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A Myriad of Contradiction with Title VII Arbitration Agreements - Duffield as the Past, Austin as the Future, and the EEOC as the Target of Restructuring

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A MYRIAD OF CONTRADICTION WITH TITLE VII ARBITRATION AGREEMENTS— *DUFFIELD* AS THE PAST, *AUSTIN* AS THE FUTURE, AND THE EEOC AS THE TARGET OF RESTRUCTURING

*Michelle Hartmann**

Table of Contents

I.	INTRODUCTION.....	360
II.	<i>DUFFIELD</i> ALONE REJECTS MANDATORY TITLE VII ARBITRATION AGREEMENTS SIGNED AS A CONDITION OF EMPLOYMENT.....	362
A.	THE CIRCUIT COURTS UNANIMOUSLY REJECT MANDATORY ARBITRATION OF TITLE VII CLAIMS FOLLOWING <i>GARDNER-DENVER</i>	362
B.	ABRUPT CHANGE IN TREATMENT OF MANDATORY TITLE VII ARBITRATION FOLLOWING <i>GILMER</i>	364
C.	<i>DUFFIELD</i> REJECTS THE HOLDING OF OTHER CIRCUITS BY EMPHASIZING THE LEGISLATIVE HISTORY TO TITLE VII.....	366
D.	THE LIKELY FUTURE OF COMPULSORY TITLE VII ARBITRATION IN INDIVIDUAL CONTRACTS SIGNED AS A CONDITION OF EMPLOYMENT.....	367
III.	CONVERSELY, <i>AUSTIN</i> ALONE UPHOLDS MANDATORY TITLE VII ARBITRATION UNDER COLLECTIVE BARGAINING AGREEMENTS.....	370
A.	THE CURRENT SETTING: A FEDERAL FAVORING OF ARBITRATION—BOTH UNDER THE FAA AND UNDER THE LMRA—SETS THE STAGE FOR ACCEPTANCE OF CBA WAIVERS.....	372
B.	THE APPARENT WILLINGNESS OF THE SUPREME COURT TO RECOGNIZE “CLEAR AND UNMISTAKABLE” WAIVERS IN CBAs DESPITE <i>GARDNER-DENVER</i> ’S PROHIBITION LIKELY CONTEMPLATES THE ABILITY TO	

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WAIVE TITLE VII'S JUDICIAL FORUM GRANT THROUGH A CBA.....	375
C. BECAUSE A VOLUNTARY WAIVER OF INDIVIDUAL RIGHTS IS NOT INHERENTLY AT ODDS WITH COLLECTIVE REPRESENTATION BY A UNION, A CBA WAIVER SHOULD BE ENFORCED	378
D. STARE DECISIS AND THE REALITY OF TITLE VII'S PLAIN MEANING MANIFESTS A NEED TO OVERRULE <i>GARDNER-DENVER</i> WITH RESPECT CBA WAIVERS....	381
IV. THE EEOC STANDS ALONE IN ITS HYPOCRITICAL POLICY AGAINST EMPLOYMENT ARBITRATION AGREEMENTS	383
A. DESPITE SUPREME COURT PRECEDENT EMBRACING ARBITRATION AND REGARDLESS OF THE FAA, THE EEOC'S CONTINUED OPPOSITION TO EMPLOYER ARBITRATION CONTRACTS CREATES AN INCONSISTENT PLIGHT.....	383
B. INHERENT CONFLICTS BETWEEN THE EEOC'S DUAL ROLE AND THE MODERN RESPECT FOR INDIVIDUAL CONTRACT ENFORCEMENT MANDATE RESTRUCTURING	387
C. TOOLS, SUCH AS CEASE AND DESIST ORDERS, AND REQUIRED REPORTING, MIGHT MEND THE CONFUSION	391
V. CONCLUSION	394

I. INTRODUCTION

As several commentators note, practitioners wishing to accurately advise their clients on the success of mandatory arbitration clauses covering Title VII claims will likely have trouble.¹ Although the use of arbitration as an alternative to judicial resolution is increasing remarkably,² the legal chaos resulting from unanswered ques-

1. See Alexandra Varney McDonald, *Escape from Arbitration*, ABA J., Aug. 1999, at 33 (discussing the tension amongst the circuits over mandatory arbitration agreements of statutory claims, and quoting Marc Greenbaum, law professor at Suffolk University in Boston, as having "a lot of discomfort with the idea that an employer can . . . effectively waive a judicial forum").

2. See *Developments in Law-Employment Discrimination*, 109 HARV. L. REV. 1568, 1672 n.20 (1996) (noting that "[t]he number of employment disputes in federal courts increased twenty fold between 1971 and 1991, an increase that is 1000% greater than that of all other types of civil litigation combined") (citing Hope B. Eastman & David M. Rothenstein, *The Fate of Mandatory Employment Arbitration Amidst Growing Opposition: A Call for Common Ground*, 20 EMPLOYEE REL. L. J. 595 (1995)); Judith Batson Sadler, *Mandatory Arbitration: Recent Developments After Gilmer in the Evolving Area of Dispute Resolution Through the Use of Mandatory Arbitration Agreements*, AMERICAN BAR ASSOC., 1999 Annual Mtg., at 1 (stating that "Employers have turned to mandatory arbitration agreements for several reasons not the least of which is the perception that arbitration provides a way to reduce legal costs").

tions in major Supreme Court cases dealing with pre-dispute arbitration agreements and conflicting pronouncements by the agency directly responsible for managing Title VII claims leaves many in the legal community concerned.³ In contrast to commentary presently in the academic marketplace of ideas, this Comment argues that arbitration clauses signed by an individual as a condition of employment should be treated no differently than those negotiated by a union into a collective bargaining agreement.

This paper looks to past actions by courts and agencies in order to present a prospective view of the mandatory arbitration of Title VII claims. Part I examines *Duffield v. Robertson Stephens & Co.*,⁴ where the Ninth Circuit held that an employer could not enforce a mandatory arbitration agreement against an employee's Title VII claim even though she signed this agreement as a condition of her employment. Recent case law within the Ninth Circuit jurisdiction strengthens *Duffield's* reach. *Duffield* contrasts with the likely future, favoring enforcement of arbitration clauses.

Part II analyzes *Austin v. Owens-Brockway Glass Container, Inc.*,⁵ where the Fourth Circuit held that a mandatory arbitration contract contained in a collective bargaining agreement was enforceable to preclude an individual from bringing her Title VII claim to a judicial forum. *Austin* approximates the future despite the overwhelming attempt by circuit courts to dismantle its effect.

Part III looks to the EEOC, particularly at its current standoff against the overwhelming judicial precedent concerning arbitration. By taking an unequivocal and unyielding stance against mandatory arbitration agreements in the employment context, the EEOC necessarily paves a future where congressional reformation of the goals and the purposes of the organization is in order.

With these three sections in mind, the analysis divides types of mandatory Title VII arbitration agreements into two groups— individual employment agreements and collective bargaining arbitration agreements.⁶

3. See Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L. J. 1, 2, 7-8 (Fall 1996) (discussing recent legal developments in arbitration and "unanswered questions which persist in their wake," and adopting the liberal view that "even 'neutral' arbitration procedures are more likely to operate to the institutional advantage of employers").

4. 144 F.3d 1182, 1199 (9th Cir.), cert. denied, 525 U.S. 982 (1998).

5. 78 F.3d 875, 882 (4th Cir.), cert. denied, 519 U.S. 980 (1996).

6. See *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997) (seemingly dividing court holdings between those based on union represented agreements and those based on individual arbitration agreements, and finding that the CBA cases "provide no basis for refusing to enforce [an individual consensual] agreement to arbitrate") (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991)).

II. DUFFIELD ALONE REJECTS MANDATORY TITLE VII ARBITRATION AGREEMENTS SIGNED AS A CONDITION OF EMPLOYMENT

This Section discusses the current treatment of mandatory Title VII arbitration, where an individual employee signs a pre-dispute waiver as a condition of initial or continued employment.

In *Gilmer v. Interstate/Johnson Lane Corp.*,⁷ the Supreme Court discussed the purpose of the Federal Arbitration Act ("FAA")⁸ in "revers[ing] the longstanding judicial hostility to arbitration agreements . . . and [in] plac[ing] arbitration agreements upon the same footing as other contracts." It recognized, however, Section 1 of the FAA as exempting from FAA enforcement "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."⁹ While this exception for "contracts of employment" may play a critical role in the enforceability of mandatory arbitration clauses found in collective bargaining agreements, it has not been interpreted by most courts as a major stumbling block as to individual employment agreements.¹⁰ That said, the Ninth Circuit recently ruled that the FAA does not apply to contracts of employment and reversed a district court ruling compelling arbitration.¹¹ *Circuit City Stores, Inc. v. Adams* was accepted on certiorari and will likely resolve any dispute in favor of general FAA applicability as to individual arbitration agreements, as opposed to certain collective bargaining agreements.¹² Noting general applicability of the FAA for the purpose of Part II(A) of this Comment, the turbid precedential history begins.

A. THE CIRCUIT COURTS UNANIMOUSLY REJECT MANDATORY ARBITRATION OF TITLE VII CLAIMS FOLLOWING *GARDNER-DENVER*

To demonstrate how full circle the circuits have come, an examination of *Alexander v. Gardner-Denver Co.*, is necessary.¹³ In *Gardner-Denver*, the Supreme Court rejected the idea that an employee could prospec-

7. 500 U.S. 20, 24 (1991).

8. See 9 U.S.C. § 2.

9. 9 U.S.C. § 1.

10. See *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997) (joining the ranks of those courts interpreting Section 1 narrowly as exempting only those employees directly engaged in the movement of maritime or interstate commerce); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1471-72 (D.C. Cir. 1997) (finding that a narrow interpretation of Section 1 is supported by the Supreme Court's holding in *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265 (1995), which interpreted the words, "in commerce" to mean "only those workers actually involved in the 'flow' of commerce"); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) (quoting *Albert v. Nat'l Cash Register Co.*, 874 F. Supp. 1324, 1327 (S.D. Fla. 1994), as saying that it "is quite impossible to apply a broad meaning to the term 'commerce' in Section 1 and not rob the rest of the exclusion clause of all significance").

11. See *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999), cert. granted, 120 S. Ct. 2004 (2000).

12. *Id.*; see also discussion *infra* notes 86-92.

13. 415 U.S. 36 (1974).

tively waive his right to a judicial forum for the enforcement of Title VII claims by agreeing to a mandatory arbitration provision in a collective bargaining agreement.¹⁴ Instead, the Court narrowly held that “there can be no prospective waiver of an employee’s rights under Title VII.”¹⁵

Working from this ruling, circuit courts unanimously held that employers could not preclude employees from bringing their Title VII claims to a judicial forum through *any* pre-dispute arbitration agreement.¹⁶ Almost absolutely, this overwhelming following and the momentum with which it rejected mandatory arbitration agreements was quelled with one urge by the Supreme Court.

Gilmer emphatically ruled that “statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.”¹⁷ Further, in emphasizing the liberal federal policy favoring arbitration, the Court held that “[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”¹⁸ Although directly addressing arbitration of *Gilmer*’s ADEA claim, the Court emphasized that “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”¹⁹ Thus, the Court flatly rejected any insinuation that arbitration was an inferior forum.²⁰ To the contrary, it fully endorsed the use of arbitration for statutory claims where Congress fails to expressly preclude non-judicial resolution. Accordingly, if the *Gardener-Denver* progeny that had so vehemently protected the judicial forum as the sole territory for Title VII judicial resolution was to continue on course, it would have to find that Congress “explicitly preclude[d] arbitration or other nonjudicial resolution of claims.”²¹ This, they could not do.

14. *See id.* at 48-49.

15. *Id.* at 51.

16. *See Swenson v. Mgmt. Recruiters Int’l, Inc.*, 858 F.2d 1304, 1307 (8th Cir. 1988) (holding that an employee was not bound by an arbitration agreement with respect to her Title VII claims because of concern that the arbitral forum is unable to adequately “assist[] victims of discrimination” or to “pay sufficient attention to transcendent public interest in the enforcement of Title VII”), *cert. denied*, 493 U.S. 848 (1989); *Schwartz v. Fla. Bd. of Regents*, 807 F.2d 901, 906 (11th Cir. 1987) (holding, *in dicta*, that *Gardner-Denver* stood for the proposition that “[t]here can be no prospective waiver of an employee’s rights under Title VII”); *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989) (joining *Gardner-Denver* progeny in holding that Title VII claims could not be forced into arbitration), *cert. denied*, 493 U.S. 1045 (1990).

17. 500 U.S. 20, 26 (1991).

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

19. *Id.* at 28 (quoting *Mitsubishi*, 473 U.S. at 637).

20. *See id.* at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989), to reject claims of the inferior nature of arbitration that “‘res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,’ and as such, [] are ‘far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes’”).

21. *Id.* at 29.

