

# Compulsory Employment Arbitration and the EEOC

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- I. INTRODUCTION
- II. THE EEOC
- III. THE ARBITRATION OF STATUTORY EMPLOYMENT CLAIMS
  - A. *The Early Years of Statutory Arbitration*
  - B. *The Steelworkers Trilogy*
  - C. *Alexander v. Gardner-Denver Co.*
  - D. *The Mitsubishi Trilogy*
  - E. *Gilmer v. Interstate/Johnson Lane Corp.*
- IV. THE EEOC POLICY STATEMENT
  - A. *Description*
  - B. *General Principles of Deference*
  - C. *Chevron Deference and the EEOC Policy Statement*
  - D. *Principles of Judicial Deference to the EEOC*
  - E. *EEOC Deference and the EEOC Policy Statement*
- V. FLEXING THE EEOC'S PROSECUTORIAL POWERS
  - A. *Frontal Assaults on Arbitration Agreements*
  - B. *Flanking Maneuvers*
    - 1. Supreme Court Guidance
    - 2. Analogous Cases From the Circuits
      - a. *The EEOC's Right to Sue*
      - b. *The Availability of Relief*
    - 3. Recent Cases Involving Arbitration Agreements
    - 4. Analysis
- VI. CONCLUSION

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## I. INTRODUCTION

In the 1991 decision of *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>1</sup> the Supreme Court enforced an employee's agreement to submit all future claims against his employer to arbitration rather than litigating the claims in court.<sup>2</sup> Since then, employers increasingly require their employees to sign arbitration agreements.<sup>3</sup> At the same time, legal scholars and practitioners debate the merits and demerits of compulsory employment arbitration.<sup>4</sup> On the positive side, arbitration provides a forum for resolving employment disputes, particularly for those employees with limited resources whose claims are too questionable or with damages too low to attract a lawyer willing to take the case on a contingency basis.<sup>5</sup> On the negative side, arbitration's informality makes it an inadequate forum for resolving large, complex, class-based claims, and the absence of a jury makes arbitration an inappropriate forum for resolving claims that derive from an employer's violation of external community values.<sup>6</sup> Moreover, several commentators are concerned with employers' ability to manipulate the arbitration process by drafting one-sided arbitration agreements.<sup>7</sup> In response, the courts, by refusing to enforce such agreements,<sup>8</sup> appear to be in the process of establishing, on a case-by-case basis, minimum procedural and substantive safeguards.<sup>9</sup>

The Equal Employment Opportunity Commission (EEOC), the administrative agency created by Congress to administer the federal employment discrimination laws, opposes compulsory employment arbitration. In a 1997 Policy Statement, the EEOC declared that these arbitration agreements usurp the judicial role of

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1. 500 U.S. 20 (1991).

2. See *id.* at 35.

3. See Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 100 (1996).

4. See, e.g., RICHARD A. BALES, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT* (1997).

5. See *id.* at 154-59; David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 89-99 (1999); Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims with Special Reference to the Three A's—Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231, 284 (1996).

6. See Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 437-39 (1999); Matthew W. Finkin, *Modern Manorial Law*, INDUS. REL., Apr. 1999, at 132-33.

7. See, e.g., Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 1024-27 (1999); David M. Kinnecome, Note, *Where Procedure Meets Substance: Are Arbitral Procedures a Method of Weakening the Substantive Protections Afforded By Employment Rights Statutes?*, 79 B.U. L. REV. 745, 762-64 (1999).

8. See, e.g., *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 941 (4th Cir. 1999); *Maciejewski v. Alpha Sys. Lab., Inc.*, 87 Cal. Rptr. 2d 390, 396 (Ct. App. 1999), review granted and opinion superseded by 986 P.2d 170 (Cal. 1999).

9. See Finkin, *supra* note 6, at 132.

interpreting and applying the federal discrimination laws, thereby limiting civil rights provided by those laws.<sup>10</sup> The EEOC, in addition to issuing this Policy Statement, has filed amicus briefs in support of employees attempting to void their arbitration agreements.<sup>11</sup> The EEOC has also used its prosecutorial powers both to challenge the validity of arbitration agreements,<sup>12</sup> and to circumvent the effect of such agreements by litigating, in its own name, the underlying employment disputes which employees contractually have agreed to arbitrate.<sup>13</sup>

This Article examines the EEOC's opposition to compulsory employment arbitration, and evaluates its likely impact. Part II introduces the EEOC, focusing on the specific powers Congress has given or denied the agency to enforce the federal anti-discrimination laws.<sup>14</sup> Part III provides a brief history and overview of employment arbitration.<sup>15</sup> Part IV analyzes the EEOC Policy Statement on employment arbitration, and considers whether and to what extent courts are likely to defer to it.<sup>16</sup> Part V discusses the EEOC's use of its prosecutorial powers to challenge and circumvent arbitration agreements, and examines the relevant and analogous case law.<sup>17</sup> Part VI concludes that neither the EEOC's Policy Statement nor its litigation efforts are likely to have a substantial effect on the current judicial trend toward acceptance of employment arbitration agreements.

## II. THE EEOC

The EEOC was created<sup>18</sup> by Congress in Title VII of the Civil Rights Act of 1964 to administer that employment discrimination statute.<sup>19</sup> Congress later expanded the EEOC's jurisdiction to include claims brought under the Age

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10. See *EEOC Policy Statement on Mandatory Arbitration*, 133 Daily Lab. Rep. (BNA), at E-4 (July 11, 1997) [hereinafter *EEOC Policy Statement*].

11. See *infra* notes 312-323 and accompanying text.

12. See *infra* Part V.A.

13. See *infra* Part V.B.

14. See *infra* notes 18-73 and accompanying text.

15. See *infra* notes 74-162 and accompanying text.

16. See *infra* notes 163-300 and accompanying text.

17. See *infra* notes 301-438 and accompanying text.

18. For a detailed history of the EEOC's creation, see ALFRED W. BLUMROSEN, *MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY* 40-92 (1993); Richard K. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOK. L. REV. 62, 62-68 (1964); Arthur Earle Bonfield, *The Origin and Development of American Fair Employment Legislation*, 52 IOWA L. REV. 1043, 1048-88 (1967); Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 5-11 (1996); Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 60.

19. 42 U.S.C. § 2000e-4 (1994).

Discrimination in Employment Act (ADEA)<sup>20</sup> and the Americans with Disabilities Act (ADA).<sup>21</sup> Proponents of the bill that eventually became Title VII envisioned an agency with broad powers to investigate alleged violations of workplace discrimination and to enforce Title VII requirements against non-compliant employers.<sup>22</sup> These powers originally included the authority to: (1) promulgate rules and regulations to eliminate ambiguities in the statute and to enforce the statute's requirements; (2) receive and investigate allegations of employment discrimination; (3) mediate conflicts between employers and employees regarding allegations of discrimination; (4) issue "cease-and-desist" orders to compel employers to stop their discriminatory practices; and (5) file lawsuits in federal court on behalf of aggrieved employees.<sup>23</sup>

The first proposed power was to promulgate rules and regulations. When Congress passed Title VII, it left several important policy issues unanswered, presumably to avoid contentious debate that might have sidelined passage of the larger civil rights package of which Title VII was a part.<sup>24</sup> Proponents of the original bill intended the EEOC to resolve these issues by issuing "suitable regulations" for the enforcement of Title VII.<sup>25</sup> The EEOC's proposed rulemaking powers received scant attention in the long congressional debate over passage of Title VII because legislators doubted that the EEOC would exercise its rulemaking authority to any significant degree.<sup>26</sup> This doubt was based on the fact that the EEOC was originally modeled after the National Labor Relations Board (NLRB),<sup>27</sup> the administrative agency created by Congress in 1935 to administer federal law governing unions.<sup>28</sup> The NLRB, which has full rulemaking authority,<sup>29</sup> traditionally has chosen to exercise its authority through the adjudication of cases rather than by substantive rulemaking.<sup>30</sup> Legislators opposed to the creation of a strong anti-discrimination enforcement agency, therefore, had no reason to perceive the EEOC's rulemaking authority as a threat.<sup>31</sup>

Nonetheless, the EEOC's authority to issue substantive regulations did not survive the passage of Title VII.<sup>32</sup> Two days before the bill was passed by the

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20. 29 U.S.C. §§ 621-634 (1994).

21. 42 U.S.C. §§ 12101-12213 (1994).

22. See HUGH D. GRAHAM, *THE CIVIL RIGHTS ERA*, 133-34 (1990); Berg, *supra* note 19, at 65.

23. See *infra* notes 25-74 and accompanying text.

24. See GRAHAM, *supra* note 22, at 144-47.

25. See H.R. 7152, 88th Cong. § 714(a) (1963).

26. See White, *supra* note 18, at 60.

27. See GRAHAM, *supra* note 22, at 148.

28. See White, *supra* note 18, at 59-60.

29. See 29 U.S.C. § 156 (1994).

30. See Charles J. Morris, *The NLRB in the Doghouse—Can an Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9, 27-28 (1987). But see Gould *Outlines His Agenda for Change as NLRB Chairman*, Daily Lab. Rep. (BNA) at 53 (Mar. 21, 1994) (promising that the NLRB will use substantive rulemaking more frequently in the future).

31. See White, *supra* note 18, at 60.

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

House, it was amended to provide that the EEOC's rulemaking authority would be limited to "procedural regulations."<sup>33</sup> This amendment was adopted without debate, thereby removing the EEOC's authority to promulgate substantive rules.<sup>34</sup> In 1966, Nicholas Katzenbach, then Attorney General, directed a task force to consider amending Title VII to give the EEOC substantive rulemaking power.<sup>35</sup> However, Title VII was not amended because the Justice Department felt that "the federal courts were likely to defer to [the EEOC's] presumed substantive authority much as they had with . . . other established regulatory agencies" even absent formal substantive rulemaking authority.<sup>36</sup> Today, the EEOC still lacks statutory authority to issue substantive regulations under Title VII, though the agency does have this power under both the ADA<sup>37</sup> and the ADEA.<sup>38</sup>

The EEOC's second proposed power was the authority to receive and investigate allegations of employment discrimination. Title VII contains an elaborate procedure (one commentator has called it "an administrative obstacle course"<sup>39</sup>) that employees must follow before they may sue their employer for an alleged violation of the statute. One of these procedures—filing a charge of discrimination—involves notifying the EEOC of employment discrimination in a sworn written statement.<sup>40</sup> To preserve the right to bring a lawsuit, an employee must file a charge within 300 days of the alleged discrimination.<sup>41</sup> After receiving a charge of discrimination, the EEOC may investigate the charge by issuing subpoenas to compel the attendance and testimony of witnesses or to compel the production of documents,<sup>42</sup> interviewing the charging party (the employee), one or more representatives of the employer and relevant witnesses,<sup>43</sup> and conducting on-

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33. See 110 CONG. REC. H2575 (1964) (statement of Rep. Celler, offeror of the amendment).

34. See *id.* (Rep. Celler noting no objections to the amendment).

35. See White, *supra* note 18, at 62.

36. See *id.*

37. See 42 U.S.C. § 12116.

38. See 29 U.S.C. § 628.

39. See 1 CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION § 11.2 (2d ed. 1988).

40. See 42 U.S.C. § 2000e-5(b).

41. See 42 U.S.C. § 2000e-5(e)(1). The requirement is applicable to employees working in states (called "deferral" states) that have established a state administrative agency parallel to the EEOC; employees working in a state that has not established such a parallel agency must file their Title VII charge within 180 days of the allegedly unlawful act. See *id.*

42. See 29 C.F.R. § 1601.16(a) (1996); see also *EEOC v. Ford Motor Credit Co.*, 26 F.3d 44, 47-48 (6th Cir. 1994) (permitting judicial enforcement of an EEOC administrative subpoena if the subpoena (1) seeks relevant information, (2) is not unduly burdensome, and (3) is within the statutory authority of the EEOC).

43. See 29 C.F.R. § 1601.15(a); see also *EEOC Compl. Man. (CCH)* ¶ 9810, at 821-32 (discussing the types and purposes of interviews during employment-related investigation).

site inspections.<sup>44</sup> The EEOC's power to receive and investigate charges survived the passage of Title VII.

The drafters of Title VII intended one of two things to occur following the EEOC's investigation of an employment discrimination charge. If the EEOC determined the charge was unfounded, it would be dismissed. If, however, the EEOC investigation found reasonable cause to believe that the charge was true, the charge would be resolved through the informal means of "conference, conciliation, and persuasion."<sup>45</sup> The latter constitutes the third power that Title VII's drafters initially envisioned for the EEOC. Congress apparently believed that employers, when confronted with an EEOC finding of discrimination, would meet the aggrieved employee willingly at a negotiating table presided over by the EEOC, and that the parties would resolve their disputes amicably and voluntarily with the aid of the EEOC as conciliator. The EEOC, therefore, was given the power to attempt "through conciliation and persuasion to resolve disputes involving employment discrimination charges."<sup>46</sup> This reflects Congress' expectation that the EEOC would be able to dispose of most charges of discrimination without resorting to litigation.<sup>47</sup>

Congress did not expect that all allegations of discrimination would be settled this way, and therefore permitted employees to sue the employer on their own behalf. Title VII explicitly permits employees to sue their employers after the employees have received a "right-to-sue" letter<sup>48</sup> from the EEOC, informing them that the EEOC has exhausted both its investigation and its efforts to achieve voluntary compliance.<sup>49</sup>

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44. *Compare* *Motorola, Inc. v. McLean*, 484 F.2d 1339, 1346 (7th Cir. 1973) (upholding the EEOC's right to conduct an on-site inspection), *with* *EEOC v. Maryland Club Corp.*, 785 F.2d 471, 475 n.2 (4th Cir. 1986) (noting the district court's refusal to enforce a subpoena demand by the EEOC to tour an employer's facility).

45. See 42 U.S.C. § 2000e-5(b).

46. See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 3284 (1968) (statement of Rep. Celler)[hereinafter EEOC, LEGISLATIVE HISTORY].

47. See, e.g., *Wheeldon v. Monon Corp.*, 946 F.2d 533, 535-36 (7th Cir. 1991); *Marrero-Rivera v. Department of Justice*, 800 F. Supp. 1024, 1028-29 (D.P.R. 1992), *aff'd*, 36 F.3d 1089 (1st Cir. 1994); *Johnson-McCray v. Board of Educ.*, 44 Fair Empl. Prac. Cas. 1145, 1146 (S.D.N.Y. 1987); see also *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 863-64 (7th Cir. 1985) ("[A]llowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would circumvent the EEOC's investigatory and conciliatory role . . . as surely would an initial failure to file a timely EEOC charge."); *Dickey v. Greene*, 710 F.2d 1003, 1006 (4th Cir. 1983) (noting that a plaintiff's failure to specifically list her former supervisor as a respondent in her EEOC charge was fatal to her suit against the supervisor because it did not give the EEOC an opportunity to investigate and conciliate the allegations made against the supervisor).

48. See 29 C.F.R. § 1601.28(a)(1) (noting that an employment discrimination claimant can request a notice of right-to-sue 180 days after filing a charge of discrimination).

49. See 42 U.S.C. § 2000e-5(f)(1) (describing procedures for filing a court claim); *Occidental Life Ins. v. EEOC*, 432 U.S. 355, 361 (1977) (noting that a "complainant whose charge is not dismissed or promptly settled or litigated" may bring a lawsuit only at the termination of the EEOC's exclusive jurisdiction); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99 (1973) (discussing

As originally drafted, Title VII would have given the EEOC two enforcement powers in addition to the enforcement power created by the individual employee's right to file suit.<sup>50</sup> Both of these additional powers would have arisen only after the EEOC found "reasonable cause" to believe that a statutory violation had occurred. First, Title VII would have permitted the EEOC to issue a "cease-and-desist" order to compel an employer to stop its discriminatory practices.<sup>51</sup> Second, Title VII would have given the EEOC authority to file a lawsuit in federal court on behalf of the aggrieved employee.<sup>52</sup>

The first enforcement power—the power to issue "cease-and-desist" orders—was hotly contested in the congressional debates preceding the passage of Title VII.<sup>53</sup> Opponents of the bill, fearful of creating a civil rights enforcement agency that could investigate and prosecute as well adjudicate employers' liability, fought hard to limit what they viewed as the potentially unchecked power of the EEOC.<sup>54</sup> As a result, the House version of Title VII did not provide the EEOC with the power to issue "cease-and-desist" orders,<sup>55</sup> but retained the EEOC's power to prosecute violations by bringing suit on behalf of aggrieved employees.<sup>56</sup> The version of the bill that became law did not authorize the EEOC to issue "cease-and-desist" orders.<sup>57</sup> In 1972, Congress attempted unsuccessfully to give the EEOC the authority to issue such orders.<sup>58</sup>

The EEOC's second proposed enforcement power—the prosecution power—was removed from the bill shortly before passage as part of a last minute compromise.<sup>59</sup> As the Senate was debating the bill, a bipartisan group of its

prerequisites to filing a discrimination lawsuit).

