EEOC v. Luce and the Mandatory Arbitration Agreement

Nicole Karas

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**Introduction**

The job search is both a familiar and exhaustive process for many individuals. Imagine finally receiving a job offer after countless hours of reviewing the classifieds, writing cover letters to prospective employers, sending resumes, and interviewing. At some point during the hiring process, an employer presents a contract highlighting terms of employment that requires an employee's signature as a condition of employment. Many prospective employees would not think twice about agreeing to such a preliminary matter. Some may attempt to read the terms thoroughly but remain unsure of what terms to challenge and ultimately defer to the employer's hiring knowledge. Others may read the terms with some hesitation but fail to ask questions out of fear of either sounding naïve or of jeopardizing the job offer.

Suppose the employer terminates or demotes the same employee in a few years due to the employee's age or race. Or perhaps the employee was sexually harassed in the workplace. In either case, the employee feels wronged by the employer and now wishes to pursue his or her rights in court. Consulting the employment contract (and perhaps an attorney), the employee is surprised to learn that the right to enforce civil rights in a judicial forum was waived. Included in the employment contract is a mandatory arbitration clause, requiring the employee to arbitrate any claims arising out of employment or termination of employment.

1. See generally Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q., 637, 676-77 (1996) (noting that few employees read their contracts and even if they did, they would not have the “legal sophistication” to understand the consequences of binding arbitration); Katherine Van Wezel Stone, *Labor/Employment Law: Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV., 1017, 1037 (1996) (noting that at the time of hire, employees lack bargaining power and thus often agree to such terms without giving them much thought); T. Shawn Taylor, *More Employers Force Workers into Arbitration – But Is It Fair?*, CHI. TRIB., Sept. 22, 2002, § 5, at 5 (article regarding an employee pursuing a racial discrimination claim against his employer but had accepted the job position before learning that he was required to sign an arbitration agreement).

2. See supra note 1.

3. Id.
What does arbitration mean and what are the consequences of foregoing a jury trial? The use of mandatory arbitration clauses in employment, consumer, and franchise contracts has generated a great deal of controversy among legislatures, courts, administrative agencies, and scholars. Critics of mandatory arbitration agreements argue that employees should not be forced to waive their right to a jury trial and that arbitration lacks the procedural advantages of litigation. Proponents of mandatory arbitration contracts assert that arbitration provides both employers and employees with a less costly, less complicated, and more efficient alternative to litigation. This sharply divided debate continues to generate litigation regarding the enforceability of arbitration claims.

The clear trend of judicial preference toward alternative dispute resolution has encouraged the use of arbitration in multiple settings even though issues regarding arbitration, including what is arbitrable, continually challenge courts.

4. Sternlight, supra note 1, at 637; Christine M. Reilly, Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment, 90 CAL. L. REV. 1203 (2002).

5. Ross Runkel, Arbitration of Employment Disputes: The New Privatization of the Judicial System, LawMemo.com, at http://www.lawmemo.com/emp/articles/arb.htm (last visited July 8, 2003). This article provides a general introduction to arbitration, including the history of arbitration as it relates to both unions and the individual employee, and describes the anatomy of a typical employment arbitration, the legal issues surrounding arbitration, and the pros and cons of arbitration.

6. Id.

7. Id.

8. See generally Runkel, supra note 5 (noting that the debates regarding the use of arbitration clauses have resulted in a "significant amount of litigation"); Katherine V.W. Stone, Private Justice: The Law of Alternative Dispute Resolution 585 (2000) (emphasizing that the use of arbitration has resulted in a number of new challenges brought by employees regarding the enforceability of arbitration clauses). Howsam v. Dean Witter Reynolds, Inc., however, is a recent and pivotal decision in which the United States Supreme Court held that an arbitrator can rule on arbitrability issues. 537 U.S. 79 (2002). The following list represents recent cases illustrating some issues courts currently face regarding arbitration: Finley Lines Joint Protective Board v. Norfolk Southern Railway Co., 312 F.3d 943 (8th Cir. 2002) (finding that the arbitration board did not exceed its authority in determining the probative value of a polygraph report); Bond v. Twin Cities Carpenters Pension Fund, 307 F.3d 704 (8th Cir. 2002) (finding that an ERISA plan's fee-splitting clause within the arbitration provision violated ERISA); Brotherhood of Maintenance of Way Employees, and Wabash Federation v. Terminal Railroad Ass'n of St. Louis, 307 F.3d 737 (8th Cir. 2002) (determining that the trial court erred in vacating the arbitration award); Providence Journal Co. v. Providence Newspaper Guild, 308 F.3d 129 (1st Cir. 2002) (finding that because there is a presumption in favor of arbitration, the employer was not relieved of its contractual obligation to arbitrate despite the expiration of a collective bargaining agreement); Collins v. New York City Transit Authority, 305 F.3d 113 (2d Cir. 2002) (finding that an arbitrator's decision is strong evidence of no Title VII violation); Riccard v. Prudential Insurance, 307 F.3d 1277 (11th Cir. 2002) (determining when an employee was a member of NASD for arbitration purposes); Chicago Teachers Union v. Ill. Education Labor Relations Board, 778 N.E.2d 1232 (Ill. App. 2002) (finding the arbitrator's award binding); District 318 Service Employees Ass'n v. Independent School District No. 318, 649 N.W.2d 896 (Minn. Ct. App. 2002)
This Note will discuss the recent Ninth Circuit case *EEOC v. Luce, Forward, Hamilton & Scripps*\(^9\) and its role in undermining the right of an employee to litigate employment discrimination claims. In Part II, this Note will explore the origins of this dispute by first discussing the history of arbitration in general and then, more specifically, the Federal Arbitration Act (FAA). In addition, Part II will highlight the more relevant cases regarding arbitration that serve as a backdrop to *Luce*.

Part III of this Note will analyze *Luce* and argue that the case was wrongly decided in light of the issues presented, the legislative history and purpose behind the Civil Rights Act, and the misapplication of case law. Moreover, this Note will demonstrate that *Luce* is another example of the judicial push to clear court dockets of unwanted employment cases.

Part IV of this Note will discuss the consequences of *Luce* as it applies to employees, employers, and the concept of arbitration in general. This Note will demonstrate how arbitration is partial to the employer and why an employee should not be forced to waive his or her right to a trial by peers. In addition, this Note will argue that the characteristics that make arbitration an attractive alternative to litigation are negated as arbitration becomes an increasingly more complex area of law. Part IV of this Note will also point out that mediation, an alternative to both arbitration and litigation, provides a more equally balanced environment for resolving employment disputes.

Part V of this Note will conclude that *Luce* was incorrectly decided and that the Ninth Circuit's decision is an example of "judicial legislation." Part V of this Note will stress that an employee should not be forced to waive his or her right to trial by jury. In addition, Part V of this Note will emphasize that arbitration strongly favors the employer and that other alternative dispute resolution methods, such as mediation, represent a more voluntary approach to resolving employment disputes.

\(^9\) *EEOC v. Luce, Forward, Hamilton & Scripps*, 303 F.3d 994 (9th Cir. 2002).
II. History of Arbitration

A. General Overview

Although Alternative Dispute Resolution (ADR)\(^{10}\) has become a hot topic in the legal community, ADR is "as old as humanity itself."\(^{11}\) Beginning with English settlement in North America, settlers utilized an alternative form of dispute resolution in order to avoid the high cost and complexity associated with the courts.\(^{12}\) Over the years, the ADR industry has grown and developed with society's continued desire to seek a less costly alternative to litigation.\(^{13}\) Arbitration is just one form of ADR that has emerged as a popular method in resolving disputes.\(^{14}\) Arbitration is generally defined as:

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\text{widely used in commercial and labor-management disagreements, involving the submission of the dispute to a third party who renders a decision after hearing arguments and reviewing evidence. It is less formal and less complex and often can be concluded more quickly than court proceedings. In its most common form, Binding Arbitration, the parties select the arbitrator and are bound by the decision, either by prior agreement or by statute. In Last Offer Arbitration, the arbitrator is required to choose between the final positions of the two parties. In labor-management disputes, Grievance Arbitration has traditionally been used to resolve grievances under the provisions of labor contracts. More recently, Interest Arbitration has been used when collective bargaining breaks down in the public sector, where strikes may be unlawful.}\(^{15}\)
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The financial burdens, time constraints, and overcrowding of court dockets associated with litigation have continued to motivate Americans to find alternative forms of dispute resolution such as arbitra-

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10. See Stone, supra note 8, at 5. The author notes that the common characteristic of all ADR methods is that each form differs from the dispute process of litigation. \textit{Id.}


13. Stone, supra note 8, at 5. The term ADR includes processes such as: mediation, private arbitration, mediation-arbitration ("med-arb"), third-party evaluation, appraisals, fact-finding panels, mini-trials, court-mandated settlement conferences, court-mandated arbitration, court-mandated mediation, summary jury trials, small claims courts, federal magistrates and special masters, and specialty courts like housing courts or patent courts. \textit{Id.}

14. See generally Stone, supra note 8, at iii, 303-04.

15. See Stone, supra note 8, at 5-6 (citing Report of the Ad Hoc Panel on Dispute Resolution and Public Policy).
tions.\textsuperscript{16} Organizations or businesses in the same trade or industry typically utilize arbitration to resolve disputes.\textsuperscript{17} Although arbitration has primarily been used to resolve commercial disputes, the use of arbitration clauses has increased in a variety of contexts, including "many residential leases, medical informed consent forms, banking and credit card agreements, attorney-client fee arrangements, health maintenance organization agreements, and residential housing association charters."\textsuperscript{18}

1. Use of Arbitration in the Employment Context

Arbitration has commonly been used to resolve labor-management disputes.\textsuperscript{19} Collective bargaining agreements typically establish formal grievance procedures, providing an "orderly method" for a union and management to negotiate contractual issues.\textsuperscript{20} Arbitration is used as a final step in this process if an agreement is not reached.\textsuperscript{21} Although employers initially resisted the use of arbitration, approximately ninety-five percent of collective bargaining agreements presently utilize arbitration to settle contract negotiations.\textsuperscript{22} In the union context, however, grievance arbitration is not the substitute for litigation but is the alternative to industrial strife.\textsuperscript{23} The United States Supreme Court has interpreted the role of arbitration in the collective bargaining setting as "a major influence on the law of arbitration in other areas [of law] as well."\textsuperscript{24}

The use of arbitration in the non-union sector of employment grew in response to a number of new employment statutes enacted by Con-
gress between 1963 and 1993. Statutes such as Title VII of the Civil Rights Act (Title VII), the Americans with Disability Act (ADA), the Age Discrimination in Employment Act (ADEA), the Equal Pay Act (EPA), and the Family and Medical Leave Act (FMLA) provided important new protections for individual employees in the workplace. The Civil Rights Act was also amended in 1991 to allow jury trials in Title VII cases and to expand remedies available to include compensatory and punitive damages. These new statutes therefore provided the individual employee "a greater number of statutory and common-law claims than ever before."

As a result, both employers and courts faced an influx of employment disputes. Employers sought out arbitration in response to this increase in litigation to reduce the cost, time, and large jury verdicts associated with litigation. To facilitate the use of arbitration, employers began to include a mandatory arbitration clause as a part of the employment contract. This clause requires both the employer and the employees to agree to submit any employment disputes to an

25. See generally Runkel, supra note 5.
27. Id. §§ 12101-12213.
29. Id. § 206.
30. Id. § 2601.
31. See generally Runkel, supra note 5.
32. Id.

[E]mployment litigation has spiraled in the last two decades. The expansion of federal and state discrimination laws and the growth in common law and statutory protection against wrongful dismissal have provided employees with broader array of tools with which to challenge employer behavior in court. In the federal courts alone, the number of suits filed concerning employment grievances grew over 400 percent in the last two decades.

Id. Alfred G. Feliu, The Scope of the FAA's Exclusion, ADR CURRENTS (American Arbitration Ass'n), Winter 1996/1997, at 1 ("The burden of employment litigation on the courts has been enormous and can be expected to grow in coming years"); Stuart L. Bass, What the Courts Say About Mandatory Arbitration under Title VII Claims, FORDHAM URB. L.J. 30 (1999), reprinted in ADR & THE LAW, at 30-31 (6th ed. 1999) (explaining employers' desire to utilize arbitration as an alternative as a result of the influx of employment disputes).
34. See generally Runkel, supra note 5.
35. A mandatory arbitration clause is also referred to as a pre-dispute mandatory arbitration agreement or a term-of-employment clause. See generally Reilly, supra note 4, at 1206.
arbitrator and thereby waive their respective rights to a jury trial, unless impermissible by law. Although the agreement is typically in boilerplate language, employers are required to make the terms clear and unambiguous so that an employee can read and understand the consequences.

2. Role of Arbitration Associations and the Process of Institutional Arbitration

The arbitration clause usually provides that the arbitration proceedings will be administered by the rules of an independent group such as the American Arbitration Association (AAA). The AAA was founded in the 1920s and has become a large national organization. The AAA maintains a list of arbitrators both for general disputes and for specialized areas of the law. The organization has also established a standard set of arbitral rules and procedures. For instance, the AAA recommends the following model arbitration clause for employers to insert into employment contracts, personnel manuals or policy statements, employment applications, or other agreements:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its National Rules for the Resolution of Employment Disputes, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof.

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37. Critics of mandatory arbitration agreements argue that an employee required to sign such an agreement does not knowingly, voluntarily, or intelligently waive his or her right to trial by jury. For a thorough discussion of this argument, see Jean R. Sternlight, Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial, 16 OHIO ST. J. ON Disp. RESOL. 669 (2001) (arguing that courts have not applied the “traditional jury trial waiver criteria” necessary to waive the fundamental right to a trial by jury).

38. See generally STONE, supra note 8, at 585.


40. See generally Runkel, supra note 5; see also STONE, supra note 8, at 304; Taylor, supra note 1, at 5. Other agencies include the National Arbitration Forum and JAMS, formerly Judicial, Arbitration and Mediation Services.


42. STONE, supra note 8, at 304.

43. Id.

44. American Arbitration Association (AAA), at http://www.adr.org/index2.1.jsp?JSPssid=15727&JSPsrc=upload\LIVESITE\Rules_Procedures\ADR_Guides\clausebook.html#Arbitration (last visited July 8, 2003). This site provides guidelines for drafting arbitration, mediation, and negotiation clauses in various contexts.

