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The Fallacy of *Duffield v. Robertson* and *Rosenberg v. Merrill Lynch*: The Continuing Viability of Mandatory Pre-Dispute Title VII Arbitration Agreements in the Post-Civil Rights Act of 1991 Era

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I. INTRODUCTION

Two recent decisions, one in the Ninth Circuit and one in a Massachusetts District Court, have erroneously held that mandatory Title VII pre-dispute arbitration clauses are unenforceable under the Civil Rights Act of 1991.1 A statutory construction analysis of the 1991 Civil Rights Act demonstrates that Congress did not intend to abolish the use of such clauses. Instead, Congress intended to support the use of mandatory pre-dispute arbitration as a valid and useful forum for the resolution of disputes arising under Title VII of the Civil Rights Act of 1964.

The purpose of the following Article is twofold. First, this Article will present a persuasive critique of the arguments presented in the *Duffield* and *Rosenberg* decisions and offer an alternative interpretation of the statutory intent of the Civil Rights Act of 1991. Second, this Article will demonstrate that enforcement of pre-dispute agreements to arbitrate statutory employment claims is in the best interest of both the public and the parties involved in employment disputes.

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II. THE HISTORICAL AND STATUTORY EVOLUTION OF
THE ARBITRABILITY OF EMPLOYMENT
DISCRIMINATION CLAIMS

A. The Pre-1991 Development of Arbitration
Within the Employment Context

Since the enactment of Title VII of the Civil Rights Act of 1964, federal courts have played a necessary and vital part in the enforcement of the anti-discrimination statute. In Kremer v. Chemical Constr. Corp., the Supreme Court explained that "federal courts were entrusted with the ultimate enforcement responsibility under Title VII." Emphasizing the central role of the federal judiciary, early decisions, particularly those in the collective bargaining context, largely held mandatory arbitration clauses unenforceable.

In Textile Workers Union v. Lincoln Mills, for example, the Supreme Court found Section 301 of the Taft-Hartley Act to forbid the use of mandatory arbitration within the collective bargaining context. In Alexander v. Gardener-Denver, the Supreme Court reached a similar conclusion and further underscored the importance of the judiciary in resolving employment claims. The Court held that an arbitration clause in a collective bargaining agreement would not preclude a plaintiff from pursuing a Title VII claim in federal court. Prior to 1991, Gardener-Denver was commonly understood to forbid compulsory arbitration of all claims brought pursuant to Title VII.

B. Gilmer v. Interstate/Johnson Lane Corporation:
Arbitration Recognized as a Valid Dispute
Resolution Mechanism by the Supreme Court

The course of arbitration of employment discrimination claims took a radical shift in Gilmer v. Interstate/Johnson Lane Corp., a 1991 Supreme Court decision. The Court in Gilmer held that a claim under the Age Discrimination in Employment Act of 1967 (ADEA) could be "subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application." The Court distinguished the facts of Gilmer from those present in Gardener-Denver on the

6. Id. at 56. The Court's decision in Gardener-Denver was reaffirmed in Chandler v. Roudebush, 425 U.S. 840 (1976) (applying the Gardener-Denver holding to federal employees), and McDonald v. West Branch, 466 U.S. 284 (1984).
7. See Utey v. Goldman Sachs & Co., 883 F.2d 184, 185-87 (1st Cir. 1989); Rosenfeld v. Department of Army, 769 F.2d 237, 239 (4th Cir. 1985); EEOC v. Children's Hosp. Med. Ctr., 719 F.2d 1426, 1431 (9th Cir. 1983).
grounds that *Gardener-Denver* involved a collective bargaining agreement, whereas *Gilmer* involved an arbitration agreement between an individual and an employer.\textsuperscript{11} The Court in *Gilmer* explained that, although arbitration may not be an appropriate forum for all statutory claims, individual agreements to arbitrate should be upheld absent express Congressional intent to prohibit waiver of remedies for the statutory rights in question.\textsuperscript{12}