B. ABRUPT CHANGE IN CIRCUIT TREATMENT OF MANDATORY TITLE VII ARBITRATION FOLLOWING *GILMER*

Building on the *Gilmer* ADEA decision, this Section addresses circuit changes in the treatment of Title VII arbitrability. Like the other circuits mentioned, the Fifth Circuit initially followed *Gardner-Denver's* seeming pronouncement on pre-dispute waivers. This remained its prevailing view until *Alford v. Dean Witter Reynolds, Inc.*,²² was vacated by the Supreme Court for reconsideration in light of *Gilmer*. On remand, the Fifth Circuit became the first court to conclude that Title VII claims are subject to compulsory arbitration under the FAA.²³ This decision marked the complete retreat from decisions rendering arbitration as inferior to judicial resolution and delineated the onset of an apparent embracing of the arbitral forum as an adequate avenue for dispute resolution of Title VII claims.²⁴

In *Seus v. John Nuveen & Co.*,²⁵ the Third Circuit analyzed several gaps left by *Gilmer* in hopes of resolving questions of Title VII arbitrability. Filing an amicus brief in support of the plaintiff's position, the EEOC argued that an exception to the FAA's liberal policy favoring arbitration was carved out by Congress in the Title VII context.²⁶ Rejecting this argument, the Court instead held that: "[b]ecause Title VII and the ADEA 'are similar in their aims and substantive provisions,' we find Title VII entirely compatible with applying the FAA to agreements to arbitrate Title VII claims."²⁷

The Court specifically focused on Section 118 of the Civil Rights Act of 1991, providing, "[w]here appropriate and to the extent authorized by law, the use of alternative dispute resolution including . . . arbitration, is encouraged to resolve disputes arising under [Title VII and the ADEA]."²⁸ It interpreted this to "evinced [] a clear Congressional intent to encourage arbitration of Title VII and ADEA claims, not to preclude

22. 905 F.2d 104 (5th Cir. 1990).

23. See *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991).

24. See *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 307 (6th Cir. 1991) (finding "*Gilmer* to be dispositive of every argument presented by the Plaintiff and the EEOC," and granting the defendant's motion to compel arbitration of Plaintiff's Title VII claims subsequent to a Securities Registration Form U-4); *Koveleski v. SBC Capital Markets, Inc.*, 167 F.3d 361, 365 (7th Cir. 1999), cert. denied, 528 U.S. 811 (1999); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487-88 (10th Cir. 1994) (holding that Title VII claims are subject to mandatory arbitration because of the substantive similarities between ADEA under *Gilmer* and Title VII, and the "strong federal policy encouraging the expeditious and inexpensive resolution of disputes through arbitration"); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997); *Desiderio v. Nat'l Assoc. of Sec. Dealers, Inc.* 191 F.3d 198, 205 (2d Cir. 1999) ("Compulsory arbitration does not defeat the right to compensatory and punitive damages, or fee shifting because an arbitrator is also empowered to grant this kind of relief.").

25. 146 F.3d 175 (3d Cir. 1998), cert. denied, 525 U.S. 1139 (1999).

26. See *id.* at 178.

27. *Id.* at 182 (citations omitted).

28. *Id.* (quoting Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071 (1991) (reprinted in notes to 42 U.S.C. § 1981)).

such arbitration.”²⁹ Further, it focused on the Report of the House Committee on the Judiciary to explain §118:

This section “encourages” the voluntary use of conciliation, mediation, arbitration, and other methods of resolving disputes under Civil Rights laws governing employment discrimination. We agree that voluntary mediation and arbitration are far preferable to prolonged litigation for resolving employment discrimination claims . . . We recognize that mediation and arbitration, knowingly and voluntarily undertaken, are the preferred methods of settlement of employment discrimination disputes.³⁰

These references, combined with the fact that the Civil Rights Act of 1991 was passed six months after *Gilmer*, led the *Seus* Court to join other circuits in accepting arbitration.³¹ The Court did, however, mimic *Gilmer* in ensuring that the waiving of one’s right to a judicial forum did not likewise render Title VII’s substantive relief invalid. “[B]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.”³² That said, the court also followed *Gilmer* in limiting Title VII’s reach to “vindication.” “[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”³³

Although initially less willing to interpret *Gilmer* broadly in *Cole v. Burns Int’l Sec. Servs.*,³⁴ stating, “obviously, *Gilmer* cannot be read as holding that an arbitration agreement is enforceable no matter what rights it waives or what burdens it imposes,”³⁵ the D.C. Circuit nevertheless recognized it as binding authority.³⁶

29. *Id.* at 182.

30. *See id.* at 183 (quoting H.R. REP. No. 102-40, pt. 2, at 78 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 764).

31. *See Seus v. John Nuveer & Co.*, 146 F.3d 175, 180 (3d Cir. 1998).

32. *Id.* at 180 (quoting *Gilmer*, 500 U.S. at 26).

33. *Id.* (quoting *Gilmer*, 500 U.S. at 28).

34. 105 F.3d 1465 (D.C. Cir. 1997).

35. *Id.* at 1482; *see also* Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, U. ILL. L. REV. 635, 644 (1995) (commenting that “[t]he Supreme Court in the *Gilmer* case did not hold that any sort of arbitration procedure before any manner of arbitrator would be fundamentally satisfactory in the adjudication of public rights”); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (holding “[T]here can be no prospective waiver of an employee’s rights under Title VII . . . Title VII strictures are absolute and represent a congressional command that each employee be free from discriminatory practices”); *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 584 (6th Cir. 1995) (finding that: “[i]t is the general rule in this circuit that an employee may not prospectively waive his or her rights under either Title VII or the ADEA.”); *Kendal v. Watkins*, 998 F.2d 848, 851 (10th Cir. 1993) (discussing that an individual cannot prospectively waive an employee’s rights under Title VII), *cert. denied*, 510 U.S. 1120 (1994).

36. *See id.* at 1489 (LeCraft Henderson, J., concurring in part and dissenting in part) (finding that, “owing to its impropriety, is the majority’s statement that ‘it is perhaps misguided to mourn the Supreme Court’s endorsement of the arbitration of complex and important public law claims.’ It is more than misguided—it is wrong. We are not in the business of lamenting or celebrating decisions of the United States Supreme Court. We are to follow them. Period.”) (citations omitted).

The First Circuit in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, likewise found that "Title VII of the Civil Rights Act of 1964, as amended by the 1991 CRA, does not, as a matter of law, prohibit pre-dispute arbitration agreements."³⁷

Rosenberg looked at the purposes of Title VII and the Civil Rights Act and found "no conflict between the language or purpose of Title VII, as amended, and arbitration."³⁸

C. DUFFIELD REJECTS THE HOLDING OF OTHER CIRCUITS BY EMPHASIZING THE LEGISLATIVE HISTORY TO TITLE VII

Those opposing mandatory arbitration of Title VII claims admittedly recognize *Gilmer* as binding. Nevertheless, they focus on specific statutory language authorizing arbitration under the Civil Rights Act only "where appropriate and to the extent authorized by law."³⁹ For example, "to the extent authorized by law" is interpreted by the Ninth Circuit as referring to the law existing *prior* to *Gilmer*. They argue that congressional intent to preclude mandatory arbitration of Title VII claims thus exists.⁴⁰

Duffield v. Robertson Stephens & Co. sidesteps *Gilmer*.⁴¹ It interprets this "authorized by law" language as "a polite bow to the popularity of 'alternate dispute resolution,'" in the midst of the Civil Rights Act's "significant enlargement of substantive and procedural rights of victims of employment discrimination."⁴² The court emphasized the need to look at the statute and its purpose as a whole, rather than as a single dissected sentence.⁴³ To that end, it found the uniform purposes of the act in expanding employees' rights and in increasing individual remedies warranted an interpretation of the statute as only mildly supporting arbitration: "It seems far more plausible that Congress meant to encourage voluntary agreements to arbitrate—agreements such as those that employers and employees enter into *after* a dispute has arisen because both parties consider arbitration to be a more satisfactory or expeditious method of resolving the disagreement."⁴⁴

37. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* 170 F.3d 1, 7 (1st Cir. 1999).

38. *Id.* at 8.

39. Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071 (1991).

40. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1188 (9th Cir.), *cert. denied*, 525 U.S. 982 (1998).

41. *Id.*

42. *Id.* at 1191 (quoting Chief Judge Posner in *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir.), *cert. denied*, 522 U.S. 912 (1997)).

43. See *id.* at 1193 (finding "[w]hen 'examining the language of the governing statute,' we must not be guided by 'a single sentence or member of a sentence, but look [] to the provisions of the whole law, and to its object and policy.'" (quoting *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 94-95 (1993)); *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (holding that civil rights statutes should be construed broadly); H.R. REP. No. 102-40, pt. 1, at 88 (1991) (directing courts "that when the statutory terms in [Title VII] are susceptible to alternative interpretations, the courts are to select the construction which most effectively advances the underlying congressional purpose").

44. *Duffield*, 144 F.3d at 1193 (emphasis added).

Thus, even though the Civil Rights Act was enacted six months after *Gilmer*, the court looked to the law at the time Congress drafted §118 in concluding that compulsory pre-dispute agreements to arbitrate Title VII claims were unenforceable, as a matter of law.⁴⁵

As further support for rejecting *Gilmer* as to Title VII, the court examined the House Committee on Education and Labor's H.R. 1 report, the bill that became the Civil Rights Act of 1991, stating:

The Committee emphasizes . . . that *the use of alternative dispute 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 collective bargaining or in an employment contract, *does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in Alexander v. Gardner-Denver Co., . . .* The Committee does not intend this section to be used to preclude rights and remedies that would otherwise be available.⁴⁶

This legislative history focusing on the need to “supplement” rather than “supplant” Title VII remedies, combined with the rejection of a Republican proposal that would have allowed employers to enforce “compulsory arbitration” agreements, led *Duffield* to conclude that Congress envisioned only voluntary *post-dispute* arbitration agreements.⁴⁷ It also found persuasive statements made by congressmen in the floor debates favoring arbitration “where parties knowingly and voluntarily elect to use those methods.”⁴⁸ Accordingly, the court became the first circuit to hold that Congress intended to preclude compulsory arbitration of Title VII claims.⁴⁹ The following Section rejects *Duffield's* reasoning by emphasizing its inconsistency with Supreme Court precedent.

D. THE LIKELY FUTURE OF COMPULSORY TITLE VII ARBITRATION IN INDIVIDUAL CONTRACTS SIGNED AS A CONDITION OF EMPLOYMENT

Duffield and the district courts that follow it undisputedly look to the

45. *See id.* at 1194 (quoting *Thompson v. Thompson*, 484 U.S. 174, 180 (1988), as stating “we should ‘examine initially’ the statute ‘with an eye toward determining Congress’ perception of the law that it was shaping or reshaping’”).

46. *Id.* at 1196 (quoting H.R. REP. NO. 102-40, pt. 1, at 97 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 642) (second emphasis added).

47. *Id.* at 1196 (holding that “[t]his part of the committee report also eliminates any possibility that § 118 was in any way a product of legislative compromise that was not meant to advance the overall purposes of the Act”).

48. 137 CONG. REC. S15,472-01, S15,478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole); *see also* 137 CONG. REC. H9505-01, H9530 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards) (stating that “[t]his section contemplates the use of voluntary arbitration to resolve specific disputes after they have arisen, not coercive attempts to force employees in advance to forego statutory rights. No approval whatsoever is intended of the Supreme Court’s recent decision in *Gilmer* . . . , or any application or extension of it to Title VII.”).

49. *See Duffield*, 144 F.3d at 1199.

context, the language, and the legislative history of Title VII.⁵⁰ In finding that Congress did not intend to prohibit pre-dispute arbitration agreements, the rest of the circuits look instead to the express purposes of Title VII and the specific language of the statute itself.⁵¹ Rather than weighing committee member support and rejection of pre-dispute waivers, the question should be whether the goals of the Civil Rights Act conflict with arbitration of Title VII claims?⁵²

The Act has at its core the twin goals of restoring civil rights laws by overruling a series of 1989 Supreme Court decisions restricting the reading of Title VII and strengthening Title VII by making it easier for individuals to bring, sustain, and receive full remedial measures on a Title VII cause of action.⁵³ Plainly, opponents of arbitration never show how the arbitral forum conflicts with these stated goals.⁵⁴ This fatal flaw will likely lead the Supreme Court to extend *Gilmer* to the Title VII context.

Reliance on the statements of congressional members and the H.R. 1 bill is misplaced. The Senate substitute to the 1991 bill originally introduced in the House expressly omitted any explicit retroactivity provisions to *Gardner-Denver* or to any "Republican substitute."⁵⁵ Further, in addressing retroactivity under section 102 of the 1991 Civil Rights Act, the Supreme Court held that statements made on the floor of Congress, as well as rejected drafts, do not explain ambiguous statutory language and thus, cannot be used as definitive evidence of congressional intent.⁵⁶ Moreover, the evidence produced from the floor and committees is partisan at best. Commentary noted by *Duffield* told half of the story.⁵⁷ Additional statements by members of Congress express the view that the Civil Rights Act does not preclude arbitration.⁵⁸ Opponents of arbitra-

50. *Id.*

51. See *Rosenberg v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 8 (1st Cir. 1999).

52. See *Gilmer*, 500 U.S. at 27 (holding that the remaining question is whether "compulsory arbitration of [Title VII] claims pursuant to arbitration agreements would be inconsistent with the statutory framework and purposes of" Title VII).

