ARBITRATION: AN EMPLOYER'S LICENSE TO STEAL TITLE VII CLAIMS?

INTRODUCTION

Many employers now require an employee to sign a mandatory arbitration agreement before the employee is hired. This practice, along with the erroneous application of the Federal Arbitration Act ("FAA")[1] to statutory claims of individual rights, has undermined the strength of statutes designed to protect individual rights. The statutes which specifically protect employees' individual rights against employer discrimination include, for example, actions arising under Title VII of the Civil Rights Act of 1964 ("Title VII")[2] and the Age Discrimination in Employment Act ("ADEA").[3] This Comment focuses on Title VII claims.

Before the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corporation,*[4] the federal circuits inconsistently applied the FAA to employees' statutory claims.[5] The *Gilmer* decision held that arbitration of an ADEA claim may be compelled pursuant to an agreement in the employee's securities registration application.[6] Lower courts have interpreted *Gilmer* to allow employers to compel arbitration of employees' statutory claims regarding their civil rights.[7] Although statutory claims are not relinquished completely by the employee, arbitration of these claims cripples their effectiveness and weakens the claims' social value.

This Comment briefly examines the FAA and pre-*Gilmer* decisions of the Supreme Court. It then touches on the more notorious deficien-

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1. 9 U.S.C. §§ 1-16 (1994).
2. 42 U.S.C. §§ 2000(e)1 to 2000(e)17 (1994).
3. 29 U.S.C. §§ 621-624 (1994).
4. 500 U.S. 20 (1991).
5. *See* Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104 (5th Cir. 1990); Utley v. Goldman Sachs & Co., 883 F.2d 184 (1st Cir. 1989), *cert. denied,* 493 U.S. 1045 (1990); Nicholson v. CPC Int'l, Inc., 877 F.2d 221 (3d Cir. 1989); Swenson v. Management Recruiters Int'l Inc., 858 F.2d 1304 (8th Cir. 1988), *cert denied,* 493 U.S. 848 (1989); Gilmer v. Interstate/Johnson Lane, 895 F.2d 195 (4th Cir. 1990) *aff'd,* 500 U.S. 20. These examples include either Title VII or ADEA claims.
6. *Gilmer,* 500 U.S. at 35.
7. *See, e.g.*, Bercovitch v. Baldwin Sch., 133 F.3d 141 (1st Cir. 1998); Desiderio v. National Ass'n of Sec. Dealers, 191 F.3d 198 (2d Cir. 1999).

cies of arbitration which demonstrate why the federal courts are a more appropriate forum for individual rights claims. Finally, this Comment discusses the purpose and intent of Title VII compared to the reasoning in *Gilmer*.

I. OVERVIEW OF APPLICABLE LAW

To evaluate whether a court should compel arbitration of an employee's statutory claim, one must first examine case and statutory law regarding arbitration. The FAA was first enacted in 1925 and then later reenacted and recodified in 1947, to legitimize agreements between parties to arbitrate future disputes.[8] The FAA states that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[9] Congressional affirmation of arbitration is the purpose of the FAA.[10]

In 1953, the United States Supreme Court spoke to the issue of arbitration of statutory claims in *Wilko v. Swan*.[11] *Wilko* involved the arbitration of federal securities laws as codified in the Securities Act of 1933[12] and the Securities Exchange Act of 1934.[13] The dispute arose when a customer alleged that the broker used false representations to induce him to buy stock.[14] The broker moved to compel arbitration pursuant to the brokerage contract's arbitration provision.[15] The Court looked to public policy considerations and Congress' intent when it refused to apply the FAA to the plaintiff's statutory claim.[16]

The Court believed there was an inherent conflict between the Securities Act and adjudication by arbitration.[17] It found that the Securities Act granted a special right which differed from common law rights.[18] The Court pointed out that disputes regarding quality of a

