1983) (Fletcher, J., concurring).

109. *See Gilmer*, 500 U.S. 20; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (discussed *infra* notes 146–168 and accompanying text).

110. *See supra* note 90 and accompanying text.

The sections that follow explain this dubious evolution of the courts' approaches to the enforcement of mandatory arbitration clauses in the employment context.

*A. The Supreme Court Disregards Congressional Intent, Take One:
Gilmer v. Interstate*

In 1991, the Supreme Court decided *Gilmer v. Interstate/Johnson Lane Corp.*,¹¹¹ leading to a decade of dispute over the arbitrability of Title VII claims in the employment context. In its two-part holding, the Court first clarified that *Gardner-Denver* was a narrow holding: Under a collective bargaining agreement, an employee's contractual rights are distinct from an employee's statutory Title VII rights.¹¹² This holding provided the opportunity for future courts to hold that an individual employee could bargain away Title VII rights by signing a mandatory arbitration clause as part of an individual employment contract.

Second, the Court held that statutory claims may be subject to a mandatory arbitration clause in an employment contract "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."¹¹³ The Court relied on its earlier holding in *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*¹¹⁴ for this proposition—despite the vast differences in the stakes of consumers at issue in *Mitsubishi Motors* and those of employees at issue in *Gilmer*.

Finally, the *Gilmer* majority found the contract at issue to be a securities registration application rather than an employment contract,¹¹⁵ and therefore passed on determining whether § 1 of the FAA excludes all employment contracts. The Court, however, was not unanimous on this point. Two dissenting justices addressed the question of whether or not employment contracts were covered by the FAA.¹¹⁶ Justice Stevens and Justice Marshall believed that arbitration clauses in employment agreements were specifically exempt from coverage of the FAA under the exception in § 1.¹¹⁷ Justice Stevens' dissent criticized the majority for con-

111. *Gilmer*, 500 U.S. at 25–26.

112. *Id.* at 33–34.

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

114. *Mitsubishi Motors Corp.*, 473 U.S. at 628. Notably, *Mitsubishi* did not involve an employment contract or a contract between merchants as envisioned by Congress and industry at the time of passage of the FAA. Rather, *Mitsubishi* involved a consumer who had signed a contract of adhesion in the course of purchasing a car. And, even then, Justices Stevens and Brennan dissented, in part on the basis that neither the text nor the legislative history of the FAA suggested that Congress intended to authorize the arbitration of statutory claims. *Id.* at 646 (Stevens, J., dissenting).

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

116. *See id.*, 500 U.S. at 36 (Stevens, J., dissenting).

117. *Id.*

struing the scope of the exception so narrowly.¹¹⁸ He maintained that although the FAA was primarily concerned with the “perceived need by the business community to overturn the common-law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities,” the legislative history demonstrated that Congress intended for employer/employee contracts to be excluded.¹¹⁹

Congress agreed with Justice Stevens and worked to remedy this misunderstanding through the Civil Rights Act of 1991.

B. Congress Responds: The Civil Rights Act of 1991 and Section 118

The Civil Rights Act of 1991 (“CRA”) was written prior to, and signed into law following, the Court’s decision in *Gilmer*. The CRA amended several of the statutes enforced by the EEOC. Under the CRA, employees who suffer intentional discrimination are afforded the remedies of jury trials, compensatory damages, and punitive damages in Title VII lawsuits.¹²⁰ In addition, Congress added § 118 to the notes of the CRA, which provides the following:

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.¹²¹

The CRA was primarily designed to “overrule” hostile Supreme Court decisions in order to make discrimination claims easier to assert and prove in federal courts.¹²²

Congress intended to increase the possible remedies to civil rights plaintiffs by making ADR methods explicitly available under the law,¹²³ but the question remained: Did Congress intend to encourage voluntary, post-dispute adoption of ADR mechanisms, or did it intend to endorse mandatory arbitration agreements? Senator Dole stated that Congress intended to encourage arbitration only “where the parties knowingly and voluntarily elect to use these methods.”¹²⁴

118. *Id.* at 39.

119. *Id.*

120. See Jeffrey Scot Fowler, *Punitive Damages in Actions for Violations of Title VII of the Civil Rights Act of 1964*, 150 A.L.R. Fed. 601 (“In enacting the Civil Rights Act of 1991 . . . Congress created a provision allowing compensatory and punitive damages in Title VII claims.”).

121. Civil Rights Act of 1991 § 118, 42 U.S.C. § 1981 (2000).

122. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1189 (9th Cir. 1998).

123. *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1304 (9th Cir. 1994).

124. *Id.* at 1305 (quoting 137 CONG. REC. S15472, S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole)).

The House Judiciary Committee approved the bill.¹²⁵ The Committee's explanation of § 118 paralleled the Conference Report's account of the same section in the Civil Rights Act of 1990, which President George H.W. Bush vetoed for other reasons.¹²⁶ That report explained that "any agreement to submit disputed issues to arbitration . . . in an employment contract does not preclude the affected person from seeking relief under the enforcement provisions of Title VII."¹²⁷

In fact, Congress specifically rejected a proposal that would have permitted the enforcement of "compulsory" arbitration agreements:

H.R. 1 includes a provision encouraging the use of alternative means of dispute resolution to supplement, rather than supplant, the rights and remedies provided by Title VII. The Republican substitute, however, encourages the use of such mechanisms "in place of judicial resolution." Thus, under the latter proposal employers could refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints. Such a rule would fly in the face of Supreme Court decisions holding that workers have the right to go to court, rather than being forced into compulsory arbitration, to resolve important statutory and constitutional rights[.]¹²⁸

During floor debates, members of Congress repeatedly echoed Senator Dole's "knowing and voluntary" requirement, bolstering the Committee's position on § 118.¹²⁹ During the debate just prior to the CRA's passage, Representative Edwards, Chairman of the House Committee on Education and Labor, explained that the provision was "intended to be consistent with . . . *Gardner-Denver*,"¹³⁰ by stating the following:

This section contemplates the use of voluntary arbitration to resolve specific disputes after they have arisen, not coercive attempts to force employees in advance to forego statutory rights. No approval whatsoever is intended of the Supreme Court's recent decision in *Gilmer* . . . or any application or extension of it to Title VII.¹³¹

Lastly, even dissenting views on the bill support the theory that Congress intended only to encourage voluntary, post-dispute arbitration

125. H.R. REP. NO. 102-40(I), at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 549.

126. *Duffield*, 144 F.3d at 1196.

127. H.R. CONF. REP. NO. 101-755, at 26 (1990).

128. H.R. REP. NO. 102-40(I), at 104 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 642.

129. 137 CONG. REC. S15478; *see also* 137 CONG. REC. H9548 (daily ed. Nov. 7, 1991) (statement of Rep. Hyde).

130. Appellant's Opening Brief at 34-36, *Duffield*, 144 F.3d 1182 (No. 97-15687) (citing 137 CONG. REC. H9530 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards)).

131. 137 CONG. REC. H9530 (statement of Rep. Edwards).

of disagreements.¹³² The Committee minority report complained that because § 118 encouraged only voluntary agreements, it was “nothing more than an empty promise” to those who wished to encourage arbitration of more Title VII claims.¹³³

Despite this available legislative history, with only a few exceptions, courts have imputed a meaning to the language of the FAA, Title VII, and the CRA of 1991 that Congress did not intend. Several federal courts have held that § 118 makes mandatory arbitration agreements in employment contracts enforceable.¹³⁴ However, the Ninth Circuit disagreed, consistently holding such contracts to be illegal.

C. The Ninth Circuit Holds Its Ground: Duffield v. Robertson Stephens

Despite the Supreme Court's apparent change of heart between its *Gardner-Denver* and *Gilmer* decisions on the issue of mandatory arbitration of statutory claims, *Gardner-Denver* and the CRA laid the foundation for the Ninth Circuit's controversial and much maligned decision¹³⁵ in *Duffield v. Robertson Stephens & Co.*¹³⁶

In *Duffield*, the Ninth Circuit held that employers may not require, as a condition of employment, that employees waive their right to bring Title VII and other statutory claims in court by agreeing to a mandatory arbitration clause.¹³⁷ The court distinguished systems under which employees choose, post-dispute, to submit claims to arbitration, and focused its analysis on situations related to mandatory pre-dispute arbitration

132. Appellant's Opening Brief at 34–36, *Duffield*, 144 F.3d 1182 (No. 97-15687).

133. H.R. REP. NO. 102-40(I), at 78 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 616.

134. *See, e.g.*, *Koveleskie v. SBC Capital Markets*, 167 F.3d 361, 365 (7th Cir. 1999) (holding that § 118 reflected a clear intent to encourage arbitration of Title VII claims, and that parties' agreement to arbitrate was enforceable); *Wright v. Circuit City Stores, Inc.*, 82 F. Supp. 2d 1279, 1282 (N.D. Ala. 2000) (finding, “in light of” § 118, no reason to preclude enforcement of the arbitration agreement); *Shaw v. DLJ Pershing*, 78 F. Supp. 2d 781, 782 (N.D. Ill. 1999) (holding mandatory arbitration provision valid and enforceable because of the “clear Congressional intent” evidenced by § 118 to encourage arbitration of Title VII claims).

