

“Forced” vs. Compulsory Arbitration of Civil Rights Claims

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Introduction

Congress has provided that employees have a right to a jury trial when they sue their employers for discrimination on the basis of a protected status.¹ In 1991, shortly before Congress permitted victims of discrimination the right to sue for damages, the Supreme Court held that an employer and an employee may agree by contract to waive an employee’s statutory right to a jury trial.² The Court’s willingness to uphold so-called compulsory arbitration clauses was based in large part on the parties’ freedom to contract;³ the Court has noted that because the parties bargained for arbitration in their contract, they should be held to their bargain.⁴

Recently, in *EEOC v. Luce, Forward, Hamilton & Scripps*,⁵ the Court of Appeals for the Ninth Circuit expanded the scope of the Supreme Court’s decision by allowing an employer to condition an offer of employment on signing a contract that would waive the employee’s statutory right to a jury trial.⁶ In such cases, if the prospective employee refuses to sign the contract waiving his or her statutory rights, the employer withdraws the offer of employment. Forced arbitration clauses differ from compulsory arbitration clauses in one significant respect: with compulsory arbitration clauses, the employee actually signs the agreement to

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1. 42 U.S.C. § 1981a(c)(1) (2000).

2. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

3. *See id.* at 24-25.

4. *Id.* at 26.

5. 345 F.3d 742 (9th Cir. 2003) (en banc).

6. *See id.* at 749, 754.

arbitrate, and thus is “compelled” to live up to the bargain, whereas with forced arbitration clauses, the employee who objects to the agreement is forced to choose between signing it or losing his or her job. Forced arbitration clauses are one of the most hotly contested issues in the civil rights and employment law context today. This is evidenced by the numerous amici curiae who submitted briefs at the appellate court level before the Ninth Circuit, including the American Association of Retired Persons (AARP), the National Employment Lawyers Association, the Employers Group, numerous individual members of the United States House of Representatives, and the Equal Employment Advisory Council.⁷

This Article will discuss whether the court in *Luce Forward* properly considered what Congress intended when it provided for the statutory right to a jury trial for civil rights claims and whether civil rights statutes should be interpreted to require a voluntary waiver of this right to a jury trial. First, this Article will explore the legislative history of the civil rights statutes providing for the right to a jury trial and permissive arbitration of statutory civil rights claims.⁸ Second, it will survey the Supreme Court’s recent history regarding arbitration of civil rights claims.⁹ Third, the Article will explore the Ninth Circuit’s expansion of the Supreme Court’s arbitration and civil rights decisions in *Luce Forward* and it will discuss why the majority in that case was misguided.¹⁰ Finally, it will offer opportunities for the Supreme Court to clarify the intent of the civil rights statutes as they relate to waiving the right to a jury trial by proposing a balancing approach that is fair to both the employer and the employee and is consistent with the text and legislative history of the civil rights statutes.¹¹

7. *Id.* at 743. Forced arbitration clauses are contested in the consumer lending context as well. For example, AARP, the National Association for the Advancement of Colored People, the Leadership Conference on Civil Rights, and a number of other groups have recently praised the lending institution Freddie Mac, which publicly announced that starting in August 2004, it will refuse to buy subprime mortgage loans with forced arbitration clauses contained in them. *Freddie Mac Will Not Buy Subprime Loans that Contain Mandatory Arbitration Clauses*, 72 U.S.L.W. 2342 (BNA) (Dec. 16, 2003).

8. See *infra* Part I.

9. See *infra* Part II.

10. See *infra* Part III.

11. See *infra* Part IV.

I. The Statutory Right to a Jury Trial for Civil Rights Violations

An employer is prohibited from discriminating against an employee or applicant for employment because of that person's race, color, religion, sex, national origin,¹² disability,¹³ or age.¹⁴ Before 1991, section 706(g) of Title VII permitted courts to award monetary damages only where the employee was a victim of intentional race discrimination.¹⁵ In response to then-recent Supreme Court cases, Congress enacted the Civil Rights Act of 1991 (the 1991 Act) in order to more effectively deter discrimination and compensate its victims.¹⁶ The 1991 Act amended Title VII and allowed for compensatory and punitive damages for all protected classes, including actions based on gender and religious discrimination, as well as claims based on race discrimination.¹⁷ Providing monetary damages was seen as "necessary to conform remedies for intentional gender and religious discrimination to those currently available to victims of intentional race discrimination."¹⁸

The Act and legislative history make clear that the damage provision, however, was not meant to foreclose other avenues of dispute resolution. One of the committee reports for the 1991 Act specifically notes that the provision entitling victims of discrimination to monetary damages and potential jury awards would not "undermine Title VII's policy encouraging the conciliation and settlement of claims of discrimination."¹⁹ The 1991 Act also added a provision regarding alternative means of

12. 42 U.S.C. § 2000e-2(a)(1) (2000).

13. *Id.* § 12112(a).

14. 29 U.S.C. § 623(a)(1) (2000).