53. See H.R. REP. No. 102-40, pt. 2, at 78 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 694-696); David Sherwyn, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 104 (Spring 1999).

54. See *Rosenberg*, 170 F.3d at 11 (looking to the plain meaning of the statute, and holding that "neither the language of the statute nor the legislative history demonstrate[] an intent in the 1991 CRA to preclude pre-dispute arbitration agreements").

55. Sherwyn, *supra* note 53, at 105-06 (finding that history of the 1991 Act conveys the impression that legislators agreed to disagree about whether and to what extent the Act would apply to preenactment conduct") (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 262 (1994)).

56. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 262-263 (1994).

57. See *Duffield*, 144 F.3d at 1197 (collecting Congress member's statements concerning the arbitrability of Title VII claims).

58. See 137 CONG. REC. S15,472-01, S15,478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole) (discussing that "[t]his provision encourages the use of alternative means of dispute resolution, including binding arbitration, where parties knowingly and voluntarily elect to use these methods. In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums."); 137 CONG. REC. H9505-01, H9548 (daily ed. Nov. 7,

tion focus on the second half of the committee report section dealing with "Alternative Means of Dispute Resolution" (both from the Education & Labor Committee and from the Judiciary Committee): "The Committee emphasizes, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII."⁵⁹ Proponents, on the other hand, emphasize the first half of these same sections: "Section 216 encourages the use of alternative means of dispute resolution to resolve disputes arising under Title VII of the Civil Rights Act."⁶⁰ Recognizably, when this gray cloud of preliminary statements and proposals passes, the remedial and deterrent functions of the Civil Rights Act remain.⁶¹

As far as the future of binding precedent, the best case scenario would allow the Supreme Court to address a Title VII case dealing with an employment arbitration contract *not* found in a securities industry application.⁶² While the Supreme Court will likely allow this gap to remain longer than the legal community would prefer, the overwhelming precedent, the express language of the statute, and *Gilmer*, demonstrate a willingness to support Title VII arbitration. As evidence of its powerful hold, attempts at the congressional level to quell the current trend toward arbitration have repeatedly failed.⁶³

In the interim, *Duffield* stands as binding precedent in the Ninth Circuit—"unless and until the day comes, *Duffield* is the law of the Ninth

1991) (statement of Rep. Hyde) (stating that "[t]his provision encourages the use of alternative means of dispute resolution . . . there is no reason to disfavor the use of such forums. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)").

59. H.R. REP. No. 120-40, pt. 1, at 97 (1991).

60. *Id.*

61. See *Gilmer*, 500 U.S. at 28 ("[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 637 (1985)); *Rosenberg*, 170 F.3d at 11 (finding that "[t]he district court's comment that an endorsement of arbitration would be at odds with the 1991 CRA's creation of a right to a jury trial . . . similarly ignores *Gilmer's* endorsement of arbitration under the ADEA—which also provides for jury trials," and that "[w]hile people may and do reasonably disagree about whether pre-dispute arbitration agreements are a wise way of resolving discrimination claims, there is no 'inherent conflict' between the goals of Title VII and the goals of the FAA, as *Gilmer* used that phrase") (quoting *Gilmer*, 500 U.S. at 26) (likewise quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987)).

62. See *Sheller v. Frank's Nursery & Crafts, Inc.*, 957 F. Supp. 150, 152 (N.D. Ill. 1997) (requiring a minor who signed a mandatory arbitration employment agreement to arbitrate her Title VII claims).

63. See 145 CONG. REC. S5155-05, S5158 (daily ed. May 12, 1999) (statement of Sen. Feingold) (introducing the "Civil Rights Procedures Protection Act of 1999," an amendment to "certain civil rights statutes to prevent the involuntary application of arbitration to claims that arise from unlawful employment discrimination"); 145 CONG. REC. E287-01, E287 (daily ed. Feb. 25, 1999) (statement of Rep. Markey) (remarking that "[m]andatory arbitration of civil rights is wrong even if the arbitration process is balanced . . . [b]ut, too often, it has a semblance of impartiality"); S. 121, 106th Cong. (1999) (introducing the "Civil Rights Procedures Protection Act of 1999"); 145 CONG. REC. S550-01, S550 (daily ed. Jan. 19, 1999) (statement of Sen. Feingold) (marking the fourth successive Congress where this legislation has been introduced "[t]o address the growing incidents of compulsory arbitration").

Circuit.”⁶⁴ As evidence of this strength, *EEOC v. Luce Forward, Hamilton & Scripps, L.L.P.*, is instructive.⁶⁵ There, a legal secretary refusing to sign an arbitration agreement as a condition of employment was denied the job opportunities.⁶⁶ The EEOC, on her behalf and individually, brought suit. While finding the applicant secretary barred on res judicata grounds by a previous state suit, the court allowed the EEOC’s injunctive suit to go forward.⁶⁷ In a far-reaching grasp, a California District Court fully and permanently enjoined the law firm at issue from attempting to execute agreements to arbitrate Title VII claims.⁶⁸ This bold restriction confines individual ability to contract and disregards both the FAA and Supreme Court precedent. The case substantiates the present gulf amongst the circuits as to Title VII arbitration clauses. The plea for Supreme Court resolution thus persists.

III. CONVERSELY, *AUSTIN* ALONE UPHOLDS MANDATORY TITLE VII ARBITRATION UNDER COLLECTIVE BARGAINING AGREEMENTS

Altering the scenery by focusing on those arrangements bargained for by a collective agent, a union, rather than an individual, is interpreted by every circuit but one to “make[] all the difference.”⁶⁹ This portion of the Comment takes a critical look at inconsistencies present in this majority stance.

As discussed in the previous section, *Gilmer* arguably closed the chasm created by *Gardner-Denver’s* ban on mandatory Title VII arbitration agreements agreed to by an individual. For all its worth with regard to individual agreements, *Gilmer* judicially constructed a gap as to mandatory arbitration agreements found in a collective bargaining agreement (“CBA”).⁷⁰ At least on the surface, response by the circuits to this newly created chasm, as in the individual context, created one lone dissenter—the Fourth Circuit.⁷¹ The Fourth Circuit, in *Austin v. Owens-Brockway Glass Container, Inc.*, looked to the federal favoring of arbitra-

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

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. See *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 886 (4th Cir.), *cert. denied*, 519 U.S. 980 (1996) (Hall, J., dissenting).

70. See Michael B. Kass, *Wright v. Universal Maritime Serv. Corp.*, 14 OHIO ST. J. ON DISP. RESOL. 945 (1999) (stating that “[p]robably one of the most controversial topics in the fields of labor law and alternative dispute resolution of whether it should be permissible for a union to waive an employee’s right to have statutory rights enforced in a judicial forum”).

71. See Robert B. Fitzpatrick, *Is Wright v. Universal Maritime Serv. Corp. the Death Knell for Alexander v. Gardner-Denver?*, SD34 A.L.I.-A.B.A. CONTINUING LEGAL ED. 53, 62 (1998) (commenting that the majority of the cases involving mandatory CBA arbitration arrangements “have chosen to follow *Gardner-Denver* and distinguish *Austin* on its facts”).

tion of labor disputes,⁷² *Gilmer's* acceptance of arbitration as an alternative rather than an inferior forum,⁷³ and the similarity between a union and an individual,⁷⁴ to reject *Gardner-Denver's* absolute ban on prospective waivers of a judicial forum in Title VII claims governed by a CBA. This created a rift in the circuits.⁷⁵ In response to this rift, many hoped the Supreme Court would maneuver precedent a bit by accepting certiorari for *Wright v. Universal Maritime Service Corp.*⁷⁶ *Wright* neither overruled *Gardner-Denver's* holding that CBAs cannot prospectively waive an individual's right to a judicial forum, nor dismantled *Austin's* holding that they can.⁷⁷ Thus, the rift enlarged.

Bearing in mind that before *Gilmer*, every circuit adamantly denied individual waivers of Title VII rights to a judicial forum,⁷⁸ and recalling that after *Gilmer*, every circuit but one steadfastly embraced the notion as to individual contracts of employment,⁷⁹ Part II disagrees with the majority—agreements to arbitrate under CBAs should be treated no differently than arrangements under individual contracts. As arsenal to combat the majority, this Part critically analyzes *Gilmer's* three reasons for distinguishing the *Gardner-Denver* line of cases:⁸⁰ (1) those cases were not

72. 78 F.3d at 879 (quoting *Adkins v. Times-World Corp.*, 771 F.2d 829, 831 (4th Cir. 1985), cert. denied, 474 U.S. 1109 (1986), as demonstrating the "well-recognized policy of federal labor law favoring arbitration of labor disputes.").

73. See *id.* at 880 (quoting *Gilmer*, 500 U.S. at 26) ("[H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." (quoting *Mitsubishi*, 473 U.S. at 628)).

74. See *id.* at 885 (stating that "[t]here is no reason to distinguish between a union bargaining away the right to strike and a union bargaining for the right to arbitrate").

75. See *Mooring-Brown v. Bear, Stearns & Co.*, 81 Fair Empl. Prac. Cas. (BNA) 1488 (S.D.N.Y. 2000) (recognizing the split and commenting that *Austin's* failure to follow *Gardner-Denver* was something "which in our view circuit courts are not free to do").

76. 525 U.S. 70 (1998).

77. See Jacob E. Tyler, *Mandatory Arbitration of Discrimination Claims Under Collective Bargaining Agreements: The Effect Of Wright*, 4 HARV. NEGOT. L. REV. 253 (1999) (commenting that "the Court expressly left aside the question of whether a 'clear and unmistakable waiver' of a judicial forum for statutory discrimination claims in favor of arbitration would be enforced."); Harvey R. Boller & Donald J. Peterson, *Mandatory Arbitration Clauses*, DISP. RESOL. J., February, 1999, at 58 (assessing *Wright*, and commenting that "the most obvious and immediate reaction is one of frustration, because the important question of whether *Gilmer* did, in fact, overrule *Gardner-Denver* remains unresolved," and that "the Supreme Court will eventually be required to resolve the issue it managed to avoid in *Wright*").

78. See *supra* note 16. The same situation is seen under CBAs. Examples of case law following the majority by foreclosing the ability to prospectively waive rights to a judicial forum include: *Penny v. United Parcel Serv.*, 128 F.3d 408, 413 (6th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 362 (7th Cir.), cert. denied, 522 U.S. 512 (1997); *Doyle v. Raley's Inc.*, 158 F.3d 1012, 1015 (9th Cir. 1998); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1453 (10th Cir. 1997), cert. granted and judgment vacated on other grounds, 524 U.S. 947 (1998); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526 (11th Cir. 1997). Those in the minority, refusing the preclude arbitration under a CBA include: *Austin*, 78 F.3d at 885; *c.f. Martin v. Dana Corp.*, 114 F.3d 421, *rev'd en banc*, 135 F.3d 765 (3d Cir. 1997) (initially following *Austin's* reasoning, but later reversing).

79. See discussion, *supra* note 24.

80. In referring to the *Gardner-Denver* line of cases, authors direct attention to: *Alexander*, 415 U.S. at 49 (holding that an employee does not forfeit his right to a judicial forum for adjudication of his Title VII claim after first exhausting administrative grievance

decided under the FAA, which reflects a liberal policy favoring arbitration agreements, (2) arbitration in those cases involved the enforceability of agreements to arbitrate statutory rights as opposed to contractual rights under a labor contract, and (3) because the arbitration in those cases occurred in the context of a CBA where claimants were represented by the union, an important tension between collective representation and individual, statutory rights exists.⁸¹ One-by-one, each of these arguments fails in the context of *Gilmer*, *Wright*, and the modern union. Once removed, the arbitration arena easily houses both individual agreements and CBA arrangements.

A. THE CURRENT SETTING: A FEDERAL FAVORING OF
ARBITRATION—BOTH UNDER THE FAA AND UNDER THE LMRA SETS
THE STAGE FOR ACCEPTANCE OF CBA WAIVERS

Gilmer recognized that the FAA was reenacted and codified in 1947 to reverse a long-standing judicial hostility toward arbitration.⁸² Further, in listing other statutory situations where arbitration was enforced, it reiterated that “[i]t is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.”⁸³ Moreover, proposed legislation within Congress,⁸⁴ as well as case law interpreting existing statutes manifest a continued celebration of arbitration as the wave of the future. Thus, *Gilmer*, and Congress dispositively embrace

processes under a CBA); *McDonald v. West Branch*, 466 U.S. 284 (1984) (finding no preclusive effect on a 42 U.S.C. § 1983 claim where the CBA contained a general provision requiring arbitration); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (holding that a CBA did not preclude claimant from bringing his Fair Labor Standards Act, 29 U.S.C. § 201 claim to a judicial forum, as the rights stems from a statutory allowance, not contractual).

81. See *Gilmer*, 500 U.S. at 34.

82. See *id.* at 22.

83. See *id.* at 24 (discussing the history of enforcing arbitration of claims arising under the Sherman Act, 15 U.S.C. §§ 1-7; §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(b); the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961; and §12(2) of the Securities Act of 1933, 15 U.S.C. § 771(2)).

