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Does Title VII Preclude Enforcement of Compulsory Arbitration Agreements - The Ninth Circuit Says Yes - Duffield v. Robertson Stephens & (and) Co.

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Does Title VII Preclude Enforcement of Compulsory Arbitration Agreements? The Ninth Circuit Says Yes

Duffield v. Robertson Stephens & Co.[1]

I. INTRODUCTION

Since 1974, federal courts have, in different contexts, considered whether Title VII of the Civil Rights Act of 1964 precludes enforcement of employment agreements that compel arbitration of Title VII claims. The statutory language of Title VII and subsequent amendments to the act providing for arbitration as a means of resolving disputes have been interpreted inconsistently by federal courts. The Federal Arbitration Act (FAA), which provides a general mandate to settle disputes through arbitration, may be applicable to statutory claims, but has been applied disparately to employment disputes implicating Title VII. The Supreme Court has twice decided whether employment agreements requiring arbitration of Title VII claims are enforceable. The holdings of these decisions are inconsistent, which the Supreme Court has recently recognized, but has failed to resolve. Consequently, the federal circuits may rely on either of these two cases, and their progeny, in deciding whether compulsory arbitration agreements are enforceable in accordance with the FAA mandate or, whether Title VII, and recent amendments, preclude enforcement of compulsory arbitration agreements.

This casenote examines a Ninth Circuit decision that considered the impact of the Civil Rights Act of 1991 on the unsettled question of whether Title VII precludes employers from requiring prospective employees, as a mandatory condition of employment, to foreclose their right to bring Title VII claims in federal court. The Ninth Circuit construed the 1991 Act to preclude enforcement of individual employment agreements that require employees to arbitrate statutory claims brought under Title VII. The holding of this case establishes a controversial precedent because it is inconsistent with a seminal Supreme Court decision, the FAA mandate and other recent federal decisions. This decision, in turn, creates uncertainty as to Congress's intent regarding the applicability of arbitration to Title VII disputes.

II. FACTS AND HOLDING

In 1988, appellant, Tonyja Duffield (Duffield), a securities broker-dealer, sought employment with respondent, Robertson Stephens & Company (Robertson Stephens). Robertson Stephens required Duffield to agree to submit to "compulsory

1. 144 F.3d 1182 (9th Cir. 1998).

arbitration"[2] for any future employment-related disputes pursuant to the securities industry's Uniform Application for Securities Industry Registration or Transfer (Form U-4).[3] Duffield agreed to this condition of employment by signing her Form U-4, and began work for Robertson Stephens as a broker-dealer.[4]

In January, 1995, Duffield brought suit in federal court alleging, *inter alia*, sexual discrimination under Title VII of the Civil Rights Act of 1964 as modified by the Civil Rights Act of 1991.[5] Duffield sought a declaration that securities industry employees cannot be compelled, as a condition of employment, to arbitrate their statutory claims brought under Title VII.[6] She argued that Congress's intent in enacting the Civil Rights Act of 1991 and the Act's underlying purpose precluded compulsory arbitration of Title VII employment disputes.[7] Robertson Stephens countered that a "plain text" meaning should be given to the statutory language of the 1991 Act consistent with a prior Supreme Court decision[8] allowing employers to require compulsory arbitration under Form U-4.[9]

The United States District Court for the Northern District of California denied Duffield's motion, and granted Robertson Stephen's motion to compel arbitration of Duffield's employment claims.[10] On appeal, the Ninth Circuit Court of Appeals considered compulsory arbitration of Title VII claims as a threshold issue.[11] Duffield renewed her argument that she could not be compelled to waive her statutory right to litigate her employment dispute claim under Title VII in favor of binding arbitration.[12] The Ninth Circuit agreed. Reversing the district court, the Court of Appeals held that under the Civil Rights Act of 1991, employees entering into individual employment agreements could not be required, as a mandatory condition of employment, to foreclose their right to bring statutory suits under Title VII in favor of binding arbitration.[13]

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2. For purposes of this casenote, "compulsory arbitration" refers to the system where an employer requires a prospective employee to agree to surrender their right to litigate any employment disputes in federal court in favor of binding arbitration in order to obtain employment with that employer. *Id.* at 1186.