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8. Pub. L. No. 401, 43 Stat. 883 (1925).
9. 9 U.S.C. § 2 (1994).
10. Perry v. Thomas, 482 U.S. 483 (1987).
11. 346 U.S. 427 (1953).
12. 15 U.S.C. §§ 77a-77aa (1994).
13. 15 U.S.C. §§ 78a-78kk. These are not federal statutes involving individual rights, but are the first federal statutes that the Supreme Court examined regarding compelling their arbitration.
14. *Wilko*, 346 U.S. at 429.
15. *Id.*
16. *Id.* at 438-40.
17. *Id.* at 434.
18. *Id.* at 431. The special rights granted by the Securities Act included seller's burden of proving scienter, prohibition of removal from state court, and expanded choice of venue. This special right that is granted by the Act and not found in common law is similar to the right

commodity and money due under a contract were traditionally the type of disputes arbitrated, as opposed to arbitrating a complex federal statute.[19] The fact that the arbiter would be applying law to a set of facts without judicial discretion and that there would not exist a complete record of the proceedings convinced the Court that the statutory claim should not be arbitrated.[20] The Court further considered the legislative objectives of the Securities Act.[21] It found that Congress intended the Securities Act to alleviate buyer disadvantages,[22] and that therefore judicial redress was important.[23]

Three decades later, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[24] the U.S. Supreme Court was again faced with the question of whether or not statutory claims may be compelled to arbitration.[25] Although this case, like *Wilko,* did not consider statutory claims of individual rights, its language and reasoning are followed by the Court in later cases examining individual rights.[26] The dispute arose between two corporations (one domestic and one foreign) under the Sherman Antitrust Act.[27] The Court first asked "whether the parties agreed to arbitrate that dispute."[28] The inquiry, the Court explained, is made by examining the contract which contains the arbitration provision and the arbitration provision's coverage.[29] The second part of the inquiry is whether Congress evidenced an intent to preclude arbitration.[30] To ascertain the intent of Congress, the Court explained, it is appropriate for the courts to examine the text and legislative history of

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granted by Title VII because it is a statutory, as opposed to a common law, cause of action.

19. *Wilko*, 346 U.S. at 435 (citing Evans v. Hudson Coal Co., 165 F.2d 970 (3d Cir. 1948)).

20. *Id.* at 435-36.

21. *Id.* at 438.

22. Title VII was also enacted to alleviate the disadvantages of those who have been discriminated against based on race. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

23. *Wilko*, 346 U.S. at 435.

> While a buyer and seller of securities, under some circumstances, may deal at arm's length on equal terms, it is clear that the Securities Act was drafted with an eye to the disadvantages under which buyers labor. Issuers of and dealers in securities have better opportunities to investigate and appraise the prospective earnings and business plans affecting securities than buyers.

Id.

24. 473 U.S. 614 (1985).

25. *Mitsubishi*, 473 U.S. 614.

26. *See generally Alexander*, 415 U.S. 36; *Mitsubishi*, 473 U.S. 614.

27. *Mitsubishi*, 473 U.S. at 616-18.

28. *Id.* at 626.

29. *Id.*

30. *Id.* at 627-28. "It is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable." *Id.* at 627 (citing Wilko v. Swan, 346 U.S. 427, 434-35 (1953)) (other citations omitted).

the statute.[31]

Applying the two-part inquiry to the agreement, the Court found that the parties had agreed to arbitrate the dispute.[32] When the Court considered the legislative intent to the Sherman Antitrust Act, it stated that out of respect for "international comity," the arbitration clause should be enforced.[33]

In *Alexander v. Gardner-Denver Co.*,[34] the Court addressed the issue of compelled arbitration of individual rights. The Court held that an employee's right to trial before a federal court under the Equal Employment provisions of the Civil Rights Act was not foreclosed by submitting a claim to arbitration.[35] The arbitration provision existed in the collective-bargaining agreements between the employer and the labor union.[36] The employee alleged racial discrimination prohibited by Title VII.[37] The Court applied a two-part inquiry similar to that in *Mitsubishi* to the parties' "broad arbitration clause covering 'differences aris[ing] between the Company and the Union.'"[38] The justices examined the purpose and legislative history of Title VII.[39] The Court found that "there can be no prospective waiver of an employee's rights under Title VII."[40] It noted especially that Title VII concerns "an individual's right to equal employment opportunities," which cannot be abrogated by a collective-bargaining agreement.[41] After *Alexander*, a majority of federal courts refused to uphold agreements to arbitrate statutory claims.[42]

Seventeen years later, the Supreme Court revisited the question regarding whether an employee could compel arbitration, pursuant to an employee-employer agreement, of a statutory claim which protected individual rights. In *Gilmer v. Interstate/Johnson Lane Corp.*,[43] the

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31. *Mitsubishi*, 473 U.S. at 628.
32. *Id.* at 628.
33. *Id.* at 629.

