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Arbitrary Civil Rights: The Case of Duffield v. Robertson Stephens

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ARBITRARY CIVIL RIGHTS?: THE CASE OF *DUFFIELD V. ROBERTSON STEPHENS*

"From fearful trip the victor ship comes in with object won"
Walt Whitman, *O Captain! My Captain!*

I. INTRODUCTION

In May 1998, the Ninth Circuit Court of Appeals handed down its decision in *Duffield v. Robertson Stephens & Company*,[1] and in so doing, opened another chapter in the heated debate surrounding compulsory arbitration of employment disputes. In *Duffield*, a three-judge panel announced that, notwithstanding a pre-dispute compulsory arbitration agreement, an employee may not be forced to arbitrate her Title VII[2] statutory claims.[3]

To fully understand the implications of the ruling in *Duffield*, one must have an appreciation of the scope of employment litigation. The dramatic increase in employment litigation began in the early 1990s. The Civil Rights Act of 1991,[4] the Age Discrimination in Employment Act,[5] and the Americans with Disabilities Act[6] gave employees the ability to sue their employers in federal court for harassment or discrimination on a variety of grounds.[7]

Consequently, embattled employees took advantage of these new rights.[8] The result has taken an alarming toll on federal courts. Employment litigation has increased by 400% over the last twenty

1. 144 F.3d 1182 (9th Cir.), *cert. denied*, 119 S. Ct. 445 (1998).
2. 42 U.S.C. §§ 2000e-e(17) (1994).
3. *See Duffield*, 144 F.3d at 1185.
4. Pub. L. No. 102-166, 105 Stat. 1071 (codified as a historical and statutory note to 42 U.S.C. § 1981 (1994)).
5. Pub. L. No. 90-202, 81 Stat. 602 (1967).
6. Pub. L. No. 101-336, 104 Stat. 327 (1990).
7. *See* Paul Eisenberg, *Got A Beef? Take it Out of Court*, BUS. PHILADELPHIA, Sept. 1, 1996, at 31.
8. *See id.*; Kevin McKenzie, *Crush of Complaints Straining EEOC*, ROCKY MTN. NEWS, Oct. 16, 1996, at 30A.

years.[9] The number of employment related civil rights lawsuits filed in federal court rose 128% from 1991 to 1995.[10] For example, employment discrimination lawsuits alone composed roughly ten percent of the federal docket in 1996.[11] Furthermore, it takes approximately two and a half years from the filing of a discrimination suit to the commencement of the trial.[12]

Economically, the cost to an employer to defend a discrimination lawsuit can be staggering.[13] For example, the legal fees alone to defend a Title VII discrimination lawsuit can reach $200,000.[14] Further, heavy punitive damage awards compound the costs to employers. In 1995, the typical jury award in sexual discrimination lawsuits was $927,269 with verdicts for the plaintiff in 42% of the cases.[15] Plainly, the cost of employment litigation is staggering.

These statistics illustrate both the economic impact of protracted employment litigation on employer resources and the increased burden on the courts.[16] The result has been a shift toward alternate dispute resolution (ADR) and away from a traditional judicial forum.[17] In contrast to the staggering figures involved in employment litigation, the cost to defend a Title VII discrimination suit through an arbitration mechanism is often less than $20,000.[18] Moreover, the ADR process arrives at a faster resolution than judicial litigation.[19] For example, from 1990 to 1995, companies using ADR saved more than $2,000,000 over companies who chose litigation.[20] Moreover, refuge from anti-employer sentiment of the lay jury increases ADR's

9. *See* Richard D. Wilkins, *Arbitrate or Out!*, CENT. N.Y. BUS. J., Feb. 5, 1996, at 1.

10. *See* McKenzie, *supra* note 8, at 30A.

11. *See* Wilkins, *supra* note 9, at 1.

12. *See id.*

13. *See* Eisenberg, *supra* note 7, at 31.

14. *See id.*

15. *See Litigation: Average Punitive Award Down in 1995 According to California Verdicts Study*, DAILY LAB. REP. (BNA) No. 97, at D-13 (May 20, 1996).

16. *See* Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. LAW. 21, 22-23 (1997).

17. *See* Eisenberg, *supra* note 7, at 31.

18. *See id.*

19. *See id.*

20. *See id.*

attractiveness to employers.[21] Thus, arbitration is an "advantageous vehicle" for employers who wish to avoid the cost, inconvenience, and uncertainty of civil litigation.[22]

In light of the federal civil rights statutes providing employees with direct judicial recourse, employers needed a mechanism to access ADR and, in particular, arbitration. The most effective method to ensure arbitration of employment disputes is to include compulsory arbitration clauses in employment contracts.[23] The result of these "binding arbitration" clauses is a method and process whereby employers gain access to ADR without fear of the cost, delay, and prejudice of federal court discrimination litigation. Employers gain consent, often tacit, of their employees to arbitrate *any future disputes.* The binding arbitration clause does not always protect both parties.

The nature of these arbitration agreements is the focus of much dispute between employers on the one side and civil rights activists and employees on the other. Despite the advantages of ADR, many employees are prospectively rejecting ADR on grounds that it does not adequately protect their rights and are seeking a way to return their claims to federal judicial forum.[24] Consequently, employees are challenging and seeking to avoid these binding arbitration clauses.

Often the scope of these arbitration agreements is the focal point of such challenges and a careful definition of compulsory is illustrative. The *Duffield* court described these agreements as compulsory "when individuals must sign an agreement waiving their rights to litigate future claims in a judicial forum in order to obtain employment with, or continue to work for, the employer."[25] In contrast, compulsory arbitration agreements *do not* include "systems under which employees agree, or otherwise elect, after disputes have arisen

21. *See* Rachel H. Yarkon, *Bargaining in the Shadow of the Lawyers: Negotiated Settlement of Gender Discrimination Claims Arising from Termination of Employment*, 2 HARV. NEGOTIATION L. REV. 165, 174-75 & n.50 (1997).

22. Bompey, *supra* note 16, at 23.

23. *See* Nancy L. Abell et al., *Selected Tips for Defending Employment Cases*, *in* CA35 A.L.I.-A.B.A. 1015, 1035-37 (1996).

24. *See, e.g.*, *Duffield*, 144 F.3d at 1187.