50. See GRAHAM, *supra* note 22, at 146-52.

51. See *id.* at 129-47.

52. See Berg, *supra* note 18, at 67, 85-88.

53. See GRAHAM, *supra* note 22, at 129-47.

54. See Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 450-51 (1966) (referring to the "fear that the EEOC would develop into another expensive octopus like the NLRB").

55. See EEOC LEGISLATIVE HISTORY, *supra* note 46, at 2043, 2057. As indicated by Honorable William McCulloch of the House Committee on the Judiciary, "[a] substantial number of committee members . . . preferred that the ultimate determination of discrimination rest with the Federal judiciary. Through this requirement . . . settlement of complaints w[ould] occur more rapidly and with greater frequency. In addition . . . the employer or labor union w[ould] have a fairer forum to establish innocence . . . ." See *id.* at 2122, 2150.

56. See *id.* at 2029.

57. See GRAHAM, *supra* note 22, at 133-34; Berg, *supra* note 18, at 65; White, *supra* note 18, at 59-60.

58. See STAFF OF SENATE SUBCOMM. ON LABOR OF COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, 141-47, 251-314, 1557 (Comm. Print 1972).

59. See EEOC LEGISLATIVE HISTORY, *supra* note 46, at 10-11, 3003-04.

supporters worked with the Department of Justice and key House members to draft a pair of substitute amendments to help ensure passage.<sup>60</sup> These amendments limited the EEOC's enforcement power to seek conciliation.<sup>61</sup>

Because of the absence of any real enforcement authority, the EEOC, for most of the first decade of its existence, was perceived as "toothless,"<sup>62</sup> and a "poor-eneebled thing"<sup>63</sup> as compared to other administrative agencies.<sup>64</sup> To correct this situation,<sup>65</sup> Congress reinstated the EEOC's prosecutorial power as part of the 1972 Equal Employment Opportunity Act amendments<sup>66</sup> to Title VII, giving the EEOC authority to sue employers for violations of the statute.<sup>67</sup> During the time between the filing of a charge and the issuance of a right-to-sue letter, the EEOC retains exclusive jurisdiction over the claim.<sup>68</sup> Should the EEOC sue the employer at that

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60. See 110 CONG. REC. 11, 926 (1964) (quoting amendment number 656); 110 CONG. REC. 13, 310 (1964) (quoting amendment number 1052).

61. See 42 U.S.C. § 2000e-5(e) (1988) (originally codified as 42 U.S.C. § 706(e) (1970)) (providing that the failure of conciliation efforts would terminate the EEOC's involvement in the case and would enable the charging party to bring a private cause of action in federal court within thirty days after EEOC notification that conciliation efforts had failed). A staff member of the Senate Judiciary Committee summarized the change as follows:

The Senate amendment struck out the power of the [EEOC] to enforce this title of the bill in court suits . . . . Its function now is limited to an attempt at voluntary conciliation of alleged unlawful practices . . . . Under the Senate amendment only an aggrieved person can bring suit against an employer unless there is a pattern or practice of resistance . . . . The Commission cannot institute suit at all.

Vaas, *supra* note 54, at 452 (quoting 110 CONG. REC. 13, 331 (1964)).

62. See GRAHAM, *supra* note 22, at 157-59, 235-36.

63. MICHAEL I. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 205 (1966).

64. The EEOC's reputation has not improved substantially over the years. See, e.g., Selmi, *supra* note 18, at 64 (describing the EEOC as "a failure; serving in some instances as little more than an administrative obstacle to resolution of claims on the merits").

65. The purpose of the change was explained in a Senate report as follows:

The accomplishment of the stated purpose of Title VII, the elimination of employment discrimination in all areas of employment in this Nation, has not been accomplished under the present system of voluntary compliance through EEOC procedures or, in the alternative, the private lawsuit. Under the provisions of section 4 of the bill, the overriding public interest in equal employment opportunity would be asserted through direct Federal enforcement.

4 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 75.01, at 75-2 (2d ed. 1995); see also H.R. REP. NO. 92-238, at 3 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2139 ("[T]he machinery created by the Civil Rights Act of 1964 [was] not adequate" because the "voluntary approach . . . failed to eliminate employment discrimination."). "[E]ffective enforcement procedures [must] be provided the Equal Employment Opportunity Commission to strengthen its efforts to reduce discrimination in employment." 1972 U.S.C.C.A.N. at 2144. "In cases posing the most profound consequences, [employers had] more often than not shrugged off the [EEOC's] entreaties and relied upon the unlikelihood of the parties suing them." S. REP. NO. 92-415, at 4 (1971). The "failure to grant the EEOC meaningful enforcement powers [was] a major flaw in the operation of Title VII." *Id.*

66. Congress also gave the EEOC the authority to pursue "pattern and practice" cases, a power previously held by the Attorney General's office. See White, *supra* note 18, at 66.

67. See 42 U.S.C. § 2000e-4.

68. See *General Tel. Co. of the North-West, Inc. v. EEOC*, 446 U.S. 318, 324 (1980).



time, the employee is barred from litigating the claim against the employer, though she has the right to intervene in the EEOC's action.<sup>69</sup> If the EEOC persuades the factfinder that the employer has intentionally engaged in unlawful discrimination, the court may order injunctive relief and such remedies as reinstatement or hiring of employees, backpay, and compensatory and punitive damages.<sup>70</sup>

The efficacy of the EEOC's prosecutorial power, however, is significantly constrained by the EEOC's chronic lack of funds. The resultant backlog of cases and shortage of staff permits the EEOC to file suit in only a small percentage of the cases it considers.<sup>71</sup>

The EEOC, therefore, has the power to investigate allegations of employment discrimination and to attempt to conciliate them. Although it has the power to sue employers to enforce the anti-discrimination laws, this power is limited by its inadequate funding. The EEOC also has the power to issue procedural, but not substantive regulations under Title VII, though the EEOC has authority to issue both types of regulations under the ADA and ADEA.<sup>72</sup> The EEOC does not have the power to issue "cease-and-desist" orders; it may only obtain prospective injunctive relief by using its prosecutorial power to file suit in federal court.<sup>73</sup>

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69. See 42 U.S.C. § 2000e-5(f)(1).

70. See 42 U.S.C. §§ 1981a(a)(1), 2000e-5(g)(1).

71. See William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, 50 DISP. RESOL. J. 40, 45 (1995); see also Selmi, *supra* note 18, at 16, 21 (noting that the EEOC receives approximately 90,000 charges of discrimination per year, but only files approximately 350 substantive lawsuits involving a total of approximately 450 allegations of discrimination).

72. See White, *supra* note 18, at 58, 89-96.

73. See *supra* notes 54-72 and accompanying text.

### III. THE ARBITRATION OF STATUTORY EMPLOYMENT CLAIMS

The evolution of the Supreme Court's treatment of employment arbitration has been extensively chronicled in the legal literature,<sup>74</sup> and therefore will be recounted here only in a concise summary.

#### A. *The Early Years of Statutory Arbitration*

At common law, an arbitration agreement could be revoked by either party at any time before the arbitrator issued an award.<sup>75</sup> The Federal Arbitration Act (FAA), enacted in 1925,<sup>76</sup> and recodified in 1947,<sup>77</sup> changed this by requiring courts to enforce arbitration agreements made in connection with commerce and maritime transactions.<sup>78</sup> Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law

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74. See, e.g., Mark L. Adams, *Compulsory Arbitration of Discrimination Claims and the Civil Rights Act of 1991: Encouraged or Proscribed?*, 44 WAYNE L. REV. 1619 (1999); Roberto L. Corrada, *The Arbitral Imperative in Labor and Employment Law*, 47 CATH. U. L. REV. 919 (1998); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997); David E. Feller, *Compulsory Arbitration of Statutory Discrimination Claims Under a Collective Bargaining Agreement: The Odd Case of Caesar Wright*, 16 HOFSTRA LAB. & EMPL. L. J. 53 (1998); David E. Feller, *Fender Bender or Train Wreck?: The Collision Between Statutory Protection of Individual Employee Rights and the Judicial Revision of the Federal Arbitration Act*, 41 ST. LOUIS U. L.J. 561 (1997); Andrea Fitz, *The Debate Over Mandatory Arbitration in Employment Disputes*, 54 DISP. RESOL. J. 35 (1999); Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039 (1998); Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1 (1998); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33; Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999); Miriam A. Cherry, Note, *Not-So-Arbitrary Arbitration: Using Title VII Disparate Impact Analysis to Invalidate Employment Contracts that Discriminate*, 21 HARV. WOMEN'S L.J. 267 (1998); Anthony J. Jacob, Comment, *Expanding Judicial Review to Encourage Employers and Employees to Enter the Arbitration Arena*, 30 J. MARSHALL L. REV. 1099 (1997); Lynne M. Longtin, Comment, *The EEOC's Position on Mandatory Arbitration*, 67 U. CIN. L. REV. 265 (1998); Patrick A. Lynd, Comment, *Recent Developments Regarding Mandatory Arbitration of Statutory Employment Disputes*, 77 OR. L. REV. 287 (1998); Donna Meredith Matthews, Note, *Employment Law After Gilmer: Compulsory Arbitration of Statutory Antidiscrimination Rights*, 18 BERKELEY J. EMPL. & LAB. L. 347 (1997); John-Paul Motley, Note, *Compulsory Arbitration Agreements in Employment Contracts from Gardner-Denver to Austin: The Legal Uncertainty and Why Employers Should Choose Not to Use Preemployment Arbitration Agreements*, 51 VAND. L. REV. 687 (1998); Amy L. Ray, Comment, *When Employers Litigate to Arbitrate: New Standards of Enforcement for Employer Mandated Arbitration Agreements*, 51 SMU L. REV. 441 (1998).

75. See, e.g., *Vynior's Case*, 77 Eng. Rep. 595 (K.B. 1609); *Kill v. Hollister*, 95 Eng. Rep. 532 (K.B. 1746); *Oregon & W. Mortgage Sav. Bank v. American Mortgage Co.*, 35 F. 22 (C.C. Or. 1888); *Allen v. Watson*, 16 Johns 205; *Jones v. Harris*, 59 Miss. 214 (1981).

76. Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994) (original version at 43 Stat. 883 (1925)).

77. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

78. See 9 U.S.C. §§ 1-16.

or in equity for the revocation of any contract.”<sup>79</sup> Section 3 permits a party to an arbitration agreement to obtain a stay of proceedings in federal court when an issue is referable to arbitration.<sup>80</sup> Section 4 permits such a party to obtain an order compelling arbitration when another party has failed, neglected, or refused to comply with an arbitration agreement, and also authorizes judicial enforcement of arbitration awards.<sup>81</sup>

Notwithstanding the FAA, the Supreme Court, in the 1953 decision of *Wilko v. Swan*,<sup>82</sup> held that a buyer of securities who had sued the seller claiming fraud in violation of Section 12(2) of the Securities Act of 1933,<sup>83</sup> could not be compelled to arbitrate the claim despite the existence of an arbitration clause in the sales contract.<sup>84</sup> The Court voided the arbitration clause as an invalid waiver of the substantive law created by the statute.<sup>85</sup> Lower federal courts subsequently interpreted *Wilko* as creating a defense to the enforcement of arbitration agreements under the FAA when statutory claims were at issue.<sup>86</sup> This defense was premised on the assumptions that: (1) courts could enforce statutory rights better than arbitrators; (2) it contravened public policy to permit a party to waive her statutory right to a judicial forum by signing a predispute arbitration agreement; and (3) the informality of arbitration made it difficult for courts to correct arbitral errors in statutory interpretation.<sup>87</sup>

### B. *The Steelworkers Trilogy*

While lower federal courts, under the authority of *Wilko*, were proclaiming the inferiority of arbitration for resolving statutory claims, the Supreme Court strongly endorsed arbitration as a mechanism for resolving industrial disputes arising under collective bargaining agreements.<sup>88</sup> In these cases, decided in 1960 and known

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79. *See id.* § 2.

80. *See id.* § 3.

81. *See id.* § 4.

82. 346 U.S. 427 (1953).

83. 15 U.S.C. § 77 (1994).

84. *See Wilko*, 346 U.S. at 438.

85. *See id.* at 430-35.

86. *See* G. Richard Shell, *The Role of Public Law in Private Dispute Resolution: Reflections on Shearson/American Express, Inc. v. McMahon*, 26 AM. BUS. L.J. 397, 404 (1988); Michael G. Holcomb, Note, *The Demise of the FAA's "Contract of Employment" Exception?*, 1992 J. DISP. RESOL. 213, 216.

87. *See, e.g., American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827 (2d Cir. 1968); *Hunt v. Mobil Oil Corp.*, 444 F. Supp. 68, 70-71 (S.D.N.Y. 1977).

88. *See* Susan A. FitzGibbon, *Reflections on Gilmer and Cole*, 1 EMPLOYEE RIGHTS & EMPL. POL'Y J. 221, 222 (1997).

collectively as the *Steelworkers Trilogy*,<sup>89</sup> the Court ignored the FAA and relied instead on section 301 of the Labor-Management Relations Act.<sup>90</sup> The holdings of the Trilogy were that arbitrators, not courts, are to decide the arbitrability of grievances;<sup>91</sup> that courts should refuse to order arbitration only if the arbitration clause “is not susceptible of an interpretation that covers the asserted dispute”;<sup>92</sup> and that courts should not review the merits of an arbitration award so long as the award “draws its essence” from the collective bargaining agreement.<sup>93</sup>

The *Steelworkers Trilogy* did not overrule *Wilko*, but instead distinguished it on the basis that the *Steelworkers* cases arose in the unique context of the collective bargaining relationship.<sup>94</sup> Whereas the alternative to arbitrating statutory claims was judicial resolution of those claims “with established procedures or even special statutory safeguards,”<sup>95</sup> the alternative to arbitrating claims arising out of a collective bargaining relationship was, according to the Court, “industrial strife.”<sup>96</sup> Thus, the *Steelworkers* cases were predicated on the Court’s fear of labor unrest,<sup>97</sup> a fear not applicable to the statutory cases that, until 1974, did not arise in the employment context.

Because the Court distinguished rather than overruled *Wilko*, the twin products of the *Steelworkers Trilogy*—a virtually irrebuttable presumption of arbitrability and a sharply limited role for the courts—applied only to arbitration agreements contained in collective bargaining agreements.<sup>98</sup> After the Trilogy, lower federal courts continued to apply *Wilko* to statutory claims,<sup>99</sup> thus dividing arbitrable collective bargaining issues from nonarbitrable statutory ones. This division was challenged by the 1974 case of *Alexander v. Gardner-Denver Co.*<sup>100</sup>

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89. *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

90. 29 U.S.C. § 185 (1994).

91. *See American Mfg. Co.*, 363 U.S. at 567-68.

92. *See Warrior & Gulf Navigation*, 363 U.S. at 582-83.

93. *See Enterprise Wheel*, 363 U.S. at 597.

94. *See Warrior & Gulf Navigation*, 363 U.S. at 578.

95. *See id.*

96. *See id.*; *see also* David E. Feller, *Arbitration and the External Law Revisited*, 37 ST. LOUIS U. L.J. 973, 974 (1993) (“Arbitration under a collective bargaining agreement, unlike commercial arbitration, was not an alternative forum for determining issues which would otherwise be litigated, but was developed as a substitute for the strike.”).

97. Note the similarity between the Supreme Court’s justification for the *Steelworkers Trilogy*-fear of “industrial strife”—and its justification for the section 301 preemption doctrine-necessity of promoting “industrial peace.”

98. *See* Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 758 (1990).

99. *See, e.g.,* *Romyn v. Shearson Lehman Bros., Inc.*, 648 F. Supp. 626, 632 (D. Utah 1986) (RICO); *Breyer v. First Nat’l Monetary Corp.*, 548 F. Supp. 955, 959 (D.N.J. 1982) (Commodities Exchange Act); *Aimcee Wholesale Corp. v. Tomar Prods., Inc.*, 237 N.E.2d 223, 225 (N.Y. 1968) (Sherman Antitrust Act).