> [W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

Id.

34. 415 U.S. 36 (1974).
35. *Alexander*, 415 U.S. at 54.
36. *Id.* at 40.
37. *Id.* at 39.
38. *Id.* at 40. (citing Art. 23, § 5 of the agreement.)
39. *Id.* at 47-48.
40. *Alexander*, 415 U.S. at 51.
41. *Id.*
42. Meredith Burrell & Debra S. Katz, *Mandatory Arbitration: New Supreme Court and Circuit Court Directives*, SE05 ALI-ABA 315 (1999).
43. 500 U.S. 20 (1991).

Court held that a statutory claim of discrimination based on age (prohibited by the ADEA[44]) could be required to be adjudicated in arbitration instead of a federal court.[45] In so holding, the Court reviewed some provisions of the FAA and its purpose.[46] The Court, citing *Mitsubishi,* stated that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[47] Turning to whether or not Congress had evinced an intention to preclude arbitration of the ADEA, the Court found that Congress had not.[48] The Court did concede that "the ADEA is designed not only to address individual grievances, but also to further important social policies."[49] But the Court found no "inherent inconsistency between [individual interests and social policies] and enforcing agreements to arbitrate age discrimination claims."[50] While the employee also challenged the adequacy of arbitration procedures, the Court dismissed this generalized attack on arbitration.[51] Since *Gilmer*, the federal courts have made a distinction between compelling arbitration found in a collective-bargaining contract (*Alexander*) and one found in a contract of employment.[52]

II. ARBITRATION DEFICIENCIES

Before examining why statutory claims against employers involving individual rights should not be compelled to arbitration, one must first examine the deficiencies, in general, of arbitration. Federal courts are preferable forums for employees to have their complaints resolved for multiple reasons: (1) discovery is broader in federal courts; (2) federal judges, as opposed to industry insiders, are more qualified to interpret federal statutory language and meaning; (3) written opinions are needed for consistency in statutory application; (4) federal courts may impose a broad range of remedies; and (5) federal court oversight is more likely to produce broad industry changes. While none of these reasons constitutes a substantive right in itself, together they provide the protections which were intended by Congress in drafting the statutes which protect individual rights.

First, discovery in federal court is broader than in arbitration be-

44. 29 U.S.C. § 621(b) (1994).
45. *Gilmer*, 500 U.S. at 23.
46. *Id.* at 24-25.
47. *Id.* at 26.
48. *Id.*
49. *Id.* at 27.
50. *Gilmer*, 500 U.S. at 27.
51. *Id.* at 30-33.
52. Burrell & Katz, *supra* note 42, at 315.

cause the Federal Rules of Civil Procedure allow civil litigants a broad range of pre-trial discovery.[53] Discovery is especially important in the litigation of individual rights. Often the evidence of discrimination is not in as blatant a form as a memo from the Personnel Director to the CEO stating that he has fired an employee on the basis of that employee's race. Usually, discrimination is invidious, occurring in the form of glass ceilings, promotional and hiring practices, and attitudes of bigotry throughout the employer's company. Therefore, broad discovery is necessary for an aggrieved employee to meet his burden of proof and thereby receive justice.

Second, federal judges are more qualified than industry insiders to adjudicate questions of federal statutory interpretation. First, arbiters are without authority to develop the law.[54] They are hired to resolve a single dispute and are not required to consider public policy.[55] This may lead to an outcome which would be different in a court because the federal court has discretion to interpret the broad public policy set out in Title VII. Second, because arbiters do not answer to Congress or the public, only industry insiders and the litigants (persons without the power to correct rulings through proper legislation) are aware of their rulings.[56]

Arbiters often lack legal training and education.[57] Although it "requires a sound understanding of law in general and of current societal standards," the arbiters are usually industry insiders who normally decide disputes over prices and contracts, instead of individual rights protected by Title VII.[58] Most arbiters are not skilled in statutory interpretation of individual rights, as opposed to federal courts which are the main workhorses for statutory interpretation and are also under the precedent of the Supreme Court.[59]

The third way in which compelled arbitration is not suited to advance the goals of individual rights statutes is that the opinions of the arbiters are neither written nor recorded. There is no way to surmise their reasons for decisions or to insure consistency in future results.[60] Without written opinions, precedents have not properly been set and

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53. FED. R. CIV. P. 26.