15. H.R. REP. NO. 102-40(I) at 65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 603.

16. H.R. REP. NO. 102-40(II) at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694.

17. H.R. REP. NO. 102-40(I) at 64-65, 74, *reprinted in* 1991 U.S.C.C.A.N. at 602-03, 612. The 1991 Act amended the Civil Rights Act of 1964 by adding the following provision:

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], . . . the complaining party may recover compensatory and punitive damages . . . in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

42 U.S.C. § 1981a(a)(1).

18. H.R. REP. NO. 102-40(I) at 64, *reprinted in* 1991 U.S.C.C.A.N. at 602.

19. *Id.* at 65, *reprinted in* 1991 U.S.C.C.A.N. at 603.

dispute resolution: "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."²⁰

The 1991 Act's legislative history supports the position that the arbitration provisions were intended to be strictly voluntary. Before its enactment, the Committee on Education and Labor rejected an amendment that would have precluded jury trials.²¹ The legislative history shows why the proposed amendment was not adopted:

[The 1991 Act] includes a provision *encouraging* the use of alternative means of dispute resolution to supplement, rather than supplant, the rights and remedies provided by Title VII. The [proposed] substitute [legislation], however, encourages the use of such mechanisms "in place of judicial resolution." Thus, under the latter proposal employers could refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII-complaints. Such a rule would fly in the face of Supreme Court decisions holding that workers have the right to go to court, rather than being forced into compulsory arbitration, to resolve important statutory and constitutional rights, including employment opportunity rights. American workers should not be forced to choose between their jobs and their civil rights.²²

The Committee Report emphasized that alternative means of dispute resolution were intended to "encourage" settlement negotiations, arbitration, facilitation, and mediation.²³ Further, the Committee Report stated that the 1991 Act "emphasizes . . . that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII."²⁴ Despite the presence of this language favoring

20. 42 U.S.C. § 1981 note (Alternate Means of Dispute Resolution).

21. H.R. REP. NO. 102-40(I) at 97-98, *reprinted in* 1991 U.S.C.C.A.N. at 635-36. The amendment provided: "In no case arising under this title shall a jury consider, recommend, or determine the amount of any monetary award sought pursuant to [this section]." *Id.* at 102-03, *reprinted in* 1991 U.S.C.C.A.N. at 640-41. The Committee on Labor and Education was chaired by Representative William D. Ford of Michigan. HOUSE COMM. ON EDUC. & THE WORKFORCE, *History of the Committee on Education and the Workforce and the Members Who Have Served as Chairman*, at <http://edworkforce.house.gov/committee/history.htm> (last visited Oct. 29, 2004).

22. H.R. REP. NO. 102-40(I) at 104, *reprinted in* 1991 U.S.C.C.A.N. at 642 (emphasis added) (citation omitted).

23. *Id.* at 97, *reprinted in* 1991 U.S.C.C.A.N. at 635.

24. *Id.*

arbitration, the Committee concluded that "any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII."²⁵ It further noted that it did "not intend [the 1991 Act] to be used to preclude rights and remedies that would otherwise be available."²⁶

President George H. Bush stated that the 1991 Act would "ensur[e] that aggrieved parties have effective remedies."²⁷ After noting the 1991 Act's "major provisions" were the subject of bipartisan consensus, the President stated that the 1991 Act expanded "the statutory prohibition against racial discrimination in connection with employment contracts; and the creation of meaningful monetary remedies for all forms of workplace harassment outlawed under Title VII of the Civil Rights Act of 1964."²⁸ The President continued:

Another important source of the controversy that delayed enactment of this legislation was a proposal to authorize jury trials and punitive damages in cases arising under Title VII. [The 1991 Act] adopts a compromise under which "caps" have been placed on the amount that juries may award in such cases. The adoption of these limits on jury awards sets an important precedent

In addition to the protections provided by the "caps," [the 1991 Act] encourages *voluntary* agreements between employers and employees to rely on alternative mechanisms such as mediation and arbitration. This provision is among the most valuable in the Act because of the important contribution that *voluntary* private arrangements can make in the effort to conserve the scarce resources of the Federal judiciary for those matters as to which no alternative forum would be possible or appropriate.²⁹

With this backdrop, the Supreme Court has had occasion to interpret both the original Civil Rights Act and the 1991 Act to determine whether employers can require their employees to submit future claims of civil rights violations to arbitration rather than to court.

25. *Id.*

26. *Id.*

27. Statement of President George Bush upon Signing S. 1745 (Nov. 21, 1991), in 1991 U.S.C.C.A.N. 768 (Nov. 25, 1991).

28. *Id.*

29. *Id.* at 769 (emphasis added).

II. The Recent History of the Supreme Court's Decisions Regarding Arbitration of Civil Rights Claims

A. *Gilmer v. Interstate/Johnson Lane Corp.*

Several months before Congress enacted the 1991 Act, the Supreme Court held, in *Gilmer v. Interstate/Johnson Lane Corp.*,³⁰ that an employee's age-discrimination claim was subject to compulsory arbitration because the employee signed an arbitration agreement.³¹ The employee, Robert Gilmer, registered with the New York Stock Exchange (NYSE) as a securities representative, as was required by his employment.³² The registration application that Gilmer signed provided in part that he agreed to arbitrate disputes with his employer as required by NYSE rules.³³ The NYSE rules provided that an employee must arbitrate "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative."³⁴ Gilmer's employer terminated his employment in 1987, when Gilmer was 62 years old.³⁵ Gilmer eventually brought suit, alleging that he was discharged because of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA).³⁶

In response to Gilmer's complaint, his employer filed a motion in district court to compel Gilmer to arbitrate his ADEA claim against his employer.³⁷ The district court denied the employer's motion, concluding that "Congress intended to protect ADEA claimants from the waiver of a judicial forum."³⁸ The Court of Appeals for the Fourth Circuit reversed the district court's decision, stating "nothing in the text, legislative history, or underlying purposes of the ADEA indicat[es] a congressional intent to preclude enforcement of arbitration agreements."³⁹ To

30. 500 U.S. 20 (1991).