135. *See EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 745 (9th Cir. 2003) (overruling *Duffield* because it was “wrongly decided”); *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1315 (11th Cir. 2002) (stating that, after pointing out that *Duffield* had been considered and rejected by other courts, it “see[s] no reason to depart from our own precedent, the mandate of the Supreme Court, and the holdings of almost every other circuit to find that compulsory arbitration agreements constitute an unlawful employment practice”); *Koveleskie*, 167 F.3d at 365 (“respectfully disagree[ing] with the Ninth Circuit on [the issue of compulsory arbitration of Title VII claims], and instead concur[ing] with the majority of circuits that have held that Congress did not intend Title VII to preclude enforcement of pre-dispute arbitration agreements.”). *See also* Keith A. Becker & Dianne R. LaRocca, *Divided Court Crosses Wires over Circuit City Decision: Holding Casts Doubt on Ninth Circuit's Duffield Decision*, 7 HARV. NEGOT. L. REV. 403, 410–11 (2002) (recognizing the controversy and ambiguity surrounding the *Duffield* decision).

136. 144 F.3d 1182 (9th Cir. 1998).

137. *Id.* at 1185.

clauses.¹³⁸ After a thorough analysis of the legislative history of the Civil Rights Act of 1991,¹³⁹ the court concluded that Congress intended to enlarge the range of substantive rights available to plaintiffs, not constrict them.¹⁴⁰

Although the settled Ninth Circuit law was that the FAA did not apply to employment contracts, and that mandatory arbitration of statutory claims was not permitted under the CRA, the other circuit courts disagreed.¹⁴¹ By 2002, eleven circuits and one state supreme court had either determined or reaffirmed that this exclusion covered only contracts of individuals employed in the interstate or international transportation of goods and people, applying the narrowest possible interpretation of the commerce clause.¹⁴²

On the other hand, many states agreed with the Ninth Circuit. Several states enacted legislation to help protect employees from these types of contracts.¹⁴³ Five states allowed the enforcement of voluntary post-dispute arbitration agreements, but precluded the enforcement of agreements to arbitrate future disputes.¹⁴⁴ Some state courts took matters into

138. *Id.* at 1187.

139. *See supra* notes 120–132 and accompanying text.

140. *Duffield*, 144 F.3d at 1190–91.

141. *See supra* note 108.

142. Brief of Amicus Curiae Employers Group in Support of Petitioner at 3, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (No. 99-1379) (citing *Brennan v. King*, 139 F.3d 258, 264 n.5 (1st Cir. 1998)); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998); *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054, 1060–61 (11th Cir. 1998) (Op. of Cox, J. and Tjoflat, J.); *Maryland Cas. Co. v. Realty Advisory Bd. on Labor Relations*, 107 F.3d 979, 982 (2d Cir. 1997); *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); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835–36 (8th Cir. 1997); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997); *Rojas v. TK Commun., Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Brown v. KFC Nat'l Mgmt. Co.*, 921 P.2d 146, 156 n.13 (Haw. 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)).

143. Brief of the States of California, Arizona, Arkansas et al. in Support of Respondent at 15, *Circuit City*, 532 U.S. 105 (No. 99-1379) (citing ARIZ. REV. STAT. § 12-1517 (2000), which exempts “arbitration agreements between employers and employees or their respective representatives” from the State’s arbitration act); KY. REV. STAT. ANN. § 417.050 (*Banks-Baldwin* 1998) (same); LA. REV. STAT. ANN. § 9:4216 (West 2000) (excluding “contracts of employment of labor”); OKLA. STAT. tit. 15, § 818 (1999) (excluding “employer and employee relations”); WIS. STATS. § 788.01 (1999) (excluding “contracts between employers and employees and between employers and associations of employees”).

144. Brief of the States of California et al. at 15–18 (citing ARK. CODE ANN. § 16-108-201 (*Michie* 1999) (exempting arbitration agreements in “employer-employee disputes . . . thereafter arising between the parties” from the State’s arbitration act)); KAN. STAT. ANN. § 5-401 (1999) (exempting “contracts between an employer and employees, or their respective representatives . . . to submit to arbitration any controversy thereafter arising”); ALA. CODE § 8-1-41 (2000) (providing that an arbitration agreement cannot be specifically enforced); *Ex parte Clements*, 587 So. 2d 317, 319 (Ala. 1991) (“[U]nless the FAA is applicable, pre-dispute arbitration agreements are void in Alabama as against public policy.”); *State v. Nebraska Ass’n of Pub. Employees*, 477 N.W.2d 577,

their own hands, holding that contracts to arbitrate employment discrimination claims violated the states' public policies and were unenforceable.¹⁴⁵ The discord made it clear that the United States Supreme Court had not decided its last case on the enforceability of arbitration agreements.

*D. The Supreme Court Disregards Congressional Intent, Take Two:
Circuit City Stores v. Adams*

Continuing its reign as the hotbed of activity with respect to mandatory arbitration agreements, the Ninth Circuit took the spotlight again when the United States Supreme Court resolved the circuit split in *Circuit City Stores v. Adams* by reversing a Ninth Circuit decision¹⁴⁶ that had earlier reversed a district court's order compelling arbitration.¹⁴⁷

In October 1995, Saint Clair Adams applied for employment with Circuit City Stores. As part of the employment application, Adams agreed to settle "claims, disputes or controversies . . . exclusively by final and binding arbitration." The much-litigated provision¹⁴⁸ went on to state that "[b]y way of example only, such claims include claims under federal, state, and local statutory or common law" including, by name, the ADEA, "Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991," the ADA, and contract and tort law.¹⁴⁹

Two years later, Adams sued Circuit City in state court, asserting claims under California's Fair Employment and Housing Act¹⁵⁰ and other tort claims under California law.¹⁵¹ Circuit City moved to compel arbitra-

580 (1991) (holding the Nebraska Uniform Arbitration Act violates the Nebraska Constitution to the extent it requires enforcement of agreements to arbitrate future disputes)).

145. Brief of the States of California et al. at 17.

146. *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999).

147. *Circuit City Stores, Inc. v. Adams*, No. 98-365, 1998 WL 1797183, at *1 (N.D. Cal. May 4, 1998).

148. See, e.g., *Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1256 (9th Cir. 2005); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1169 (9th Cir. 2003), *cert. denied*, 540 U.S. 1160 (2004); *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1104 (9th Cir. 2003), *cert. denied*, 540 U.S. 1160 (2004); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 891 (9th Cir. 2002), *cert. denied*, 535 U.S. 1112 (2002) (all holding that the contract was unconscionable and unenforceable); see also, e.g., *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 654 (6th Cir. 2003); *Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373, 374 (4th Cir. 1998), *after remand*, 203 F.3d 821 (4th Cir. 2000), *cert. denied*, 530 U.S. 1276 (2000); *Morrison v. Circuit City Stores, Inc.*, 70 F. Supp. 2d 815, 818 (S.D. Ohio 1999); *Sportelli v. Circuit City Stores, Inc.*, No. 97-5850, 1998 WL 54335, at *2 (E.D. Pa. Jan. 13, 1998).

149. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 110 (2001).

150. *Id.* (referencing CAL. GOV'T CODE § 12900 (West 1992 & Supp. 1997)).