25. *Id.*

to submit them to arbitration."[26] It is the former arbitration agreement definition that has been the subject of protracted litigation, voluminous opinions, and legal commentary. The *Duffield* decision departs from ambiguous precedent and turns a new page in employment dispute resolution.

Part II of this Note analyzes the historical backdrop of the enforceability of the mandatory arbitration clause in employment agreements. This section examines the Federal Arbitration Act of 1925,[27] subsequent judicial interpretations, and statutory authority, primarily centering on the Civil Rights and Women's Equity in Employment Act of 1991 (the "Civil Rights Act of 1991" or "CRA").[28] It traces the development of mandatory arbitration jurisprudence and outlines the litigation framework. Part III analyzes the Ninth Circuit's decision and reasoning in *Duffield*, focusing on *Duffield*'s legal analysis within this precedential framework. Part IV investigates and criticizes the weak aspects of the opinion. Finally, Part V argues and concludes that the case law, statutory authority, and public policy support the outcome despite the flaws in *Duffield*'s reasoning.

II. THE ENFORCEABILITY OF MANDATORY ARBITRATION CLAUSES

The Federal Arbitration Act of 1925 (FAA),[29] provides for the enforcement of general arbitration agreements. Enacted to give arbitration agreements federal contractual rights protection, the Act serves as a backdrop to any arbitration discussion and must be understood before a careful examination of the legal precedents. This section analyzes the FAA and then details the relevant case law interpretations.

In 1974, the Court agreed to address the issue of enforcement of compulsory arbitration clauses in the employment context for the first time. In *Alexander v. Gardner-Denver Co.*,[30] the Supreme Court declined to compel arbitration of the employee's Title VII claim, despite a compulsory arbitration provision in the governing

26. *Id.*
27. 9 U.S.C. § 2 (1994).
28. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as a historical and statutory note to 42 U.S.C. § 1981 (1994)).
29. 9 U.S.C. § 2.
30. 415 U.S. 36 (1974).

collective bargaining agreement.[31] Subsequently, in the mid-1980s, the Court decided a trilogy of cases which reversed the *Gardner-Denver* presumption against the enforcement of arbitration clauses with regard to statutory claims.[32] Then, in 1991, the Supreme Court decided the seminal case *Gilmer v. Interstate/Johnson Lane Corp.*,[33] and held that, pursuant to an arbitration clause contained in the securities registration application, an employee was required to arbitrate his age discrimination claim.[34]

Coincident with the decision in *Gilmer*, Congress passed the Civil Rights Act of 1991.[35] This Act was designed to increase the remedies available under Title VII and to facilitate the initiation of discrimination suits "to deter unlawful harassment and intentional discrimination" in the employment arena.[36] In addition, it contained an ambiguous phrase endorsing alternative dispute resolution "[w]here appropriate and to the extent authorized by law."[37]

A. The Federal Arbitration Act of 1925 Background

In 1925, Congress enacted the Federal Arbitration Act to place agreements to arbitrate on par with other contractual agreements.[38] Subsequently, the scope of the FAA was determined to be coterminous with the reach of congressional commerce power.[39] Thus, for

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31. *See id.* at 47-49, 59-60.

32. *See* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 241-42 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985).

33. 500 U.S. 20 (1991).

34. *See id.* at 35.

35. Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (codified as a historical and statutory note to 42 U.S.C. § 1981 (1994)).

36. *Id.* § 2, 105 Stat. at 1071.

37. *Id.* § 118, 105 Stat. at 1081.

38. *See Gilmer*, 500 U.S. at 24. The FAA specifically states that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable and enforceable . . . ." 9 U.S.C § 2 (1994).

39. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273 (1995) (holding the FAA preempts Alabama law invalidating pre-dispute arbitration agreement); *see also* U.S. CONST. art. I, § 8, cl. 3 (empowering Congress to regulate interstate commerce).

an arbitration agreement in an employment contract to be within the FAA's presumption of validity, an employer must demonstrate that the business somehow involves interstate commerce.[40] The Supreme Court, however, has interpreted this requirement with such broad construction so as to virtually eliminate it.[41] Thus, the FAA extends federal statutory protection and endorsement to most, if not all, arbitration covenants.

Despite the seemingly broad scope of this coverage, section 1 of the FAA incorporates several apparent exclusions.[42] Section 1 states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[43] At first blush, section 1 seems to exclude all employment contracts from FAA enforcement. After further inspection, the language of section 1 evinces a congressional intent to exempt interstate *transportation employee agreements* from FAA coverage. Consequently, the issue of whether the FAA endorses arbitration clauses in labor and employment contracts has been largely left to the judiciary.

Not surprisingly, the circuits have split with regard to the construction of section 1. A narrow approach, adopted by the Fourth Circuit, excludes all employment contracts from FAA coverage.[44] Conversely, a broad construction interpretation, favored by the First, Second, Third, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits, holds that employment agreement arbitration clauses fall under the penumbra of the FAA, provided the agreement does not involve the

40. *See Allied-Bruce*, 513 U.S. at 273. "Involving commerce" requires that the employer demonstrates that the employer's activities affect interstate commerce, the employee produces goods for interstate commerce, or the employee works in interstate commerce. *See id.*; *see also* Perry v. Thomas, 482 U.S. 483 (1987) (holding that the FAA preempts California law precluding compulsory arbitration of wage collection claims).

41. *See Allied-Bruce*, 513 U.S. at 273; *cf.* Wickard v. Filburn, 317 U.S. 111 (1942) (holding that a farmer producing wheat entirely within Ohio indirectly affected interstate commerce and, thus, was subject to the reach of the Commerce Clause).

42. *See* 9 U.S.C. § 1 (1994).

43. *Id.*

44. *See* United Elec., Radio, & Mach. Workers v. Miller Metal Prods., 215 F.2d 221, 224 (4th Cir. 1954).

transportation industry.[45] The Ninth Circuit has yet to directly consider the scope of section 1.

Although the Ninth Circuit has not decided the scope of the FAA as applied to individual employment contracts and does not directly discuss the issue in *Duffield*, the legacy of the FAA generates underlying federal policy considerations. These considerations sparked the development of a strong federal policy in favor of arbitration and run throughout this discussion.[46] Despite the FAA's pro-arbitration mandate, the first step taken by the Supreme Court is backward—away from the enforcement of arbitration agreements.