31. *Id.* at 23.

32. *Id.*

33. *See id.*

34. *Id.* (alteration in original).

35. *Id.*

36. *Id.*

37. *Id.* at 24.

38. *Id.*

39. *Id.* (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 197 (4th Cir. 1990)).

resolve the issue, the Supreme Court granted certiorari.⁴⁰

The Court began its analysis by discussing the Federal Arbitration Act (FAA).⁴¹ The purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."⁴² The substantive provision of the FAA in question states: "A written provision in . . . 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, save upon such grounds as exist at law or in equity for the revocation of any contract."⁴³ The *Gilmer* Court reiterated a significant earlier teaching as to which rights are affected by the FAA: "[B]y 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."⁴⁴

Most importantly, the Court stated:

Although all statutory claims may not be appropriate for arbitration, "[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." In this regard, we note that the burden is on *Gilmer* to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims. *If such an intention exists, it will be discoverable in the text of the ADEA, its legislative history, or an "inherent conflict" between arbitration and the ADEA's underlying purposes.* Throughout such an inquiry, it should be kept in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."⁴⁵

Gilmer conceded to the Court that, at the time, neither the ADEA's text nor its legislative history "explicitly preclude[d] arbitration."⁴⁶ He argued, however, that requiring arbitration went against the purpose of the ADEA because it deprived

40. *Id.*

41. The Court noted the FAA reflects a "liberal federal policy favoring arbitration agreements." *Id.* at 25 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

42. *Id.*

43. 9 U.S.C. § 2 (2000).

44. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

45. *Id.* (alteration in original) (emphasis added) (citations omitted).

46. *Id.*

individuals of a judicial forum.⁴⁷ The Court rejected Gilmer's contention, noting that Congress did not specifically preclude arbitration, "even in its recent amendments to the ADEA. '[I]f Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.'"⁴⁸

Gilmer also argued that the ADEA was designed to further important social policies in addition to addressing individual grievances.⁴⁹ The Court disagreed, stating that there was no "inherent inconsistency between those policies . . . and *enforcing agreements* to arbitrate age discrimination claims."⁵⁰ It noted that both judicial resolution of claims and alternative means of dispute resolution, like arbitration, can further broad social purposes.⁵¹ The Court opined that "[s]o long as the [employee] may vindicate [his or her] statutory cause of action in the arbitral forum, the [ADEA] will continue to serve both its remedial and deterrent function."⁵²

As one of many objections to the arbitration process, Gilmer argued that there is often unequal bargaining power between employers and employees.⁵³ The Court noted, however, "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."⁵⁴ It stated that courts should be aware of supported claims that the arbitration agreement was the result of fraud or coercion but that such disputes about unequal bargaining power should be resolved on a case-by-case basis.⁵⁵ The Court ultimately required Gilmer to arbitrate his ADEA claim pursuant to the securities agreement he signed.⁵⁶

B. Circuit City Stores, Inc. v. Adams

In 2001, the Supreme Court was again faced with the

47. *Id.* at 29.

48. *Id.* (alterations in original) (quoting *Mitsubishi*, 473 U.S. at 628).

49. *Id.*

50. *Id.* (emphasis added).

51. *Id.* at 27-28.

52. *Id.* at 28 (second alteration in original) (quoting *Mitsubishi*, 473 U.S. at 637).

53. *Id.* at 33.

54. *Id.*

55. *Id.* It noted that "[t]here is no indication in this case, however, that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application." *Id.*

56. *See id.* at 24-25, 35.

question of whether employers can compel employees to arbitrate their claims if the employee signed an arbitration agreement. Specifically, the Court in *Circuit City Stores, Inc. v. Adams*⁵⁷ addressed the issue of whether the FAA exempted employees from having to arbitrate their claims in all employment contracts or only those employment contracts of transportation workers.⁵⁸ The Court held that the FAA exempts from its coverage transportation workers only, and all other employment claims may properly be the subject of the FAA.⁵⁹

In 1995, Adams applied for a job at a Circuit City store, at which time he signed an employment application that stated in relevant part:

I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration* before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law or contract and [the] law of tort.⁶⁰

Two years after signing the arbitration agreement, Adams filed suit in state court against Circuit City alleging violations of California's employment act.⁶¹ Circuit City filed suit in federal court, requesting the court to enjoin the state court action and to compel arbitration of Adams's claims.⁶² The district court enjoined the state court action, but the Court of Appeals for the Ninth Circuit reversed, claiming that all employment contracts are excluded from the FAA.⁶³ The Supreme Court granted certiorari.⁶⁴

Adams argued that his employment contract was not a "contract evidencing a transaction involving interstate commerce" as stated by the FAA; therefore, the FAA did not apply to him.⁶⁵ Citing *Gilmer*, the Court rejected Adams's claim, stating that Adams's proposed interpretation of the FAA would be inconsistent

57. 532 U.S. 105 (2001).

58. *Id.* at 109.

59. *Id.*

60. *Id.* at 109-10 (alteration in original).

61. *Id.* at 110.

62. *Id.*

63. *Id.* at 110-11.

64. *Id.* at 111.

