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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

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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

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I. INTRODUCTION

In *Gilmer v. Interstate / Johnson Lane Corp.* the Supreme Court enforced a mandatory arbitration clause in a securities registration application and barred the employee from seeking relief in federal court for his Age Discrimination in Employment Act ("ADEA") claim.¹ Since the Court's decision compelling arbitration of an employee's statutory claim, labor and employment lawyers have encouraged employers to include binding arbitration clauses covering all potential employer-employee claims in employment applications, handbooks, and collective bargaining agreements ("CBAs").² As one commentator wrote after the *Gilmer* decision, "[t]he only thing remaining is for employers to begin writing compulsory arbitration clauses into their employment contracts."³

By inserting these clauses, many lawyers fail or refuse to recognize that the Supreme Court distinguished *Gilmer* from its earlier decision in *Alexander v. Gardner-Denver Co.*⁴ In *Gardner-Denver*, the Court allowed an employee to litigate his claim that the employer violated Title VII of the Civil Rights Act of 1964 ("Title VII") in federal court even though the union's CBA contained a mandatory arbitration provision.⁵ The *Gilmer* Court distinguished *Gardner-Denver* on three issues,⁶ but lower courts appear to adhere only to the distinction based on the context of the agreement. Courts since *Gilmer* have tended to enforce arbitration clauses in individual employment contracts but not provisions contained in CBAs.⁷ The Fourth Circuit

1. See 500 U.S. 20, 26-35 (1991).

2. Potential claims include statutory discrimination claims such as those under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act, and the ADEA. See Margaret A. Jacobs, *Required Job-Bias Arbitration Stirs Critics*, WALL ST. J., June 22, 1994, at B5; see also Andrew W. Volin, *Recent Legal Developments in the Arbitration of Employment Claims*, DISP. RESOL. J., Summer 1997, at 16, 17 (advising employers, in light of *Gilmer*, to require binding arbitration for employee disputes).

3. R. Bales, *A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 HOUS. L. REV. 1864, 1912 (1994).

4. 415 U.S. 36 (1974).

5. See *id.* at 49.

6. The Court in *Gilmer* distinguished *Gardner-Denver* on the basis that: (1) *Gardner-Denver* did not address the issue of the enforceability of an arbitration clause but rather "the quite different issue [of] whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims;" (2) *Gardner-Denver* involved a mandatory arbitration provision in a CBA; while in *Gilmer*, the clause was included in an individual employment agreement; and (3) *Gilmer*, unlike *Gardner-Denver*, came under the Federal Arbitration Act of 1925. *Gilmer*, 500 U.S. at 35.

7. See *infra* Part II.E. This distinction is quite relevant since approximately 14% of all employees in the United States are now covered under CBAs. See Robert A. Ringler, *Gilmer and Compulsory Arbitration of Employment Claims in the Union Sector: Avoiding a "Distinction Without a Difference"*, 47 LAB. L. J. 147, 148 (1996).

in *Austin v. Owens-Brockway Glass Container, Inc.*,⁸ however, eliminated this difference just five years after *Gilmer*. It held that voluntary arbitration agreements are enforceable whether included in an employment contract or a CBA.⁹ The *Austin* decision, though, has not been widely adopted.¹⁰

With the distinctions between *Gilmer* and *Gardner-Denver* are dissolving and the legal precedent becoming increasingly uncertain, employers and their lawyers will be unsure of the appropriate action to take with respect to compulsory arbitration agreements.¹¹ This Note argues that employers should eliminate mandatory arbitration clauses from preemployment agreements. This argument, however, does not rely solely on legal precedent or predictions of the Supreme Court's next decision. Instead, this Note focuses on the negative effects of *Austin* found by lower courts when following *Austin's* precedent, recent Congressional action, and public initiatives by government organizations and private arbitration firms. This Note also introduces the perspective of a strategic human resources manager trying to determine the appropriate solution for employers.

This Note first analyzes the history of enforceability of mandatory arbitration clauses in employment agreements, examining the Federal Arbitration Act of 1925, Supreme Court history from

8. 78 F.3d 875, 885 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996).

9. *See id.*

10. *See infra* Part IV.A. The United States Supreme Court just granted certiorari in March, 1998 to review a Fourth Circuit decision that compelled arbitration under a CBA. *See Wright v. Universal Maritime Serv. Corp.*, No. 96-2850, 1997 WL 422869, at *1 (4th Cir. July 29, 1997), *cert. granted*, 118 S. Ct. 1162 (1998). In *Wright*, the Fourth Circuit followed its prior decision in *Austin* and held that a broad arbitration clause in a CBA does bind the employee to arbitrate his ADA claim instead of seeking redress in federal court. *See id.* at *2.

11. The United States Supreme Court has also granted certiorari from a decision of the United States Court of Appeals for the District of Columbia. The lower court, in *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415 (D.C. Cir.), *cert. granted*, 118 S. Ct. 554 (1997), held that a nonunion employee was not required to exhaust federally mandated arbitration provided by the union if he disputed the calculation of his agency fees. *See id.* at 1421. Under a prior Supreme Court decision in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), unions must offer an "impartial decisionmaker" to nonunion employees who wish to challenge the fee they are required to pay under an agency shop agreement. *See id.* at 310. *Miller* actually puts unions in the position to argue for mandatory arbitration. Under the union's argument, the law requires it to provide arbitration, and if the law allows the nonunion employee to bring a claim in court also, this would force the union to defend its agency fees in dual forums simultaneously.

Although *Miller* does not address a statutory claim and the arbitration is federally mandated and not by voluntary agreement, the decision by the *Miller* Court could provide some insight into its view of mandatory arbitration clauses. The court of appeals, in refusing to compel arbitration, held that it saw "no legal basis for forcing into arbitration a party who never agreed to put his dispute over federal law to such a process." *Miller*, 108 F.3d at 1421 (emphasis omitted). If the Supreme Court follows this reasoning, arbitration agreements between unions and employers in CBAs could not be enforced against individual employees, since the employee himself never waived his statutory rights.

Gardner-Denver to *Gilmer*, and decisions by lower courts since *Gilmer*. Part III studies the Fourth Circuit's opinion in *Austin* and its effect on cases decided by the few courts that have followed its reasoning. Part IV suggests how the law should proceed as the distinctions between *Gilmer* and *Gardner-Denver* begin to dissolve. In this section, the Note argues that legislative history, public rejection of mandatory arbitration agreements by government and private organizations, and a strategic human resources management perspective emphasize the need for voluntary agreements after the dispute arises and not preemployment agreements. Finally, this Note recommends that employers provide a grievance procedure that would allow the employee to discuss any problems that arise with a higher-ranking employee and, hopefully, resolve any conflict before incurring the necessary expenses and time required by litigation. If arbitration is not a viable option at this point, the employee should be allowed to bring his claim in federal court since federal statutes such as Title VII, the Americans with Disabilities Act ("ADA"), and the ADEA were implemented to "provide minimum substantive guarantees to individual workers."¹²

II. SUPREME COURT HISTORY ON ENFORCEABILITY OF MANDATORY ARBITRATION CLAUSES IN LABOR AND EMPLOYMENT AGREEMENTS

The Supreme Court's first opinion addressing compulsory arbitration in the employment context came in 1974 in *Alexander v. Gardner-Denver Co.*¹³ In this case, the Court refused to compel arbitration of an employee's Title VII claim despite a binding arbitration provision in the governing CBA.¹⁴ The Supreme Court, in the late 1980s, then issued a trilogy of opinions that allowed binding and final arbitration of statutory claims under the Sherman Act, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act ("RICO").¹⁵ In 1991, the Court issued its opinion in *Gilmer*, which held that an employee must follow the grievance procedures provided in his securities registration application to the New York Stock Exchange ("NYSE").¹⁶ Before examining these three

12. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 737 (1981).

13. 415 U.S. 36 (1974).

14. *See id.* at 47-49.

15. *See infra* Part II.C.

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

steps in the Supreme Court's history, the importance of the Federal Arbitration Act of 1925¹⁷ and the controversy that surrounds it should be examined.

A. *The Federal Arbitration Act of 1925*

In 1925 Congress enacted the Federal Arbitration Act ("FAA") to place arbitration agreements on equal ground with more accepted contractual agreements.¹⁸ For the FAA to apply, the arbitration agreement must first meet section 2 qualifications, namely that the transaction "involve commerce."¹⁹ Employers may satisfy the commerce requirement by showing that the employee's activities affect interstate or foreign commerce, the employee produces goods for interstate commerce, or the employee works in interstate commerce.²⁰ More recently, the Supreme Court held that the phrase "involving commerce" in section 2 is as broad as "affecting commerce" in the Commerce Clause of the Constitution.²¹

Although section 2 appears relatively clear, section 1 of the FAA produces special difficulty for arbitration agreements in employment contracts. Section 1 provides that "nothing herein contained shall apply to *contracts of employment* of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."²² The scope of the section 1 exclusion is of tremendous importance to individual employment arbitration. If construed broadly, the FAA will not apply to any employment contract. Alternatively, section 1 could be interpreted narrowly to exclude only contracts with transportation workers. In that case the FAA would apply to all employment contracts except those involving transportation workers.²³

17. 9 U.S.C. §§ 1-16 (1994).

18. See *Gilmer*, 500 U.S. at 24.

19. Section 2 of the FAA states:

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.

9 U.S.C. § 2 (emphasis added).

20. See *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 200-01 (1956).

21. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995).

22. 9 U.S.C. § 1 (emphasis added).

23. In deciding whether the worker is engaged in transportation work, at least one court has indicated that the focus is on the class of work and not on the actual activities of the worker. See *Rosen v. Transx Ltd.*, 816 F. Supp. 1364, 1371 (D. Minn. 1993) (holding that the FAA's interstate transportation exception applied even though the driver's employment may not have taken him across state boundaries).

