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Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?

Sharona Hoffman*

The enforceability of mandatory arbitration policies contained in employment contracts between employees and their direct employers remains an open question, even after the Supreme Court’s 1991 decision in Gilmer v. Interstate Johnson Lane Corp. While Gilmer gave effect to a mandatory arbitration clause in a contract between a securities broker and his licensing exchange, the Court noted that the contract at issue was not an ordinary employment contract between employer and employee. The Court declined to decide whether arbitration agreements in ordinary employment contracts are per se enforceable under the Federal Arbitration Act or whether these provisions are exempt from the Act and therefore subject to closer judicial scrutiny.

Sharona Hoffman argues that arbitration provisions in ordinary employment contracts are beyond the scope of the Federal Arbitration Act, a conclusion consistent with the approach of the majority of courts of appeal which have considered this issue.

To demonstrate the continuing development of the law governing the enforcement of mandatory arbitration policies, the author details a recent case in which the Equal Employment Opportunity Commission challenged and successfully enjoined enforcement of a mandatory arbitration policy. The arbitration policy was vulnerable to attack because its provisions so clearly favored the employer and because pre-existing employees were forced to choose between keeping their jobs or prospectively agreeing to arbitrate nearly all disputes under the terms of the employer’s arbitration policy.

Hoffman concludes that while voluntary alternative dispute resolution schemes are enforceable, mandatory arbitration policies unilaterally imposed by employers upon employees may be voidable under both statutory law and the common law of contracts.

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I. INTRODUCTION

Alternative dispute resolution (ADR) has been hailed as a welcome vehicle for the reduction of the length and cost of litigation, the alleviation of unmanageable backlogs in the courts, and the general enhancement of efficiency in the American legal system. Alternative dispute resolution is perceived as so desirable that provisions encouraging its use have been incorporated into the texts of various statutes.¹

Mandatory arbitration policies in the employment context are becoming increasingly common. An article appearing in the January/February 1995 issue of the Washington Lawyer advised law firms "to consider including in their letters of engagement a mandatory-arbitration provision requiring both parties to resolve any disputes arising under the agreement via arbitration."² The article justified its recommendation by stating that "[t]his procedure will greatly reduce the cost of resolving such disputes and expedite final disposition of employment controversies."³

As alternative dispute resolution has grown in popularity, however, so has its potential for abuse. This article will focus on the phenomenon of mandatory arbitration policies which are unilaterally implemented by employers through employment contracts, employee manuals, or separate policy memoranda. Employees who wish to obtain employment or retain their

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³ Id.
positions with employers who have instituted compulsory arbitration programs are thereby forced to relinquish their rights of access to the courts and to agree to resolve most, if not all, disputes solely through arbitration.

Alongside the advantages of arbitration, namely, overall cost reduction, increased efficiency, and expedited dispute resolution, there exist several distinct disadvantages. A report issued by the General Accounting Office in March 1994 examined arbitration procedures utilized in the securities industry and highlighted several startling realities. The report found that in 1992, 89 percent of New York Stock Exchange (N.Y.S.E.) arbitrators were white men with an average age of 60. Some claimants, particularly those with allegations of discrimination, may find the lack of diversity among arbitrators to be quite troubling, since they may have difficulty finding an arbitrator whose background makes him sympathetic to their claims. The same report concluded that N.Y.S.E. and National Association of Securities Dealers (N.A.S.D.) arbitrators handling employment discrimination cases are not necessarily employment discrimination law experts. Scholars have long urged that arbitrators must be trained to insure their expertise in the substantive areas of law involved in the cases they handle. One writer, Judge Harry T. Edwards, cautions that "[i]nexpensive, expeditious, and informal adjudication is not always synonymous with fair and just adjudication" since "decisionmakers may not understand the values at stake and parties to disputes do not always possess equal power and resources."

It has also been noted that some statutory remedies are not available when claims are arbitrated. New York law, for example, prohibits the award of punitive damages in arbitration.

5. Id. at 2, 8.
6. Id. at 12.
8. Id. at 679.
9. In Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793, 794 (1976), the New York Court of Appeals ruled that an arbitrator has no power to award punitive damages even if agreed upon by the parties. The court explained its decision as follows:
   The evil of permitting an arbitrator whose selection is often restricted or manipulatable by the party in a superior bargaining position, to award punitive damages is that it displaces the court and the jury, and therefore the State, as the engine for imposing a social sanction. ... If arbitrators were allowed to impose punitive damages, the usefulness of arbitration would be destroyed. It would become a trap for the unwary given the eminently desirable freedom from judicial overview of law and facts. It would mean that the scope of determination by arbitrators, by the license to award punitive damages, would be both unpredictable and uncontrollable.
   Id. at 796.
Furthermore, unlike federal judges, who are appointed for life, and unlike jurors, whose livelihoods are not dependent upon the decisions they make, arbitrators must be selected by the parties for each arbitration they conduct.\textsuperscript{10} Judge Edwards warns that "[t]here are now a number of self-proclaimed ADR 'experts' with business cards in hand and consulting firms in the yellow pages, advertising an ability to solve any dispute."\textsuperscript{11} This critique suggests that participants in the ADR industry may not always have pure motives.\textsuperscript{12}

A danger exists that the decisions of some arbitrators may be motivated, at least in part, by a desire to secure their own future employment. Since an individual employee is unlikely to utilize arbitration frequently, whereas employers are often repeatedly sued, the arbitrator may recognize that he or she stands to benefit from providing the employer with a favorable decision. By contrast, an arbitrator who awards punitive damages to an employee in a particular case may be deemed an extremist and may be rejected by employers in future arbitrations. In fact, under some employment-related arbitration agreements, the employer is solely responsible for selecting the arbitrator,\textsuperscript{13} since presumably the employer is more likely to have the knowledge and resources to do so. Under such circumstances it may be particularly difficult to insure arbitrator impartiality.

In addition, an arbitrator's error of law does not ordinarily constitute grounds for vacating the award unless the award demonstrates a manifest disregard for the law.\textsuperscript{14} A manifest disregard of the law can be proven only if it is "demonstrated that the majority of arbitrators deliberately disregarded what they knew to be the law in order to reach the result they did."\textsuperscript{15} In light of the highly deferential standard of judicial review of arbitration awards,\textsuperscript{16} some arbitrators may have little incentive to engage in rigorous, responsible analysis in reaching their decisions. As one scholar has observed, "[a]djudication is more likely to do justice than ... arbitration ... or any other contrivance of ADR, precisely because it vests the power of the state in officials who act as trustees for the public, who are highly visible, and who are committed to reason."\textsuperscript{17}

\footnotesize
\textsuperscript{10} See, e.g., \textit{infra} note 27.
\textsuperscript{11} Edwards, \textit{supra} note 7, at 683.
\textsuperscript{12} Id.
\textsuperscript{13} Fair Employment Practices\textquotesingle s Summary of Latest Developments, March 13, 1995 at 27. This issue summarizes discussions that were held regarding the arbitration of employment discrimination disputes at the District of Columbia Bar's convention in Washington, D.C. and at a meeting of the American Bar Association's Committee on Labor Arbitration and the Law of Collective Bargaining Agreements.
\textsuperscript{14} See Health Services Management Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992); Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1059-60 (9th Cir. 1991).
\textsuperscript{15} Hughes, 975 F.2d at 1267.
\textsuperscript{16} Id.
It is also significant that arbitration awards have no precedential value for purposes of future litigation. Arbitration provides for the resolution of potentially important questions of law in a private forum. Judge Edwards offered the following admonition:

Additionally, by diverting particular types of cases away from adjudication, we may stifle the development of law in certain disfavored areas of law. Imagine, for example, the impoverished nature of civil rights law that would have resulted had all race discrimination cases in the sixties and seventies been mediated rather than adjudicated. The wholesale diversion of cases involving the legal rights of the poor may result in the definition of these rights by the powerful in our society rather than by the application of fundamental societal values reflected in the rule of law.18

It has been said that "voluntary binding arbitration is about as voluntary as deciding to hand over one's money to a mugger."19 These sentiments are echoed by many who are active in the arena of employee civil rights.20 Prominent among the opponents of mandatory, binding arbitration is the United States Equal Employment Opportunity Commission (EEOC), the governmental agency entrusted with enforcing the federal statutes which outlaw discrimination in the workplace.21 The EEOC recently litigated a case in which it successfully challenged a mandatory arbitration policy which was implemented in December of 1994 by a Houston company, River Oaks Imaging & Diagnostic (ROID).22

This article argues that compulsory arbitration agreements for workplace disputes are unlawful and should not be enforced by the courts. In formulating this argument, the paper will analyze the ROID case and its implications. In addition, the Federal Arbitration Act23 will be examined, as it applies to employment contracts. An analysis of the relevant Supreme Court and court of appeals cases will suggest that the Federal Arbitration Act's exemption, found in section 1 of the statute, should be read expansively to exclude all contracts of employment from the purview of the Federal Arbitration Act. Finally, the thesis will be bolstered by several concepts drawn from traditional contract law, including the public policy defense, duress, and unconscionability.

21. See, e.g., id.
II
EEOC v.ROID: A CASE STUDY OF MANDATORY
ALTERNATIVE DISPUTE RESOLUTION IN THE
EMPLOYMENT ARENA

ROID is a large outpatient imaging and diagnostic center located in Houston, Texas, which employs over 100 people. At the end of 1994 ROID implemented a mandatory arbitration policy under which the parties "agreed" to the resolution by arbitration of all controversies that may arise between the employer and employee, with a few very limited exceptions.24

The alternative dispute resolution policy required employees to pay half the cost of arbitration, and under certain circumstances, to pay the employer’s attorney’s fees if the employer prevailed.25 Under such a policy, an employee who had been terminated and was unemployed may be unable to afford arbitration, and having waived access to the courts by signing the arbitration policy, would have no recourse to any dispute resolution mechanism.26


Claims Covered by the Agreement
The Company and I mutually consent to the resolution by arbitration of all claims or controversies ("claims"), whether or not arising out of my employment (or its termination), that the Company may have against me or that I may have against the Company or against its officers, directors, employees, or agents in their capacity as such or otherwise. The claims covered by this Agreement include, but are not limited to, claims for wages or other compensation due; claims for breach of any contract or covenant (express or implied); tort claims; claims for discrimination (including, but not limited to race, sex, religion, national origin, age, marital status, or medical condition, handicap, or disability); claims for benefits (except where an employee benefit or pension plan specifies that its claims procedure shall culminate in an arbitration procedure different from this one); and claims for violation of any federal, state, or other governmental law, statute, regulation, or ordinance, except claims excluded in the following paragraph.

Claims Not Covered by the Agreement
Claims I have for Workers’ Compensation or unemployment compensation benefits are not covered by this Agreement.
Also not covered are claims by the Company for injunctive and/or other equitable relief for unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information, as to which I understand and agree that the Company may seek and obtain relief from a court of competent jurisdiction.

25. Id. at 3-4. The specific provision is as follows:

Arbitration Fees and Costs
The Company and I shall equally share the fees and costs of the Arbitrator. Each party will deposit funds or post other appropriate security for its share of the Arbitrator’s fee, in an amount and manner determined by the Arbitrator, 10 days before the first day of hearing. Each party shall pay for its own costs and attorneys’ fees, if any. However, if any party prevails on a statutory claim which affords the prevailing party attorneys’ fees, or if there is a written agreement providing for fees, the Arbitrator may award reasonable fees to the prevailing party.

26. Under 28 U.S.C.A. § 1914(a) (1994), a party instituting a civil action pays a filing fee of only $120. A party may then represent herself pro se or engage an attorney who will work on a contingency fee basis, and thus the claimant will absorb no further costs of litigation. Moreover, the filing fee may
Under ROID's policy, Judicial Arbitration & Mediation Services, Inc. would provide the parties with a list of eleven arbitrators. The parties would alternate striking names off the list until only one arbitrator remained. If either party were dissatisfied with the remaining arbitrator, a new list would be obtained, and the process would begin anew. The policy, however, did not provide for disclosure of the employment backgrounds and past arbitration awards of potential arbitrators, thereby decreasing the likelihood that employees would make informed decisions when selecting arbitrators. Employees who had no information concerning the arbitrators on the list provided to them would not be able to strike those who might be biased against them or otherwise unqualified to handle the dispute.

The policy also stated in vague terms that "[t]he Arbitrator shall render an award and opinion in the form typically rendered in labor arbitrations." This statement did not elucidate whether a written decision was to be issued by the arbitrator and if so, what specific information had to be contained therein.

Another provision in the policy required employees to notify ROID of their claims within one year of the occurrence of the event in question. Although employees who signed the policy could not pursue court actions

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27. Memorandum of Law, Exhibit F, supra note 24, at 2-3. The provision reads, in relevant part, as follows:

*Arbitration Procedures*

The Company and I agree that, except as provided in this Agreement, any arbitration shall be in accordance with the then-current Employment Arbitration Rules of Judicial Arbitration & Mediation Services, Inc. ("JAMS") before an arbitrator who is licensed to practice law in the state in which the arbitration is convened ("the Arbitrator"). The arbitration shall take place in or near the city in which I am or was last employed by the Company.

The Arbitrator shall be selected as follows. JAMS shall give each party a list of 11 arbitrators drawn from its panel of labor and employment arbitrators. Each party may strike all names on the list it deems unacceptable. If only one common name remains on the lists of all parties, that individual shall be designated as the Arbitrator. If more than one common name remains on the lists of all parties, the parties shall strike names alternately until only one remains. The party who did not initiate the claim shall strike first. If no common name remains on the lists of all parties, JAMS shall furnish an additional list or lists until an Arbitrator is selected.

28. Id.

29. Id. at 3.

30. Id. at 1-2. The provision states, in relevant part, the following:

*Required Notice of All Claims [and Statute of Limitations]*

The Company and I agree that the aggrieved party must give written notice of any claim to the other party within one (1) year of the date the aggrieved party first has knowledge of the event giving rise to the claim; otherwise, the claim shall be void and deemed waived even if there is a federal or state statute of limitations which would have given more time to pursue the claim.
on their own behalf; they were not prevented from filing claims of discrimination with governmental enforcement agencies, thereby allowing these agencies to prosecute cases based on the claims, where appropriate.\textsuperscript{31} It is arguable, however, that ROID’s notice provision was designed to mislead its employees with respect to administrative filing deadlines.