3. *Id.* at 1185. Paragraph 5 of Form U-4, the arbitration clause, reads as follows:
I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in item 10 as may be amended from time to time. *Id.*

4. *Id.* at 1186.

5. *Id.*

6. *Id.*

7. *Id.*

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

9. *Duffield*, 144 F.3d at 1189-90.

10. *Id.* at 1186.

11. *Id.*

12. *Id.*

13. *Id.* at 1185.

III. LEGAL BACKGROUND

When deciding whether employment agreements that require compulsory arbitration of Title VII claims are enforceable, the federal circuits have considered the relative bargaining power between the employer and employee. The procedural adequacy of arbitration has also been an important factor in federal decisions. But these fact-specific considerations have not been dispositive. Rather, federal courts have decided the issue by endorsing one of two laudable public policies: alternative dispute resolution, specifically arbitration, which is codified in the Federal Arbitration Act (FAA)[14]; or eliminating employment discrimination through suits brought in federal court under Title VII. In the context of compulsory arbitration of Title VII claims, these policies collide. Without clear direction from the Supreme Court, the federal circuits have decided the issue by determining which policy should supersede the other; a decidedly result-oriented approach. Because of their fundamental importance, a preliminary consideration of these policies is appropriate.

Title VII of the Civil Rights Act of 1964 sought, as its primary objective, to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin.[15] Congress considered the policy against discrimination to be of the "highest priority," which remains Title VII's remedial purpose.[16] To this end, the Supreme Court has interpreted the act as evincing Congress's intent to invest plenary power in the federal courts to secure compliance with Title VII.[17] The Court has stated that "the federal courts were entrusted with the ultimate enforcement responsibility under Title VII."[18] In 1964, at the time of its adoption, the drafters of Title VII did not contemplate alternative dispute resolution procedures as viable alternatives to enforce the substantive protections codified in Title VII.

Since then, alternative methods of dispute resolution (ADR), including arbitration, have become increasingly popular to prevent and resolve disputes.[19] The federal policy favoring arbitration of labor disputes has steadily gained strength since its adoption by the Supreme Court in the late 1950's.[20] In the 1980's, ADR proliferated as courts became inundated with protracted litigation that clogged the formal legal system. Arbitration became the preferred alternative to litigation because it offered a binding decision without the expense and formality of a conventional trial.

In deciding whether Title VII precludes enforcement of compulsory arbitration, the federal courts have considered the virtues of these policies under different factual circumstances. Of particular importance has been the type of employment agreement a party seeks to enforce. Employment agreements generally fall into one of two categories: (1) collective-bargaining agreements, or (2) individual employment

14. 9 U.S.C. §§ 1-15 (1988).
15. 42 U.S.C. §§ 2000e to e-17 (1998).
16. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974).
17. *Id.* at 45.
18. Kremer v. Chemical Const. Corp., 456 U.S. 461, 468 (1982).
19. *See* LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 1-7 (abridged ed. 1988).
20. *See* Textile Workers Union of Am. v. Lincoln Mills of Alabama, 353 U.S. 448 (1957).

contracts. The importance of the distinction, for purposes of compulsory arbitration, centers on the means of negotiating each type of contract. Collective bargaining agreements are negotiated between the employer and an association, usually a union, that represents a large number of employees. The negotiations are conducted on behalf of employees collectively, which does not afford individual employees an opportunity to negotiate the provisions of the collective-bargaining agreement on their own behalf. In contrast, an individual employment contract is negotiated directly between the employer and prospective employee, giving the employee an opportunity to negotiate specific provisions of the contract, including arbitration clauses.

In 1974, the Supreme Court first considered whether compulsory arbitration of employment disputes could be enforced in the context of collective-bargaining agreements. In *Alexander v. Gardner-Denver Co.*,[21] the Court held that prospective employees could not be forced to arbitrate their employment dispute claims arising under Title VII pursuant to a provision within a collective-bargaining agreement.[22] The Court found that an employee did not foreclose his right to bring a statutory action under Title VII in federal court by *first* submitting his claim to arbitration in accordance with the agreement.[23] The Court intimated that in spite of the federal policy favoring arbitration of employment disputes,[24] arbitration was not appropriate as an exclusive forum to redress employment disputes that implicate Title VII protections.[25] The congressional intent of Title VII was construed to allow an individual to pursue independently his statutory claims in federal court.[26]