Courts have since held that *Gilmer*’s endorsement of compulsory arbitration for statutory civil rights claims brought pursuant to the ADEA also applies to claims brought under Title VII of the Civil Rights Act of 1964.\textsuperscript{13} In *Mago v. Shearson Lehman Hutton Inc.*, for example, the Ninth Circuit in compelling arbitration reasoned that “although Gilmer involved a claim under the Age Discrimination in Employment Act of 1967 rather than the Title VII claim brought by [the plaintiff], both statutes are similar in their aims and substantive provisions.”\textsuperscript{14} This interpretation was broadly accepted by the federal judiciary until the *Rosenberg* and *Duffield* courts denied such an extension based on an erroneous analysis of the Civil Rights Act of 1991.\textsuperscript{15}

\textbf{C. The Civil Rights Act of 1991}

Five months after the Supreme Court’s decision in *Gilmer*, Congress enacted the Civil Rights Act of 1991. The 1991 Act was chiefly designed to ease the burden of initiating and proving discrimination claims.\textsuperscript{16} It also expanded the procedural remedies available to plaintiffs bringing discrimination suits and expressly stated 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.”\textsuperscript{17} Despite express Congressional approval, this Act serves as the basis for the misguided *Rosenberg* and *Duffield* decisions.

\textsuperscript{11} *Id.* at 34-35.
\textsuperscript{12} *Id.* at 24-26.
\textsuperscript{14} *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 935 (9th Cir. 1992).
\textsuperscript{15} The Fifth Circuit in *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991) and the District of Columbia Circuit, in *Cole v. Burns International Securities Services*, 105 F.3d 1465 (D.C. Cir. 1997) have expressly accepted the use of mandatory pre-dispute arbitration agreements.
\textsuperscript{16} *Duffield*, 144 F.3d at 1191.
III. Recent Challenges to the Validity of Mandatory Pre-Dispute Employment Arbitration Agreements

An individual seeking work as a broker in the securities industry with any employer is required to sign the industry’s Uniform Application for Securities Industry Registration or Transfer, commonly known as a “Form U-4.” The Form U-4 is a standardized form that requires all prospective securities brokers to “agree to arbitrate any dispute, claim or controversy that may arise between [the employee] and [the] firm, or a customer, or any other person.” 18 As a condition of her employment as a broker-dealer in the securities industry, therefore, Tonyja Duffield, the plaintiff in Duffield, signed an agreement to arbitrate all potential claims against her employer, effectively waiving her right to a judicial forum to resolve any employment dispute.

In 1995, Duffield filed suit in federal court alleging sexual discrimination and sexual harassment under Title VII of the Civil Rights Act of 1964. 19 As a threshold matter, Duffield requested that the court enter a judgment declaring that employees in the securities industry cannot be bound by the Form U-4 to arbitrate all employment disputes. 20 To support this assertion, Duffield argued, inter alia, (1) that the U-4 form was not a “voluntary” agreement; (2) that she did not make a “knowing” agreement to arbitrate by signing the Form U-4 within the meaning of Title VII; (3) that the NYSE’s system of arbitration did not sufficiently protect her rights under Title VII; and (4) that the Form U-4 is an unconscionable contract of adhesion. 21

The plaintiff in Rosenberg also signed a Form U-4 as a condition to working as a securities broker. She also filed suit in federal court for gender and age discrimination in violation of Title VII and asserted that she could not, as a condition of employment, be obliged to waive the right to litigate her Title VII claim in a judicial forum.