B. The Alexander v. Gardner-Denver Co. *First Step*

In *Alexander v. Gardner-Denver Co.*,[47] the Supreme Court held that a discharged union member could bring a Title VII suit in federal court despite the fact that the discharge had previously been arbitrated pursuant to grievance procedures in the union's collective bargaining agreement.[48] In *Gardner-Denver*, the defendant company discharged Harrell Alexander, a black drill operator.[49] He subsequently lodged a complaint with the Steelworker's Union alleging racial discrimination under the collective bargaining agreement's contractual nondiscrimination clause.[50] A compulsory arbitration provision in the collective bargaining agreement subjected Alexander's claim to binding arbitration.[51]

Prior to the arbitration, however, Alexander filed a discrimination complaint with the Equal Employment Opportunity Commission

45. *See* Penny v. United Parcel Serv., 128 F.3d 408, 412 (6th Cir. 1997); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 835 (8th Cir. 1997); Great Western Mortgage Corp. v. Peacock, 110 F.3d 222, 227 (3d Cir. 1997); Pryner v. Tractor Supply Co., 109 F.3d 354, 357 (7th Cir. 1997); Cole v. Burns Int'l. Sec. Servs., 105 F.3d 1465, 1472 (D.C. Cir. 1997); Rojas v. TK Communications, Inc., 87 F.3d 745, 748 (5th Cir. 1996); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972); Dickstein v. duPont, 443 F.2d 783, 785 (1st Cir. 1971).

46. *See Gilmer*, 500 U.S. at 24-25.

47. 415 U.S. 36 (1974).

48. *See id.* at 59-60.

49. *See id.* at 38.

50. *See id.* at 42.

51. *See id.* at 40-42.

(EEOC).[52] The arbitrator ruled that Alexander was discharged for just cause and the EEOC dismissed his claim.[53] Alexander then brought a Title VII racial discrimination action in federal court.[54] The Gardner-Denver Company contended that the collective bargaining agreement's arbitration procedure provided Alexander with an adequate remedy and moved to dismiss the suit.[55] The district court granted Gardner-Denver's motion and the appeals court affirmed.[56]

On review, the Supreme Court held that the collective bargaining agreement's arbitration provision did not foreclose Alexander's statutory right to trial under Title VII.[57] The Court first analyzed Title VII's enforcement scheme and concluded "Congress indicated that it considered the policy against discrimination to be of the 'highest priority' [and] [c]onsistent with this view, Title VII provides for consideration of employment-discrimination claims in several forums." [58] Within these several forums, the *Gardner-Denver* Court regarded the federal courts as the final enforcement authority stating: "The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal."[59] The Court further stated that "Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration."[60]

Although *Gardner-Denver* was decided within the labor-collective bargaining agreement-arbitration context, the sweeping language of the Court indicated a wider intended application. For many years, the "decision was cited for the rule that *no* agreement to

52. *See id.* at 42.
53. *See id.*
54. *See id.* at 43.
55. *See id.*
56. *See id.*
57. *See id.* at 47.
58. *Id.* (quoting Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968)).
59. *Id.* at 56.
60. *Id.* at 49.

arbitrate could prevent a civil rights plaintiff from bringing suit in federal court."[61]

Seven years later, the Supreme Court reaffirmed the *Gardner-Denver* decision. In *Barrentine v. Arkansas-Best Freight System, Inc.*,[62] the Court held that an employee's Fair Labor Standards Act claim could be raised in federal court despite a compulsory arbitration grievance procedure in the governing collective bargaining agreement.[63] Allowing the employee's claim to be raised in a judicial forum, the Court noted that the statutory rights at issue were "designed to provide minimum substantive guarantees to individual workers."[64] Despite the *Gardner-Denver* and *Barrentine* decisions, the Supreme Court, in 1985, reversed the presumption against arbitrability of statutory claims.

C. *The* Mitsubishi *Shift*

In a series of three cases decided in the mid-1980s, the Supreme Court reversed the long-standing presumption spawned in *Gardner-Denver* and held that statutory claims could be the subject of an arbitration agreement.[65] Notably, the Court managed to preserve the precedential value of *Gardner-Denver* even while shifting away from its ideology and holding.

In the first of these cases, *Mitsubishi Motors Corporation*,[66] the Court compelled the arbitration of antitrust claims brought under the Sherman Act.[67] Grounding its decision in contract principles, the Court held that if a party makes a contract to arbitrate, "the party should be held to it unless Congress . . . has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at

61. Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F. Supp. 190, 194 (D. Mass. 1998) (emphasis added).

62. 450 U.S. 728 (1981).

63. *See id.* at 745; *see also* McDonald v. City of W. Branch, 466 U.S. 284, 292 (1984) (stating that awards received pursuant to collective bargaining agreement arbitration procedures should not be accorded res judicata effect).

64. *See Barrentine*, 450 U.S. at 737.

65. *See* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 486 (1989); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 242 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985).

66. *Mitsubishi*, 473 U.S. at 614.

67. *See id.* at 640.

issue."[68] The Court subsequently enforced an arbitration agreement brought pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO").[69] Finally, in *Rodriguez de Quijas*,[70] the Court held statutory securities claims brought pursuant to the Securities Exchange Act of 1934 to be arbitrable under the FAA.[71]

As a consequence of the *Mitsubishi* trilogy, the FAA was presumed to apply to *all* agreements to arbitrate unless one of three conditions was found. For an arbitration agreement to be set aside, the plaintiff must show (1) "Congress had expressed an intent to preclude compulsory arbitration, either in the statute's text or its legislative history; (2) that there was an inherent conflict between compulsory arbitration and the statute's purpose; or (3) the arbitral forum was inadequate to vindicate the plaintiff's rights effectively."[72] Thus, all future statutory claims subject to compulsory arbitration clauses will be analyzed under this framework. The clause will be presumed valid and enforceable unless one of the three amorphic categories indicate a reason to set it aside.[73]

Although none of the *Mitsubishi* trilogy directly involved Title VII claims, the implication was that the rule against compulsory arbitration of statutory claims was gone and with it, the judicial forum guarantees of *Gardner-Denver*. Indeed, with these cases, the Court announced and reaffirmed a "healthy regard for the federal policy" in favor of arbitration stemming from the FAA enacted sixty years earlier.[74] However, because the *Mitsubishi* trilogy focused exclusively on "arbitration agreements in the setting of *business transactions*," the application of these precedents to Title VII claims remained unclear.[75] Based on the civil rights subject matter of *Gardner-Denver*, several courts envisioned a different outcome if a *Mitsubishi*-style analysis was applied to civil rights statutes. *Gilmer*, of course, had not yet been decided.