Under Title VII of the Civil Rights Act of 1964, a charge of employment discrimination in Texas must be filed with the EEOC within 300 days after the allegedly unlawful conduct occurred.\textsuperscript{32} The correlative Texas statute requires that a charge be filed within 180 days with the Texas Commission on Human Rights by employees who wish to turn to the state agency.\textsuperscript{33} Neither Title VII nor the cases which construe it provide for the tolling of this statutory limitation period in instances where employees utilize alternative dispute resolution procedures prior to filing a charge with the EEOC.\textsuperscript{34}

Thus, ROID’s “generous” one year notice provision may have lulled employees into inaction and induced them to miss the shorter filing deadlines applicable to state and federal enforcement agencies.

The policy’s signature page featured the subheading “Voluntary Agreement” and contained spaces for the signatures of the employee and a company representative.\textsuperscript{35} It was followed by a page entitled “Acknowledgement,” which consisted of the following language:

\begin{center}
\begin{footnotesize}
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\item 31. \textit{Id.} at 3. The policy contains the following language:
  
  Except as otherwise provided in this Agreement, both the Company and I agree that neither of us shall initiate or prosecute any lawsuit or administrative action (other than an administrative charge of discrimination) in any way related to any claim covered by this Agreement. Although the language is somewhat confusing, the parenthetical phrase “other than an administrative charge of discrimination” authorized employees to file charges of discrimination with enforcement agencies.

32. 42 U.S.C.A. § 2000e-5(e)(1) (1994). In general, charges of discrimination must be filed within 180 days of the occurrence of the allegedly discriminatory act. In states such as Texas, where state or local agencies also have authority to prosecute employment discrimination cases, charges of discrimination must be filed with the EEOC within 300 days of the occurrence of the alleged act of discrimination. (Where “the person aggrieved has initially instituted proceedings with a State or local agency . . . such charge shall be filed . . . within three hundred days.”) \textit{Id.}


34. See International Union of Electrical, Radio and Machine Workers, AFL-CIO Local 790 v. Robbins & Myers, Inc., et al., 429 U.S. 229, 240 (1976) (holding that statutory limitation period for filing EEOC charges of discrimination is not tolled during the pendency of grievance or arbitration procedures provided for in a collective bargaining agreement).

35. Memorandum of Law, Exhibit F, supra note 24, at 6. The provision reads as follows: 

Voluntary Agreement

I ACKNOWLEDGE THAT I HAVE CAREFULLY READ THIS AGREEMENT, THAT I UNDERSTAND ITS TERMS, THAT ALL UNDERSTANDINGS AND AGREEMENTS BETWEEN THE COMPANY AND ME RELATING TO THE SUBJECTS COVERED IN THE AGREEMENT ARE CONTAINED IN IT, AND THAT I HAVE ENTERED INTO THE AGREEMENT VOLUNTARILY AND NOT IN RELIANCE ON ANY PROMISES OR REPRESENTATIONS BY THE COMPANY OTHER THAN THOSE CONTAINED IN THIS AGREEMENT ITSELF.

I FURTHER ACKNOWLEDGE THAT I HAVE BEEN GIVEN THE OPPORTUNITY TO DISCUSS THIS AGREEMENT WITH MY PRIVATE LEGAL COUNSEL AND HAVE AVAILED MYSELF OF THAT OPPORTUNITY TO THE EXTENT I WISH TO DO SO.
\end{itemize}
\end{footnotesize}
\end{center}
I acknowledge that I have been provided with a copy ofROID's policy on Mandatory Arbitration. I understand that my continued employment withROID shall be deemed as evidence of my consent to abide by this policy. I further understand that my refusal to sign this acknowledgement shall be deemed a voluntary termination initiated by the employee.\textsuperscript{36}

ROID's employees were thus required to sign the policy if they wished to retain their jobs, and, by the policy's terms, if they refused to sign, they were deemed to have voluntarily quit. This resignation provision deprived any employee who resisted the policy not only of employment, but also of the right to obtain unemployment compensation, which is not awarded in cases of resignation.\textsuperscript{37} The policy was brought to the EEOC's attention by two women who declined to sign the document and were promptly escorted off the company's premises.\textsuperscript{38}

The EEOC challengedROID's mandatory arbitration policy because its specific provisions were egregiously unfavorable to employees, and, more generally, on the ground that mandatory alternative dispute resolution policies which are unilaterally imposed by employers upon their employees are unlawful per se.\textsuperscript{39}

## III

### The Outcome of EEOC v.ROID and Its Implications

On April 19, 1995, Chief Judge Norman Black of the United States District Court for the Southern District of Texas, Houston Division, entered an Order granting the EEOC’s application for a preliminary injunction.\textsuperscript{40} In the Order, Chief Judge Black found that “the EEOC has shown by a preponderance of the evidence that the so-called ‘ADR Policy’ ofROID is so misleading and against the principles of Title VII of the Civil Rights Act of 1964 that its use violates such law.”\textsuperscript{41} The court revoked the mandatory alternative dispute resolution policy whichROID had unilaterally imposed upon its employees.\textsuperscript{42} The Preliminary Injunction further instructed thatROID could not in the future implement an alternative dispute resolution policy which would require employees to pay the costs of alternative dispute resolution proceedings or which would interfere with employees’

\textsuperscript{36} Id. at 7.

\textsuperscript{37} See, e.g., TEX. LAB. CODE ANN. § 207.045(a) (West 1995) (“An individual is disqualified for benefits if the individual left the individual’s last work voluntarily without good cause connected with the individual’s work.”).

\textsuperscript{38} Memorandum of Law, supra note 24, at 6-7, Exhibits D, E (on file with author).


\textsuperscript{41} Id. at 1243.

\textsuperscript{42} Transcript of Preliminary Injunction Hearing, April 17, 1995, at 78.
rights to file EEOC charges or to file suit once administrative remedies have been exhausted. 43

During the Preliminary Injunction hearing, which concluded on April 17, 1995, Chief Judge Black stated that he found the arbitration policy’s “Acknowledgement” provision to be fraudulent, since rather than being an acknowledgement of receipt of the policy, it bound employees to the policy itself. 44 The court also criticized the notice provision which instructed employees that they could inform ROID of their claims anytime within one year of the occurrence of the alleged wrongs. 45 The court stated that this provision could easily lure employees into inaction and mislead them with respect to the EEOC’s 300 day filing deadline. 46 The court in ROID thus invalidated the alternative dispute resolution policy at issue based on its specific provisions, which the court deemed to have contravened Title VII. 47 The case was ultimately resolved via a consent order, which permanently revoked ROID’s ADR Policy and was entered by the court on June 23, 1995. 48

Chief Judge Black was specific in his reasons for revoking ROID’s arbitration policy and focused upon particular provisions which he found to violate Title VII. The ROID case, therefore, does not set a precedent mandating that all mandatory arbitration policies are per se unlawful. However, it is significant that the court did not blindly uphold the mandatory arbitration policy, but rather, scrutinized it and was persuaded by the EEOC’s arguments regarding its illegality. The EEOC’s successful action should encourage others to challenge arbitration policies which are imposed upon employees in a coercive and abusive fashion.

Moreover, the EEOC continues to oppose all binding arbitration policies which are unilaterally imposed upon employees as a condition of employment. 49 A study of case law, statutory law, and applicable legislative history reveals ample support for the EEOC’s position and for the invalidation of compulsory alternative dispute resolution policies in the employment context.