The *Gardner-Denver* Court emphasized the importance of the right to bring Title VII claims in federal court in the context of collective-bargaining agreements.[27] The Court reasoned that individual employees, as members of the union, are protected by the contractual provisions provided in the agreement, but found that these contractual rights should not operate to foreclose an employee's right to bring a Title VII claim in federal court.[28] Title VII, the Court concluded, afforded individuals protection against employment discrimination *in addition* to contractual protections provided in a collective-bargaining agreement.[29] Indeed, the Court stated that "the individual's private right of action remains an essential means of obtaining judicial enforcement of Title VII."[30] In 1974, therefore, compulsory arbitration clauses of collective bargaining agreements did not preclude employees from bringing Title VII statutory claims in federal court after such claims were first submitted to arbitration.[31]

Since the Supreme Court's decision in *Gardner-Denver*, the growing acceptance of arbitration in the 1980's pressured the federal courts to reevaluate their reluctance to enforce employment agreements that required compulsory arbitration. After some

21. 415 U.S. 36, 59-60 (1974).
22. *Id.*
23. *Id.*
24. *See* Textile Workers Union of Am. v. Lincoln Mills of Alabama, 353 U.S. 448, 456 (1957).
25. *Gardner-Denver*, 415 U.S. at 45.
26. *Id.*
27. *Id.*
28. *Id.* at 48-49.
29. *Id.*
30. *Id.* at 45.
31. *Id.* at 59.

resistance, the federal courts recognized arbitration as a "cheaper, faster, and less forma" alternative to formal adjudication.[32] Accordingly, the Supreme Court began to enforce pre-dispute agreements under the FAA.[33] In *Gilmer v. Interstate Johnson Lane Corporation*, the Supreme Court revisited the question of whether compulsory arbitration agreements are enforceable.[34] In *Gilmer*, however, the Court considered the question in the context of an individual employment agreement, not a collective bargaining agreement. This proved to be an important difference the Court relied upon to distinguish its holding in *Gardner-Denver* and enforce the compulsory arbitration provision of a securities registration agreement.[35]

In *Gilmer*, the compulsory arbitration provision of the securities industry registration agreement (Form U-4) was upheld with regard to claims arising under the Age Discrimination in Employment Act of 1967 (ADEA).[36] The employee was compelled to arbitrate his claim pursuant to an individual employment agreement that required prospective employees to register as securities representatives with several stock exchanges.[37] The Court found that "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."[38] The Court iterated what it considered to be a "well settled" notion; that arbitration is a suitable forum to redress employment disputes that implicate statutory protections of the 1964 Civil Rights Act.[39] The Court stated that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in arbitral, rather than a judicial, forum."[40] The Court noted that previous cases decided under the FAA found that "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[41] This is especially true, the Court found, for individual employment

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32. Carla Wong McMillian, *Collective Bargaining Agreements, Mandatory Arbitration, and Title VII: Varner v. National Supermarkets, Inc.*, 32 GA. L. REV. 287 (1997); *see* Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187, 1188 (1993) ("Traditionally, courts had refused to enforce agreements to arbitrate. Recently, however, with the growing popularity of ADR, courts have abandoned their traditional hostility toward arbitration and openly embraced agreements to arbitrate.").

33. *See* 9 U.S.C. § 2; *see also* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 239-40 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). Section 2's mandate covers pre-dispute arbitration agreements:

> 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, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, 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.

34. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
35. *Id.* at 22.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 24.
41. Mitsubishi Motors Corp. v. Sole Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

contracts where the individual employee has the opportunity to negotiate her own contract.[42] The Court conceded that not all statutory claims may be appropriate for arbitration, but the burden is upon the employee to demonstrate that Congress intended to preclude a waiver of a judicial forum for ADEA claims.[43]

The Court established the following test that employees must meet in order to satisfy this burden: "If such an intention exists, it will be discoverable in the text of the ADEA, its legislative history, or an "inherent conflict" between arbitration and the ADEA's underlying purposes."[44] Employing this test the Court found against petitioner and noted that the ADEA provides that the Equal Employment Opportunity Commission (EEOC) is encouraged to pursue "informal methods of conciliation, conference, and persuasion,"[45] evincing Congress's intent to sanction arbitration within the statutory scheme of the ADEA.[46]