The circuit courts usually interpret the exclusionary language of section 1 narrowly in light of the strong federal policy favoring arbitration. The First, Second, Third, Fifth, Seventh, Eighth and D.C. Circuits find the FAA applicable to employment contracts as long as the agreement does not include workers actively involved in the transportation industry.²⁴ Conversely, the Fourth Circuit interprets the section 1 employment contracts exclusion broadly and views the FAA as inapplicable to all types of employment contracts and not just those in the transportation industry.²⁵ The Fourth Circuit held that the term "interstate commerce" in section 1 should apply to employees engaged in any type of interstate commerce and not just to workers employed in the transportation industry.²⁶ The Sixth Circuit, meanwhile, appears to hold that individual employment contracts include the provisions of the FAA for employees personally engaged in the movement of goods in interstate commerce,²⁷ while CBAs are excluded from FAA coverage.²⁸ Finally, the Ninth Circuit has not decided the scope of section 1 of the FAA, but at least one district court in that circuit has held that the FAA does not apply to CBAs.²⁹ Unfortunately, the Supreme Court has yet to decide the scope of the FAA and employment contracts.³⁰

24. See *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835-37 (8th Cir. 1997); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 226-27 (3rd Cir.), *cert. denied*, 118 S. Ct. 299 (1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 357-58 (7th Cir.), *cert. denied*, 118 S. Ct. 295 (1997); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1470-72 (D.C. Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971).

25. See *United Elec., Radio & Mach. Workers v. Miller Metal Prods., Inc.*, 215 F.2d 221, 224 (4th Cir. 1954); see also *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 879 n.2 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996) (stating that the Fourth Circuit does not rely on the FAA as applying to CBAs).

26. See *United Elec., Radio & Mach. Workers*, 215 F.2d at 224.

27. See *Cosgrove v. Shearson Lehman Bros.*, No. 95-3432, 1997 WL 4783, at *2 (6th Cir. Jan. 6, 1997), *cert. denied*, 118 S. Ct. 169 (1997); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 601 (6th Cir. 1995).

28. See *Willis v. Dean Witter Roynolds, Inc.*, 943 F.2d 305, 311 (6th Cir. 1991) (noting that CBAs are contracts of employment within the meaning of section 1 of the FAA and thus excluded from coverage of the Act); see also *Gray v. Toshiba Am. Consumer Prods., Inc.*, 959 F. Supp. 805, 812 (M.D. Tenn. 1997) (allowing plaintiff's claim to go forward because the FAA is inapplicable to CBAs); *Jackson v. Quanex Corp.*, 889 F. Supp. 1007, 1010 (E.D. Mich. 1995) (following *Willis* and declaring that CBAs are excluded from provisions of the FAA). Neither district court recognized the recent Sixth Circuit decisions which held that employment contracts outside the transportation industry came under the FAA. See *supra* note 27.

29. See *Buckley v. Gallo Sales Co.*, 949 F. Supp. 737, 743 (N.D. Cal. 1996) (citing *Gardner-Denver* and finding that the FAA does not apply to CBAs).

30. The Court in *Gilmer* refused to decide the applicability of the FAA because the securities registration application was not an agreement between employer and employee. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991).

Although textualists and intentionalists would apply the FAA's exclusionary language in section 1 broadly to all employment contracts,³¹ the reach of the employment contract exception has been restrictive. As will be shown later, the general acceptance by most circuits that the FAA applies to employment agreements tends to erase one of the three differences between *Gardner-Denver* and *Gilmer*.³²

B. *Alexander v. Gardner-Denver Co. and Its Progeny*

In *Gardner-Denver*, the Supreme Court's first decision covering arbitration of statutory claims in the labor context, the Court held that a discharged employee who had previously arbitrated a contractual grievance pursuant to an arbitration clause in a CBA could still adjudicate his Title VII action even though it was based upon the same conduct involved in the arbitration.³³ After being terminated, the employee filed a claim for racial discrimination under the CBA's contractual nondiscrimination clause.³⁴ The grievance procedures subjected the employee to binding arbitration under a broad clause in the CBA, but the procedures did not explicitly address waiver of statutory claims.³⁵ Prior to the arbitration hearing, the employee also filed a Title VII complaint with the Equal Employment Opportunity Commission ("EEOC").³⁶ The arbitrator ruled that the employee had been discharged for "just cause,"³⁷ and the EEOC determined that no reasonable basis existed for the Title VII claim. The employee then decided to file a complaint in federal district court.³⁸

The Supreme Court held that the prior submission of the employee's claim to arbitration under the CBA did not foreclose his statutory right to trial under Title VII.³⁹ The Court reasoned that since Congress intended Title VII to make discrimination one of the nation's highest priorities, the employee's right to statutory relief

31. See Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259, 304 (arguing that the FAA's text allows a broad interpretation of the employment exclusion).

32. See *infra* note 80 and accompanying text.

33. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59-60 (1974).

34. See *id.* at 39.

35. See *id.* at 40-42 & n.3.

36. See *id.* at 42.

37. See *id.*

38. See *id.* at 43.

39. See *id.* at 47.

should not be forfeited because of an arbitration agreement between the employer and the employee's union.⁴⁰ Distinguishing between a statutory right related to collective activity, such as the right to strike, and a statutory "right to equal employment opportunities," the Court held that individual rights conferred by Title VII were not part of the collective-bargaining process because "waiver of these rights would defeat the paramount congressional purpose behind Title VII."⁴¹ The Court indicated that *Gardner-Denver* did not include a knowing and voluntary waiver.⁴² It emphasized this conclusion by stating that in "no event can the submission to arbitration of a claim under the nondiscrimination clause of a collective-bargaining agreement constitute a binding waiver with respect to an employee's rights under Title VII."⁴³ The Court reasoned that the employee's Title VII action asserted a separate statutory right independent of the arbitration process⁴⁴ and noted that it was reluctant to depend on the competence of arbitrators to apply public law concepts.⁴⁵

In 1981 and 1984, the Supreme Court affirmed the *Gardner-Denver* decision. In *Barrentine v. Arkansas-Best Freight Systems, Inc.*, the Supreme Court held that an employee's claims under the Fair Labor Standards Act ("FLSA") could be brought in federal court even though a grievance procedure existed in the governing CBA.⁴⁶ The Court followed its decision in *Gardner-Denver* and held that courts should defer to arbitral decisions for employment rights found in the CBA unless the employee's claim is based on statutory rights "designed to provide minimum substantive guarantees to individual workers."⁴⁷ The Court also noted three major concerns with arbitration of statutory claims by employees covered under a CBA. First, the Court argued that a union may not pursue zealously the employee's rights if vindication of those rights would not benefit the union membership as a whole.⁴⁸ Second, the Court again questioned

40. See *id.* at 47-49. "[F]inal responsibility for enforcement of Title VII is vested with federal courts." *Id.* at 44. "The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal." *Id.* at 56.

41. *Id.* at 51. The Court stated that the union's reciprocal promise not to strike is the "primary incentive" for employers to enter into arbitration agreements. *Id.* at 54.

42. See *id.* at 52 n.15.

43. *Id.*

44. See *id.* at 54.

45. See *id.* at 57 ("[T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land.").

46. See 450 U.S. 728, 745 (1981).

47. *Id.* at 737.

48. See *id.* at 742.

the competency of arbitrators to hear statutory claims that address significant public policy issues.⁴⁹ Finally, the Court noted that an arbitrator may not be authorized to provide the type of relief sought by the employee.⁵⁰

Similarly, in *McDonald v. City of West Branch*, the Supreme Court held that federal courts should not attach res judicata or collateral-estoppel effect to awards received through arbitration pursuant to terms of a CBA.⁵¹ In *McDonald*, a police officer filed a grievance under the CBA and lost.⁵² He then filed a section 1983 action alleging he was terminated for exercising various First Amendment rights.⁵³ The Court again followed *Gardner-Denver* and reiterated its concerns with the effects of allowing individual statutory claims to be compelled to arbitrate through terms of a CBA.⁵⁴

C. *Mitsubishi Trilogy of Arbitration Cases Addressing Statutory Claims*

In the late 1980s, the Supreme Court decided three cases that recognized statutory claims could be the subject of an arbitration agreement. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Supreme Court enforced an arbitration agreement involving a claim brought under the Sherman Act.⁵⁵ The Court held that if a party makes a bargain to arbitrate, "the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."⁵⁶ The Court reasoned that by submitting to arbitration, "a party does not forgo the substantive rights afforded by the statute, it only submits to their resolution in an arbitral, rather than a judicial, forum."⁵⁷ Following *Mitsubishi*, the Supreme Court also enforced arbitration agreements relating to claims brought pursuant to RICO and the Securities Exchange Act of 1934.⁵⁸

49. See *id.* at 743.

50. See *id.* at 744-45.

51. See 466 U.S. 284, 292 (1984).

52. See *id.* at 285-86.

53. See *id.* at 286.

54. See *id.* at 289-91.

55. See 473 U.S. 614, 640 (1985).

56. *Id.* at 628.

57. *Id.*

58. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 241-42 (1987) (holding that *Mitsubishi* supports the arbitration of RICO claims and finding nothing in RICO's text or legislative history that would preclude arbitration of such statutory claims); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 486 (1989) (holding that "resort to

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

In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court held for the first time that an agreement to arbitrate an employment discrimination claim was enforceable under the FAA, and the Court barred the employee from seeking relief in federal court.⁵⁹ The employer, Interstate/Johnson Lane Corporation ("Interstate"), had hired Robert Gilmer as Manager of Financial Services.⁶⁰ Gilmer registered as a securities representative with the NYSE.⁶¹ His registration application provided that he arbitrate "any dispute, claim or controversy" with his employer as required under the rules, constitutions, or bylaws of the NYSE.⁶² One of the NYSE's rules provided for arbitration of "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative."⁶³

In 1987, when Gilmer was sixty-two years old, Interstate terminated Gilmer's employment.⁶⁴ Gilmer filed a charge with the EEOC and brought suit in federal court alleging a violation of the ADEA.⁶⁵ Interstate responded with a motion to compel arbitration of the ADEA claim based on the arbitration agreement in his NYSE registration application.⁶⁶ Following the reasoning of the *Mitsubishi* trilogy,⁶⁷ the Supreme Court held that a claim under the ADEA was subject to arbitration.⁶⁸

The Court based its holding on three arguments and distinguished its decision in *Gardner-Denver* without overruling it. First, the Court held that in enacting the ADEA, Congress had not indicated an intention to preclude a waiver of the judicial forum for ADEA claims.⁶⁹ The Court found nothing in the text of the statute or its legislative history that specifically precluded arbitration.⁷⁰ Second,

the arbitration process does not inherently undermine any of the substantive rights afforded . . . under the Securities Act").