84. See 143 CONG. REC. S8674-01 (daily ed. Sept. 2, 1997) (statement of Sen. Jeffords) (presenting Senate Resolution 117, celebrating the Federal Mediation and Conciliation Services (FMCS) for fifty years of expert arbitration service and interpretation of collective bargaining agreements); 144 CONG. REC. H4953-02 (statement of Rep. Bonior) (presenting a bill, H.R. 2848, the Labor Relations First contract Negotiations Act to allow employees to organize and bargain collectively for living standards and calling for arbitration under CBA disputes); 144 CONG. REC. H1445-03 (daily ed. Mar. 24, 1998) (statement of Rep. Lafalce) (presenting H.R. 2578 Amendment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 allowing for arbitration under a CBA as to financial disputes); 144 CONG. REC. S9426-02 (daily ed. July 30, 1998) (statement of Sen. Grassley) (presenting the Family Investment and Rural Saving Tax Act in an effort to improve the NLRA and expand remedies available for wrongfully discharged employees under required arbitration pursuant to a CBA); 145 CONG. REC. S2841-02 (daily ed. Mar. 17, 1999) (statement of Sen. Bingaman) (presenting S. 638, Safe School Security Act, expanding remedies available to the NLRB through arbitration under a CBA); 145 CONG. REC. H9523-01 (daily ed. Oct. 7, 1999) (H.R. 2723, Bipartisan Consensus Managed Care Improvement Act of 1999, authorizing the establishment and maintenance pursuant to a CBA procedures for ERISA disputes to be resolved through arbitration).

arbitration of statutory claims under the FAA. As demonstrated in Part I, every circuit but the Ninth, follows this mandate as to individual employment contracts signed as a condition of employment.⁸⁵ What then, is the difficulty when the arbitration arrangement is governed by a CBA?

It would be easiest to say, as several courts and commentators have, that the differences lie in the governing law: individual contracts of employment fall under the FAA and are not excluded under Section 1 as "contracts of employment,"⁸⁶ but CBAs trap themselves squarely into the Section 1 exclusion as "contracts of employment" and are thus governed by the Labor Management Relations Act ("LMRA"), the Railway Labor Act ("RLA"), or some other specialized labor statute. As the argument goes, *labor* arbitrators are confined to effectuating the intent of the parties as expressed in the CBA and have no general authority to invoke public laws, whereas the *commercial* arbitrator provides a forum for the vindication of public law rights.⁸⁷ Thus, *Gardner-Denver* would govern CBAs, while *Gilmer* would control individual agreements. The snarl in this reasoning is that the majority of commentators note that the FAA governs CBAs, unless they involve transportation or work directly in interstate commerce.⁸⁸ Accordingly, the distinction rests on the line of work, not the contract.

Still persuasive, is the argument taken by *Austin*—any distinction between the FAA and the LMRA is false, especially given that *Gilmer* found a non-negotiable, adhesion registration form containing the arbitration provision was *not* a contract for employment excluded from the FAA.⁸⁹ This argument has merit. If there is a federal favoring of arbitra-

85. See *supra* note 24.

86. See *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1454 (10th Cir. 1995) (stating that we have "previously concluded that [FAA exclusion] encompasses collective bargaining agreements, and have thus held the FAA 'is generally inapplicable to labor arbitration.'" (quoting *United Food & Commercial Workers, Local Union No. 7R v. Safeway Stores, Inc.*, 889 F.2d 940, 944 (10th Cir. 1989)); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 311 (6th Cir. 1991) (holding that "this court has held that collective bargaining agreements are 'contracts of employment' and therefore outside the scope of the FAA"); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 525 (11th Cir. 1997) (noting that "the Supreme Court has yet to address arbitration clauses in collective bargaining agreements in light of *Gilmer*" with reference to whether they fall under the FAA exception, and noting the split in the circuits, but finding the CBA at issue indistinguishable from *Gardner-Denver*); *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1088 (9th Cir. 1999).

87. See *Harrison*, 112 F.3d at 1453-54.

88. See William H. Daughtrey, Jr. & Donnie L. Kidd, Jr., *Modifications Necessary for Commercial Arbitration Law to Protect Statutory Rights Against Discrimination in Employment: A Discussion and Proposals for Change*, 14 OHIO ST. J. ON DISP. RESOL. 29, 67 (1998) (stating that "[a]lthough the interpretation of section 1 has garnered a number of constructions, the general consensus is that the section is limited to employment contracts involving those who work directly in interstate commerce"); *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997) (finding the Supreme Court's citing with apparent approval a Seventh Circuit opinion limiting exclusion of employment contracts in section 1 to workers engaged in physical movement of goods in interstate or foreign commerce as evidence of their holding).

89. See *Austin*, 78 F.3d at 883 n.2 (stating that "although we do not rely on the FAA in this case, we do rely on the federal labor law policy encouraging arbitration of labor disputes as expressed in the *Steelworkers Trilogy*"); Pub. L. No. 80-101, 61 Stat. 136 (1947)

tion, as evidenced by the current ability of *labor* arbitrators to adjudicate other protected rights falling under CBAs,⁹⁰ there should be no distinction between commercial arbitrators and labor arbitrators.⁹¹ In fact, nowhere in Title VII history is there a discrimination between those alternative methods of adjudication "authorized by law" in individual contracts and those in CBAs.⁹² Simply, the FAA/LMRA distinction cannot decide this controversy.

Despite this apparent conflict amongst the circuits as to the applicability of the FAA, the Supreme Court in *Wright* declined to consider FAA applicability under the "circumstances."⁹³ The "circumstances" likely refer to the failure of the Respondents to argue the FAA applicability issue, largely due to strong Fourth Circuit precedent opposing FAA applicability to CBAs.⁹⁴ Given that *Wright* was a longshoreman who surely engaged in interstate commerce and transportation, the issue, if argued, would probably have fallen within the Section 1 exclusion anyway.⁹⁵

(codified as amended in scattered sections of 29 U.S.C.) (LMRA codified and interpreted with the principal rationale that arbitrators are in a better position than courts to interpret the terms of a CBA).

90. See *Martin v. Shaw's Supermarkets, Inc.*, 105 F.3d 40,43 (1st Cir. 1997), *cert. denied*, 522 U.S. 818 (1997) (precluding former employee from bringing her failure to rehire/retaliation claim to a judicial forum where statutes expressly withhold protection where it would be "inconsistent with labor agreements"); *Lancaster v. Air Line Pilots Ass'n Int'l.*, 76 F.3d 1509 (10th Cir. 1996) (finding, under terms of the CBA, that arbitrator had jurisdiction to decide discharged nonunion pilot's challenge to validity of sympathy strike assessment after termination); *Kerr-McGee Chem. Corp. v. United Steelworkers of Am. Local No. 15258*, 800 F. Supp. 1405 (N.D. Miss.) (holding that arbitration award resulting in reinstatement of employees who tested positive for drug use drew its essence from its governing CBA and was thus enforceable and granted due process rights to employees), *aff'd*, 988 F.2d 1214 (1992); *U.S. Dept. of Interior v. Federal Labor Relations Auth.*, 1 F.3d 1059 (10th Cir. 1993) (upholding decision of FLRA that arbitrator's determination that Bureau of Reclamation acted unlawfully in unilaterally terminating pay practice required by CBA between Bureau and union, and finding that it was not subject to judicial review). *But see Felt v. Atchison, Topeka & Santa Fe Ry. Co.*, 60 F.3d 1416, 1419 (9th Cir. 1995) (prohibiting a prospective waiver of Title VII judicial forum rights under the Railway Labor Act).

91. *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368 (1974), extended the presumption of arbitrability to the question of whether a strike was statutorily protected. Even though there was no no-strike clause in the CBA, the Court recognized this as inherent in the agreement. This illustrates the extent of the presumption of arbitration, even under the LMRA.

92. Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071 (1991); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997) (stating that "[n]othing in the Family and Medical Leave Act suggests that congress wished to exempt disputes arising under it from the coverage of the FAA.>").

93. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 78 (1998).

94. *See id.*

95. *See Pryner*, 109 F.3d at 357 (commenting on Professor Finkin's prevailing view acknowledging that the impetus for the FAA Section 1 exclusion came entirely from the seafarers union, concerned that arbitrators would be less favorably inclined toward seamen's claims than judges, in part because of a tradition that seamen were "wards in admiralty, in part because of peculiarities of maritime law that would make it easy to slip an arbitration clause into a maritime employment contract without the seaman's noticing it, and in part because the maritime employment relation was already heavily regulated by federal law."). The fact that the seafarer's union was the impetus behind the FAA exclusion lends support to *Wright's* claims falling neatly into this exclusion. Thus, it was probably wise for the Supreme Court to add to the confusion by addressing FAA applicability in this clear cut case, especially when the issue was not argued.

Nevertheless, the explicit failure of the Supreme Court to address this conflict is noteworthy. If it were clearly inapplicable, the “circumstances” would not matter. Regardless, the first distinction raised by *Gilmer* renders the *Gardner-Denver* differentiation unsatisfying because, as set forth above, Title VII makes no distinction. FAA applicability likely turns on job construction rather than contract formation, and the federal favoring of arbitration prevails under the LMRA as well as the FAA.

B. THE APPARENT WILLINGNESS OF THE SUPREME COURT TO RECOGNIZE “CLEAR AND UNMISTAKABLE” WAIVERS IN CBAS DESPITE *GARDNER-DENVER*’S PROHIBITION LIKELY CONTEMPLATES A CBA ABILITY TO WAIVE TITLE VII’S JUDICIAL FORUM GRANT

Looking to Supreme Court precedent for an argument differentiating CBAs from individual agreements leads to frustration. *Gardner-Denver*’s unstable foundation admittedly recognizes a federal policy favoring arbitration of *labor* disputes.⁹⁶ Further, it reiterates the congressional policy embodied in the LMRA to “promote industrial peace and that the grievance-arbitration provision of a collective agreement was a major factor in achieving this goal.”⁹⁷ Nevertheless, even in this case where the Plaintiff had first fully utilized the arbitration mechanism found within his CBA, judicial efficiency and the federal favoring of arbitration was not enough to overcome the tension between contractual and statutory objectives.⁹⁸ As discussed, the stress results from the labor arbitrators’ apparent ability to resolve only contractual rather than statutory rights.

For all of its worth to *Gardner-Denver* and its progeny,⁹⁹ the distinction between contractual and statutory rights was of so little importance post-*Gilmer* that it raised its head only in a footnote in *Livadas v. Bradshaw*, a National Labor Relations Act case allowing a former employee to bring her §1983 claim to the judicial forum—largely because the statute evinced no other remedy in its history.¹⁰⁰ Footnote 21 reads:

Gilmer distinguished *Gardner-Denver* as relying, inter alia, on: the ‘distinctly separate nature of . . . contractual and statutory rights’ (even when both were ‘violated as a result of the same factual occurrence’), the fact that a labor ‘arbitrator has authority to resolve only questions of contractual rights’, and the concern that in collective-bargaining arbitration, ‘the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit.’¹⁰¹

96. See *Gardner-Denver*, 415 U.S. at 45 (citing *The Steelworker’s Trilogy—United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960), *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)).

97. See *Gardner-Denver*, 415 U.S. at n.6.

98. See *id.* at 56.

99. See *supra* note 83.

100. 512 U.S. 107, 126 n.21 (1994).

101. *Id.* (citations omitted)

The deliberate failure to rely on any contractual/statutory distinction effects the Title VII arbitration controversy. The lack of import in Supreme Court precedent arguably strengthens the argument for similar treatment in the CBA context.

In spite of *Gardner-Denver's* strong opposition to prospective waivers of the judicial forum, it stands as Supreme Court precedent. To be sure, *Gardner-Denver* was qualified by *Gilmer* to the extent that it held arbitration as an "inferior" forum.¹⁰² Notwithstanding this qualification, it was not expressly overruled.

The Supreme Court once again failed to elucidate matters in *Wright v. Universal Maritime Service Corp.*¹⁰³ The distinction between individual agreements and CBAs thus underwent further qualification and frustration. "This case presents the question whether a general arbitration clause in a collective-bargaining agreement (CBA) requires an employee to use the arbitration procedure for an alleged violation of the [ADA]."¹⁰⁴ The Court narrowly analyzed the specific CBA in dispute and issued a highly limited decision that found the CBA at issue too general to cover the longshoreman's ADA claim contractually.¹⁰⁵ Although, in a footnote, *Wright* states that "[w]e take no position [] on the effect of this provision in cases where a CBA clearly encompasses employment discrimination claims, or in areas outside collective bargaining," it arguably leaves open the availability of waiver. It analyzes the CBA language, rather than simply holding, as its precedent holds, that there can be no prospective waiver.¹⁰⁶ "[W]e do not find a clear and unmistakable waiver in the Longshore Seniority Plan. Like the CBA itself, the Plan contains no antidiscrimination provision; and specifically limits its grievance procedure to disputes related to the agreement."¹⁰⁷ *Wright* further instructs:

whether or not *Gardner-Denver's* seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer*, *Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA.¹⁰⁸

As noted, most read *Gardner-Denver* as a complete ban on prospective waivers, not as a protection against those "less than explicit" waivers. *Wright's* flexibility with *Gardner-Denver* as precedent manifests a recognition of the existing confusion amongst the circuits.