Arguing for the opposite result, petitioner vigorously asserted that the Court's decision in *Gardner-Denver* precludes arbitration of employment discrimination claims.[47] The *Gilmer* Court disagreed and distinguished *Gardner-Denver* in three ways. First, the Court noted that *Gardner-Denver* did not involve the issue of the enforceability of an agreement to arbitrate statutory claims.[48] Rather, it involved the issue of whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims.[49] Second, because the arbitration in that case occurred in the context of a collective-bargaining agreement, it differed from the individual agreement entered into by the complaining employee.[50] An important concern in *Gardner-Denver* that the Court found inapplicable in the context of individual contracts was the tension between collective representation and individual statutory rights.[51] Finally, the Court noted that those cases were not decided under the FAA, a statute that reflects a "liberal federal policy favoring arbitration agreements."[52] Taken together, these differences persuaded the *Gilmer* Court to uphold individual employment contracts that required prospective employees to agree to compulsory arbitration of future employment disputes as a condition of their employment.

Most federal courts have followed the *Gilmer* Court's endorsement of the FAA. For example, only months after *Gilmer* was decided the Sixth Circuit decided *Willis v. Dean Witter Reynolds, Inc.*[53] In *Willis*, the plaintiff (Willis) brought a sexual discrimination claim under Title VII. Defendant moved to have this claim arbitrated pursuant to the Securities Registration Form U-4 Willis signed as a condition of her employment. In reversing the United States District Court, the Sixth Circuit held that *Gilmer* was dispositive of plaintiff's Title VII claim.[54] The Court found that Form

42. *Gilmer*, 500 U.S. at 24.
43. *Id.*
44. *Id.*
45. *Id.* at 27 (citing 29 U.S.C. § 626(b) (1991)).
46. *Id.* at 28.
47. *Id.*
48. *Id.* at 34.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* (citing *Mitsubishi Motors Corp.*, 473 U.S. at 628).
53. Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991).
54. *Id.* at 306-07.

U-4 employment agreements were enforceable, and that Willis could be compelled to arbitrate her Title VII claim pursuant to that agreement.

Barely six months after the Supreme Court decided *Gilmer*, Congress enacted the Civil Rights Act of 1991.[55] The Act had two primary goals with regard to Title VII: (1) "to overrule a series of 1989 Supreme Court decisions that represented an unduly narrow and restrictive reading of Title VII," and (2) "to strengthen Title VII by making it easier to bring and prove lawsuits, and by increasing the available judicial remedies so that plaintiffs could be fully compensated for injuries resulting from discrimination."[56] Section 118 of the Act, however, included text that explicitly established arbitration as a viable means of resolving Title VII disputes.[57] Section 118 provides that: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution,...including arbitration is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this Title."[58]

Since the 1991 Act's adoption, some federal courts have construed the text of section 118 to evince Congress's intent to endorse compulsory arbitration agreements in accordance with the FAA mandate. The Third Circuit in *Seus v. John Nuveen & Co., Inc.*[59], upheld Form U-4 under the FAA with respect to claims brought under both Title VII and the ADEA.[60] The Court stated: "On its face, the text of section 118 evinces a clear Congressional intent to encourage arbitration of Title VII and ADEA claims, not to preclude such arbitration."[61] Taking the *Gilmer* holding a step further the Court found that because Title VII and the ADEA are similar in their aims and substantive provisions, Title VII was entirely compatible with applying the FAA to agreements to arbitrate Title VII claims.[62] Other federal circuits that have decided the issue agree with the Third Circuit's contention that the language of section 118 of the Civil Rights Act of 1991 did not impliedly repeal the FAA with respect to agreements to arbitrate Title VII claims.[63]

Against the backdrop of *Gardner Denver*, *Gilmer*, and the text of section 118 of the Civil Rights Act of 1991, the Ninth Circuit considered for the first time the effect of the 1991 Act on the question of whether individual employment contracts that require compulsory arbitration of future Title VII claims are enforceable.[64]

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55. *See supra* text accompanying note 8.
56. *Duffield*, 144 F.3d at 1190.
57. Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991) (codified as amended in scattered sections of 42 U.S.C.)
58. *Id.*
59. Seus v. John Nuveen & Co., Inc., 146 F.3d 175 (3d Cir. 1998).
60. *Id.* at 182.
61. *Id.*
62. *Id* at 182-83.
63. See Koveleskie v. SBC Capital Markets, Inc., 167 F.3d 361, 365 (7th Cir. 1999); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 10-11 (1st Cir.1999).
64. *Duffield*, 144 F.3d at 1189.