151. *Id.*

tion and the district court granted the motion.¹⁵² Adams appealed to the Ninth Circuit,¹⁵³ where the court held that the FAA did not apply because the arbitration agreement was part of an employment contract, and remanded to the district court.¹⁵⁴

Circuit City appealed the Ninth Circuit's decision and the Supreme Court granted certiorari.¹⁵⁵ The five-member majority held that the Ninth Circuit erred by excluding all employment contracts from the FAA because the "engaged in commerce" exclusion in § 1 of the FAA should be narrowly construed.¹⁵⁶ Under this view, only contracts of employment of transportation workers were exempted.¹⁵⁷ The majority based part of its reasoning on the interpretive maxim of *ejusdem generis*—when a general term follows specific terms, the general term covers only examples of the same sort as the preceding specifics.¹⁵⁸ Under this reading, the § 1 exclusion applies to "seamen" and "railroad employees," and the residual clause, "any other class of workers engaged in . . . commerce" means only those individuals whose work is similar to that of seamen and railroad employees.¹⁵⁹

Four members of the Supreme Court dissented in two separate opinions. Justice Stevens' dissent was joined by Justices Ginsburg, Breyer and, in part, by Justice Souter.¹⁶⁰ Justice Stevens' dissent looked largely to the inclusive section of the FAA, § 2, which states that written agreements to arbitrate are enforceable "in any maritime transaction or a contract evidencing a transaction involving commerce."¹⁶¹ Analyzing the FAA's legislative history, Justice Stevens concluded that Congress had not intended that the FAA apply to labor disputes at all¹⁶² but instead had added the § 1 exemption specifically in response to concerns that the FAA might be used to enforce arbitration clauses in employment contracts and collective-bargaining agreements.¹⁶³

Justice Souter's dissent, which also focused on the § 1 exemption, was joined by Justices Stevens, Ginsburg, and Breyer.¹⁶⁴ Justice Souter

152. *Circuit City Stores, Inc. v. Adams*, No. 98-365, 1998 WL 1797183, at *1 (N.D. Cal. May 4, 1998).

153. *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999).

154. *Id.* at 1071.

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

156. *Id.* at 119.

157. *Id.*

158. *Id.* at 114–15.

159. *Id.* at 114.

160. *Id.* at 124 (Stevens, J. dissenting).

161. *Id.* (quoting 9 U.S.C. § 2 (2000)).

162. *Id.* at 127.

163. *Id.*

164. *Id.* at 133.

argued that the exemption for employment contracts had kept “pace with the expanded understanding of the commerce power generally,”¹⁶⁵ and concluded that the majority’s reading of § 1 was impermissibly narrow.¹⁶⁶ He also took issue with the majority’s application of *ejusdem generis* and argued that because the interpretation could be overruled by contrary legislative history, the application of *ejusdem generis* was inappropriate in this case.¹⁶⁷

Despite these strong dissents, *Circuit City* became known as the case that made mandatory arbitration agreements enforceable in employment contracts for all employees except transportation workers.¹⁶⁸ While the *Circuit City* case wound its way through the federal courts, another important California case was working its way through the California and Ninth Circuit courts.

E. The Ninth Circuit Falls in Line: EEOC v. Luce Forward

In *EEOC v. Luce, Forward, Hamilton & Scripps*¹⁶⁹ the question again came to the Ninth Circuit: Can employers require employees, as a condition of employment, to agree to arbitrate Title VII claims that arise in the course of their employment?

In September 1997, Donald Scott Lagatree was offered a position as a legal secretary at Luce, Forward, Hamilton & Scripps LLP (“Luce Forward”), a California law firm.¹⁷⁰ When Lagatree reported to work, he received a “Letter of Employment,” which confirmed the offer and detailed the terms of his employment.¹⁷¹ The offer letter included an arbitration provision, which stated that “claims arising from or related to” his employment must be settled using binding arbitration.¹⁷² Lagatree refused to sign the agreement because he believed that it was unfair.¹⁷³ Lagatree testified that he did not want to give up his right to “a jury trial and redress of grievances through the government process.”¹⁷⁴ The firm informed Lagatree that the arbitration agreement was not negotiable.¹⁷⁵

165. *Id.* at 137.

166. *Id.*

167. *Id.* at 139.

168. *See, e.g., EEOC v. Luce, Forward, Hamilton & Scripps*, 303 F.3d 994, 997 (9th Cir. 2002).

169. *Id.*

170. *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 743 (9th Cir. 2003).

171. *Id.* at 745.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

Upon Lagatree's continued refusal to sign the agreement, Luce Forward withdrew its job offer.¹⁷⁶

Lagatree first sued in state court, alleging wrongful termination in violation of public policy and in violation of the California Unfair Competition Law.¹⁷⁷ The state court held that Luce Forward had lawfully discharged Lagatree.¹⁷⁸ The California Court of Appeals affirmed, and the California Supreme Court denied review.¹⁷⁹

Simultaneous with his lawsuit, Lagatree filed a discrimination charge with the Equal Employment Opportunity Commission.¹⁸⁰ He alleged that he was wrongfully terminated in retaliation for his refusal to sign the arbitration provision.¹⁸¹ The EEOC brought a case in the public interest and on behalf of Lagatree, arguing that under *Duffield*, Luce Forward could not require employees to sign mandatory arbitration agreements. The EEOC also asserted that Luce Forward's refusal to hire Lagatree constituted unlawful retaliation for Lagatree's assertion of his constitutional right to a jury trial under Title VII.¹⁸²

In addition to relief for Lagatree, the EEOC sought to permanently enjoin Luce Forward from engaging in unlawful retaliation and ordered the firm to "desist from utilizing mandatory arbitration agreements."¹⁸³ The district court granted the injunction on the EEOC's claims for injunctive relief under the Ninth Circuit's analysis in *Duffield*,¹⁸⁴ but did not rule on the EEOC's retaliation theory.¹⁸⁵

A three-judge panel of the Ninth Circuit heard Luce Forward's appeal and the EEOC's cross-appeal.¹⁸⁶ In a split decision, the majority held that the United States Supreme Court's decision in *Circuit City v. Adams* overruled *Duffield* by implication.¹⁸⁷ According to the majority, Lagatree had not engaged in protected activity by refusing to sign the agreement because the agreement was not illegal; thus, the panel rejected the EEOC's theory of illegal retaliation.¹⁸⁸ Judge Pregerson dissented,

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* (discussing *Lagatree v. Luce, Forward, Hamilton & Scripps*, 88 Cal. Rptr. 2d 664 (Cal. Ct. App. 1999)).

180. *Id.*

181. *Id.*

182. *Id.* at 745-46.

183. *Id.* at 746.

184. *EEOC v. Luce, Forward, Hamilton & Scripps*, 122 F. Supp. 2d 1080, 1086-93 (C.D. Cal. 2000).

185. *Luce Forward*, 345 F.3d at 746.

186. *EEOC v. Luce, Forward, Hamilton & Scripps*, 303 F.3d 994, 997 (9th Cir. 2002).

187. *Id.*

188. *Id.*

concluding that *Duffield* remained good law after *Circuit City* because the cases addressed different issues and had compatible holdings.¹⁸⁹ Judge Pregerson emphasized that the issue in *Duffield* was whether employers may require their employees to agree to arbitrate Title VII claims as a mandatory condition of employment.¹⁹⁰ The issue in *Circuit City*, he juxtaposed, was whether the FAA excluded employment arbitration agreements by non-transportation workers.¹⁹¹ Although the *Circuit City* decision did address discrimination, it looked exclusively at state law claims because the plaintiff had not alleged Title VII claims.¹⁹² Moreover, Judge Pregerson argued, the United States Supreme Court never explicitly mentioned *Duffield*, and accordingly did not explicitly overrule that decision.¹⁹³

The Ninth Circuit agreed to rehear the case en banc and unanimously agreed that the panel had erred in holding that *Circuit City* implicitly overruled *Duffield*.¹⁹⁴ Nonetheless, the court then explicitly overruled *Duffield* on the grounds that the case had been wrongly decided.¹⁹⁵ The court found the text of § 118 of the CRA to be unambiguous, and thus decided that they were precluded from considering its legislative history.¹⁹⁶

The dissenting opinions argued, however, that *Duffield* was still good law and that employees should not be forced to arbitrate statutory discrimination claims. These opinions consisted of a three-judge partial concurrence and a partial dissent authored by Judge Pregerson.¹⁹⁷ Judge Pregerson agreed that *Circuit City* did not overrule *Duffield*, but reasoned that *Duffield* remained good law because it was based upon a proper analysis of the legislative history of § 118 of the CRA.¹⁹⁸ “The majority opinion,” Judge Pregerson wrote, “allows employers to force their employees to choose between their jobs and their right to bring future Title VII claims in court. That choice is no choice at all.”¹⁹⁹ He cited the House Committee reports to support his assertion that Congress intended

189. *Id.* at 1008–09 (Pregerson, J., dissenting).

190. *Id.*

191. *Id.*

192. *Id.* at 1008.

193. *Id.*

194. *EEOC v. Luce*, Forward, Hamilton & Scripps, 345 F.3d 742, 744 (9th Cir. 2003).

195. *Id.* at 745.

196. *Id.* at 753 (citing *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 97 (2003); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994)).

197. *Luce Forward*, 345 F.3d at 754.

198. *Id.* at 754 n.1 (Pregerson, J. dissenting).