100. 415 U.S. 36 (1974).

*C. Alexander v. Gardner-Denver Co.*

*Gardner-Denver* presented the issue of whether an employer could require an employee to arbitrate a statutory employment discrimination claim pursuant to the arbitration provisions of his collective bargaining agreement.<sup>101</sup> The plaintiff, ostensibly discharged for producing too many defective parts,<sup>102</sup> testified at the arbitration hearing that he had been fired because of his race.<sup>103</sup> The arbitrator ruled for the employer.<sup>104</sup> The plaintiff then filed a Title VII discrimination suit in federal court.<sup>105</sup> The district court granted summary judgment for the employer, finding that the discrimination claim had been submitted to and resolved by the arbitrator.<sup>106</sup> The Tenth Circuit affirmed.<sup>107</sup>

The Supreme Court reversed, holding that an employee does not forfeit his Title VII discrimination claim by first pursuing a grievance to final arbitration under the nondiscrimination clause of a collective bargaining agreement.<sup>108</sup> The Court presented four reasons why labor arbitration was inappropriate for the final resolution of Title VII claims. First, the Court stated that labor arbitrators lack both the experience and the authority to resolve Title VII claims.<sup>109</sup> The "specialized competence of arbitrators," the Court noted, "pertains primarily to the law of the shop, not the law of the land."<sup>110</sup> Second, the Court noted the relative informality of arbitration hearings as compared to judicial proceedings, and concluded that arbitral factfinding procedures were inadequate to protect employees' Title VII rights.<sup>111</sup> Third, the Court pointed out that arbitrators are under no obligation to issue written opinions.<sup>112</sup> Finally, the Court noted the union's exclusive control over the manner and extent to which an employee's grievance is presented.<sup>113</sup> The

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101. *See id.* at 38.

102. *See id.*

103. *See id.* at 38, 42.

104. *See id.* at 42.

105. *See id.* at 39, 42-43.

106. *See id.* at 43.

107. *See id.*

108. *See id.* at 49-50.

109. *See id.* at 57.

110. *See id.*

111. *See id.* at 56-58. *But cf.* FRANK ELKOURI & EDNA A. ELKOURI, *HOW ARBITRATION WORKS* 376 (4th ed. 1985) ("Courts aren't right more often than arbitrators and the parties because they are wiser. They are right because they have the final say.") (quoting James E. Westbrook, *The End of an Era in Arbitration: Where Can You Go if You Can't Go Home Again?* (1980)) (internal quotation marks omitted).

112. *See Gardner-Denver*, 415 U.S. at 58.

113. *See id.* at 58 n.19.

Court was concerned that a union's duty to represent employees collectively might interfere with its pursuit of an individual employee's claim.<sup>114</sup>

The *Steelworkers Trilogy* and *Gardner-Denver* seemed to stand for the proposition that arbitration was an appropriate mechanism for resolving issues arising under the "law of the shop,"<sup>115</sup> but was not appropriate for resolving issues arising under the "law of the land."<sup>116</sup> Following this reasoning, several lower courts ruled that arbitration clauses contained in individual employment contracts, instead of in collective bargaining agreements, would not preclude subsequent suits under anti-discrimination laws.<sup>117</sup>

#### D. The Mitsubishi Trilogy

While post-*Gardner-Denver* decisions in the lower courts refused to compel arbitration of statutory claims in the employment context, the Supreme Court issued three decisions approving arbitration of statutory claims arising under antitrust,<sup>118</sup> securities,<sup>119</sup> and racketeering<sup>120</sup> laws. In these cases, collectively known as the *Mitsubishi Trilogy*, the Court interpreted the FAA as creating a presumption that statutory claims are arbitrable, and made this presumption rebuttable only upon a showing by the party opposing arbitration that Congress specifically intended

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114. See *id.*

115. See Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U.L. REV. 687, 726 (1997); see also *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1964) (stating that a collective bargaining agreement "calls into being . . . the common law of a particular industry or of a particular plant.") (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1959)).

116. See Bales, *supra* note 115 at 726.

117. See, e.g., *Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 187 (1st Cir. 1989) (Title VII); *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221, 227-28 (3d Cir. 1989) (ADEA); *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304, 1307 (8th Cir. 1988) (Title VII); *Jones v. Baskin Flaherty, Elliot & Mannino, P.C.*, 661 F. Supp. 597, 604 (W.D. Pa. 1987) (ADEA); *Steck v. Smith Barney, Harris Upham & Co.*, 661 F. Supp. 543, 544-47 (D.N.J. 1987) (ADEA); *Horne v. New England Patriots Football Club, Inc.*, 489 F. Supp. 465, 467-70 (D. Mass. 1980) (ADEA). But see *Pihl v. Thompson McKinnon Sec.*, 48 Fair Empl. Prac. Cas. (BNA) 922, 924-26 (E.D. Pa. 1988) (holding that ADEA claims are subject to compulsory arbitration).

118. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985) (compelling enforcement of a private contract to arbitrate claims arising under the Sherman Antitrust Act).

119. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 479, 484-85 (1989) (compelling enforcement of a private contract to arbitrate claims arising under section 12(2) of the Securities Act of 1933).

120. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 238, 242 (1987) (compelling enforcement of a private contract to arbitrate claims arising under both RICO and section 10(b) of the Securities Act of 1934).

otherwise.<sup>121</sup> Moreover, the Court explicitly rejected arguments questioning the competence of arbitrators and the sufficiency of arbitral procedures.<sup>122</sup>

The Court predicated this new presumption of arbitrability on two assumptions, both of which were a marked departure from prior precedent. The first was that an arbitration agreement involves no waiver of substantive rights:

By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.<sup>123</sup>

The second assumption was that arbitrators are capable of deciding complex statutory issues. Noting that the parties may appoint arbitrators with particular statutory expertise and that the arbitrator or the parties may employ experts, the Court concluded that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."<sup>124</sup> On this basis, the Court expressly overruled *Wilko*.<sup>125</sup>

The *Mitsubishi* Trilogy represented a transformation of the Supreme Court's attitude toward arbitration outside the union context. Before the *Mitsubishi* Trilogy, statutory claims were not arbitrable; afterward, they were arbitrable so long as they did not arise in the employment setting. It was in this context that the Court granted certiorari in a case raising the issue of the arbitrability of statutory employment claims

#### *E. Gilmer v. Interstate/Johnson Lane Corp.*<sup>126</sup>

The *Gilmer* decision precipitated the recent prevalence of employment arbitration agreements.<sup>127</sup> Robert Gilmer was discharged from his job as manager

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121. See *McMahon*, 482 U.S. at 226; *Mitsubishi*, 473 U.S. at 628 (citation omitted).

122. See *McMahon*, 482 U.S. at 232 ("[T]he streamlined procedures of arbitration do not entail any consequential restriction on substantive rights."); *Mitsubishi*, 473 U.S. at 628.

123. *Mitsubishi*, 473 U.S. at 628.

124. See *id.* at 626-27. The "well past" language seems hyperbolic, given that just one year before, in *McDonald*, the Court had stated that an arbitrator may lack the competence required to resolve the complex legal issues involved in a section 1983 action. See *McDonald v. City of West Branch*, 466 U.S. 284, 284-85 (1984).

125. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483-84 (1989).

126. 500 U.S. 20 (1991).

127. See Richard A. Bales, *Creating and Challenging Compulsory Arbitration Agreements*, 13 THE LAB. LAW. 511, 511 (1998).

of financial services at Interstate/Johnson Lane Corp.<sup>128</sup> Subsequently, he filed a civil suit, alleging that he had been fired because of his age in violation of the ADEA.<sup>129</sup> The employer moved to compel arbitration pursuant to an arbitration agreement contained in Gilmer's registration agreement with the New York Stock Exchange (NYSE), in which Gilmer had "agree[d] to arbitrate any dispute, claim, or controversy" between him and his employer "arising out of the employment or termination of [his] employment."<sup>130</sup>

The Supreme Court granted the motion, and ordered Gilmer to arbitration.<sup>131</sup> In doing so, the Court rejected four broad arguments supporting Gilmer's claim that the arbitration clause should not preclude his ADEA suit: first, that an arbitral forum is inadequate to protect an employee's statutory employment rights;<sup>132</sup> second, that arbitration is inconsistent with the statutory purposes and framework of the ADEA;<sup>133</sup> third, that an FAA provision excluding "contracts of employment" rendered the FAA inapplicable;<sup>134</sup> and fourth, that *Gardner-Denver* stood for the proposition that an employee could not be required to arbitrate his statutory claims.<sup>135</sup>

First, the Court rejected Gilmer's claim that the arbitral forum was inadequate to protect his statutory employment rights, noting that the *Mitsubishi* Trilogy had rejected this argument as "'far out of step with our current strong endorsement'" of arbitration.<sup>136</sup> Gilmer further attacked arbitral adequacy on the ground that arbitral discovery was more limited than that available through federal courts.<sup>137</sup> The Court, noting that NYSE rules permitted "document production, information requests, depositions, and subpoenas,"<sup>138</sup> declared that "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'"<sup>139</sup>

As a separate attack on arbitral adequacy, Gilmer pointed out that arbitrators are not required to issue written opinions.<sup>140</sup> This, he argued, would reduce public accountability for employer discrimination, hamper effective judicial review, and stifle development of the law. The Court responded with three arguments.<sup>141</sup> First,

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128. See *Gilmer*, 500 U.S. at 23.

129. See *id.*

130. See *id.* (quoting Respondent's Brief at 1, 18).

131. See *id.* at 35.

132. See *id.* at 30.

133. See *id.* at 29, 33.

134. See *id.* at 25.

135. See *id.* at 33.

136. See *id.* at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)).

137. See *id.* at 31.

138. See *id.*

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

140. See *id.*

141. See *id.*



the Court asserted, incorrectly, that NYSE arbitration rules require arbitrators to issue written opinions.<sup>142</sup> The Court reasoned that courts would continue to issue judicial opinions in employment discrimination cases because not all employers and employees are likely to sign binding arbitration agreements.<sup>143</sup> The Court noted that settlement agreements, which are encouraged by the ADEA, similarly fail to produce written opinions.<sup>144</sup>

Second, the Court rejected Gilmer's argument that arbitration was inconsistent with the statutory purposes and framework of the ADEA, and that this inconsistency rebutted the presumption of arbitrability created by the *Mitsubishi* Trilogy.<sup>145</sup> To this, the Court responded that the arbitral forum was consistent with the ADEA and adequate to protect the statute's important social policies, that nothing in the ADEA evinced congressional intent to preclude arbitration with sufficient clarity to rebut the *Mitsubishi* presumption, and that arbitration agreements in the employment setting would not be voided merely because they were entered into under conditions of unequal bargaining power between employers and employees.<sup>146</sup> The Court also rejected Gilmer's argument that arbitration would undermine the role of the EEOC in enforcing the ADEA by not requiring employees to file a charge of discrimination before arbitrating their claims.<sup>147</sup> The Court responded that an arbitration agreement would not preclude an employee from filing an EEOC charge, and that the agreement therefore would not necessarily exclude the EEOC from the dispute resolution process.<sup>148</sup>

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142. See *id.* at 31-32. NYSE rules require only that the arbitrator issue a written award, which does little more than state who shall receive what and when the individual will receive it. See Uniform Arbitration Act § 8-16, 7 U.L.A. 207-08 (1994); see also GEORGE GOLDBERG, A LAWYER'S GUIDE TO COMMERCIAL ARBITRATION 57-60 (2d ed. 1983) (describing the procedures and content of an arbitration award). The arbitrator is not required to issue an *opinion* giving reasons for the award. See Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 413 (1996); Peter M. Mundheim, Comment, *The Desirability of Punitive Damages in Securities Arbitration: Challenges Facing the Industry Regulators in the Wake of Mastrobuono*, 144 U. PA. L. REV. 197, 202 (1995).

143. See *Gilmer* 500 U.S. at 32.

144. See *id.*

145. See *id.* at 32-33.

146. See *id.* at 33.

147. See *id.* at 28.

148. The Court stated that inability to file a private judicial action would not prevent an employee from filing a charge with the EEOC. See *id.* The Court further stated that the EEOC's role in fighting discrimination was not dependent on individual employees filing a charge. See *id.* First, the EEOC can investigate claims even when a charge is not filed. See *id.* The Court also asserted that "nothing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes." See *id.* Finally, the Court, citing the Securities Exchange Commission's involvement in enforcing securities statutes, stated that the mere involvement of an administrative agency in the enforcement of a statute does not preclude compulsory arbitration. See *id.* at 28-29.

Third, the Court rejected the argument of several amici curiae that an FAA provision excluding “contracts of employment” rendered the FAA and its presumption of arbitrability inapplicable to Gilmer’s case. The Court concluded that because the arbitration agreement was contained in Gilmer’s registration application with the NYSE, it was not part of the “contract of employment” with his employer.<sup>149</sup>

Fourth, the Court distinguished the *Gardner-Denver* decision from Gilmer’s case in three ways.<sup>150</sup> First, the Court noted that unlike a labor arbitrator whose authority is limited to interpreting the collective bargaining agreement at issue,<sup>151</sup> the arbitrator deciding Gilmer’s case would be given explicit authority to resolve “any dispute, claim or controversy” arising out of Gilmer’s employment.<sup>152</sup> Second, the Court pointed out that Gilmer—unlike the plaintiff in *Gardner-Denver*—was not dependent on a union to enforce his statutory claims.<sup>153</sup> Third, noting that *Gardner-Denver* was not decided under the FAA,<sup>154</sup> the Court applied the statute and the *Mitsubishi* presumption of arbitrability to the employment context of *Gilmer*.<sup>155</sup>

*Gilmer* left several issues unresolved. For example, by sidestepping the “contracts of employment” provision in the FAA, the Court left open the possibility that *Gilmer* would apply only to employees in the securities industry whose arbitration agreement is contained in their registration application with the NYSE.<sup>156</sup> Most lower courts, however, have interpreted the clause narrowly to exclude only those workers involved directly in interstate commerce, such as truck drivers.<sup>157</sup> Similarly, on its face, *Gilmer* applies only to ADEA claims, but lower

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149. The Court also noted that Gilmer had not presented, and the courts below had not considered, the effect of this provision on Gilmer’s case. *See id.* at 25 n.2.

150. *See id.* at 33-35.

151. *See id.* at 34.

152. *See id.* at 23, 35.

153. *See id.* at 35.

154. *See id.*

155. *See id.*

156. *See Slawsky v. True Form Founds. Corp.*, No. 91-1882, 1991 WL 98906, at \*1 (E.D. Pa. June 4, 1991).

157. *See, e.g., McWilliams v. Logicon, Inc.*, 143 F.3d 573, 575 (10th Cir. 1998); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 747-48 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 596-602 (6th Cir. 1995). *But see Craft v. Campbell Soup Co.*, 161 F.3d 1199, 1206 (9th Cir. 1998) (interpreting clause as excluding all labor and employment contracts), *amended and superseded on denial of reh’g by* 177 F.3d 1083 (9th Cir. 1999). One commentator, after exhaustively canvassing the statute’s legislative history, agreed with the *Gilmer* dissent that the exclusion was intended broadly to preclude application of the FAA to any employment relationship. *See* Matthew W. Finkin, *Employment Contracts Under the FAA--Reconsidered*, 48 LAB. L.J. 329, 329-35 (1997); Matthew W. Finkin, “Workers’ Contracts” *Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282, 290 (1996). *But see* Estreicher, *supra* note 74, at 1344, 1363-72 (predicting that the Supreme Court will interpret the exclusion narrowly).

courts have compelled arbitration of claims arising under Title VII,<sup>158</sup> other federal anti-discrimination statutes,<sup>159</sup> state anti-discrimination law,<sup>160</sup> and state common law.<sup>161</sup> It therefore appears that, at least until the Supreme Court revisits these issues, compulsory arbitration is firmly entrenched in the employment landscape.<sup>162</sup>

#### IV. THE EEOC POLICY STATEMENT

On July 10, 1997, the EEOC issued a Policy Statement declaring its opposition to compulsory employment arbitration agreements.<sup>163</sup> This Policy Statement, and the effect it is likely to have on judicial decisions concerning the enforcement of employment arbitration agreements, is discussed in Part IV.A. below.<sup>164</sup> It is an open issue, however, whether and to what extent courts will defer to the Policy Statement. Part IV.B. examines the general *Chevron* principles under which courts defer to the policy promulgations of administrative agencies.<sup>165</sup> Part IV.C. applies these general principles of deference to the EEOC's Policy Statement.<sup>166</sup> Historically, the Supreme Court has used a different set of principles to determine

158. See, e.g., *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 362 (7th Cir. 1999), *cert. denied*, No. 98-1778, 1999 WL 296951, at \*1 (U.S. Oct. 4, 1999); *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 182-83 (3d Cir. 1998), *cert. denied*, 119 S. Ct. 1028 (1999); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700-01 (11th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 307 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 229-30 (5th Cir. 1991). *But see* *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1188 (9th Cir.), *cert. denied*, 119 S. Ct. 445 (1998) (noting that the language and legislative history of Title VII and the Civil Rights Act of 1991 evince congressional intent that claims brought under that statute not be subject to compelled arbitration).