59. See 500 U.S. 20, 35 (1991).

60. See *id.* at 23.

61. See *id.*

62. *Id.*

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

64. See *id.*

65. See *id.* at 23-24.

66. See *id.* at 24.

67. See *supra* Part II.C.

68. See *Gilmer*, 500 U.S. at 35.

69. See *id.* at 29.

70. See *id.*

the Court rejected the plaintiff's challenges to the adequacy of the arbitration procedure.⁷¹ The Court noted that in the *Mitsubishi* trilogy it had refuted attacks on the arbitration process as being "far out of step" with the current endorsement of federal statutes favoring arbitration.⁷² Third, the Court refused to hold arbitration agreements relating to ADEA claims unenforceable due to "mere inequality in bargaining power" between the parties.⁷³ The Court, however, did note that an arbitration agreement could be revoked under normal contract principles of fraud or "overwhelming economic power."⁷⁴

In refusing to follow the *Gardner-Denver* precedent, the *Gilmer* Court recognized three distinctions. First, the Court noted that *Gardner-Denver* did not address the enforceability of an agreement to arbitrate statutory claims but rather addressed the issue of whether arbitration of contract-based claims precluded the adjudication of subsequent statutory claims.⁷⁵ Second, the arbitration in *Gardner-Denver* occurred in the context of a CBA where the claimants were represented by a union in arbitration proceedings.⁷⁶ Unlike *Gilmer*, the collective representative posed a potential disparity of interest with the individual employee he represented. Third, the Court noted that in contrast to *Gardner-Denver*, *Gilmer* was decided under the FAA, which reflected a liberal policy in favor of arbitration.⁷⁷

71. See *id.* at 30-32. The Court also pointed out the requirement under NYSE rules for all arbitration awards to be in writing, including the names of the parties. See *id.* at 31-32. This requirement, according to the Court, countered the argument that arbitration was insufficient in that it does not provide public knowledge of employers' discrimination policies. See *id.* at 31-32.

72. *Id.* at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1987)).

73. *Id.* at 33; see also *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 229 (3rd Cir.), *cert. denied*, 118 S. Ct. 299 (1997) (following *Gilmer* by holding that more than a disparity in bargaining power between employer and employee is needed to show that the agreement is not entered into willingly).

74. *Gilmer*, 500 U.S. at 33 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985)).

75. See *id.* at 35.

76. See *id.*

77. See *id.* In a footnote, the *Gilmer* Court noted that it did not have to decide whether the exclusion in section 1 of the FAA regarding "contracts of employment" applied under the facts of this case because the arbitration clause at issue was "in *Gilmer's* securities registration application, which is a contract with the securities exchanges, not with Interstate." *Id.* at 25 n.2. The Court stated that it would "leave for another day" the issue of whether an arbitration agreement contained in a standard employment contract or application would be enforceable. *Id.*

In the dissenting opinion, Justice Stevens argued that arbitration clauses in employment agreements are excluded from coverage under the FAA; thus, *Gilmer* should not be compelled to arbitrate his ADEA claim. See *id.* at 36 (Stevens, J., dissenting). Justice Stevens reviewed

*E. Lower Court Decisions Since Gilmer: Defining the Distinctions
Between Gardner-Denver and Gilmer*

Since *Gilmer*, many lower courts have struggled to distinguish it from *Gardner-Denver*.⁷⁸ While the *Gilmer* Court made three distinctions between the two cases,⁷⁹ lower courts tend to emphasize only the second difference: whether the arbitration clause is included in an individual employment agreement or a CBA.⁸⁰ Generally, lower courts have compelled arbitration of an employment statutory claim when the employee knowingly and voluntarily signed an individual agreement with the employer.⁸¹ Meanwhile, courts hesitate to enforce arbitration clauses included in CBAs.⁸²

Following *Gilmer*, circuit courts enforced mandatory arbitration clauses in securities registration applications. Decisions in the Fifth, Sixth, Tenth, and Eleventh Circuits have compelled arbitration of statutory claims where the clause was included in a securities registration application or similar form.⁸³ In these cases,

legislative history and congressional intent to determine that the FAA does not cover any employment contracts. *See id.* at 39-41 (Stevens, J., dissenting).

Gilmer has been criticized for avoiding the interpretation of section 1. *See, e.g.,* Stempel, *supra* note 31, at 276-77.

78. *See, e.g.,* Donna Meredith Matthews, Note, *Employment Law After Gilmer: Compulsory Arbitration of Statutory Antidiscrimination Rights*, 18 BERKELEY J. EMP. & LAB. L. 347, 366-67 (1997). The author notes five issues left unresolved after *Gilmer*: (1) whether the FAA applies to employment agreements; (2) whether the decision applies outside of the highly regulated securities market; (3) whether a pre-employment arbitration agreement could be considered a contract of adhesion; (4) what would be required to find the arbitral process unconscionable; and (5) what constitutes a valid waiver of an individual's statutory right to a judicial forum.

79. *See supra* notes 75-77 and accompanying text.

80. Compare *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 838 (8th Cir. 1997) (enforcing an arbitration clause in an individual contract) with *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996) (refusing to enforce an arbitration clause in a CBA), *cert. denied*, 117 S. Ct. 946 (1997). As noted earlier, only the Fourth Circuit excludes all employment agreements from the FAA. *See supra* notes 25-30 and accompanying text. Thus, the fact that *Gilmer* applied the FAA and *Gardner-Denver* did not cannot affect the outcome of cases except in the Fourth Circuit, which still excludes employment contracts from the provisions of the FAA.

81. *See, e.g., infra* note 85.

82. *See, e.g., infra* note 103.

83. *See Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1488 (10th Cir. 1994) (forcing arbitration, under the FAA, of a Title VII claim because of the employee's consent in a securities registration application); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1163 (5th Cir. 1992) (stating that an employee's Title VII claim was subject to a mandatory arbitration provision contained in a contract with the securities exchange); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 (11th Cir. 1992) (*per curiam*) (compelling arbitration under FAA of a Title VII claim after employee had signed an arbitration agreement in securities registration application); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 312 (6th Cir. 1991) (holding that discrimination claims were subject to an arbitration clause in a securities regulation form).

the lower courts relied on the precedent and similar facts of *Gilmer*. As in *Gilmer*, the circuit courts avoided the question of the exclusionary language of section 1 of the FAA. Instead the courts found the FAA applicable because the employee's agreement with the securities exchange was not an employment contract.⁸⁴

Most courts continue to expand *Gilmer* beyond securities registration applications to individual employee agreements where the employee knowingly and voluntarily signs an arbitration agreement. The Third, Eighth, Ninth, and D.C. Circuits have enforced arbitration agreements included in employment applications, handbooks and preemployment agreements.⁸⁵ The only courts that have refused to compel arbitration in an individual employment agreement focus on the requirement of knowing and voluntary consent by the employee.⁸⁶ The Ninth Circuit adopted a "knowing waiver" requirement to invalidate arbitration agreements in two separate cases. In *Prudential Insurance Co. of America v. Lai*, the court refused to enforce a mandatory arbitration clause because the agreement did not refer specifically to statutory claims or employment disputes.⁸⁷ The employees had to sign a securities registration application similar to *Gilmer*.⁸⁸ The employees then registered with the National Association of Securities Dealers ("NASD"), which required disputes "arising in connection with the business" of its

84. See *Metz*, 39 F.3d at 1488; see also *supra* note 77 (discussing the *Gilmer* Court's avoidance of this issue).

85. See *Patterson*, 113 F.3d at 833-34, 838 (requiring arbitration under the FAA of a Title VII claim after the employee had signed the back page of an employment handbook); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 224-25 (3d Cir.), *cert. denied*, 118 S. Ct. 299 (1997) (compelling arbitration under the FAA of a sexual harassment claim brought by an employee who had signed an arbitration agreement in her application and in a more detailed arbitration agreement after her employment); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1469 (D.C. Cir. 1997) (enforcing arbitration of Title VII claim where the employee had signed a preemployment arbitration agreement); *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1439 (9th Cir. 1994) (compelling arbitration of Title VII claim due to provision contained in employee handbook).

86. See *Renteria v. Prudential Ins. Co. of Am.*, 113 F.3d 1104, 1106-08 (9th Cir. 1997) (relying on *Lai*); *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994) (relying on *Gilmer*). In *Gilmer*, the Court noted that the employee was an experienced businessman who was not "coerced or defrauded" into signing the agreement. The Court also stated that "arbitration agreements are enforceable 'save upon such grounds as exist at law or in equity for the revocation of any contract.'" 500 U.S. at 33 (quoting 9 U.S.C. § 2 (1994)).

87. See 42 F.3d at 1305. See generally Christine K. Biretta, Comment, *Prudential Insurance Company of America v. Lai: The Beginning of the End for Mandatory Arbitration?*, 49 RUTGERS L. REV. 595 (1997) (arguing that *Lai* is the beginning of the end for mandatory arbitration and marks a return to *Gardner-Denver*).

88. See *Lai*, 42 F.3d at 1301.

members to be arbitrated.⁸⁹ Thus, the facts in *Lai* mirrored those in *Gilmer* except that the employee registered with the NASD instead of the NYSE, and the NASD used slightly different language in its arbitration agreement. Still, the Ninth Circuit refused to enforce the signed arbitration agreement because neither the employment contract nor the arbitration agreement gave adequate notice that the arbitration process covered Title VII claims.⁹⁰ The Court held that its "knowing waiver" requirement reflected public policy goals of Title VII, including protecting victims of sexual discrimination and harassment. These goals were at least as strong as the public policy favoring arbitration.⁹¹

The Ninth Circuit followed *Lai* in its subsequent decision in *Renteria v. Prudential Insurance Co. of America*.⁹² The only difference between the two cases was the language in the securities registration application.⁹³ The application signed by the plaintiff stated that the undersigned must arbitrate all disputes listed in the NASD code "as may be amended from time to time."⁹⁴ The court held that the "as amended" language "simply [did] not cure the flaw the *Lai* court found in the agreement to arbitrate."⁹⁵ Again, the court found that neither the employment contract nor the securities registration application expressly included employment disputes in the arbitration agreement.⁹⁶

The Ninth Circuit decisions imply that the court may have compelled arbitration if the agreement expressly included employment statutory claims. For example, the Sixth Circuit in *Cosgrove v. Shearson Lehman Brothers* enforced an arbitration clause in an employment application expressly covering labor disputes.⁹⁷ The court in *Cosgrove* distinguished *Lai* because in *Cosgrove*, the arbitration agreement expressly included language referring to employment disputes.⁹⁸

89. *See id.* The NYSE application required arbitration of "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative." *Gilmer*, 500 U.S. at 23.