199. *Id.* at 754.

that "American workers should not be forced to choose between their jobs and their civil rights."²⁰⁰

As a result of the United States Supreme Court's decision in *Circuit City* and the Ninth Circuit's corresponding opinion in *Luce Forward*, American workers faced with mandatory arbitration clauses must do just what Congress intended to prevent. An employee who experiences discrimination and who has signed a pre-dispute arbitration clause can only hope that Congress acts to clarify its intent, or that a court will declare the clause unenforceable.

V. ARE EMPLOYEES FIGHTING A LOSING BATTLE?

Against the backdrop of federal case law on the matter, the situation is rather bleak for employees who are forced to sign arbitration clauses and later experience discrimination. Although the United States Supreme Court does not appear poised to reverse course on this matter any time soon, there are a few glimmers of hope for employees. First, courts have made two fundamental mistakes regarding the statutory law in question by failing to recognize the anticipatory retaliation aspect of new hire, mandatory pre-dispute arbitration contracts and by refusing to acknowledge the ambiguity of the Civil Rights Act of 1991 and the resulting need to inquire into the legislative history when construing the Act. Second, despite facing an uphill battle, members of Congress embark on an annual attempt to undo the courts' disregard of congressional intent by introducing legislation to prohibit mandatory, pre-dispute arbitration agreements in the employment context, as Congress initially intended.

An employee's best hope, however, is in the continued willingness of lower courts to recognize what the Supreme Court fails to: An employee forced to choose between her job and her right to sue faces no meaningful choice at all. Thus, state and federal courts applying state law will likely continue to find mandatory pre-dispute arbitration clauses in the employment context procedurally unconscionable.

A. Anticipatory Retaliation Is Prohibited by Title VII

Although it may sound like a stretch for a current or prospective employee to bring a claim under Title VII for unlawful retaliation after being fired for refusing to sign a mandatory arbitration agreement, this type of claim should be considered a valid cause of action. In *Luce Forward* and similar cases, a new employee (1) is presented with a mandatory arbitration clause requiring arbitration of federal statutory discrimi-

200. *Id.* at 755 (citing H.R. REP. NO. 102-40(1), at 104 (1991)). For a more detailed criticism of the Ninth Circuit's decision in *Luce Forward*, see Kent, *supra* note 9, at 109-10.

nation claims under Title VII, (2) refuses to sign the employment agreement, and (3) is fired for refusing to do so. The EEOC's creative counsel argued in *Luce Forward* that the termination is an unlawful discharge, which is illegal adverse treatment under the anti-retaliation provision of Title VII.²⁰¹

The basis for this argument is sound, yet courts have not given the argument enough credit.²⁰² By the plain language of the anti-retaliation provision of Title VII, when employees use the tools Congress provided to protect their rights, they are protected from discrimination and adverse treatment.²⁰³ By affording protection against retaliation, Congress meant to preserve access to remedial measures in the course of protecting the employee's statutory rights.²⁰⁴ The remedial measures provided under Title VII for unlawful employment practices include the right to file and the right to litigate a civil action against one's employer.²⁰⁵ But in addition to those rights, courts should also consider preserving the right to file and the right to litigate a civil action against one's employer, specifically in a court of law, as a protected tool.

The anti-retaliation provision of Title VII "protects an individual from discrimination and adverse treatment that results from an employee 'utiliz[ing] the tools provided by Congress to protect his rights by filing or litigating a civil action against his employer.'"²⁰⁶ Thus, if the right to file a suit in court is a protected tool, the EEOC correctly argued that the anti-retaliation measures in our nation's anti-discrimination laws provide protection against such adverse treatment to applicants or employees who exercise their statutory procedural right to seek judicial redress for unlawful employment practices.²⁰⁷

In contrast, permitting employers to commit adverse employment actions in response to an employee's refusal to sign a mandatory arbitration clause provides the *employer* a tool that Congress did not intend.²⁰⁸

201. Answering Brief/Cross-Opening Brief of EEOC at 10, *EEOC v. Luce, Forward, Hamilton & Scripps*, 303 F.3d 994 (9th Cir. 2002) (Nos. 00-57222, 01-55321).

202. See *Luce Forward*, 303 F.3d at 1004-05.

203. EEOC Brief at 21-22, *Luce Forward* (Nos. 00-57222, 01-55321) (citing *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) and *Garcia v. Lawn*, 805 F.2d 1400, 1401 (9th Cir. 1986)).

204. *Id.* at 13 (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)).

205. *Id.* at 20 (discussing 42 U.S.C. § 2000e-5(f)(1), (3) (2000)).

206. *Id.* at 21-22 (citing *Sias*, 588 F.2d at 695; *Garcia*, 805 F.2d at 1401).

207. *Id.* at 22 (citing *Maynard v. City of San Jose*, 37 F.3d 1396, 1403 (9th Cir. 1994) ("[A]nti-retaliation provision of Title VII 'grants special protection to all employees—regardless of race—who are subjected to retaliation' for engaging in protected conduct.")). Such protection does not depend on the viability of the discrimination claim. The "participation clause shields an employee from retaliation regardless of the merit" of the underlying claim of discrimination. *Id.* at 22 n.9 (citing *Sias*, 588 F.2d at 695).

208. See *id.* at 25.

Rather than allowing an employee to reach the point where his or her actions would be statutorily protected from any retaliatory adverse treatment—the point where that employee has filed or begun to litigate a suit under Title VII in a court of law—the employer preempts the employee’s opportunity to this unquestionable protection. By denying employment to any individual who will not waive the right to a judicial forum for resolution of any future discrimination claims, the employer commits a form of anticipatory retaliation, in direct conflict with federal law’s goal of maintaining unfettered access to statutory remedial mechanisms²⁰⁹

Employers should not be permitted to retaliate against employees and prospective employees who wish both to work with the given firm and preserve their rights to a judicial forum for the resolution of potential statutory claims. Such a practice conflicts with Congress’ goal of maintaining unimpeded access to statutory remedial mechanisms. The refusal to sign mandatory arbitration clauses should be considered protected activity under federal anti-discrimination statutes.

The anticipatory retaliation issue has not, to date, been raised in other circuit courts or accepted for review by the United States Supreme Court. Despite the short shrift given the argument by the Ninth Circuit, other courts may still resolve the question differently.

B. Mandatory Arbitration Directly Conflicts with the Civil Rights Act of 1991

Despite several courts’ conclusory statements that the Civil Rights Act of 1991 is clear and unambiguous, more careful scrutiny of the timing of the drafting and passage of the CRA and its language leads to the inevitable conclusion that the CRA is ambiguous. The enforcement of mandatory arbitration clauses directly conflicts with Congress’ intent in passing the CRA. While courts have repeatedly refused to consider Congress’ intent because the statute is “clear and unambiguous,”²¹⁰ the presence of a circuit split, at least until recently, indicates that the statute is ambiguous, and dissension by unconvinced judges is even more demonstrative.²¹¹

The language in § 118 of the CRA is ambiguous not only because it addresses arbitration with too much breadth, but also because of the timing of its drafting (before *Gilmer*) and adoption (after *Gilmer*).²¹² Section 118 encourages the use of alternative means of dispute resolution, in-

209. *Id.*

210. See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001); *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 753 (9th Cir. 2003).

211. See, e.g., *Luce Forward*, 345 F.3d at 754.

212. See *supra* notes 120–134 and accompanying text.

cluding "arbitration," where appropriate and to the extent authorized by law to resolve disputes arising under the federal anti-discrimination statutes.²¹³ However, arbitration is only one of the ADR methods mentioned. The others include negotiation, conciliation, facilitation, mediation, fact-finding, and minitrials.²¹⁴ Of those methods listed other than arbitration, all are typically used post-dispute, voluntarily, and by agreement of the parties. Although not conclusive, it is reasonable to presume that arbitration, used in this list of ADR methods, refers to voluntary, post-dispute arbitration.

Furthermore, Congress did not explicitly endorse *agreements* to arbitrate. Rather, Congress endorsed arbitration as an example of the many ADR methods by which disputing parties may choose to resolve their claims. Endorsing arbitration as one method of post-dispute resolution is clearly different from endorsing agreements to arbitrate without regard to whether the agreement is made pre- or post-dispute. The former is the position Congress took in the CRA; the latter is the position adopted by many courts.

Last, the phrase "to the extent authorized by law," is ambiguous. The CRA of 1991 was written before, yet signed into law after, *Gilmer*.²¹⁵ Without inquiring into congressional intent, it is impossible to determine to which version of "law" Congress intended to bind parties. These ambiguities can only be resolved by inquiry into congressional intent by courts willing to interpret the law as Congress intended.