IV. INSTANT DECISION

The Ninth Circuit Court of Appeals employed the test espoused in *Gilmer* to determine whether section 118 of the Civil Rights Act of 1991 precludes employers from enforcing individual contracts that required compulsory arbitration of Title VII claims. The relevant language of section 118 provides for the use of arbitration "where appropriate and to the extent authorized by law."[65] The task before the court was to assign meaning to this language in the context of the Act's underlying purposes; (1) to remedy previous Supreme Court Decisions reading Title VII too restrictively, and (2) to strengthen Title VII by making it easier to bring and prove lawsuits, and by expanding available judicial remedies.[66]

In accordance with *Gilmer*, the Court required Duffield to show that Congress intended to preclude compulsory arbitration as a condition of employment through the Act's text, Congressional intent, or an "inherent conflict" between arbitration and Title VII's underlying purposes.[67] In order to satisfy this test, Duffield argued that Congress's intent to preclude the compulsory arbitration of Title VII claims is conclusively demonstrated in the text and/or legislative history of the Civil Rights Act of 1991, as well as by an examination of its purposes.[68]

Robertson Stephens argued that a "plain text" reading of section 118, consistent with *Gilmer,* not only allows employers to mandate that prospective employees agree to compulsory arbitration, but that it encourages arbitration of Title VII claims.[69] They contended that because Congress passed the 1991 Act after *Gilmer* had "authorized" compulsory arbitration of ADEA claims as a mandatory condition of employment under individual employment contracts, Congress intended the language "and to the extent authorized by law" as an endorsement of the Supreme Court's decision in *Gilmer.*[70] Robertson Stephens asserted that they may, therefore, compel Duffield to submit to compulsory arbitration because she properly agreed to arbitrate her Title VII employment claim by signing her Form U-4.

At the outset, the Court noted that the Ninth Circuit was the first circuit court to consider the "plain text" argument that Robertson Stephens made in the context of an individual agreement that requires as a condition of employment the arbitration of Title VII claims.[71] As a matter of construction, the Court stated that Robertson Stephens' construction of section 118 is at odds with Congress's directive to read Title VII broadly so as to best effectuate its remedial purposes.[72] The purpose of the Act was "uniformly to expand employees' rights and to increase the possible remedies available to civil rights plaintiffs."[73] The Court stated that it would be paradoxical if the Act, which was to "strengthen existing protections and remedies available to employees under Title VII," were to "encourage" the use of a process

65. *Id.* at 1191.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 1192.
73. *Id.*

whereby employers condition employment on their prospective employees' surrendering their rights to a judicial forum for the resolution of all future claims of employment discrimination.[74]

The Court noted, however, that there are two circuit court decisions consistent with Robertson Stephens' "plain language" construction of section 118.[75] The Court distinguished both of these decisions, which arose under the Americans with Disabilities Act (ADA); the first did not involve an employment agreement or a compulsory waiver, and the second appeared to be a voluntary agreement to arbitrate consummated at a performance review by a current, not prospective, employee.[76] The Court also recognized a third case,[77] which held that under the ADA and Title VII binding arbitration was enforceable pursuant to collective bargaining agreements.[78] This decision flatly rejected the holding in *Gardner-Denver*, which the Ninth Circuit criticized. The Court found that *Gardner-Denver* was still good law and, therefore, the Fourth Circuit should not have dismissed its holding.[79]