65. *Id.* at 113.

with *Gilmer* and could not be reconciled with the Court's "expansive reading" of the words contained in the FAA.⁶⁶

Adams also argued that the Court should interpret the meaning of "engaged in commerce" differently for employment contracts "because the FAA was enacted when congressional authority to regulate under the commerce power was to a large extent confined by [previously decided Supreme Court] decisions."⁶⁷ But the Court rejected the argument, noting: "Construing the [FAA] to exclude all employment contracts fails to give independent effect to the statute's enumeration of the specific categories of workers which precedes it."⁶⁸

The Court stated that its decision was reached based on the text of the FAA; therefore, it did not need to address the legislative history of the exclusion provision.⁶⁹ Based on a reading of the text alone, the Court held that the FAA exempts from its coverage transportation workers only, and all other employment claims may properly be the subject of the FAA.⁷⁰ Finally, the Court noted its decision was consistent with previous Supreme Court case law "holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law."⁷¹ Although the Court recognized that *Gilmer* involved the federal ADEA and *Circuit City* involved a state statute, it made no difference to the Court's decision that the employee was required to pursue arbitration because he signed an employment contract requiring arbitration.⁷²

C. EEOC v. Waffle House, Inc.

In 2002, the Supreme Court again was faced with a case concerning a compulsory arbitration clause contained in an employment contract. In *EEOC v. Waffle House, Inc.*,⁷³ the Court decided that a contract between an employee and employer containing a compulsory arbitration clause did not preclude the

66. *Id.* at 113-14. The Court refers to its decision in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), as adopting an "expansive reading" of § 2 of the FAA. *Circuit City*, 532 U.S. at 113.

67. *Circuit City*, 532 U.S. at 116.

68. *Id.* at 114.

69. *Id.* at 119.

70. *Id.* at 109, 119.

71. *Id.* at 123.

72. *Id.* at 123-24.

73. 534 U.S. 279 (2002).

Equal Employment Opportunity Commission (EEOC) from pursuing employee-specific relief, including damages.⁷⁴

In the *Waffle House* case, the employee, Baker, was required, as a condition of employment, to sign an application that contained a mandatory arbitration clause.⁷⁵ After working at Waffle House for a brief period, Baker had a seizure while at work and was subsequently fired.⁷⁶ Baker filed a claim with the EEOC alleging that he was fired in violation of the Americans with Disabilities Act.⁷⁷

The EEOC investigated the claim, and after first attempting to conciliate with Waffle House, it filed an enforcement action in federal district court.⁷⁸ The complaint sought both injunctive relief as well as any other specific relief as would make Baker whole, including damages.⁷⁹ Waffle House then filed a petition under the FAA to stay the proceedings in federal court and to compel arbitration.⁸⁰ The district court denied Waffle House's motion based on the determination that the employment contract itself did not contain the arbitration clause.⁸¹ The Court of Appeals for the Fourth Circuit granted an interlocutory appeal and ruled that the EEOC's remedies were limited to injunctive relief.⁸² The Supreme Court granted certiorari to resolve a conflict among the circuits over whether the EEOC may pursue an enforcement action in court despite an employee-signed arbitration agreement.⁸³

The Supreme Court began its analysis by noting that the EEOC was initially limited to an investigatory—at most, conciliatory—role, but that the 1972 amendments to Title VII “created a system in which the EEOC was intended to bear the primary burden of litigation.”⁸⁴ The Court further noted that later amendments allowed recovery of damages by a “complaining party,” a term which includes both the EEOC and individual

74. *Id.* at 282-85.

75. *Id.* at 282-83.

76. *Id.* at 283.

77. *Id.*

78. *Id.*

79. *Id.* at 283-84.

80. *Id.* at 284.

81. *Id.*

82. *Id.* at 284-85.

83. *Id.*

84. *Id.* at 286 (quoting *Gen. Tel. Co. of Northwest v. EEOC*, 446 U.S. 318, 326 (1980)).

litigants.⁸⁵ The Court decided that because the EEOC may be a complaining party, it was permitted to bring suit to enjoin an employer from discriminating against an employee in violation of the statute, and to “pursue reinstatement, backpay, and compensatory or punitive damages.”⁸⁶ The Court stated:

The FAA directs courts to place arbitration agreements on equal footing with other contracts, but it “does not require parties to arbitrate when they have not agreed to do so.” Because the FAA is “at bottom a policy guaranteeing the enforcement of private contractual arrangements,” we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement.⁸⁷

The Court further stated that where there are ambiguities in the language of the contract, it should be interpreted in favor of arbitration.⁸⁸ However, the Court noted that it cannot reach a result that is inconsistent with the unambiguous language of the contract merely because there is a policy favoring arbitration.⁸⁹

In perhaps one of its most important statements on the issue at hand, the Court stated, “[a]rbitration under the [FAA] is a matter of consent, not coercion.”⁹⁰ The Court cited a previous decision in which it stated that “the FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that ‘arbitration proceed *in the manner provided for in [the parties]’ agreement.*”⁹¹

In concluding that the contract was unambiguous, the Court stated that a contract cannot bind an entity who is not a party to the contract.⁹² Since the EEOC was not a party to the contract between Adams and Waffle House, it was not bound by the arbitration clause.⁹³ The Court ultimately rejected Waffle House’s arguments and noted that the Fourth Circuit had “turn[ed] what is effectively a forum selection clause into a waiver of a nonparty’s

85. *Id.* at 287 (citing 42 U.S.C. § 1981a(d)(1)(A), (a)(1) (1994)).