43. 67 Fair Empl. Prac. Cas. (BNA) at 1243-44.
44. Transcript, Preliminary Injunction Hearing, April 17, 1995 at 77 (on file with author) (“On its face the provision for the employee to acknowledge receipt is an acceptance of the policy, just as if they signed a contract.”)
45. Id.
46. Id.
47. 67 Fair Empl. Prac. Cas. (BNA) at 1243.
49. On July 17, 1995 the EEOC issued a Policy Statement on Alternative Dispute Resolution. The Statement explained that “the Commission believes that parties must knowingly, willingly and voluntarily enter into an ADR proceeding.” EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGAL SERVICES, OFFICE OF LEGAL COUNSEL, NOTICE No. 915.002 AT 3 (JULY 17, 1995).
IV
THE FEDERAL ARBITRATION ACT AND THE CASES
INTERPRETING THE STATUTE—UNILATERALLY
IMPOSED MANDATORY ARBITRATION
PROVISIONS ON THIN ICE

A. The Supreme Court’s Gilmer Decision

In 1974 the Supreme Court held in Alexander v. Gardner-Denver Co.\(^5\) that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.\(^5\) The Court explained:

In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.\(^5\)

The Court also emphasized that “there can be no prospective waiver of an employee’s rights under Title VII.”\(^5\)

The Supreme Court has never explicitly overruled the Alexander decision. However, in 1991 the Supreme Court held in Gilmer v. Interstate Johnson Lane Corp.\(^4\) that a security broker’s age discrimination claim was subject to compulsory arbitration pursuant to an arbitration agreement contained in his New York Stock Exchange securities registration application.\(^5\) By signing the agreement, the individual had thus waived access to a judicial forum with respect to his allegation of discrimination.

The Court pointed to the Federal Arbitration Act (FAA), codified in 1947 as Title 9 of the U.S. Code, which provides in relevant part as follows:

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy there­after arising out of such contract or transaction . . . shall be valid, irrevoca­ble, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.\(^5\)

Section 1 of the Act excludes a particular category of contracts from coverage under the FAA. The section provides that “nothing herein contained shall apply to contracts of employment of seamen, railroad employ-

\(^5\) Id. at 52.
\(^5\) Id. at 49-50.
\(^5\) Id. at 51.
\(^5\) Id. at 23.
ees, or any other class of workers engaged in foreign or interstate commerce." 57 Consequently, arbitration provisions in contracts excluded by section 1 of the FAA would not be presumed valid and enforceable and could therefore be carefully scrutinized by the courts. Arbitration provisions in contracts covered by the FAA, however, can rarely be successfully challenged in a judicial forum. The question of exactly which contracts are meant to be excluded by section 1 of the FAA has been vigorously debated for several decades. 58

The Gilmer Court ruled that the section 1 exclusion did not apply to the case at bar because the arbitration clause in question in the case was not contained in a contract with an employer, but rather, in a contract with a securities exchange. 59 The Supreme Court noted in a footnote that "[s]everal amici curiae in support of Gilmer argue that that section excludes from the coverage of the FAA all ‘contracts of employment.’" 60 The Court explicitly stated that since Gilmer’s arbitration agreement was not found in an ordinary contract of employment, it chose to leave for another day the issue raised by amici curiae. 61 Thus, the Supreme Court has never defined the scope of the exclusion found in section 1 of the FAA and has never ruled whether an arbitration agreement contained in an ordinary employment contract is enforceable.

The dissent in Gilmer quoted extensively from the legislative history of the FAA. 62 The dissent explained that the Act was originally drafted to overturn a common-law rule which precluded enforcement of agreements to arbitrate in commercial contracts. 63 The dissent noted that at the hearing related to the proposed bill, the chairman of the American Bar Association committee responsible for drafting the bill told senators that the bill “is not intended [to] be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it.” 64

The dissent further quoted the following statement made by Senator Walsh at the same hearing:

The trouble about the matter is that a great many of these contracts that are entered into are really not [voluntary] things at all. Take an insurance policy; there is a blank in it. The agent has no power at all to decide it. Either

58. The FAA was originally enacted in 1925 as 43 Stat. 883, and then was reenacted and codified in 1947 beginning at 9 U.S.C.A. § 1. See Gilmer, 500 U.S. at 24.
59. Gilmer, 500 U.S. at 25, n.2.
60. Id.
61. Id.
62. Id. at 39 (Stevens, J., dissenting).
63. Id. See also Southland Corp. v. Keating, 465 U.S. 1, 14 (1984) (“The problems Congress faced [when passing the Act] were therefore twofold: the old common-law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements.”).
64. Gilmer, 500 U.S. at 39 (Stevens, J., dissenting) (quoting Hearing on S4213 and S4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess. 9 (1923)).
MANDATORY ARBITRATION

you can make that contract or you can not make any contract. It is the same with a good many contracts of employment. A man says, 'These are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all. 65

The quoted legislative history of the FAA thus itself supports the conclusion that the FAA should not apply to employment contracts and that forced arbitration of employment discrimination disputes is not to be sanctioned by the courts.

Since the issue has not been explicitly resolved by the Supreme Court, one might turn to a study of court of appeals cases for further elucidation. A review of court of appeals cases, however, does not provide a consistent answer to whether all employment contracts are excluded from coverage under the FAA or whether the exclusion applies to a narrower category of employment contracts.

B. Court of Appeals Precedent

Several circuits have interpreted the FAA exclusion for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" 66 as being limited to contracts of employment of workers actively employed in the transportation industries. In Miller Brewing Co. v. Brewery Workers Local Union No. 9, 67 the Miller Brewing Company brought suit to set aside an arbitrator's award with respect to a collective bargaining agreement's hiring preference for employees who were laid off by a different employer in a multi-employer bargaining unit. 68 In considering the mandates of the FAA, the Seventh Circuit held that "the Act's exclusion of 'contracts of employment of . . . workers engaged in foreign or interstate commerce,' 9 U.S.C. § 1, is inapplicable; it . . . [is] limited to workers employed in the transportation industries." 69 The court thus found that the arbitration provision in question did not fall outside the purview of the FAA.

Similarly, in Erving v. Virginia Squires Basketball Club, 70 the Second Circuit found that the Federal Arbitration Act was applicable to an arbitration provision contained in a basketball player's contract with a profes-

65. Id.
67. 739 F.2d 1159 (7th Cir. 1984), cert. denied, 469 U.S. 1160 (1985).
68. Id. at 1161-62.
69. Id. at 1162. See also Pietro Scalzitti Co. v. International Union of Operating Engineers, Local No. 150, 351 F.2d 576, 580 (7th Cir. 1965) (affirming lower court's granting of the union's motion to stay the proceedings pending arbitration) ("The terms 'foreign or interstate commerce,' as used in the exemption, were not intended to apply to collective bargaining agreements similar to the one . . . in the instant case.").
70. 468 F.2d 1064 (2d Cir. 1972).
essional club. Consequently, the court held that Erving’s claim for damages for alleged concealment and false representations, which induced him to enter into the contract, were subject to arbitration. The court explained that “the exclusionary clause in Section 1 applied only to those actually in the transportation industry. Erving clearly is not involved in the transportation industry.”

The First Circuit has issued contradictory decisions regarding the applicability of the FAA to employment contracts. In a 1974 case, *Dickstein v. duPont,* the First Circuit adhered to a narrow view of the FAA’s exclusionary clause, commenting on the appellant’s contentions as follows: Equally unavailing is appellant’s argument that he was a worker “engaged in foreign or interstate commerce” within the exceptions to the Arbitration Act set out in section 1. 9 U.S.C. § 1. Courts have generally limited this exception to employees, unlike appellant, involved in, or closely related to, the actual movement of goods in interstate commerce.