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68. *Id.* at 628.
69. *See McMahon*, 482 U.S. at 242.
70. *Rodriguez de Quijas*, 490 U.S. at 477.
71. *See id.* at 486.
72. Rosenburg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F. Supp. 190, 195-96 (D. Mass. 1998).
73. *See id.*
74. *Mitsubishi*, 473 U.S. at 626.
75. *Rodriguez*, 490 U.S. at 484 (emphasis added).

D. *The* Gilmer v. Interstate/Johnson Lane *Rule*

Although the *Mitsubishi* cases were read broadly as applying contract law principles to enforce arbitration agreements solely in the business transactional context, in 1991, the Supreme Court extended the enforcement of arbitration provisions into the civil rights arena.[76] In *Gilmer*, the Court declared for the first time that an employee could be compelled to arbitrate a discrimination claim pursuant to an individual employment contract.[77] The plaintiff, Robert Gilmer, worked as a manager of financial services with the defendant company.[78] As a condition of his employment, Gilmer was required to register as a securities broker with the New York Stock Exchange (NYSE).[79] The registration application, commonly known as Form U-4, contained, *inter alia*, a provision wherein Gilmer "'agree[d] to arbitrate any dispute, claim or controversy' arising between him and Interstate" pursuant to the governing provisions of the NYSE.[80] In particular, the NYSE rules stated that arbitration would be required in "[a]ny controversy between a registered representative and any member or member organization *arising out of the employment or termination of employment.*"[81]

In 1987, when Gilmer reached the age of sixty-two, Interstate terminated his employment.[82] Believing age was relevant to his discharge, Gilmer filed a charge with the EEOC and then subsequently brought suit in federal court alleging a violation of the Age Discrimination in Employment Act of 1967 (ADEA).[83] Interstate responded by moving to compel arbitration of the claim pursuant to the Form U-4 and claimed that the FAA required enforcement of the mandatory arbitration clause.[84] The district court, following the *Gardner-Denver* mandate, denied Interstate/Johnson's motion to

76. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991).
77. *See id.* at 35.
78. *See id.* at 23.
79. *See id.*
80. *Id.*
81. *Id.* (emphasis added).
82. *See id.*
83. *See id.* at 23-24; *see also* Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (West 1998) (providing for a federal cause of action for age discrimination).
84. *See Gilmer*, 500 U.S. at 24.

compel.[85] The Court of Appeals for the Fourth Circuit reversed, noting that "nothing in the text, legislative history, or . . . purposes of the ADEA indicat[ed] a congressional intent to preclude enforcement of arbitration agreements."[86]

On review, the Supreme Court subjected the ADEA to a *Mitsubishi*-type analysis, stating "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."[87] The Court reasoned that if Congress intended to preclude arbitration from the ADEA, it would "be discoverable in the text . . . legislative history, or an 'inherent conflict' between arbitration and the ADEA's underlying purposes."[88] Upon careful examination of the ADEA, the Court concluded that neither its text nor legislative history explicitly precluded arbitration.[89] Despite this language, the Court managed to preserve the *Gardner-Denver* decision.

The *Gilmer* Court distinguished *Gardner-Denver* on three grounds without overruling it. First, the Court reasoned that the *Gardner-Denver* holding was limited to statutory claims brought in connection with a collective bargaining agreement. Second, unlike Harrell Alexander who was subject to a collective bargaining agreement negotiated by a third party union, Robert Gilmer independently signed the Form U-4 and agreed to submit any disputes to arbitration.[90] Third, the Court reasoned that the *Mitsubishi* cases, decided pursuant to the FAA, "reflect[ed] a 'liberal federal policy favoring arbitration agreements'" while the *Gardner-Denver* decision did not implicate the FAA.[91] Concluding that *Mitsubishi* controlled Gilmer's claim and consequently fell under the FAA, the Supreme Court held that *Gardner-Denver* did not control in FAA-covered claims.[92] Thus, *Gilmer* established new precedent by extending

85. *See id.*
86. *Id.*
87. *Id.* at 26.
88. *Id.* (quoting Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987)).
89. *See id.*
90. *See id.* at 23, 35.
91. *Id.* at 35.
92. *See id.* at 33-35.

Mitsubishi to the ADEA and established a framework for analyzing statutory claims subject to compulsory arbitration.

E. The Civil Rights Act of 1991 Wrinkle

In the same year that the Supreme Court handed down the decision in *Gilmer*, Congress enacted the Civil Rights Act of 1991.[93] The CRA was designed to amend Title VII and to reinforce the civil rights of employees subject to job discrimination.[94] In addition, the Act contained a specific section dealing with the arbitrability of employment discrimination claims.[95] Because the CRA was drafted before, but enacted after *Gilmer*, the extent to which the CRA amendments—directed primarily at the scope of the rights of victims of employment discrimination—impact the existing law as interpreted by the Supreme Court in *Gilmer* and *Gardner-Denver* is unclear.

The interpretation of the effect of the CRA is the pivotal issue in *Duffield*. To begin, an examination of the underlying purpose and legislative history behind the CRA amendments is instrumental to understanding on which side of the arbitral line the CRA falls.