159. See, e.g., *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881-82 (4th Cir. 1996) (Americans with Disabilities Act); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 318-20 (9th Cir. 1996) (Fair Labor Standards Act); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1112 (3d Cir. 1993) (Employee Retirement Income Security Act); *Saari v. Smith Barney, Harris Upham & Co.*, 968 F.2d 877, 881-82 (9th Cir. 1992), (Employee Polygraph Protection Act); *Reese v. Commercial Credit Corp.*, 955 F. Supp. 567, 570 (D.S.C. 1997) (Family Medical Leave Act); *Topf v. Warnaco, Inc.*, 942 F. Supp. 762, 764 (D. Conn. 1996) (Rehabilitation Act of 1973); *Kinnebrew v. Gulf Ins. Co.*, CA No. 3:94-CV-1517-R, 1994 WL 803508, at \*1 (N.D. Tex. Nov. 28, 1994) (Equal Pay Act); *William v. Katten, Muchin & Zavis*, 837 F. Supp. 1430, 1437 (N.D. Ill. 1993) (42 U.S.C. § 1981).

160. See, e.g., *Willis*, 948 F.2d at 308 (applying FAA to cause of action brought under Kentucky statute prohibiting gender discrimination).

161. See, e.g., *Bender*, 971 F.2d at 699 (compelling arbitration of common law claims of battery, intentional infliction of emotional distress, and negligent retention).

162. See BALES, *supra* note 4, at 169.

163. See EEOC Policy Statement, *supra* note 10.

164. See *infra* notes 169-218 and accompanying text.

165. See *infra* notes 219-235 and accompanying text.

166. See *infra* notes 236-266 and accompanying text.

the degree to which it defers to the EEOC. Part IV.D. reviews these principles,<sup>167</sup> and Part IV.E. applies them to the EEOC Policy Statement.<sup>168</sup>

### A. Description

The EEOC does not oppose employment arbitration wholesale. The Policy Statement affirms the Commission's "strong support of voluntary alternative dispute resolution programs that resolve employment discrimination disputes in a fair and credible manner, and are entered into after a dispute has arisen."<sup>169</sup> The EEOC does not, however, support predispute agreements imposed by the employer as a condition of employment.<sup>170</sup>

The EEOC Policy Statement provides eight reasons for which the Commission opposes compulsory employment arbitration agreements.<sup>171</sup> Some of these reasons have been explicitly rejected by the Supreme Court in the *Mitsubishi* and *Gilmer* decisions. Some have been resolved or at least addressed in lower court decisions. Others present good policy arguments for opposing arbitration. The following is a discussion of the EEOC's eight reasons, following the order in which they are raised in the Policy Statement.

First, the EEOC argues that arbitration agreements inhibit the ability of courts to create precedent.<sup>172</sup> This may be true, but as the Supreme Court pointed out in *Gilmer*, not all employers and employees are likely to sign arbitration agreements.<sup>173</sup> Moreover, settlement agreements, like arbitration agreements, tend to reduce judicial opinion writing, but are not any less encouraged.<sup>174</sup> Indeed, as discussed in Part II, one of the primary reasons Congress created the EEOC was to induce settlement.<sup>175</sup>

Second, the EEOC argues that because arbitral decisions are not regularly reported or otherwise made publicly available, the decisions lack the deterrent effect of a highly-publicized damage award.<sup>176</sup> "Publicity from employment cases

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167. See *infra* notes 267-293 and accompanying text.

168. See *infra* notes 294-300 and accompanying text.

169. See *EEOC Policy Statement*, *supra* note 10.

170. See *id.*

171. See generally Beth M. Primm, Comment, *A Critical Look at the EEOC's Policy Against Mandatory Pre-Dispute Arbitration Agreements*, 2 U. PA. J. LAB. & EMPL. L. 151, 163-68 (1999) (arguing that the justifications provided by the EEOC against the enforcement of mandatory arbitration agreements are unsubstantiated and questionable).

172. See *EEOC Policy Statement*, *supra* note 10; see also Moohr, *supra* note 6, at 432-37 (arguing that arbitrators may stifle the development of the law because they lack legal training and expertise, and are not accountable to Congress or the public for their decisions).

173. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991). Of course, the incidence of arbitration will rise as arbitration agreements become more widely enforced.

174. See *id.*

175. See *supra* notes 45-47 and accompanying text.

176. See *EEOC Policy Statement*, *supra* note 10; see also Mundheim, *supra* note 142, at 203 (discussing arbitration in the securities industry).

. . . discourages publicity-conscious employers from engaging in unlawful behavior.”<sup>177</sup> Publicity also “educates both employers and employees about what is, and what is not, legal behavior in the workplace.”<sup>178</sup> “Every case reported in the popular media reminds employees that they have certain rights that society considers important, that employers are required to respect, and for which the law provides a remedy . . . .”<sup>179</sup> Again, however, settlement agreements, strongly favored under Title VII, equally provide employers with a method of avoiding publicity regarding their wrongdoing.

Third, the EEOC points out that judicial review of arbitral decisions is extremely limited, making it difficult for courts to correct arbitrator errors in statutory interpretation.<sup>180</sup> This is true; courts applying the FAA have consistently stated that they will not reverse an arbitrator’s award based on the mere fact that the arbitrator incorrectly interpreted or applied the law,<sup>181</sup> but will reverse only if the arbitrator acted in “manifest disregard of the law”<sup>182</sup>—a standard that requires the losing party to show that “the arbitrator ‘understood and correctly stated the law

177. BALES, *supra* note 4, at 168; *see* Moohr, *supra* note 6, at 432-37.

178. BALES, *supra* note 4, at 168.

179. *Id.*

180. *See EEOC Policy Statement, supra* note 10.

181. *See, e.g.,* DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 822 (2d Cir. 1997) (refusing to vacate arbitral award despite arbitrators’ failure to award attorney’s fees as required by statute; “there [was] no persuasive evidence that the arbitrators actually knew of—and intentionally disregarded—the mandatory aspect of the [statute’s fee-shifting] provision.”); *Gingiss Int’l, Inc. v. Bormet*, 58 F.3d 328, 333 (7th Cir. 1995) (holding that appellate review of arbiter’s opinion is not allowed under the FAA); *Ainsworth v. Skurmick*, 960 F.2d 939, 940 (11th Cir. 1992) (discussing the court’s ability to vacate an arbitration award); *Robbins v. Day*, 954 F.2d 679, 683 (11th Cir. 1992) (considering whether “manifest disregard of the law” is a proper basis for vacating an arbitration award); *National R.R. Passenger Corp. v. Chesapeake & Ohio Ry. Co.*, 551 F.2d 136, 143 (7th Cir. 1977) (stating that arbitration awards will not be vacated if arbitrators misinterpret the law); *Republic of Korea v. New York Navigation Co., Inc.*, 469 F.2d 377, 380 (2d Cir. 1972) (stating that the case did not provide any grounds for vacation because the arbitrators did not exhibit “manifest disregard of the law”); *Regina M. Lyons, Testamentary Trust v. Shearson Lehman Hutton, Inc.*, 809 F. Supp. 302, 302 (S.D.N.Y. 1993) (denying trust’s motion to vacate arbitration award).

182. The “manifest disregard of the law” standard was first mentioned in dictum by the Supreme Court in *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953). The Court in *Wilko* recognized that courts have limited power to vacate arbitration awards, but stated that:

[w]hile it may be true . . . that a failure of the arbitrators to decide in accordance with [applicable law] would constitute grounds for vacating the award pursuant to Section 10 of the Federal Arbitration Act, that failure would need to be made clearly to appear. . . . [T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.

*Id.* (footnotes omitted) (internal quotation marks omitted).

but proceeded to ignore it.”<sup>183</sup> The Supreme Court answered in *Gilmer* that “although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.”<sup>184</sup> However, many commentators,<sup>185</sup> and at least one court,<sup>186</sup> have argued for an expanded review of cases involving statutory claims.

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183. See *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 892-93 (2d Cir. 1985) (quoting *Bell Aerospace Co. Div. of Textron, Inc. v. Local 516*, 356 F. Supp. 354, 356 (W.D.N.Y. 1973), *rev'd on other grounds*, 500 F.2d 921 (2d Cir. 1974)); see also *Wilko*, 346 U.S. at 436-37 (stating that arbitrators are not subject to judicial review for errors in interpretation); *DiRussa*, 121 F.3d at 821-22 (stating that “manifest disregard” means more than error or misunderstanding); *Prudential Bache Sec., Inc. v. Tanner*, 72 F.3d 234, 239 (1st Cir. 1995) (stating that arbitration awards are reviewable where it is clear that the arbitrator recognized, but then ignored, governing law); *Health Servs. Management Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992) (stating that to vacate an arbitration award for manifest disregard of the law, “it must be demonstrated that the majority of arbitrators deliberately disregarded what they knew to be the law in order to reach the result they did”); *Marshall v. Green Giant Co.*, 942 F.2d 539, 550 (8th Cir. 1991) (stating that although the arbitrator may have erred in applying offensive collateral estoppel, there was no “manifest disregard” of the law); *Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 (1st Cir. 1990) (finding that brokerage house failed to show that arbitrators manifestly disregarded the law when they ordered restoration as part of the remedy for wrongful liquidation of investor’s holdings); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) (stating that “disregard” implies that the arbitrator decided to ignore a clearly governing legal principle); *San Martine Compania de Navegacion v. Saguenay Terminals, Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961) (stating that “manifest disregard of the law must be something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law”). But see *R.M. Perez & Assoc., Inc. v. Welch*, 960 F.2d 534, 539 (5th Cir. 1992) (noting that “this circuit never has employed a ‘manifest disregard of the law’ standard in reviewing arbitration awards”).

184. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991).

185. See, e.g., *Feller*, *supra* note 96, at 982-83; *Moohr*, *supra* note 6, at 447-56; *Stone*, *supra* note 7, at 1026-27; *Jacob*, *supra* note 74, at 1102; *Monica J. Washington, Note, Compulsory Arbitration of Statutory Employment Disputes: Judicial Review Without Judicial Reformation*, 74 N.Y.U. L. REV. 844, 847 (1999). But see *Kenneth R. Davis, When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 123-25 (1997) (arguing that the intent of contracting parties should control).

186. See *Cole v. Burns Int’l Sec. Serv.*, 105 F.3d 1465, 1487 (D.C. Cir. 1997). After noting the pronouncements in *Gilmer* that “‘by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum’” and that “‘although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute[.]’” the circuit court concluded that “[t]hese twin assumptions regarding the arbitration of statutory claims are valid only if judicial review under the ‘manifest disregard of the law’ standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law.” See *id.* (quoting *Gilmer*, 500 U.S. at 26, 32 n.4). Additionally, the court stated that a higher standard of review would not significantly undermine the finality of arbitration because most employment discrimination claims center on factual, rather than legal, disputes. See *id.*; see also *Chisolm v. Kidder, Peabody Asset Management, Inc.*, 966 F. Supp. 218, 222-27 (S.D.N.Y. 1997), *aff’d*, 164 F.3d 617 (2d Cir. 1998) (discussing whether the “manifest disregard” standard should be applied differently for claims asserting statutory rights, but deciding that the factual nature of the dispute made resolution of that issue unnecessary).

Fourth, the EEOC opposes compulsory arbitration because it involves a waiver by employees of their right to trial by jury.<sup>187</sup> As Professor Matthew Finkin points out, arbitration is more than capable of resolving disputed facts, such as determining credibility, and applying those facts to contractual or legal standards,<sup>188</sup> such as the burden-shifting paradigms of employment discrimination claims.<sup>189</sup> However, arbitration is not as well-suited to the adjudication of claims that derive from an employers' violation of external community values,<sup>190</sup> such as claims predicated on invasion of privacy<sup>191</sup> or the creation of a hostile work environment.<sup>192</sup>

Fifth, the EEOC points out that discovery in arbitration is limited compared to discovery that is available in litigation.<sup>193</sup> Restrictions on discovery fall hardest on employees because the employer already possesses most of the relevant information such as personnel files and employee demographic information.<sup>194</sup> Without discovery, proving disparate treatment<sup>195</sup> is difficult because a plaintiff bringing such a case must prove that she was treated differently than other similarly situated non-class members,<sup>196</sup> she therefore must discover evidence of how those non-class

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187. See *EEOC Policy Statement*, *supra* note 10. It may be worth noting, however, that employment discrimination claims were not tried by juries until the Civil Rights Act of 1991.

188. See Finkin, *supra* note 6, at 132-33.

189. See, e.g., *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (discussing the burden-shifting approach to disparate treatment cases).

190. See Finkin, *supra* note 6, at 132-33.

191. See, e.g., *K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632, 636 (Tex. App. 1984) (discussing invasions of workplace privacy).

192. See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22-23 (1993) (discussing the factors which should be used to determine the existence of a hostile work environment).

193. See *EEOC Policy Statement*, *supra* note 10.

194. See Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1670 (1996); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 4 U. ILL. L. REV. 635, 661-62 (1995); Schwartz, *supra* note 75, at 60; Turner, *supra* note 6, at 289; see also Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 283-84 (1995) (emphasizing the importance of discovery to consumers when they are arbitrating claims against a company); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 683-84 (1996) (same).

195. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981) (describing the allocation of the burden of proof in disparate treatment cases).

196. See Christine G. Cooper, *Where Are We Going with Gilmer? Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 218 (1992); see also *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993) (discussing plaintiff's burden of proof); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (specifying the elements the plaintiff must prove to establish a *prima facie* case of racial discrimination).

members were treated.<sup>197</sup> Proving disparate impact<sup>198</sup> is impossible<sup>199</sup> without obtaining from an employer statistical information about how the employment practice in question affects different demographic segments of the employee population.<sup>200</sup>

The *Gilmer* court, after noting the availability under NYSE arbitration rules of document production, information requests, depositions, and subpoenas,<sup>201</sup> replied that this is simply part of the tradeoff for the employee who agrees to arbitrate.<sup>202</sup> Generally, lower courts have responded to unreasonable restrictions on discovery by refusing to enforce the offending arbitration agreement.<sup>203</sup> Nonetheless, most courts seem to agree with the *Gilmer* Court that discovery should be less available in arbitration than litigation.<sup>204</sup> This is a net disadvantage to employees, and a valid reason for concern about compulsory arbitration.

Sixth, the EEOC argues, as have several commentators,<sup>205</sup> that the employer's unique<sup>206</sup> status as a repeat player in arbitration gives employers two distinct advantages. First, the employer is likely to have more and better information about

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197. See Cooper, *supra* note 196, at 218.

198. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (holding that employers are prohibited from requiring a high school education or a standardized general intelligence test as a condition of employment).

199. See Cooper, *supra* note 196, at 218.

200. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-51 (1989) ("It is such a comparison between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs that generally forms the proper basis for the initial inquiry in a disparate-impact case.").

201. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991).

202. See *id.* (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

203. See, e.g., *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 614-15 (D.S.C. 1998), *aff'd*, 173 F.3d 933 (4th Cir. 1999). But see *Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817, 822 (Tex. App. 1996) (holding that an arbitration clause prohibiting discovery was not unconscionable on its face, but remanding for a factual determination of whether the arbitration agreement as a whole was unconscionable).

204. See, e.g., *Williams v. Katten, Muchin, & Zavis*, 837 F. Supp. 1430, 1439 (N.D. Ill. 1993).

205. See, e.g., Alleyne, *supra* note 142, at 426; Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RIGHTS & EMPL. POL'Y J. 189, 192-93 (1997); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 241 (1998); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 U. MO. KAN. CITY L. REV. 449, 476-79 (1996); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1, 43-44 (1996); Dennis O. Lynch, *Conceptualizing Forum Selection as a "Public Good": A Response to Professor Stone*, 73 DENV. U. L. REV. 1071, 1073 (1996); Schwartz, *supra* note 75, at 60-61. On the importance of bilateral repeat player status in the context of labor arbitration, see Bernard D. Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, PROC. OF THE 20TH ANN. MEETING OF THE NAT'L ACAD. OF ARB. 1, 3-4 (1997); Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 929-30 (1979).