The courts in Duffield and Rosenberg, therefore, were both faced with essentially the same question: can an employer require, as a condition of employment, that each of its employees waive his or her right to litigate Title VII and other statutory and non-statutory claims in a judicial forum and agree to arbitrate all employment disputes? To answer this question, the courts in Duffield and Rosenberg engaged in statutory construction analyses of the Civil Rights Act of 1991 to ascertain whether Congress evinced an intent to preclude agreements of that nature in enacting the 1991 Act. 22 Both courts considered this question and concluded that Congress did intend to prohibit the use of compulsory arbitration agreements to resolve employment claims arising under Title VII. 23

The courts in Duffield and Rosenberg relied chiefly upon an interpretation of the purpose behind the passage of the 1991 Civil Rights Act and of the Act’s

18. Duffield, 144 F.3d at 1185.
19. Id. at 1186.
20. Id.
21. Id.
22. Id. at 1185; Rosenberg, 995 F. Supp. at 193-94.
23. Duffield, 144 F.3d at 1185; Rosenberg, 995 F. Supp. at 200.
legislative history in holding that compulsory arbitration agreements are unenforceable pursuant to the 1991 Act. The Duffield and Rosenberg courts found that the primary purpose of the Civil Rights Act of 1991 was to overrule Supreme Court cases with which Congress disagreed and to make employment discrimination suits easier for plaintiffs to initiate and prove. Based upon this characterization of the main goals of the Act, the Duffield and Rosenberg courts concluded that Congress could not have meant to validate provisions such as the compulsory arbitration agreements at issue in these two cases, given that such agreements involve individuals waiving rights to appear in federal court to resolve statutory claims. The Duffield and Rosenberg courts reasoned that such agreements would limit plaintiffs’ rights rather than broaden them, thereby contravening the purpose of the Act.

The Duffield and Rosenberg courts also declared that Congress’s position on arbitration (contained in Section 118 of the Act quoted above) was "ambiguous" and chose to analyze legislative history. Based on a review of the legislative reports the courts chose to accept as representative of Congress’s "true" intent, the Duffield and Rosenberg courts concluded that the 1991 Civil Rights Act overruled the Supreme Court’s decision in Gilmer, regardless of the fact that the Act itself never does take such a stance and only contains positive statements concerning the use of alternative dispute resolution mechanisms.

The Duffield and Rosenberg courts’ faulty reasoning has been recently adopted by several district courts as well. For example, in Winkler v. Pacific Brokerage Services, Inc., the Northern District of Illinois found that “any agreement by [a] plaintiff to submit future Title VII claims to arbitration, made either in the employment application or in the arbitration agreement, is unenforceable.” Similarly, a Second Circuit District Court has recently held that plaintiffs could prove “[C]ongress intended to prohibit prospective agreements to arbitrate Title VII claims”, but also stated that the issue of mandatory pre-dispute arbitration still “remains a federal question without a clear answer.” The remaining portion of this project intends to set forth the elusive “clear answer” for which the Illinois District Court and the rest of the federal judiciary continue to search.

IV. **Gilmer Still the Last Word: Evidence of Congressional Approval of Mandatory Pre-Dispute Arbitration Agreements**

The courts in Duffield and Rosenberg erroneously held that through the enactment of the Civil Rights Act of 1991 Congress invalidated the use of

24. Duffield, 144 F.3d at 1190-91; Rosenberg, 995 F. Supp. at 193-94.
25. Duffield, 144 F.3d at 1191; Rosenberg, 995 F. Supp. at 200.
26. Duffield, 144 F.3d at 1193; Rosenberg, 995 F. Supp. at 201.
27. Duffield, 144 F.3d at 1193; Rosenberg, 995 F. Supp. at 201.
28. Duffield, 144 F.3d at 1193-99; Rosenberg, 995 F. Supp. at 201-03.
29. Duffield, 144 F.3d at 1193-99; Rosenberg, 995 F. Supp. at 200-03.
compulsory arbitration of Title VII claims, thereby implicitly "overturning" the Supreme Court's decision in Gilmer. Careful analysis of the text and purpose of the statute, however, illustrates that Congress has not taken any explicit or implicit action to discourage the mandatory arbitration of civil rights claims.

A. Plain Meaning and Contextual Analysis of the Civil Rights Act of 1991

"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."32 Congress has demonstrated no such intent through its enactment of the Civil Rights Act of 1991. To the contrary, the plain language found in Section 118 of the 1991 Act clearly sanctions the arbitration of disputes falling under the Act.