54. Geraldine Moohr, *Arbitration and the Goals of Employment Discrimination* Law, 56 WASH. & LEE L. REV. 395, 435 (1999).

55. *Id.* at 435.

56. *Id.* at 431-32.

57. *Id.* at 435.

58. *Id.* at 435.

59. Moorh, *supra* note 54, at 435-37 & n.221.

60. *Id.* at 432; *see* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31-32 (1991). The majority of the court apparently accepted legal development as an important adjudicative function.

interpretive guidelines have not been established.[61] These guidelines are needed for proper review of the decisions (if the arbitration decision is appealed). Written opinions are also needed for their deterrent effect on other employers.[62] Without written opinions, employers do not know which activities are considered discrimination and which activities are legitimate practices.[63] Written opinions also give victims of employment discrimination notice of redress and an education as to how discrimination is defined.[64] Finally, written opinions facilitate the development of the law, which has long been recognized as an important aspect of adjudication.[65]

Fourth, federal courts' freedom to administer a wide range of remedies against discrimination is another reason statutory claims brought against employers which regard individual rights should not be adjudicated in arbitration. A federal court may enjoin a discriminatory practice of the employer, but an arbiter may only determine the outcome of the dispute at hand and assess damages. The federal courts have discretion to grant equitable avenues of relief that are not available in arbitration. Federal courts may grant relief to classes of injured employees and not just the plaintiff at hand.

Finally, federal courts should hear these discrimination claims because broad industry discrimination can be eliminated by court oversight. Arbitration and resolution of single complaints cannot affect sufficient changes in an employer's discrimination. This is consistent with the fact that federal courts may impart broader remedies; they also have the ability to oversee that the employers conform to the remedies. Arbiters decide a dispute and are not involved in enforcing the judgment. Federal courts have played an enormous and indispensable role in correcting discrimination in the past and should be afforded that opportunity in present employment discrimination. As the Supreme Court stated in *Alexander*, "final responsibility for enforcement of Title VII is vested with federal courts."[66]

This discussion does not seek to imply that arbitration is an insufficient forum for many disputes. Arbitration is a legitimate and sometimes helpful forum of alternative dispute resolution. In many cases, contracts to arbitrate should not be discarded lightly. Contracts to compel arbitration that are between an employer and employee are not made with the same amount of bargaining power. The employer usually has the resources and drafts the contract. The future employee

61. Moohr, *supra* note 54, at 432.
62. *Id.* at 431-32.
63. *Id.* at 437.
64. *Id.*
65. *See id.* at 432.
66. *Alexander*, 415 U.S. at 44.

signs the contract to get the job, not knowing what rights he is surrendering to arbitration.

III. PURPOSES OF TITLE VII

Title VII of the Civil Rights Act was created to eliminate discrimination in the workplace.[67] Its objectives were twofold: (1) to end workplace discrimination, and (2) to remedy individual injuries.[68] The first objective evaluates the need to make sweeping changes against discrimination in the American workplace.[69] Arbitration is not an appropriate vehicle to make these widespread changes.[70] The second objective is fulfilled through compensation or reinstatement of an aggrieved employee.[71] To effectively complete these objectives, an employee's Title VII claim should not be subject to arbitration.