The AAA’s policy on employment ADR is guided by the state of existing law, as well as its obligation to act in an impartial manner. In following the law, and in the interest of providing an appropriate forum for the resolution of employment disputes, the Association administers dispute resolution programs which meet the due process standards.
The AAA also provides a list of recommendations to consider when drafting a clear, unambiguous arbitration clause.\textsuperscript{45}

If a dispute arises in the employment context, the employee sends a written notice and a filing fee to the agency, such as the AAA, and the agency gives the employer an opportunity to respond.\textsuperscript{46} The process of selecting an arbitrator depends on the terms of the clause.\textsuperscript{47} While some terms specify that the agency assigns an arbitrator, other situations require the parties to select an arbitrator.\textsuperscript{48}

The arbitrator establishes a hearing or conference date.\textsuperscript{49} The actual hearing may vary in form, from a more formal proceeding, involving rules of evidence and other formal procedures similar to litigation, to an informal discussion between parties.\textsuperscript{50} The process typically used, however, is found in some variation between these two extremes.\textsuperscript{51} More importantly, "arbitration is a creature of the parties and the parties are free to shape the scope of arbitration and the procedures to be used in whatever way they please."\textsuperscript{52}

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\textsuperscript{45} as outlined in its National Rules for the Resolution of Employment Disputes and the Due Process Protocol.

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} The clause might cover all disputes that may arise, or only certain types; [i]t could specify only arbitration — giving a binding result — or also provide an opportunity for non-binding negotiation or mediation. The arbitration clause should be signed by as many potential parties to a future dispute as possible; [t]o be fully effective, "entry of judgment" language in domestic cases is important; it is normally a good idea to state whether a panel of one or three arbitrators is to be selected, and to include the place where the arbitration will occur; [i]f the contract includes a general choice of law clause, it may govern the arbitration proceeding. The consequences should be considered; [i]f the parties wish to exclude punitive damages, they should specifically so state; [c]onsideration should be given to incorporating the AAA's Supplementary Procedures for Large, Complex Disputes for potentially substantial or complicated cases; [t]he drafter should keep in mind that the AAA has specialized rules for arbitration in the construction, textile, patent, securities and certain other fields. If anticipated disputes fall into any of these areas, the specialized rules should be considered for incorporation in the arbitration clause. An experienced AAA administrative staff manages the processing of cases under AAA rules; [t]he parties are free to customize and refine the basic arbitration procedures to meet their particular needs. If the parties agree on a procedure that conflicts with otherwise applicable AAA rules, the AAA will almost always respect the wishes of the parties and will implement the agreement as written.

\textsuperscript{49} \textit{See generally} Runkel, \textit{supra} note 5.

\textsuperscript{50} \textit{Stone, supra} note 8, at 303.

\textsuperscript{51} \textit{Id.}

\textsuperscript{52} \textit{Id.}
An arbitrator usually makes a decision within thirty days after the hearing, which may or may not be accompanied by a written decision. The arbitrator’s decision is binding unless a party can show that the award was obtained by “corruption, fraud, or undue means” or that the arbitrator was partial, corrupt, guilty of misconduct, or exceeded his or her powers. Judicial review of an arbitrator’s decision is therefore limited, and courts usually do not review the merits of a dispute.

3. Enforceability of Arbitration Agreements

Although the United States Supreme Court has held that the FAA preempts state laws “hostile to arbitration,” the courts have treated the enforceability of arbitration agreements differently. According to the FAA, a party may challenge the enforcement of an arbitration agreement under general contract defenses such as fraud, duress, and unconscionability.

As a result, federal courts may not invalidate an arbitration agreement under state arbitration provisions but must ap-

53. See generally Runkel, supra note 5; Stone, supra note 8, at 304.
54. 9 U.S.C. § 10(a)(1)–(4) (2000) (grounds on which an arbitration award may be vacated; part 3 describes misconduct as “refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced”; part 4 states that the arbitrators exceed their power when a “mutual, final, and definite award upon the subject matter submitted was not made.”). See generally Runkel, supra note 5; Stone, supra note 8, at 304.
55. Stone, supra note 8, at 304.
57. See generally Circuit City v. Adams, 279 F.3d 889 (9th Cir. 2002) (finding the arbitration agreement unconscionable under state law); Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230 (10th Cir. 1999) (finding the arbitration agreement unenforceable because the agreement contained a fee-splitting provision and denied the plaintiff access to litigate his statutory claims in court); Cooper v. MRM Inv. Co., 199 F. Supp. 2d 771 (M.D. Tenn. 2002) (finding an arbitration clause as part of an employment contract as oppressive and unconscionable). But see Tinder v. Pinkerton Sec., 305 F.3d 728 (7th Cir. 2002) (finding an unsigned arbitration agreement was supported by consideration); OPE Int’l LP v. Chet Morrison Contractors, Inc., 258 F.3d 443 (5th Cir. 2001) (holding that the FAA preempted Louisiana state law and thus the arbitration agreement was enforceable); Doctor’s Assocs., Inc. v. Hamilton, 150 F.3d 157 (2d Cir. 1998) (finding the state law that governed franchise agreements was preempted by the FAA and thus the arbitration agreement was enforceable); Ritch v. Eaton, No. 02-7689, 2002 U.S. Dist. LEXIS 24726 (E.D. Pa. Dec. 9, 2002) (finding the arbitration provision not unconscionable or unenforceable); Bd. Trs. of Cayuga County Cmty. Coll. v. Cayuga County Cmty. Coll. Faculty Ass’n, 750 N.Y.S.2d 721 (App. Div. 2002) (New York Appellate Division reverses trial court’s finding that the arbitration agreement binding a third party would violate public policy).
58. 9 U.S.C. § 2 (arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”); Southland Corp., 465 U.S. at 16 (noting that grounds for revocation must be based on general contract provisions and not laws specifically designated for arbitration agreements).
ply "ordinary state-law principles that govern the formation of contracts" in determining the validity of an arbitration agreement.\textsuperscript{59} A fortiori, a federal court's review of the enforceability of an arbitration agreement will vary according to the applicable state contract law.\textsuperscript{60}

As mentioned, the legal, political, and academic communities remain sharply divided regarding arbitration in the employment context.\textsuperscript{61} While employers embrace arbitration,\textsuperscript{62} national organizations such as the Equal Employment Opportunity Commission (EEOC)\textsuperscript{63}

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  \item \textsuperscript{59} Circuit City, 279 F.3d at 892 (citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995); Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).
  \item See cases cited supra note 59. National employers wishing to use arbitration agreements are continually challenged when complying with individual state contract laws while maintaining legally binding arbitration contracts. See also supra note 57 and accompanying text.
  \item See generally Michael Z. Green. Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims, 31 Rutgers L.J. 399, 407-08 (2000) ("a prolific amount of scholarly criticism about . . . employers' use of mandatory arbitration has transpired over the last decade."); Reilly supra note 4, at 1206-07 ("lively public policy debate among legislatures, courts, administrative agencies, alternative dispute resolution providers, and legal scholars"); Runkel, supra note 5 (noting that pre-dispute arbitration agreements "have resulted in extensive controversy"); \textsuperscript{STONE} supra note 8, at 585 (emphasizing that the use of arbitration has resulted in a number of new challenges brought by employees regarding the enforceability of arbitration clauses); Van Wezel Stone, supra note 1, at 1017 (noting that the trend of mandatory arbitration clauses to assert statutory rights effectively acts as a new yellow dog contract of the 1990s).
  \item See Green, supra note 61, at 407 ("Due to the meteoric rise of the ADR movement, increasing distrust of the legal system by corporate leaders, and the Supreme Court's 1991 endorsement of arbitration to resolve statutory employment discrimination disputes in \textsuperscript{Gilmer}, a growing number of employers have started to use mandatory arbitration agreements."); Runkel, supra note 5 (noting that employers seek arbitration agreements and not employees and that employers are increasingly requiring employees to sign an arbitration agreement or be discharged or not hired); \textsuperscript{STONE} supra note 8, at 585 (noting that \textsuperscript{Gilmer} opened the door for employers to utilize mandatory arbitration agreements in the non-union sector, referencing a survey by the Government Accounting Office that found ten percent of private sector employers were using nonunion arbitration systems). See also AAA Caseload Hits All-Time High, Disp. Resol. Times, April-June 2002, at http://www.adr.org/index2.1.jsp?JSPssid=15771&JSPsrc=upload\LIVESITE\NewsAndEvents\Publications\DRTimes\articles.html (last visited July 8, 2003). The AAA reported a 5.5 percent increase in employment arbitration for the year 2001. Id. The total case number went from 2,049 in 2000 to 2,159 for 2001. Id.
    The use of unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment harms both the individual civil rights claimant and the public interest in eradicating discrimination. Those whom the law seeks to regulate should not be permitted to exempt themselves from federal enforcement of civil rights laws. Nor should they be permitted to deprive civil rights claimants of the choice to vindicate their statutory rights in the courts — an avenue of redress determined by Congress to be essential to enforcement.
  \item Id. See also Tanya A. Yatsco, \textit{How About a Real Answer? Mandatory Arbitration as a Condition of Employment and the National Labor Relations Board's Stance}, 62 Alb. L. Rev. 257 (1998) (exploring the NLRB's opposition to mandatory arbitration agreements).
\end{itemize}
and the National Labor Relations Board (NLRB)\textsuperscript{64} have issued strong policy statements against using arbitration to resolve individual employment disputes. To clarify the underlying issues regarding arbitration, an understanding of the history and intent behind the codification of the FAA and relevant cases is necessary.

\section*{B. The Federal Arbitration Act}

\subsection*{1. History of the FAA}

Arbitration law was initially governed by state statutes and a "hodgepodge of English, state, and federal cases" and, thus, lacked "universal harmony."\textsuperscript{65} Judicial distaste and refusal to enforce commercial arbitration agreements also impeded the growth of arbitration.\textsuperscript{66} As business began to flourish in the early 1900s, however, business groups such as the maritime industry lobbied for a reform movement to overcome these obstacles.\textsuperscript{67}

The American Bar Association's Committee on Commerce, Trade and Commercial Law drafted proposals for a federal arbitration act in 1921, 1922, and 1923.\textsuperscript{68} The United States Arbitration Act (USAA) was unanimously passed by Congress and approved by President Coolidge in 1925.\textsuperscript{69} The USAA was renamed the FAA\textsuperscript{70} and was later codified in 1947 as Title IX of the United States Code.\textsuperscript{71} The history of the FAA indicates that the motivation for adopting the Act was "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts."\textsuperscript{72} The FAA specifically sought to simplify commercial transactions and provide a less costly, but more efficient, forum for merchants to resolve their disputes.\textsuperscript{73}

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\item \textsuperscript{64} See Green, \textit{supra} note 61, at 435.
\item \textsuperscript{65} \textsc{MacNeil}, \textit{supra} note 11, at 21-22 (describing arbitration as "the common law of Nowhere").
\item \textsuperscript{67} \textsc{MacNeil}, \textit{supra} note 11, at 21-22 (discussing in detail the gaps in arbitration law that resulted in a need for reformation).
\item \textsuperscript{68} \textsc{Stone}, \textit{supra} note 8, at 312.
\item \textsuperscript{69} \textit{Id.} at 313.
\item \textsuperscript{70} \textit{Id.}
\item \textsuperscript{71} 9 U.S.C. §§ 1-208 (2000).
\item \textsuperscript{72} Gilmer v. Interstate/Johnson Lane, 500 U.S. 20 (1991).
\item \textsuperscript{73} Circuit City v. Adams, 532 U.S. 105, 126 (2001).
\end{thebibliographynoindent}
2. Interpretation of the FAA's Exemption Clause

The main provision of the FAA states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, 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.74

However, section 1 of the FAA contains a "curious exclusion" regarding contracts of employment,75 stating, "... nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."76 The interpretation and application of this exemption clause is the source of most litigation regarding the FAA.77 The main question posed when parties litigate FAA disputes is whether the FAA was meant to apply to a given industry's employment contracts.78 Two issues necessarily clarify this question, namely: (1) Congress's commerce power at the time the FAA was passed; and (2) the language utilized in the FAA relating to commerce.79

The FAA includes all contracts "evidencing a transaction involving commerce" but excludes employment contracts of workers "engaged in... commerce."80 The plain meaning of the statute appears to exempt any worker engaged in interstate commerce.81 However, interpretation of this clause has remained in "a muddle because the interpreters, lacking an appreciation of the historical context, have felt free to provide a [sic] historical (and in some cases anachronistic) 'explanation' in support of their conclusions."82 Three separate interpretations of the clause have been adopted by circuit courts.83 Under the first interpretation, some courts read the statute as exempting all em-

74. 9 U.S.C. § 2.
75. Feliu, supra note 33, at 10.
76. 9 U.S.C. § 1.
77. Feliu, supra note 33, at 10.
78. See generally Feliu, supra note 33, at 9-13.
79. Id. at 10-12 (discussing the three interpretations of the FAA exemption clause); Finkin, supra note 66, at 282.
81. Finkin, supra note 66, at 289.
82. Id. at 289-90 (discussing in detail the legislative history and floor debates regarding the FAA, with particular focus on the history of the exemption clause that supports the broad construction of the clause).
83. Feliu, supra note 33, at 10-12; see also Finkin, supra note 66, at 289-98.
ployment agreements. Courts following the second interpretation read the statute as exempting only employees covered by a collective bargaining agreement. Finally, other courts have interpreted the statute as exempting only those classes of workers engaged in transporting goods and services in foreign and interstate commerce.

a. Exemption Clause Applies To All Employment Contracts

The broadest interpretation is that the exemption clause applies to all employment contracts. Proponents of this view argue that the legislative history and Congress's commerce power at the time the FAA was enacted support the interpretation that the FAA was only intended to apply to commercial transactions. As mentioned, the proposal of the FAA originated with the business community's desire to establish an alternative to resolving commercial disputes. The legislative history and floor debates also indicate that there was some opposition from the International Seamen's Union (ISU) regarding the proposed arbitration act. The ISU argued that the FAA would compel arbitration of employment matters and, in particular, wage issues between seamen and their employers. In response, the chairman of the ABA committee responsible for the proposed arbitration act stated that the bill "is not intended [to] be an act referring labor