What then does *Wright* add to the present CBA jurisprudence? The CBA arrangement in *Wright*, which was a general all "[m]atters under dispute" governance, did not preclude an individual from bringing a Title

102. See *Gilmer*, 500 U.S. at 32 n.5.

103. 525 U.S. 70 (1998).

104. *Id.* at 72.

105. See *id.* at 78-79 (holding that the "dispute in the present case, however, ultimately concerns not the application or interpretation of any CBA, but the meaning of a federal statute.").

106. *Id.* at n.2.

107. *Id.*

108. *Id.*

VII claim to a judicial forum.¹⁰⁹ Nonetheless, its holding at least left the door open for the opportunity to include statutory rights, or an exact version, in the CBA.

Further, *Wright* reaffirmed that a union could waive statutory rights “to be free of antiunion discrimination,” but held that “such a waiver must be clear and unmistakable.”¹¹⁰ As stated, this arguably qualifies *Gardner-Denver* and may turn the importance away from FAA governance and onto whether the right claimed by the plaintiff is defined explicitly in the CBA as a contractual issue. Recent case law, however, demonstrates the need for further clarity.

Interestingly, although the Fourth Circuit is the lone dissenter with regard to CBA pre-dispute waivers, it declined the spotlight in *Brown v. Trans World Airlines*, a case preceding *Wright*.¹¹¹ Governed by Railway Labor Act, *Brown* found the plaintiff’s Title VII and FMLA claims outside of the scope of the governing CBA.¹¹² “While it is true that the collective bargaining agreement in this case prohibits conduct similar to that prohibited by Title VII and by the Family and Medical Leave Act, none of the substantive provisions in the agreement reaches beyond the agreement to cover disputes arising under these laws.”¹¹³ This reasoning follows the “clear and unmistakable” mandate of *Wright*, and also ensures that, under normal contract principles, a union does not waive an individual’s right to a judicial forum without notice.

Recognizing the ambiguity inherent in *Wright*, the D.C. Circuit held that even after *Gilmer* and notwithstanding *Wright*, “Gardner-Denver stands as a fire wall between individual statutory rights the Congress intended can be bargained away by the union . . . and those that remain exclusively within the individual’s control.”¹¹⁴ The Circuit thus interpreted *Wright* as leaving *Gardner-Denver* fully intact. It found that absent congressional intent to the contrary, a union cannot “use the employees’ individual statutory right to a judicial forum as a bargaining

109. *Id.*

110. *Id.* (quoting *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), an NLRA case, that “we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is ‘explicitly stated.’ More succinctly, the waiver must be clear and unmistakable.”)

111. 127 F.3d 337 (4th Cir. 1997).

112. *See id.* at 341.

113. *Id.*; *see also* *Carson v. Giant Foods, Inc.* 175 F.3d 325, 331 (4th Cir. 1999) (following *Brown* & *Wright* in finding no “clear and unmistakable” waiver in a general arbitration clause because “[b]road, general language is not sufficient to meet the level of clarity required to affect a waiver in a CBA.”); *Robinson v. HealthTex, Inc.* 215 F.3d 1321 (Table), No. 99-2023, 2000 WL 691053, at *3 (4th Cir. May 30, 2000) (recognizing two ways to determine whether a CBA “clearly and unmistakably” waives the right to litigate statutorily based anti-discrimination claims: (1) intent demonstrated by an explicit arbitration clause drafting; (2) in the case of less clear clauses, employees may be bound if another provision like a non-discrimination clause makes it clear that discrimination statutes are at issue).

114. *Air Line Pilots Ass’n Int’l v. Northwest Airlines, Inc.*, 199 F.3d 477, 484 (D.C. Cir. 1999).

chip to be exchanged for some benefit to the group.”¹¹⁵

In contrast, the Eastern District of New York seized the opportunity created by *Wright* to rule that “a new protocol exists for the analysis of whether Title VII claims are subject to binding arbitration as provided for under collective bargaining agreements.”¹¹⁶ There, the CBA at issue specifically incorporated the statutory prohibition on sexual harassment and expressly charged the arbitrator to resolve disputes over whether that statutory law was breached.¹¹⁷ It was found to meet the “clear and unmistakable” test even though the arbitral proceedings “were expeditious, and perhaps even ‘informal,’ as compared with the typical course of litigation in federal district court.”¹¹⁸ This correctly reads *Wright*. It respects the ability of waiver under the FAA and ensures that an individual who has previously exhausted the arbitral process does not then claim “foul play” in the courts.

Given the federal favoring of arbitration found explicitly in Title VII, the federal favoring of arbitration mandated by the Supreme Court in *Gilmer*, and the “clear and unmistakable” language prescribed in *Wright*, for a CBA to require arbitration of a statutory right, the language must, in the least, fall explicitly under the contract.¹¹⁹ Assuming that the CBA explicitly, clearly, and unmistakably covers the statutory claim brought by the plaintiff, and that, as argued, there is no difference between those contracts covered by the FAA and those covered by the LMRA, precedent may still raise questions as to the inherent conflict of interest between a majoritarian body representing and negotiating an individual’s independent, statutory rights.¹²⁰ The following Section explores this argument.

C. BECAUSE A VOLUNTARY WAIVER OF INDIVIDUAL RIGHTS IS NOT INHERENTLY AT ODDS WITH COLLECTIVE REPRESENTATION BY A UNION, A CBA WAIVER SHOULD BE ENFORCED

As stated in *Livadas*’ footnote 21, *Gardner-Denver*’s concern that “the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit,” may be the tendril that guards against *Gardner-Denver*’s complete collapse.¹²¹ Under *Gardner-Denver*, “[u]nions [have] the power to waive certain collective rights (such as the right to strike) to obtain economic benefits for their mem-

115. *Id.*

116. *Clarke v. UFI, Inc.*, 98 F. Supp. 2d 320, 333 (E.D.N.Y. 2000).

117. *Id.*

118. *Id.* at 335.

119. *See Bratten v. SSI Serv., Inc.*, 187 F.3d 621 (tbl.) (6th Cir. 1999) (joining other courts to recognize that “under a ‘clear and unmistakable’ standard, the ADA and other statutory claims must be expressly recounted in the CBA”); *Albertson’s, Inc. v. United Food and Commercial Workers Union* 157 F.3d 758, 760 (9th Cir. 1997) (finding that an FLSA claim governed by the LMRA was statutory, not contractual), *cert. denied*, 528 U.S. 809 (1999).

120. *See Livadas*, 512 U.S. at 126 n.21.

121. *See id.*

bers.”¹²² Courts and commentators note inherent problems with arbitral resolution of statutory claims under CBAs, including employees’ lack of awareness as to the rights the union is negotiating away, the inability of the employer to compel arbitration at the hands of a union representative, and the underlying conflict in having a majoritarian body protect a worker incapable of protecting himself.¹²³

The concern, as stated in *Pryner v. Tractor Supply Co.*, is that:

We may assume that the union will not engage in actionable discrimination against minority workers. But we may not assume that it will be highly sensitive to their special interests, which are the interests protected by Title VII and the other discrimination statutes, and will seek to vindicate those interests with maximum vigor.¹²⁴

While the parade of horrors presented by those opposing waivers of statutory rights through CBAs admittedly raises concerns,¹²⁵ these fears exist as to individual agreements as well.¹²⁶

What power do individuals signing agreements to arbitrate as a condition of employment wield that a collective bargaining unit does not? Quite plainly, none. To the contrary, safeguards are more prevalent in the union context.¹²⁷ The agreement must clearly and unmistakably waive an individual’s rights (a much higher threshold than *Gilmer’s* affection toward waivers in industry-wide, adhesion contracts),¹²⁸ the majority must vote as to all agreements, the union is bound as a fiduciary to fairly

122. See *Gardner-Denver*, 415 U.S. at 51-52.

123. See Ann E. Ahrens, *Collective Bargaining Agreements, Arbitration Provisions and Employment Discrimination Claims: Compulsory Arbitration or Judicial Remedy?*, J. DISP. RESOL., 1999, at 69 (commenting that because the CBA represents majority rights, it conflicts necessarily with minority rights); T. Christopher Baile, *Reconciling Alexander and Gilmer: Explaining the Continued Validity of Alexander v. Gardner-Denver Co. in the Context of Collective Bargaining Agreements*, 43 ST. LOUIS U. L.J. 219, 238-239 (1999) (stating that “[a]lthough the courts’ concern derives from past treatment of minorities by the unions, recent cases indicate the concern is still presently valid,” and finding that the rights of minorities will not receive adequate consideration during the CBA negotiations); *Harrison*, 112 F.3d at 1454 (commenting that the theoretical possibility of negotiating a separate deal with individual contracts like *Gilmer* butts them a step above unionized employees who have no such choice).

124. 109 F.3d 354, 362 (7th Cir.), cert. denied, 522 U.S. 512 (1997).

125. A good example of the parade of horrors can be found at *Universal Maritime Serv. Corp.*, Brief for Petitioner at 26-30, *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998) (presenting a series of hypotheticals ranging from a co-worker revealing HIV-positive status to possible hesitation to pursue sexual harassment charges against a supervisor that the representative works with daily).

126. See Daniel Roy, *Mandatory Arbitration of Statutory Claims in the Union Workplace after Wright v. Universal Maritime Serv. Corp.*, 74 IND. L.J. 1347, 1360 (1999) (cataloguing the types of individual contracts containing individual agreements to contract: form contracts, employment manuals, and clauses in job applications).

127. See *Carson v. Giant Food, Inc.*, 175 F.3d 325, 330 (4th Cir. 1999) (remarking on the higher threshold necessary under a CBA in stating that “[b]road, general language is not sufficient to meet the level of clarity required to effect a waiver in a CBA. In the collective bargaining context, the parties ‘must be particularly clear’ about their intent to arbitrate statutory discrimination claims.”) (quoting *Wright*, 525 U.S. at 79).

128. See *Wright*, 525 U.S. at 80.

represent all members,¹²⁹ as a majority the union has more power to negotiate, and as a unit that continues to work with the management, there is an incentive to fairly contract.¹³⁰ These factors commingle to create a situation where the collective group is bound to fairly represent the individual and where the individual's voice will not lose the job opportunity by attempting to negotiate a better deal. In individual contracts signed as a condition of employment, the consequence of not signing the agreement is simple—no job. In collective bargaining situations, bargaining is not a myth. As stated by *Austin*:

A union has the right and duty to bargain for the terms and conditions of employment. Through the collective bargaining process, unions may waive the right to strike and other rights protected under the [NLRA]. The Supreme Court finds such waiver 'valid because they rest on the premise of fair representation.' There is no reason to distinguish between a union bargaining away the right to strike and a union bargaining for the right to arbitrate.¹³¹

Thus, any distinction between an individual's power over an employer as to mandatory individual arbitration agreements and a union's power over an employer as to mandatory CBA arbitration arrangements is a distinction without a difference.¹³² Cleverly argued by Roy:

In the non-union workplace, employees are not represented by unions, of course, but agree to the terms of their employment on their own. But the notion that these employees sit down at the "bargaining table" with their employers and hammer out their own, personalized employment contract is an illusion. An overwhelming majority of these workers are never given the opportunity to personalize their employment contracts in any way. Rather, the non-union, at-will workplace is governed not by individualized employment agreements, but by form contracts, employment manuals, and clauses in job applications, all of which include the terms of employment set forth by the employer. It is within these "agreements" where clauses mandating the arbitration of statutory claims are likely to be found.¹³³

129. See *DelCostello v. Teamster*, 462 U.S. 151, 164 (1983) (holding that if the union arbitrarily refuses to prosecute a grievance, let alone refuses on racial or other invidious grounds to do so, the worker can bring a suit against the union for breach of its duty of fair representation of all members of the bargaining unit); *Angst v. Mack Trucks, Inc.*, 969 F.2d 1530, 1536 (3d Cir. 1992) (requiring employees complaining about breaches of a "buy out plan" to exhaust the administrative remedies of arbitration and the grievance process before bringing suit, but holding that they have a possible breach of the duty of fair representation claim against the union).

130. See Roy, *supra* note 126, at 1350-51 (finding that when the two sets of employees are compared, those represented by a union are capable of providing the same kind of consent to a mandatory arbitration clause as non-union employees).

131. *Austin*, 78 F.3d at 885 (citations omitted).

132. See *Lang v. Burlington N. R.R. Co.*, 835 F. Supp. 1104, 1105 (D. Minn. 1993) (binding an employee to arbitration of his wrongful discharge claim after the employer unilaterally altered the relationship by placing a mandatory arbitration clause in an employee handbook).

133. Roy, *supra* note 126.

In *Alexander v. Local 496, Laborers' International Union of North America*, the Sixth Circuit authorized a claimant to raise Title VII claims not only against his union, but also against the international union parent.¹³⁴ This illustrates the reach of union liability. Long past are the days when a union can discriminate against its members without fault. Moreover, *Gardner-Denver* does not impede an employer from requiring a new hire to sign a mandatory arbitration agreement as a condition of employment for entering into an employment contract as a unionized employee.¹³⁵ Thus, if employers are placed in the incongruous situation of pursuing enforceable waivers with non-union employees but being denied this efficiency as to unionized employees, the result may be individual agreements outside of the CBA.