Title VII's prohibition against discrimination did not create a new right, but granted a right to enter federal court.[72] The House Committee on the Judiciary stated, "The bill . . . is designed primarily to protect and provide more effective means to enforce the civil rights of persons within the jurisdiction of the United States."[73] This comment evidences Congress's concern regarding the effectiveness of discrimination suits litigated outside of a federal forum. Title VII turned claims that would traditionally be handled (or mishandled) in a state court into claims "arising under"[74] a federal statute.[75] A claim under a federal statute gives the claimant a door to federal court, which is a more impartial forum for adjudication of his claim.[76] This protection was considered necessary because of existing racial turmoil.[77] Federal question jurisdiction is based on a distrust of state courts to impartially and/or precisely adjudicate a particular dispute.[78] It exists "to protect litigants relying on federal law from the danger that the state courts will not properly apply that law, either through misunderstanding or lack of sympathy."[79] This new right to a federal forum is a safeguard against state and local discrimination.

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67. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979).
68. Albemarle Paper v. Moody, 422 U.S. 405, 417-18 (1975).
69. *Albemarle Paper*, 422 U.S. at 417.
70. *See supra* Part II.
71. *Albemarle Paper*, 422 U.S. at 418.
72. H.R. REP. NO. 914 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391.
73. *Id.*
74. 28 U.S.C. § 1331 (1994).
75. *See* Moohr, *supra* note 54, at 424.
76. *See id.* at 424-26.
77. *See id.* at 423.
78. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 263 (3d ed. 1999).
79. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 164-168 (1969).

The federal courts are better suited to assure Title VII's purpose of ending workplace discrimination. If the state courts cannot be trusted with these claims of individual rights, then it is even more offensive to Title VII's purpose to have the claims determined in arbitration. The reasons offered in favor of federal anti-discriminatory statutes being adjudicated in a federal forum, rather than that of a state, apply to arbitration as well. Like state court judges, arbiters are not familiar with the statutes in question or the complex judicial decisions which make up their applicable body of law. Arbiters may be swayed by local discriminations and do not have the job security that is provided for federal judges.

IV. *GILMER*'S APPLICATION TO TITLE VII CLAIMS

The U.S. Supreme Court's reasoning in *Gilmer* is inappropriate as applied to claims arising under Title VII. These are the major flaws in the Court's opinion in *Gilmer*: (1) the Court's erroneous assumption that it must adopt a healthy attitude towards arbitration; (2) the Court's mistaken assumption that a statute meant to protect individual rights is comparable to other federal statutes under which claims have been compelled to arbitration; (3) the Court's erroneous finding that Congress had no intention to preclude other forms of dispute resolution; and (4) the Court's short-sighted assumption that litigants may vindicate their statutory claims appropriately in arbitration.[80] Before discussing these arguments, the Court stated that it would not consider the argument, raised by amici curiae and the dissent, that arbitration clauses existing in contracts of employment are not controlled by the FAA.[81]

A. The Court's Assumptions Regarding the FAA

The Court begins by giving a brief overview of the FAA. It ends the analysis by quoting *Cone Memorial Hospital v. Mercury*,[82] stating that the FAA's "provisions manifest a liberal federal policy favoring arbitration agreements."[83] The flaw in accepting this view of arbitration is that it is not statutorily mandated. The FAA never states that the policy for enforcing the contracts should be liberal, instead it sets up certain procedures that must be followed in order for an arbitration

80. *Gilmer*, 500 U.S. at 24-35.
81. *Gilmer*, 500 U.S. at 25 n.2; *id.* at 36 (Stevens & Marshall, JJ., dissenting).
82. 460 U.S. 1 (1983).
83. *Gilmer*, 500 U.S. at 25 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

contract to be binding.[84]

The context of the quote is also important. The *Mercury* case involved a dispute between a hospital in North Carolina and a contractor in Alabama.[85] The parties had an arbitration agreement in the construction contract in accordance "with the Construction Industry Arbitration Rules of the American Arbitration Association."[86] The dispute arose over delays in construction, and the hospital filed an action to bar the arbitration.[87] When the Court states that "[s]ection 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements," it cites no authority or congressional history for this proposition.[88]

In *Mercury*, the type of arbitration agreement is far different from an arbitration provision in an employment contract. An arbitration agreement between two commercial entities contains the safeguard of equal or comparable bargaining power. This insures that both sides are relinquishing a similar privilege. On the other hand, an employee (especially in less skilled jobs) may not have any bargaining power. If he does not sign the arbitration contract the next applicant will. The commercial entities also have experience in making these contracts and have access to experts (corporate attorneys) who are conscious of the drawbacks and benefits associated with arbitration. In contrast, a potential employee may not have the experience or understanding to acknowledge the protections he is foregoing.[89] In light of these differences, the Court incorrectly assumed that it should enforce a liberal policy favoring arbitration.