The first step in a statutory construction analysis is to review the express language of the provision at issue.33 The Act provides that: "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes."34 Therefore, arbitration of statutory claims is "authorized by law," pursuant to Section 118 of the Civil Rights Act of 1991. The words "authorized by law" in Section 118, viewed in their everyday usage, mean to "give power or authority to" the law.35 This phrase demonstrates a clear signal that Congress is willing to defer to the judiciary for guidance on the validity of mandatory arbitration agreements. When the 1991 Act was enacted by Congress, Gilmer was the most recent word by the Supreme Court on the mandatory arbitration of statutory claims. Gilmer, handed down by the Supreme Court on May 13, 1991, had been the law on arbitration for five months when the Civil Rights Act of 1991 was passed by both houses of Congress on November 7, 1991,36 and had been in effect for nearly six months when the 1991 Act was signed into law by President Bush on November 21, 1991.37 Hence, the controlling law at the time the 1991 Act was passed clearly rendered mandatory pre-dispute arbitration agreements involving employment claims legally enforceable documents.38

The plain meaning of the text contained in Section 118 is better understood through a contextual examination of the remaining relevant portion of the statute.39

32. Seas, 146 F.3d at 179 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).
35. WEBSTER'S II NEW RIVERSIDE DICTIONARY 139 (1994).
38. See Gilmer, 500 U.S. at 20.
Section 118 states that in appropriate situations, arbitration agreements that are authorized under the law are "encouraged" to resolve disputes arising under the 1991 Act.40 The plain meaning of the term "encourage" is "to give support to."41 Thus, this section of the Civil Rights Act of 1991 can be read to indicate Congress's willingness to support the use of those authorized arbitration agreements.

The *Duffield* court sidestepped this contextual interpretation of Section 118 by stating that it is "disingenuous to fasten onto one word" and to assume that Congress meant to state its approval of all forms of arbitration.42 However, proponents of the position that mandatory arbitration agreements are valid under the Civil Rights Act of 1991 do not posit that Congress sanctions all forms of arbitration. Rather, the proponents recognize that Congress used the words "authorized by law,"43 to confer authority upon the federal judiciary to decide in which situations arbitration is the proper method of dispute resolution.

The Supreme Court in *Gilmer* exercised its authority in this regard and clearly stated that mandatory pre-dispute arbitration agreements are valid and effective instruments for dispute resolution.44 The plain meaning of Section 118 of the 1991 Act is that Congress sought to defer to the *Gilmer* Supreme Court decision on this issue. Indeed, several circuits have consistently construed the language of Section 118 of the 1991 Civil Rights Act as consistent with the *Gilmer* decision and compulsory arbitration.45

The only reference to the arbitration process in the 1991 Act is in Section 118, excerpted above. If the intent of Congress is obvious, courts are required to give effect to the unambiguously expressed intent of Congress.46 In its plain language, the 1991 Act encourages employees and employers to seek alternatives to litigation. Arbitration, therefore, is not only not precluded (as maintained by the courts in *Rosenberg* and *Duffield*), but is actually encouraged.47

**B. Legislative History of the Civil Rights Act of 1991 and Interpretative Guidance**

Where Congress has plainly stated its intended meaning in the text of a statute and the statutory text contains an unambiguous phrase, the meaning of the phrase

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Tillery Enter., 133 F.3d 1183 (9th Cir. 1998); Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507 (5th Cir. 1997); United States v. Rivera, 131 F.3d 222 (1st Cir. 1997).
41. WEBSTER'S II NEW RIVERSIDE DICTIONARY 430 (1994).
42. *Duffield*, 144 F.3d at 1193.
44. *Gilmer*, 500 U.S. at 25.
46. *Norfolk & Western Ry.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117, 128 (1991); *Caminetti* v. United States, 242 U.S. 470, 485 (1917) (stating that where the plain meaning is "clear on its face," the sole function of the courts is to enforce it according to its terms).
should not be extended or subverted by the statements of individual legislators or committees made during the enactment process. The text of Section 118 of the Civil Rights Act of 1991 is clear. It is not necessary to look beyond the face of the statute to ascertain that Congress did not evince an intent to prohibit mandatory arbitration of statutory claims in the 1991 Civil Rights Act.