The CRA had two primary goals to augment existing remedies available under Title VII. It was designed to combat increased harassment and discrimination in the workplace and to provide statutory substantive and procedural guidelines to facilitate the adjudication of suits brought pursuant to Title VII.[96] Moreover, section 3 announced an additional goal: "to respond to recent decisions of the Supreme Court by *expanding the scope of relevant civil rights statutes* in order to provide adequate protection to victims of discrimination."[97] Congress intended the CRA to respond to a series of 1989 Supreme Court decisions that Congress considered to be too restrictive an interpretation of Title VII.[98] The CRA was designed to codify a specific rule of construction for future courts: all civil rights laws were to be given a *broad interpretation* to effectuate their remedial

93. Pub. L. No. 102-166, 105 Stat. 1071, 1071 (1991).
94. *See id.* § 3, 105 Stat. at 1071.
95. *See id.* § 118, 105 Stat. at 1081.
96. *See id.* § 3, 105 Stat. at 1071.
97. *Id.* (emphasis added).
98. *See* H.R. REP. NO. 102-40(I), at 88 (1991), *reprinted in* 1991 U.S.S.C.A.N. 549, 627.

purposes.[99] In codifying this rule of construction, Congress intended that when the statutory terms in civil rights laws were "susceptible to several alternative interpretations, the courts . . . [were] to select the construction which most effectively advances the underlying congressional purpose."[100] Thus, Congress attempted to rein in the Supreme Court's conservative interpretations of Title VII. Congress, however, had failed to announce in what shape these interpretations should crystallize—*Gardner-Denver* or *Gilmer.*

In addition to section 3, the CRA includes a provision addressing alternative dispute resolution which further clouds its construction. Section 118 of the CRA encourages alternative dispute resolution "[w]here appropriate and to the extent authorized by law . . . ."[101] Because the language of section 118 was drafted prior to the *Gilmer* decision but enacted after *Gilmer* was decided, the question becomes whether Congress was referring to the *Gardner-Denver* decision as appropriate and authorized by law—thus indicating a bar on pre-dispute arbitration agreements consistent with that opinion—or whether Congress intended to encourage such agreements, consistent with the opinion in *Gilmer.* The revelation to this question presumably can be found in the legislative history—the exact intent of Congress. The resolution is unclear despite the voluminous written history underlying the CRA, however, several intimations can be drawn from a study of the congressional debate surrounding the CRA's passage.

House Report No. 102-40(II) seems to resolve the question in favor of *Gardner-Denver.*[102] The report, drafted before *Gilmer,* plainly states that "any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement

99. *See, e.g.*, Dennis v. Higgins, 498 U.S. 439, 443 (1991).

100. H.R. REP. NO. 102-40(I), at 88.

101. Civil Rights Act of 1991, § 118, 105 Stat. at 1081. The full text of section 118 reads:

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

Id. (emphasis added).

102. *See* H.R. REP. NO. 102-40(I), at 97.

or in an employment contract, *does not preclude the affected person from seeking relief under the enforcement provisions of Title VII.*"[103] Congress declared, "[t]his view is consistent with the Supreme Court's interpretation of Title VII in [*Gardner-Denver*]."[104] Clearly, Congress intended *Gardner-Denver* to control not only in disputes governed by collective bargaining agreements, but also in the context of single employment contracts. Under the rubric of the *Mitsubishi* framework, the legislative history underlying statutory claims pursuant to the CRA indicated an intent to preclude compulsory arbitration of Title VII claims.[105] Thus, the endorsement of alternative dispute resolution under section 118 seems subject to the constraints of *Gardner-Denver* and is designed to "supplement, not supplant, the remedies provided by Title VII."[106]

Ironically, the textual references adopting the *Gardner-Denver* precedent, subjected section 118 to another, broader, view on the proper use of arbitration. A second interpretation of section 118 focuses on the intent of Congress to favor arbitration where the parties knowingly and voluntarily elect to use those methods. Section 118 is susceptible to the interpretation that arbitration is favored when an employee voluntarily agrees to the clause, regardless of whether it is a condition of employment. This proposition drove the decision in *Gilmer* and finds support in, of all places, *Gardner-Denver*.[107]

The *Gardner-Denver* Court recognized that a voluntary agreement to waive an employee's cause of action under Title VII may be valid: "In determining the effectiveness of any such waiver, a court would have to determine . . . that the employee's consent to the settlement was voluntary and knowing."[108] Thus, although buried in a

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103. *Id.* (emphasis added).

104. *Id.*

105. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

106. H.R. REP. NO. 102-40(I), at 97.

107. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974) (stating that "presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement"). Because the dispute arose pursuant to a collectively bargained employment agreement, the Court did not consider the waiver argument. *See id.*

108. *Id.* at 52 & n.15. The Ninth Circuit has adopted a knowing and voluntary waiver requirement. *See* Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299,

footnote, the *Gardner-Denver* Court acknowledged that an employee *could waive* her statutory right through a "voluntary and knowing waiver"—a point later relied upon in *Gilmer.*[109]

Consequently, the legislative history of section 118's ambiguous endorsement of arbitration in Title VII claims could be interpreted as an endorsement of voluntary arbitration of statutory claims (*Gilmer)* or a preclusion of employment contract arbitration clause of civil rights (*Gardner-Denver*). From the CRA, its legislative history, and the prior and subsequent Supreme Court decisions, it is clear that any attempt to enforce a compulsory arbitration agreement with respect to an individual employment contract must square its reasoning with both *Gardner-Denver* and *Gilmer* in light of the CRA. In 1998, for the first time, the Ninth Circuit attempted just such a feat.

III. THE *DUFFIELD V. ROBERTSON STEPHENS & CO.* OPINION

In 1988, Tonja Duffield began working as a securities broker-dealer for Robertson Stephens & Company.[110] Prior to the start of her employment, Duffield, like the plaintiff in *Gilmer*, was required to "waive her right to a judicial forum to resolve all 'employment related' disputes and to agree instead to arbitrate any such disputes."[111] She waived these rights by executing, as a condition of her employment, the industry's securities registration Form U-4.[112] Because Robertson Stephens was a member of the NYSE and the National Association of Securities Dealers (NASD), the company was listed on the Form U-4 as Duffield's employer.[113] Both the NYSE

1304-05 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995). A discussion of the rigors of a Title VII waiver, however, is beyond the scope of this comment. For a more in-depth discussion, see Christine K. Biretta, Prudential Insurance Company of America v. Lai: *The Beginning of the End for Mandatory Arbitration?*, 49 RUTGERS L. REV. 595 (1997).