B. The Court's Comparison to Other Statutory Claims

The *Gilmer* Court stated, "It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."[90] The Court lists cases in which it has enforced arbitration agreements arising under statutory claims.[91] The statutes at issue in those cases were the Sherman Antitrust Act,[92] the Securities and Ex-

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84. 9 U.S.C. §§ 1-16 (1994).
85. *Mercury*, 460 U.S. at 4.
86. *Id.* at 5.
87. *Id.* at 4-7.
88. *Id.* at 24.
89. This may not be the case in examining the employment contracts of employees who are more savvy and experienced in the job market. Consideration should also be given to whether the employee is more sophisticated and whether he was made aware that the arbitration agreement was made in return for compensation.
90. *Gilmer*, 500 U.S. at 26.
91. *Id.*
92. 15 U.S.C. §§ 1-7 (1994).

change Act of 1934,[93] the civil provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"),[94] and the Securities Act of 1933.[95] Each of these statutes concern regulation of businesses and not individual rights. Compelling an arbitration agreement regarding antitrust issues between two corporations under the Sherman Act is quite different than compelling arbitration regarding discrimination between an employee and an employer. As discussed in the previous section, arbitration contracts between corporations and those between employers and employees are inherently different.

It is also unconscionable to assume that the arbitration of commercial disputes is the same as the arbitration of a person's individual rights and civil liberties. The purposes of the Sherman Act, the Securities Acts, and RICO are very different from the purpose of Title VII. The Sherman Act is designed to regulate and ensure competition in the marketplace.[96] The purpose of the Securities Exchange Act and the Securities Act are to regulate the trade of securities and insure investors of reliable information.[97] RICO was conceived to cease organized crime rings and the control they held over certain commodities.[98] Congress' intention behind Title VII is different than that behind these other statutes.[99]

Moreover, the Court, quoting *Mitsubishi*, stated that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute."[100] Once again the Court is quoting from a case which dealt with arbitration of a corporate contract (not an employee-employer contract) and a statutory claim that is not an individual right.[101] The Court is correct in pointing out that arbitration agreements do not forgo a litigant's statutory claim. In other words, the same statutes should be applied in both litigation and arbitration. The right to equal employment rights exists whether the claim is arbitrated or not. The problem, however, lies in the fact that arbitration does not provide sufficient protection for this right. The right to a federal forum is just as important as the individual right itself. The federal forum is the only way Congress can guarantee that its purposes and intentions of protecting certain classes of people will be fulfilled.

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93. *Id.* § 78j(b).
94. 18 U.S.C. §§ 1962-1964.
95. 15 U.S.C. § 77l(2); *Gilmer*, 500 U.S. at 26.
96. 15 U.S.C. §§ 1-7.
97. *Id.* §§ 78j(b), 77l(2).
98. 18 U.S.C. §§ 1962-1964.
99. *See supra* Part III.
100. *Mitsubishi*, 473 U.S. at 628.
101. *Id.*

C. Whether Congress Has Precluded a Waiver of Judicial Forum

Congress' intention to preclude a waiver of judicial forum is demonstrated by Title VII's "inherent conflict" between arbitration and the purposes of Title VII. The Court states 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."[102] The burden is now placed on the employee to demonstrate that Congress "intended to preclude a waiver of a judicial forum."[103] There are three ways to show that such an intention exists: (1) the text of the statute; (2) its legislative history; and (3) "an 'inherent conflict' between arbitration and the [statute's] underlying purposes."[104]