86. *Id.*

87. *Id.* at 293-94 (citations omitted) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985)).

88. *Id.* at 294.

89. *Id.*

90. *Id.* (quoting *Volt*, 489 U.S. at 479) (alteration in original).

91. *Waffle House*, 534 U.S. at 293, n.9 (quoting *Volt*, 489 U.S. at 474-75) (alteration in original).

92. *Id.* at 294.

93. *Id.*

statutory remedies."⁹⁴ Therefore, the Court concluded that the EEOC was entitled to pursue an action against Waffle House, including seeking compensatory or punitive damages, since it was not a party to the arbitration agreement between the employee and Waffle House.⁹⁵

III. The Ninth Circuit's Decision in *EEOC v. Luce, Forward, Hamilton & Scripps*

A. *The Decision*

In September 2003, in *EEOC v. Luce, Forward, Hamilton & Scripps*,⁹⁶ the Court of Appeals for the Ninth Circuit held that an employer does not have to hire an applicant when that applicant refuses to sign a mandatory arbitration clause.⁹⁷

Donald Lagatree applied for a job as a legal secretary at the law firm of Luce, Forward, Hamilton & Scripps, LLP, and the law firm presented him with an offer letter on his first day of work.⁹⁸ The letter included a mandatory arbitration provision.⁹⁹ The letter provided:

In the event of any dispute or claim between you and the firm (including employees, partners, agents, successors and assigns), including but not limited to claims arising from or related to your employment or the termination of your employment, we jointly agree to submit all such disputes or claims to confidential binding arbitration, under the Federal Arbitration Act. Any arbitration must be initiated within 180 days after the dispute or claim first arose, and will be heard before a retired State or Federal judge in the county containing the firm office in which you were last employed. The law of the State in which you last worked will apply.¹⁰⁰

Lagatree protested the requirement that he sign the arbitration agreement, stating that the arbitration agreement "was unfair."¹⁰¹ The firm told Lagatree that the agreement was a non-negotiable condition of employment and, after Lagatree again

94. *Id.* at 295.

95. *Id.* at 298.

96. 345 F.3d 742 (9th Cir. 2003) (en banc).

97. *Id.* at 749.

98. *Id.* at 743.

99. *Id.* at 745.

100. *Id.*

101. *Id.* Lagatree testified in his deposition "that he believed he needed to retain his 'civil liberties, including the right to a jury trial and redress of grievances through the government process.'" *Id.*

refused to sign the agreement, withdrew its job offer.¹⁰² This refusal was the only reason he was not hired.¹⁰³

Lagatree filed a discrimination charge with the EEOC and the EEOC sued Luce Forward in federal court on Lagatree's behalf.¹⁰⁴ The district court's opinion found that the Ninth Circuit's decision in *Duffield v. Robertson Stephens & Co.*¹⁰⁵ prohibited the law firm from requiring employees to sign compulsory arbitration agreements.¹⁰⁶ The lower court enjoined the firm from requiring, requesting, or enforcing such provisions with regard to Title VII claims.¹⁰⁷ Luce Forward appealed¹⁰⁸ and the Ninth Circuit agreed to hear the case.¹⁰⁹

The Ninth Circuit began its analysis by citing the provisions of Title VII and of the 1991 Act, which "for the first time [provided] a right to damages and to trial by jury."¹¹⁰ It also cited *Gilmer*, noting that it was decided six months before the enactment of the 1991 Act.¹¹¹ The court noted that *Gilmer* stood for the principle that "statutory claims can be made subject to arbitration, 'unless Congress itself has evinced an intention to preclude a waiver of judicial remedies.'"¹¹² It found the Supreme Court's favorable language regarding arbitration to undercut the claim in *Duffield* that compulsory arbitration agreements are inconsistent with the

102. *Id.*

103. *Id.*

104. *Id.* at 745-46. Lagatree also unsuccessfully sued the law firm in state court, alleging that he was wrongfully terminated in violation of public policy and of the California Unfair Competition law. *Id.* at 745.

105. 144 F.3d 1182 (9th Cir. 1998). In *Duffield*, the court held that the Civil Rights Act of 1991 prohibited employers from conditioning employment on the mandatory arbitration of Title VII claims. *Id.* at 1185.

106. *Luce Forward*, 345 F.3d at 745.

107. *Id.* at 745-46.

108. *Id.* The EEOC also cross-appealed, "seeking to enjoin Luce Forward from engaging in an 'unlawful retaliatory practice by denying employment to any applicant . . . who refuses to waive his right to participate in statutorily protected . . . proceedings.'" *Id.* at 746.

109. *Id.* A three judge panel of the 9th Circuit initially heard the appeal, reaching a similar result as the en banc rehearing, but by different reasoning. See *id.* at 744. The panel opinion was later withdrawn. *Id.* at 744-45. For discussion of the first Ninth Circuit opinion, see Nicole Karas, EEOC v. Luce and the Mandatory Arbitration Agreement, 53 DEPAUL L. REV. 67 (2003) and Steven S. Poindexter, *Pre-Dispute Mandatory Arbitration Agreements and Title VII: Promoting Efficiency While Protecting Employee Rights*, 2003 J. DISP. RESOL. 301.

110. *Luce Forward*, 345 F.3d at 746-47.