90. *See Lai*, 42 F.3d at 1305.

91. *See id.*

92. 113 F.3d 1104 (9th Cir. 1997).

93. *See id.* at 1106.

94. *Id.*

95. *Id.* at 1107.

96. *See id.* at 1108.

97. No. 95-3432, 1997 WL 4783, at *2 (6th Cir. Jan. 6, 1997), *cert. denied*, 118 S. Ct. 169 (1997).

98. *Id.* The application included the following language: "I hereby agree that any controversy arising out of or in connection with my compensation, employment or termination of employment shall be submitted to arbitration . . ." *Id.* at *1.

Other courts have rejected *Lai*'s "knowing waiver" requirement as contrary to Supreme Court history and based on inadequate legislative history. In *Maye v. Smith Barney, Inc.*, the district court found that *Lai* relied too much on a committee report from the House of Representatives.⁹⁹ Instead, the *Maye* court interpreted the requirement of knowing consent consistently with the "duty to read" doctrine of contract law.¹⁰⁰ The court held that absent fraud or deception, under state law, a person who signs or accepts a written contract is conclusively presumed to know and to assent to the content of the contract.¹⁰¹

Thus, courts generally protect the freedom to contract between individual employees and their employers as long as the employer can show the employee knowingly and voluntarily consented to the arbitration agreement. The use of arbitration clauses in CBAs, however, has met a different fate in the majority of circuit courts. In *Gilmer*, the Supreme Court distinguished *Gardner-Denver* by noting that in *Gardner-Denver*, a tension existed between collective representation and individual statutory rights.¹⁰² In other words, the statutory rights that generally protect minority groups may not be available to those represented by a collective union. The Seventh, Eighth, Tenth and Eleventh Circuits have followed this distinction and held that a union-represented employee could not be forced to submit a statutory claim to arbitration under a provision in a CBA.¹⁰³ These courts found *Gardner-Denver* to be the controlling authority. For example, the court in *Harrison v. Eddy Potash, Inc.* refused to ignore the context in which an arbitration clause arose and distinguished *Gilmer* as applying only to individual employment contracts.¹⁰⁴ Furthermore, Judge Posner in *Pryner v. Tractor Supply Co.*, focused on the "essential conflict . . . between majority and minority rights" and found that the union is not always highly sensitive to minority

99. See 897 F. Supp. 100, 107 (S.D.N.Y. 1995) (referring to the *Lai* court's dependence on a committee report from the drafting of the Civil Rights Act of 1991).

100. See *id.* at 107-08. In *Maye*, two employees completed and executed documents entitled "Principles of Employment" as part of the hiring process. The employees argued that during orientation, they signed a number of documents without an adequate opportunity to read all of the materials and that the employer never mentioned the arbitration clause. See *id.* at 102-04.

101. See *id.* at 108.

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

103. See *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 525-26 (11th Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1451-54 (10th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3137 (U.S. Aug. 6, 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 362-65 (7th Cir.), *cert. denied*, 118 S. Ct. 294 (1997); *Varner v. National Super Mkts., Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 946 (1997).

104. See *Harrison*, 112 F.3d at 1453-54.

workers' statutorily protected special interests, nor will the union "seek to vindicate those interests with maximum vigor."¹⁰⁵

The distinction between CBAs and individual contracts often has caused the same circuit to enforce an arbitration provision in an employment contract yet refuse to recognize the same provision in a CBA.¹⁰⁶ District courts have followed the courts of appeals in distinguishing between individual employment contracts and CBAs.¹⁰⁷ For example, the court in *Darby v. North Mississippi Rural Legal Services, Inc.*, held that an employee who filed an ADA claim in federal court was not required to exhaust grievance procedures contained in a CBA.¹⁰⁸ The court stated that "*Gilmer* is inapplicable, since it involved an arbitration clause in an individual employment contract, as opposed to an arbitration clause contained within a CBA."¹⁰⁹

III. DISSOLVING THE DISTINCTIONS BETWEEN *GARDNER-DENVER* AND *GILMER*: THE EMERGENCE OF *AUSTIN V. OWENS-BROCKWAY GLASS CONTAINER, INC.*

The lower courts' applications of *Gardner-Denver* or *Gilmer*, based on whether the arbitration clause was included in a CBA or

105. *Pryner*, 109 F.3d at 362-63.

106. *Compare* *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 838 (8th Cir. 1997) (enforcing an arbitration clause in an individual contract, *with Varner*, 94 F.3d at 1213 (Eighth Circuit refusing to compel arbitration under CBA provision); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487-88 (10th Cir. 1994) (Tenth Circuit requiring arbitration in securities registration application), *with Harrison*, 112 F.3d at 1453-54 (failing to require arbitration under union's CBA); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir. 1992) (*per curiam*) (enforcing arbitration clause in securities registration application), *with Brisentine*, 117 F.3d at 525-26 (Eleventh Circuit following *Alexander* and not compelling arbitration of statutory claim pursuant to CBA agreement).

107. *See* *Buckley v. Gallo Sales Co.*, 949 F. Supp. 737, 742 (N.D. Cal. 1996) (holding that a CBA can waive only contractual rights of the collective union and not individual statutory rights); *Bush v. Carrier Air Conditioning*, 940 F. Supp. 1040, 1043 (E.D. Tex. 1996) (holding that a "union may not waive an employee's right under Title VII to bring a claim in federal court"); *Jackson v. Quanex Corp.*, 889 F. Supp. 1007, 1011 (E.D. Mich. 1995) (stating employees are "not required to arbitrate their statutory claims under the terms of the CBA"); *Randolph v. Cooper Indus.*, 879 F. Supp. 518, 521-22 (W.D. Pa. 1994) (refusing to enforce mandatory arbitration clause in CBA); *Griffith v. Keystone Steel & Wire Co.*, 858 F. Supp. 802, 804 (C.D. Ill. 1994) (holding that an employee need not exhaust grievance procedures under CBA before bringing Title VII claim to court); *Claps v. Moliterno Stone Sales, Inc.*, 819 F. Supp. 141, 147 (D. Conn. 1993) (concluding that a "collective bargaining agreement cannot . . . require an employee to arbitrate individual statutory claims"). *But see* *Battle v. Prudential Ins. Co. of Am.*, 973 F. Supp. 861, 866-67 (D. Minn. 1997) (enforcing an arbitration agreement in a securities registration application).

108. *See* No. 1:96CV214-B-A, 1997 WL 88241, at *2 (N.D. Miss. Feb. 28, 1997).

109. *Id.*

individual contract, created a rather bright-line distinction: If the case is brought by a union employee, courts follow *Gardner-Denver* and allow the claim to be heard in federal court; if a nonunion employee brings the claim, courts follow *Gilmer* and compel arbitration.¹¹⁰ The Fourth Circuit, however, eliminated this distinction in *Austin v. Owens-Brockway Glass Container, Inc.*¹¹¹ In *Austin*, an employee alleged violations of the Americans with Disabilities Act and Title VII. She claimed her employer refused to offer her light-duty work after she was injured on the job. The company eliminated her job classification and terminated her employment yet reassigned a male in the same job classification to another position.¹¹² The CBA, to which the female employee was a party, stated that “[a]ll disputes . . . may be referred to arbitration.”¹¹³ The Fourth Circuit, in an unprecedented step, declared no distinction should be made between a CBA and an individual employment contract.¹¹⁴ Instead, the court held:

Whether the dispute arises under a contract of employment growing out of [a] securities registration application, a simple employment contract, or a collective bargaining agreement, an agreement has yet been made to arbitrate the dispute. So long as the agreement is voluntary, it is valid, and we are of the opinion it should be enforced.¹¹⁵

The Fourth Circuit, ironically, is the only circuit that maintains all employment agreements are excluded under the “contracts of employment” language in section 1 of the FAA.¹¹⁶ Thus, instead of relying on the FAA, the *Austin* court based its decision on “the well-

110. “After *Gilmer*, lower courts have struggled to answer the question of whether federal statutory claims that are subject to compulsory arbitration under the terms of collective bargaining agreements may instead be brought in federal court.” *Gray v. Toshiba Am. Consumer Prods., Inc.*, 959 F. Supp. 805, 810 (M.D. Tenn. 1997) (emphasis omitted).

111. *See* 78 F.3d 875, 885 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996).

112. *See id.* at 877-78.

113. *Id.* at 880 (emphasis added). The court determined that the word “may” did not make arbitration permissive. Instead, the use of “may” in the arbitration clause gave the employee the choice between arbitration and abandonment of her claim. *See id.* at 879.

114. *See id.* at 885. *See generally* Katherine L. Kettler, Annual Survey of Labor Law, 38 B.C. L. REV. 303, 358-70 (1997) (reviewing *Austin* and arguing that the Supreme Court needs to clarify the remaining significance between *Gardner-Denver* and *Gilmer*).

115. *Austin*, 78 F.3d at 885. The court further stated: “There is no reason to distinguish between a union bargaining away the right to strike and a union bargaining for the right to arbitrate. The right to arbitrate is a term or condition of employment, and as such, the union may bargain for this right.” *Id.* *But see id.* at 886 (Hall, J., dissenting) (declaring that the “[t]he majority fails to recognize . . . that the only difference makes all the difference”).