The Court intimated that reading the language of section 118 in context reveals the text's ambiguity, and that the term "encouraged" only means that parties are encouraged to arbitrate within the statutory boundaries Congress contemplated.[80] The Court defined these boundaries by qualifying section 118's language with the Acts underlying purpose.[81] In the first instance, the Court downplayed section 118 as an "innocuous-appearing section in a statute providing for a vast strengthening of employees' rights,"[82] but recognized that this phrase provides the section's substantive limitations.[83] The Court construed the phrase "where appropriate" to limit the phrase "to the extent authorized by law," in that Congress did not intend to encourage all forms of arbitration or to encourage the use of arbitration under all circumstances that might otherwise be lawful.[84] Rather, the Court found that Congress intended to encourage arbitration only under circumstances it deemed to be both legally permissible and appropriate.[85] The meaning of the words "where appropriate," the Court said, can be gleaned from the purpose and objective of the 1991 Act.[86] "Where appropriate," as used in the Act, "would appear to mean where arbitration furthers the purpose and objective of the Act--by affording victims of discrimination an opportunity to present their claims in an alternative forum, a forum that they find desirable--not by forcing an unwanted forum upon them."[87]

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74. *Id.*
75. Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 148-50 (1st Cir. 1998); Miller v. Public Storage Mgmt., Inc., 121 F.3d 215, 218 (5th Cir. 1997).
76. *Duffield*, 144 F.3d at 1191-92.
77. Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 880-82 (4th Cir. 1996).
78. *Duffield*, 144 F.3d at 1192.
79. *Id.*
80. *Id.* at 1193.
81. *Id.*
82. *Id.* at 1191.
83. *Id.*
84. *Id.* at 1193.
85. *Id.*
86. *Id.* at 1193-94.
87. *Id.* at 1194. *See, e.g.*, John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86 (1993).

Likewise, the phrase "to the extent authorized by law" the Court construes as referring to the *Gardner-Denver* line of cases prohibiting compulsory arbitration under Title VII rather than to the *Gilmer* decision allowing compulsory arbitration under the ADEA.[88] The Court concluded that the congressional intent of section 118 did not include *Gilmer* within its definition of what was "authorized by law."[89] The Court stated that "[t]he overwhelming weight of the law at the time Congress drafted section 118, as it was reported out of the House Education and Labor committee, was to the effect that compulsory agreements to arbitrate Title VII claims were unenforceable. In other words, such agreements were not 'authorized by law'."[90] The Court employed *Gardner-Denver's* view of the purpose of Title VII to inform what meaning section 118's language, "to the extent authorized by law," should be given. Specifically, "that the law at that time prohibited employers from compelling employees to arbitrate Title VII claims pursuant to collective bargaining agreements, 'in large part' because of the Court's recognition of the critical role that Congress envisioned for the independent federal judiciary in advancing Title VII's societal goal."[91] The Court, therefore, maintained that *Gardner-Denver* was still applicable law and that it stated the purpose of Title VII under which the language of section 118 should be construed.[92]

The Court looked to the 1991 Act's legislative history as part of *Gilmer's* test to discover whether Title VII does preclude compulsory arbitration of employment disputes.[93] There, the Court found that its reliance on *Gardner-Denver* was justified. The Court concluded that the legislative history of section 118 unambiguously confirms that Congress sought to codify the law as it stood at the time the section was drafted, "which would eliminate any possibility that Congress intended to write *Gilmer* into Title VII."[94] The Court found that because the Supreme Court has "repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill," and the congressional statements contained in the Reports occurred before the Supreme Court's decision in *Gilmer* was issued, it evinces Congress's intent to endorse *Gardner-Denver* and its progeny, not *Gilmer*.[95] Moreover, the Court emphasized that a proposal which would have allowed employers to enforce agreements containing compulsory arbitration provisions was

88. *Duffield*, 144 F.3d at 1195.
89. *Id.*
90. *Id.* at 1194.
91. *Id.*; *see* McDonald v. City of West Branch, Michigan, 466 U.S. 284 (1984).
92. *Duffield*, 144 F.3d at 1194-95.
93. *Id.* at 1194.
94. *Id.* at 1195. The Committee Report states:
> The Committee emphasizes that the use of alternative dispute mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the committee believes that any agreement to submit disputed issues to arbitration, whether in the context of collective bargaining or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII.

Id.
95. *Id.*

rejected by Congress during the legislative process.[96] Therefore, the Court found the legislative history of section 118 dispositive in that it contained Congress's view of the law during the relevant course of enactment, and conclusively evidenced Congress' intent to codify the holding of *Gardner-Denver*--that compulsory arbitration of Title VII claims was not "authorized by law."[97]

By relying on the reasoning in *Gardner-Denver* to qualify the language of section 118, the Court held that Duffield satisfied the *Gilmer* preclusion test by showing that Congress intended to preclude enforcement of individual contracts that require compulsory arbitration of Title VII claims as a condition of employment. Accordingly, Duffield's Title VII sexual discrimination claim was found to be properly before a federal court, and the district court's order compelling arbitration was reversed.