111. *Id.* at 747

112. *Id.* (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985))).

purposes of the 1991 Act.¹¹³ The court also refused to examine the legislative history of the Act, finding that the text of the Act clearly did not preclude such agreements.¹¹⁴

The court noted its *Duffield* decision "stands alone" against the other federal circuit courts that had concluded Title VII does not prohibit mandatory arbitration agreements.¹¹⁵ Indeed, the court cited cases from ten other circuits allegedly supporting its position.¹¹⁶ The Ninth Circuit thus overturned its decision in *Duffield*, which held that "for Title VII claims, the 1991 Act precludes enforcement of arbitration agreements entered into as a condition of employment."¹¹⁷ Two members of the *Luce Forward* panel issued opinions criticizing the majority's approach and result.¹¹⁸

B. Criticism of the Decision

1. The Court's Reasoning Was Flawed Because the Court Relied on Unsupportive or Distinguishable Case Law

The Ninth Circuit's reading of precedent was flawed. First, the court improperly cited *Gilmer*, a case that predated the 1991 Act, as support for its position that allowing compulsory arbitration does not weaken the 1991 Act.¹¹⁹ Second, the court also cited the *Waffle House* decision as continued support for mandatory arbitration clauses, without recognizing that *Waffle*

113. *See id.* at 749-51.

114. *Id.* at 751-52.

115. *Id.* at 748.

116. *Id.* (citing *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999); *Koveleskie v. SBC Capitol Mkts., Inc.*, 167 F.3d 361, 365 (7th Cir. 1999); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 21 (1st Cir. 1999); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997); *Austin v. Owens-Brockway Class Container, Inc.*, 78 F.3d 875, 881-82 (4th Cir. 1996); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir. 1996); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 308 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 182 (3d Cir. 1998)).

117. *Id.* at 749 (citing *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1185 (9th Cir. 1998)).

118. Both opinions argued that the court's earlier analysis in *Duffield* followed much more closely Supreme Court teaching and congressional intent than did the majority opinion's. *See id.* at 754-61 (Pregerson, J., dissenting in part and concurring in part); *id.* at 762-68 (Reinhardt, J., dissenting). Judge Reinhardt's dissent also characterized the majority as manifesting a historical judicial tendency to undercut legislation benefiting workers, women, and people of color. *See id.* at 762, 768.

119. *Id.* at 750 (majority opinion).

House and *Gilmer* differed significantly from the facts in *Luce Forward*. The Supreme Court cases dealt with employees who signed arbitration agreements but who later wanted to invalidate their contracts or permit the EEOC to pursue a damages claim despite the employee-signed contract; *Luce Forward* dealt with an employee who refused to sign the contract in the first place. Therefore, the principles of contract law on which *Gilmer* and *Waffle House* were based do not apply to *Luce Forward* because the contract was never signed.

The *Luce Forward* court also “reject[ed] the argument . . . that the 1991 Act’s provision of a right to jury trial precludes arbitration of Title VII claims.”¹²⁰ Using somewhat perplexing language in support of its position, the court recognized that even *Duffield* “acknowledged that right provides no general bar to voluntary arbitration.”¹²¹ Although it later noted the distinction between voluntary and compulsory arbitration, it stated that it would “now join several other circuits in concluding, pursuant to *Gilmer*, that the right to jury trial presents no bar to compulsory arbitration.”¹²² However, the court clearly missed the significance that *Gilmer* was decided before the 1991 Act. Careful examination reveals that only one case on which the Ninth Circuit relied addresses the issue of whether an employee can condition an employment offer on signing a waiver. That Second Circuit opinion, *Desiderio v. National Ass’n of Security Dealers, Inc.*,¹²³ also found the text of the 1991 Act, specifically the Act’s language encouraging alternative dispute resolution,¹²⁴ to be unambiguous and did not look to the legislative history.¹²⁵

In each of the other nine decisions the Ninth Circuit cited, the federal circuit courts dealt with post-contractual claims—employees who wanted to get out of the contracts they already signed.¹²⁶ Only the Second Circuit and Ninth Circuit have now

120. *Id.*

121. *Id.* (emphasis added).

122. *Id.* See cases cited *supra* note 116.

123. 191 F.3d 198 (2d Cir. 1999).

124. See *supra* text accompanying note 20.

125. *Desiderio*, 191 F.3d at 204-06.

126. The First Circuit case dealt with an employee who “signed a standard securities industry form . . . agreeing to arbitrate certain claims after being hired by Merrill.” *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 3 (1st Cir. 1999). The Third Circuit case dealt with an employee who “was required to sign a Form U-4 . . . contain[ing an] arbitration clause.” *Seus v. John Nuveen & Co.*, 146 F.3d 175, 177 (3d Cir. 1988). The Fourth Circuit case involved an employee who worked for her employer for approximately 14 years under a collective bargaining agreement that contained a compulsory arbitration clause.

extended a reading of the statute to hold that an employer may condition an offer of employment on waiving a statutory right, even though the text of the statute is silent on the issue and the legislative history is clearly against allowing employers to do so.

2. The Court Failed to Recognize Alternative Readings of the Text of the 1991 Act

Although the court examined the text of the 1991 Act, it did not appreciate its significance as it relates to an employee who refuses to contractually waive a statutory right. The court noted that the text of the 1991 Act encourages alternative dispute resolution¹²⁷ but it failed to recognize the importance of the word "encouraged" in the 1991 Act. The court stated, "[a]lthough the *Gilmer* Court did not expressly interpret the ADEA's text because *Gilmer* conceded that nothing in the text *precluded* arbitration . . . it squarely held that claims under the ADEA *can be* subjected to compulsory arbitration."¹²⁸ However, recognizing that "nothing in the text precludes arbitration" and recognizing that "nothing in the text *requires* arbitration" are two completely different legal points. Even though claims under the civil rights statutes can be subject to compulsory arbitration, the text of the statute does not permit an employer to condition employment on signing an agreement. The text of the 1991 Act simply states that arbitration "is encouraged." *Luce Forward* stands for the proposition that arbitration is encouraged, even *absent* an agreement to arbitrate.