116. *See supra* note 25 and accompanying text; *see also* *United Elec., Radio & Mach. Workers v. Miller Metal Prods.*, 215 F.2d 221, 224 (4th Cir. 1954) (holding that employment contracts are excluded from the coverage of the Arbitration Act).

recognized policy of federal labor law favoring arbitration of labor disputes.'¹¹⁷ Since the case did not arise under the FAA and the arbitration provision was included in a CBA, *Gardner-Denver* appeared to be the logical precedent to follow.¹¹⁸ The court, however, explained that the employee had agreed voluntarily to the arbitration of her statutory complaints.¹¹⁹ In so doing, the court effectively eliminated two of the distinctions between *Gilmer* and *Gardner-Denver*. First, the court followed *Gilmer* even though it did not rely on the FAA's encouragement of arbitration.¹²⁰ Second, the court did not follow other circuits in distinguishing cases where employees are covered by CBAs and their statutory rights are waived by a union representative.¹²¹ In effect, the Fourth Circuit declared that *Gilmer* should apply to all arbitration claims in employment disputes and that *Gardner-Denver* no longer had any precedential value.

The Fourth Circuit's rejection of the distinction between *Gardner-Denver* and *Gilmer* raises the critical issue of whether a union employee should be allowed remedies different from a nonunion employee when filing statutory discrimination claims. *Austin's* unprecedented approach in examining arbitration clauses in CBAs deserves close examination before dismissing it as against Supreme Court precedent.

IV. PUBLIC POLICY AND STRATEGIC CHOICES: WHY COURTS SHOULD ADOPT *GARDNER-DENVER* AS APPLYING TO ALL EMPLOYMENT AGREEMENTS

The Fourth Circuit in *Austin* took an unprecedented step by refusing to distinguish between union and nonunion employees. The decision does provide for a notion of horizontal equity among all American employees. In other words, employees on the same level in different companies receive the same remedies whether or not they are represented by a union.¹²² Still, public policy and strategic

117. *Austin*, 78 F.3d at 879 (quoting *Adkins v. Times-World Corp.*, 771 F.2d 829, 831 (4th Cir. 1985) and declaring that the court need not rely on the FAA).

118. See *supra* Parts II.B and note 110 and accompanying text.

119. See *Austin*, 78 F.3d at 883 n.2.

120. See *supra* note 77 and accompanying text (discussing the first distinction made by the *Gilmer* court in distinguishing *Gardner-Denver*: its reliance on the FAA).

121. See *supra* Part II.E (discussing the second distinction made by the *Gilmer* court in distinguishing *Gardner-Denver*: the tension between collective representation and individual statutory rights).

122. Cf. GEORGE T. MILKOVICH & JERRY M. NEWMAN, COMPENSATION 277-79 (4th ed. 1993) (discussing equity theory among employees and how the key element is not actual equity across

business choices show that the *Austin* court's decision to follow *Gilmer* instead of *Gardner-Denver* is inappropriate. Courts should follow *Austin* and not distinguish between employees based on where the arbitration clause is included. In contrast to *Austin*, however, courts should allow every employee the right to litigate in federal court if the employee so desires. An examination of legislative history, government statements, private organizations' actions, and strategic business policies leads to the conclusion that preemployment mandatory arbitration agreements of statutory claims should not be used as a condition for employment.

A. *The Adoption of Austin by District Courts*

Few courts have followed *Austin's* holding that no distinction should exist between an arbitration clause included in a securities registration application, an employment contract, or a CBA.¹²³ One district court opinion, however, shows the danger in compelling arbitration regardless of the context of the compulsory arbitration clause. In *Moore v. Duke Power Co.*, an employee missed work for an extended period of time due to a disability.¹²⁴ Upon return, the employer demoted, denied transfers to, suspended, and later terminated the employee.¹²⁵ After being dismissed, the employee pursued a remedy under the grievance procedures provided by the CBA.¹²⁶ The arbitrator in these procedures refused to allow the employee's attorney to participate, and the union representative declined to address the employee's ADA claim, relying only on contractual claims of dis-

lines but "perceived" equity). Currently, the majority of circuits allow union-represented employees to litigate their statutory claims despite an arbitration provision in the CBA, while the same courts will often compel arbitration of an employee's statutory claim when governed by an individual arbitration agreement. *See supra* note 106.

123. *See Breech v. Alabama Power Co.*, 962 F. Supp. 1447, 1455 n.6 (S.D. Ala. 1997) (declaring that *Austin* was decided erroneously and that *Gardner-Denver* has not been overruled); *Nieves v. Individualized Shirts*, 961 F. Supp. 782, 790-91 (D.N.J. 1997) (declaring that "*Austin* has not been universally accepted" and noting that the "*Gilmer* Court went out of its way" to distinguish *Gardner-Denver* partly based on the distinction between a CBA and an individual contract); *Gray v. Toshiba Am. Consumer Prods., Inc.*, 959 F. Supp. 805, 812 (M.D. Tenn. 1997) (noting that the "*Austin* court . . . failed to acknowledge the clear distinctions drawn by the *Gilmer* Court between compulsory arbitration under individual contracts and collective bargaining agreements"); *Buckley v. Gallo Sales Co.*, 949 F. Supp. 737, 743 (W.D. Cal. 1996) (disagreeing with *Austin* on two grounds: *Gardner-Denver* is still good law and the difference between a CBA and individual contract "makes all the difference.").

124. *See* 971 F. Supp. 978, 980 (W.D.N.C. 1997).

125. *See id.*

126. *See id.*

crimination.¹²⁷ The arbitrator denied the union's claim and found the employee had been terminated for "just and proper cause."¹²⁸

The employee then sought relief for his ADA claim in federal court.¹²⁹ The district court of the Fourth Circuit followed the precedent established in *Austin*.¹³⁰ The court required the employee to pursue final and binding arbitration under the CBA and precluded review of the arbitrator's decision absent a showing that the union breached its duty of fair representation.¹³¹ The court found that the union's failure to bring the employee's ADA discrimination claim constituted either negligence or "merely . . . a strategic error."¹³² In a decision that was highly deferential to the union's judgment, the court found that this negligent error did not breach the duty of fair representation by the union.¹³³

Moore illustrates the tension between individual statutory rights and collective representation that concerned the Supreme Court in *Gilmer*.¹³⁴ Because the employee was not allowed to use his own attorney and had to rely on the union for representation, he was effectively barred from bringing his ADA claim due to the union representative's negligence.

At least two more district courts have followed *Austin*. In *Almonte v. Coca-Cola Bottling Co.*, the court required an employee to arbitrate his section 1981 race discrimination claim pursuant to an express provision in the governing CBA.¹³⁵ The *Almonte* court found that since the CBA expressly prohibited discrimination as defined by federal law, the case fell between *Gardner-Denver* and *Gilmer*.¹³⁶ The court followed the reasoning in *Austin* and the federal policy favoring arbitration.¹³⁷

127. *See id.* at 980-81.

128. *Id.* at 980.

129. *See id.*

130. *See id.* at 984.

131. *See id.*

132. *Id.* at 985. The court stated: "A union's exercise of its judgment need not appear as wise in the glaring light of hindsight, and a violation of the duty of fair representation is not made out by proof that the union made a mistake in judgment." *Id.* at 984 (quoting *Smith v. Local 7898, United Steelworkers*, 834 F.2d 93, 96 (4th Cir. 1987)).

133. *See id.* at 984-85. "Simple negligence, ineffectiveness, or poor judgment is insufficient to establish a breach of the union's duty . . . Rather, the union's conduct must be 'grossly deficient' or in reckless disregard of the member's rights." *Id.* at 984 (quoting *Ash v. United Parcel Servs., Inc.*, 800 F.2d 409, 411 (4th Cir. 1986) (citations omitted)).

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

135. *See* 959 F. Supp. 569, 574 (D. Conn. 1997).

136. *See id.* at 573.

137. *See id.* at 574. Ironically, the same district court held in an earlier case that an employee did not need to exhaust grievance procedures under a CBA before bringing a Title VII action in federal court. *See Claps v. Moliterno Stone Sales*, 819 F. Supp. 141, 147 (D. Conn.

In *Jessie v. Carter Health Care Center, Inc.*, a district court also held that a CBA provision made arbitration obligatory.¹³⁸ The employee, therefore, could not bring a Title VII claim into federal court. In this case, the employee alleged that her employer constructively discharged her due to her pregnancy.¹³⁹ The court simply stated that except for *Austin*, very little precedent existed on the issue of whether an agreement between parties in a CBA to arbitrate statutory claims was enforceable.¹⁴⁰ The court held that *Jessie* was “on all fours with . . . *Austin* and the . . . law as stated in *Austin* [was] sound.”¹⁴¹ This decision once again caused an employee who never signed any waiver of her statutory rights to lose her claim in court due to an agreement between her union and her employer.

The decision in *Austin* and its effect on the opinions in *Moore*, *Almonte*, and *Jessie* show the dangerous effects of enforcing an arbitration clause provided in CBAs. The *Austin* court made a well-reasoned argument that an employee covered by a CBA should not be treated differently than an employee covered under an individual contract.¹⁴² The court, however, made a poor decision to develop a *per se* rule that arbitration should be compelled unless Congress indicates otherwise. The decisions in *Moore* and *Almonte* demonstrate that this rule can lead to adverse consequences. In *Moore*, the employee was effectively barred from bringing his ADA claim due to the union’s negligence or “strategic error” in addressing the claim during the grievance procedures.¹⁴³ In *Almonte*, the employee followed the grievance procedure and received a second award from the arbitrator

1993). The *Almonte* court, however, used the same reasoning as *Claps*. See *Almonte*, 959 F. Supp. at 574. In *Claps*, the court suggested the use of a rebuttable presumption: “Courts would assume that individual statutory claims were excluded from grievance procedures unless the collective bargaining agreement expressly provided otherwise.” *Claps*, 819 F. Supp. at 147 n.6. The *Almonte* court adopted that standard, and proceeded to find that, unlike the CBA in *Claps*, the CBA governing *Almonte* expressly prohibited discrimination under federal law and required arbitration of these claims. See *Almonte*, 959 F. Supp. at 574. The effect of the *Almonte* decision was to force the same employee to arbitrate a racial discrimination claim two years after the same employee had received an arbitrator’s award for racial harassment by the same employer. See *id.* at 573. One could argue that the employee did not believe the previous arbitration effectively deterred the employer and that the employee was now seeking a public rather than a private forum in order to increase pressure on the employer to stop discriminating.