Almonte v. Coca-Cola Bottling Co., Inc. involved a § 1981 claim alleged by a union member covered by a CBA.¹³⁶ Reaching for a "more reasonable accommodation of the conflict between vitiating individual statutory rights and enforcing the express terms of a fairly negotiated contract than a per se rule barring enforcing the express terms of a fairly negotiated contract than a per se rule barring enforcement of a CBA mandated arbitration," *Almonte* enforced the arbitration clause.¹³⁷ Although pre-*Wright*, *Almonte* properly handles any stress created by union waivers of individual rights.

Candidly, concerns that were likely important enough to place in a footnote in the *Gardner-Denver* decade do not carry such force today. As illustrated by the onset of duty of fair representation suits and the ability of the complainant to pursue statutory claims, such as Title VII, directly against the union itself, the collective scenery no longer emanates but one voice.¹³⁸

D. STARE DECISIS AND THE REALITY OF TITLE VII'S PLAIN MEANING MANIFESTS A NEED TO OVERRULE *GARDNER-DENVER* AND TO RESPECT CBA WAIVERS

Gilmer's attempts to distinguish the union situation from the non-union arrangement fail. The FAA/LMRA distinction is a false separation.

134. *Alexander v. Local 496, Laborers' Int'l Union of N. Am.*, 87 Daily Lab. Rep. E-1 (6th Cir. May 6, 1999).

135. See John J. Gallagher & Margaret H. Spurlin, *Mandatory Arbitration of Statutory Employment Claims*, ALI-ABA, 1999, at 685 (commenting that even though the union might object that such an individual arbitration agreement usurps their duty to exclusively bargain with the carrier, there should be no conflict given that the union has no lawful authority to bargain for statutory claims/waivers).

136. 959 F. Supp. 569 (D. Conn. 1997).

137. *Id.* at 574.

138. For an example of cooperative CBA accommodation, see *Rodriguez v. City of Chicago*, 156 F.3d 771, 776 (7th Cir. 1998) (illustrating union cooperation and accommodation under a CBA where a police officer raised Title VII religious concerns over the guarding of an abortion clinic); *Bowen v. United States Postal Serv.*, 459 U.S. 212 (1983) (noticeably increasing the liability of unions as to back wages, compensatory damages and attorneys fees, and likely accelerating the willingness of a union to accommodate members in the arbitral process in an effort to avoid the judicial forum).

Both contemplate broad, remedial power as to the contract at issue, and both promote, as their backdrop, the federal favoring of arbitration. What is more, many CBA arrangements fall under the FAA.¹³⁹ Likewise, the contract versus statute differentiation is easily treated by *Wright's* "clear and unmistakable" admonishment.¹⁴⁰ Finally, alleged tension between a collective representative and an individual masquerades a distrust for the arbitral process that was expressly renounced by *Gilmer*.¹⁴¹ Claims against the union, either as a breach of its duty to fairly represent its members or as an independent statutory violation, serve as a union incentive to avidly pursue individual claims.¹⁴² Add to these assertions the fact that nothing in Title VII distinguishes the use of individual arbitration mechanisms "authorized by law" from CBA mechanisms, and the situation becomes clear—mandatory arbitration agreements under CBAs stand, at the very least, in the same shoes as individual agreements.¹⁴³

These underpinnings, combined with the current Supreme Court's willingness to recognize the plain language of a statute as explicit, should have led *Wright* to go a step further in closing the chasm created by *Gilmer*.¹⁴⁴ Because Title VII finds no distinction between agreements to arbitrate found in CBAs and those found in individual contracts, the plain language of the statute releases the precedential hold of *Gardner-Denver*.¹⁴⁵ Nonetheless, in the wake of *Wright*, *Gardner-Denver* stands.

In *Agostini v. Felton*, the Court stated that "[s]tare decisis is not an inexorable command,' but instead reflects a policy judgment that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.'"¹⁴⁶ Judging from this reading of stare decisis and

139. See *supra* notes 89-91.

140. *Wright*, 525 U.S. at 80.

141. *Gilmer*, 500 U.S. at 30 (rejecting claims remarking on the inferior nature of arbitration).

142. See Connye Y. Harper, *Threshold Issues in Initiating and Responding to a Sexual Harassment Lawsuit—Should You Sue the Union, Too?*, ABA CENTER FOR CONTINUING LEGAL EDUC. NAT'L INST., 1998 (discussing the trend in bringing Title VII claim for race or sex harassment against a union as well).

143. Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071 (1991); Statement of President George Bush upon signing S. 1745, *reprinted in* 1991 U.S.C.C.A.N. 768, 769 ("section 118 of the Act encourages voluntary agreements between employers and employees to rely on alternative mechanisms such as mediation and arbitration. This provision is among the most valuable in the Act because of the important contribution that voluntary private arrangements can make in an effort to conserve the scarce resources of the Federal judiciary for those matters as to which no alternative forum would be possible or appropriate.").

144. See *Fla. Prepaid PostSecondary Ed. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 660-665 (1999) (Rehnquist, J., holding that the congressional intent was "unmistakably clear" in the language of the Patent and Plant Variety Protection Remedy Clarification Act as to preclude states' sovereign immunity); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 494 (1999) (O'Connor, J., using the plain present indicative of the words "substantially limited" to hold, contrary to every circuit but one, that "disability" under the ADA is to be evaluated with regard to mitigating measures such as medication); *Martin v. Hadix*, 527 U.S. 343, 353 (1999) (O'Connor, J., holding that the Prison Litigation Reform Act limits fees by its unambiguous address to the statute's temporal reach).

145. See *Gilmer*, 500 U.S. at 34.

146. 521 U.S. 203, 235 (1997) (citations omitted).

working from the previous analysis of *Gilmer's* three distinctions from *Gardner-Denver*, the doctrine appears inapplicable.

The present confusion should not boil down to a reluctance to "overtax the country's belief in the Court's good faith."¹⁴⁷ Any distinction between CBAs and individual agreements is flanked with inconsistencies.¹⁴⁸

IV. THE EEOC STANDS ALONE IN ITS HYPOCRITICAL POLICY AGAINST EMPLOYMENT ARBITRATION AGREEMENTS AND IN ITS NEED FOR SWEEPING RESTRUCTURE

Building on the background from Part I and II, Part III looks to the agency charged with the official enforcement of Title VII—the Equal Employment Opportunity Commission ("EEOC").¹⁴⁹ As stated by President Carter in his Reorganization Plan, the EEOC's "experience and broad scope make [it] suitable for the role of principal Federal agency in fair employment enforcement."¹⁵⁰ The highly deferential grant of executive authority shifted the responsibilities of eighteen somewhat overlapping governmental units to the EEOC and authorized the EEOC, with specific reference to Title VII, to "act[] on individual complaints and also initiate[] private sector cases involving a 'pattern or practice' of discrimination."¹⁵¹ As will be examined, herein lies the confusion. Reconciling the EEOC's disgust for Title VII pre-dispute waivers with the federal policy and judicial precedent enforcing Title VII arbitration is difficult in the EEOC's current structure. After attempting to dissect the current model, this Part assembles an alternate archetype, one that retains the EEOC's "pattern and practice" enforcement abilities but reconsiders cease and desist authority.

A. DESPITE SUPREME COURT PRECEDENT EMBRACING ARBITRATION, AND REGARDLESS OF THE FAA, THE EEOC'S CONTINUED OPPOSITION TO EMPLOYER ARBITRATION CONTRACTS CREATES AN INCONSISTENT PLIGHT

The EEOC consistently opposes employer/employee pre-dispute arbitration agreements, either signed as a condition of employment or agreed

147. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (O'Connor, J., commenting, in what appeared to most to be a wholesale retreat from *Roe v. Wade* and its trimester approach to abortion as a fundamental right, that overruling *Roe* would "seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law.").

148. See *Prince v. Coca-Cola Bottling Co.*, 37 F. Supp.2d 289, 292 (S.D.N.Y. 1999) (illustrating a post-Wright case following, at least in theory, the "clear and unmistakable" standard, which in practice looks more like contract principles of knowing and voluntary waiver).

149. See Civil Rights Act of 1964, § 706 (codified as amended 42 U.S.C. § 2000e-4 (Supp. 1995)).

150. Reorganization Plan No. 1, 3 C.F.R. § 321 (1978), reprinted in 5 U.S.C. app. at 1366 (1988) and in 92 Stat. 3781 (1985).

151. *Id.*

to through a CBA.¹⁵² While stating that it “is not unmindful of the case law enforcing specific mandatory arbitration agreements,”¹⁵³ the EEOC, in its July 10, 1997 Policy Statement, denounced arbitration as an improper tribunal to adjudicate statutory claims due to its: (1) inherent, incurable limitations, such as its private nature, its failure to develop law, and its procedural limitations;¹⁵⁴ (2) structural biases against discrimination plaintiffs;¹⁵⁵ and (3) adverse affects on the EEOC’s ability to enforce the Civil Rights laws.¹⁵⁶ This Policy Statement was reaffirmed in the EEOC’s April 10, 1997 Notice on non-waivable employee rights:

A strong public policy prohibits interference with governmental law enforcement activities. Agreements that prevent employees from cooperating with EEOC during enforcement proceedings interfere with enforcement activities because they deprive the Commission of important testimony and evidence needed to determine whether a violation has occurred. Furthermore, insofar as such agreements make it more difficult for the Commission to prosecute past violations, an atmosphere is created that tends to foster future violations of the law.¹⁵⁷

Notably, in *Borg-Warner Protective Service Corp. v. EEOC*, an employer challenged the EEOC’s authority to issue policy statements such as this.¹⁵⁸ The D.C. District Court found no federal question jurisdiction under either the Administrative Procedure Act or the Declaratory Judgment Act and also failed to find Article III standing.¹⁵⁹ While employer success in this suit is lacking, the case underscores the turmoil resulting from the EEOC’s bold moves against precedent. Likewise, in *EEOC v. Luce, Forward, Hamilton & Scripps, L.L.P.*, the EEOC took advantage of the Ninth Circuit’s anti-arbitration jurisprudence to challenge an em-

152. See *Cole v. Burns Int’l Sec. Serv.*, 105 F.3d 1465, 1478 (D.C. Cir. 1997) (stating that “[d]espite the Supreme Court’s recent endorsement of arbitration of statutory claims . . . the Equal Employment Opportunity Commission has taken the position that such agreements are unenforceable . . .”); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 936 (4th Cir. 1999) (disagreeing with the EEOC’s position as amicus curiae contending that employees cannot agree to arbitrate Title VII claims in predispute agreements), *aff’d*, 173 F.3d 933 (4th Cir. 1999); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 179 (3d Cir. 1998) (rejecting the EEOC’s position in its amicus brief); John J. Gallagher & Margaret H. Spurlin, *Mandatory Arbitration of Statutory Employment Claims*, SD50 ALI-ABA 665, 673 (1999) (quoting EEOC Associate General Counsel Peggy Mastroianni as saying that “mandatory arbitration of employment disputes is the greatest threat to civil rights enforcement.”).

153. *EEOC Policy Statement on Mandatory Arbitration*, 133 Daily Lab. Rep. (BNA) E-4, I (July 11, 1997). For a discussion upholding the EEOC’s ability to issue policy statements without interfering in an employer’s ability to require employees to sign mandatory arbitration agreements, see *Borg-Warner Protective Serv. Corp. v. EEOC*, 81 F. Supp. 2d 20 (D.D.C. 2000).

154. See *EEOC Policy Statement on Mandatory Arbitration*, 133 Daily Lab. Rep. (BNA) 3-4, (V)(A) (July 11, 1997).

155. See *id.* at (V)(B).

156. See *id.* at (V)(C).

157. *Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes*, EEOC COMPLIANCE MANUAL § 801, at 6531 (1999).

158. 81 F. Supp. 2d 20, 22 (D.D.C. 2000).

159. *Id.* at 28, 29.

ployer's right to require arbitration as a condition of employment.¹⁶⁰ The California District Court took the bait and permanently enjoined a law firm from requiring, requesting, or enforcing any arbitration employment agreement.¹⁶¹ The reach of this uncharacteristic move, though questionable on legal grounds, is worrisome.

Plainly, the EEOC's logic is faulty. First, arbitration is not inferior due to its private nature. The EEOC notably ignores the fact that the vast majority of EEOC-handled cases not only settle before they provide precedential value, but are encouraged to do so by the EEOC.¹⁶² What is more, recent publicity focuses on the EEOC's Alternative Dispute Resolution (ADR) Program and the agency's plans to utilize this expeditious method of resolution to cure its current backlog plague.¹⁶³ Basically, the EEOC sees its own ADR program as voluntary and just, but, in a somewhat paternalistic fashion, adamantly opposes employer/employee pre-dispute waivers as an appalling denial of civil rights. The EEOC's second argument, that arbitration fosters structural biases against the plaintiff, rests on an inherent distrust of the arbitral process—a distrust that was emphatically rejected by *Gilmer*.¹⁶⁴ Finally, the EEOC attempts to argue that pre-dispute waivers will adversely affect its enforcement powers. This argument disregards *Gilmer* once again. As emphasized by Justice White, a "claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action."¹⁶⁵ Each proffered argument tumbles. Nevertheless, the EEOC refuses to budge. Despite increased employment litigation and tremendous backlogs in the handling of cases within the EEOC process¹⁶⁶ and regardless of internal arbitration proceedings

160. 122 F. Supp. 2d 1080 (C.D. Cal. Nov. 21, 2000).