Austin v. Owens-Brockway Class Container, Inc. 78 F.3d 875, 877-78 (4th Cir. 1996). The Fifth Circuit case involved an employee who was fired from her job as a stockbroker after she signed a contract containing an arbitration clause. *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 229 (5th Cir. 1991). The Sixth Circuit case considered a securities registration form apparently signed before employment began, but did not find the form to be an employment contract. *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 306, 312 (6th Cir. 1991). The Seventh Circuit decision the *Luce Forward* court cited involved an employee who "signed [a] Form U-4 . . . requir[ing], among other things, that a securities trader arbitrate . . . any dispute with his or her employer." *Koveleskie v. SBC Capitol Mkts., Inc.*, 167 F.3d 361, 363 (7th Cir. 1999). The Eighth Circuit decision involved an employee who "signed an arbitration clause set forth on the last page of [an employee] handbook." *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 834 (8th Cir. 1997). The Tenth Circuit decision involved an employee who signed a registration form for a security dealer's association which required her to arbitrate all claims between her and her employer. *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1486 (10th Cir. 1994). Finally, the court cited an Eleventh Circuit decision involving an employee who, "[i]n her application for registration as a stock broker[,] . . . agreed to arbitrate disputes with her employer." *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir. 1996).

127. See *supra* text accompanying note 20.

128. *Luce Forward*, 345 F.3d at 751 (emphasis added).

The *Luce Forward* court also stated, “[t]he phrase ‘where appropriate’ simply provides no direct indication that Congress intended to preclude a waiver of the judicial forum.”¹²⁹ While the court’s statement is true, it is equally true that the text of the 1991 Act does not address whether an employer can force an employee to sign a waiver or withdraw the offer of employment.¹³⁰ A more plausible interpretation, one consistent with the legislative history of the 1991 Act, is that Congress intended to allow *voluntary* waiver of employees’ rights, but not forced waiver.¹³¹ Absent from the court’s analysis in *Luce Forward* is any discussion of the distinction between voluntarily waiving statutory rights and being forced to choose between waiving those rights and gaining meaningful employment all together.

3. The Court Should Have Relied on the Legislative History of the 1991 Act

The Ninth Circuit also chose not rely on the legislative history of the 1991 Act. The court stated that it found the text of the Act to be unambiguous; therefore, it would not consider the Act’s legislative history, despite recognizing “[t]he legislative history does contain language suggesting Congress intended to retain the judicial forum.”¹³² Quoting *Desiderio* with approval, the Ninth Circuit noted that “primarily because we find the language of the statute to be clear, we need not consider the inconsistent legislative history.”¹³³ It is true, as the court noted, the text is clear that it does not “preclude” a waiver, but again, the court missed the point. While waiver is not precluded, waiver is also not *required*. The text of the 1991 Act is silent as to whether an employer may condition the offer of employment on signing the waiver.

Where the text of an act is silent, looking at the legislative history is appropriate.¹³⁴ There can be no doubt that the

129. *See id.*

130. *Cf. id.* at 758 (Pregerson, J. dissenting in part and concurring in part) (“It is true the text of § 118 does not contain ‘prohibitory language.’ But the text does contain limiting phrases such as ‘where appropriate’ and ‘to the extent authorized by law.’”).

131. *See id.* at 758 n. 4; *see also id.* at 767 (Reinhardt, J., dissenting) (“[T]he majority in Congress who voted for the 1991 Civil Rights Act plainly thought that the Act did not allow employers to force their workers to sign compulsory arbitration clauses forfeiting their right to trial by jury in Title VII cases.”).

132. *Id.* at 752-53 (majority opinion).

133. *Id.* at 753 (quoting *Desiderio*, 191 F.3d at 205-06).

134. Judge Pregerson’s opinion argues that the majority wrongly interprets the issue as one of general statutory construction. *Id.* at 759 (Pregerson, J. dissenting

legislative history of the 1991 Act is inconsistent with *Luce Forward*, and indeed, the Ninth Circuit recognized the inconsistency. The flaw in the Ninth Circuit's analysis was that it claimed it was prevented from examining legislative history because the text of the statute does not "preclude" waiver. However, the issue was not whether waiver was precluded in general, but whether, in the absence of a voluntary waiver, an employer may refuse to hire an employee because the employee did not relinquish the right to a jury trial afforded by statute. After all, *Waffle House* recognized "arbitration is a matter of consent, not coercion."¹³⁵

IV. Reconciling Basic Contract Principles with Statutory Civil Rights Protections to Achieve a Consistent Reading of the 1991 Act and Its Legislative History

According to basic contract principles, once a contract is signed, it is binding on both parties, unless a doctrine applies that would void the contract.¹³⁶ In the past, once an employee has signed a contract, the Supreme Court has been unwilling to find fraud, duress, or unconscionability in the mere inequality of bargaining power between the employer and the employee.¹³⁷ *Gilmer* recognized that courts should be aware of supported claims that the arbitration agreement was the result of fraud or overwhelming economic power that "would provide grounds for the revocation of any contract"¹³⁸ but refused to, as a rule, preclude such agreements.¹³⁹ The Court in *Gilmer* specifically stated "[h]aving made the bargain to arbitrate, the party should be held to it."¹⁴⁰

The Court's analysis in *Gilmer* should not be the same

in part and concurring in part). He notes *Gilmer* established the inquiry regarding congressional intent to include both a statute's text and its legislative history as alternative sources of authority. *Id.* A court need not reach any conclusion when examining the text before the court looks to the legislative history.