206. In traditional labor arbitration between an employer and a union, both parties participate in arbitration with equal frequency. In employment arbitration, however, the employer alone is a repeat player, because the employee is unlikely to participate in arbitration more than once or twice in his or her entire lifetime.



proposed arbitrators, allowing the employer to choose an arbitrator who is favorable to the employer.<sup>207</sup> Second, knowledge that the employer is far more likely than the employee to need an arbitrator for successive cases may, consciously or subconsciously, influence the arbitrator's decision in a case.<sup>208</sup> Though courts have not been persuaded to deny enforcement on these grounds,<sup>209</sup> they present a valid concern.<sup>210</sup>

Seventh, the EEOC Policy Statement expresses concern that employers—the most powerful party to the arbitration agreement—create the terms of the arbitration agreement, and frequently skew those terms in their favor.<sup>211</sup> The case law abounds with examples of employers exercising their superior bargaining power by, for example, limiting an employee's ability to recover punitive or other types of damages,<sup>212</sup> imposing undue restrictions on discovery,<sup>213</sup> creating an arbitrator selection process that encourages arbitrator bias,<sup>214</sup> and drafting one-sided procedural rules.<sup>215</sup> However, courts generally refuse to enforce arbitration agreements that are obviously one-sided.<sup>216</sup>

Eighth, the EEOC argues that compulsory arbitration would undermine the role of the EEOC in enforcing the anti-discrimination laws because employees would not be required to file charges with the EEOC before proceeding to arbitration.<sup>217</sup> The *Gilmer* Court, however, flatly rejected this argument, reasoning that because an arbitration agreement would not preclude an employee from filing an EEOC charge, the agreement would not necessarily shut the EEOC out of the dispute

207. See *EEOC Policy Statement*, *supra* note 10.

208. See *id.*

209. See, e.g., *Saari v. Smith Barney, Harris Upham & Co.*, 968 F.2d 877, 882 (9th Cir. 1992); *Olson v. American Arbitration Ass'n, Inc.*, 876 F. Supp. 850, 852 (N.D. Tex.), *aff'd*, 71 F.3d 877 (5th Cir. 1995).

210. For an exploration of conflicts of interest generated by payment of fees by an interested party in another context, see generally Timothy S. Hall, *Third-Party Payor Conflicts of Interest in Managed Care: A Proposal for Regulation Based on the Model Rules of Professional Conduct*, 29 SETON HALL L. REV. 95 (1998).

211. See *EEOC Policy Statement*, *supra* note 10.

212. See, e.g., *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1057-58 (11th Cir. 1998); *Graham Oil Co. v. Arco Products Co.*, 43 F.3d 1244, 1246 (9th Cir. 1994); see also *Trumbull v. Century Mktg. Corp.*, 12 F. Supp. 2d 683, 686 (N.D. Ohio 1998) ("Because the arbitration procedure proposed by the defendant would limit the remedies available to the plaintiff under Title VII, it is not an acceptable replacement for a judicial forum.").

213. See, e.g., *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 614 (D.S.C. 1998), *aff'd*, 173 F.3d 933 (4th Cir. 1999).

214. See *Hooters*, 173 F.3d at 940.

215. See *id.* at 939.

216. See Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591, 595 (1995).

217. See *EEOC Policy Statement*, *supra* note 10.

resolution process.<sup>218</sup>

Some of the EEOC's policy arguments against compulsory employment arbitration are more persuasive than others. Some of the arguments have already been rejected by the courts; other arguments have persuaded courts to refuse to enforce arbitration agreements in specific cases because the agreements appeared unfair to employees in some way. The remainder of this Part considers whether courts are likely to defer to the EEOC's general pronouncement in its Policy Statement that compulsory employment arbitration agreements should never be enforced.

## B. General Principles of Deference

As many commentators have noted, judicial deference to rules and policy promulgations by administrative agencies comes in all shapes and sizes.<sup>219</sup> At one extreme, the reviewing court treats an agency's opinion with only as much deference as it would the opinion of an expert or litigant.<sup>220</sup> At the other extreme, the reviewing court adopts and applies a reasonable agency opinion with which the court disagrees.<sup>221</sup>

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>222</sup> the Supreme Court announced a two-part test for determining the validity of an administrative agency's statutory construction:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly

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218. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (stating that the inability to file a private judicial action would not prevent an employee from filing a charge with the EEOC). The Court further stated that the EEOC's role in fighting discrimination was not dependent on individual employees filing a charge. See *id.* First, the EEOC can investigate claims even when a charge is not filed. See *id.* The Court also asserted that "nothing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes." See *id.* Finally, the Court, citing the Securities Exchange Commission's involvement in enforcing securities statutes, stated that the mere involvement of an administrative agency in the enforcement of a statute does not preclude compulsory arbitration. See *id.*

219. See *Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 445 (7th Cir. 1994) (Easterbrook, J., concurring), *aff'd sub nom*, *Brotherhood of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe Ry. Co.*, 516 U.S. 152 (1996); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 379-80 (1986); Clark Byse, *Scope of Judicial Review in Informal Rulemaking*, 33 ADMIN. L. REV. 183, 191 (1981); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 565-67 (1985).

220. See Ronald M. Levin, *Judicial Review and the Uncertain Appeal of Certainty on Appeal*, 44 DUKE L.J. 1081, 1084 (1995).

221. See, e.g., *Regents of Univ. of Cal. v. Public Employees' Relations Bd.*, 485 U.S. 589, 603-04 (1988) (White, J., concurring); *Lukhard v. Reed*, 481 U.S. 368, 383 (1987) (Blackmun, J., concurring); *Pattern Makers League v. NLRB*, 473 U.S. 95, 117 (1985) (White, J., concurring).

222. 467 U.S. 837 (1984).

addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>223</sup>

From the outset, *Chevron* was heralded by lower courts<sup>224</sup> and legal commentators<sup>225</sup> as a bold move in favor of greater judicial deference toward administrative agencies.<sup>226</sup> Recently, however, two problems have arisen with this vision. The first is that, empirically, the Court has given no more deference to agency interpretations after *Chevron* than the Court had given before *Chevron*.<sup>227</sup> The second is that each of the two steps has proven highly malleable,<sup>228</sup> able to justify different outcomes in the same case.<sup>229</sup> For example, Justice Stevens would have courts play an active role in determining congressional intent under *Chevron* step one,<sup>230</sup> and would consider legislative history<sup>231</sup> and traditional tools of statutory construction;<sup>232</sup> whereas Justice Scalia would limit courts to examining the statutory text.<sup>233</sup> For these reasons, several commentators have concluded that although *Chevron* provides a consistent framework for judicial review of agency

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223. *Id.* at 842-43 (footnotes omitted).

224. *See, e.g.*, Population Inst. v. McPherson, 797 F.2d 1062, 1069-70 (D.C. Cir. 1986).

225. *See, e.g.*, Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986).

226. *See* Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1256 (1997).

227. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 983 (1992); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 358-60 (1994); *see also* Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1070-71 (noting the failure of the lower courts to give greater deference to administrative decision-making in the post-*Chevron* era).

228. *See* Mark Burge, Note, *Regulatory Reform and the Chevron Doctrine: Can Congress Force Better Decisionmaking By Courts and Agencies?*, 75 TEX. L. REV. 1085, 1097-1103 (1997); Levin, *supra* note 226, at 1262.

229. *See* Burge, *supra* note 228, at 1097-1103 (discussing *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 667 (1995)).

230. *See* Burge, *supra* note 228, at 1097.

231. *See* Bank One Chicago v. Midwest Bank & Trust Co., 516 U.S. 264, 276 (1996) (Stevens, J., concurring).

232. *See* Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987).

233. *See* Bank One Chicago, 516 U.S. at 279 (Scalia, J., concurring).

actions,<sup>234</sup> it is not a particularly good predictor of whether courts are likely to defer to an agency in a given case.<sup>235</sup>

### C. *Chevron Deference and the EEOC Policy Statement*

Step one of the *Chevron* analysis asks whether Congress has already spoken to the question at issue. The question here, then, is whether the federal anti-discrimination statutes are ambiguous regarding the enforceability of compulsory employment arbitration agreements.

In *Gilmer*, the plaintiff argued that compulsory arbitration was inconsistent with the statutory framework and the purposes of the ADEA.<sup>236</sup> The Court flatly rejected the argument.<sup>237</sup> Quoting *Mitsubishi*, the Court first responded that “if 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.”<sup>238</sup> The Court then cited two ADEA provisions which, the Court concluded, suggested that arbitration was consistent with the statutory framework: the statutory direction to the EEOC to pursue “informal methods of conciliation, conference, and persuasion,”<sup>239</sup> and the statutory grant of concurrent jurisdiction over ADEA claims to state and federal courts.<sup>240</sup> Regarding the latter, the Court quoted a case from the *Mitsubishi* Trilogy for the proposition that arbitration agreements, “like the provision for concurrent jurisdiction, serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise.”<sup>241</sup> Consistent with the Supreme Court’s reasoning in *Gilmer*, all circuit courts that have considered the issue, except the Ninth Circuit, have concluded that compulsory arbitration is not inconsistent with the other federal anti-discrimination statutes.<sup>242</sup>

It is true, of course, that nothing in the ADEA explicitly forbids compulsory arbitration. This is hardly surprising, because the ADEA was enacted in 1967, at a time when *Wilko* rendered arbitration agreements unenforceable as to statutory claims, and the Court’s enthusiasm for arbitration was confined to collective bargaining agreements. The Court’s citations to ADEA provisions are not any more persuasive. A preference for post-dispute settlement in no way indicates

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234. See, e.g., Levin, *supra* note 226, at 1259; Burge, *supra* note 228, at 1103.

235. See, e.g., Burge, *supra* note 228, at 1089; Note, *A Pragmatic Approach to Chevron*, 112 HARV. L. REV. 1723, 1723-24 (1999).

236. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991).

237. See *id.*

238. See *id.* at 29.

239. See 29 U.S.C. § 626(b).

240. See *id.* § 626(c)(1).

241. See *Gilmer*, 500 U.S. at 29 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989)).

242. See *supra* notes 156-62 and accompanying text.

acquiescence for a pre-dispute arbitration agreement,<sup>243</sup> particularly when other statutory provisions explicitly provide for jury trials.<sup>244</sup> Similarly, a congressional preference that an ADEA litigant have access to multiple judicial fora does not indicate congressional acquiescence to an arbitral forum.<sup>245</sup>

Of course, the question the *Gilmer* Court addressed—whether compulsory arbitration is inconsistent with the anti-discrimination statutes—is different from the *Chevron* question of whether the statutes are ambiguous regarding compulsory arbitration. A statute that is silent on an issue may at the same time be both ambiguous and not inconsistent with that issue. Therefore, even accepting the Court's conclusion that compulsory arbitration is not inconsistent with the ADEA, it does not necessarily follow that there is no ambiguity.

Several commentators have recently argued that Congress settled the issue by enacting the Civil Rights Act of 1991<sup>246</sup> ("Civil Rights Act"). Section 118 of the Civil Rights Act amended the major federal anti-discrimination statutes, including Title VII, the ADEA, and the ADA.<sup>247</sup> It provides that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, mini-trials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this Title."<sup>248</sup> One might argue that this provision, by endorsing alternative dispute resolution generally and arbitration in particular, also endorses arbitration that is the product of a pre-dispute arbitration agreement.<sup>249</sup> On the other hand, the forms of alternative dispute resolution listed in the statute are traditionally agreed to only after a dispute has arisen, and one might infer from this that Congress did not intend to endorse pre-dispute arbitration agreements.

243. See Cooper, *supra* note 198, at 222.

244. See 29 U.S.C. § 626(c)(2).

245. See Karen Halverson, *Arbitration and the Civil Rights Act of 1991*, 67 U. CIN. L. REV. 445, 472 (1999); G. Richard Shell, *ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 568-69 (1990).

246. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 42 U.S.C.).

247. See Halverson, *supra* note 245, at 446 n.13.

248. Pub. L. No. 102-166, 105 Stat. 1071, 1081.

249. See John A. Gray, *Have the Foxes Become the Guardians of the Chickens? The Post-Gilmer Status of Predispute Mandatory Arbitration as a Condition of Employment*, 37 VILL. L. REV. 113, 131 n.64 (1992); see also DeGaetano v. Smith Barney, Inc., 70 Fair Empl. Prac. Cas. (BNA) 401, 405 (S.D.N.Y. 1996) (finding no evidence in Title VII's legislative history or the Civil Rights Act of 1991 that Congress intended to preclude the arbitrability of claims under Title VII); Todd H. Thomas, *Using Arbitration to Avoid Litigation*, 44 LAB. L.J. 3, 14 (1993) (arguing that the Civil Rights Act of 1991 provides "another source of authority" for compelling arbitration of statutory claims); White, *supra* note 19, at 71 ("The Civil Rights Act of 1991 and the *Gilmer* decision portend the widespread future use of arbitration to resolve employment discrimination claims.").

The legislative history of the Civil Rights Act cuts both ways. Interpretive memoranda placed in the record by Senator Robert Dole and Representative Henry Hyde state in identical language their support for compulsory arbitration:

This provision encourages the use of alternative means of dispute resolution, including *binding* arbitration, where the parties knowingly and voluntarily elect to use these methods. In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums.<sup>250</sup>

Both memoranda cite *Gilmer* with approval. Another point that at least marginally supports the proposition that Congress intended to endorse compulsory arbitration is the failure of post-*Gilmer* attempts to legislatively overrule *Gilmer* or to limit *Gilmer* to ADEA cases.<sup>251</sup>

However, other sections of the legislative history indicate that Congress may not have intended to permit compulsory arbitration. Using identical language, the House Committee on Education and Labor and the House Committee on the Judiciary, describing the purpose of section 118 of the Civil Rights Act, stated that:

The Committee emphasizes, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The Committee does not intend for the inclusion of this section to be used to preclude rights and remedies that would otherwise be available.<sup>252</sup>

Moreover, the Republican version of the Civil Rights Act, proposed by President Bush and introduced as an amendment in the nature of a substitute,<sup>253</sup> would have encouraged the use of arbitration “in place of judicial resolution.”<sup>254</sup> Noting that this proposal would allow employers to “refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints,” the House Committee on Education and Labor rejected it, stating:

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250. 137 CONG. REC. H9505-01, at H9548 (daily ed. Nov. 7, 1991).

251. For a discussion of post-*Gilmer* legislative attempts to restrain compulsory employment arbitration, see generally Bryan K. Van Engen, Note, *Post Gilmer Development in Mandatory Arbitration: The Expansion of Mandatory Arbitration for Statutory Claims and the Congressional Effort to Reverse the Trend*, 21 J. CORP. L. 391 (1996).

252. H.R. REP. NO. 102-40, at 97 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 635.

253. See H.R. REP. NO. 102-40(I), at 97-98 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 635-36.

254. See *id.* at 104, reprinted in 1991 U.S.C.C.A.N. 549, 642.

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.<sup>255</sup>

The conflicting legislative history, together with the failure of the statutory text to address pre-dispute arbitration specifically, creates ambiguity<sup>256</sup> sufficient to satisfy the first step of the *Chevron* test.

The second step of the *Chevron* test requires the court to determine whether the agency's interpretation is "based on a permissible construction of the statute."<sup>257</sup> Nothing in the anti-discrimination statutes explicitly endorse compulsory arbitration; the only provision that even comes close is section 118 of the 1991 Civil Rights Act which, as discussed above, is far from conclusive.<sup>258</sup> The legislative history discussed above is similarly inconclusive.<sup>259</sup> It therefore appears that step two of the *Chevron* test is satisfied.