161. *Id.*

162. See David Sherwyn et al., *In Defense Of Mandatory Arbitration Of Employment Disputes: Saving The Baby, Tossing Out The Bath Water, And Constructing A New Sink In The Process*, 2 U. PA. J. LAB. & EMP. L. 73, 130 (1999) (commenting on the priority handling used by the EEOC that works to encourage quick settlement of disputes).

163. See *EEOC: Former EEOC Commissioner Sees Agency Deferring to ADR Programs*, 41 Daily Lab. Rep. (BNA) A-4 (Mar. 3, 1998) (Gilbert F. Casellas, former chairman of the EEOC commenting on the benefits given to claimants in the EEOC's new multi-step ADR program, such as resolution in half the time of litigation); *EEOC: "Significant" Expansion of ADR Program in the Works, Chairwoman Castro Says*, 234 Daily Lab. Rep. (BNA) C-1 (Dec. 7, 1998) (Chairwoman of the EEOC, Ida Castro, commenting that the thirty-seven million dollar increase in the EEOC's 1999 budget will help the EEOC expand its ADR program).

164. See *Gilmer*, 500 U.S. at 33-34 n.5.

165. *Id.* at 28.

166. See Sherwyn, *supra* note 162, at 76 (citing a four-hundred percent increase in discrimination cases filed in federal court over the past twenty years, and a one-hundred and nine percent increase in discrimination cases filed in federal court between 1991 and 1995). Despite necessary changes in the EEOC's priority handling that requires investigators to place cases in "A," "B," or "C" categories depending on their priority, tremendous waits still accompany an aggrieved individual wanting to pursue resolution. See *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 360 (7th Cir.), *cert. denied*, 522 U.S. 512 (1997) (finding that "[b]ecause the [EEOC] has an enormous backlog and limited resources for litigating, the vast majority of workers who have claims under any of the statutes that the Commission enforces have perforce to bring and finance their own lawsuits; they cannot rely on the

and inherent conciliation efforts that support arbitration only on its terms, the EEOC continues to vehemently oppose pre-dispute waivers of the judicial forum.

What does this unbending stance contemplate for the continued success of pre-dispute waivers in the employment context? Probably, little. Although the EEOC is the agency charged with directing and implementing Title VII, it is unlikely that these views will be given great deference.¹⁶⁷ No reference to the EEOC's stance appeared in *Gilmer* even though it found unpersuasive the argument that arbitration will undermine the role of the EEOC.¹⁶⁸ Perhaps the Court would have focused more on this conflict between agency rights and individual rights had the case not fallen under the ADEA, where, unlike Title VII, the EEOC's role is not dependent on the filing of a charge.¹⁶⁹ Regardless of the EEOC's fervent opposition, however, the Court emphasized the ability of an individual to waive his right to a judicial forum.

The EEOC's position conflicts with Supreme Court precedent embracing pre-dispute waivers knowingly entered into and the federal favoring of arbitration and battles the plain language of both the FAA and Title VII. In fact, congressional discussions over increasing the EEOC budget for FY 1999, included congressional leaders and management attorneys chastising the EEOC for its refusal to support mandatory arbitration agreements.¹⁷⁰ The following section discusses how this trivial standoff

Commission to do so for them."); Peter T. Kilborn, *Backlog of Cases is Overwhelming Job-Bias Agency*, N.Y. Times, Nov. 26, 1994, at 1 ("People fall out of the system . . . It's like the urban court system. Clogged. Justice delayed, justice denied."); *Alternative Dispute Resolution: Mandatory Arbitration Better for Workers With EEOC, Courts Stretched*, Professor Says, 151 Daily Lab. Rep. (BNA) C-2 (Aug. 6, 1997) ("In light of an overworked, underfunded EEOC and backlogged court dockets, St. Antoine argued that most employees might be better off with mandatory arbitration—even of statutory claims . . .").

167. Although agencies directed by Congress to issue regulations constitute a body of experience and informed judgment, the degree of deference given varies from case to case. See *Olmstead v. Zimring*, 527 U.S. 581, 582-83 (1999) (holding that the Department of Justice's regulations issued under Title II warranted respect). *But see* *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (giving the EEOC no deference where the EEOC guidelines to the ADA advising individual disability to be evaluated without regard to medication or mitigating measures constituted an impermissible construction of the ADA). Given that the *Gilmer* holding rested on a contrary construction of permissible arbitration agreement, and that the EEOC Notices likely don't carry the weight of regulations, deference should not be great. See *United States v. Haggard Apparel Co.*, 526 U.S. 380, 382 (1999) (commenting on possible heightened deference to an agency when notice-and-comment rulemaking processes are observed). *But see* *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 12 (1st Cir. 1999) (refusing to defer to the EEOC's definition of "waiver" in the OWBPA as including arbitration agreements because the Court "[does] not defer to views espoused only in the context of litigation . . . This is particularly true where the agency has gone through rule making and has conspicuously ignored the topic in its rules.") (citations omitted).

168. *Gilmer*, 500 U.S. at 28.

169. See *EEOC v. American & Efirid Mills*, 964 F.2d 300, 304 (4th Cir. 1992) (stating that "[u]nlike the limited authority given the EEOC under Title VII . . . the ADEA gives the EEOC authority to investigate and enforce independent of individual employee charges.").

170. See *EEOC: Republicans Tie EEOC Budget Boost to Elimination of Initiative on Testers*, 3/5/98 Emp. Pol'y & Lab. Daily (BNA) d7 (1998) (Fred Alvarez, former commis-

creates troublesome predicaments for the EEOC's dual role as federal enforcer and individual representative.

B. INHERENT CONFLICTS BETWEEN THE EEOC'S DUAL ROLE AND
THE MODERN RESPECT FOR INDIVIDUAL CONTRACT
ENFORCEMENT MANDATE RESTRUCTURING

This Section attempts to navigate through the agitated waters generated by the EEOC's right to sue both on behalf of the individual injured by discrimination and independent of any private plaintiff's rights "to vindicate the public interest in preventing employment discrimination."¹⁷¹ Title VII's multistep enforcement program allows the Commission to investigate and remedy discrimination by authorizing it to bring a civil action in federal district court against private employers reasonably suspected of violating Title VII.¹⁷² Although an EEOC charge is necessary for an enforcement action, either by an aggrieved individual or by a Commissioner,¹⁷³ once this charge is filed, an EEOC investigation must take place, and the EEOC is given flexible subpoena power to carry out this investigative role.¹⁷⁴ Following the investigation, if no reasonable cause is found to believe the charge is true, the individual is then authorized to file a private action against the employer on its own.¹⁷⁵ On the other hand, if reasonable cause is found, enforcement actions can be brought only by the Commission to seek either relief for one or a group of aggrieved individuals or to pursue broader, public relief through pattern-or-practice suits.¹⁷⁶ As explained, this structure leaves the EEOC controlling private as well as public employment discrimination litigation under the reasoning that "private litigants cannot adequately represent the government's interest in enforcing the prohibitions of federal statutes."¹⁷⁷ The schizophrenic consequence creates an unworkable model when combined with the presumption that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like

sioner, commenting that the "EEOC could make a major contribution toward prompt resolution of discrimination complaints if it embraced rather than resisted employer-established ADR . . .").

171. *Gen. Tel. Co., Inc. v. EEOC*, 446 U.S. 318, 326 (1980).

172. *See id.* at 325-26.

173. *See EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (discussing the situations where a Commissioner may file a charge: either when a victim of discrimination is reluctant to file of charge because of fear of retaliation, or where the Commissioner files charges in writing, under oath, and with such information as the Commission requires).

174. *See id.* at 63-64.

175. *See id.* at 64 n.13.

176. *See Gen. Tel. Co., Inc.*, 446 U.S. at 328 (explaining the changes in enforcement power subsequent to the 1972 amendments that gave the EEOC not only the right to bring suit pursuant to a private charge, but also the authority to bring pattern-or-practice suits).

177. *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993).

defense to arbitrability.”¹⁷⁸ Because the FAA presumes agreements to arbitrate between individuals should be valued, the EEOC’s control-centered role navigating individual claims of discrimination in addition to pattern-or-practice suits directly interferes with the FAA. This discord, if unrestrained, leads to symphonic disaster.

Courts addressing this interplay vary in reaction—from a lackadaisical *Gilmer*,¹⁷⁹ to an application of *res judicata* as to individual relief at the hands of the EEOC following individual adjudication in the arbitral forum,¹⁸⁰ to a wholesale limitation or strengthening of the EEOC’s role.¹⁸¹ For example, the Eighth Circuit found no interference with the EEOC’s role: “the public policy of the statute will be carried out through suits of employees who are not parties to arbitration agreements, through EEOC actions, and through the vindication of individual claims through arbitration.”¹⁸² For all its worth in the abstract, this unresponsive position becomes less convincing when the EEOC seeks to vindicate an individual’s rights in federal court after signing a pre-dispute agreement to arbitrate all Title VII claims with his employer. This was the situation in *EEOC v. Frank’s Nursery & Crafts, Inc.*¹⁸³ There, the Sixth Circuit went beyond finding that an individual cannot contract away her right to file a charge with the EEOC:¹⁸⁴

To empower a private individual to take away this congressional mandate, by entering into arbitration agreements or other contractual arrangements, would grant that individual the ability to govern whether and when the EEOC may protect the public interest and further our national initiative against employment discrimination, and to thereby undo the work of Congress in its 1972 amendments.¹⁸⁵

Although the district court applied the FAA in ordering the plaintiff to arbitrate in accordance with her agreement, *Frank’s Nursery* found not only that the EEOC could not be bound by this agreement, but also that

178. *Brennan v. King*, 139 F.3d 258, 264 (1st Cir. 1998) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

179. See *Gilmer*, 500 U.S. at 28 (finding unpersuasive the argument that a federal favoring of arbitration will interfere with the EEOC’s role because the aggrieved individual will still be free to file a charge with the EEOC).

180. See *Harris Chernin*, 10 F.3d at 1292-93 (authorizing separate actions on the same subject would render inconsequential both the provision for permissive intervention by the EEOC in an individual’s suit, and the requirement of a certificate from the EEOC before bringing suit); *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 496-97 (3d Cir. 1990) (“individuals who fully litigated their own claims under the ADEA are precluded by *res judicata* from obtaining individual relief in a subsequent EEOC action based on the same claims”).

181. See *EEOC v. Frank’s Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999) (holding that the power to decide whether adjudication takes place in an arbitral setting or a judicial setting rests in the hands of the EEOC-based reasonable cause determination). *But see EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998).

182. *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 838 (8th Cir. 1997).

183. 177 F.3d 448 (6th Cir. 1999).

184. See *EEOC v. Cosmair Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987); *EEOC v. Astra USA, Inc.*, 94 F.3d 738 (1st Cir. 1996) (finding policy requiring employees to waive their right to file an EEOC as a condition of settlement void as against public policy).

185. *Frank’s Nursery & Crafts*, 177 F.3d at 459.

the plaintiff's agreement to arbitrate only bound her if the EEOC gave her the right to proceed individually by a finding of no cause.¹⁸⁶ By this rationale, the EEOC controls the individual suit, not the individual. Accordingly, the agreement to arbitrate can only be respected if the EEOC finds no reasonable cause. "[W]hile Title VII affords recovery through private action or an action by the EEOC, it does not allow both, and the power to decide which route to follow rests in the hands of the EEOC, not the aggrieved employee."¹⁸⁷ The Sixth Circuit reaffirmed this protective right of the EEOC to control an individual's forum in *EEOC v. Northwest Airlines, Inc.*: "[w]e need not fear that employees will sidestep arbitration agreements by having the EEOC bring suits for damages on their behalf because the decision whether to pursue a charge rests with the EEOC."¹⁸⁸ Flatly, the Sixth Circuit misinterprets the role of the EEOC and the effect of the FAA.

Aside from the Sixth Circuit's EEOC-centered approach to the conflict, another camp exists. This second group concentrates on separating the components of the dual nature of the EEOC to enforce individual arbitration agreements as to the aggrieved individual's relief while still allowing the EEOC to carry out its governmental role in the demise of discrimination. Even within this group of circuits enforcing the individual arbitration agreement, however, contrariety simmers. The Second Circuit, in *EEOC v. Kidder, Peabody & Co., Inc.*, held that an employee's arbitration agreement precluded the EEOC from seeking purely monetary relief for the employee.¹⁸⁹ However, it authorized the EEOC to seek injunctive relief in the federal forum, even for employees who were bound by arbitration agreements:

[A]llowing the EEOC to pursue injunctive relief in the federal forum while encouraging arbitration of the employee's claim for private remedies, strikes the right balance between these interests. Further, to permit an individual, who has freely agreed to arbitrate all employment claims, to make an end run around the arbitration agreement by having the EEOC pursue back pay or liquidated damages on his or her behalf would undermine the Gilmer decision and the FAA.¹⁹⁰

Although the Second Circuit differed from the Sixth by recognizing that allowing the EEOC to dodge an employer/employee contract any time it found reasonable cause would dishonor the FAA, it stopped short of precluding the EEOC from obtaining equitable or injunctive relief on behalf of the aggrieved employee. The court differentiated individual, injunctive relief from individual, monetary relief by finding the "public

186. *See id.* at 462.