More recently, however, the First Circuit stated that “the USAA, by its terms, is inapplicable to most labor contracts, see 9 U.S.C. § 1.”

The majority of circuits which have considered the FAA’s exclusionary clause have held that its scope is broad. The Sixth Circuit, for exam-

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71. Id. at 1068-69.
72. Id. at 1066-67, 1069.
73. Id. at 1069. *See also* Signal-Stat Corp. v. Local 475, United Electrical Radio & Machine Workers of America, 235 F.2d 298 (2d Cir. 1956), cert. denied, 354 U.S. 911 (1957) (granting the union a stay of the action pending arbitration pursuant to the collective bargaining agreement, thereby holding that employees of a manufacturer of automotive electrical equipment were not engaged in commerce within the meaning of the FAA’s exclusionary provision).
74. 443 F.2d 783, 788 (1st Cir. 1971) (affirming the district court’s order staying an action for breach of contract pending arbitration).
75. Id. at 785.
76. When it was first enacted in 1925, the Act was named the United States Arbitration Act (USAA). When the Act was codified in 1947 beginning at 9 U.S.C.A. § 1, it was not officially renamed, but has since been customarily known as the Federal Arbitration Act. The USAA of 1925 is thus simply an earlier name for the FAA. *II Ian R. MacNeil et al., Federal Arbitration Law § 5.3.1 (1994).*
77. Posadas de Puerto Rico Associates, Inc. v. Asociacion de Empleados, 873 F.2d 479, 482 (1st Cir. 1989) (holding that Puerto Rico’s 30-day time bar rather than the USAA’s 90-day limitation period was applicable to an employer’s suit under the Labor Management Relations Act to set aside an arbitration award). *See also* Derwin v. General Dynamics Corp., 719 F.2d 484, 488 (1st Cir. 1983) (holding that the FAA’s one year limitation period was not applicable to a union’s suit to confirm an arbitration award).
78. Courts evaluating the validity of arbitrating employment discrimination claims have not focused upon the question of whether the employees at issue are “engaged in foreign or interstate commerce” in a literal sense. The phrase “engaged in foreign or interstate commerce,” contained in FAA § 1 is generally perceived as synonymous with the phrase “involving commerce” in FAA § 2. *II Ian R. MacNeil et al., Federal Arbitration Law § 11.2.2, citing International Union United Furniture Workers of America v. Colonial Hardwood Flooring Co., 168 F.2d 33 (4th Cir. 1944); Gatliff Coal Co. v. Cox 142 F.2d 876 (6th Cir. 1944). The phrase “involving commerce” has been very broadly construed by the courts. The Tenth Circuit has stated that “[t]he requirement that the underlying transaction involve commerce is to be broadly construed so as to be coextensive with congressional power to regulate under the Commerce Clause.” Foster v. Turley, 808 F.2d 38, 40 (10th Cir. 1986). The Ninth Circuit has held that the FAA applied to a contract “[i]n light of the evidence that the construction of the
ple, in Willis v. Dean Witter Reynolds, Inc., made the following determination:

Based upon Congress's determination in Title VII that any employer with 15 or more employees necessarily implicates interstate commerce, any claims implicating employment contracts with employers subject to regulation under Title VII or the ADEA would necessarily implicate interstate commerce. Thus, all employment contracts with employers subject to regulation under Title VII—or other similar acts of Congress designed to protect employees from unlawful discrimination and enacted pursuant to Congress's commerce power—fall within the exclusion of "contracts of employment" under § 1 of the FAA.

Likewise, the Third Circuit in Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, stated that "'contracts of employment' are explicitly exempted from the FAA." The Ninth Circuit in Herring v. Delta Air Lines, Inc., a case which involved a labor dispute between pilots, their union, and Delta Airlines, also made the general statement that the FAA "specifi-

United States v. Nuemann Caribbean International, Ltd., 750 F.2d 1422, 1426 (9th Cir. 1985). Thus, a literal reading of the exclusion delineated in FAA § 1 would support the proposition that virtually all employment contracts are eliminated from FAA coverage.

A district court in Mississippi recently engaged in a thorough analysis of the issue. In relevant part, it provided the following explanation:

"Interstate commerce at the time the FAA was enacted was generally understood to be limited to maritime and railroad transactions. Thus, when Congress excluded employment contracts of maritime and railroad workers, it resulted in voiding the power to enforce arbitration clauses of most employment contracts. With the addition of the catch-all phrase "or any other class of worker engaged in foreign or interstate commerce," all employment contracts would have been excluded from the arbitration enforcement power of the FAA. Interpreting the exclusion phrase "engaging in commerce" as broadly as the empowering phrase "involving commerce" does not result in neutralizing the FAA, as some courts have argued. What results is a mechanism for enforcement of arbitration clauses which are in any contract involving commerce, except for arbitration clauses which appear in employment contracts.

Arce v. Cotton Club of Greenville, Inc., 883 F.Supp. 117, 123 (N.D. Miss. 1995). Based on this analysis the court concluded that arbitration clauses contained in employment agreements are excluded from the enforcement power of the FAA and denied defendant's motion to stay the proceedings pending arbitration. Id.

79. 948 F.2d 305 (6th Cir. 1991).
80. Id. at 311. The Willis case, like Gilmer, involved a discrimination complaint brought by a registered securities representative who had signed a securities registration form containing a mandatory arbitration clause. Thus, despite the language quoted above, the court held that the complainant's sex discrimination claims against her brokerage firm were subject to arbitration pursuant to the securities registration form which she had executed. 948 F.2d at 312. See also Occidental Chemical v. International Chemical Workers Union, 853 F.2d 1310, 1315 (6th Cir. 1988) (recognizing that the FAA excludes labor contracts from its parameters).
81. 7 F.3d 1110 (3d Cir. 1993).
82. Id. at 1119. The case, however, did not arise in an employment context, and thus the court reversed the lower court's denial of defendants' motion to compel arbitration of claims brought by pension plan trustees against a broker, its financial consultant, and sister corporation for violations of ERISA. Id. at 1122. But see Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers, 207 F.2d 450, 452-453 (3d Cir. 1953) (limiting the FAA's exclusionary clause to employees involved in or closely related to the actual movement of goods in interstate commerce).
83. 894 F.2d 1020 (9th Cir.), cert. denied, 494 U.S. 1016 (1990).
call) excludes from coverage 'contracts of employment.' Therefore, the appellants' reliance upon the FAA is misplaced.\footnote{Id. at 1023.} Although the employees in \textit{Herring} were obviously involved in the transportation industry and thus would fall within the FAA’s exclusionary clause even under a narrow interpretation of its terms, it is noteworthy that the court did not limit itself to such a ruling, but rather, explicitly construed the provision to exclude all contracts of employment.

It is arguable that collective bargaining agreements containing arbitration clauses are excluded from coverage under the FAA because, unlike other contracts of employment, they are governed by section 301(a) of the Labor Management Relations Act,\footnote{29 U.S.C.A. § 185(a) (1978) (enacted in 1947, while the FAA was enacted in 1925). The provision reads as follows:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.} which superseded the FAA. In \textit{Textile Workers Union of America v. Lincoln Mills of Alabama},\footnote{353 U.S. 448 (1957).} the Supreme Court held that in enacting section 301, "Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common-law rule . . . against enforcement of executory agreements to arbitrate."\footnote{Id. at 456.} The Court thus found that section 301(a) required that agreements to arbitrate future disputes arising under collective bargaining agreements be specifically enforced by the federal courts. Since the Supreme Court made no mention of the FAA in its decision, one may read the \textit{Lincoln Mills} opinion as suggesting that the FAA does not govern collective bargaining arbitration. Based on this decision, a distinction could be made between arbitration provisions contained in collective bargaining agreements, which should be excluded from FAA coverage, and arbitration policies contained in other employment contracts, which have not been specifically addressed by the Supreme Court and thus should remain within the scope of the FAA.