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84. See supra note 83.
85. Id.
86. Id.
87. Circuit City v. Adams, 532 U.S. 105, 124 (2001) (Stevens, J. dissenting) ("neither the phrase 'maritime transaction' nor the phrase 'contract evidencing a transaction involving commerce' was intended to encompass employment contracts"); Textile Workers v. Lincoln Mills of Ala., 353 U.S. 448, 466 (1957) (Frankfurter, J., dissenting) ("when Congress passed legislation to enable arbitration agreements to be enforced by federal courts, it saw fit to exclude this remedy with respect to labor contracts"); Craft v. Campbell Soup Co., 177 F.3d 1083 (9th Cir. 1999) (holding that proper construction and legislative history indicate that the FAA did not apply to employment contracts and thus did not apply to the collective bargaining agreement covering the plaintiff's employment); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991) (finding that the contracts of employment were outside of the scope of the FAA, but that a securities agreement to arbitrate was not an employment contract and thus not exempt); Arce v. Cotton Club of Greenville, Inc., 883 F. Supp. 117 (N.D. Miss. 1995) (finding an enforceable arbitration clause but that employment contracts were exempted, specifically disagreeing with the Third Circuit's decision in Tenney Engineering, Inc. v. Electrical Workers, 207 F.2d 450 (3d Cir. 1954)).
88. Feliu, supra note 33, at 10-11; Circuit City, 532 U.S. at 126 (Stevens, J., dissenting) (discussing highlights of legislative history and floor debates: "neither the history of the drafting of the original bill by the ABA, nor the records of deliberations in Congress during the years preceding the ultimate enactment in 1925, contains any evidence that the proponents of the legislation intended it to apply to agreements affecting employment"); Finkin, supra note 66, at 282-89.
89. See supra note 67 and accompanying text.
90. Circuit City, 532 U.S. at 126-27.
91. Id.
disputes, at all. It is purely an act to give the merchants the right or privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is in this."92 Moreover, the chairman advised including language in the act to clarify this point, stating "nothing herein contained shall apply to contracts of employment of seamen or any class of workers in interstate and foreign commerce."93 Herbert Hoover, then Secretary of Commerce, also promoted the inclusion of this language to avoid confusion.94

Proponents of this broad interpretation of the exemption clause also argue that the words "any other class of workers engaged in commerce" indicate that the exemption should apply to all contracts of employment.95 Critics of this view, however, point out that reading sections 1 and 2 of the FAA together indicates that Congress makes a distinction between "a transaction involving commerce" and exempting those workers "engaged . . . in commerce."96 Congress would have used the same terms if the sections were meant to be read the same way and, consequently, critics argue that the clause must exempt only those workers actually engaged in the transportation of goods in interstate or foreign commerce.97

On the other hand, proponents of the broad interpretation argue that Congress's commerce powers were limited when the FAA was passed; thus, Congress had the power to regulate those workers "engaged" in commerce but had no power to regulate employment relations who "affected" commerce.98 Under this argument, the exemption clause was meant to cover all employment contracts affected by Congress's commerce power at the time the FAA was enacted.99

96. Tenney Eng'g v. United Elec. Workers, 207 F.2d 450, 452-53 (3d Cir. 1954) (emphasis added); see also Finkin, supra note 66, at 293-95.
97. Finkin, supra note 66, at 293-95.
98. Id. (emphasis added).
99. Id.
b. Exemption Clause Applies to Union Employees

The second interpretation of the exemption clause is that it only applies to workers covered by a collective bargaining agreement. At the time the FAA was introduced, Congress had already enacted special arbitration legislation for seamen and railroad unions and thus exempted these groups from the FAA. Under this view, courts reasoned that Congress did not intend to disrupt procedures connected with unions and therefore the phrase "contracts of employment" was interpreted as meaning collective bargaining agreements. Most courts, however, have abandoned the view that the exemption clause only applies to employees covered by a collective bargaining agreement.

c. Exemption Clause Applies to Workers Engaged in Commerce

The final interpretation is that the exemption clause applies to individual employment contracts except those for workers actually engaged in the physical movement of goods in interstate or foreign commerce. The United States Court of Appeals for the Third Circuit in Tenney Engineering v. United Electrical Workers first expressed this narrow reading of the exemption clause.

In Tenney Engineering, the court concluded that seamen and railroad employees shared two qualities: first, both classes of employees were directly engaged in the movement of goods in interstate or foreign commerce; and, second, both classes of employees already had special procedures established to resolve their employment disputes. Interpreting section 1 of the FAA, the court applied ejusdem generis, the canon of construction that holds "when a general word or phrase follows an enumeration of specific persons or things, the general word or phrase will be construed as applying only to those per-

100. Lincoln Mills of Ala. v. Textile Workers, 230 F.2d 81, 86 (5th Cir. 1956), rev'd on other grounds, 353 U.S. 448 (1957); Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Pa. Greyhound Lines, Inc., 192 F.2d 310, 313 (3d Cir. 1951); Mercury Oil Ref. Co. v. Oil Workers, 187 F.2d 980, 983 (10th Cir. 1951); Shirley-Herman Co. v. Hod Carriers, 182 F.2d 806, 809 (2d Cir. 1950).
101. Feliu, supra note 33, at 11; Finkin, supra note 66, at 290-92.
102. Feliu, supra note 33, at 11.
103. Id.
104. Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465 (D.C. Cir. 1997); Rojas v. TK Communications, Inc., 87 F.3d 745, 747-49 (5th Cir. 1996); Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1162 (7th Cir. 1984); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972); Tenney Eng'g v. United Elec. Workers, 207 F.2d 450, 452-53 (3d Cir. 1954).
105. 207 F.2d at 452-53.
106. Id.
sons or things of the class within which the specific types fall.”\textsuperscript{107} The
court therefore interpreted “any other class of worker” as being those
similarly situated as seamen or railroad employees, or those actually
engaged in the movement of interstate or foreign commerce.\textsuperscript{108} Critics of this view argue that this reasoning is flawed because other trans-
portation workers engaged in interstate commerce were highly visible
at the time and thus would have been included in this exemption
clause.\textsuperscript{109}

The \textit{Tenney Engineering} court also supported its holding by inter-
preting “engaged in . . . commerce” as “affecting commerce.”\textsuperscript{110} Critics
of this approach stress that exempting only some employees
produces an anomaly in that “a boilerplate arbitration clause in an
interstate trucker’s employment form or application could not be cov-
ered . . . but the same provision in the same form used for the employ-
ment of the trucking company’s secretary would be.”\textsuperscript{111} Moreover,
this interpretation of the exemption clause is the result of a sweeping
judicial policy in favor of arbitration rather than clear legislative
intent.\textsuperscript{112}

In \textit{Circuit City v. Adams}, in a 5-4 split, the United States Supreme
Court held that section 1 of the FAA only exempts transportation
workers and thus applies to all other employment contracts.\textsuperscript{113} The
Court specifically rejected the argument that “engaged in . . . com-
merce” should be interpreted based on Congress’s commerce power
when the FAA was adopted in 1925.\textsuperscript{114} The Court also reasoned that
interpreting “transaction involving commerce” as applying to only
commercial contracts would render the exemption clause
meaningless.\textsuperscript{115}

\textbf{C. The Road Leading to EEOC v. Luce}

The United States Supreme Court has “grappled” with issues relat-
ing to the FAA for fifty years\textsuperscript{116} as the enforceability of arbitration
agreements has bred litigation in various contexts.\textsuperscript{117} Early cases deal-

\begin{footnotesize}
\begin{enumerate}
\item[texsuperscript{107}] Black's Law Dictionary 218 (Pocket ed. 1996).
\item[texsuperscript{108}] Tenney Eng'g, 207 F.2d at 452-53.
\item[texsuperscript{109}] Finkin, supra note 66, at 291-92.
\item[texsuperscript{110}] Id.
\item[texsuperscript{111}] Id. at 298.
\item[texsuperscript{112}] Id. at 298-99.
\item[texsuperscript{113}] Circuit City v. Adams, 532 U.S. 105, 109 (2001).
\item[texsuperscript{114}] Id. at 118-19.
\item[texsuperscript{115}] Id. at 113-15.
\item[texsuperscript{116}] Stone, supra note 8, at 379.
\item[texsuperscript{117}] See generally Runkel, supra note 5. The United States Supreme Court has enforced
agreements to arbitrate under a variety of federal statutes: Green Tree Financial Corp.-Alabama
\end{enumerate}
\end{footnotesize}
ing with the enforceability of arbitration provisions illustrate the Court's initial disapproval for compelling arbitration of statutory or tort law claims. The Court reversed its position in the 1980s and adopted a federal policy favoring arbitration. The most noticeable impact of this change is in the area of employment law and an employee's ability to litigate statutory employment discrimination claims.

1. Wilko v. Swan

Wilko v. Swan was one of the Supreme Court's first opportunities to interpret the scope of the FAA. Wilko applied the FAA to a claim arising out of an agreement to arbitrate under the Securities Exchange Act. In holding that the arbitration clause was void, the Court expressed concerns including the one-sidedness of an arbitrator and the arbitrator's ability to misinterpret or forgo the law. The Court was particularly concerned that an arbitrator's decision could be rendered without reasoning and without a complete record of the proceedings.

2. Alexander v. Gardner-Denver

In Alexander v. Gardner-Denver, the Supreme Court was faced with the issue of whether a union's agreement to arbitrate waived the rights of an individual to litigate statutory claims. Pursuant to the provisions of a collective bargaining agreement, the petitioner-employee initiated a grievance procedure, against the respondent-employer, alleging that he was fired on the basis of race and without just cause. After losing in arbitration, the employee filed a Title VII

lawsuit against the employer.\textsuperscript{129} The employer argued that the petitioner's right to sue was barred because the issue had already been arbitrated.\textsuperscript{130} The Court held that the employee was not precluded from bringing a Title VII suit because the union only represented the employee's contractual claims.\textsuperscript{131}

The Court reasoned that strong congressional intent conferred on federal courts "plenary powers to secure compliance with Title VII" and that "deferral to arbitral decisions would be inconsistent with this goal."\textsuperscript{132} Moreover, the Court recognized that "the choice of forums inevitably affects the scope of the substantive right to be vindicated."\textsuperscript{133} The Court concluded that arbitration was inappropriate for "the final resolution of rights created under Title VII" and expressed concern regarding the ability of an arbitrator to deal with statutory interpretation as opposed to contractual disputes.\textsuperscript{134} In summary, the Court stated:

\[\text{T]he resolution of statutory or constitutional issues is a primary responsibility of the courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts. . . . Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.}\textsuperscript{135}

Although the Court has departed from \textit{Gardner-Denver}'s reasoning, this case has not yet been overruled.

3. \textit{Southland Corp. v. Keating}\textsuperscript{136}

A shift in the Supreme Court's position regarding arbitration emerged in \textit{Southland Corp. v. Keating}.\textsuperscript{137} A year prior to \textit{Southland Corp.}, in \textit{Moses H. Cone Memorial Hospital v. Mercury Construction Corp.},\textsuperscript{138} the Court announced that questions regarding arbitrability

\begin{itemize}
\item \textsuperscript{129} \textit{Id.} at 42-43.
\item \textsuperscript{130} \textit{Id.} at 43.
\item \textsuperscript{131} \textit{Id.} at 49-51.
\item \textsuperscript{132} \textit{Gardner-Denver}, 415 U.S. at 56.
\item \textsuperscript{133} \textit{Id.} at 56 (citing \textit{U.S. Bulk Carriers v. Arguelles}, 400 U.S. 351, 359-60 (1971)).
\item \textsuperscript{134} \textit{Id.} at 56.
\item \textsuperscript{135} \textit{Id.} at 57-58 (the Court notes the following differences make arbitration an inappropriate forum: the fact-finding of arbitration is not compatible to judicial fact-finding; the arbitration records of the proceeding are not complete; the rules and procedures common to civil trials do not apply; and the arbitrator has no obligation to submit a written decision).
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} 465 U.S. 1 (1984).
\item \textsuperscript{138} 460 U.S. 1 (1983).
\end{itemize}
“must be addressed with a healthy regard for the federal policy favoring arbitration.”\textsuperscript{139}

In \textit{Southland Corp.}, the Court reaffirmed this new policy and found a provision of the Californian Franchise Investment Act, requiring judicial review of claims brought under it, was preempted by the FAA when a contract included an arbitration clause.\textsuperscript{140} The Court reasoned that section 2 of the FAA, as substantive law under the Commerce Clause, extended to both federal and state courts, and “Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”\textsuperscript{141} The Court’s new policy that the FAA preempts any state law that is “hostile to arbitration”\textsuperscript{142} represents the turning point for the Court’s interpretation of all arbitration agreements.

4. \textit{Gilmer v. Interstate/Johnson Lane Co.}\textsuperscript{143}

In 1991, the Supreme Court decided \textit{Gilmer v. Interstate/Johnson Lane Co.},\textsuperscript{144} a seminal and much criticized case that captured the Court’s clear reversal of its position regarding arbitration in the employment context.\textsuperscript{145}

Interstate hired Robert Gilmer as a Manager of Financial Services in May 1981.\textsuperscript{146} Gilmer registered as a securities representative with the New York Stock Exchange (NYSE) as a requirement of his employment.\textsuperscript{147} Gilmer’s registration contract with the NYSE included an agreement to arbitrate any disputes arising between him and Interstate.\textsuperscript{148} At age sixty-two, Gilmer was fired in May 1987 by Interstate.\textsuperscript{149} Gilmer filed a claim against Interstate pursuant to the ADEA.\textsuperscript{150} In response, Interstate filed a motion to compel arbitra-

\begin{footnotes}
\item[139] \textit{Id.} at 24.
\item[140] 465 U.S. at 16.
\item[141] \textit{Id.}
\item[143] \textit{Id.}
\item[146] \textit{Gilmer}, 500 U.S. at 23.
\item[147] \textit{Id.}
\item[148] \textit{Id.}
\item[149] \textit{Id.}
\item[150] \textit{Id.}
\end{footnotes}
tion pursuant to Gilmer’s contract.\textsuperscript{151} Relying on \textit{Gardner-Denver}, the district court denied Interstate’s motion.\textsuperscript{152} The United States Court of Appeals for the Fourth Circuit reversed, finding no congressional intent to preclude arbitrating ADEA claims.\textsuperscript{153}

The Supreme Court granted certiorari and affirmed the Fourth Circuit’s decision.\textsuperscript{154} The Court reasoned that individual agreements to arbitrate are considered enforceable unless the plaintiff can show that Congress intended otherwise through the statute’s text, legislative history, or through an inherent conflict between arbitration and the purpose of the statute.\textsuperscript{155} The Court found that Gilmer did not meet this burden of proof and held that the ADEA claim was arbitrable.\textsuperscript{156} In reaching this holding, the Court disagreed with Gilmer’s following arguments: that compulsory arbitration conflicted with the social policies furthered by the ADEA; that arbitration would “undermine the role of the EEOC in enforcing ADEA;” that arbitrating ADEA claims would deprive the claimants of the procedural advantages associated with federal courts; that arbitrators were biased; and that there was unequal bargaining power between an employee and an employer.\textsuperscript{157} Additionally, the Court found that an arbitrator’s failure to issue a written opinion was not problematic and rejected Gilmer’s claims that no written opinion would deprive the public of notice regarding employer abuses, deter the development of law, or preclude appellate review.\textsuperscript{158}