The text of Title VII does not expressly preclude an employee-employer contract from waiving the employee's (or employer's) right to a judicial forum.[105] The legislative history of Title VII communicates the statute's purpose, but does not expressly show Congress' intent to preclude a waiver of judicial remedies.[106] But there does exist "an inherent conflict" between arbitration and Title VII's underlying purpose.[107] Title VII was enacted "to protect and provide more effective means to enforce the civil rights of persons within the jurisdiction of the United States."[108] This evidence of Congress' intent exhibits an inherent conflict with arbitration. If Congress intended for Title VII to protect and provide access to federal courts, then this design precludes arbitration. Arbitration, which takes these claims out of federal courts, is inconsistent with Congress' intent. Therefore, Congress has evinced "an intention to preclude a waiver of judicial remedies" through the "inherent conflict" between arbitration and Title VII.[109]

D. Vindication of Statutory Claims through Arbitration

The Court, quoting *Mitsubishi*, stated 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."[110] First, it must be remembered that

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102. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting *Mitsubishi*, 473 U.S. at 628) (internal quotations omitted).

103. *Id.*; *see* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987).

104. *Gilmer*, 500 U.S. at 26.

105. 42 U.S.C. §§ 2000e-2 to 2000e-3 (1994).

106. H.R. REP. NO. 88 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391.

107. *Gilmer*, 500 U.S. at 26; see *supra* Part VI.

108. H.R. REP. NO. 88.

109. *Gilmer*, 500 U.S. at 26.

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

Mitsubishi spoke to arbitration between corporate entities.[111] This statement from *Mitsubishi*, which is being applied by the Court to justify compelling employee-employer arbitration, makes an erroneous assumption that vindication of the claim will preserve the statute's remedial and deterrent function.

To once again examine the weaknesses of arbitration in general, proper vindication of a Title VII claim is not guarded by arbitration as it would be in a federal forum; biased or unknowledgeable arbiters may fail to properly apply Title VII jurisprudence to the matter before them.[112] Vindication of the individual employee's claim does further the other Title VII goals of remedy and deterrence.[113] The limited available remedies of arbitration prevent it from being an effective forum for Title VII claims.[114] Title VII cannot continue to serve its "remedial function" through arbitration. Without remedies such as injunctions, court oversight, and class-wide compensation, employers may continue to discriminate. The employer may maintain its discriminatory practices against its other employees who (for various reasons) do not or cannot bring suit against the employer.

Title VII's ability to deter discriminatory practices is diminished by arbitration. Since arbiters' remedies do not include punitive damages or any wide-range/broad-sweeping ability to require change in policy, the deterrent effect of Title VII is weakened.[115] An employer only has to compensate the individual who brought the claim, instead of being punished and therefore deterred.[116] Arbitration does not include the bad publicity that a federal trial brings to the corporate entity.

The Court did not adequately delve into each and every issue raised in compelling arbitration of an individual rights' statute in an employee-employer contract. It failed to discuss whether arbitration clauses in employment contracts are even covered by the FAA, although the issue was raised in Justice Steven's dissent (joined by Justice Marshall).[117] Justice Stevens stated that "arbitration clauses contained in employment agreements are specifically exempt from coverage of the FAA."[118] This argument is warranted since the text of the FAA never references employment contracts.[119] The dissent explores and concurs with the arguments this Comment makes regarding the

111. *Mitsubishi*, 473 U.S. at 637.
112. *See supra* Part III.
113. *Gilmer*, 500 U.S. at 28; *Mitsubishi*, 473 U.S. at 637.
114. *See supra* Part III.
115. *Gilmer*, 500 U.S. at 41-42 (Stevens & Marshall, JJ., dissenting).
116. *Id.* at 42.
117. *Id.* at 36.
118. *Id.*
119. 9 U.S.C. §§ 1-16 (1994).

intent of Title VII.[120]

CONCLUSION

Title VII is a prophylactic statute intended by Congress to prevent and deter discrimination based on race, color, religion, sex, or national origin. By giving employees who have been discriminated against a door to federal courts, Title VII provides the fairest forum for discrimination suits to be redressed. The majority's decision in *Gilmer* did not thoroughly address all issues that compelling arbitration of individual rights in employment contracts raises. Furthermore, the decision should not be broadened to include claims arising under Title VII.

Mary Rebecca Tyre

120. *Gilmer*, 500 U.S. at 41-42 (Stevens & Marshall, JJ., dissenting) (referencing Title VII even though the claim at bar was an ADEA right).