109. The *Gilmer* Court relied upon legislative history discussing the non-judicial resolution of the ADEA. *See* Gilmer v. Interstate/Johnson Lane Co., 500 U.S. 20, 29 (1991). The legislative history of the ADEA parallels the arbitration language of the CRA. *See* H.R. REP. NO. 102-40(II), at 41.

110. *See* Duffield v. Robertson Stephens Co., 144 F.3d 1182, 1186 (1998).

111. *Id.* at 1185.

112. *See id.* at 1186.

113. *See id.* at 1185.

and the NASD had rules in place to "compel employees to arbitrate any employment-related dispute at the request of their employers."[114]

In January 1995, Duffield brought suit against Robertson Stephens alleging sexual discrimination and harassment in violation of Title VII.[115] In addition, she brought claims for breach of contract, deceit, intentional infliction of emotional distress, and negligent infliction of emotional distress.[116] As a threshold matter, Duffield sought a declaratory judgment stating that securities employees cannot be compelled to arbitrate their claims pursuant to the arbitration clause in the Form U-4.[117] Duffield argued, *inter alia*, that the CRA precluded the enforcement of the arbitration clause with respect to her Title VII claims.[118] Relying on the text and legislative history of the CRA, Duffield argued that Congress expressly intended to distinguish between two types of statutory claims.[119] She argued that the CRA demarcated a line between "post-1991 Title VII claims (like hers) from the pre-1990 ADEA claim that the Supreme Court found arbitrable in *Gilmer*."[120]

Robertson Stephens subsequently moved to compel arbitration pursuant to the Form U-4 clause.[121] The district court denied Duffield's request for declaratory judgment and granted Robertson

114. *Id.* at 1186. Since the disposition of *Duffield v. Robertson Stephens & Co.*, the NASD has eliminated its mandatory arbitration of civil rights claims provision. *See NASD Proposes Eliminating Mandatory Arbitration of Employment Discrimination Claims for Registered Brokers,* NASD Press Release (visited Jan 12, 1999) <http://www.nasdaqnews.com/news/pr/nesection9752.html>. The replacement provision, which would allow the employee broker to reserve the right to a judicial forum, has yet to be approved by the Securities and Exchange Commission. *See id.*

115. *See Duffield*, 144 F.3d at 1186.

116. *See id.*

117. *See id.*

118. *See id.* Duffield also advanced four additional arguments which are not discussed herein. In addition to the CRA argument, she asserted: 1) that the Form U-4 was not a knowing agreement to arbitrate; 2) that the NYSE arbitration rules fail to adequately protect Title VII rights; 3) that the Form U-4 was an unconscionable adhesion contract; and 4) that the mandatory arbitration agreement was an unconstitutional condition of employment. *See id.*

119. *See id.* at 1189-90.

120. *Id.* at 1190.

121. *See id.* at 1186.

Stephens's motion to compel arbitration.[122] The court, however, refused to enter final judgment on the declaratory judgment claim, and certified its order for immediate appeal.[123] Duffield then appealed the order to the Ninth Circuit.

While Duffield predicated her arguments on the CRA's endorsement of a judicial forum, Robertson Stephens advanced an argument rooted in the text of section 118.[124] Robertson Stephens argued that "the plain language of the section evinces a congressional intent to allow—indeed, to 'encourage'"—compulsory arbitration clauses.[125]

Furthermore, Robertson Stephens argued that because the CRA was enacted subsequent to the decision in *Gilmer* and the ADEA is substantively similar to Title VII, the statutory language "authorized by law" refers to *Gilmer* and its endorsement of civil rights statutory claim arbitration.[126] Thus, according to Robertson Stephens's plain text argument, the CRA was intended to encourage the use of compulsory arbitration notwithstanding the express textual reference to *Gardner-Denver*.[127]

Noting that the "plain text" argument had yet to be considered by a appellate court and following the framework of the *Mitsubishi* trilogy, the Ninth Circuit examined the purpose, text, and legislative history of the CRA to determine the construction of the phrase "[w]here appropriate and to the extent authorized by law."[128] The purpose of section 118, explained the Ninth Circuit, was to expand

122. *See id.*

123. *See id.*; *see also* 28 U.S.C. § 1292 (1998) (allowing for immediate appeal of certified interlocutory decisions).

124. *See Duffield*, 144 F.3d at 1191.

125. *Id.*

126. *See id.*

127. *See id.*

128. *Id.* at 1193. The Ninth Circuit did note that several district courts have reached differing conclusions regarding the plain text argument. *See id.* at 1191. *Compare* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F. Supp. 190 (D. Mass. 1998) (holding that the CRA precluded compulsory arbitration pursuant to the Form U-4) *with* Johnson v. Hubbard Broad., Inc., 940 F. Supp. 1447, 1456-58 (D. Minn. 1996) (holding that the CRA does not prevent compulsory arbitration pursuant to the Form U-4).

the substantive rights of employees and increase the remedies available for civil rights violations.[129]

Moreover, the court noted that to accept Robertson Stephens's argument would create "at least a mild paradox."[130] In the eyes of the court, to conclude that Congress encouraged a system whereby employees surrendered their judicial forum rights to the resolution of future claims would be "at odds" with the primary purpose of strengthening those available remedies.[131] Indeed, such agreements *limit* the amount of remedies available.[132] The panel concluded that the purpose of the act did not sustain the plain text application advocated by Robertson Stephens.[133]

The court then turned to the text of section 118 and noted that it was "the critical statutory language."[134] Acknowledging that the phrase, if read out of context, could be ambiguous, the court interpreted the language, in light of the CRA's "object and policy," to install substantive limitations on the use of compulsory arbitration.[135] The panel interpreted the phrase "where appropriate" to mean "where arbitration furthers the purpose and objective of the Act—by affording victims of discrimination an *opportunity* to present their claims in an alternative forum . . . not by forcing an unwanted forum upon them."[136] On this point, Robertson Stephens's interpretation fell markedly short.