Moreover, the Court found that Gilmer’s reliance on \textit{Gardner-Denver} was misplaced because \textit{Gardner-Denver} involved a different issue relating to an arbitration clause in a collective bargaining agreement.\textsuperscript{159} Because the agreement to arbitrate in \textit{Gardner-Denver} was incorporated in a collective bargaining agreement, the Court in \textit{Gilmer} stressed the following as distinguishing factors: 1) employees did not agree to arbitrate statutory claims, only contract claims, via a collective bargaining agreement; 2) the interests of an individual employee may be subordinated to the collective interests of the union; and 3) the collective bargaining agreements were not decided under

\begin{flushleft}
151. \textit{Id.}
153. \textit{Id.}
154. \textit{Id.} at 23.
156. \textit{Gilmer}, 500 U.S. at 27.
158. \textit{Id.} at 31.
159. \textit{Id.} at 33-34.
\end{flushleft}
the FAA, which favors a liberal federal policy toward arbitration.\textsuperscript{160} Contrary to the view expressed in \textit{Gardner-Denver}, the Court rejected the argument that arbitration was an inferior process for resolving statutory claims.\textsuperscript{161} The Court therefore chose to distinguish \textit{Gilmer} instead of overruling \textit{Gardner-Denver}.\textsuperscript{162}

Justice John Paul Stevens, in his dissent, argued that the Court was mistaken in concluding that an ADEA claim is arbitrable without first determining whether the FAA applied to employment contracts.\textsuperscript{163} Justice Stevens reasoned that based on legislative history and intent, the FAA exempted employment contracts.\textsuperscript{164} Moreover, he found that compulsory arbitration conflicted with the congressional purpose of the ADEA.\textsuperscript{165} In particular, Stevens argued that the limited remedies available in an arbitral forum conflict with the courts' ability to award broad injunctive relief in furtherance of the purposes behind the ADEA, Title VII, and other federal statutes.\textsuperscript{166} Citing Chief Justice Warren E. Burger, Justice Stevens stressed that deferring to arbitral decisions allows an employer to contract away the rights of an individual and therefore contradicts with the sole purpose of the Civil Rights Act.\textsuperscript{167} Moreover, he argued that the Court abandoned precedent and "eviscerate[d] the important role played by an independent judiciary in eradicating employment discrimination"\textsuperscript{168} and "has effectively rewritten the [FAA]."\textsuperscript{169}

Because \textit{Gilmer} never answered the question as to whether employment contracts are exempt from the FAA, the lower courts remained unsure of how to interpret the FAA exemption or the scope of the FAA in terms of the employment context.\textsuperscript{170} Meanwhile, in response to the \textit{Gilmer} decision, employers increased the use of mandatory arbitration agreements as a condition of employment for non-union employees.\textsuperscript{171} Although courts initially upheld these agreements, by the 1990s, courts, government agencies, and others began to reevaluate

\begin{thebibliography}{10}

\bibitem{160} Id. at 34-35; \textit{see also} \textit{MacNeil}, supra note 11, at 76-77; Malin, supra note 23, at 84.
\bibitem{161} \textit{Gilmer}, 500 U.S. at 34.
\bibitem{162} See Malin, supra note 23, at 83.
\bibitem{163} \textit{Gilmer}, 500 U.S. at 36 (Stevens, J., dissenting).
\bibitem{164} Id. at 36-41.
\bibitem{165} Id. at 42.
\bibitem{166} Id. at 41-42.
\bibitem{167} Id. at 42 (citing \textit{Barrentine} v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 750 (1981)).
\bibitem{168} \textit{Gilmer}, 500 U.S. at 42-43.
\bibitem{169} Id.
\bibitem{170} \textit{Stone}, supra note 8, at 570.
\end{thebibliography}
these agreements based on their “unanticipated undesirable effects.”

5. Prudential Insurance Co. of America v. Lai

Prudential Insurance Co. of America v. Lai was one of the first cases to undermine the Gilmer doctrine. In this case, the United States Court of Appeals for the Ninth Circuit held that “a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration.” Applying this “knowing and voluntary” standard to the facts of the case, the Lai court held that the employee did not knowingly agree to arbitrate because the agreement signed by the employee did not specify the disputes subject to arbitration. Although other courts adopted the knowing and voluntary requirement, most now reject this standard.

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172. Id.
173. 42 F.3d 1299 (9th Cir. 1995).
175. Lai, 42 F.3d at 1305.
176. See Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054 (11th Cir. 1998) (affirming the district court’s denial of the employer’s motion to compel arbitration because the terms of the arbitration agreement were deficient in purporting to cover statutory claims); Farrand v. Lutheran Bhd., 993 F.2d 1253 (7th Cir. 1993) (because the arbitration agreement did not authorize arbitration of employment disputes, the parties could not have agreed to arbitrate the employee’s ADEA claim); Hooters of Am., Inc. v. Phillips, 39 F. Supp. 2d 582 (D.S.C. 1998) (employee did not make a knowing and intelligent waiver of her right to file her claims in court because the employer did not provide a copy of the rules before she agreed to the employment contract); Trumbull v. Century Mktg. Corp., 12 F. Supp. 2d 683 (N.D. Ohio 1998) (an individual may waive his or her right to pursue Title VII claims in federal court, but the waiver must be knowing; no evidence that employee waived this right when she signed the employment handbook); Phox v. Allied Capital Advisers, No. CIV.A.96-2745, 1997 U.S. Dist. LEXIS 5709, at *1 (D.D.C. Apr. 11, 1997) (denying motion to compel arbitration because when the employee signed the employment handbook, he did not knowingly and voluntarily agree to arbitrate his statutory claims); Hoffman v. Aaron Kamhi, Inc., 927 F. Supp. 640 (S.D.N.Y. 1996) (denying motion to compel arbitration because the contract was ambiguously phrased and failed to make specific reference to discrimination claims and because the plaintiff could not have intended to waive his rights under laws not yet in existence).
177. Haskins v. Prudential Ins. Co. of Am., 230 F.3d 231 (6th Cir. 2000) (rejecting the knowing standard established in Lai, ignorance of terms is no excuse and agreement to arbitrate will be enforced absent a showing of fraud, duress, mistake, or some other ground upon which a contract may be voided); Seus v. John Nuveen & Co., 146 F.3d 175 (3d Cir. 1998) (although the Securities Code did not explicitly provide for the arbitration of employment disputes, the court reasoned that the Code encompassed such disputes, and thus the employee had agreed to submit her Title VII and ADEA claims to arbitration); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997) (even though the employment handbook stated it was not meant to be a contract or binding, the court found the arbitration clause constituted an enforceable contract because it was separate from the other provisions of the handbook); Beauchamp v. Great W. Life Assurance Co., 918 F. Supp. 1091 (E.D. Mich. 1996) (rejecting the Lai knowing standard and holding
Other courts have held mandatory arbitration agreements invalid in the employment context based on grounds of unconscionability. Some courts have remained sensitive to the unequal bargaining power between employer and employee. Courts have also have found bias in some arbitration agreements.


Finally, other courts have held compulsory arbitration as a condition of employment undermines statutory rights. In Duffield v. Robertson Stephens & Co., the United States Court of Appeals for the Ninth Circuit held that the employer could not, as a condition of employment, compel individuals to waive their Title VII rights to a judicial forum. The court utilized the Gilmer test and found that the purpose of the Civil Rights Act of 1991, as supported by legislative history, was to strengthen employees' protections and remedies in discrimination claims. As a result, the court reasoned that employers could not use mandatory arbitration agreements to undermine these rights. The court concluded that Congress incorporated a list of alternative dispute resolutions in section 118 of the Civil Rights Act to that a party has knowledge of the existence and scope of an arbitration clause if the party has signed the document incorporating the clause and in absence of fraud, deception, or other misconduct that would excuse the lack of such knowledge; DeCaminada v. Coopers & Lybrand, LLP, 591 N.W.2d 364 (Mich. Ct. App. 1999) (the FAA did not require "knowledge," and an otherwise valid arbitration clause did not depend on whether a party was specifically aware of its scope).

179. Circuit City v. Adams, 279 F.3d 889 (9th Cir. 2002) (on remand, the court found that the arbitration clause was: 1) procedurally unconscionable because it was a contract of adhesion, drafted by a party of superior bargaining power; and 2) substantively unconscionable because it bound the employee to arbitrate but not the employer, limited the relief available to the employees, and forced the employee to arbitrate his statutory claims); Hooters of Am., v. Phillips, 173 F.3d 933 (4th Cir. 1999) (finding an employer breached the agreement to arbitrate by establishing unfair arbitration rules, the court specifically found that the notice and procedural rules were one-sided, which allowed Hooters to select a panel of biased arbitrators); Gibson v. Neighborhood Health Clinics, 121 F.3d 1126 (7th Cir. 1997) (refusing to compel arbitration because the agreement bound the employee to arbitrate claims but not the employer); Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d (Ct. App. 1997) (finding the arbitration clause provides the employer with more rights and remedies than would otherwise be available while depriving the employees of rights and remedies they would normally enjoy).

180. Circuit City, 279 F.3d at 892; Hooters of Am., 173 F.3d at 935.
181. See supra note 180; Rosenberg v. Merrill Lynch, 995 F. Supp 190 (D. Mass. 1998), aff'd, 170 F.3d 1 (1st Cir. 1999) (district court found that the arbitration system of the NYSE was biased because the NYSE members controlled the system).
182. See generally Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998).
183. Id.
184. Id. at 1185.
185. Id. at 1190-93.
186. Id. at 1199.
provide the employee with more options to bring Title VII claims. Although the Supreme Court denied certiorari on Duffield, the Ninth Circuit overruled Duffield in Luce.

Even though the Supreme Court has held that the FAA applies to employment contracts, one of the main questions unanswered by Circuit City was whether an employer could require an employee to sign a mandatory arbitration agreement as a condition of employment. This issue was presented in Luce.

D. The Ninth Circuit and EEOC v. Luce

1. Background

In September of 1997, the law firm Luce, Forward, Hamilton and Scripps (Luce) had an opening for a full-time legal-secretary. Donald Lagatree applied and was offered the job. After reporting for work on September 16, 1997, Lagatree received a letter of employment confirming the job offer and detailing other terms and conditions of employment such as salary and benefits. A binding arbitration clause was included in this letter. The clause required Lagatree to waive his right to judicial resolution of any "claims arising from or related to [his] employment or termination of ... employment." On September 18, 1997, Lagatree advised Luce that he could not sign the letter because the arbitration clause was "unfair." Lagatree was particularly concerned about maintaining his civil liberties, including the right to have access to a jury trial in an at-will employment situation. Luce refused to strike the clause and advised Lagatree that the arbitration clause "was a non-negotiable condition of employment." Lagatree refused to sign, and Luce subsequently terminated Lagatree's "conditional employment."

187. Id. at 1194-99.
188. EEOC v. Luce, Forward, Hamilton, & Scripps, 303 F.3d 994, 997 (9th Cir. 2002).
190. 303 F.3d at 997.
191. First Brief on Cross-Appeal for Appellee/Cross-Appellant at 5, EEOC v. Luce, 303 F.3d 994 (9th Cir. 2002) (No. CV-00-01322-FMC).
192. Id.
193. Id.; Luce, 303 F.3d at 997.
194. First Brief on Cross-Appeal for Appellee/Cross-Appellant at 5, EEOC v. Luce, 303 F.3d 994 (9th Cir. 2002) (No. CV-00-01322-FMC).
195. Id.
196. Id. at 6.
197. Luce, 303 F.3d at 997-98.
198. Id. at 998.
199. First Brief on Cross-Appeal for Appellant/Cross-Appellee at 5, EEOC v. Luce, 303 F.3d 994 (9th Cir. 2002) (No. CV-00-01322-FMC).
In February 1998, Lagatree sued Luce in Los Angeles Superior Court for wrongful termination. Luce's motion to dismiss was granted, and the Superior Court held that Luce did not unlawfully discharge Lagatree based on Lagatree's refusal to sign an arbitration clause as a condition of employment. The Superior Court's decision was affirmed by a California appellate court, and the California Supreme Court denied review.

2. The EEOC Claim

On March 4, 1998, two months prior to the Ninth's Circuit decision in Duffield, Lagatree filed a complaint with the EEOC, "alleging that [Luce] fired him in retaliation for [his] opposition to employment practices [he] believed violated Title VII, the ADEA, the EPA and the ADA." Lagatree argued that his claim was evident because the firm would not hire him unless he waived his right to challenge any discrimination claims in court.

The EEOC sued Luce on behalf of Lagatree and in the public's interest under Title VII, the ADA, the ADEA, and the EPA "to correct unlawful employment practices on the basis [of] retaliation, and to provide appropriate relief to [Mr.] Lagatree who was adversely affected by such practices when he was terminated" because of his refusal to sign the mandatory arbitration agreement, "or in the alternative was not hired in retaliation for his refusing to sign the mandatory arbitration agreement."

On behalf of Lagatree, the EEOC sought relief, including "'rightful place employment,' back wages and benefits, and compensatory and punitive damages." The EEOC also sought a permanent injunction to enjoin Luce from engag-
ing in unlawful retaliation and an order to stop Luce from utilizing mandatory arbitration agreements.\textsuperscript{208}

3. \textit{District Court Relies on Duffield}

The district court granted partial summary judgment for both Luce and the EEOC.\textsuperscript{209} The court found Lagatree was precluded from any monetary award because of his prior litigation against Luce in state court.\textsuperscript{210} Relying on \textit{Duffield}, however, the court issued an injunction enjoining Luce from "requiring its employees to agree to arbitrate their Title VII claims as a condition of employment and from attempting to enforce any such previously executed agreements."\textsuperscript{211} An injunction was not issued prohibiting arbitration of ADA, ADEA, or EPA claims.\textsuperscript{212} In addition, the court did not expressly rule on the EEOC’s retaliation claim or address the theory of liability.\textsuperscript{213} Luce appealed the district court’s decision regarding the injunction, and the EEOC cross-appealed, seeking an injunction to enjoin Luce from engaging in its retaliation practice.\textsuperscript{214}