The *Duffield* and *Rosenberg* courts, however, deemed the language of Section 118 "ambiguous" and engaged in a protracted analysis of the 1991 Act's legislative history in order to glean Congress's intent. While the plain language of the 1991 Civil Rights Act clearly expresses Congress's approval of arbitration, an analysis of the Act's legislative history may be useful to demonstrate the error of the *Duffield* and *Rosenberg* decisions.

In *Rosenberg*, the district court cited specifically to House Reports 40(I) and 40(II) to establish that Congress disapproved of mandatory pre-dispute arbitration. According to the court in *Rosenberg*, because Congress rejected an amendment which would have statutorily approved of mandatory pre-dispute arbitration in these reports, it could not have been referring to the *Gilmer* decision when it used the phrase "authorized by law." What the *Rosenberg* court failed to recognize in relying on these reports in its statutory analysis, however, is that the Supreme Court decided *Gilmer* on May 13, 1991, three weeks after House Report 40(I) was published, and only four days before House Report 40(II) was published. Although critics have attempted to bypass this fact calling it a "quirk of chronology," the timing of these reports is essential in understanding Congress's true intent. Given that these reports were published months before the passage of the 1991 Act and that one was even published before the Supreme Court handed down its decision in *Gilmer*, it is clear that the *Rosenberg* court incorrectly relied on these unrepresentative reports for legislative guidance.

Hence, even granting an indulgent review of the legislative history cited by the *Duffield* and *Rosenberg* courts provides no clear evidence that Congress intended to preclude arbitration in enacting the 1991 Civil Rights Act. Rather, it is more appropriate to look to the legislative history that was created a reasonable amount of time after the Supreme Court's decision in *Gilmer* to obtain an accurate picture of the legislative climate that was present when the 1991 Civil Rights Act was passed.

In the *Duffield* case, the plaintiff asserted that "[n]o one in Congress advanced the . . . view . . . that the 1991 Act would allow perspective waivers obtained as a condition of employment." This argument, however, ignores the post-*Gilmer* legislative history of the 1991 Civil Rights Act which suggests that influential

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50. Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (1st Cir. 1994) (stating that after reviewing the plain meaning of a statute, it is sometimes advantageous to engage in further statutory analysis to determine legislative intent).
52. *Id.*
55. Brief for Appellant at 25, Duffield v. Roberston Stephens, 144 F.3d 1182 (9th Cir 1998).
members of both the House and the Senate were in favor of Gilmer's holding supporting the use of mandatory pre-dispute arbitration agreements. On the day that the Civil Rights Act was passed in the Senate, Senate Majority Leader Bob Dole submitted a section-by-section analysis of the Act into the congressional record which represented his views, those of the administration, and those of thirteen other senators.

This analysis included a section entitled "alternative means of dispute resolution" which indicated that members of Congress viewed arbitration and other innovative methods of dispute resolution in a favorable light. The section declared: "In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums."

The senatorial analysis then directly cites the Supreme Court's decision in Gilmer for support of this proposition, demonstrating that many legislators involved in the passage of the 1991 Civil Rights Act were not only aware of the Supreme Court's decision and its approval of mandatory pre-dispute arbitration, they supported it. An exact duplicate of this analysis was also entered into the House of Representatives' congressional record as an interpretive memorandum on the day that the Civil Rights Act of 1991 was passed by the House.

Further illustrative of Congress's approval of the use of mandatory pre-dispute arbitration, as set forth in Gilmer, is the willingness of President Bush to accept Senator Robert Dole's interpretative guidance on the statute. Concurring with Senator Dole's interpretation, President Bush made the following statement regarding the pertinent section:

[S]ection 118 of the Act encourages . . . alternative mechanisms such as mediation and arbitration. This provision is among the most valuable in the Act because of the important contribution that voluntary private arrangements can make in the effort to conserve the scarce resources of the Federal judiciary for those matters as to which no alternative forum would be possible or appropriate.