Most significantly, when the CRA was implemented, Congress directed courts that "when the statutory terms in [Title VII] are susceptible to alternative interpretations, courts are to select the construction which most effectively advances the underlying congressional purpose [of the Act]."²¹⁶ To date, few courts have done so.²¹⁷

C. Legislative Remedies Face a Tough Battle

California lawmakers proposed a bill that would have prohibited employers from requiring employees to sign mandatory arbitration agreements regarding civil rights claims, as a condition of employment.²¹⁸ California's A.B. 1715 was passed by the State House of Repre-

213. *Id.*

214. 42 U.S.C. § 1981 (2000).

215. See *supra* note 120 and accompanying text.

216. H.R. REP. NO. 102-40(I), at 88 (1991); accord *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (holding that civil rights statutes should be construed broadly).

217. See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 124 (2001) (Stevens, J., dissenting); *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 754 (9th Cir. 2003) (Pregerson, J., dissenting).

218. A.B. 1715, 2003–2004 Gen. Assem., Reg. Sess. (Cal. 2003).

sentatives on May 19, 2003, and by the Senate on August 27, 2003, only to be vetoed by Governor Gray Davis on October 12, 2003, during a difficult recall campaign.²¹⁹ Governor Davis vetoed the bill, citing concerns that the proposed restrictions would hamper the ability of small businesses to resolve disputes in a cost-efficient manner.²²⁰ However, he also stressed that the arbitration system needs to be reformed to ensure fairness and encouraged legislation that would treat employers and employees equally.²²¹

Other state legislatures do not appear to be following suit with their own proposed legislation.²²² Thus, employees in California and across the United States can only look to the United States Congress, mold-breaking federal courts, and state courts for assistance.

Members of the United States Congress who urged Governor Davis to support California's A.B. 1715²²³ proposed broader federal legislation that would have accomplished the same goal.²²⁴ Under the Preservation of Civil Rights Protections Act of 2004, the FAA would have been amended to exclude such clauses in employment contracts for all workers involved in "commerce."²²⁵ Additionally, under the Act, if a clause required arbitration of a dispute arising under the federal constitution or federal law, the clause would have been rendered unenforceable.²²⁶

The proposed legislation also contained an exception permitting post-dispute arbitration, if both parties entered into the agreement knowingly and voluntarily,²²⁷ and would not have precluded an employee or union from enforcing any of the rights or terms of a valid collective bargaining agreement.²²⁸ In the introductory remarks of the larger Civil Rights Act of 2004, nicknamed "The Fairness Act," of which this legislation would have been a part, Senator Kennedy stated that the Act was intended to "guarantee that victims of discrimination and unfair labor practices have access to the courts when necessary to enforce their rights

219. *Id.*

220. Staff Reporters, *Davis Vetoes Limits on Mandatory Employment Arbitration Clauses*, Oct. 15, 2003, available at <http://www.adrworld.com> by subscription (copy on file with author).

221. *Id.*

222. According to a combined source search of the 2003–2004 Bill Tracking databases on Lexis-Nexis (TRCK 03 and TRCK 04), California's A.B. 1715 appears to be the only recently proposed legislation on point. Search terms and connectors used were the following: "mandatory arbitration" OR "compulsory arbitration" OR "arbitration agree!" AND "employ!"

223. Kucinich, *Democratic Leaders Urge Gov. Davis to Support California Law*, available at <http://www.commondreams.org/news2003/0905-09.htm> (Sept. 5, 2003).

224. Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, S. 2088, H.R. 3809, 108th Cong. (2004).

225. S. 2088, 108th Cong. § 512 (2004).

226. *Id.* § 513.

227. *Id.* § 513 (b)(1).

228. *Id.* § 513 (b)(2).

and to obtain effective remedies.”²²⁹ Senator Kennedy acknowledged Congress’ lack of clarity in earlier legislation: “Our proposals will strengthen existing protections, often in cases where the courts have let us down by adopting unacceptably narrow interpretations of existing law.”²³⁰

Although this proposed legislation furthered the congressional intent at the passage of the CRA of 1991, President George W. Bush and the Republican majority in both the House and Senate were unlikely to adopt this or any similar legislation. The sponsorship of the bill was telling: All twenty-six co-sponsors in the Senate, and 100 of the 101 co-sponsors in the House are Democrats; the remaining co-sponsor, Representative Sanders, is an Independent.²³¹ After introduction, the bill was referred to the Senate Committee on Health, Education, Labor and Pensions²³² and to the House Committees on Education and the Workforce, the Judiciary, and Transportation and Infrastructure,²³³ where it seems to have died a quiet death. This bill appears unlikely to be revived in the current polarized political climate; even the Clinton-era chair of the EEOC acknowledged that “[t]he train has left the station on mandatory arbitration.”²³⁴

Coupled with the lack of success of similar, previously introduced legislation,²³⁵ the Preservation of Civil Rights Protections Act of 2004 faced a challenging trip through Congress. In the meantime, employees are forced to sign mandatory arbitration agreements against the express intent of Congress.²³⁶ As the foregoing cases suggest, courts continue to rely on the FAA and § 118 of the CRA of 1991 to circumvent employee’s statutory rights.²³⁷

229. 150 CONG. REC. S1296 (daily ed. Feb. 12, 2004) (statement of Sen. Kennedy).

230. *Id.*

231. Congressional Information Service, Inc., Bill Tracking Reports, 2004 Bill Tracking S. 2088 and 2004 Bill Tracking H.R. 3809 (LEXIS through 2004 legislation).

232. 150 CONG. REC. S1296 (statement of Sen. Kennedy).

233. 150 CONG. REC. H514 (daily ed. Feb. 11, 2004) (statement of Rep. Lewis).

234. Nancy Montweiler, *EEOC: Ex-EEOC Chairwoman Expresses Concern over Agency Direction in Bush Administration*, DAILY LAB. REP., Aug. 23, 2001, at 163.

235. The Preservation of Civil Rights Protections Act of 2004 is the third major attempt by legislators to address this issue. Neither the 2001 nor 2002 versions of the Act were passed. Both of the earlier attempts have languished in committee. See Congressional Information Service, Inc., Bill Tracking Reports, 2001 Bill Tracking H.R. 2282 and 2002 Bill Tracking S. 2435 (LEXIS through 2002 legislation).

236. See *supra* notes 128–134 and accompanying text.

237. See, e.g., *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 681 (9th Cir. 2001) (finding that invalid limitation on punitive damages can be severed and remainder of arbitration agreement enforced); *Farac v. Permanente Med. Group*, 186 F. Supp. 2d 1042, 1046–47 (N.D. Cal. 2002) (rejecting plaintiff’s unconscionability arguments and compelling arbitration).

D. The Employee's Best Hope: State Court Defenses to Arbitration Clauses

Once contracts are formed, courts apply state law principles of contract formation to determine the validity of agreements to arbitrate.²³⁸ According to the United States Supreme Court, general state law contract defenses such as fraud, duress, and unconscionability may invalidate arbitration agreements.²³⁹ Although case law surrounding the arbitrability of statutory claims in the employment context is voluminous, the Supreme Court has addressed challenges to arbitration clauses on the grounds of unconscionability only four times.²⁴⁰ And while the Ninth Circuit has busily applied the doctrine to the various *Circuit City* arbitration clauses,²⁴¹ the Supreme Court, so far, has chosen not to review the Ninth Circuit's findings of unconscionability.²⁴²

Even with these available defenses, plaintiffs must overcome substantial obstacles to prove that an arbitration agreement is invalid on contract law grounds, and few plaintiffs succeed.²⁴³ Despite these obstacles, plaintiff successes on claims of unconscionability are on the rise,²⁴⁴ per-

238. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

239. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir. 2002) (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

240. *Doctor's Assocs.*, 517 U.S. at 681 (finding that state law rendering contract arbitration clauses unenforceable was preempted by the Federal Arbitration Act); *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995) (holding arbitration clause enforceable, despite its requirement to litigate in a distant forum at an increased cost); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (ruling that Federal Arbitration Act preempts a California statute permitting judicial action despite existence of an arbitration agreement); *Wilco v. Swan*, 346 U.S. 427, 440 (1953) (holding that the right to select judicial forum is a provision that cannot validly be waived, and agreement to arbitrate is unconscionable and invalidated by the Securities Act's express provisions against waiver), *overruled by Rodriguez De Quijas v. Shearson/American Express, Inc.* 490 U.S. 477, 485 (1989) (finding that, without discussing unconscionability, arbitration clause was valid because arbitration did not affect the substantive provisions of the Securities Act and was merely a procedural remedy).

241. *See Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1256 (2005); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1169 (2003), *cert. denied*, 540 U.S. 1160 (2004); *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1104 (2003), *cert. denied*, 540 U.S. 1160 (2004); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 891 (2002), *cert. denied*, 535 U.S. 1112 (2002) (all holding arbitration agreement unconscionable).