135. See *supra* text accompanying note 90.

136. Courts would traditionally void contracts in limited circumstances, such as if a contracting party lacked capacity or entered a contract because of misrepresentation or duress. See E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.1 (3d ed. 2004).

137. See *supra* text accompanying note 54.

138. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (quotation marks omitted) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985)).

139. See *supra* text accompanying note 55.

140. *Gilmer*, 500 U.S. at 26 (emphasis added) (citations omitted).

analysis that is applied to pre-contract disputes. The employee in *Luce Forward* never made the decision to arbitrate. Similarly, in the *Waffle House* case, the EEOC never made the decision to arbitrate. The Court in *Waffle House* limited the scope of the FAA to compelling arbitration according to parties' agreements.¹⁴¹ Because the EEOC never made the decision to arbitrate, the Court could not compel it to arbitrate the claim it pursued on the employee's behalf, even though the 1991 Act "encourages" arbitration.¹⁴²

It would be against the purpose of the 1991 Act, as evidenced by its legislative history, to allow employers to circumvent the protections of the statute by forcing employees to give up their rights. It is one thing if an employee signs an agreement; it is very difficult to void a contract that was legally entered into, absent extraordinary circumstances. But it is quite another thing to allow employers to force employees to choose between their civil rights and being employed. As the legislative history suggests, "[s]uch a rule would fly in the face of Supreme Court decisions holding that workers have the right to go to court, rather than being forced into compulsory arbitration, to resolve important statutory and constitutional rights, including employment opportunity rights. . . ."¹⁴³

While a general rule of classical contract law is that parties are free to contract with anyone they wish, one legal tenet that predates the classical contract law model "has long placed limitations on the right of certain parties to choose the persons with whom they contract."¹⁴⁴ Modern courts have been more willing to "prohibit discrimination prior to bargain contract formation in circumstances deemed appropriate in the light of social values prevailing at a given time."¹⁴⁵ So too should courts prohibit employers from forcing employees to forfeit their anti-discrimination protections in order to receive a job. Where a statute's legislative history clearly provides a right to a jury trial and damages in the event of discrimination, courts should be loath to allow employers to avoid the employee-provided protections of the statute by forcing employees to sign arbitration contracts with

141. See *supra* text accompanying notes 90-93.

142. See *supra* text accompanying note 87.

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

144. Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 GEO. WASH. L. REV. 183, 202 (1994).

145. *Id.* at 203.

which they do not agree.

Employers are not at a loss under either the text or the legislative history of the 1991 Act. Employers can legitimately seek to avoid the costs associated with litigation where the employee agrees to a knowing and voluntary waiver of his or her statutory rights. Therefore, the parties may choose to bargain away their statutory right to a jury trial where the employer has disclosed the nature of the employee's statutory right and has not forced the employee to sign the agreement or lose the job. Such an approach is consistent with both the text and the legislative history of the statute, as well as with Supreme Court decisions. A balanced approach between employer and employee rights was achieved by the 1991 Act and courts should enforce this balance.

Conclusion

One of the most significant purposes of the 1991 Act was to provide employees who are the victims of discrimination with the right to pursue their claim for damages in front of a jury. This right was balanced against the parties' right to choose to arbitrate their civil rights claims instead of resolving the matter through litigation. The right to voluntarily choose arbitration should not be read as a permission slip for employers to require employees to sign arbitration clauses if employees do not want to give up their statutory right to a jury trial. Our civil rights statutes would be significantly undermined if the courts allowed employers to force employees to choose between their statutorily protected civil rights and their jobs. Nowhere is the danger of unequal bargaining power more apparent than in the pre-contract context where the employer holds all the cards. It is particularly pungent in an economy where jobs are scarce and employees cannot afford to turn down employment, even if it means giving up their civil rights protections afforded by statute.

While the text of the 1991 Act does not preclude waiver of civil rights protections, it also does not compel waiver at the insistence of the employer. Because the text of the statute is silent as to whether an employer may condition employment on waiving the employee's civil rights protection, it is appropriate to examine the legislative history of the Act. In so doing, it is abundantly clear that Congress did not intend to permit employers to force employees to choose between their civil rights and their jobs. Both the Second and Ninth Circuits have recognized this clear legislative intent, but both circuit courts have refused to consider it in making their decisions.

The Ninth Circuit's decision in *Luce Forward* was erroneous on several levels. The cases relied upon in *Luce Forward* do not even address the pre-contract issue presented in the Ninth Circuit's case. The court also ignored the difference between pre-contract disputes and numerous Supreme Court and circuit court decisions involving post-contract disputes. Finally, the court ignored a potential reading of the statute that is consistent with both its text and its legislative history. The only way to read both the text and the legislative history in a consistent manner is to permit employees to make a waiver of their statutory civil rights protections. Absent a voluntary waiver, courts should prohibit employers from forcing employees to choose between their civil rights and their jobs.