President Bush's statement indicating an acceptance of language contained in the legislative history of Section 118 is of critical importance to the interpretation of the statute because although legislative history often plays a salient part in the statutory analysis process, legislative history is a "frail substitute for the . . . text of a law and its presentment to the President." In stating the importance of alternative dispute resolution mechanisms to resolve Title VII claims, President Bush further underscored the fact that Congress accepted and adopted the law in force at the time

57. Id.
59. See id.
61. See President Signs Omnibus, supra note 37.
62. Id.
the 1991 Act was passed, namely that which was created by the Supreme Court in *Gilmer*.  

**C. Arbitration Is Compatible with the Purpose of the Civil Rights Act of 1991**

The court in *Duffield* bases its holding in part on what it discerns was the purpose behind the passage of the Civil Rights Act of 1991. According to the *Duffield* court, the 1991 Act had two primary goals:

1. To "restore . . . civil rights laws" by "overruling" a series of 1989 Supreme Court decisions that Congress thought represented a 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.  

The *Duffield* court concluded that, in light of the Act's enlargement of rights of victims of employment discrimination, to read the Act as sanctioning mandatory arbitration of Title VII claims would be incompatible with the purposes behind the Act. However, the *Duffield* and *Rosenberg* courts both ignored the ability of pre-dispute mandatory arbitration agreements to promote these purported Congressional goals.

As an initial matter, it is notable that courts have consistently held that all of the remedies available within the federal judiciary are also available in arbitration. Therefore, by agreeing to arbitrate a statutory claim, a party does not waive any of the substantive rights afforded by a statute. When a party agrees to arbitrate, it merely "submits to resolution in an arbitral rather than judicial forum."  

Arbitration may also be more effective than the federal judiciary in accomplishing the second goal of the 1991 Act, that of lessening the burden on plaintiffs. Arbitration provides a much less expensive and more expedient avenue

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64. *Gilmer*, 500 U.S. at 21.

65. *Duffield*, 144 F.3d at 1191.

66. *Id.; see also Rosenberg*, 995 F. Supp. at 205.


68. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628); *see also Saari v. Smith*, Barney, Harris Upham & Co., 968 F.2d 877, 881 (9th Cir. 1992) (stating that the "substantive rights enforced by arbitration are identical to those enforced in a judicial forum") (emphasis added); Rodriguez de Ouijas v. Shearson/American Express, Inc., 490 U.S. 477, 482-83 (1989) (explaining that arbitration agreements are a specialized type of forum selection clause).

of relief than a federal court’s resolution of a dispute.\textsuperscript{70} In fact, several recent court decisions have noted both the expediency and efficiency of the arbitral process. In \textit{Furr’s Supermarkets, Inc. \textit{v. United Food & Commercial Workers Union}}, for example, the Tenth Circuit stated that the “primary purpose behind arbitration is to avoid the expense and delay of a court proceeding.”\textsuperscript{71} In \textit{Yusuf Ahmed Alganim \textit{v. Toys "R" Us, Inc.}},\textsuperscript{72} the Second Circuit explained that the two primary goals of arbitration are settling disputes efficiently and avoiding long and expensive litigation. Contrary to the reasoning set forth in \textit{Duffield} and \textit{Rosenberg}, therefore, arbitration of employment discrimination claims may very well reach the goals of the 1991 Civil Rights Act by allowing plaintiffs a more expedient and less expensive resolution of employment disputes.