4. \textit{Ninth Circuit Overrules Duffield}

The United States Court of Appeals for the Ninth Circuit reviewed \textit{Luce} en banc and held that Luce’s refusal to hire Lagatree was not unlawful retaliation because “Lagatree’s right to a judicial forum is not afforded absolute protection under any federal statute.”\textsuperscript{215} Additionally, reasoning that the Supreme Court “implicitly overruled \textit{Duffield}” in \textit{Circuit City}, the \textit{Luce} court held that “employers may require employees to sign agreements to arbitrate Title VII claims as a condition of their employment.”\textsuperscript{216}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{208} First Brief on Cross-Appeal for Appellee/Cross-Appellant at 8-9, EEOC v. Luce, 303 F.3d 994 (9th Cir. 2002) (No. CV-00-01322-FMC); \textit{Luce}, 303 F.3d at 998.
\item\textsuperscript{209} EEOC v. Luce, 122 F. Supp. 2d 1080 (C.D. Cal. 2000).
\item\textsuperscript{210} \textit{Id.} at 1086; \textit{see also} First Brief on Cross-Appeal for Appellee/Cross-Appellant at 9, EEOC v. Luce, 303 F.3d 994 (9th Cir. 2002) (No. CV-00-01322-FMC).
\item\textsuperscript{211} \textit{Luce}, 303 F.3d at 998.
\item\textsuperscript{212} \textit{Id.}
\item\textsuperscript{213} \textit{Id.;} Response to Petition for Initial Rehearing En Banc for Appellee/Cross-Appellant at 2, EEOC v. Luce, 303 F.3d 994 (9th Cir. 2002) (No. CV-00-01322-FMC). The district court’s failure to address the claims presented by the EEOC is important because, by relying on \textit{Duffield}, the court essentially changed the EEOC’s argument (the EEOC did not even rely on \textit{Duffield} for its retaliation argument), which would, in turn, open the door to re-evaluation of \textit{Duffield}.
\item\textsuperscript{214} \textit{Luce}, 303 F.3d at 998.
\item\textsuperscript{215} \textit{Id.} at 1008.
\item\textsuperscript{216} \textit{Id.} at 997.
\end{enumerate}
\end{footnotesize}
The *Luce* court advanced two arguments in support of its holding.\(^{217}\) First, the court relied on the Supreme Court's dicta in *Circuit City* that "arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law."\(^ {218}\) The court reasoned that this language was not consistent "with *Duffield*'s holding that Congress intended Title VII . . . to preclude compulsory arbitration of discrimination claims."\(^ {219}\)

The second argument the *Luce* court advanced was based on the Supreme Court's reiteration in *Circuit City* that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."\(^ {220}\) The Ninth Circuit also found it persuasive that other circuits, as well as the Supreme Courts of California and Nevada, disagreed with the *Duffield* decision.\(^ {221}\)

Addressing the retaliation claim,\(^ {222}\) the *Luce* court found that "as a matter of law Luce Forward's refusal to hire Lagatree for not signing a compulsory arbitration agreement was not illegal retaliation."\(^ {223}\) The court reasoned that Lagatree "could not have reasonably believed that Luce Forward's policy of requiring arbitration was an unlawful employment practice, his opposition was not protected opposition conduct."\(^ {224}\) Moreover, the court rejected the EEOC's argument that Luce could not fire Lagatree in retaliation for reserving his right to bring a civil action, reasoning that Lagatree's right to a judicial forum is not "afforded absolute protection under each of the federal anti-retaliation provisions."\(^ {225}\)

\(^{217}\) Id. at 1002-04.

\(^{218}\) Id. at 1002 (citing *Circuit City* v. Adams, 532 U.S. 105, 122-23 (2001)).

\(^{219}\) Id. at 1003.

\(^{220}\) *Luce*, 303 F.3d at 1002 (citing *Circuit City*, 532 U.S. at 122-23).

\(^{221}\) Id. at 1002.

\(^{222}\) Id. at 1005-07. Employment discrimination laws make it unlawful for employers to retaliate against an employee or applicant because he or she has engaged in a protected activity. *Id.* at 1004. See Title VII, 42 U.S.C. § 2000e-3(a); ADA, 42 U.S.C. § 12203(a); ADEA, 29 U.S.C. § 623(d); EPA, 29 U.S.C. § 215(a)(3). The *Luce* court summarized what must be proved to establish retaliation: 1) the employee or applicant "engaged in a protected activity"; 2) the employee or applicant "suffered an adverse employment decision"; and 3) "there was a causal link between [the employee or applicant's] activity and the adverse employment decision." *Id.* at 1005. "Protected activities include: 1) opposing an unlawful employment practice; and 2) participating in a statutorily authorized proceeding." *Id.* See also *Hashimoto* v. *Dalton*, 118 F.3d 671, 679 (9th Cir. 1997); *Silver* v. *KCA*, Inc., 586 F.2d 138, 141 (9th Cir. 1978).

\(^{223}\) *Luce*, 303 F.3d at 1006.

\(^{224}\) *Id.*

\(^{225}\) Id. at 1007.
The dissent in *Luce* criticized the majority's reliance on *Circuit City* in overruling *Duffield*, arguing that *Duffield* and *Circuit City* are the "proverbial apples and oranges: different law, different issues, and different, yet compatible holdings." The dissent pointed out that in utilizing the test established by the Supreme Court in *Gilmer*, the *Duffield* court's holding was determined only after careful scrutiny of the text of Title VII and the legislative history of that section. *Duffield*, according to the dissent, should remain good law and was in no way overruled by *Circuit City*. Addressing the second argument made by the majority, the dissent argued that *Duffield* did not establish that arbitration was a substantive right but a procedural right.

III. *EEOC v. Luce*: Another Product of Judicial Legislation

The foregoing analysis will demonstrate that *Luce* was wrongly decided. First, this section will argue that the district court misconstrued the issues presented by the EEOC and thus incorrectly relied on *Duffield*. As a result, the Ninth Circuit had an opportunity to overrule *Duffield*. This section, however, will demonstrate that *Duffield* should remain good law in light of the legislative purpose behind the Civil Rights Act. Similar to the dissent's argument in *Luce*, this section will argue that the majority's application of *Gilmer* was misleading and, in overruling *Duffield*, the majority misapplied *Circuit City*. In turn, this misapplication resulted in the failure of the EEOC's retaliation claim. This section will conclude that *Luce* can only be rec-

226. Id. at 1008.
227. Id. at 1010-12.
228. Id. at 1012-13.

Nowhere in *Duffield*, however, did we suggest that this "right to a judicial forum" is a substantive right, as the majority claims. Indeed, our statement in *Duffield* that the Civil Rights Act of 1991 increased substantially the procedural rights and remedies available to Title VII plaintiffs suggests, to the contrary, that we perceived the right to jury trial as a procedural right. *Duffield*, then, "was not premised . . . on the arbitral forum causing a loss of substantive rights." Instead, "*Duffield* found . . . that Congress intended to preclude compulsory arbitration of Title VII claims." Accordingly, the Supreme Court's statement that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute," does not contradict our conclusion that "Congress intended to preclude compulsory arbitration of Title VII claims."

*Luce*, 303 F.3d at 1012-13.

229. Id. at 1009.
230. See supra note 191 and accompanying text.
231. See supra note 216 and accompanying text.
232. *Luce*, 303 F.3d at 1008, 1010.
233. Id. at 996.
A. Overlooking the Retaliation Claim

Instead of explicitly addressing the retaliation claim presented by the EEOC, the district court concluded that the Ninth Circuit's decision in Duffield "required [the district court] to issue an injunction prohibiting [Luce] from requiring its employees to agree to arbitration of their Title VII claims as a condition of employment and from attempting to enforce any such previously executed agreements." The district court avoided the statutory anti-retaliation claims by rendering a decision based solely on Duffield.

On appeal, Luce sought to have the case heard en banc in order to overturn Duffield. As the EEOC argued, however, the district court's decision should not have been reviewed en banc because resolution of the retaliation claim was not dependent on overruling Duffield. Lagatree was fired because he refused to waive his statutory

234. MacNeil, supra note 11, at 170. The author noted that the United States Supreme Court's decision in Southland Corp. v. Keating, 465 U.S. 1 (1984), upholding arbitration under a state franchise law, is an example of the Court's analysis in regard to arbitration agreements and was based on "judicial legal 'history':"

The majority used artifacts of the history of the [FAA] in building their arguments just as a mason uses stone in building a stone wall - picking ones that are useful, ignoring ones that are not, discarding troublesome ones, chipping away offensive spurs on otherwise useful pieces, twisting and turning each stone until it best fits, and above all, covering up the chinks and defects with a mortar of words. . . . The result is a pathological history.

Id.

235. Response of the Equal Employment Opportunity Committee to Petition for Initial Rehearing En Banc for Appellee/Cross-Appellant at 1-2, EEOC v. Luce, 303 F.3d 994 (9th Cir. 2002) (No. CV-00-01322-FMC). The EEOC's introduction is clear:
In this suit, the Equal Employment Opportunity Commission ("EEOC") claims that Luce, Forward, Hamilton & Scripps, LLP ("LFHS"), violated the federal statutory prohibitions against retaliation by dismissing Donald Lagatree because he refused to sign an arbitration agreement waiving his right to participate fully in the remedial mechanisms provided in the federal non-discrimination laws. The EEOC also claims that LFHS violated these anti-retaliation provisions by maintaining a policy of refusing to employ any individual who opposes the compulsory waiver of his statutory rights to seek judicial redress for unlawful discrimination.

Id. at 1.

236. Luce, 122 F. Supp. 2d at 1093.

237. See also Response to Petition for Initial Rehearing En Banc for Appellee/Cross-Appellant at 2, EEOC v. Luce, 303 F.3d 994 (9th Cir. 2002) (No. CV-00-01322-FMC).

238. Third Brief on Cross-Appeal for Appellant/Cross-Appellee at 1, EEOC v. Luce, 303 F.3d 994 (9th Cir. 2002) (No. CV-00-01322-FMC).

239. Response to Petition for Initial Rehearing En Banc for Appellee/Cross-Appellant at 2-3, EEOC v. Luce, 303 F.3d 994 (9th Cir. 2002) (No. CV-00-01322-FMC); see also Luce, 303 F.3d at 1004 (the Ninth Circuit gives some credence to the EEOC's claim but in an indiscreet way: "the
rights by not signing the arbitration agreement. Unlike Lagatree, Tonyja Duffield had already agreed to arbitrate her claims. The issue presented in *Luce*, based on its particular facts, was therefore entirely different than the issue presented and resolved in *Duffield*. As a result, the EEOC's complaint did not invoke the FAA (or rely on *Duffield*) but rather, alleged that Lagatree's termination was unlawful under the anti-retaliation provisions of Title VII, ADEA, ADA, and EPA and not the FAA or the Civil Rights Act. The EEOC supported this factual difference by pointing out that the FAA, by its terms, requires the agreement to arbitrate to be "a written provision . . . in a contract . . . an agreement in writing to submit to arbitration."

**B. The Ninth Circuit Seizes the Moment**

The Ninth Circuit seized the opportunity to overrule *Duffield*. Ironically, the *Luce* court first accused the *Duffield* court of "picking and choosing snippets of legislative history consistent with its desired result." The *Luce* court, however, failed to provide any counter-evidence regarding legislative intent but concluded that *Duffield* was "arguably . . . at odds with existing Circuit authority." Additionally, the *Luce* majority supported this argument by listing "Sister Circuit" decisions that have "unanimously repudiated" *Duffield*’s holding.

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240. Response to Petition for Initial Rehearing En Banc for Appellee/Cross-Appellant at 9, EEOC v. Luce, 303 F.3d 994 (9th Cir. 2002) (No. CV-00-01322-FMC); see also *Luce*, 303 F.3d at 998.

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

242. See also Response to Petition for Initial Rehearing En Banc for Appellee/Cross-Appellant at 3, EEOC v. Luce, 303 F.3d 994 (9th Cir. 2002) (No. CV-00-01322-FMC).

243. *Id.* at 7-8.

244. *Id.* at 13.


246. *Luce*, 303 F.3d at 997.

247. *Id.* at 1001.

248. *Id.* at 1001-02. The court cited only two cases for support, however. The first was *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992). As the court even acknowledged, *Mago* did not interpret the legislative history behind section 118 of the Civil Rights Act of 1991 (provides for arbitration). *Luce*, 303 F.3d at 1001. Regarding the second case, *Prudential Insurance Co. of America v. Lai*, the court found that section 118 allowed for arbitration "where the parties knowingly and voluntarily elect to use these methods." 42 F.3d 1299, 1304-05 (9th Cir. 1994).

249. *Luce*, 303 F.3d at 1002. As the dissent noted, six of the cases listed were prior to the decision in *Duffield*. *Id.* at 1014 n.5 (Pregerson, J., dissenting).
Applying the *Gilmer* test\(^{250}\) however, the legislative text and history of the 1991 Civil Rights Act indicates that Congress did not intend to preclude a waiver of judicial remedies for statutory remedies.\(^{251}\)

1. **Interpretation of Section 118 of the 1991 Civil Rights Act**

The Civil Rights Act was amended in 1991 "to strengthen and improve Federal civil rights laws."\(^{252}\) As summarized in *Duffield*, the amendment has two primary goals:

(1) to 'restore . . . civil rights laws' by 'overruling' a series of 1989 Supreme Court decisions that Congress thought represented an unduly narrow and restrictive reading of Title VII, and (2) to 'strengthen' Title VII by making it easier to bring and to prove lawsuits, and by increasing the available judicial remedies so that plaintiffs could be fully compensated for injuries resulting from discrimination. Among other things, the 1991 Act provided for the first time a right to damages and to trial by jury and expanded Title VII's fee-shifting provisions.\(^{253}\)

One of the changes to the Act included the endorsement\(^{254}\) of ADR for resolution of discrimination claims.\(^{255}\) Section 118 embodies Congress's support for ADR: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title."\(^{256}\)

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253. *Duffield*, 144 F.3d at 1191.

254. *Id.* ("Congress also included what Chief Judge Richard Posner has termed 'a polite bow to the popularity of alternative dispute resolution.'" (quoting Pryner v. Tractor Supply Co., 109 F.3d 354, 263 (7th Cir. 1997))).


256. *Id.* See generally Sternlight, *supra* note 251, at 306-07: Grodin, *supra* note 145, at 30-35. Professor Grodin explains that the language of the 1991 amendment was derived from the Civil Rights Act of 1990, which in turn, was derived from section 513 of the Americans with Disabilities Act (ADA). *Id.* at 30-31. The committee report associated with the ADA stated that an agreement to arbitrate did not preclude the right to seek relief under the enforcement provisions of the Act. *Id.* at 31. Moreover, the committee indicated that the United States Supreme Court's decision in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974) was correct and that section 513 should not preclude the rights and remedies otherwise available to an employee with disabilities. *Id.* at 31.
a. Statutory Interpretation of Section 118

Courts have remained divided regarding the interpretation of section 118. The main source of this divisiveness is the struggle to reconcile the ambiguity of the language “where appropriate and to the extent authorized by law” with the United States Supreme Court’s decision in Gilmer. Although section 118 was drafted before Gilmer, the revised Civil Rights Act was not adopted until after Gilmer was decided. As a result of this sequence of events, the inference was made that either section 118 codified the Gilmer decision or represented “positive” congressional support for mandatory arbitration of Title VII claims.

As the court in Duffield explained, however, both the text and the legislative history indicates that Congress did not intend for an employee to waive his or her right to a judicial forum. First, “where appropriate” and to the “extent authorized by law” are both limiting phrases and should not be read as conclusive that Congress “was boundlessly in favor of all forms of arbitration.” Reading section 118 in the context of the Civil Rights Act’s purpose of expanding employees rights and remedies, the Duffield court reasoned that the intent of “where appropriate” was to provide employees with an “opportunity to present their claims in an alternative forum.” Moreover, this language was meant to encourage voluntary agreements to seek alternative forms of dispute resolution such as arbitration.