V. COMMENT

The federal courts have had the difficult task of determining whether Title VII precludes enforcement of employment agreements requiring compulsory arbitration of Title VII claims. The inconsistent holdings in *Gardner-Denver* and *Gilmer* are difficult to reconcile even considering that *Gardner-Denver* was decided in the context of a collective bargaining agreement, and *Gilmer* in the context of an individual employment agreement. A juxtaposition of these cases for current review leaves courts without a clear statement of the law. The Civil Rights Act of 1991, which strengthened statutory protections under Title VII while endorsing arbitration "where appropriate" and "to the extent authorized by law," added another dimension to this already complex question.

The premise upon which the *Duffield* case rests is that Title VII is unique.[98] The statutory protections contained in Title VII were created to fulfill an important goal--to end employment discrimination. The Ninth Circuit's holding promotes the position that these protections should not be subverted in favor of compulsory arbitration despite arbitration's many advantages. This conclusion follows naturally from the Supreme Court's decision in *Gardner-Denver* and its progeny, but contradicts *Gilmer*, which is mandatory authority in the context of individual employment agreements like the agreement at issue in *Duffield*. Extending *Gilmer* to apply to Title VII, many federal courts have upheld compulsory arbitration of Title VII claims, opposing the Ninth Circuit's decision in *Duffield*.

The *Duffield* opinion, however, is not without support from other federal decisions that have recently considered the issue. Just three months after the *Duffield*

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96. *Id.* House Report No. 40(I) provides: The Republican substitute, however, encourages the pursuit of such mechanisms "in place of judicial resolution." Thus, under the latter proposal employers could refuses to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints. Such a rule would fly in the face of Supreme court decisions, [*Gardner-Denver*] holding that workers have the right to go to court, rather than being forced into compulsory arbitration, to resolve important statutory and constitutional rights, including opportunity rights. H.R. REP. NO. 102-40(I), at 104 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549 (Leg. Hist.) (emphasis added).

97. *Duffield*, 144 F.3d at 1195.

98. *Id.* at 1188.

decision, the United States District Court, S.D. Ohio considered the question in *O'Hara v. Mt. Vernon Board of Education*.[99] The Court held, in the context of collective bargaining agreements, that *Gardner-Denver* was still the law and that the 1991 amendments to Title VII did not intend to abrogate *Gardner-Denver*.[100] This decision lends support, although only persuasive, to the Ninth Circuit's reliance on the viability of *Gardner-Denver* even after *Gilmer*. This decision does not support, however, the Ninth Circuit's construction of section 118.

Where other courts have construed the language of section 118 to clearly endorse the FAA,[101] the Ninth Circuit found ambiguity. Because the language of section 118, on its face, appears to clearly endorse arbitration of Title VII claims, the Court's determination that the language was ambiguous was a crucial, and controversial, finding that made possible its ultimate holding. This finding allowed the Court, in accordance with the *Gilmer* preclusion test, to look beyond the textual language to the legislative history of section 118. The Court found that *Gilmer* and its reliance on the FAA mandate was not adopted by the drafters of section 118. Thus, by implication, the *Duffield* Court determined that the FAA is repealed by section 118 with respect to compulsory arbitration of Title VII claims.

Commentary on the 1991 Act challenges this view. Beginning in the early 1970's, several Congressional acts provided for arbitration in their statutory text.[102] These acts ranged from environmental protections to intellectual property law.[103] Arbitration of statutory claims brought under these acts was consistently upheld. Likewise, there is wide support for interpreting section 118 as an endorsement of the FAA arbitration mandate. Interpreting the language of section 118, one commentator noted that "encouragement" connotes "permission."[104] This interpretation is consistent with the majority of federal decisions holding that section 118 expresses congressional intent to permit resolution of Title VII claims in accordance with the FAA mandate.[105] This view, however, begs the question of why the *Duffield* Court was not bound by *Gilmer's* holding when both *Gilmer* and *Duffield* involved individual employment contracts.