It should further be noted that the Supreme Court in \textit{Gilmer} rejected the notion that arbitration’s procedural differences render it inferior to judicial proceedings. In \textit{Gilmer}, the Supreme Court rejected challenges to the adequacy of the arbitration process. The Court stated that the "procedures and opportunity of review of the courtroom" that a plaintiff who submits to arbitration may forego are compensated for by the "simplicity, informality and expedition of arbitration."\textsuperscript{73} It finally noted that the limitations on discovery in the arbitration process do not render the procedure insufficient to allow a plaintiff opportunity to prove his claim.\textsuperscript{74}

\textbf{D. Addition of Jury Trial Right in Civil Rights Act of 1991 Does Not Indicate Implicit Denial of Mandatory Pre-Dispute Arbitration}

The \textit{Duffield} court also reasoned that the fact that the 1991 Civil Rights Act added the right to a jury trial evinces an intent by Congress to broaden the remedies available to plaintiffs and to preclude arbitration of statutory claims. This rationale can be refuted by looking to the remedies provided under the ADEA when \textit{Gilmer} was decided by the Supreme Court. \textit{Gilmer} rejected the idea that mandatory arbitration is inappropriate because "it deprives claimants of the judicial forum provided for by the ADEA."\textsuperscript{75} Even though at the time \textit{Gilmer} was handed down jury trials were included among the rights of plaintiffs under the ADEA, the Supreme Court enforced the mandatory arbitration agreement. The Court in \textit{Gilmer}

\begin{itemize}
\item \textsuperscript{70} See Elger Mfg., Inc. \textit{v. Kowin Dev.Corp.}, 14 F.3d 1250, 1254 (7th Cir. 1991) (holding arbitration is a private system of justice offering benefits of reduced delay and expenses); Ultracashmore House, Ltd. \textit{v. Meyer}, 664 F.2d 1176, 1179 (11th Cir. 1981) (stating arbitration was designed to be speedier and less costly than litigation); \textit{see also Frank Elkouri & Edna Elkouri, HOW ARBITRATION WORKS} 8-10 (3d ed. 1973); Dawn Perry, \textit{Deterring Egregious Violations of Public Policy: A Proposed Amendment to the Model Employment Termination Act}, 67 WASH. L. REV. 915, 923 (1992).
\item \textsuperscript{71} No. 97-2002, 97-2020, 1997 WL 699063, at * 4 (10th Cir. Nov. 10, 1997); \textit{see also ARW Exploration Corp. \textit{v. Aguirre}}, 45 F.3d 1455, 1459 (10th Cir. 1995) (noting that arbitration saves time and expense).
\item \textsuperscript{72} 126 F.3d 15, 23 (2d Cir. 1997).
\item \textsuperscript{73} \textit{Gilmer}, 500 U.S. at 31.
\item \textsuperscript{74} \textit{See id.}; \textit{see also Sacks v. Richardson Greenshield Sec., Inc.}, 781 F. Supp. 1475, 1478 n.5 (N.D. Cal. 1991) (explaining that \textit{Gilmer} held that the limited discovery process does not render arbitration an ineffective or unfair process).
\item \textsuperscript{75} \textit{Gilmer}, 500 U.S. at 29.
\end{itemize}
held that the waiver of the right to present one’s case before an Article III court and representative jury does not render an agreement to arbitrate unenforceable.\textsuperscript{76}

The Supreme Court has also upheld agreements to arbitrate in other instances where plaintiffs had a statutory right to a jury trial. In Rodriguez de Ouijas, for example, the Supreme Court enforced an arbitration agreement in a claim that arose under §12(2) of the Securities Act of 1993, a statute which provides a jury trial right to plaintiffs.\textsuperscript{77}

Thus, Congress’s decision to include a right to a jury trial in the Civil Rights Act of 1991 is not probative with respect to the question of whether Congress approved of the arbitration of claims under the Act’s purview. As Courts have noted: ‘Establishing a right to a jury trial for Title VII claims does not evince a congressional intent to preclude arbitration; it merely defines those procedures which are available to plaintiffs who pursue the federal option, as opposed to arbitration. Title VII claims are clearly subject to arbitration.’\textsuperscript{78}

\textbf{E. Further Evidence of Congressional Intent in the Civil Rights Act of 1991}

To illustrate further that Congress did not intend to overturn \textit{Gilmer} in enacting the 1991 Civil Rights Act, it should be noted that within the Act itself Congress expressly overturned several other cases which it deemed inconsistent with the purposes behind the Act. Hence, where the Civil Rights Act was intended to overrule employment discrimination cases, it unambiguously makes specific references to the cases Congress sought to overrule.