The Duffield court also interpreted the phrase “to the extent authorized by law” as not rendering “a fixed definition.” At the time section 118 was drafted, the Duffield court concluded that compulsory arbitration of Title VII claims was unenforceable and thus not authorized by law. The court relied on the Supreme Court’s decision in Gardner-Denver to support this reasoning and concluded that Congress, when drafting the 1991 Civil Rights Act, could not have predicted that the Court would narrow Gardner-Denver in Gilmer.

257. See Sternlight, supra note 251, at 307-08.
258. Id.; see also Duffield, 144 F.3d at 1188-99.
259. Sternlight, supra note 251, at 307-08.
260. Id.; see also Duffield, 144 F.3d at 1194-95.
261. Duffield, 144 F.3d at 1199.
262. Id. at 1193.
263. Id. at 1194.
264. Id. at 1193.
265. Id. at 1194.
266. Id.
267. Duffield, 114 F.3d at 1194.
b. Legislative History of Section 118

The legislative history of the 1991 Civil Rights Act also indicates that Congress did not intend to "incorporate Gilmer's holding into Title VII."268 The House Judiciary Committee Report reads:

The Committee emphasizes, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII.269

Moreover, the report indicated that the Committee's view was consistent with the Court's interpretation of Title VII in Gardner-Denver and was not meant to "preclude rights and remedies that would otherwise be available."270

Congress also expressly rejected a Republican proposal that would have allowed employers to utilize mandatory arbitration agreements in place of judicial review:

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, including equal opportunity rights. American workers should not be forced to choose between their jobs and their civil rights.271

Despite this clear history, many courts relied on Gilmer and the absence of any express congressional opposition to arbitrating claims under Title VII.272

C. Misstating Gilmer

The majority in Luce, as the dissent points out, is "misleading"273 by reasoning that "the Supreme Court in Gilmer expressly permitted requiring compulsory arbitration of ADEA claims as a condition of em-

268. Id. at 1195.
270. Id.
271. H.R. Rep. No. 102-40, pt. 1, at 104; see also Duffield, 144 F.3d at 1196.
272. Sternlight, supra note 251, at 307-08.
273. EEOC v. Luce, Forward, Hamilton & Scripps, 303 F.3d 994, 1010 (9th Cir. 2002) (Preger- son, J., dissenting).
The Court, in *Gilmer*, did not address the issue regarding mandatory arbitration as a condition of employment but, rather, reasoned that “[a]lthough all statutory claims may not be appropriate for arbitration, ‘having made the bargain to arbitrate, the party should be held to it.’” The Court then placed the burden on Gilmer to prove Congress “intended to preclude a waiver of judicial forum for ADEA claims.” The *Luce* majority over-generalized the holding in *Gilmer* by concluding that that the Supreme Court “expressly permitted” mandatory arbitration.

**D. Misapplication of Circuit City in Overruling Duffield**

Even if the district court was correct in initially invoking *Duffield* to resolve the EEOC’s retaliation claim, the Ninth Circuit’s conclusion that *Circuit City* “implicitly overruled” *Duffield* is unsupported. The issue presented in *Circuit City* was entirely different than the issue presented in *Duffield*. In *Circuit City*, the United States Supreme Court resolved the issue left unanswered by *Gilmer*: “Circuit City petitioned this Court, noting that the Ninth Circuit’s conclusion that all employment contracts are excluded from the FAA conflicts with every other Court of Appeals to have addressed the question . . . . We granted certiorari to resolve the issue.” The *Circuit City* opinion was a lengthy discussion regarding the interpretation of sections 1 and 2 of the FAA and not regarding whether an employer could require an employee to sign a mandatory arbitration agreement as a condition of employment. The majority’s sweeping conclusion

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274. *Id.* at 1005.
276. *Id.*
277. *Luce*, 303 F.3d at 1005.
278. *Id.* at 1010 (emphasis added). The dissent stated:

> While the arbitration provision at issue in *Gilmer* was indeed required as a condition of employment, this was not made an issue by the Supreme Court, which held more generally that the plaintiff “has not met his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act.”

279. *Id.* at 997.
280. *Id.* at 1008.
282. *Id.* at 109-24.
283. *Duffield*, 144 F.3d at 1185.

This case presents the issue of whether employers may require as a mandatory condition of employment in a certain profession . . . . that all employees waive their right to bring Title VII and other statutory and non-statutory claims in court and instead agree in advance to submit all employment-related disputes to binding arbitration.

*Id.*
in *Luce* that *Circuit City* overruled *Duffield* therefore does not follow from *Circuit City*’s holding that the FAA applies to non-transportation employment contracts. As the dissent pointed out in *Luce*, “In answering ‘yes’ to the first question, *Circuit City* did not also implicitly answer ‘yes’ to the second question.”

The Supreme Court, in *Circuit City*, only addressed the specific issue regarding the lawfulness of arbitrating statutory claims to the extent of re-quoting the language and reasoning of *Gilmer*. As the dissent in *Luce* pointed out, “*Circuit City* added nothing to the interpretation of the *Gilmer/Mitsubishi* language.” The *Luce* majority, however, overruled *Duffield* based on this re-quoting of *Gilmer* in *Circuit City*. The majority’s reliance on this language is problematic because *Duffield* already addressed the language and test established in *Gilmer*, concluding that mandatory arbitration of statutory claims was unlawful. In addition, the Supreme Court denied certiorari of *Duffield* and made no reference to *Duffield* in *Circuit City*, undermining the majority’s “inevitable conclusion” that *Duffield* is no longer good law. As the *Luce* dissent argued, “In the end, the majority does no more than register its own disagreement with this court’s earlier interpretation of the *Gilmer/Mitsubishi* language in *Duffield*."

E. The Fall of the Retaliation Claim

By misstating the *Gilmer* holding and unraveling *Duffield*, the *Luce* court concluded that Lagatree’s retaliation claim failed. Title VII’s retaliation claim prohibits an employer from retaliating against an employee for opposing employer conduct that is unlawful. For Lagatree’s conduct to be protected under this claim, he had to prove that his opposition to signing the mandatory arbitration agreement was based on a reasonable belief that Luce’s policy of requiring an em-

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284. *Luce*, 303 F.3d at 997.
286. *Luce*, 303 F.3d at 1009.
287. *Circuit City*, 532 U.S. at 123 (“by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute . . . ’); see also *Luce*, 303 F.3d at 1013.
288. *Luce*, 303 F.3d at 1013.
289. Id. at 1002-03.
290. *Duffield*, 144 F.3d at 1187-200; see also *Luce*, 303 F.3d at 1010-13.
292. *Luce*, 303 F.3d at 1013 (Pregerson, J., dissenting).
293. Id.
294. Id. at 996.
295. Id. at 1005.
ployee to agree to arbitrate his claims as a condition of employment was unlawful.296

The majority concluded that Lagatree "could not have reasonably believed that Luce Forward’s arbitration policy was an unlawful employment practice" because Gilmer "expressly permitted" mandatory arbitration.297 As previously mentioned, this conclusion misstates the holding in Gilmer.298 The majority also made the unsupported conclusion that due to the "voluminous contrary legal precedent," Lagatree could not have reasonably believed Luce’s policy was unlawful.299

Moreover, the majority argued that "Lagatree could not have reasonably interpreted the text of any relevant federal statute to forbid compulsory arbitration."300 The majority seems to overlook the holding of Duffield, which, ironically, is the same case the district court invoked in order to find Luce’s mandatory arbitration agreement unlawful.301

F. Judicial Preference v. Legislative Intent

The district court’s circumvention of the EEOC’s retaliation claim, combined with the Ninth Circuit’s failure to provide sound support in overruling Duffield, the Ninth Circuit’s misleading reference to Gilmer’s holding and misapplication of Circuit City, and the Ninth Circuit’s reasoning that Lagatree unreasonably believed that Luce’s policy was unlawful, leaves the impression that Mr. Lagatree’s outcome was a product of judicial preference and not congressional intent. This result is not uncommon to the world of arbitration, as Professor MacNeil explains:

The story of arbitration in the Supreme Court illustrates the cover-up function of formalism. One cannot immerse oneself in the arbitration cases without coming to the conclusion that a major force driving the Court is docket-clearing pure and simple. That is, the Court is motivated to reduce the cases having to be tried by the judicial system, particularly the federal judicial system.302

Professor Turner also supports this docket-clearing rationale as the United States Supreme Court’s motive for overruling cases such as Wilko:

296. Id.
297. Id.
298. See supra note 278 and accompanying text.
299. Luce, 303 F.3d at 1006.
300. Id.
301. Luce, 122 F. Supp. 2d at 1093.
302. MacNeil, supra note 11, at 172.
there was a change in the law . . . [that] was not grounded in the text of the statute or the expressed intention of those who enacted the FAA in 1925, but in the Court's changing view on the attractiveness and adequacy of arbitration . . . . Facing an increasing federal caseload, the judiciary has approved the use of alternative dispute mechanisms, including arbitration, as a means of controlling and reducing employment law disputes and other cases on the court dockets. Docket-clearing decisions are driven by a policy goal to clear court dockets, and with the same sweep, rid the court of cases considered less prestigious or worthy.303

Professor Turner utilizes Gilmer as an illustration of judicial preference and the consequences that flow.304 Professor Turner points out that Gilmer failed to prove that Congress did not intend to preclude arbitrating ADEA claims because:

That answer, based on a fictive intent, not expressed in statutory text or legislative history, or considered by the Congress enacting the ADEA in 1967, is not obviously and indisputably correct. Congress could not have expressed an intent on an issue it had not contemplated. Given the state of FAA-based arbitration law in 1967, there was no reason for Congress to consider the arbitrability issue . . . . Placing the burden on the plaintiff to show that the ADEA-enacting Congress intended to preclude arbitration required Gilmer to find and prove a nonexistence. To rule against him, when he was unsurprisingly unable to meet that burden, is to give operative effect to the Court's approach to, and view of, arbitration and not the congressional intent.305

As Professor Turner summarized: "'Gilmer's imaginative elaboration of legislative purpose' is problematic because it certainly provides more room for judicial lawmaking and policymaking, than does statutory interpretation tethered to text and legislative history."306

Recent statistics confirm that in the past thirty years, the number of federal trials has decreased despite the increase in workload.307 Although a variety of reasons may exist for this decline, many experts

304. Id. at 307-08.
305. Id.
306. Id. at 308.
307. Hope Viner Samborn, The Vanishing Trial, 88 A.B.A. J. 24, 26 (2002). In particular, the following was found:

The percentage of jury and bench trials in civil cases has declined from 10 percent of cases resolved in 1970 to 2.2 percent in 2001. The percentage of civil jury trials alone didn't drop as much, but it didn't have as far to go. Juries resolved 4.3 percent of civil cases in 1970 and only 1.5 percent - 3,633 cases in raw numbers - in 2001. And the drop occurred against a backdrop of federal court workloads that have risen by 146 percent during the same time period.

Id.
suggest that this is the result of the judicial trend in pushing for private resolutions through mediation, arbitration and other ADR methods.\textsuperscript{308} State courts have also experienced a decline in the number of cases going to trial.\textsuperscript{309}

IV. IMPACT OF MANDATORY ARBITRATION FOR EMPLOYEES, EMPLOYERS, AND ADR

This section will first argue that requiring an employee or applicant to sign a mandatory arbitration agreement as a condition of employment is unfair because of the involuntary nature of the agreement. The actual process of arbitrating a dispute also involves factors weighing against the employee or applicant. For instance, the neutrality of the arbitrator and his or her role as a decision-maker in place of judge and jury is problematic. Arbitration also deprives the employee or applicant of a public forum in which to air his or her grievances, presents due process and procedural issues, and involves both limited remedies and expensive fee sharing.

This section will then point out the disadvantages the employer faces with the use of arbitration. First, arbitration may provide no cost benefit over litigation. Employers also face some uncertainty regarding what issues are arbitrable. In addition, opposition to mandatory arbitration is increasing within the political arena while the EEOC remains an obstacle for employers.

This section will next address the effects of judicial legislation on the process of arbitration. This section will argue that arbitrating statutory claims has caused, and continues to cause, arbitration to become a more complex process, thereby defeating the purpose of providing a less complicated alternative to litigation. Finally, this section will address alternatives to arbitration.

A. Employees Beware

Many argue that forcing an employee or an applicant to waive his or her right to judicial redress inherently conflicts with the underlying purposes of the employment discrimination laws.\textsuperscript{310} One of the main

\begin{itemize}
\item \textsuperscript{308} Id.
\item \textsuperscript{309} Id. at 26-27 (noting that the percentage of cases going to trial has dropped in sixteen out of the twenty-two states that reported trial statistics).
\item \textsuperscript{310} See Senator Russell D. Feingold, Mandatory Arbitration: What Process is Due?, 39 Harv. J. on Legis. 281, 290-93 (2002) ("The practice of mandatory, binding arbitration does not comport with the purpose and spirit of our nation's civil rights and sexual harassment laws."); Grodin, supra note 145, at 30-35 ("On their face, therefore, the committee reports provide a substantial basis for the argument that the Congress which enacted the ADA thought the policies of that statute would be undermined by precluding judicial enforcement on the basis of a
arguments asserted by critics of mandatory arbitration is the involuntary nature of arbitration agreements.\textsuperscript{311} Others argue that the actual process of arbitrating employment disputes is unequal and thus results in unfair decisions.\textsuperscript{312}

1. Mandatory Equals Involuntary

First, the phrase "mandatory arbitration" in itself indicates an involuntary standard.\textsuperscript{313} Mandatory arbitration clauses in employment contracts are often "blatant contracts of adhesion," presenting a take-it-or-leave-it approach.\textsuperscript{314} Lagatree, for example, when informed by Luce that the arbitration clause was non-negotiable, was faced with either accepting the job and waiving his rights or termination.\textsuperscript{315} Moreover, often employees or applicants do not know they have waived these rights until a dispute arises.\textsuperscript{316}

Additionally, some critics of mandatory arbitration stress that the "barrier to achieving knowing and voluntary consent" is raised when
arbitration agreements are a condition of employment. Proponents of arbitration argue that mandatory arbitration agreements are not contracts of adhesion because an employee has the choice of seeking employment elsewhere. This argument is illusory, however, because it "distorts the reality of the bargaining environment." First, ADR is an alternative to litigation and not "a choice between working in a given industry and finding another livelihood." Moreover, this argument ignores the unequal bargaining power between employer and employee and assumes that the employee has employment alternatives.