Ironically, the answer lies in the preclusion test espoused in *Gilmer*. The *Gilmer* test allows courts to preclude compulsory arbitration by finding text, intent, or *congressional purpose* of a statute to prohibit arbitration of claims brought under that statute. *Gilmer's* preclusion test, therefore, grants courts the authority to find that arbitration may be precluded under that statute regardless of the mandate codified in the FAA and its own holding. According to the Ninth Circuit, the text of section 118 is ineffectual in furthering or rejecting the liberal policy codified in the FAA because its ambiguous language does not positively describe the effect of the FAA mandate, if any, after *Gilmer*. Clearly, the Ninth Circuit was not satisfied that Congress meant

99. O'Hara v. Mt. Vernon Bd. of Educ., 16 F. Supp. 2d 868 (S.D. Ohio 1998).
100. *Id.* at 879.
101. *Seus*, 146 F.3d at 183.
102. Douglas E. Abrams, *Arbitrability in Recent Federal Civil Rights Legislation: The Need for Amendment*, 26 CONN. L. REV. 521, 533 (1994).
103. *Id.*
104. *Id.* at 555.
105. *Id.*; *see* sources cited *supra* note 33.

to endorse the FAA within the language of section 118 without unmistakably clear language providing as much.

The Ninth Circuit had a result in mind. Specifically, the Court wanted to promote the purpose of Title VII by protecting employees right to bring Title VII claims in federal court. The *Duffield* Court relied heavily on the remedial purpose of Title VII in order to construe section 118 to preclude compulsory arbitration of Title VII claims, thereby satisfying the *Gilmer* test. The extensive analysis in *Duffield* is due, in part, to the complexity of the issue, and that it was a case of first impression in the Ninth Circuit. But the Court also had to craft an exhaustive argument to justify circumventing *Gilmer* and the FAA.

The wisdom of the *Duffield* holding is dubious when considered in light of the *Gilmer* preclusion test that allows federal courts to reach a result that contravenes the same FAA mandate that the *Gilmer* Court found dispositive. Curiously, the Ninth Circuit relied on *Gardner-Denver* to support its conclusion that section 118 did not "encourage" arbitration for Title VII employment claims when the *Gilmer* Court distinguished *Gardner-Denver* to find that arbitration was appropriate for claims arising under the ADEA. The explanation, it seems, is that *Gardner-Denver* is still good law, and promotes the policy that the *Duffield* Court wanted to endorse.

Recently, in *Wright v. Universal Maritime Service Corporation*, the Supreme Court recognized a "tension" between *Gardner-Denver* and *Gilmer*.[106] Unfortunately, the Court failed to resolve the tension, leaving the question for a future case because no waiver of the employee's right to a judicial forum had occurred in the collective bargaining agreement at issue.[107] In fact, the Court noted that it followed both *Gilmer* and *Gardner-Denver* in deciding whether statutory claims are subject to compulsory arbitration, but under different statutes.[108] By implication, therefore, the Ninth Circuit concluded correctly that *Gardner-Denver* was still good law, even if its reliance on that case was suspect under the circumstances of the case before it.

The Supreme Court failed to recognize, however, the "tension" between the FAA mandate and the *Gilmer* preclusion test, which was highlighted in *Duffield*. *Gilmer* allows courts, like the Ninth Circuit, to ignore the mandate in order to promote the policy it chooses, notwithstanding explicit language that appears to provide clear direction such as section 118. Each circuit, apparently, may rely on the authority that suits its desired end, which generates conflicting interpretations of federal statutes. The effect of federal legislation must be consistent throughout the nation. The Supreme Court should resolve the issue so that each circuit does not determine for itself which federal policy it will follow where Congress has made that policy decision. Congress has spoken with regard to arbitration of Title VII claims. The Supreme Court has only to give effect to the policy federal lawmakers have chosen.

VI. CONCLUSION

If not an extreme case, the *Duffield* decision is an outlier that subverts the federal policy supporting arbitration in favor of allowing employee's to bring Title VII

106. 119 S.Ct. 391, 394 (1998).
107. *Id.* at 394-95.
108. *Id.* at 394.

claims in a judicial forum. Until the Supreme conclusively decides the specific question considered in *Duffield,* the division over which policy should prevail will continue.

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