Similarly, the panel went on to consider the second qualifying phrase "to the extent authorized by law." The court conceded that because of the temporal conflict between the Act's passage and the *Gilmer* decision, the endorsement of existing law under section 118 was ambiguous.[137] The court, however, interpreted the term "law" to

129. *See Duffield*, 144 F.3d at 1192.
130. *Id.* at 1192-93 (quoting Pryner v. Tractor Supply Co., 109 F.3d 354, 363 (7th Cir. 1997)).
131. *See id.* at 1193.
132. *See, e.g.*, Thomas J. Stipanowich, *Resolving Consumer Disputes*, 53 DISP. RESOL. J., Aug. 1998, at 8, 13 (discussing the limited remedies available to the arbitrator in determining an award).
133. *See Duffield*, 144 F.3d at 1192-93.
134. *See id.* at 1193.
135. *See id.* (quoting John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 94-95 (1993)).
136. *Id.* at 1194.
137. *See id.*

mean the law existing at the time the section was drafted—the rule of *Gardner-Denver*—and not the law at the time the section was passed—the rule of *Gilmer* as Robertson Stephens argued.[138] "The overwhelming weight of the law at the time Congress drafted § 118 . . . was to the effect that compulsory agreements . . . were unenforceable."[139] The court, however, did not rely solely on timing to support its endorsement of *Gardner-Denver.*

To further support its conclusion, the panel relied on the legislative history of section 118 to bolster its construction.[140] The court said that the legislative history "unambiguously confirms" that Congress intended to adopt the rule of *Gardner-Denver.*[141] The court disregarded the implication that *Gilmer* could be the existing law under section 118.[142] It stated that while *Gilmer* turned out to undermine *Gardner-Denver*, this in no way altered Congress's intent.[143] The panel unequivocally declared the legislative history clearly implied that section 118 intended "to codify its position that 'compulsory arbitration' of Title VII claims was not 'authorized by law,' and that compelling employees to forego their rights to litigate future Title VII claims as a condition of employment was not 'appropriate.'"[144]

Thus, the Ninth Circuit decided that Title VII claims are not subject to compulsory arbitration. By examining the text, purpose, and legislative history behind the CRA, the panel concluded that enforcing the arbitration clause would be inconsistent with congressional intent.[145] Furthermore, the panel sidestepped the *Gilmer* precedent by noting that when the CRA was passed, an open question existed as to which "law"—*Gilmer* or *Gardner-Denver*—section 118 endorsed.[146] Consequently, the logic went, the court was free to adopt either precedent, nimbly distinguishing the two. Finally, the court concluded that, under the framework of the *Mitsubishi* trilogy,

138. *See id.*
139. *Id.*
140. *See id.* at 1195.
141. *See id.*
142. *See id.*
143. *See id.* at 1196.
144. *Id.*
145. *See id.* at 1199.
146. *See id.* at 1189.

the CRA manifested an intent to endorse the spirit of *Gardner-Denver* in the context of employment agreements.[147] Consequently, Tonja Duffield prevailed on her appeal for declaratory judgment and the Ninth Circuit remanded her case for further proceedings.[148]

IV. THE FLAWS

Despite grounding its opinion in an extensive analysis of legislative history and weaving a careful path through precedent, the *Duffield* opinion makes several assumptions and missteps in its reasoning. The court fails to properly address Robertson Stephens's plain text argument. Moreover, it does not fully discuss whether Duffield waived her right to a judicial forum by operation of the Form U-4. Finally, the court falls short of squaring its decision with the *Gilmer* precedent in light of significant legal and factual similarities.

First, in one short paragraph and a footnote, the panel summarily dismissed Robertson Stephens's argument that the legislative history and text of the CRA support the arbitration agreement.[149] The text of section 118 literally reads in favor of Robertson Stephens's position—it openly encourages arbitration.[150] In addition, despite the prevalent references to the *Gardner-Denver* opinion in the legislative history, Robertson Stephens argued that the phrase "to the extent authorized by law [embodies] an elastic phrase . . . expanding and contracting with the ebb and flow of court decisions."[151] Indeed, these decisions, including that of *Gilmer*, are the law.[152]

While this argument is susceptible to a traditional slippery slope attack, the panel *failed* to actually address the argument in its opinion. Instead, Judge Reinhardt, writing for the panel, sarcastically dismissed the contention, stating that to hold that section 118 was "instantaneously transmogrified [to take] on exactly the opposite meaning, [as Robertson Stephens suggested], . . . would entail a

147. *See id.* at 1195-96.

148. *See id.* at 1202-03. The Ninth Circuit affirmed the district court's rejection of Duffield's claims that state tort and contract law raised a constitutional bar to enforcing the Form U-4. *See id.*

149. *See id.* at 1197-98 & n.16.

150. *See supra* note 101 and accompanying text.

151. *Duffield*, 144 F.3d at 1197-98.

152. *See supra* Part II.B.

gross perversion of the legislative process."[153] The casual dismissal of Robertson Stephens's key argument revolving around the CRA undermines the strength of the opinion. In short, the Ninth Circuit fails to address—never mind distinguish—the Robertson Stephens's plain text argument.

Second, the panel failed to adequately address the issue of Duffield's waiver of her statutory discrimination claims. The congressional intent upon which the Ninth Circuit based its opinion clearly evinces a desire to encourage arbitration where the parties knowingly and voluntarily elect to use those methods.[154] Section 118 of the CRA openly encourages arbitration where there is a voluntary waiver.[155] Indeed, the *Gardner-Denver* case recognized this principle.[156] This principle would seem to govern when an employee voluntarily agrees to submit to arbitration regardless of whether or not it is a condition of employment. Although *Gardner-Denver* decided that an agreement to arbitrate in a collective bargaining agreement was not voluntary, the *Gilmer* court did not extend the precedent to preclude arbitration in individual employment contracts.[157] Under this theory, Robertson Stephens argued, the legislative history and text of the CRA, in addition to *Gardner-Denver*, support "voluntary" agreements to arbitrate Title VII claims and "Duffield's decision to sign [the] Form U-4 was purely voluntary."[158] Clearly outside the context of a collective bargaining agreement, Duffield's waiver raises more than a mere barrier to the Ninth Circuit's conclusion because it resembles a *Gilmer*–like waiver—a waiver the Supreme Court has found valid.

The court responded to this argument in a footnote by stating "[w]hatever the merit of this dubious assertion, it is irrelevant here because our task is not to divine a literal meaning of the word

153. *Duffield*, 144 F.3d at 1198.

154. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991) (codified as a historical and statutory note to 42 U.S.C. § 1981 (1994)).