Another barrier to achieving a voluntary standard results from the pre-dispute nature of the agreement. The employee, at a minimum, should have the right to make an informed choice regarding the use of arbitration after the dispute has arisen. Agreements to arbitrate claims after the dispute has developed (post-dispute) involve some degree of negotiation and thus are less of a concern than the pre-dispute agreements. Conversely, an employee signing a pre-dispute arbitration agreement is often unsure of the rights he or she is waiving and will often not dedicate time to research something he or she cannot "change or escape." Whereas post-dispute agreements conform to the unique characteristics of individual complaints, pre-dispute agreements are applicable to all employees and "magnif[y] their impact upon the overall implementation of the statutory scheme."

Overriding the argument that a mandatory arbitration agreement is involuntary is the inherently superior bargaining power of the employer. Employers, as "repeat players in the employment marketplace," are experienced at drafting and maintaining employment contracts. Unlike employers, an employee is a "one-shot player" with less experience and less knowledge regarding the legal implications associated with signing an employment contract. In addition,
an employee lacks the organization, financial support, and sophistication of an employer.\footnote{329}{Id.}

The employer’s superior bargaining position also results in an employment contract drafted with terms favoring the employer.\footnote{330}{Id. at 1236-37.} Unlike the employee, the employer has the financial access to hire attorneys to draft a contract in its self-interest.\footnote{331}{Id.} Because an employee is an inferior player and lacks the bargaining power to negotiate these terms, an employer has little incentive to draft mutually favorable terms.\footnote{332}{Id.} The Dunlop Commission on the Future Worker-Management Relations expressed this concern in its 1994 report:

We remain very concerned about the potential abuse of ADR created by the imbalance of power between employer and employee, and the resulting unfairness to employees who, voluntarily or otherwise, submit their disputes to ADR. These concerns are obvious if the process is controlled unilaterally by employers, such as when employees are required to sign mandatory arbitration clauses as a condition of employment . . . .\footnote{333}{Id.}

Additionally, applicants automatically lack bargaining power when in need of employment.\footnote{334}{Id.} As a result, an applicant is left with little recourse but to waive his or her rights in exchange for financial stability.\footnote{335}{Id.} Some critics have therefore termed mandatory arbitration agreements as a condition of employment as the “new yellow dog contract.”\footnote{336}{Id.} In the early nineteenth century, employers presented applicants with a stipulation that the applicant forgo becoming a union member in exchange for employment.\footnote{337}{Id.} Like the mandatory arbitration agreement, the yellow dog contract presented the worker with the option of either forfeiting the protections of a union or employment.\footnote{338}{Id.}

The one-sidedness of mandatory arbitration agreements is problematic in light of the history of the FAA. Arbitration was initially disfavored in common law because of the one-sidedness of agreeing to arbitrate future disputes.\footnote{339}{MacNeil, supra note 11, at 68-69.} Merchants of equal bargaining power, however, eventually found arbitration to be a quick and cheap method

\begin{thebibliography}{9}
\bibitem{329} Id.
\bibitem{330} Id. at 1236-37.
\bibitem{331} Id.
\bibitem{332} Reilly, supra note 4, at 1236-37.
\bibitem{333} See U.S. Dep’t of Labor, supra note 33, at 54-55.
\bibitem{334} Sternlight, supra note 1, at 676-77.
\bibitem{335} Reilly, supra note 4, at 1233-35; Sternlight, supra note 1, at 676-77.
\bibitem{336} Van Wezel Stone, supra note 1, at 1037-38.
\bibitem{337} Id.
\bibitem{338} Id.
\bibitem{339} MacNeil, supra note 11, at 68-69.
\end{thebibliography}
of resolving their disputes.\textsuperscript{340} As mentioned, the FAA was originally drafted in order to provide an alternative to litigation in the commercial environment.\textsuperscript{341} The intent behind the adoption of the FAA therefore contradicts the application of the FAA to a situation, such as the employer-employee relationship, in which the parties cannot bargain on equal terms.

2. An Unequal Process

Although arbitration arguably has negative and positive elements for both the employer and employee,\textsuperscript{342} the overall effect of an arbitration proceeding favors the employer.\textsuperscript{343} First, critics of arbitration of statutory rights argue that arbitrators are not always neutral or well-versed in the law.\textsuperscript{344} The procedures and remedial aspects of arbitration also result in due process issues for the employee.\textsuperscript{345}

a. Is the Arbitrator Neutral?

Many critics of arbitration argue that an arbitrator, unlike a judge or jury, is less likely to be a neutral decision-maker.\textsuperscript{346} Arbitrators are subject to what some critics have called the "repeat player syndrome."\textsuperscript{347} Because an employer is a more frequent user of arbitra-

\textsuperscript{341} Id.
\textsuperscript{342} Compare Green, supra note 61, at 400-01 ("use of mandatory arbitration as a dispute resolution mechanism for employment discrimination claims has failed to give employers an overall advantage"); with Feingold, supra note 310, at 283-84, 288-92 (describing the due process inefficiencies inherent in arbitration), and Reilly, supra note 4, at 1209-13 (highlighting the procedural rights individuals waive by submitting their disputes to arbitration).
\textsuperscript{343} See Steven E. Abraham & Paula B. Voos, Empirical Data on Employer Gains From Compulsory Arbitration of Employment Disputes, LawMemo.com, at http://www.lawmemo.com/arb/res/empirical.htm (last visited July 8, 2003) (study done on effect of the Gilmer decision in the securities industry, concluding that "the use of binding arbitration systems for the settlement of legal disputes with employees benefits employers – in other words, there are empirical gains to employers who institute binding arbitration for their employees"); see also Feingold, supra note 310, at 284; Reilly, supra note 4, at 1210-13.
\textsuperscript{344} See Malin, supra note 23, at 95-102; Taylor, supra note 1, at 5. For a recent case regarding this issue, see Boise Cascade Corp. v. Paper Allied-Industrial, Chemical & Energy Workers, 309 F.3d 1075 (8th Cir. 2002) (overturning the arbitrator's decision because the arbitrator failed to discuss the language of the agreement and thus did not consider the parties' intent, rendering an award contrary to the contract).
\textsuperscript{345} See Feingold, supra note 310, at 288-89; Grodin, supra note 145, at 42-47 (discussing what is needed to overcome procedural inequalities); Reilly, supra note 4, at 1209-13.
\textsuperscript{346} See generally Taylor, supra note 1, at 5; see also Susanne Craig, California Duels with NYSE, NASD, WALL ST. J., Aug. 30, 2002, at C1. This article explains California's effort to combat lack of arbitrator neutrality through new legislation that requires arbitrators to submit additional information regarding their financial and professional relationships.
\textsuperscript{347} Taylor, supra note 1, at 5; see also Mercuro v. Super. Ct., 116 Cal. Rptr. 2d 671 (Ct. App. 2002) (Although the arbitration agreement required that the arbitrator be selected from the
tion, arbitrators are often “reluctant to find against employers or award large damages for fear of not being invited back.”

Even when the parties rely on selection of an arbitrator by a neutral agency such as the AAA, the employer, as a more frequent user of the agency, will remain at an advantage as it becomes more familiar with specific arbitrators and their past decisions.

b. Arbitrator v. Judge

One of the arguments made in Gilmer was that allowing a private arbitrator to determine statutory rights would “impede the development of the law.”

Although the United States Supreme Court dismissed this argument, as Professor Malin points out, “[t]he Court’s lack of analysis is most unfortunate because it demonstrates a lack of appreciation of the different roles of arbitrators and courts and the impact of those differences on the policies which underlie most employment statutes.”

Professor Malin argues that:

Most employment statutes represent congressional determinations to provide uniform labor standards. . . . Judges are part of the public justice system which effectuates these uniform labor standards. . . . Judges are screened publicly prior to assuming office either through direct election (in most state courts) or through the nomination and confirmation process. Their decisions are subject to a hierarchy of review in higher courts, culminating in review in a Supreme Court. . . . Arbitrators, on the other hand, fall outside the public justice system. They are appointed privately and their decisions are binding, only on the parties in the actual case. Consequently, unlike judges, they are not linked together through a unified public justice system designed to produce a single, socially binding interpretation of the law.

National Arbitration Forum, a neutral agency, the provision called for an arbitrator in the federal district court where the employee worked. Because there were only eight potential arbitrators in this jurisdiction, the California Court of Appeals was concerned about the “repeat player effect” and the employee’s lack of participation in the selection of the arbitrator and thus found the arbitration agreement unconscionable.

348. Taylor, supra note 1, at 5; see also Grodin, supra note 145, at 43-44.

349. Grodin, supra note 145, at 43-44; See also Alexander v. Gardner-Denver, 415 U.S. 36, 57 (1974). Although applying this rationale to the union context, even the United States Supreme Court noted that the arbitral process remained inadequate for resolving statutory disputes because the special role of the arbitrator was to “effectuate the intent of the parties rather than the requirements of enacted legislation.” Id. As a result, the Court reasoned that “[p]arties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations.” Id.


351. Id.

352. Id. at 100-01.
In addition, an arbitrator is not required to issue a written award. As a result, the arbitrator’s legal reasoning is not reviewable, making it “nearly impossible to tell whether the arbitrator paid any attention to the statutory provisions or common law that governed the case.” Another argument that Professor Malin makes is that an arbitrator’s misinterpretation of statutory law will “undermine the legislative policy of setting uniform labor standards.” The National Academy of Arbitrators also argues that an arbitrator’s lack of knowledge or understanding of statutory law results in a forum that is “different, deficient, and ineffective for adjudicating statutory rights.”

Even assuming that a judge does not thoroughly understand statutory law, his or her decision is at least subject to judicial review. Most courts will only review an arbitrator’s decision under limited circumstances and will only overturn an arbitrator’s decision if there is a “manifest disregard of the law.”

c. The Importance of a Public Forum

Trials, unlike arbitration, produce verdicts that become precedent for future disputes. Arbitration will therefore hinder the development of law and provide little guidance for both the decision-makers and potential litigants. Although minimizing the amount of litigation is important, the privatization of disputes will undermine the role of the legislature in measuring, maintaining, revising, and enacting meaningful employment statutes. In turn, this approach takes “em-

353. See Feingold, supra note 310, at 288; Runkel, supra note 5.
354. See generally Runkel, supra note 5.
357. Id.
358. See generally Runkel, supra note 5. A recent case highlighting this tension is Greendale Education Association v. Greendale School District, No. 01-3234, 2002 WL 31455693, at *1 (Wis. Ct. Ap. Nov. 5, 2002) (per curiam). In this case, the school district fired a physical education teacher after a number of sexual harassment allegations were filed against him. Id. at *3-4. The arbitrator reinstated the teacher, finding that the teacher’s conduct did not amount to sexual harassment. Id. at *4. The trial court found that the arbitrator’s decision was unsupported and resulted in a decision contrary to public policy concerning the protection of the students. Id. at *4-5. The Wisconsin Court of Appeals reversed the trial court’s decision, finding that the arbitrator’s decision was not contrary to public policy because the arbitrator did not exceed his authority in holding a de novo hearing and making factual findings. Id. at *14-15.
360. Id.
361. Van Wezel Stone, supra note 1, at 1043.
ployment concerns out of the public arena, away from public scrutiny and political accountability."\textsuperscript{362}

Although many cases settle before reaching trial, critics of arbitration argue that the cases that do reach trial serve an important educational role.\textsuperscript{363} Trials create an "open forum," providing an opportunity for the public to understand how the law works.\textsuperscript{364} As more disputes are privatized, however, the risk of the public becoming more detached from the legal system will increase.\textsuperscript{365}

A public verdict also serves a critical role in deterring employers from future discriminatory conduct.\textsuperscript{366} Although some may argue that a private decision benefits both employer and employee, many individuals may want an opportunity to have his or her day in court.\textsuperscript{367} At a minimum, an agreement to arbitrate should be entered into voluntarily and should not be mandatory to preserve these pillars of the American judicial system.

d. Due Process Issues

Mandatory arbitration has become problematic because it undermines the fundamental constitutional right to a trial by jury.\textsuperscript{368} In a recent Montana Supreme Court decision striking down a contractual arbitration clause,\textsuperscript{369} Justice William Leaphart, in concurrence, emphasized the importance of this right:

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Given the sacredness and inviolability of the fundamental right to trial by jury, any contract provision that openly or subtly causes the forfeiture of the exercise of this right must be rigorously examined by the courts. . . . Indeed, the use of such contractual provisions is at one and the same time an 'open attack' on the right of jury trial and a 'secret machination' causing forfeiture of that right that [Justice William] Blackstone predicted would 'sap and undermine' the right, and with our 'public and private liberties.'\textsuperscript{370}
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\textsuperscript{362} Id.; see also Samborn, supra note 307, at 26 ("Private dispute resolution also shields lawsuits from the imposition of public values about important concerns, such as discrimination in the workplace . . . 'To the extent that these cases are tried, the values behind those statutes are vindicated in a public forum . . . '.")

\textsuperscript{363} Samborn, supra note 307, at 26.

\textsuperscript{364} Id.

\textsuperscript{365} Id.

\textsuperscript{366} Taylor, supra note 1, at 5.

\textsuperscript{367} Samborn, supra note 307, at 27.

\textsuperscript{368} See Feingold, supra note 310, at 288.

\textsuperscript{369} Kloss v. Edward D. Jones & Co., 54 P.3d 1 (Mont. 2002). Although this case involved the use of a mandatory arbitration clause in an agreement between a financial services company and a client, the court's general distaste for mandatory arbitration clauses (in situations where there cannot be a knowing and intelligent waiver of the right to trial by jury) is important to the study of the use of arbitration clauses in all contexts. Id. at 7-8, 10-17.