Because both steps of the *Chevron* test are satisfied, it appears the EEOC position that compulsory arbitration is inconsistent with the anti-discrimination statutes is entitled to judicial deference.<sup>260</sup> The anti-discrimination statutes, however, are not the only statutes relevant to a judicial determination of arbitrability. The statutory basis for the Supreme Court's *Gilmer* decision was the FAA, a statute over which the EEOC has no interpretive authority.<sup>261</sup> Therefore, the EEOC cannot assert a narrow interpretation of the *Mitsubishi* presumption of arbitrability, or that the FAA should be applied only to commercial agreements, or that the "contracts of employment" exclusion should be interpreted broadly to exclude all employment contracts.<sup>262</sup> Moreover, should the Court decide that the proper approach is to balance the Title VII provisions giving employment discrimination plaintiffs the right to a jury trial<sup>263</sup> against the FAA policy favoring arbitration,<sup>264</sup> as at least one commentator has suggested,<sup>265</sup> then the EEOC can only

255. See *id.* (citations omitted).

256. See BALES, *supra* note 4, at 53; Halverson, *supra* note 245, at 448.

257. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

258. See *supra* notes 246-49 and accompanying text.

259. See *supra* notes 250-56 and accompanying text.

260. See *Chevron*, 467 U.S. at 843-44.

261. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); BALES, *supra* note 4, at 87-88.

262. See BALES, *supra* note 4, at 88.

263. See *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir.), *cert. denied sub nom. Tractor Supply Co. v. Pryner*, 118 S. Ct. 294 (1997).

264. See *supra* notes 76-81 and accompanying text.

265. See, e.g., Halverson, *supra* note 245, at 448.

speak to one side of this equation. Therefore, courts are unlikely to give unqualified deference to the EEOC Policy Statement on arbitration based on *Chevron* deference alone.<sup>266</sup>

#### *D. Principles of Judicial Deference to the EEOC*

Historically, the Supreme Court has given varying degrees of deference to the EEOC.<sup>267</sup> In *Griggs v. Duke Power Co.*,<sup>268</sup> the Court gave “great deference” to the EEOC’s guidelines permitting only “job-related tests” to serve as employment prerequisites.<sup>269</sup> As a result, the Court invalidated an employer’s practice of requiring intelligence tests and a high school diploma, which bore no relationship to the job, but resulted in fewer blacks being hired or promoted.<sup>270</sup>

In *Albemarle Paper Co. v. Moody*,<sup>271</sup> the Court adhered to this great deference policy when it used criteria contained in EEOC guidelines to determine that a particular set of employment tests were not job related.<sup>272</sup> The Court noted, however, that the EEOC guidelines at issue were not “administrative ‘regulations’ promulgated pursuant to formal procedures established by the Congress.”<sup>273</sup> By this, the Court meant that the EEOC had not given notice of the proposed guidelines and an opportunity for the public to comment on them before the guidelines took effect, as is required of notice and comment rules issued by agencies under section 553 of the Administrative Procedure Act.<sup>274</sup> Justice Burger, concurring and dissenting in *Albemarle*, stated that for this reason the EEOC guidelines deserved less deference from the courts than the more formal regulations promulgated by other agencies.<sup>275</sup>

In *General Electric Co. v. Gilbert*,<sup>276</sup> the Court put a brake on its great deference policy. In *Gilbert*, the issue was whether Title VII’s prohibition of sex discrimination also prohibited pregnancy discrimination.<sup>277</sup> The EEOC had issued interpretive guidelines indicating that Title VII prohibited pregnancy discrimination.<sup>278</sup> The Court not only disagreed, but also belittled the guidelines.<sup>279</sup> According to the Court, since Congress in Title VII had given the EEOC the authority to issue procedural but not substantive rules, its substantive guidelines

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266. See Longtin, *supra* note 74, at 291.

267. See Halverson, *supra* note 245, at 472.

268. 401 U.S. 424 (1971).

269. See *id.* at 433-34.

270. See *id.* at 436.

271. 422 U.S. 405 (1975).

272. See *id.* at 431.

273. See *id.*

274. See 5 U.S.C. § 553 (1994).

275. See *Albemarle*, 422 U.S. at 452 (Burger, C.J., concurring in part and dissenting in part).

276. 429 U.S. 125 (1976).

277. See *id.* at 127-28.

278. See *id.* at 140-41 (quoting 29 C.F.R. § 1604.10(b) (1975)).

279. See *id.* at 142.



were merely interpretive rules entitled to "less weight" from the reviewing court.<sup>280</sup> Justice Brennan, dissenting, cited *Griggs* and *Albemarle* in support of the proposition that EEOC guidelines were entitled to great deference, and accused the majority of abandoning this precedent.<sup>281</sup>

*Gilbert* seemed to stand for the proposition that the Court would be more willing to defer to the EEOC's procedural rules than to the agency's substantive rules. Consistent with this approach, the Court deferred to the EEOC in *EEOC v. Commercial Office Products Co.*<sup>282</sup> In that case, the procedural issue was whether a state equal employment opportunity agency's waiver of its exclusive sixty day period for processing discrimination charges terminated the state agency's proceedings.<sup>283</sup> The EEOC assumed, in various "worksharing" agreements with such state agencies, that the state agency's waiver of the sixty day period terminated that agency's proceedings, permitting the EEOC immediately to deem the charge filed with the EEOC and to begin processing it.<sup>284</sup> The Supreme Court, deferring to the EEOC's interpretation, agreed.<sup>285</sup> *Commercial Office* seemed unremarkable, both because it was consistent with the apparent policy of *Gilbert* to give greater deference to the EEOC's procedural as opposed to substantive rules, and because it was consistent with the apparent policy behind the then-recent *Chevron* decision to give greater deference to agency decisions generally.

Three years after *Commercial Office*, in *EEOC v. Arabian American Oil Co.*<sup>286</sup> ("Aramco"), the Court refused to defer to the EEOC's policy applying Title VII extraterritorially.<sup>287</sup> As in *Gilbert*, the Court gave only persuasive weight to the EEOC's statutory interpretation of this substantive issue.<sup>288</sup> Unlike the EEOC's interpretation before the Court in *Gilbert*, however, the interpretation at issue in *Aramco* did not derive from an "interpretive guideline."<sup>289</sup> Instead, the interpretation was expressed in a series of less formal documents, including a policy statement, a decision by the EEOC, a letter from the EEOC's General Counsel, and testimony by the EEOC's Chair.<sup>290</sup>

Summing up the above-described cases, it appears as though the post-*Griggs* Court is guided by two basic principles. The first is that the Court will give the

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280. See *id.* at 141 n.20.

281. See *id.* at 156-57 (Brennan, J., dissenting).

282. See 486 U.S. 107, 112, 121-22 (1988).

283. See *id.* at 109-10.

284. See *id.* at 112.

285. See *id.* at 115-16 & 125-26 (O'Connor, J., concurring).

286. 499 U.S. 244 (1991).

287. See *id.* at 258.

288. See *id.*

289. See *id.* at 256-57.

290. See *id.*

EEOC substantially greater deference on procedural matters than on substantive ones, at least with regard to rules issued under Title VII. This is consistent with Congress' decision to give the EEOC only procedural rulemaking authority under Title VII.<sup>291</sup> The second, and concededly less-developed principle, is that the Court apparently will give more deference to the EEOC's notice and comment rules than it will to less formal types of policy pronouncements such as policy statements. This is consistent with the Court's treatment of the policy pronouncements of other agencies.<sup>292</sup> Lower courts, however, do not appear to apply these principles regularly, and their decisions concerning the degree of deference due to the EEOC are inconsistent.<sup>293</sup>

### *E. EEOC Deference and the EEOC Policy Statement*

The first principle—the substantive-procedural distinction—would augur a strong judicial deference to the EEOC's Policy Statement on compulsory employment arbitration. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>294</sup> the title case of the *Mitsubishi* Trilogy, and again in *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>295</sup> the Supreme Court stated that compulsory arbitration agreements do not affect a party's statutory rights.<sup>296</sup> Instead, such agreements, according to the Court,<sup>297</sup> merely change the procedures and the forum in which those statutory rights are decided.<sup>298</sup> Because the Court considers arbitration to be a procedural issue rather than a substantive one, and because the Court gives greater deference to the EEOC on procedural issues than substantive ones, the first

291. See *supra* notes 18-38 and accompanying text.

292. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (refusing to grant deference to an agency interpretation expressed as a "litigating position" in an agency's brief); Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 YALE J. ON REG. 1, 6-7 (1990). But see *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990) (upholding interpretation announcement in advisory opinion); *Mead Corp. v. Tilley*, 490 U.S. 714, 725 (1989) (same); *Young v. Community Nutrition Inst.*, 476 U.S. 974, 975-76 (1986) (upholding interpretation announcement in informal adjudication).

293. See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993) (stating that courts may consider but are not bound by EEOC guidelines); *Rowe v. Sullivan*, 967 F.2d 186, 192-94 (5th Cir. 1992) (giving deference to EEOC's opinions); *Vogel v. Cincinnati*, 959 F.2d 594, 598 (6th Cir. 1992) (giving deference to EEOC interpretation of Civil Rights Act of 1991); *Colgan v. Fisher Scientific Co.*, 935 F.2d 1407, 1421 n.11 (3d Cir. 1991) (stating that courts need not defer to the EEOC); *Russell v. Microdyne Corp.*, 830 F. Supp. 305, 308 (E.D. Va. 1993) (giving EEOC guidelines limited deference), *rev'd on other grounds*, 65 F.3d 1229 (4th Cir. 1995).

294. 473 U.S. 614 (1985).

295. 500 U.S. 20 (1991).

296. See *Gilmer*, 500 U.S. at 26; *Mitsubishi*, 473 U.S. at 628.

297. For a contrary view, see *Ware*, *supra* note 74, at 725-27 (arguing that because of the lax standard by which courts review arbitration awards, arbitration agreements *de facto* privatize the substantive law); Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, 541-42 (1994) (same).

298. See *Mitsubishi*, 473 U.S. at 628.

principle indicates judicial deference.

The second principle—the distinction between notice and comment rules and other less formal types of policy pronouncements—augurs less deference.<sup>299</sup> The EEOC's Policy Statement on employment arbitration is similar in form to the EEOC's policy statement on extraterritorial application of Title VII at issue in *Aramco*. Because it is not a notice and comment rule, the Court is likely to give it less deference.

The principles behind the Supreme Court's historical grant of deference to the EEOC's statutory interpretations, therefore, sends mixed signals. It seems to indicate that the EEOC's Policy Statement opposing compulsory arbitration is entitled to some, though not a great deal of, deference. Moreover, as discussed above, the EEOC lacks statutory authority to interpret the FAA,<sup>300</sup> so it cannot so much as venture an opinion on the interplay between the anti-discrimination statutes and the FAA policy favoring arbitration. For these reasons, the EEOC's Policy Statement is unlikely to be a strong factor in the ultimate determination of the enforceability of compulsory employment arbitration agreements.

## V. FLEXING THE EEOC'S PROSECUTORIAL POWERS

The issuance of the Policy Statement is merely one mechanism by which the EEOC has opposed compulsory employment arbitration. Another way that the EEOC has done so is by using its prosecutorial powers, which it has done in two ways. The first is by directly challenging compulsory employment arbitration agreements in court, either by filing suit against employers on behalf of employees who have signed these agreements, or by filing amicus briefs on behalf of employees who have sued their employer on their own.<sup>301</sup> The second is by litigating, in the EEOC's name, the underlying discrimination claims which employees contractually have agreed to arbitrate.<sup>302</sup>

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299. For a thorough discussion of the degree of deference courts give to less formal agency pronouncements, see Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1323-28 (1992).

300. See *supra* notes 261-66 and accompanying text.

301. See *infra* notes 303-23 and accompanying text.

302. See *infra* notes 324-438 and accompanying text.

## A. Frontal Assaults on Arbitration Agreements

One way that the EEOC has used its prosecutorial powers to oppose compulsory employment arbitration is by suing employers with the specific goal of voiding the arbitration agreements which the employees have signed. For example, in *EEOC v. River Oaks Imaging & Diagnostic* ("ROID"),<sup>303</sup> the EEOC sued an outpatient medical testing facility which had implemented a compulsory employment arbitration policy. ROID's policy required employees to pay half the cost of arbitration up front.<sup>304</sup> It provided that employees could inform ROID of their claims and initiate arbitration any time within one year of the occurrence of the alleged wrongs; this provision, according to the court, had the potential to lull employees into inaction and mislead them with respect to the EEOC's 300-day filing deadline.<sup>305</sup> Although the policy's signature page stated that it was a "Voluntary Agreement," a separate "Acknowledgment" page provided:

I acknowledge that I have been provided with a copy of ROID's policy on Mandatory Arbitration. I understand that my continued employment with ROID shall be deemed as evidence of my consent to abide by this policy. I further understand that my refusal to sign this agreement shall be deemed a voluntary termination initiated by the employee.<sup>306</sup>

ROID implemented its compulsory arbitration policy after two employees had filed discrimination charges with the EEOC.<sup>307</sup> These employees were fired on the spot when they refused to sign the arbitration agreement until after they had consulted lawyers, despite the fact that a cover letter accompanying the agreement recommended that employees consult a lawyer before signing the agreement.<sup>308</sup>

After a hearing, the court concluded that ROID's arbitration policy was "misleading and against the principles of Title VII" and "might constitute retaliation against [the two] employees for making complaints to the EEOC."<sup>309</sup>

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303. 63 U.S.L.W. 2733 (S.D. Tex. 1995).

304. *See id.* For another case disapproving of requirements that employees contribute to the cost of arbitration, see *Cole v. Burns Int'l Sec. Serv.*, 105 F.3d 1465, 1483-86 (D.C. Cir. 1997).

305. *See River Oaks Imaging*, 63 U.S.L.W. at 2733.

306. *See id.*

307. *See Federal Judge Issues Injunction Against Employment Arbitration Policy*, 6 WORLD ARB. & MEDIATION REP. 95, 95 (1995) ("Judge Norman Black found that the arbitration policy appeared to be part of an effort by the employer to penalize or dismiss workers who had filed discrimination and harassment complaints."); *Boss Can't Force Staff to Sign an ADR Clause, Court Finds, Adopting the EEOC's Argument*, 13 ALTERNATIVES TO HIGH COST LITIG. 76, 76 (1995) (noting that the EEOC argued that "the company imposed the policy to get even with employees who complained of sexual harassment and other discriminatory conduct").

308. *See River Oaks Imaging*, 63 U.S.L.W. at 2733.

309. *See id.*

The Court, therefore, granted the EEOC's motion to enjoin ROID's operation of the policy.<sup>310</sup>

The *ROID* case represents a very effective use by the EEOC of its prosecutorial powers. Unfortunately, as discussed in Part II of this article, the EEOC does not have the financial resources to litigate many cases.<sup>311</sup> For this reason, the EEOC has had to look for a less expensive way to persuade courts to void compulsory employment arbitration agreements.

Instead of suing employers in its own name, the EEOC often files amicus briefs in support of employees who have filed suit on their own. In recent years, the EEOC has filed dozens of amicus briefs on behalf of employees who wish to void a compulsory arbitration agreement that they have signed.<sup>312</sup> The typical case parallels the following chronology: employee signs an arbitration agreement; a dispute occurs, giving rise to an employment discrimination claim; employee files a charge of discrimination with the EEOC, receives a right-to-sue letter, and later files suit in federal court; employer moves to stay or dismiss the suit pending arbitration; employee and the EEOC as amicus curiae ask the court to declare the arbitration agreement unenforceable.

For example, in *Seus v. John Nuveen & Co., Inc.*,<sup>313</sup> an employee sued her employer for, among other things, sex discrimination and sexual harassment under Title VII.<sup>314</sup> After filing an EEOC charge, she sued her employer in federal court.<sup>315</sup> The employer, citing the FAA and a pre-dispute arbitration agreement that plaintiff had signed, filed a motion to dismiss or stay and compel arbitration.<sup>316</sup> Both the plaintiff, and the EEOC as amicus, opposed the motion, arguing that the court should not enforce the arbitration agreement because the arbitration clause at issue was not sufficiently specific to put the plaintiff on notice that it would apply to employment disputes.<sup>317</sup> The district court disagreed, and granted the

310. *See id.*

311. *See supra* note 71 and accompanying text.

312. *See, e.g.*, *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999); *Shankle v. B-G Maintenance Mgmt. of Colo., Inc.*, 163 F.3d 1230 (10th Cir. 1999); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998); *Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373 (4th Cir. 1998); *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175 (3d Cir. 1998); *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998); *Miller v. Public Storage Mgmt., Inc.*, 121 F.3d 215 (5th Cir. 1997); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126 (7th Cir. 1997); *Cosgrove v. Shearson Lehman Bros.*, No. 95-3432, 1997 WL 4783, at \*1 (6th Cir. 1997); *Johnson v. Hubbard Broadcasting, Inc.*, 940 F. Supp. 1447 (D. Minn. 1996).