The language of the FAA, however, provides no basis for differentiating between collective bargaining agreements and other employment contracts. It is therefore arguable that if collective bargaining agreements in general are excluded, then the FAA is inapplicable to all employment contracts. Under this theory, the fact that collective bargaining arbitration is enforceable under a different statutory provision is irrelevant to an interpretation of the FAA’s section 1 exclusion. The courts of appeal which have considered the issue of collective bargaining arbitration generally have not
indicated in their decisions that collective bargaining agreements are distinguishable from other employment contracts under section 1 of the FAA.

In Domino Sugar v. Sugar Workers Local 392, the Fourth Circuit held that the Federal Arbitration Act does not apply to disputes stemming from collective bargaining agreements. The court quoted section 1 of the FAA as stating that nothing therein "contained shall apply to contracts of employment of . . . any . . . class of workers engaged in interstate commerce." Thus, the court rejected the narrower interpretation of the provision, which would limit the exclusion to employment contracts of workers actually engaged in the movement of goods. The court made no reference to the Labor Management Relations Act and thus did not rationalize its decision by stating that collective bargaining arbitration is enforceable under a different statute. Similarly, the Eleventh Circuit has held that "collective bargaining agreements are 'contracts of employment' within the meaning of the exclusion." 92

In United Food & Com. Workers Local 7R v. Safeway, the Tenth Circuit held that the FAA is inapplicable to labor arbitration and consequently that an individual was not entitled to seek confirmation and enforcement under the FAA of an arbitrator's award. Like the Fourth Circuit, the Tenth Circuit represented that "[t]he Arbitration Act expressly excludes from its coverage 'contracts of employment of . . . workers engaged in foreign or interstate commerce.'" The court noted that the Supreme Court had itself stated in United Paperworkers Int'l Union v. Misco, Inc., that the FAA does not apply to labor arbitration. Although the Misco decision was issued before Gilmer, it has never been overruled by the Supreme Court, nor should it be affected by the Gilmer decision, since, as discussed above, Gilmer did not involve a contract between an employer and an employee.

88. 10 F.3d 1064 (4th Cir. 1993).
89. Id. at 1067 (citing 9 U.S.C.A. § 1).
90. Id.
91. See also Sine v. Local No. 992 International Brotherhood of Teamsters, 644 F.2d 997, 1002 (4th Cir. 1981), cert. denied, 454 U.S. 965 (United States Arbitration Act does not apply to actions concerning collective bargaining agreements); United Electrical, Radio & Machine Workers of America v. Miller Metal Products, 215 F.2d 221, 224 (4th Cir. 1954) (denying the defendants' motion to stay further proceedings pending completion of arbitration, stating that section 1 of the USAA excluded contracts of employment of employees who produced goods for commerce as well as workers who transported such goods).
93. 889 F.2d 940 (10th Cir. 1989).
94. Id. at 943-44.
95. Id.
97. Id. at 40, n.9 ("The Arbitration Act does not apply to 'contracts of employment of . . . workers engaged in foreign or interstate commerce.'").
The Fifth Circuit has never explicitly addressed the issue of whether employment contracts are excluded from the mandate of the FAA. In Alford v. Dean Witter Reynolds, Inc., the court held an arbitration clause contained in a stockbroker's contract with a securities exchange to be enforceable under the FAA. However, the court emphasized in a footnote that the "arbitration clause was contained in the employee's contract with a securities exchange, not with the employer." The decision further cautioned that "courts should be mindful of this potential issue in future cases." The careful treatment and characterization of the contract in Alford implies that, if faced with the issue, the Fifth Circuit will likely follow the majority of other circuits in holding that employment contracts are excluded from coverage under the FAA and that arbitration agreements contained therein are not necessarily enforceable.

A review of the case law discussed above reveals that the meaning of the Federal Arbitration Act’s exclusionary provision is crucial to resolution of the question of whether mandatory arbitration agreements which are unilaterally imposed by employers are to be enforced by the courts. If employment contracts are not generally excluded from coverage under the FAA, the courts are bound by the statute’s directive that contractual arbitration agreements are presumed "valid, irrevocable, and enforceable." It is only if arbitration provisions contained in employment contracts are excluded from coverage under the FAA that courts can be free to evaluate such provisions on a case by case basis. Both the legislative history of the FAA and the majority of courts which have interpreted its exclusionary provision support the proposition that all employment contracts fall outside the scope of the Act’s coverage.

98. 939 F.2d 228 (5th Cir. 1991).
99. Id. at 229-230.
100. Id. at 230. See also Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir. 1992) (citing the earlier decision in which "this Court . . . already held . . . that the securities registration application containing the arbitration agreement was a contract between Alford and the securities exchanges, and not a contract with her employer." On this basis the court refused to reconsider the issue).
101. Alford, 939 F.2d at 230. See also Williams v. Cigna Financial Advisors Inc., 56 F.3d 656 (5th Cir. 1995). The case involved a broker with Cigna Financial Advisors Inc. who registered with the National Association of Securities Dealers and signed a standard "U-4" contract, containing an arbitration clause. When he was terminated in December of 1993, he brought an age discrimination claim, which CIGNA attempted to force into arbitration. The Fifth Circuit held that Williams' dispute was not exempt from arbitration under section 1 of the FAA "because the agreement to arbitrate is not contained in a contract for employment but in Williams' U-4 Registration." Id. at 660.
MANDATORY ARBITRATION

V

MANDATORY ARBITRATION POLICIES UNILATERALLY IMPOSED BY EMPLOYERS UPON EMPLOYEES SHOULD NOT BE ENFORCEABLE UNDER TRADITIONAL CONTRACT LAW

A. The Public Policy Defense

Compulsory arbitration policies are subject to challenge under several principles of common law contracts doctrine. The public policy defense arises in the arbitration context when one party contends that an agreement to arbitrate is unenforceable because of a legislative or judicial policy requiring the dispute to be litigated in court or mandating that the enforceability of contracts to arbitrate such a dispute be otherwise limited. The public policy defense is most often used where Congress or a state legislature has created statutory rights benefiting one party, which arguably limit the ability to arbitrate disputes relating to those rights.

Public policy considerations militate against the enforceability of involuntary arbitration programs governing employment discrimination disputes. The right to be free of discrimination in the workplace is a right created by statute. The relevant statutes create private rights of action and access to a judicial forum for victims of discrimination. These statutory rights should not be curtailed by a coercive, unilaterally imposed mandatory arbitration policy.

The Gilmer decision has been perceived by some as precluding challenge to the mandatory arbitration of employment discrimination claims because it held that a security broker’s age discrimination claim was subject to compulsory arbitration. The Gilmer decision was based upon a claim brought under the Age Discrimination in Employment Act (ADEA). The ADEA contains no provision addressing the arbitrability of ADEA claims and thus does not articulate Congressional intent regarding arbitration of such disputes.