\textsuperscript{370} Id. at 12.
Moreover, the 1991 Civil Rights Act expressly protects the right to trial by jury in Title VII and ADA claims.\textsuperscript{371}

Although the Supreme Court has articulated that by arbitrating a statutory claim an individual does not "forgo" his or her substantive rights,\textsuperscript{372} some argue that depriving an individual's right to access the courts "could lead to the inequitable application of substantive law."\textsuperscript{373} As Senator Russell Feingold explains:

Under the FAA, arbitrators are not required to apply the particular federal or state law that would be applied by a court. This enables the stronger party to use arbitration to circumvent laws specifically enacted to regulate the parties' relationship in a particular jurisdiction. Circumventing these laws is inequitable and eliminates their deterrent effects.\textsuperscript{374}

In Lai, the Ninth Circuit also recognized that in some instances, such as Title VII sexual harassment claims, the forum may substantially affect the outcome of the trial.\textsuperscript{375} The Lai court stated: "[I]n an area as personal and emotionally charged as sexual harassment and discrimination, the procedural right to a hearing before a jury of one's peers, rather than a panel of the National Association of Securities Dealers, may be especially important."\textsuperscript{376}

\textbf{e. Other Procedural Issues}

The right to a jury trial also guarantees certain procedural safeguards absent in an arbitration proceeding.\textsuperscript{377} The Supreme Court summarized some of the deficiencies of arbitration in Gardner-Denver:

\begin{quote}
[T]he fact-finding process in arbitration usually is not equivalent to judicial fact-finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.\textsuperscript{378}
\end{quote}

The lack of these procedural formalities is, in fact, what makes arbitration a more efficient, simplified process.\textsuperscript{379}

\begin{footnotes}
\item[371] See generally Runkel, supra note 5.
\item[373] Feingold, supra note 310, at 288.
\item[374] Id.
\item[375] Id.
\item[376] Prudential Ins. Co. of Am. v. Lai, 42 F.3d at 1305 n. 4 (1994).
\item[377] See generally Feingold, supra note 310, at 288; Reilly, supra note 4, at 1209-12.
\item[378] Alexander v. Gardner-Denver, 415 U.S. 36, 57-58 (1974); see also Feingold, supra note 310, at 288; Reilly, supra note 4, at 1209-12.
\item[379] See generally Runkel, supra note 5.
\end{footnotes}
Some of these procedural differences disadvantage the employee. For example, California's rules of evidence limit the admissibility of evidence relating to a plaintiff's sexual background in a judicial proceeding. In an arbitration proceeding, an employee with a sexual discrimination claim is not afforded the protection inherent with this rule of evidence.

f. Limited Remedies

Arbitration also results in smaller awards for an employee. For example, arbitrators will usually not award punitive damages, and, in some states, punitive damages are prohibited altogether. Punitive damages are significant in deterring employers, and, absent this remedy, an employer is unlikely to change its discriminatory behavior. In addition, a jury trial will produce a higher award for the employee because jurors, unlike the arbitrator, are more sympathetic to the employee.

g. Fee Sharing

Another issue for employees is that arbitration often entails fee sharing. Many arbitration agreements require the parties to split the cost of the arbitrator and the arbitration proceeding. The cost of arbitration is sometimes significant. Arbitrator fees alone often amount to $750 to $1,000 a day. Arbitration costs also include filing fees and other administrative costs beyond what is normally associated with court services.

Fee sharing can act as a huge deterrent for an individual in situations in which an arbitration agreement requires the parties to make payments prior to the proceedings. In Green Tree Financial Corp.
Alabama v. Randolph, the Supreme Court addressed the fee sharing issue in a non-employment context and held that "where . . . a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs."\(^{391}\)

The lower courts, however, remain divided on this issue.\(^{392}\) Some courts have held that an employee should not have to pay any expenses of an arbitrator when a statutory claim is at issue.\(^{393}\) Although other courts have held that an employee should not pay for any "unreasonable costs" associated with arbitration, what is "unreasonable" remains undefined.\(^{394}\) Most courts, however, analyze each case differently and take into consideration "the employee's personal ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation, and whether that cost differential is so substantial as to deter the bringing of claims."\(^{395}\)

B. Is Arbitration Really a Better Alternative for Employers?

Like employees, employers also face certain disadvantages in the use of mandatory arbitration as an alternative dispute mechanism.\(^{396}\) Employers face obstacles such as the increasing cost of arbitration, uncertainties as to what is arbitrable, and political opposition to mandatory arbitration agreements.\(^{397}\) Most importantly, the EEOC has recently gained a substantial victory in its fight against mandatory arbitration agreements.\(^{398}\)

1. Is There Any Cost Benefit to Arbitration?

Despite the professed benefits of arbitration, until recently, no independent research had ever been done to support this conclusion.\(^{399}\) In

\(^{391}\) 531 U.S. 79, 92 (2000); see also Runkel, supra note 5.

\(^{392}\) See generally Runkel, supra note 5.

\(^{393}\) Id.; see also Circuit City v. Adams, 279 F.3d 889 (9th Cir. 2002); Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230 (10th Cir. 1999); Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054 (11th Cir. 1998); Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465 (D.C. Cir. 1997); Armendariz v. Found. Health Psychcare Serv., 6 P.3d 669 (Cal. 2000).

\(^{394}\) See generally Runkel, supra note 5; see also Cole, 105 F.3d at 1483-84.

\(^{395}\) See generally Runkel, supra note 5; see also Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549 (4th Cir. 2001).

\(^{396}\) See generally Green, supra note 61, at 401-02.

\(^{397}\) Id.

\(^{398}\) See EEOC v. Wafflehouse, 534 U.S. 279 (2002) (holding that the EEOC can recover damages and other relief on behalf of an employee who signed a mandatory arbitration agreement).

\(^{399}\) Public Citizen, Cost of Arbitration: Executive Summary (May 1, 2002), available at http://www.lawmemo.com/arb/res/cost.htm (last visited July 8, 2003); see also Green, supra note 61, at 421-24. Professor Green notes that not many studies have been done regarding the cost savings
May 2002, Public Citizen released a report indicating that arbitration can be more costly than litigation. In summary, Public Citizen found that

initiating an arbitration is almost always higher than the cost of instituting a lawsuit; forum costs . . . can be up to five thousand percent higher in arbitration than in court litigation. . . . Arbitration costs are high under a pre-dispute arbitration clause because there is no price competition among providers. . . . Arbitration costs will probably always be higher than court costs in any event, because the expenses of a private legal system are so substantial. . . . Arbitration saddles claimants with a plethora of extra fees that they would not be charged if they went to court. . . . Taking a case to arbitration does not guarantee that a[n] . . . employee will stay out of court, making arbitration still more costly.

2. Arbitrability Issues

Although the United States Supreme Court has adopted a liberal policy in favor of arbitration, what exactly is arbitrable remains unclear. Employers (and employees for that matter) will most likely continue to face this uncertainty until Congress takes action. Additionally, an employer may still face judicial hostility toward the use of a mandatory arbitration provision in an employment contract as lower courts are beginning to challenge the fairness of such agreements. A national employer will also have the additional burden of drafting arbitration agreements that will meet both federal law requirements and the provisions of each state in which the employer conducts business.

of arbitration, but that “[t]he little data . . . that does exist supports the position that arbitration may not be as big a savings in cost or time as proponents claim.” Id. at 422. He cites one example that involved an arbitration proceeding originating from a pre-dispute clause that lasted seven years and cost the company approximately $100 million. Id. at 422-23.

400. See supra note 399 and accompanying text.

401. Id. The report also concludes that in some instances, the high cost of arbitration can work to the advantage of the employer. Id. For example, the party being sued may file a motion to dismiss or motion for summary judgment. Id. The claimant then has to provide the funds up front for the arbitrator to decide on the motion, which in turn, may force a claimant unable to pay to abandon his or her case early in the proceedings. Id.

402. Green, supra note 61, at 418.

403. Id.

404. Id. at 428-32. For a good illustration of this situation, see Cole v. Burns International Securities Services, 105 F.3d 1465 (D.C. Cir. 1997). In this case, the United States Court of Appeals for the District of Columbia Circuit established minimum standards an employer must meet in order to have an enforceable arbitration agreement. Id. at 1482-83.

405. See generally Runkel, supra note 5.
3. **The Political Pull**

The political arena is also critical of mandatory arbitration.\(^{406}\) For example, the National Association of Securities Dealers (NASD) and the NYSE became a target of civil rights groups due to their use of mandatory arbitration agreements.\(^{407}\) As a result, members of Congress pressured the NASD and the NYSE into "banning their long-standing requirements of mandatory arbitration."\(^ {408}\) Political representatives such as Senator Russell D. Feingold are also taking affirmative steps in Congress to eradicate mandatory arbitration in many contexts.\(^ {409}\)

4. **The EEOC Barrier**

The most "significant deterrent" an employer faces in the use of mandatory arbitration agreements is the EEOC.\(^ {410}\) The Supreme Court recently held in *EEOC v. Waffle House, Inc.* that a signed mandatory arbitration agreement between an employer and employee did not prohibit the EEOC from independently suing and seeking victim-specific relief on behalf of the employee.\(^ {411}\) Remedies that the EEOC can obtain include reinstatement, back pay, front pay, and both compensatory and punitive damages.\(^ {412}\) Prior to *Waffle House*, the circuits were split regarding the ability of the EEOC to recover damages and other relief on behalf of an employee who had signed a mandatory arbitration agreement.\(^ {413}\) As Justice Clarence Thomas reasoned in dissent, the holding in *Waffle House* will discourage the use

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406. *Id.* at 427-28.
407. *Id.*
409. See generally Feingold, *supra* note 310, at 292-93, 295, 297. In 1994, Senator Feingold introduced the Civil Rights Procedures Protection Act "which aims to preserve the right to take employment discrimination claims to court." *Id.* at 292. In 2001, Feingold, along with other Senators, introduced the Civil Rights Act of 2001. *Id.* at 292-93. This Act would amend the civil rights statutes including claims arising under Title VII, ADA, EPA, FMLA, the Rehabilitation Act of 1973, and the FAA. *Id.* at 293. The amendment would allow only for arbitration based on voluntary terms after the claim arises. *Id.* In addition, Representative Dennis Kucinich (D-Ohio) and thirty-seven other members of Congress have submitted a proposal to amend the FAA to require the exemptions of all employment contracts from arbitration provisions. *Id.* Feingold has also introduced bills prohibiting mandatory arbitration agreements in the automobile industry and with consumer credit agreements. Feingold, *supra* note 306, at 295, 297.
411. 534 U.S. at 287.
412. *Id.*
413. Compare *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (4th Cir. 2002) (holding that the arbitration agreement limited the remedies the EEOC could seek), and *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998) (EEOC could pursue injunctive relief but not monetary relief), with *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999) (arbitration agreement does not bar EEOC from seeking injunctive relief, back pay, and damages).
of arbitration agreements in the employment context and argued that employers like Waffle House
will be worse off in cases where the EEOC brings an enforcement action should it continue to utilize arbitration agreements in the future. This is because it will face the prospect of defending itself in two different forums against two different parties seeking precisely the same relief. It could face the EEOC in court and the employee in an arbitral forum.414

C. Arbitrating Statutory Claims Defeats the Purpose of ADR

Although arbitration is a simple concept, the judicial rewriting of the legislative history behind the FAA has resulted in "a defective product."415 The use of mandatory arbitration agreements in the employment context and the litigation, not arbitration, that has flowed from the controversies surrounding the enforceability of these agreements is a clear illustration of how arbitration has become a complex process. As Professor MacNeil concluded, the judicial decisions regarding arbitration "tend to be fundamentally aimless, meandering, and above all, confusing. They are hence dysfunctional in terms of both the policies being achieved and of legal efficiency."416

D. Alternatives to Arbitration

Other forms of ADR are also available for resolving employment disputes.417 Mediation, for example, provides a more neutral environment to resolve employment disputes.418 Like arbitration, mediation involves a neutral party in the resolution of the dispute.419 Unlike arbitration, mediation is a voluntary process in which both parties "are free to walk away at any time."420 The mediator does not issue an award but helps the parties reach a mutual agreement.421 The parties may complete their agreement by signing a contract and, if no agreement is reached, litigation or arbitration remains an option.422

Lagatree and Luce, for example, may have never reached litigation if mediation was employed. In this case, neither party appeared will-

414. 534 U.S. at 309.
415. MacNeil, supra note 11, at 171.
416. Id. at 172.
417. See generally Stone, supra note 8, at 5; see also supra note 13 and accompanying text.
418. See generally Runkel, supra note 5.
419. Id.
420. Id.
421. Id.
422. See generally Runkel, supra note 5.
ing to compromise.\textsuperscript{423} Whereas Lagatree felt the mandatory arbitration agreement was unfair,\textsuperscript{424} Luce argued the agreement was non-negotiable.\textsuperscript{425} The mandatory nature of the agreement and Luce’s immediate and blatant refusal to negotiate with Lagatree confirmed Lagatree’s fears that, as an employee of Luce, his civil liberties were at stake.\textsuperscript{426} The parties in the case did not make an effort to break the deadlock and, instead, headed for the courtroom.\textsuperscript{427}

Mediation would have provided an opportunity for Lagatree and Luce to reach a mutual agreement without automatically defaulting to costly litigation. The mediator would have consulted both sides and established a detailed understanding of the respective positions. A neutral perspective may have brought the parties to an understanding. Perhaps Luce’s agreement to mediate, alone, would have mitigated Lagatree’s fears and concerns by undermining the firm’s initial willingness to negotiate. Even if no agreement was reached, both parties would have retained their right to sue.

\section*{V. Conclusion}

Arbitration offers an efficient and cost-effective alternative to litigation in certain contexts. The FAA was enacted in an effort to quickly resolve commercial disputes between merchants. Since the FAA was passed, however, the use of arbitration has expanded to contexts not originally considered in the adoption of the FAA. As a result, both the United States Supreme Court and the lower courts have faced new questions regarding the enforceability of arbitration agreements as applied in these various situations.

The use of mandatory arbitration agreements in the employment context, in particular, has resulted in a sharply divided debate. The Supreme Court has not yet addressed the issue of whether the use of a pre-dispute mandatory arbitration agreement in an employment contract or application is enforceable when statutory claims are at issue. Although the United States Court of Appeals for the Ninth Circuit originally resolved this issue in \textit{Duffield}, the \textit{Luce} court overruled \textit{Duffield} and joined in the judicial effort to clear court dockets. Similar to Professor MacNeil’s characterization of the Supreme Court’s decisions regarding arbitration, the Ninth Circuit decision in \textit{Luce} represents “bureaucratic formalism” where “never are the basic goals of

\begin{itemize}
\item \textsuperscript{423} \textit{Luce}, 303 F.3d at 997-98.
\item \textsuperscript{424} \textit{Id.} at 997.
\item \textsuperscript{425} \textit{Id.} at 998.
\item \textsuperscript{426} \textit{Id.} at 997-98.
\item \textsuperscript{427} \textit{Id.} at 998.
\end{itemize}
the law thoroughly examined and comprehensively addressed. Instead the Supreme Court examines bits and pieces, the flotsam and jetsam of [the] particular case.”

The outcome of *Luce* is wrong and conflicts with an employee’s right to judicial redress of his or her statutory claims. An employment contract that requires an individual to agree to arbitration as a condition of employment is inherently unequal and leaves the individual little or no choice. Although the use of arbitration as an alternative to litigation has potentially positive and negative elements for both employer and employee, the positive factors weigh in favor of the employer. Moreover, the judicial decision-making regarding arbitration in the employment context has undermined, and continues to undermine, the purpose of providing an efficient and cost-effective alternative to litigation.

Other forms of ADR, such as mediation, may present a better alternative for both employer and employee. Mediation still offers an employer an alternative to litigation and yet provides the employee with a more voluntary process of resolving his or her dispute. Additionally, the employee who was wronged by his or her employer may still preserve the right to enforce his or her civil rights in a judicial forum.

Nicole Karas

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