242. *See, e.g., Ingle*, 328 F.3d at 1165, *cert. denied*, 540 U.S. 1160 (2004); *Mantor*, 335 F.3d at 1101, *cert. denied*, 540 U.S. 1160 (2004); *Adams*, 279 F.3d at 889, *cert. denied*, 535 U.S. 1112 (2002).

243. 7-29 CORBIN ON CONTRACTS § 29.4 (2004) (citing, among others, *Tjart v. Smith Barney, Inc.*, 107 Wash. App. 885, 28 P.3d 823 (2001)). Plaintiffs appear more likely to succeed on the grounds that (1) requiring arbitration of their dispute would be against public policy, especially when there is a health and/or safety concern, or (2) their contract is outside the reach of the FAA. *See, e.g., Young v. Ferrellgas*, 106 Wash. App. 524, 531, 21 P.3d 334, 337 (2001).

244. Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFFALO L. REV. 185, 186-87 (2004). In her research, Randall found that judges hold arbitration agreements unconscionable at twice the rate of non-arbitration agreements; that they find

haps evidence of judicial resistance to the enforcement of unconscionable arbitration agreements.

Unconscionability and other contract defenses litigated under state law appear to be the plaintiff's best hope to avoid arbitration, at least until legislative action or judicial fiat remedy the situation. State courts have repeatedly expressed concern over allowing employment contract provisions to replace statutory causes of action. In one notable example, *Young v. Ferrellgas*,²⁴⁵ the Washington State Court of Appeals held that it would be against public policy to enforce a mandatory arbitration agreement to resolve a statutory overtime wage claim in a non-FAA transportation employee case.²⁴⁶ This case, although distinguishable in many ways from the other case law studied in this Comment, provides a unique perspective on such clauses and agreements. The *Young* court's introduction to the arbitration presumption is merely that "Washington has long favored arbitration of employment disputes . . . [b]ut there is a strong, countervailing, public policy against wrongful discharge."²⁴⁷ More recent enunciations of the arbitration presumption in the FAA context, inspired by the long line of federal decisions discussed above, tips the scale toward the federal policy in favor of arbitration, and plaintiffs appear to face a more difficult challenge when the presumption is framed in the more recent fashion. *Young* is one of the few instances where the court applied the law, in concert with considerations of common sense and public policy, to determine the enforceability of a clause purporting to require arbitration of statutory claims.

In *Young*, the court first determined that the plaintiff, a whistleblower, was not obligated to arbitrate his wrongful discharge claim because such a requirement would be against public policy.²⁴⁸ The court went on to hold that the plaintiff's overtime wage claims, brought under the Washington State Minimum Wage Act, were not subject to arbitration based on broad public policy principles.²⁴⁹ If the employer failed to pay overtime as required by the Revised Code of Washington, "it contravened a substantive, nonnegotiable, statutorily-guaranteed right."²⁵⁰ The

specific features of such agreements unconscionable when they do not find them to be so in non-arbitration agreements; and that unconscionability cases have increased with the increased use of arbitration agreements. *Id.* Randall also determined that, in the cases she reviewed, judges deemed 50.3% of the arbitration agreements unconscionable, double the rate of 25.6% for other types of contracts. *Id.* at 194. Twenty years ago, courts held that agreements were unconscionable at a rate of 12.5% for arbitration agreements and 15.2% for other types of contracts. *Id.* at 196.

245. 106 Wash. App. 524, 21 P.3d 334 (2001).

246. *Id.* at 532, 21 P.3d at 338.

247. *Id.* at 528, 21 P.3d at 336.

248. *Id.* at 531, 21 P.3d at 337.

249. *Id.* at 532, 21 P.3d at 337-38.

250. *Id.* at 531, 21 P.3d at 337.

court added, "Allowing an arbitration provision to replace this statutory cause of action would thwart public policy guaranteeing fair wages, codified by our Legislature."²⁵¹

Shortly after *Young*, the Washington Court of Appeals reviewed a sexual discrimination claim filed by a stockbroker but was not persuaded by a public policy argument when made in the context of a discrimination case.²⁵² In *Tjart v. Smith Barney, Inc.*, the stockbroker brought sex discrimination claims under state law and Title VII and, like the plaintiff in *Young*, included arguments based upon public policy.²⁵³ The court distinguished *Tjart* from *Young* on two grounds: *Young* was not an FAA case and *Young* was a whistleblower case involving workplace health and safety issues.²⁵⁴ The *Tjart* court made no mention of the *Young* court's analysis of the overtime wage claim, despite the fact that the overtime wage claim had no effect on workplace health or safety. Because of this apparently illusory distinction, the *Tjart* court's reasoning is less than satisfying. A whistleblower with a wrongful discharge claim not subject to the FAA may be a different case than a stockbroker with a sexual harassment claim subject to the FAA.²⁵⁵ However, the difference between a plaintiff with a statutory overtime wage claim, and a plaintiff with a statutory sexual harassment claim seems much smaller. If *Young* was entitled to litigate his overtime wage claim in a judicial forum on principles of public policy, *Tjart* should also have been entitled to litigate her statutory sexual harassment claim on principles of public policy.

251. *Id.* at 532, 21 P.3d at 337-38.

252. *Tjart v. Smith Barney, Inc.*, 107 Wash. App. 885, 899, 28 P.3d 823, 831 (2001).

253. *Id.* at 896-901, 28 P.3d at 829-32.

254. *Id.* at 900, 28 P.3d at 831.

255. This is, of course, setting aside the argument that employees who report employment discrimination should be treated in parity with employees traditionally thought of as whistleblowers in the public health and safety arena; an argument destined to gain momentum after the United States Supreme Court's decision in *Jackson v. Birmingham Board of Education*, No. 02-1672, 2005 U.S. LEXIS 2928 (U.S. Mar. 29, 2005). In *Jackson*, the Court held that the private right of action implied by Title IX encompasses claims of retaliation, including protection for school employees who make complaints about sex discrimination. *Id.* at *14. Although not specifically framed as a whistleblower case, the Court reasoned that a teacher "would have no recourse if [he or she] were subsequently fired for speaking out [about sexual discrimination]. Without protection from retaliation, individuals who witness discrimination would likely not report it . . . and the underlying discrimination would go unremedied." *Id.* at *26. In the wake of *Jackson*, we can expect increased scrutiny of the courts' disparate treatment of discrimination whistleblowers and health and safety whistleblowers, who may be less likely to be forced into arbitration. *See, e.g.*, *Young v. Ferrellgas*, 106 Wash. App. 524, 21 P.3d 334 (2001); *see also, e.g.*, *Brunderidge v. Fluor Fed. Servs.*, 109 Wash. App. 347, 356, 35 P.3d 389, 394 (2001) (holding that the FAA did not require arbitration of pipe fitters' claim of wrongful discharge in violation of public policy); *Wilson v. City of Monroe*, 88 Wash. App. 113, 116, 943 P.2d 1134, 1135 (1997) (holding that a whistleblower was not required to exhaust the remedies in a collective bargaining agreement arbitration clause, and that "[t]he right to be free from wrongful termination in contravention of public policy is independent of any underlying contractual agreement between employee and employer").

E. Unconscionability: An Opportunity for State Courts to Apply the Law and Common Sense

Although the United States Supreme Court has said that state laws that are hostile to arbitration cannot be enforced,²⁵⁶ state law is still the grounds for determining if a particular arbitration clause may be enforced.²⁵⁷

Volition is the essence of a contract, and recognizes the “free exercise of will by parties who are on a relatively equal economic footing and who are brought together in the dynamic market place by their needs and desires.”²⁵⁸ When one party has an overwhelming ability to dictate the terms of a contract to the detriment of the weaker party, the essence of the contract is undermined.²⁵⁹ This idea is the basis of the unconscionability doctrine. First-year law students learn the doctrine through *Henningsen v. Bloomfield Motors*.²⁶⁰

On its face, the unconscionability doctrine seems clearly applicable to a mandatory pre-dispute arbitration clause in an employment contract, whether the clause is presented prior to the beginning of employment or as a condition to continued employment. First, there is a gross inequality of bargaining positions between the employer and employee, except in situations involving the most highly sought after, specialized employees. Second, while the employer may have a pile of resumes stacked halfway to the ceiling for one open position, the employee most likely has only one offer in hand and little, if any, negotiating power. Because an increasing number of employers require arbitration agreements as a condition of employment,²⁶¹ it is less likely that the employee or job seeker

256. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

257. *Tjart*, 107 Wash. App. at 885, 28 P.3d at 823.

258. 1-6 MURRAY ON CONTRACTS § 96 (2001).