Two other civil rights statutes do contain sections which address the issue of arbitration. Section 118 of the Civil Rights Act of 1991 encourages legitimate alternative dispute resolution mechanisms by providing as follows:

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, concilia-

104. Id.
tion, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title. 108

Coercive alternative dispute resolution regimens, however, do not comport with the statutory expectations. The legislative history of section 118 discloses that Congress intended to encourage only alternative dispute mechanisms that were voluntarily adopted by all parties. Senator Robert Dole interpreted section 118 as encouraging alternative dispute resolution “where the parties knowingly and voluntarily elect to use these methods.” 109

Likewise, Representative Don Edwards made the following statement: This proviso is intended to supplement, not supplant, remedies provided by Title VII and is not to be used to preclude rights and remedies that would otherwise be available. This section is intended to be consistent with decisions such as Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), which protect employees from being required to agree in advance to arbitrate disputes under Title VII and to refrain from exercising their right to seek relief under Title VII itself. This section contemplates the use of voluntary arbitration to resolve specific disputes after they have arisen, not coercive attempts to force employees in advance to forego statutory rights. No approval whatsoever is intended of the Supreme Court’s recent decision in Gilbert v. Interstate Johnson Lane Corp., 111 S.Ct. 1647 (1991), or any application or extension of it to Title VII. 110

It is interesting to note that the House Committee on Education and Labor specifically rejected a Republican substitute provision which would have encouraged the use of alternative dispute resolution mechanisms “in place of judicial resolution” rather than as a supplement to the rights and remedies established by Title VII. 111 The Committee was troubled by the fact that the Republican proposal would enable employers to “refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints.” 112 In rejecting this version of the bill, the House Committee on Education and Labor stated the following:

[s]uch a rule would fly in the face of Supreme Court decisions holding that workers have the right to go to court, rather than being forced into compulsory arbitration, to resolve important statutory and constitutional rights, including employment opportunity rights. See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); McDonald v. City of West Branch, 466 U.S.C.A. § 1981 note (1994).

109. 137 CONG. REC. S15472, S15478 (daily ed. October 30, 1991) (statement of Senator Dole, representing the views of the Bush administration, Senator Dole, and 13 other Senators) (emphasis added). Senator Dole’s analysis did not, however, discourage alternative means of dispute resolution as a whole, for “[i]n light of the litigation crisis . . . and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums.” Id.
112. Id.
U.S. 284 (1984). American workers should not be forced to choose between their jobs and their civil rights. 113

Thus, although the Civil Rights Act of 1991 encourages the use of alternative dispute resolution, Congress did not intend to establish a fiat that arbitration be used whether or not employees have knowingly and voluntarily agreed to it.

Like the Civil Rights Act of 1991, the Americans with Disabilities Act 114 (ADA) contains a provision regarding alternative dispute resolution proceedings. Section 513 of the ADA states 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 this chapter.” 115

The legislative history of this provision elucidates that it too was meant to encourage only voluntary means of alternative dispute resolution. The House Conference Committee Report explains that “[i]t is the intent of the conferees that the use of these alternative dispute resolution procedures is completely voluntary. Under no condition would an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their rights under the ADA.” 116 Similarly, the House Judiciary Committee Report contains the following explication:

The Committee wishes to emphasize, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by this Act. 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 this Act. ... The Committee believes that the approach articulated by the Supreme Court in Alexander v. Gardner-Denver Co. 117 applies equally to the ADA and does not intend that the inclusion of Section 513 be used to preclude rights and remedies that would otherwise be available to persons with disabilities. 118

The legislative histories of the provisions which address the arbitrability of employment discrimination claims reveal that Congress did not intend to preclude access to a judicial forum by sanctioning voluntary agreements to arbitrate such disputes. Had the Gilmer case involved a claim brought under the Civil Rights Act or the ADA and had the Court had

113. Id.
the opportunity to study the legislative histories cited above, it may have reached a different decision. The public policy defense, based on Congressional intent, provides a compelling argument against the enforcement of compulsory arbitration policies which include within their scope employment discrimination disputes.

In Prudential Ins. Co. of America v. Lai, the Ninth Circuit vacated a lower court's decision compelling arbitration with respect to the plaintiffs' Title VII claims and ruled that the arbitration agreement in question was not binding since the plaintiffs had not knowingly agreed to submit disputes to arbitration. The plaintiffs had signed a Securities Industry Registration form ("U-4 form") stating that "I agree to arbitrate any dispute, claim or controversy that may arise between me or my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or bylaws of the organizations with which I register." The plaintiffs eventually joined the National Association of Securities Dealers (NASD), which requires that disputes "arising in connection with the business" of its members be arbitrated, though the women were never given copies of the NASD Manual, which contained the terms of the arbitration agreement.

The Ninth Circuit quoted the legislative history of section 118 of the Civil Rights Act of 1991, which notes that arbitration is to be encouraged only "where the parties knowingly and voluntarily elect to use these methods." The court found that the "plaintiffs could not have understood that in signing . . . [the U-4 form], they were agreeing to arbitrate sexual discrimination suits." The Ninth Circuit held that because the plaintiffs did not knowingly contract to forego their Title VII remedies in favor of arbitration, they could not be bound by the arbitration "agreement."

Since the Ninth Circuit has already refused to enforce an arbitration provision to which the complaining parties did not knowingly agree, it is likely that this circuit, relying on the same legislative history, would also invalidate an arbitration policy to which employees did not voluntarily agree. The Prudential case thus sets an important precedent in the battle against coercive arbitration policies.

B. Duress and Unconscionability

A unilaterally imposed compulsory arbitration policy is also subject to challenge under the doctrines of duress and unconscionability. "The re-
quirements for a showing of duress by threat can be grouped under four headings. First, there must be a threat. Second, the threat must be improper. Third, the threat must induce the victim's manifestation of assent. Fourth, it must be sufficiently grave to justify the victim's assent. 126

Employees who are threatened with termination if they fail to agree prospectively to the arbitration of all claims against their employer, face an improper threat in light of the FAA's section 1 exemption and the legislative history of civil rights legislation, both of which, as discussed above, contravene the enforceability of mandatory arbitration agreements. Moreover, the threat of unemployment in many cases will induce employees to agree to compulsory arbitration regardless of their opposition to the policy and thus will constitute duress. In the Gilmer decision, the Supreme Court urged that "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract." 127 The Court noted that Gilmer was well versed in the business world. 128 By contrast, most employees, such as the medical technicians employed by ROID, are not sophisticated business people who are involved in business negotiations on a daily basis. When threatened with loss of their jobs, such employees or applicants for employment may acquiesce and sign agreements to utilize arbitration simply to avoid adverse consequences, including immediate job loss or harassment by management.

The related doctrine of unconscionability "has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." 129 When employees are forced to choose between signing an arbitration agreement and losing their jobs, they are not faced with any meaningful choice regarding arbitration. Moreover, an employer who unilaterally implements an arbitration policy is free to dictate the terms of arbitration and to establish arbitration procedures which greatly disadvantage employees.