313. 77 Fair Empl. Prac. Cas. (BNA) 761 (E.D. Pa. 1997), *aff'd*, 146 F.3d 175 (3d Cir. 1998).

314. *See id.*

315. *See id.* at 763.

316. *See id.* at 764.

317. *See id.* at 765.

employer's motion.<sup>318</sup> On appeal, the plaintiff and, again, the EEOC as amicus, argued that Title VII should be interpreted as prohibiting compulsory employment arbitration agreements.<sup>319</sup> The Third Circuit disagreed and affirmed the district court's ruling.<sup>320</sup>

Occasionally, the EEOC's amicus briefs appear to have some effect on a court's decision. In *Duffield v. Robertson Stephens & Co.*,<sup>321</sup> the EEOC's argument that compulsory arbitration is inconsistent with Title VII was adopted by the Ninth Circuit<sup>322</sup>—the only circuit that has taken this position to date.<sup>323</sup> Indeed, EEOC successes with its amicus briefs have been few and far between. Courts seldom cite to the briefs, except to note that the EEOC has filed them, and courts more often than not enforce the arbitration agreements over the EEOC's objection. It does not appear, therefore, that the filing of amicus briefs has been a particularly effective strategy for the EEOC.

### *B. Flanking Maneuvers*

As discussed above, the EEOC has launched direct efforts to persuade courts not to enforce compulsory employment arbitration agreements, both by filing suit in its own name and by filing amicus briefs on behalf of employees who have sued their employer in their own names. The EEOC has also taken a different approach; it has filed suits in its own name on behalf of employees who have signed employment arbitration agreements. The EEOC has sought the full array of damages for the alleged discriminatory violations that the employees might have sought had they sued on their own. This approach is different from the *ROID* approach in that the EEOC does not directly challenge the enforceability of the arbitration agreement against the employee. Instead, the EEOC argues that while the arbitration agreement may be enforceable against the employee (thereby precluding the employee from filing suit against the employer), the agreement is not enforceable against the EEOC because the EEOC was not a signatory to the agreement, and because the EEOC has independent statutory authority to sue employers on behalf of employees. The EEOC argument is not that the arbitration clause is void, but rather that it is irrelevant to any suit brought by the EEOC in its own name.

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318. *See id.* at 767.

319. *See Seus*, 146 F.3d at 183.

320. *See id.*

321. 144 F.3d 1182 (9th Cir. 1998).

322. *See id.* at 1189.

323. *See supra* note 158 and accompanying text.

## 1. Supreme Court Guidance

As discussed in Part III, the plaintiff in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>324</sup> argued that compulsory arbitration would undermine the role of the EEOC in enforcing federal anti-discrimination laws because aggrieved employees would not be required to file an EEOC charge before proceeding to arbitration.<sup>325</sup> This, the plaintiff argued, would effectively shut the EEOC out of the enforcement process, in violation of the strong congressional policy of encouraging voluntary conciliation of disputes between employer and employee with the EEOC as intermediary.<sup>326</sup>

The Supreme Court rejected this argument, noting that “[a]n individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action.”<sup>327</sup> The Court further noted that the EEOC’s role in fighting discrimination is not dependent on individual employees filing a charge because the EEOC can investigate claims of discrimination even when a charge is not filed.<sup>328</sup> In other words, the EEOC’s investigatory authority is broader than the contents of an aggrieved individual’s charge of discrimination.<sup>329</sup> The Court explained that “arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief.”<sup>330</sup> Lower courts have interpreted the *Gilmer* Court’s discussion of the EEOC as confirming that the EEOC has independent authority to investigate and conciliate an EEOC charge and to file suit should its conciliation efforts fail.<sup>331</sup> This interpretation is consistent with other judicial decisions holding that the EEOC’s authority to investigate and file suit is

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324. 500 U.S. 20 (1991).

325. *See id.* at 28.

326. *See id.* at 28-29.

327. *See id.* at 28.

328. *See id.*

329. Moreover, the filing of an EEOC right-to-sue letter by the aggrieved employee is not necessarily a prerequisite to arbitration, as it is with litigation. *See* BALES, *supra* note 4, at 158.

330. *Gilmer*, 500 U.S. at 32.

331. *See* U.S. EEOC v. Tire Kingdom, Inc., 80 F.3d 449, 451-52 (11th Cir. 1996) (confirming the EEOC’s authority to conduct an investigation into alleged discrimination in the absence of a valid charge of discrimination); EEOC v. American & Efird Mills, Inc., 964 F.2d 300, 301 (4th Cir. 1992) (same); *see also* R. Gaull Silberman et al., *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1533, 1550 (1994) (stating that the EEOC has the power to investigate and resolve any charge, and file suit if conciliation fails).

independent of an aggrieved employee's claim.<sup>332</sup> For example, in *General Telephone Co. v. EEOC*,<sup>333</sup> the EEOC received complaints of sexual discrimination from four General Telephone employees.<sup>334</sup> The EEOC then sued General Telephone, seeking injunctive relief and back pay for all women affected by General Telephone's alleged discriminatory practices.<sup>335</sup> General Telephone moved to dismiss the suit based on the EEOC's failure to certify, under Federal Rule of Civil Procedure 23,<sup>336</sup> the class for which the EEOC was seeking relief.<sup>337</sup>

The Supreme Court held that certification was unnecessary because the EEOC was proceeding in its own name, pursuant to its own statutory authority to file suit, and not merely on behalf of the employees.<sup>338</sup> While securing relief for a group of aggrieved individuals is a paramount purpose of the EEOC's statutory authority to file suit, it is only one goal among others.<sup>339</sup> Another goal of the EEOC, the Court stated, is to "implement the public interest" in obliterating all traces of employment discrimination.<sup>340</sup> Thus, like *Gilmer*, this case stands for the proposition that the EEOC has the authority to litigate employment discrimination claims on its own, and that this authority is independent of the right that employees have to file suit on their own behalf.

## 2. Analogous Cases From the Circuits

### a. *The EEOC's Right to Sue*

When the EEOC sues an employer seeking relief on behalf of employees who have signed arbitration agreements, the employer usually argues that it is unfair for courts to allow the EEOC to litigate on behalf of employees who have contractually

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332. In addition to the cases cited in the text, see also *EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085, 1090 (5th Cir. 1987) (holding that an employee's waiver of the right to file a charge with the EEOC is void as against public policy); *EEOC v. Astra U.S.A., Inc.*, 929 F. Supp. 512, 521 (D. Mass.) (granting the EEOC's request for a preliminary injunction enjoining the enforcement of provisions in settlement agreements that prohibited the employees from filing EEOC charges or assisting the EEOC in any investigation), *aff'd in part, vacated in part*, 94 F.3d 738 (1st Cir. 1996).

333. 446 U.S. 318 (1980).

334. *See id.* at 320.

335. *See id.* at 321.

336. Federal Rule of Civil Procedure 23 permits

[o]ne or more members of a class [to] sue or be sued as representative parties on behalf of all [members of the class] only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

337. *See General Telephone*, 446 U.S. at 321-22.

338. *See id.* at 333-34.

339. *See id.* at 324.

340. *See id.* at 326.



agreed to arbitrate. Analogous situations occur when the EEOC sues an employer on behalf of employees who have settled or already litigated their individual claims against the employer. Again, the employer argues that it is unfair for the EEOC to litigate issues that have already been resolved.

Notwithstanding this argument, courts have confirmed the EEOC's independent authority to sue in situations where the aggrieved employees have settled or already litigated their complaints against the employer. For example, in *EEOC v. McLean Trucking Co.*,<sup>341</sup> Allen Brown, Jr., an African-American truck driver employed by McLean, filed an EEOC charge alleging that McLean's "no transfer rule" discriminated against him and other African-American drivers.<sup>342</sup> While his EEOC charge was pending, Brown filed a grievance pursuant to a collective bargaining agreement between McLean and Brown's union.<sup>343</sup> Before Brown's grievance was arbitrated, Brown asked the EEOC to withdraw his charge.<sup>344</sup> The EEOC, however, refused to grant its consent to withdraw.<sup>345</sup> In July 1971, Brown's grievance was arbitrated, and he was awarded part of the relief that he had requested.<sup>346</sup>

In March 1972, the EEOC found reasonable cause to believe that McLean's transfer policies violated Title VII and that McLean was maintaining racially segregated job classifications.<sup>347</sup> In July 1972, Brown filed a Title VII lawsuit against McLean based on essentially the same allegations.<sup>348</sup> Two months later, the EEOC filed an additional suit against McLean, again alleging racial discrimination in McLean's transfer policies and job classifications.<sup>349</sup>

In October 1973, Brown voluntarily dismissed his lawsuit against McLean pursuant to a compromise settlement between him and McLean.<sup>350</sup> McLean then moved to dismiss the EEOC's lawsuit, arguing among other things that Brown's acceptance of the arbitration award and settlement of his individual Title VII suit against McLean mooted the EEOC's suit.<sup>351</sup> The district court agreed and dismissed the EEOC's suit.<sup>352</sup>

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341. 525 F.2d 1007 (6th Cir. 1975).

342. *See id.* at 1008.

343. *See id.*

344. *See id.* at 1008-09.

345. *See id.* at 1009. The Code of Federal Regulations permits an aggrieved person to withdraw his or her EEOC charge only with the consent of the EEOC. *See* 29 C.F.R. § 1601.10.

346. *See McLean*, 525 F.2d at 1009.

347. *See id.*

348. *See id.*

349. *See id.*

350. *See id.* at 1009 n.4.

351. *See id.*

352. *See id.* at 1009-10.

On appeal, the EEOC argued that neither Brown's acceptance of the arbitration award nor the settlement of his suit precluded the EEOC from bringing an action in the public interest to eliminate discriminatory practices uncovered during the EEOC's investigation of Brown's discrimination charge.<sup>353</sup> The Sixth Circuit agreed, concluding that the "EEOC sues to vindicate the public interest, which is broader than the interests of the charging parties, and that [the] EEOC is not barred by the doctrine of *res judicata* from basing its complaint on charges of discrimination which it never agreed to settle."<sup>354</sup>

The Ninth Circuit reached the same conclusion in *EEOC v. Goodyear Aerospace Corp.*<sup>355</sup> In that case, Marshaline Pettigrew filed a charge with the EEOC, alleging that Goodyear had failed to promote her because of her race.<sup>356</sup> After the EEOC sued Goodyear, Pettigrew and Goodyear signed a settlement agreement in which Goodyear gave her the promotion in return for her signing a release and her requesting that the EEOC dismiss its lawsuit against Goodyear.<sup>357</sup> The EEOC nonetheless refused to voluntarily dismiss its lawsuit.<sup>358</sup> Goodyear then requested that the trial court dismiss the lawsuit, arguing that the settlement mooted the EEOC's suit.<sup>359</sup> The trial court agreed and dismissed the EEOC's case.<sup>360</sup> The Ninth Circuit reversed, holding that Pettigrew's settlement did not moot the EEOC's right to seek injunctive relief to protect employees as a class, and to deter Goodyear from discrimination.<sup>361</sup> The court explained that "Goodyear's argument erroneously assumes that the EEOC's [lawsuit] is merely a representative suit, and not one to vindicate public interests."<sup>362</sup>

Similarly, in *EEOC v. United Parcel Service*,<sup>363</sup> Jerome Patterson, a package delivery driver for UPS, challenged UPS' policy that employees with beards could not hold jobs in positions involving public contact.<sup>364</sup> Patterson suffered from a skin condition that affects approximately twenty-five percent of the African-American male population; the sole treatment for this condition is to refrain from shaving.<sup>365</sup> When UPS informed Patterson that he would be transferred to a lower-paying, non-public contact position if he did not shave, Patterson filed a charge with the EEOC.<sup>366</sup> The EEOC brought suit against UPS on behalf of Patterson and

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353. *See id.* at 1010.

354. *See id.* (quoting *EEOC v. Kimberley-Clark Corp.*, 511 F.2d 1352 (6th Cir. 1975)).

355. 813 F.2d 1539 (9th Cir. 1987).

356. *See id.* at 1541.

357. *See id.* at 1541-42.

358. *See id.* at 1542.

359. *See id.*

360. *See id.*

361. *See id.* at 1543.

362. *See id.* at 1542.

363. 860 F.2d 372 (10th Cir. 1988).

364. *See id.* at 373.

365. *See id.*

366. *See id.*

other similarly situated African-American males.<sup>367</sup> After Patterson settled with UPS, the district court granted summary judgment in favor of UPS on the EEOC suit, concluding that the EEOC lacked standing because it could not present an actual injured party to the court.<sup>368</sup> The Tenth Circuit reversed, holding that the EEOC's right to proceed with its suit was not dependent on its production of an injured party; this right "endure[s] until the alleged discrimination [is] eradicated."<sup>369</sup>

Other courts have held that the EEOC's right to sue an employer for violation of Title VII is independent of an aggrieved employee's right to bring such a suit.<sup>370</sup> These cases, together with the Supreme Court's discussion of the issue in *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>371</sup> strongly suggest that an employee's signing of a compulsory employment arbitration agreement will neither affect the employee's right to file a charge with the EEOC, nor the EEOC's right to investigate the charge and, upon a finding of discrimination, to sue the employer.

### *b. The Availability of Relief*

Although the settlement cases discussed above indicate that the EEOC's right to sue an employer will not be affected by an aggrieved employee having signed a pre-dispute arbitration agreement, the existence of such an agreement may limit the types of relief that the EEOC is entitled to seek. This is particularly true if the arbitration agreement results in an arbitration award being rendered before the resolution of the EEOC's lawsuit. In both *McLean* and *Goodyear*, in which the aggrieved employees had settled their claims against the company before the conclusion of the EEOC's litigation, the courts held that the prior private settlements limited the scope of relief that the EEOC could seek on behalf of the

367. *See id.*

368. *See id.* at 374.

369. *See id.* at 377.

370. *See, e.g.,* EEOC v. G-K-G, Inc., 39 F.3d 740, 744-45 (7th Cir. 1994) (refusing to dismiss an EEOC suit as duplicative to a suit brought by an aggrieved former employee); EEOC v. Wackenhut Corp., 939 F.2d 241, 242-43 (5th Cir. 1991) (same); New Orleans S.S. Ass'n v. EEOC, 680 F.2d 23, 25 (5th Cir. 1982); *see also* Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 694 (7th Cir. 1986) (holding that government actions to enforce ERISA are not barred under *res judicata* principles by private ERISA litigation); Donovan v. Cunningham, 716 F.2d 1455, 1462 (5th Cir. 1983) (same); United States v. Massachusetts Maritime Academy, 762 F.2d 142, 151-52 (1st Cir. 1985) (holding that the mootness of the complainant's claim in a Title IX action did not moot the Attorney General's right to continue the suit against the maritime academy for sex discrimination in student recruitment and admissions); *but cf.* EEOC v. Harvey L. Walner & Assoc., 91 F.3d 963, 971 (7th Cir. 1996) (dismissing a suit filed by the EEOC because the EEOC had consented to the aggrieved employee's withdrawal of his charge).

371. 500 U.S. 20 (1991).

settling employees.<sup>372</sup> The Sixth and Ninth Circuits held, respectively, that the settling employees were not entitled, via the EEOC suit, to recover any "private benefits," such as back pay, not granted to them in their settlements.<sup>373</sup> The EEOC was thus restricted to seeking classwide and injunctive relief.

Other courts have ruled similarly. For example, in *EEOC v. U.S. Steel Corp.*,<sup>374</sup> the EEOC filed a complaint alleging that U.S. Steel had violated the ADEA by requiring that its employees execute a release as a condition for obtaining a generous pension.<sup>375</sup> Earlier, several employees unsuccessfully had brought individual suits on the same claim.<sup>376</sup> The district court ruled for the EEOC and enjoined U.S. Steel from requiring the release.<sup>377</sup> The district court also ruled that the earlier judgments did not preclude retroactive relief for the employees who had sued and lost.<sup>378</sup>

The Third Circuit reversed. Without considering whether the EEOC had the authority to seek the injunctive relief,<sup>379</sup> the court held that the employees who had fully litigated their own claims were precluded by *res judicata* from obtaining individual relief in the subsequent EEOC action based on the same claims.<sup>380</sup> The court reasoned that Congress intended that the EEOC serve as the individual employee's representative when it seeks to recover individual benefits for him,<sup>381</sup> and that "when the EEOC seeks to represent grievants by attempting to obtain private benefits on their behalf, the doctrine of representative claim preclusion must be applied."<sup>382</sup>

Similarly, in *EEOC v. Harris Chernin, Inc.*,<sup>383</sup> Donald Rosenthal sued his employer for, among other things, age discrimination.<sup>384</sup> The EEOC subsequently filed suit on the same claim, requesting an injunction prohibiting the employer from "engaging in any employment practice which discriminates because of age . . . ."<sup>385</sup> The employer moved for summary judgment in Rosenthal's individual case on statute of limitations grounds, and the district court granted the motion.<sup>386</sup> The

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372. See *supra* notes 341-62 and accompanying text.