138. See 930 F. Supp. 1174, 1176 (E.D. Ky. 1996).

139. See *id.* at 1175-76.

140. See *id.* at 1176.

141. See *id.*

142. See *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 885 (4th Cir), *cert. denied*, 117 S. Ct. 432 (1996).

143. *Moore v. Duke Power Co.*, 971 F. Supp. 878, 984-85 (W.D.N.C. 1997).

after his first claim of racial harassment.¹⁴⁴ Since the discriminatory conduct continued, however, the employee apparently decided to seek retribution in a public forum.¹⁴⁵ Instead of the employee receiving public disclosure of the discriminatory practices, the court followed *Austin* and required the employee to arbitrate his claim again in a private forum.¹⁴⁶ Finally, the *Jessie* court simply adopted the per se rule established by *Austin* without debating the consequences of its decision.¹⁴⁷

The adverse consequences of these decisions demonstrate that *Austin* should have reached an opposite result. Courts and Congress should realize that an employee is an employee when trying to eradicate discrimination in the workplace. In effect, each individual should have the same remedies available whether a CBA or an individual agreement covers the employee's grievance procedures. Allowing a union employee recourse in the federal courts and disallowing the same claim brought by a nonunion employee seems unfair. Congress and employers should realize this inequity and stop forcing an individual employee's statutory discrimination claims into private arbitration proceedings.

B. Public Policy Arguments Against Compulsory Arbitration

The Supreme Court in *Gilmer* decided that individual employee's statutory claims are appropriate for arbitration.¹⁴⁸ It further explained that if Congress intended to preclude a waiver of the judicial forum that intent would be shown in the "text of the [applicable statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes."¹⁴⁹ Proponents of compulsory arbitration agreements use this argument when seeking arbitration of claims brought under the ADA and the Civil Rights Act of 1991. In the Civil Rights Act of 1991, Congress added the following language to Title VII and the ADEA:

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

144. See *Almonte v. Coca-Cola Bottling Co.*, 959 F. Supp. 569, 571 (D. Conn. 1997).

145. See *supra* note 137.

146. See *Almonte*, 959 F. Supp. at 574.

147. See *Jessie v. Carter Health Care Ctr.*, 930 F. Supp. 1174, 1176 (E.D. Ky 1996) (deciding the case without discussing contrary authority); see also *supra* notes 140-41 and accompanying text.

148. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (following the precedent established by the *Mitsubishi* trilogy of cases).

149. *Id.* (quoting *Shearson/American Express, Inc. v. McMahon*, 492 U.S. 220, 226 (1987)).

facilitation, mediation, factfinding, minitrials, and arbitration, is *encouraged* to resolve disputes arising under the Acts or provisions of Federal law amended by this title.¹⁵⁰

The ADA contains nearly identical language.¹⁵¹ While employers often cite this language when ADA, ADEA and Title VII claims are brought to federal court, the legislative history shows that Congress did not intend for arbitration to replace the federal court system.¹⁵²

The House Report to the adoption of the ADA stated that alternative dispute resolution was "intended to supplement, not supplant" ADA remedies.¹⁵³ The report implies that even voluntary agreements were not intended to interfere with an individual's right to sue in federal court.¹⁵⁴ According to the report, the committee believed that arbitration agreements, whether in collective bargaining agreements or in employment contracts, did "not preclude the affected person from seeking relief under the enforcement provisions of this Act."¹⁵⁵ Furthermore, the report stated that *Gardner-Denver* applied equally to the ADA.¹⁵⁶ Congress did not intend for the inclusion of this provision to preclude rights and remedies that would otherwise be available to persons with disabilities. The House Conference Report added that while the use of these alternative dispute resolutions were voluntary, "[u]nder no condition would an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their rights under the ADA."¹⁵⁷

The Civil Rights Act of 1991 and the ADA encourage arbitration of statutory claims by employees, and courts use these amendments to show a congressional intent in favor of arbitration for

150. Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991) (emphasis added).

151. See 42 U.S.C. § 12212 (1994).

152. See *Hill v. American Nat'l Can Co./Foster Forbes Glass Div.*, 952 F. Supp. 398, 406 (N.D. Tex. 1996) (relying on legislative history to state that "[e]ven voluntary agreements to arbitrate were not intended to interfere with an individual's right to sue . . . under the ADA.>").

153. H.R. REP. NO. 101-485, at 76 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 499.

154. See *Hill*, 952 F. Supp. at 406-07.

155. H.R. REP. NO. 101-485, at 76-77; see also H.R. REP. NO. 102-40, at 97 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 635 (including the same language in reference to similar amendments added by the Civil Rights Act of 1991 to Title VII of the Civil Rights Act of 1964).

156. See H.R. REP. NO. 101-485, at 77; see also H.R. REP. NO. 102-40, at 97 (including the same language in reference to similar amendments added by the Civil Rights Act of 1991 to Title VII of the Civil Rights Act of 1964).

157. H.R. CONF. REP. NO. 101-596, at 89 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 598 (emphasis added).

statutory claims.¹⁵⁸ Unlike most lower court decisions since *Gilmer*, however, the legislative history does not make a distinction between CBAs and individual employment contracts.¹⁵⁹ In fact, the reports apply to both types of agreements. At the same time, Congress implicitly approved of the *Gardner-Denver* decision.¹⁶⁰ The last sentence in House Conference Report 596 provides the strongest authority, stating that “under no condition” can a CBA or employment contract waive an employee’s rights under federal discrimination statutes.¹⁶¹

The legislative history suggests that Congress intended to “encourage” post-dispute voluntary arbitration and not preemployment compulsory agreements. Arbitration provides a more efficient route if both parties voluntarily agree to the process, but to force a party to agree to arbitrate before the claim arises constitutes coercion. As one district court noted, *Gardner-Denver* and subsequent legislative history indicate that an employee can exercise his or her rights in either court or arbitration.¹⁶² In other words, the worker may voluntarily choose between arbitration or litigation. Either way, if the employee knowingly chooses his action, then the court will respect that decision.

Since *Gilmer* and the extension of its decision by many circuit and district courts, congressional leaders have attempted to draft explicit legislation to exclude preemployment arbitration agreements that compel arbitration of federal discrimination claims. The first bill on this matter, known as the Protection from Coercive Employment Agreements Act, was introduced in the Senate on April 13, 1994.¹⁶³ The bill proposed to amend Title VII, the ADEA, the ADA, the Rehabilitation Act of 1973, and section 1977 of the Revised Statutes of the United States by making it illegal to force employees to sign arbitration agreements that included federal discrimination claims before accepting employment.¹⁶⁴

158. See, e.g., *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881 (4th Cir.) (arguing that the statutory language of the Civil Rights Act of 1991 “could not be any more clear in showing Congressional favor towards arbitration”), *cert. denied*, 117 S. Ct. 432 (1996).

159. See H.R. REP. NO. 102-40, at 97, reprinted in 1991 U.S.C.A.N. 549, 635 (stating that an agreement to arbitrate does not preclude judicial relief “whether in the context of a collective bargaining agreement or in an employment contract”); H.R. REP. NO. 101-485, at 76-77 (same).

160. H.R. REP. NO. 102-40, at 97 (stating Congress’s intent not to preclude judicial relief is consistent with *Gardner-Denver*); H.R. REP. NO. 101-485, at 77 (same).

161. H.R. CONF. REP. NO. 101-596, at 89.

162. See *Hill v. American Nat’l Can Co./Foster Forbes Glass Div.*, 952 F. Supp. 398, 407 (N.D. Tex. 1996).

163. S. 2012, 103d Cong. §§ 2-6 (1994).

164. See *id.* For example, the bill would amend Title VII by adding:

A more recent version of the bill, the Civil Rights Procedures Protection Act of 1994, was introduced in both the House and Senate. This bill would keep the statutory relief as the exclusive remedy for employment discrimination unless "after such claim arises the claimant voluntarily enters into an agreement to resolve such claim through arbitration or another procedure."¹⁶⁵ The bill differed most from the previous bill in that it restricted the arbitration of the discrimination claim itself instead of focusing only on agreements in employment contracts.¹⁶⁶

The legislative history of the amendments encouraging arbitration and the proposed bills in the House and Senate appear to be concerned over the same issue: whether an employee can still receive his or her minimum guaranteed rights under federal law if employers can condition employment on the employee agreeing to compulsory private arbitration of federal statutory claims. The Supreme Court in *Barrentine* identified the same concern.¹⁶⁷ Certain federal statutes, such as the FLSA, give specific minimum protections to workers and should not be endangered by coercive preemployment agreements drafted by employers.

Thus, legislative history appears to follow *Austin* in that it treats individual contracts and collective agreements alike.¹⁶⁸ Congressional reports and proposed bills, however, show that Congress's desire to encourage voluntary arbitration does not necessarily mean the extension of *Gilmer* to all types of employment agreements. Instead, the legislative history could be interpreted as showing Congress's desire for post-dispute voluntary arbitration

It shall be an unlawful employment practice for an employer to—

(1) fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment of the individual, because the individual refuses to submit any claim under this title to mandatory arbitration; or

(2) make the submission of such claim to mandatory arbitration a condition of the hiring, continued employment, or the compensation, or a term, condition, or privilege of employment, of the individual.

Id.

165. S. 2405, 103d Cong. §§ 2-9 (1994) (emphasis added); H.R. 4981, 103d Cong. §§ 2-9 (1994) (emphasis added). This bill would have amended the same statutes as the previous one as well as the Equal Pay Requirement under the FLSA, the FMLA, and the FAA. The bill was reintroduced in the 104th Congress on February 7, 1995, in the Senate and July 27, 1996, in the House of Representatives. H.R. 3748, 104th Cong. (1996); S. 366, 104th Cong. (1995).

166. See Brian K. Van Engen, Note, *Post-Gilmer Developments in Mandatory Arbitration: The Expansion of Mandatory Arbitration for Statutory Claims and the Congressional Effort to Reverse the Trend*, 21 J. CORP. L. 391, 412 (1996) (arguing that the second proposed bill "has more 'bite' . . . because it restricts arbitration of the claim itself").