In Gilmer, the Court noted that the rules applicable to Gilmer's arbitration agreement provided numerous safeguards against biased arbitration panels. 130 The rules required, for example, that the parties be informed of each arbitrator's work history and be allowed to initiate further inquiries

126. 1 E.A. FARNsworth, Contracts § 4.16 at 257 (1990).
128. Id.
129. 1 E.A. FARNsworth, Contracts § 4.28 at 314. See also Restatement (Second) of Contracts § 208 cmt. d (1982): [G]ross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.
into the arbitrators' backgrounds. Each party was allowed one peremptory challenge and unlimited challenges for cause. In addition, the arbitrators were required to disclose any circumstances which might impede their objectivity and impartiality. Moreover, all arbitration decisions were to be made public and rendered in writing, including a specification of the names of the parties, a summary of the issues in controversy, and a description of the award issued. By detailing the features of the arbitration policy it was evaluating, the Supreme Court implicitly suggested that a policy which did not contain similar guarantees of fairness may not be considered as favorably and may be vulnerable to unconscionability challenges.

One indication of whether an arbitration contract is unconscionable may be the presence or absence of consideration. The Restatement (Second) of Contracts provides that “the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.” Unilaterally imposed arbitration policies, such as that implemented by ROID, typically do not provide employees with consideration for signing the policy. The employee is not paid additional salary or given extra benefits for agreeing prospectively to arbitrate all disputes which might arise.

It is arguable that under traditional contract principles, a distinction should be made between mandatory arbitration policies that are contained in the initial employment contract signed by an employee at the commencement of his or her employment, and those which are implemented at some later time. Presumably, if an employee signs an arbitration agreement contained in the employment contract, the employee is receiving the benefit of employment itself as consideration for signing the contract. By contrast, an employee who is forced to sign an arbitration agreement at some later time during his or her tenure, receives no additional consideration in return for the promise to arbitrate disputes. The Restatement (Second) of Contracts establishes that “[p]erformance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration.” Thus, continued employment should not be deemed to constitute consideration for an employee’s agreement to sign a separate compulsory arbitration policy. The position was already promised to the employee at the commencement of his or her employment and, assuming that an employment contract exists, the employer has a legal duty to allow the employee to retain his or her job for the contract period barring justifiable reasons for termination.

131. Id.
132. Id.
133. Id.
134. Id. at 31-32.
Thus, some courts may deem it acceptable for an employer to unilaterally impose a mandatory alternative dispute resolution policy on employees at the time they are hired, if the courts are persuaded that employees received the job as consideration for agreeing to arbitrate all future disputes. However, courts may look less favorably upon the implementation of a coercive policy at a later time, when the employee already has a vested interest in the job and certain expectations concerning his or her working conditions. If forced to sign an arbitration policy implemented during his or her tenure, the employee would receive no separate consideration for waiving the right to use a traditional judicial forum for purposes of dispute resolution.

This distinction, however, is not supported by the statutory language or the legislative histories of the FAA and the arbitration provisions contained in the federal civil rights statutes. Nothing in these sources establishes a basis for determining the validity of a coercive arbitration policy based upon the time at which it was signed. Nevertheless, under contract law principles, it may be easier to challenge a compulsory arbitration policy which was established during an employee's tenure than one which was imposed before the employee initiated his or her employment.

VI

CONCLUSION

The Gilmer decision has been perceived by some as precluding all challenges to mandatory arbitration policies which are implemented by employers in the employment context. It must be recalled, however, that the Gilmer case involved a third party agreement between a registered securities agent and the New York Stock Exchange. The Supreme Court explicitly eschewed any effort to construe the scope of the FAA's exclusionary provision and provided no comment regarding the implications of its decision upon direct employment contracts.

A December 1994 report issued by the Commission on the Future of Worker-Management Relations, appointed by Secretary of Labor Robert Reich and Secretary of Commerce Ronald H. Brown, concluded that mandatory arbitration policies should not be enforceable even if they are established as part of the initial employment contract. The report makes the following recommendation:

Binding arbitration agreements should not be enforceable as a condition of employment. The Commission believes the courts should interpret the Federal Arbitration Act in this fashion. If they fail to do so, Congress should pass legislation making it clear that any choice between available methods

137. 500 U.S. at 23.
138. Id. at 25 n.2.
for enforcing statutory employment rights should be left to the individual who feels wronged rather than dictated by his or her employment contract.140

This article does not suggest that employers should never implement alternative dispute resolution policies. The advantages of alternative dispute resolution mechanisms, namely the enhancement of efficiency, the expediting of dispute resolution, and the reduction in the overall cost of the proceedings, may often be appealing to both the employer and the employee. Alternative dispute resolution programs are thus a commendable option for work-related disputes so long as they are not coercive.

Employers are unlikely to be challenged if they institute a policy by which all disputes are initially mediated at the employer’s expense. Since mediation is by its nature non-binding, no employee rights would be sacrificed by an early attempt at settlement with the assistance of a professional facilitator. Claims which are not settled would simply be pursued via ordinary litigation. Nevertheless, a mediation program may save employers significant long-term costs, since disputes which are easily resolvable would be eliminated quickly, without prolonged litigation.

Similarly, arbitration programs which are voluntarily chosen by employees are not unlawful. Although the term “voluntary” is somewhat malleable, employers might be able to prove voluntariness by showing that employees were provided with literature regarding the potential advantages and disadvantages of the arbitration procedures. Other indicia of voluntariness include allowing employees ample time to consult attorneys or other advisors with respect to their choice, and insuring that employees who elect not to pursue arbitration suffer no ill consequences as a result of their decision.

Employers would be well advised to offer employees the option of arbitration once they are informed of a particular dispute. Thus the employee could evaluate his or her case and determine whether arbitration was desirable in light of the particular matter at issue. Voluntariness may be more difficult to prove in the case of arbitration policies which require employees to waive access to the courts prospectively, with respect to all disputes which may arise in the course of their employment. However, if the employer is able to prove that employees were educated with respect to the pros and cons of arbitration and were given a meaningful choice as to whether they wished to agree to its utilization in all future claims they may have against their employer, the policy is likely to withstand scrutiny if challenged.141

140. Id.
141. It is the EEOC’s position, however, that regardless of any alternative dispute resolution program which might be implemented, employers cannot prevent employees from filing charges of discrimination with the EEOC or a state enforcement agency. Furthermore, according to the EEOC, the employer cannot hinder the government from investigating and prosecuting discrimination claims even
By contrast, the unilateral imposition of mandatory arbitration policies upon employees who are given no choice but to accept such policies if they wish to retain their jobs, vitiates many of the individual rights delineated in the employment discrimination statutes. These include the right of access to a federal or state court once administrative remedies have been exhausted and the right to trial by a presumably impartial judge or jury.\(^{142}\) The remedies and procedural protections available in arbitration proceedings may differ vastly from those available in state and federal courts.\(^{143}\) As one court has observed, "the results of arbitration by private and untrained 'judges' are distantly remote from the fair process procedurally followed and application of principled law found in the judicial process."\(^{144}\) These differences may be particularly significant in emotionally charged cases such as those involving claims of discrimination and civil rights violations.\(^{145}\) The statutory mandates of the civil rights laws and the public policy commitment to the protection of victims of discrimination are certainly no less important than society's enthusiasm for judicial economy and for the promotion of arbitration to that end.\(^{146}\) In our eagerness for speed and efficiency in the judicial system we must not default to a system of coercion and must not lose sight of the primary purpose of all dispute resolution mechanisms, that is, the promulgation of justice and equity.

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144. Stroh Container Co. v. Delphi Industries, Inc., 783 F.2d 743, 751 n.12 (8th Cir.), cert. denied, 476 U.S. 1141 (1986). The court further noted that "[n]o one ever deemed arbitration successful in labor conflicts because of its superior brand of justice." Id.
145. Prudential, 42 F.3d at 1305.
146. Id.