373. See *Goodyear*, 813 F.2d at 1543; *McLean*, 525 F.2d at 1011; see also *EEOC v. Astra U.S.A., Inc.*, 929 F. Supp. 512, 521 (D. Mass.), *aff'd in part, vacated in part*, 94 F.3d 738 (1st Cir. 1996) (stating in dicta that an employee may, in a settlement agreement, "waive the right to recover damages both in his or her own lawsuit and in a lawsuit brought by the EEOC on the employee's behalf").

374. 921 F.2d 489 (3d Cir. 1990).

375. See *id.* at 490.

376. See *id.* at 491.

377. See *id.*

378. See *id.* at 492.

379. See *id.*

380. See *id.* at 495.

381. See *id.* at 494-95.

382. *Id.* at 496.

383. 10 F.3d 1286 (7th Cir. 1993).

384. See *id.* at 1287-88.

385. See *id.* at 1288, 1291.

386. See *id.* at 1288.

employer then moved for summary judgment in the EEOC case on *res judicata* grounds.<sup>387</sup> The district court, relying on the Third Circuit's *U.S. Steel* decision, granted the motion.<sup>388</sup> Acknowledging that the EEOC's interest in pursuing a discrimination claim "may be broader than that of an individual for whose benefit the EEOC initiated its investigation," the court nonetheless dismissed the EEOC's suit because it did not "allege a single incident of discrimination against any employee other than Rosenthal."<sup>389</sup>

The Seventh Circuit agreed with the district court that Rosenthal's individual suit barred the EEOC from recovering backpay, liquidated damages, or reinstatement on his behalf.<sup>390</sup> However, it reversed the decision insofar as the district court held that the EEOC could not seek an injunction against further violation, concluding that "[t]here is no privity such that *res judicata* as to Rosenthal's claim for individual relief would bar the EEOC from bringing an action seeking an injunction . . . in order to prevent further violations."<sup>391</sup>

### 3. Recent Cases Involving Arbitration Agreements

If courts treat arbitration cases consistently with the cases discussed above, the fact that an employee has signed an arbitration agreement with an employer will limit the EEOC's ability to obtain relief that the employee might otherwise have obtained on her own, but will not limit the EEOC's ability to obtain injunctive relief against future violations or relief for other aggrieved employees. To date, there are only three cases on point. The Second and Fourth Circuits and the District Court for the District of Maryland have held that the EEOC may not seek monetary relief on behalf of employees who have signed arbitration agreements, but may seek classwide injunctive relief.<sup>392</sup> The Sixth Circuit, however, has held that there is no limitation on the types of relief that the EEOC may seek.<sup>393</sup>

In *EEOC v. Kidder, Peabody & Co.*,<sup>394</sup> the EEOC brought an age discrimination suit against Kidder seeking back pay, liquidated damages, and reinstatement on behalf of nine<sup>395</sup> former investment bankers.<sup>396</sup> All nine of the former

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387. *See id.*

388. *See id.* at 1288-89.

389. *See id.* at 1289.

390. *See id.* at 1291.

391. *See id.*

392. *See infra* notes 394-419 and accompanying text.

393. *See infra* notes 420-37 and accompanying text.

394. 156 F.3d 298 (2d Cir. 1998).

395. The EEOC initially brought suit on behalf of seventeen former employees, but for reasons that are not explained in the circuit court opinion, that number later dropped to nine. *See id.* at 300.

396. *See id.*

employees had signed arbitration agreements; three of them arbitrated their claims while the EEOC suit was pending and lost. Meanwhile, Kidder discontinued its investment banking operations, after which the EEOC withdrew its request for injunctive relief.<sup>397</sup> Kidder then moved to dismiss the suit, arguing that the arbitration agreements precluded the EEOC's pursuit of monetary damages on behalf of the nine former employees.<sup>398</sup> The district court agreed.<sup>399</sup>

The Second Circuit affirmed. Citing *Goodyear*, *Harris Chernin*, and *U.S. Steel* for the proposition "that the EEOC may not seek monetary relief in the name of an employee who has waived, settled, or previously litigated the claim,"<sup>400</sup> the court reasoned that this analysis was equally applicable when an employee had agreed to arbitrate the claim.<sup>401</sup> To rule otherwise, the court concluded, would permit an employee who previously agreed to arbitrate her claim "to make an end run around the arbitration agreement by having the EEOC pursue back pay or liquidated damages on his or her behalf."<sup>402</sup>

In *EEOC v. Waffle House, Inc.*,<sup>403</sup> Eric Baker signed an employment application, which contained an arbitration provision, with Waffle House.<sup>404</sup> Shortly after he began working, he suffered two seizures and was subsequently fired.<sup>405</sup> Baker filed a charge with the EEOC, claiming that his discharge violated the ADA.<sup>406</sup> The EEOC sued Waffle House and sought, among other things, a permanent injunction prohibiting Waffle House from discriminating on the basis of disability, and an award of reinstatement, backpay, and compensatory and punitive damages for Baker.<sup>407</sup>

Waffle House moved to compel arbitration and to either stay or dismiss the EEOC suit.<sup>408</sup> The magistrate recommended that the EEOC be "required to arbitrate the claims it filed on behalf of Baker."<sup>409</sup> The district court disagreed, concluding that the arbitration provision was not applicable.<sup>410</sup> The Fourth Circuit, expressly agreeing with the approach taken by the Second Circuit in *Kidder*,<sup>411</sup> stated:

When the EEOC seeks 'make-whole' relief for a charging party, the federal policy favoring enforcement of private arbitration agreements outweighs the

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397. *See id.*

398. *See id.*

399. *See id.*

400. *See id.* at 301-02.

401. *See id.* at 302.

402. *See id.* at 303.

403. 193 F.3d 805 (4th Cir. 1999).

404. *See id.* at 807.

405. *See id.*

406. *See id.*

407. *See id.* at 807-08.

408. *See id.* at 808.

409. *See id.*

410. *See id.*

411. *See id.* at 812.

EEOC's right to proceed in federal court because in that circumstance, the EEOC's public interest is minimal, as the EEOC seeks primarily to vindicate private, rather than public, interests. On the other hand, when the EEOC is pursuing large-scale injunctive relief, the balance tips in favor of EEOC enforcement efforts in federal court because the public interest dominates the EEOC's action.<sup>412</sup>

The court concluded as follows:

(1) that the EEOC cannot be compelled, by reason of an arbitration agreement between the charging party and his employer, to arbitrate claims, but (2) that, to the extent that the EEOC seeks to obtain 'make-whole' relief on behalf of a charging party who is subject to an arbitration agreement, it is precluded from seeking such relief in a judicial forum.<sup>413</sup>

The court, therefore, dismissed the EEOC's claims on behalf of Baker individually, but permitted the EEOC to move forward on its claims for broad injunctive relief.<sup>414</sup>

The District Court for the District of Maryland reached a similar conclusion in *EEOC v. World Savings & Loan Association, Inc.*<sup>415</sup> In that case, the EEOC sought general injunctive relief against World Savings for alleged Title VII violations as well as monetary damages on behalf of two former employees.<sup>416</sup> Each of the employees previously signed a pre-dispute arbitration agreement,<sup>417</sup> but apparently decided neither to arbitrate nor to litigate claims on their own behalf.<sup>418</sup> Like the Second Circuit in *Kidder*, the Maryland district court found the settlement cases analogous to arbitration cases, and held that the EEOC was limited to seeking class-based equitable relief.<sup>419</sup>

The Sixth Circuit reached the opposite conclusion in *EEOC v. Frank's Nursery & Crafts, Inc.*<sup>420</sup> In *Frank's*, Carol Adams complained to the EEOC that Frank's denied her a promotion because of her race.<sup>421</sup> Similar to the employees

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412. *Id.*

413. *Id.* at 807.

414. *See id.* at 813.

415. 32 F. Supp. 2d 833, 836 (D. Md. 1999).

416. *See id.* at 834.

417. *See id.*

418. *See id.* at 836.

419. *See id.* at 835-36. The court dismissed the case with prejudice to facilitate immediate appellate review of its decision to deny the EEOC the authority to seek monetary damages. The court also gave the EEOC the option of prosecuting the suit for class-based equitable relief only. In this event, the EEOC could seek review of the court's order concerning monetary damages after final judgment on its claim for equitable relief: *See id.* at 836.

420. 177 F.3d 448 (6th Cir. 1999).

421. *See id.* at 453.

in *World Savings & Loan* and six of the nine employees in *Kidder*, Adams elected not to pursue her individual claims on her own.<sup>422</sup> Instead, the EEOC filed suit against Frank's, requesting both classwide equitable relief and an order requiring Frank's to "make [Adams] whole" with backpay, compensatory, and punitive damages.<sup>423</sup> Frank's moved to compel arbitration and for summary judgment based on an arbitration agreement contained in Adams' employment application.<sup>424</sup> The district court granted the motion and dismissed the suit in its entirety,<sup>425</sup> holding that "to the extent that Adams is bound by her agreement to arbitrate, so is the EEOC."<sup>426</sup> The court reasoned that "[t]o decide otherwise would render agreements to arbitrate voidable at the whim of the EEOC."<sup>427</sup>

The Sixth Circuit reversed. First, the court held that the district court's dismissal of the EEOC's claim for monetary relief was inconsistent with the 1972 amendments to Title VII<sup>428</sup> giving the EEOC unilateral authority to exercise its prosecutorial powers by filing suit.<sup>429</sup>

Congress granted to the EEOC the right to represent an interest broader than that of a particular individual when it exercises its authority to sue. To empower a private individual to take away this congressional mandate, by entering into arbitration agreements or other contractual arrangements, would grant that individual the ability to govern whether and when the EEOC may protect the public interest and further our national initiative against employment discrimination, and to thereby undo the work of Congress in its 1972 amendments.<sup>430</sup>

Second, the court held that because the EEOC was not a party to Adams' agreement to arbitrate, it could not be bound by that agreement.<sup>431</sup> Moreover, the court reasoned that the *Mitsubishi* presumption of arbitrability is effectively rebutted by the statutory language giving the EEOC the unilateral authority to sue.<sup>432</sup> Thus, an employee signing an arbitration agreement should have no effect on the EEOC's ability to sue for any relief authorized by the anti-discrimination statutes.<sup>433</sup>

Third, the court held that neither *res judicata* nor waiver principles barred the EEOC from seeking monetary relief because Adams had not settled or arbitrated her claims.<sup>434</sup> Finally, the court concluded that "our interest in protecting, as a

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422. See *id.* at 453, 460 n.7, 469 (Nelson, J., concurring in part and dissenting in part).

423. See *id.* at 453.

424. See *id.*

425. See *id.*

426. See *EEOC v. Frank's Nursery & Crafts, Inc.*, 966 F. Supp. 500, 505 (E.D. Mich. 1997), *rev'd*, 177 F.3d 448 (6th Cir. 1999).

427. See *id.*

428. See *supra* notes 65-70 and accompanying text.

429. See *Frank's*, 117 F.3d at 467.

430. *Id.* at 459.

431. See *id.* at 459-62.

432. See *id.* at 461.

433. See *id.*

434. See *id.* at 462-67.



matter of public policy, the EEOC's power to guide the course of every Title VII action outweighs the interest in enforcing Adams' private promise to arbitrate against the EEOC."<sup>435</sup>

Judge Nelson agreed with the majority that the district court erred by dismissing the EEOC's claims for classwide injunctive relief, but dissented with respect to the monetary damages issue.<sup>436</sup> Quoting the Second Circuit's *Kidder* decision, Judge Nelson concluded that permitting the EEOC to pursue injunctive relief in federal court while relegating claims for individual relief to arbitration "strikes the right balance" between the FAA policy favoring arbitration and Title VII's grant of prosecutorial authority to the EEOC.<sup>437</sup>

#### 4. Analysis

Both the *Frank*'s majority and Judge Nelson accurately frame the policy issue; they simply reach different conclusions as to how it should be resolved. On the one hand, the 1972 amendments to Title VII give the EEOC the authority to sue employers not only for classwide relief and prospective injunctive relief, but also for monetary damages on behalf of aggrieved individuals. There is no express or implied restriction in the text of Title VII that limits the EEOC's authority to do so when an employee has agreed to arbitrate, or for that matter settle, her individual claims. On the other hand, the Supreme Court has, since the *Mitsubishi* Trilogy, interpreted the FAA as embodying a "liberal federal policy favoring arbitration agreements,"<sup>438</sup> and permitting the EEOC to litigate claims for monetary relief on behalf of employees who have agreed to arbitrate their claims seems inconsistent with this policy.

While I agree with Judge Nelson's conclusion, I would arrive at the same conclusion by means of a somewhat different approach. An employee settlement or the signing of an arbitration clause does not take away the EEOC's statutory authority to sue. Instead, it merely provides the employer with a defense to liability. If, for example, the individual employee had arbitrated her claim, won, and recovered backpay damages, surely the courts would not permit the EEOC to sue the employer on behalf of the employee for backpay damages. To do so would constitute an extra-statutory penalty on the employer and a windfall to the employee. The employee has received what she is entitled to and anything more would unjustly enrich her and unjustly penalize the employer.

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435. See *id.* at 461.

436. See *id.* at 468-71 (Nelson, J., concurring in part and dissenting in part).

437. See *id.* at 471 (quoting *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998)).

438. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

The same rule should apply if the employee took her case to arbitration and lost on the merits. Permitting the EEOC to litigate on behalf of an employee under these circumstances gives the employee two bites at the same apple, one through her own individual case and one through the EEOC. It would also require the employer to litigate the same case twice, once in arbitration and again in litigation brought by the EEOC. Under these circumstances, it makes sense to apply the principles of *res judicata* to preclude the EEOC from seeking the same relief that the employee already has sought.

I see no reason to apply a different rule when an employee has failed, for whatever reason, to pursue her claim in arbitration. To allow the EEOC to litigate on behalf of an employee who has agreed, but failed, to arbitrate would discourage employees from arbitrating. This result is directly contrary to the Supreme Court's strong policy favoring arbitration.

If, however, the EEOC is seeking classwide injunctive relief or relief on behalf of other employees, the EEOC suit should be permitted to go forward. This would not affect the general principle that the EEOC should not be allowed to litigate a claim or pursue damages on behalf of an individual who signed an arbitration agreement and either did or could have arbitrated the claim for damages.

## VI. CONCLUSION

The EEOC has opposed compulsory employment arbitration agreements in several different ways. First, it promulgated a Policy Statement declaring that courts should not enforce such agreements because the agreements usurp the judicial role of interpreting and applying the federal anti-discrimination laws. However, courts have already squarely held that these agreements are consistent with, and therefore are enforceable, under the anti-discrimination laws. Moreover, the EEOC lacks statutory authority to interpret the FAA, the statute which the Supreme Court has used as the basis for enforcing arbitration agreements. For these reasons, it is unlikely that courts will adopt the EEOC's position that employment arbitration agreements are unenforceable.

Second, the EEOC has opposed employment arbitration by suing employers to obtain a court order declaring the agreements unenforceable. However, because the agency's resources are limited, it is able to take this approach in only a small number of cases. Recently, the agency has sought to accomplish the same thing by filing amicus briefs in cases brought by aggrieved employees. It does not appear that the EEOC has had appreciable success using this approach.

Third, the EEOC has sued employers in its own name on behalf of employees who have signed arbitration agreements. The EEOC has sought the full array of damages similar to those which the employees might have pursued had they brought the action on their own. Courts have given this approach a mixed reception because it effectively allows the EEOC to circumvent the arbitration agreement that the aggrieved employee has signed. This Article argues that courts should not permit the EEOC to litigate a claim on behalf of an individual who has

signed an arbitration agreement and either did or could have arbitrated the claim. An arbitration agreement should not, however, preclude the EEOC from seeking classwide injunctive relief or relief on behalf of other employees.