187. *Id.* at 466.

188. *EEOC v. Northwest Airlines, Inc.*, 188 F.3d 695, 701 (6th Cir. 1999).

189. 156 F.3d 298, 301 (2d Cir. 1998).

190. *Id.* at 303.

interest in back pay award [] minimal."¹⁹¹ For all its worth in valuing the individual's right to contract, this distinction between monetary and equitable individual relief is seriously flawed. A contract to settle all individual claims in the arbitral forum should be valued in its entirety.

As did the Second Circuit in *Kidder*, the Fourth Circuit in *EEOC v. Waffle House, Inc.*, held that an employee arbitration agreement found in an employment application governed an aggrieved employee's ADA claim, despite the EEOC's finding of reasonable cause.¹⁹² Conversely, the Fourth Circuit held that "when the EEOC enforces the individual rights of [the plaintiff] by seeking backpay, *reinstatement*, and compensatory and punitive damages, it must recognize [his] prior agreement to adjudicate those rights in the arbitral forum."¹⁹³ Thus, although stating that it agreed with the balance struck by the Second Circuit, the Fourth Circuit precluded the EEOC from seeking singular, injunctive relief—thus, limiting the EEOC to seeking pattern-or-practice type relief only.¹⁹⁴ This legitimate balance properly evaluates the FAA's goals and the EEOC's purposes:

When the EEOC seeks "make whole" relief for a charging party, the federal policy favoring enforcement of private arbitration agreements outweighs the EEOC's right to proceed in federal court because in that circumstance, the EEOC's public interest is minimal, as the EEOC seeks primarily to vindicate private, rather than public, interests. On the other hand, when the EEOC is pursuing large-scale injunctive relief, the balance tips in favor of EEOC enforcement efforts in federal court because the public interest dominates the EEOC's action.¹⁹⁵

Although not a perfect model, the Fourth Circuit is closest to satisfying both the EEOC and the FAA. Nevertheless, the common denominator, the prevalent marauder, continues to be the disguised, dual natured agency.

In its current state, both the individual and the EEOC are placed in a precarious position. The individual *must* exhaust his administrative remedies by filing a charge with the EEOC and *must* await authority from the EEOC to file suit.¹⁹⁶ Admittedly, the individual may intervene in the EEOC's suit on his behalf, but as it stands, he may not withdraw his charge without EEOC approval. Likewise, the EEOC's awkward, dual

191. *Id.* at 302 (quoting *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987)).

192. *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 812 (4th Cir. 1999).

193. *Id.* at 813 (emphasis added).

194. *See id.* at 812.

195. *Id.*; *EEOC v. World Sav. and Loan Assoc.*, 32 F. Supp. 2d 833, 835 (D. Md. 1999) (reaffirming the Fourth Circuits holding in a case where an EEOC suit seeking equitable and monetary relief on behalf of two employee individuals bound by pre-dispute waivers was dismissed pending a determination of whether the equitable relief sought was class-based equitable relief not "owned" by the aggrieved individuals).

196. *See EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1354-55 (6th Cir. 1975), *cert. denied*, 423 U.S. 994 (1975).

role requires it to wear both the hat of the individual and that of the government:

[t]he EEOC is authorized to proceed in a unified action and to obtain the most satisfactory overall relief even though competing interests are involved and particular groups may appear to be disadvantaged. . . . The EEOC exists to advance the public interest in preventing and remedying employment discrimination, and it does so in part by making the hard choices where conflicts of interest exist.¹⁹⁷

Noting this crudeness on several occasions, the Supreme Court found that “[t]he result is considerable awkwardness when complainants try to fit allegations of systemic discrimination into a mold designed primarily for individual claims.”¹⁹⁸ Add to this equation a binding individual arbitration agreement, and, as the cases display, turmoil ensues.

Nothing prevents the EEOC from seeking injunctive relief in its role as a public enforcer. The line, however, should be drawn at singular, injunctive relief such as reinstatement because this uses the judicial system to capitalize on the EEOC’s dual role at the expense of the FAA’s federal favoring of arbitration and right of contract. Surely the contract contemplated the arbitration of injunctive relief benefiting the individual as well as monetary or legal relief. While confusing the issue with its privity analysis, a California district court understood the public versus singular injunctive relief distinction in *EEOC v. Luce, Forward, Hamilton & Scripps, L.L.P.*¹⁹⁹ It barred any injunctive relief on behalf of the aggrieved individual under *res judicata* grounds rather than with respect to the arbitration clause. Nevertheless, it allowed the EEOC to seek injunctive relief against the defendant to enjoin it from using or enforcing the arbitration agreement at issue. The outcome, because it follows *Duffield’s* circumvention of Supreme Court precedent, is flawed, but the right of the EEOC to vindicate public rights is exemplary.

C. TOOLS, SUCH AS CEASE AND DESIST ORDERS, AND REQUIRED REPORTING, COMBINED WITH SEPARATION OF EEOC PUBLIC POLICY ENFORCEMENT FROM INDIVIDUAL DISCRIMINATION ENFORCEMENT, IF PROMULGATED, MIGHT NECESSARILY MEND THE CONFUSION

The EEOC’s binary role cannot effectively serve both the FAA and its internal structure of fully interfering with an individual’s right to contract. This Section proposes a separation between the EEOC’s public duty and its private obligation—strengthening its authorization as to the vindication of broad, public rights while alleviating the tension caused by control over individual suits. The EEOC’s underlying purpose in combating workplace discrimination will remain at the heart of the organization,

197. *Id.*; see also *EEOC*, *supra* note 163 (former EEOC Chairman commenting that the EEOC has an “institutional schizophrenia” because of its dual role in developing law and litigating cases, and in processing claims).

198. See *EEOC v. Shell Oil Co.*, 466 U.S. 54, 67 (1984).

199. 122 F. Supp. 2d 1080 (C.D. Cal. 2000).

and, in practice, will materialize in the form of: pattern-or-practice suits; cease and desist orders as to public practices; and mandatory reporting. But, its conflicting role as an individual representative will be eliminated. According to an assessment of the EEOC compiled by the Citizens Commission on Civil Rights, the EEOC lacks adequacy in its “no cause” finding rate which “hovers at a record high of 61 percent, up from a 28.5 percent ‘no-cause’ rate in fiscal year 1980,” ought to increase its emphasis on systemic litigation and Equal Pay Act cases, and needs to continue its support for employment “testers” to uncover discrimination in the workplace.²⁰⁰ The model below answers these deficiencies by concentrating on systemic, public vindication rather than individual, private relief.

Clearly, the EEOC acts “to vindicate the public interest in preventing employment discrimination.”²⁰¹ As seen, however, problems arise when this public interest clashes with the enforcement of an employer/employee contract. Largely, the difficulty rests on the role that filing a charge fills in Title VII’s statutory scheme. “The EEOC has no authority to conduct an investigation based on hunch or suspicion, no matter how plausible that hunch or suspicion may be.”²⁰² Thus, while the EEOC may have the public interest at heart, control over the aggrieved individual is, at least indirectly through a charge, necessary. First and foremost, this parasitic relationship must be severed. While not advocating non-filing covenants in any way,²⁰³ the EEOC should have the ability to challenge policies and actions of employers without an aggrieved individual or Commissioner’s charge.²⁰⁴ In this sense, the individual’s right to contract with his employer is valued under the FAA, but the EEOC still has the authority to police discriminatory activities and the employee still has the ability to settle his claims in arbitration.²⁰⁵ Further, an employee’s right in aiding the EEOC’s investigation as to these discriminatory practices,

200. *Civil Rights: Advocacy Group Sees Mixed Record on Enforcement Efforts at EEOC*, 11 Daily Lab. Rep. (BNA) A-10 (Jan. 19, 1999).

201. *General Tel. Co., Inc. v. EEOC*, 446 U.S. 318, 326 (1980).

202. *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 746 (1st Cir. 1996) (discussion the dependency of the Commission’s power on the filing of a charge of discrimination, unlike other federal agencies possessing plenary investigative power).

203. *See id.* at 747 (discussing public policy arguments for and against non-filing covenants as a condition of settlement or employment).

204. By allowing the EEOC to challenge employer practices without a charge, even those individuals bound by arbitration agreements would have the EEOC policing their activities. *See EEOC v. River Oaks Imaging & Diagnostic*, 67 Fair Empl. Prac. Cas. (BNA) 1243 (S.D. Tex. 1995) (allowing the EEOC to challenge the validity of an employer ADR policy even before the enforcement of the arbitration agreement as being void as against public policy due to its attempt to divest an individual’s ability to file a charge with the EEOC); *EEOC v. Bd. of Governors of St. Colleges & Univ.*, 957 F.2d 424, 431 (7th Cir. 1992) (allowing the EEOC to challenge an arbitration agreement as void as against public policy where the CBA provided that grievances will proceed to arbitration only if the employee refrains from participating in protected activity under the ADEA), *cert. denied*, 506 U.S. 906 (1992).

205. *See Williams v. Cigna Fin’l Advisors Inc.*, 197 F.3d 752, 757 (5th Cir. 1999) (an arbitration award may be vacated for “manifest disregard” where the award is contrary to public policy, the award is arbitrary and capricious, or the award fails to draw its essence from the underlying contract), *cert. denied*, 120 S. Ct. 1833 (2000).

even if the employee is bound by a pre-dispute waiver, must not be hampered:

In contrast to the individual right to recover damages, however, an employee's right to communicate with the EEOC must be protected, not to safeguard the settling employee's entitlement to recompense but instead to safeguard the public interest. It is not a right that an employer can purchase from an employee, nor is it a right that an employee can sell to her employer. A waiver of the right to assist the EEOC would offend public policy under both the ADEA and Title VII.²⁰⁶

In fact, reporting of claims should be required. In addition to the annual reports currently filed by employers with the EEOC and with the Office of Federal Contract Compliance Programs of the Department of Labor, the employer would be required to submit any adverse discrimination claim to the EEOC, whether resulting in a settlement, a conciliation, or favorable and/or unfavorable arbitration.²⁰⁷ This, combined with subpoena and investigative power independent of a charge, allows the EEOC to obtain information from employees, permits individuals to bring suit without waiting 180 days, and entitles individuals to freely contract without EEOC interference. In situations where a relationship is not bound by an arbitration agreement, reporting requirements would likewise be placed on the employer. Thus, in both situations the EEOC has the ability to utilize its public power to seek broad relief.

In addition to strengthening the EEOC's ability to bring pattern-or-practice suits by dismissing the need for a charge, the EEOC, as was the case in the initial draft of the amendments to the Civil Rights Act of 1964, should be authorized to issue cease and desist orders.²⁰⁸ Cease and desist orders under this proposed model would not authorize the EEOC to interfere with individual relief.²⁰⁹ Rather, cease and desist orders would be tied to pattern-or-practice investigations. In this sense, as is different from the proposed cease and desist orders that failed in both houses of Congress, the EEOC authority expands as to the policing of broad scale discriminatory patterns or activities, but diminishes as to individual relief. Accordingly, the EEOC's dual role is dismantled, the confusion over where to separate public and private relief is quelled, and the FAA is respected. Thus, the EEOC would combat workplace discrimination as a true enforcement agency with the threat of pattern-or-practice suits and

206. *Astra USA, Inc.*, 94 F.3d at 744 n.5.

207. *See Shell Oil Co.*, 466 U.S. at 70-71 (discussing the recording requirements of employers, and the ability of the EEOC to receive pattern-or-practice information from these records).

208. *See Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 362 (1977) (discussing the dominant debate in Congress during the EEOC's formation as to the power of the EEOC to issue cease and desist orders).

209. *See EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 457 (6th Cir. 1999) (commenting on the battle between the minority favoring of district court enforcement authority following failed conciliation efforts and the majority favoring of cease and desist authority, and discussing the minority's win over the majority).

cease and desist orders rather than a political design with a confused, clashing, severely backlogged infrastructure.

V. CONCLUSION

The legal chaos resulting from unanswered questions in major Supreme Court cases dealing with arbitration of statutory causes of action, and seemingly conflicting pronouncements by the agency directly responsible for managing claims stemming from workplace discrimination leaves many in the legal and employment community concerned. *Duffield* and any claim by the EEOC tempting the deterioration of the FAA should the definite past. Given the vigor with which it is currently followed in the Ninth Circuit, however, a supreme court pronouncement is necessary. *Austin* and its appreciation of both the FAA and the LMRA as an alternative rather than an inferior adjudication setting, even in collective bargaining instances where negotiation power is genuine and duty of fair representation claims are real, is the tangible future. For the present, conflicting goals create friction between the federal favoring of arbitration under the FAA and EEOC opposition to arbitration, at least when arbitration is initiated between individuals rather than internally in the EEOC itself. This structural tension necessitates dismantling EEOC control over individual claims in exchange for a single-natured agency authorized to bring pattern-or-practice suits and issue cease and desist orders.