259. *Id.*

260. *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 75 (N.J. 1960). In that case, a buyer contracted to purchase a new car, and the standard form purchase agreement featured an express warranty from the manufacturer for replacement of defective parts that purported to disclaim all other warranties, express or implied. *Id.* The buyer brought an action for breach of the implied warranty of merchantability, which the seller defended against by arguing the disclaimer of other warranties, and that the buyer had a duty to read and understand the contracts he signs. *Id.* The court recognized the “gross inequality” of bargaining position between the buyer and seller in this situation. *Id.* at 87. The fact that virtually all American automobile manufacturers subjected consumers to the same standard form contract, with no bargaining, in a take-it-or-leave-it fashion, indicated that there was no competition among auto manufacturers regarding the warranty term. *Id.* Accordingly, the buyer was forced to choose between signing a contract that removed the fundamental protection of the U.C.C.’s implied warranty of merchantability and not purchasing a product “material to his economic well-being.” 1-6 MURRAY ON CONTRACTS § 96(a)(1) (2001). The court held the contract invalid, focusing upon the lack of meaningful choice by the purchaser when faced with a Hobson’s choice. *See Henningsen*, 161 A.2d at 102.

261. This is evidenced by the increased litigation regarding such clauses. A LEXIS search of all state and federal cases for the search terms “(mandatory OR compulsory) /s (“arbitration clause”

would be able to obtain offers with competition among employers on the arbitration term. Rather, such clauses are typically presented in a take-it-or-leave-it fashion as part of standard form contracts. Here, rather than facing a Hobson's choice regarding the purchase or absence of a product, the employee or job seeker must choose between two factors critical to her economic well-being: new or continued employment and the right to sue in a court of law should an actionable employment dispute arise.

Despite the apparently natural fit of the unconscionability doctrine, mandatory pre-dispute arbitration agreements in the employment context are not typically considered unconscionable contracts of adhesion merely because of unequal bargaining power.²⁶² Courts have developed a wide-ranging set of rules for determining whether contracts are unconscionable, ranging from multi-element tests to vague parameters resembling the proverbial "smell test."²⁶³ Some courts have also required various combinations of substantive and/or procedural unconscionability in order to void a contract.²⁶⁴

In *Circuit City*, for example, the Ninth Circuit on remand determined that the mandatory arbitration clause at issue was unconscionable under California law.²⁶⁵ Other circuits have followed, holding similar clauses procedurally and substantively unconscionable under their respective state laws.²⁶⁶ State courts, meanwhile, are busy outlining their own approaches to unconscionability, some in ways that appear to preserve judicial skepticism as to whether employees volitionally agree to such contract clauses. Typically, courts break the analysis into two parts:

OR "arbitration agreement") AND employment" resulted in a total of 834 documents, with 551 of them dated after Jan. 1, 1995. Considered in two-year increments, the cases since then show a slow, but steady, increase in litigation of these clauses, from a two-year low of 58 in 1995 and 1997 to a high of 156 cases from Jan. 1, 2003 to Mar. 4, 2005.

262. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991). But see *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1171–72 (9th Cir. 2003).

263. See, e.g., *Mullan v. Quickie Aircraft Corp.*, 797 F.2d 845, 850 (10th Cir. 1986) (suggesting a seven-element test); *Wille v. Southwestern Bell Tel. Co.*, 549 P.2d 903, 906–07 (Kan. 1976) (recommending a ten-element test); *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264, 266 (1969) (acknowledging that finding unconscionability exists under specific facts is substantially easier than explaining the doctrine).

264. See, e.g., *Ingle*, 328 F.3d at 1170; *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1105 (9th Cir. 2003) (requiring both procedural and substantive elements, not necessarily present in the same degree, to find a contract unconscionable); *Adler v. Fred Lind Manor*, 103 P.3d 773, 781–82 (Wash. 2004) (noting that federal courts have interpreted Washington law to require a showing of either procedural or substantive unconscionability; holding that substantive unconscionability alone can support a finding of unconscionability but passing on the question of whether procedural unconscionability will suffice); *Sanderson Farms, Inc. v. Gatlin*, 848 So. 2d 828, 845 (Miss. 2003) (requiring only procedural unconscionability).

265. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002).

266. See, e.g., *Ingle*, 328 F.3d at 1165; *Alexander v. Anthony Int'l*, 341 F.3d 256, 266–67 (3d Cir. 2003).

(1) substantive unconscionability (terms that are overly harsh, particularly one-sided, or outrageously unfair) and (2) procedural unconscionability (the absence of meaningful choice).²⁶⁷ Many courts have applied the substantive unconscionability analysis to specific provisions of arbitration agreements such as fee-splitting provisions and time bars shorter than the statute of limitation.²⁶⁸ However, courts have frequently concluded that such mandatory pre-dispute arbitration clauses are not procedurally unconscionable; first, because they are not procedurally unconscionable on their face, and second, because there is usually insufficient evidence of external circumstances to prove that the manner in which the contract was entered was procedurally unconscionable.²⁶⁹

Two cases recently decided as companion cases by the Washington Supreme Court indicate that the court will seriously consider the factors surrounding the formation of the contract, when making the unconscionability determination, rather than just reciting that such clauses are not per se procedurally unconscionable.²⁷⁰

In *Zuver v. Airtouch Communications*, the plaintiff signed an arbitration agreement containing a waiver of a judicial forum for statutory and other claims about fifteen days after she accepted employment as a sales support representative.²⁷¹ The plaintiff had a preexisting medical condition that worsened and, although her employer made accommodations for her condition, she still required medical leave. She was fired nine months later.²⁷² The plaintiff filed suit alleging a violation of the Washington Law Against Discrimination.²⁷³ Initially, the defendant company did not mention arbitration in its answer,²⁷⁴ but when the plaintiff requested a copy of her personnel files, the company learned of the arbitration agreement and moved to compel arbitration.²⁷⁵

In *Adler v. Fred Lind Manor*, after three years of employment, the plaintiff signed an arbitration agreement as a condition to his continued employment.²⁷⁶ After being injured on the job and filing claims with the Department of Labor and Industries, the plaintiff was fired for an "inabil-

267. See *Adler*, 103 P.3d at 781.

268. See, e.g., *id.*; *Gutierrez v. Autowest, Inc.*, 6 Cal. Rptr. 3d 262, 267 (Cal. Ct. App. 2003).

269. See *Tjart v. Smith Barney, Inc.*, 107 Wash. App. 885, 898-99, 28 P.3d 823, 830 (2001) (finding an arbitration clause not procedurally unconscionable where the employee had a "reasonable opportunity to understand that she was agreeing to arbitrate her future statutory claims, and the arbitration provision was obvious in the fairly short contract").

270. *Adler*, 103 P.3d at 773; *Zuver v. Airtouch Commun., Inc.*, 103 P.3d 753 (Wash. 2004).

271. 103 P.3d at 757.

272. *Id.* at 758.

273. WASH. REV. CODE § 49.60.010 (1999).

274. *Zuver*, 103 P.3d at 759.

275. *Id.*

276. 103 P.3d at 778.

ity to operate all aspects of [the] maintenance department.”²⁷⁷ After EEOC mediation, the plaintiff filed suit, alleging a violation of the Washington Law Against Discrimination. The company subsequently moved to compel arbitration.²⁷⁸

Treating the two as companion cases to be resolved by similar law, the Washington Supreme Court laid out Washington’s approach to determining the enforceability of mandatory arbitration agreements in the employment context. The court recognized the two categories of unconscionability—substantive and procedural—and articulated definitions that are consistent with the previously discussed doctrine of unconscionability.²⁷⁹ Substantive unconscionability in Washington concerns contract clauses that are one-sided or overly harsh or “shocking to the conscience.”²⁸⁰ Procedural unconscionability denotes “the lack of meaningful choice, considering all the circumstances surrounding the transaction,”²⁸¹ including the manner in which the contract was entered, “whether the party had ‘a reasonable opportunity to understand the terms of the contract,’ and whether ‘the important terms [were] hidden in a maze of fine print.’”²⁸² In making a procedural unconscionability determination, the court said that “these three factors [should] not be applied mechanically without regard to whether, *in truth*, a meaningful choice existed.”²⁸³

The Association of Washington Business, as amicus curiae for the defendant, argued that the majority of courts require proof of *both* substantive and procedural unconscionability in order to void a contract on the basis of unconscionability.²⁸⁴ It argued that despite even grossly unequal bargaining power and other evidence of lack of meaningful choice, there is no injury to the weaker party if the terms of the contract are “fair.”²⁸⁵

The Washington Supreme Court instead agreed with precedent from the Arizona Supreme Court and other courts²⁸⁶ that unconscionability can be proven by showing substantive unconscionability alone.²⁸⁷ The

277. *Id.*

278. *Id.*

279. *Id.* at 781.

280. *Id.* (citations omitted).