167. See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981).

168. See *supra* note 115 and accompanying text.

agreements. Congress intended to provide employees with a choice of two forums. If the employee wants retribution for back pay or damages and cannot afford the lengthy and expensive trial process, then entering into voluntary arbitration after the claim arises should not be discouraged. However, if the employee would rather address the discriminatory conduct in a public forum for any reason, then the employee should not be held to an agreement required as a condition of employment.

In addition to the legislative branch, the executive branch, and other government and private organizations have publicly criticized compulsory arbitration agreements. Both the EEOC and the National Labor Relations Board ("NLRB") publicly oppose employment contracts that force workers to arbitrate federal discrimination claims.¹⁶⁹

The Southern District of Texas recently granted the EEOC an injunction to prevent an employer's use of its ADR policy, finding the employer's arbitration policy misleading and against the principles of Title VII.¹⁷⁰ The court enjoined the employer from forcing an employee to enter into an ADR policy that required the employee to pay the costs of the ADR proceedings, prevented or interfered with an employee's right to file complaints with the EEOC or a court of law, and retaliated against or terminated an employee who opposed the mandatory ADR policy.¹⁷¹ Also, the EEOC now has the authority to receive and process any discrimination charges filed by employees regardless of the existence of an employment agreement or employer-sponsored ADR program.¹⁷²

Private organizations have also begun to oppose compulsory arbitration. The National Academy of Arbitrators ("NAA") and the American Arbitration Association ("AAA") both issued recent statements supporting voluntary, post-dispute arbitration, but opposing mandatory arbitration based on pre-dispute agreements.¹⁷³ Another provider of private arbitrators, JAMS/Endispute, recently issued

169. See Margaret A. Jacobs, *Policies Requiring Arbitration Challenged*, WALL ST. J., Oct. 16, 1995, at B5. A regional director of the NLRB said, "The requirement that an employee or job applicant sign a mandatory arbitration policy is an unlawful labor practice, as is their discharge for not signing." *Id.*

170. See *EEOC v. River Oaks Imaging and Diagnostic*, No. H-95-755, 1995 WL 264003, at *1 (S.D. Tex. Apr. 19, 1995).

171. See *id.*

172. See *Motions on Alternative Dispute Resolution Adopted by the EEOC, April 25, 1995*, Daily Lab. Rep. (BNA), at E1 (Apr. 26, 1995).

173. *Voluntary Arbitration in Worker Disputes Endorsed by Two Groups*, WALL ST. J., June 20, 1997, at B2. Additionally, the National Academy of Arbitrators asked its members to refuse to hear cases where "unfair" procedures were imposed by the employer. *Id.*

"Minimal Standards of Procedural Fairness," which must be met in the arbitration proceeding before it will accept arbitration from employers through mandatory arbitration clauses.¹⁷⁴ Under these standards, the arbitration process must provide the employee minimal procedural protections, like those available in court, including the right to full remedies, prehearing discovery, and representation by counsel.¹⁷⁵ JAMS also recommends that employers "carefully consider how to distribute costs and require a reasoned award."¹⁷⁶ Finally, directors of the NASD recently voted to stop mandating arbitration of discrimination claims brought by its members.¹⁷⁷

Lawyers giving advice to employers, therefore, may want to re-examine legislative history and keep a close watch on Congress and public opinion regarding mandatory arbitration clauses. If Congress returns to pro-labor control, employers may be surprised when all preemployment arbitration agreements are found void by operation of law. Employers, however, should not make this decision solely on advice from a lawyer or a prediction of congressional action. The emergence of strategic human resources management ("SHRM") in the past few years should lead employers to their own strategic decision prior to the resolution by the courts.

C. Strategic Human Resources Management Perspective on Compulsory Arbitration Agreements

When deciding how to handle employment disputes, employers often seek the advice of their legal counsel. Since the Supreme Court decision in *Gilmer*, many corporate attorneys hastily encourage employers to include broad mandatory arbitration clauses within employment applications, employee handbooks and offer letters.¹⁷⁸ When

174. See S. Gale Dick, *Major Providers Changing Employment ADR Procedures, as Controversy Rages*, ALTERNATIVES TO HIGH COST LITIG., Mar. 1995, at 34; see also Margaret A. Jacobs, *Workers Call Some Private Justice Unjust*, WALL ST. J., Jan. 26, 1995, at B1.

175. See Dick, *supra* note 174, at 34.

176. See *id.*

177. See Deborah Lohse, *NASD Votes to End Arbitration Rule in Case of Bias*, WALL ST. J., Aug. 8, 1997, at B14. The NASD included a compulsory arbitration provision in its U4 form, the securities registration application for brokers. The decision to exclude the arbitration clause arose from the "negative publicity" surrounding two recent discrimination suits against the two largest brokerage firms, Merrill Lynch and Co., and Smith Barney. *Id.*

178. See Volin, *supra* note 2, at 19. In this article, a practicing attorney provides 16 tips to employers considering arbitration of employment statutory claims. The tips include inserting compulsory arbitration clauses into employee applications and handbooks as well as making the provisions very broad. See *id.* at 17-19; see also Arthur D. Rutkowski, *Mandatory Arbitration of Job Bias Claims: An Employer's Panacea or Simply Two Bites of the Apple?*, 45 LABOR L.J. 636, 640-41 (1994) (providing five guidelines to ensure an enforceable arbitration agreement).

employers ask why, attorneys are quick to note five general arguments in favor of arbitration: speed, cost, confidentiality, finality and friendliness.¹⁷⁹ An employer who decides to adopt an SHRM perspective,¹⁸⁰ however, should begin by looking internally for answers rather than to lawyers who thrive on controversy.¹⁸¹ A closer examination of each of these five "advantages" to employers reveals competitive disadvantages from the SHRM perspective.

Most employers realize arbitration takes less time than litigation.¹⁸² The speed of arbitration, however, may not be as advantageous at first glance. First, the speed of the process allows employees to bring frivolous claims under the grievance procedures of the employment contract or CBA.¹⁸³ Second, employers tend to believe arbitration will be less expensive. Some commentators, however, argue that the new trend of mandatory arbitration clauses only increases

179. See Mark Featherman, *Mandatory Arbitration Agreements as an Unfair Labor Practice: Gilmer v. Interstate/Johnson Lane Corp. and the Resurgence of the Yellow Dog Contract*, 47 LABOR L.J. 162, 167-169 (1996) (noting speed, cost, finality, and friendliness as advantageous); Robert J. Lewton, Comment, *Are Mandatory, Binding Arbitration Requirements a Viable Solution for Employers Seeking to Avoid Litigating Statutory Employment Discrimination Claims?*, 59 ALB. L. REV. 991, 1028 (1996) (noting, among other advantages, confidentiality).

180. Strategic human resources management ("SHRM") is a rather new business approach adopted within the last decade. The employers' objective is "to make better competitive use of their firm's human resources and for human resource managers . . . to enhance the human resource function's contribution to the strategic objectives of the firm." Cynthia A. Lengnick-Hall & Mark L. Lengnick-Hall, *Strategic Human Resource Management: A Review of the Literature and a Proposed Typology*, 13 ACAD. OF MGMT. REV. 454, 454 (1988). The premise of SHRM arose from Michael Porter's theory of competitive advantages. See generally MICHAEL E. PORTER, *COMPETITIVE ADVANTAGE* (1985). For more general discussions and practical applications of SHRM, see generally MICHAEL BEER ET AL., *MANAGING HUMAN ASSETS* (1984); CHARLES R. GREER, *STRATEGY AND HUMAN RESOURCES: A GENERAL MANAGEMENT PERSPECTIVE* (1995); Raymond E. Miles & Charles C. Snow, *Designing Strategic Human Resources Systems*, 13 ORGANIZATIONAL DYNAMICS 36 (1984); Randall S. Schuler & Susan E. Jackson, *Linking Competitive Strategies with Human Resource Management Practices*, 1 ACAD. OF MGMT. EXECUTIVE 207 (1987).

181. Employers "need to invest more in our human resources professionals to create internal systems that will minimize the number of disputes and less in lawyers who have a self-interest in a continuation of disputes." Robert B. Fitzpatrick, *The War in the Workplace Must End, but Arbitration Is Not the Answer*, in CURRENT DEVELOPMENTS IN EMPLOYMENT LAW 1289, 1300 (ALI-ABA Course of Study Materials, 1997); see also Lewton, *supra* note 179, at 1033 (advising that "ADR processes should not be viewed as a substitute for sound human resource management").

182. See Rutkowski, *supra* note 178, at 642.

183. See Stuart H. Bompey & Michael P. Pappas, *Is There a Better Way? Compulsory Arbitration of Employment Discrimination Claims after Gilmer*, 19 EMPLOYEE REL. L.J. 197, 211 (1993-94) ("Arbitration . . . provides a more inviting forum for 'frivolous' claims because arbitrators rarely will dismiss a case prior to hearing, and they generally do not award sanctions . . . for bringing such claims.").

different forms of litigation.¹⁸⁴ The number of open issues regarding arbitration of employment claims since *Gilmer* supports this point.¹⁸⁵ Instead of the parties litigating over discriminatory conduct, the adversaries now dispute the correct forum for the claim and then, depending on the court's decision, follow with the traditional battle over discrimination either in court or in arbitration.

Confidentiality is a third advantage quoted to employers.¹⁸⁶ Yet in *Gilmer*, the Supreme Court emphasized that NYSE rules required all arbitration decisions to be in writing.¹⁸⁷ Whether the Supreme Court views the right to public knowledge as a substantive statutory right that cannot be waived under the *Mitsubishi* trilogy is unclear.¹⁸⁸ A fourth advantage corporate lawyers often assert is the finality of the arbitration process or its rather narrow appellate review.¹⁸⁹ Again, with the onslaught of mandatory arbitration clauses and decisions such as *Lai* and *Renteria*, courts are beginning to increase their judicial review of these "voluntary" agreements.¹⁹⁰ Moreover, as long as the circuit courts remain split and the Supreme Court leaves open many questions following *Gilmer* and its distinction with *Gardner-Denver*, courts will continue to scrutinize the arbitration of statutory claims and employers may not know which way a court will decide.