155. *See supra* notes 101, 107-09 and accompanying text.

156. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 & n.15 (1974).

157. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33-35 (1991).

158. *Duffield*, 144 F.3d at 1197 n.16.

'voluntary'."[159] Again, the panel dismissed a valid textual argument with flippant prose. At the very least, a waiver argument is significantly more than a dubious assertion. The panel, however, failed to adequately consider the argument. Indeed, Robertson Stephens's argument is rooted in Supreme Court precedent. The failure to address the argument undermines the strength and scholarship of the opinion and leaves a shaky foundation for subsequent case reliance.

Finally, despite couching its analysis in *Mitsubishi* terms, the opinion fails to sufficiently square its outcome with the powerful precedent of *Gilmer*. First, the ADEA discrimination claims in *Gilmer* were legislatively analogous to Title VII discrimination claims. It follows that Duffield's civil rights claims would be subject to the same analysis as Gilmer's ADEA claims. Second, the arbitration agreement in the Form U-4 was factually identical to that in *Duffield*.[160] Third, unlike *Gardner-Denver*, the arbitration clause in *Duffield* was not implicated pursuant to a collective bargaining agreement. These similarities factually equate Duffield's claims with those of *Gilmer* and distinguish *Gardner-Denver*.

The panel, however, sidestepped *Gilmer* by merely endorsing Congress's intent to codify the *Gardner-Denver* holding in the CRA without equal consideration of *Gilmer*'s factual and legal applicability.[161] What the panel did not address was the possible inference that Congress, by not overturning the *Gilmer* decision, intended to codify its holding—or at least to exhibit a tacit acceptance of the *Gilmer*'s principles. Because of the factual similarities between *Gilmer* and *Duffield*, the court should have thoroughly addressed and distinguished the precedent.[162] Instead, the court relied on the CRA's

159. *Id.*

160. *See Gilmer*, 500 U.S. at 23; *Duffield*, 144 F.3d at 1185-86.

161. *See Duffield*, 144 F.3d at 1197 & n.14.

162. Since *Duffield*, other courts have recognized the similarities between the ADEA and Title VII discrimination claims and have concluded that *Gilmer* applies to mandatory arbitration pursuant to Form U-4. In *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998), the Third Circuit held the Form U-4 arbitration clause was valid and enforceable under the FAA and that it applied to an employee's Title VII and ADEA discrimination claims. *See id.* at 187. In so holding, the Third Circuit expressly disagreed with the *Duffield* court. *See id.* at 183; *see also* Mouton v. Metropolitan Life Ins. Co., 147 F.3d 453, 455 (5th Cir. 1998)(enforcing arbitration clause with respect to Title VII claims); Thomas v. Bear, Stearns & Co., No. CIV.A. 3:93-CV-1970D, 1998 WL

incorporation of *Gardner-Denver* as "law" and concluded the pre-*Gilmer* legislative history is more dispositive than Supreme Court precedent. Again, the Ninth Circuit failed to adequately address and distinguish what is the largest challenge to its opinion.

V. CONCLUSIONS

Despite these flaws, the decision in *Duffield* is sustainable in light of the legislative history of the CRA and its relevant case law. Moreover, the court's decision is supported by strong public policy to protect the rights of discrimination victims. Although the Ninth Circuit failed to address the viability of the CRA's ratification of *Gilmer*, a conclusive reading of the legislative history evinces a strong intention to preclude compulsory arbitration. In addition, a knowing and voluntary requirement for waiver of these statutory rights, although authorized by the statute, runs counter to the purposes underlying Title VII.

Despite the ambiguity of the term "law" in section 118, the Ninth Circuit's conclusion that section 118 endorses *Gardner-Denver* is sound in light of the policies underpinning the CRA. To read section 118 as enforcing *Gilmer* would be thoroughly inconsistent with the legislative intent that alternative dispute resolution "*supplement, not supplant*" those remedies provided by Title VII.[163]

The strongest support for the *Duffield* decision, however, is rooted in the public policy underpinning civil rights statutes. Careful consideration of the legislative history behind these statutes reveals that Congress intended arbitration to augment the traditional judicial remedies with the claimant's consent.[164] With the increase in employment litigation, the practical need for arbitration is rising. This increase in arbitration should not come at the expense of the civil rights and remedies provided under Title VII and similar laws. Arbitration is simply an inadequate remedial forum for *all* civil rights

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684232, at *1 (N.D. Tex. Sept. 25, 1998) (enforcing arbitration clause with respect to Title VII claims); Sacks v. Richardson Greenshield Sec., Inc., 781 F. Supp. 1475, 1487 (E.D. Cal. 1991) (enforcing arbitration clause with respect to Title VII claims).

163. H.R. REP. NO. 102-40(II), at 97 (1991), *reprinted in* 1991 U.S.S.C.A.N. 549, 635 (emphasis added); *see supra* notes 102-06 and accompanying text.

164. *See, e.g., supra* note 109 and accompanying text.

litigation.[165] Moreover, the enforcement of compulsory arbitration clauses limits if not erases many potential remedies available to a discrimination victim. To protect these rights, the courts must safeguard against the erosion of the remedies.

In conclusion, the *Duffield* decision protects the availability of the judicial forum to discrimination victims. To fashion a rule that would require the victim to submit to a potentially inadequate forum undercuts the purpose of providing the discrimination remedy. In essence, mandatory arbitration declaws Title VII because victims cannot avail themselves of its necessary protections. Thus, despite *Duffield*'s patent flaws, this decision serves to safeguard the rights and remedies guaranteed under Title VII and similar statutory schemes.

On November 9, 1998, the Supreme Court denied Robertson Stephens's petition for certiorari.[166] The denial of certiorari preserves the holding of the Ninth Circuit's decision and enables Tonja Duffield to proceed with her complaint against Robertson Stephens. Despite this apparent victory guaranteeing a judicial forum for the litigation of civil rights, the Supreme Court's refusal to enter the debate creates even more doubt about the efficacy of mandatory arbitration clauses in contracts. Until the Supreme Court promulgates a uniform rule, the question remains as to whether we all have arbitrary civil rights.

*Robert S. McArthur**

165. *See* Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 392 (1996).

166. 119 S. Ct. 445 (1998).

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