281. *Id.*

282. *Id.* (citations omitted).

283. *Id.* (emphasis added).

284. *Id.* at 782.

285. *Id.*

286. *Id.*

287. *Id.* See also *Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1259 (9th Cir. 2005) (citing *Tjart v. Smith Barney, Inc.*, 107 Wash. App. 885, 898, 28 P.3d 823, 830 (2001)) (applying Washington law to continued conflicts over the enforceability of the Circuit City arbitration agree-

question remains, however, whether procedural unconscionability alone can render a contract void.²⁸⁸

Despite the unanswered question, the outcome of the Washington cases represents a minor success both for businesses wishing to use arbitration agreements and employees bound by them. From the employer perspective, courts will generally sever the unconscionable provisions²⁸⁹ and compel arbitration without the unconscionable provisions.²⁹⁰ Employees benefit when courts sever provisions that are deemed unconscionable, such as those dictating fee-splitting provisions, non-mutual commitments to arbitrate, time-based limitations on actions that are far shorter than comparable statutes of limitation, and other similarly objectionable clauses.²⁹¹ While these protections against the enforcement of unconscionable clauses certainly represent steps in the right direction, employees are still subject to the process of arbitration, which is arguably an inequitable method of dispute resolution as discussed in this Comment and by many other commentators.²⁹²

The remaining question is whether courts will find that procedural unconscionability alone can support a finding of unconscionability.²⁹³ In the unanimous *Adler* opinion, Justice Bridge stated that “if [the employer’s] representative threatened to fire [the plaintiff] for refusing to sign the agreement, despite the fact that Adler raised concerns with its terms or indicated a lack of understanding, the manner of the transaction would lend support to Adler’s claim of procedural unconscionability.”²⁹⁴ If the employer, on the other hand, “explained the document and/or offered to answer Adler’s concerns or questions,” those facts would work against Adler’s claim of procedural unconscionability.²⁹⁵ The court re-

ment, the Ninth Circuit stated that “a contract *generally* may be invalid based on *either* substantive or procedural unconscionability,” but acknowledged the Washington Court of Appeals’ failure to address the question of whether, in the employment context, procedural unconscionability alone will support an unconscionability claim).

288. Neither the Arizona Supreme Court nor the Washington Supreme Court has addressed the question. *Adler*, 103 P.3d at 782.

289. *See id.* at 787.

290. *See, e.g., Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 683 (9th Cir. 2001) (holding that invalid limitation on punitive damages can be severed and the remainder of the arbitration agreement can be enforced).

291. *See, e.g., Adler*, 103 P.3d at 786–88 (finding an attorneys’ fees provision and a substantially shorter statute of limitation than that provided under statutory law (180 days vs. 3 years) to be unconscionable).

292. *Id.*

293. *Id.* at 791.

294. *Id.* at 784. Justice Madsen concurred, emphasizing that an employee’s disagreement with the terms of an arbitration agreement in the employment context is insufficient to invalidate that agreement under Ninth Circuit and United States Supreme Court precedent. *Id.* at 791.

295. *Id.* at 791.

manded the case to the trial court to allow the plaintiff to prove his claim of procedural unconscionability.²⁹⁶ Significantly, although mentioned in a footnote, the court stated that, given the facts of the case, a finding of procedural unconscionability would “necessarily lead to a finding that Adler’s waiver of his right to a jury was not ‘knowing, voluntary, and intelligent,’” and thus, the waiver would be void.²⁹⁷

One cannot rush to predict the effect of these carefully chosen words. In fact, it is still uncertain whether an arbitration clause will be found void because an employer threatens to fire an employee or because employment is conditioned upon the signing of an arbitration agreement; that uncertainty remains even if these acts are coupled with an objection by the employee because of his or her lack of understanding. But while *Adler* does not open the door to a finding of unconscionability for all plaintiffs who are forced to choose between their jobs and their right to sue, *Adler* does acknowledge that even jurists who firmly enforce federal policy favoring arbitration recognize that there are employees for whom, *in truth*, there is no meaningful choice when presented with an arbitration agreement.

Given the complexities inherent in evaluating the extent to which each individual employee has a meaningful choice in signing a mandatory arbitration contract, the following questions remain: How much is too much of a threat, and how little is too little understanding? And if procedural unconscionability can be established in *Adler* and cases like it, what does this mean for other employees forced to sign arbitration clauses they do not understand? Finally, what, *in truth*, distinguishes the case of a sympathetic plaintiff forced to choose between his job and his right to sue and the potentially millions of Americans forced to make the same decision based upon “cripplingly imperfect information?”²⁹⁸

Information inequity or a total absence of real information in determining whether to sign an arbitration agreement negates meaningful choice as much as a lack of understanding of the contract. In the consumer context,

[t]he paradigm of the consumer or buyer who is aware of material, risk-shifting provisions over which he has no bargaining power is extremely rare. The sad reality is that the typical consumer does not

296. *Id.* at 784. The plaintiff in *Adler* emigrated to the United States from Poland in 1990. *Id.* When the company filed a motion to compel to enforce the arbitration agreement, Adler responded that he did not understand the agreement and was not given a copy of the document. He requested that the court declare the agreement unconscionable. Nonetheless, the court granted the company’s motion to compel without a hearing. *Id.* at 779.

297. *Id.* at 784 n.9.

298. Bodie, *supra* note 10, at 8.

have the foggiest notion of such provisions, but signs what the salesperson refers to as the "standard form," though the salesperson is equally ignorant of the import of the boilerplate provisions.²⁹⁹

The same can be said of uninformed employees agreeing to arbitration clauses in employment contracts.

Although critics of mandatory arbitration in the employment context often point to the power imbalance between the parties,³⁰⁰ until recently, few have done enough research to quantify the problem. Some scholars have suggested that post-dispute agreements to arbitrate employment claims may be economically efficient, given certain caveats.³⁰¹ In the post-dispute setting, the parties should know the exact nature of the dispute and the potential legal claims, permitting them to perform an adequate cost-benefit analysis to determine whether a judicial or arbitral forum is the better method of dispute resolution. In the pre-dispute setting, however, numerous predictions are required to determine the number and likelihood of potential claims, and to conduct a cost-benefit analysis of the offered (or current) job and a different job.³⁰² Compared with post-dispute information, predictions made pre-dispute "border on fantasy."³⁰³

Employees facing the decision of whether to sign a pre-dispute arbitration agreement are forced to assent or decline without adequate information regarding the importance of their decision. They may face threats and ultimatums by employers, or they may possess too little information to truly understand the decision they are being forced to make. As more and more cases like *Adler* emerge, courts must evaluate whether an employee can truly "knowingly, voluntarily and intelligently" assent to a contract clause when they have no real understanding of the clause.

VI. CONCLUSION

Contemporary courts, with few exceptions, have ignored the fact that employment contracts are not commercial contracts or collective bargaining agreements. An employee suffering discrimination or retaliation because of a refusal to sign an arbitration clause faces far different stakes than a consumer or an employee who is a party to a collective bargaining agreement. Congress' long-standing intent to provide a public,

299. 1-6 MURRAY ON CONTRACTS § 96 (2001).

300. See, e.g., Nicole Karas, EEOC v. Luce and the Mandatory Arbitration Agreement, 53 DEPAUL L. REV. 67, 107 (2003); Eric A. Hernandez, *Mandatory Arbitration and Employment Discrimination: The Unfair Law*, 2 CARDOZO ONLINE J. CONFLICT RESOL. 96, 100 (2001).

301. Bodie, *supra* note 10, at 18.

302. *Id.*

303. *Id.* at 23.

judicial forum for Title VII claims should again be made a part of our law, whether through judicial decisions that accurately interpret congressional intent or through Congress' adoption of an amended Civil Rights Act.

Meanwhile, the Ninth Circuit and state courts appear poised to continue to refuse to enforce mandatory employment clauses on state law grounds, including the unconscionability doctrine.³⁰⁴ When considering future mandatory arbitration cases, the Ninth Circuit and other courts may wish to listen to an often ignored segment of our society: the United States Congress. "While conformity to a current of opinion is certainly a more comfortable position, there is nothing 'ignominious' about standing alone where, as here, one is right and the majority—as sometimes happens—is wrong."³⁰⁵

304. See *supra* note 241 and accompanying text.

305. Brief of Amici Curiae Representatives George Miller, Barney Frank, Dennis J. Kucinich, John Coyers, Jr., Robert E. Andrews, and Other Members of the United States House of Representatives in Support of En Banc Rehearing and Reversal of Luce Forward Panel Decision at 12, *EEOC v. Luce, Forward, Hamilton & Scripps*, 303 F.3d 994 (9th Cir. 2002) (Nos. 00-57222, 01-57221).