Finally, some commentators argue that arbitration is a friendlier process than litigation.¹⁹¹ From a strategic human resources perspective, this again may be false. The use of mandatory arbitration

184. See Fitzpatrick, *supra* note 181, at 1295. "Arbitration will not result in a decrease in litigation, but rather a different form of litigation. While the issues will be different, the legal bills will continue to be astronomical and the divisiveness will only be further exacerbated." *Id.*

185. See Lewton, *supra* note 179, at 1031 (suggesting that the issues left unresolved by *Gilmer* will lead to ADR associated litigation as expensive and time-consuming as employment litigation); see also Matthews, *supra* note 78, at 366-67 (discussing five issues left unresolved after *Gilmer*).

186. See Lewton, *supra* note 179, at 1031.

187. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31-32 (1991) (noting that *Gilmer's* arbitration required a written opinion including "the names of the parties, a summary of the issues in controversy, and a description of the award issued").

188. See Lewton, *supra* note 179, at 1031.

189. See, e.g., Bompey & Pappas, *supra* note 183, at 211.

190. See *supra* notes 86-96 and accompanying text; see also Kenneth R. Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 137-39 (1997) (asserting that expanded judicial review of arbitration decisions concerning employee statutory claims would protect public policy); Anthony J. Jacob, Comment, *Expanding Judicial Review to Encourage Employers and Employees to Enter the Arbitration Arena*, 30 J. MARSHALL L. REV. 1099, 1124-25 (1997) (arguing that expanding judicial review to discrimination claims arising from compulsory arbitration agreements will encourage employees to use arbitration).

191. See Featherman, *supra* note 179, at 167-68.

clauses as a form of boilerplate in employment agreements demonstrates the employee's lack of bargaining power. Preemployment agreements force potential employees to face the decision of signing the contract or finding other employment.¹⁹² Unfortunately, if one employer requires these agreements, chances are other employers will require the same.¹⁹³ At the time of the decision, moreover, employees may not realize the importance of waiving their substantive statutory rights. The threat of unemployment or inferior employment may be enough to induce the employee to sign such agreements.¹⁹⁴ If the employee must settle for grievance procedures later rather than seek redress in federal court, the relationship between the employee and employer will not be "friendlier" because of the forced arbitration.¹⁹⁵ Instead, the compulsory arbitration may leave the relationship irreparable.

The competitive disadvantages involved with mandatory arbitration clauses suggest that employers should think twice before agreeing with the "easy" solution of forcing all employment disputes into arbitration. The global marketplace demands that employers seek competitive advantages from every aspect of their business.¹⁹⁶ With service industries becoming more prevalent, employees become the firm's largest asset. One commentator argues that employers should provide meaningful choices about ADR programs to employees.¹⁹⁷ The different programs include peer review, employee assistance plans, an internal grievance program, mediation, and arbitration.¹⁹⁸ However, the most important message an employer should relay is one of "mutual respect and dignity."¹⁹⁹ Pre-dispute mandatory arbitration agreements do not provide this message.

192. See Jacob, *supra* note 190, at 1118.

193. Cf. John T. Dunlop & Arnold M. Zack, *The New Frontier of Employment Dispute Resolution*, 1 PERSP. ON WORK 56, 57 (1997) (noting that in 1930, no more than 8 to 10% of CBAs contained arbitration as a step in a grievance procedure, but by 1960, virtually all CBAs contained some sort of arbitration clause).

194. See Jacob, *supra* note 190, at 1118.

195. As one commentator noted, "an employee gains the same 'advantages' of arbitration whether he waives his right to a judicial forum prospectively or retrospectively." Featherman, *supra* note 179, at 169. Thus, an employer adopting a SHRM perspective should realize that his or her employees will not provide the same competitive advantages or have the same motivation to work when the employee would have preferred to choose her option after the claim arises.

196. See PORTER, *supra* note 180, at xv (establishing a framework of competitive advantages required for all companies seeking to profit in a world of slower domestic growth and increased competition).

197. See Fitzpatrick, *supra* note 181, at 1297-98.

198. See *id.*

199. *Id.* at 1300.

Instead, compulsory arbitration clauses in applications and handbooks are simply unfair.²⁰⁰

V. SOLUTION FOR THE STRATEGIC HUMAN RESOURCES MANAGER

After *Austin*, the last relevant distinction between *Gilmer* and *Gardner-Denver* fell to scrutiny. Courts no longer apply a bright line distinction between union and nonunion employees when deciding the enforceability of arbitration clauses. As the Fourth Circuit held, it no longer matters whether the dispute arises under a securities registration application, an employment contract, or a collective bargaining agreement.²⁰¹ Quite simply, an employee is an employee.

As the last section explained, legislative history, recent Congressional action, statements and actions taken by government organizations and private associations, and decisions by strategic human resources managers suggest that courts should follow the *Austin* reasoning and treat all employees similarly. In contrast to *Austin*, however, courts should not bind any employee to a preemployment arbitration agreement. Instead, the employee should voluntarily decide the process for his or her statutory claim after the dispute arises.

The legal uncertainty and likelihood that mandatory arbitration agreements of statutory claims may soon be void suggests that employers should eliminate these provisions. Employers should instead adopt preemployment agreements requiring employees to discuss discriminatory conduct with supervisors before bringing claims into federal court. Through discussions with higher-ranking employees, the allegedly discriminated employee may find that arbitration is the best choice for him or her. If given the choice, employees, like employers, would probably choose arbitration over litigation in the majority of instances.²⁰² The difference arises when employees

200. Attorney Robert Fitzpatrick relates workplace disputes to a visit to the doctor. When a person becomes sick, he must first visit the doctor, describe the problem and then receive the prescription for medicine. Similarly, an employee should be allowed to discuss the employment dispute with his or her employer and then agree upon the method of attack to solve the problem, either through an ADR program or through litigation. *See id.* at 1299.

201. *See Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 885 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996).

202. *See Fitzpatrick, supra* note 181, at 1300 (stating that few employees want to go to court and some would probably prefer mediation or arbitration).

feel coerced.²⁰³ Some employees wish only to end the discriminatory practices of the employer rather than to seek damages. Post-dispute arbitration agreements could handle this problem.²⁰⁴

Post-dispute agreements may make employees feel more involved in the process, and managers may be surprised that litigation claims actually decrease. Courts will likely enforce arbitration agreements created after the employee brings the claim against the employer and fully knows the consequences of the arbitration agreement.

Finally, strategic human resources managers should be aware that compulsory arbitration provisions in preemployment contracts and CBAs will not necessarily be upheld in courts. Legal precedent lacks certainty in this area.²⁰⁵ Furthermore, congressional action and public sentiment toward these agreements do not provide much support for their use.²⁰⁶ Rather than asking lawyers to predict future judicial or legislative action, employers should instead look for the competitive advantage of keeping a motivated workforce.²⁰⁷ From a legal perspective, lawyers may also want to encourage employers to change the preemployment mandatory arbitration agreements to provisions that require the employee to discuss the problem with the employer before bringing the claim to court. Most courts do not follow *Austin* but do distinguish between individual contracts and CBAs.²⁰⁸ Some courts still invalidate the arbitration by finding a lack of knowing consent.²⁰⁹ Moreover, Congress continues to attempt to adopt legislation that would make these mandatory arbitration

203. "Forcing parties into unfair arbitration procedures ultimately undermines the valuable things that voluntary ADR can offer in this setting." *Dick*, *supra* note 174, at 34 (quoting Mr. Clifford Palefsky, member of the American Arbitration Association's employment drafting committee).

204. In *Almonte*, the employee had previously received damages from an arbitration agreement but the discriminatory conduct continued. Instead of internally filing another grievance, the employee decided to proceed directly to federal court, but the court, following *Austin*, would not allow the employee to bypass the arbitration provisions in the governing CBA. See *Almonte v. Coca-Cola Bottling Co.*, 959 F. Supp. 569, 571 (D. Conn. 1997); see also *supra* note 195 (noting that employees gain the same advantages from arbitration whether they decide to seek this process before or after the claim arises, but they feel more comfortable making the decision after alleging the discriminatory conduct); *supra* notes 158-62 and accompanying text (discussing how legislative history and congressional legislation provides only for post-dispute arbitration agreements).

205. See *supra* Parts III and IV.A.

206. See *supra* Part IV.B.

207. See *supra* Part IV.C.

208. See *supra* note 123.

209. See *supra* notes 86-96 and accompanying text discussing the decisions in *Lai* and *Renteria*. Although the case does not discuss it, the employee may have been seeking public disclosure of the discriminatory conduct in belief that this would deter the illegal practices, since the arbitrator's award had no such effect. See *supra* note 137.

agreements null and void.²¹⁰ Lawyers, thus, should advise their clients not to use compulsory arbitration clauses but instead to think about the issue from an SHRM perspective and, if nothing else, to realize that these agreements are not necessarily enforceable under current case law.

VI. CONCLUSION

From the adoption of the FAA in 1925 and its liberal federal policy favoring arbitration to the Supreme Court decisions in *Gardner-Denver* and *Gilmer*, to the recent Fourth Circuit decision in *Austin*, the enforcement of arbitration clauses in employment agreements continues to create legal problems. The *Gilmer* decision, the most recent Supreme Court decision in this area, is now the most cited and the most followed by lower courts. Yet, the distinctions the court made in *Gilmer* between that decision and its decision in *Gardner-Denver* seem to be dissolving.²¹¹ First, except in the Fourth Circuit, courts generally apply the FAA to all employment agreements.²¹² Second, the Fourth Circuit decision in *Austin* eliminated the distinction between CBAs and individual employment agreements even though the case did not arise under the FAA.²¹³ Thus, the Supreme Court may need to readdress this issue. Until then, each employee should be treated the same and receive the same remedies when bringing federal statutory claims. Employers and lawyers should realize that with an uncertain legal precedent, the best solution may be found not in the courts, but instead in the competitive marketplace. To be successful, businesses have adopted an SHRM perspective in the last decade realizing that their biggest competitive advantage can be found in their employees. Employers should realize the benefits of post-dispute voluntary agreements and

210. See *supra* Part IV.B.

211. See *supra* Part III.

212. See *supra* Part II.A.

213. See *supra* notes 116-120 and accompanying text.

eliminate the coercive and unfair compulsory arbitration agreements used as boilerplate in employment contracts and handbooks.

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