For example, Congress expressly used the Civil Rights Act to overturn the Supreme Court’s decision in \textit{Wards Cove Packing Co., Inc. v. Atonio},\textsuperscript{79} regarding employers’ defenses to disparate impact claims brought by employees under Title VII.\textsuperscript{80} In addition to \textit{Wards Cove}, the Civil Rights Act of 1991 overturned at least five other Supreme Court decisions.\textsuperscript{81} In contrast, the text of the 1991 Act failed to overrule \textit{Gilmer} and the legislative history of the Act contains a favorable cite to the decision.\textsuperscript{82}

\textbf{V. THE PROCEDURAL ADEQUACY OF ARBITRAL PROCESS}

Despite the fact that arbitration offers an efficient and expedient alternative to the federal judiciary, critics of arbitration posit that the gains achieved through arbitration are outweighed by the losses in procedural formalities and the ability to

\textsuperscript{76} \textit{Id.}


\textsuperscript{78} Ngheim v. NEC Elec., Inc., 25 F.3d 1437, 1441 (9th Cir. 1994); accord \textit{Gilmer}, 500 U.S. at 29.

\textsuperscript{79} 490 U.S. 642 (1989).


\textsuperscript{82} See 137 CONG. REC. H9505-01; 137 CONG. REC. S15472-01.
conduct broad discovery of information.® Relying on generalizations and mischaracterizations, many critics of the arbitration process allege that arbitrators are not required to follow case precedent or statutory law and that a smaller percentage of plaintiffs prevail in arbitration than in the federal court system. In fact, however, arbitration provides employment discrimination claimants with a more simple and expedient process in which to seek vindication of their statutory rights and holds systematic advantages for both sides of the dispute.

Another common criticism of the arbitration process is that the informality of the process results in insufficient opportunity to conduct pre-hearing discovery and inadequate adherence to the rules of evidence.® However, what critics of arbitration fail to recognize is that it is this very informality and simplicity that works in the favor of claimants and increases the possibility that an individual will have an opportunity to be heard before a neutral decision-maker on an employment claim. Because the arbitration process is so much less formal and rigid, it provides a far less expensive and much more expedient remedy than a claimant can obtain through bringing suit in federal court.

In the post-Gilmer and post-Civil Rights Act of 1991 era, federal courts have continued to sanction the arbitration process as a tool for resolving claims of employment discrimination. In Cole v. Burns International Securities Services,** for example, the D.C. Circuit considered a number of the standard objections to the arbitration process and dismissed the challenges, recognizing arbitration as a valid and efficient means of dispute resolution. In Saari v. Smith Barney, Harris Upham & Co., the Ninth Circuit cited Gilmer as support for rejecting the claim that deficiencies in the arbitration process were sufficient to avoid arbitration of the employment dispute. In Willis v. Dean Witter Reynolds, Inc.,®* the Sixth Circuit refused to accept that the arbitration process was not a fair forum for resolution of a sexual discrimination claim.

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85. See also Stemlight, supra note 83; see generally, Jean Stemlight, Rethinking the Constitutionality of the Supreme Court's Preference For Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns, 72 TUL. L. REV. 1 (1997).
87. 105 F.3d 1465 (D.C. Cir. 1997).
88. 968 F.2d 877, 882 (9th Cir. 1992).
90. Id.; see also Johnson v. Piper Jaffray, Inc., 530 N.W.2d 790, 803 (Minn. 1995) (dismissing plaintiff's claim that arbitration process suffered from procedural deficiencies).
VI. POLICY ARGUMENTS OPPOSING THE DUFFIELD AND ROSENBERG READING OF THE 1991 CIVIL RIGHTS ACT.

A. The Critical State of the American Litigation System

The litigation system that is used to resolve employment discrimination disputes is currently in a state of chaos and crisis. In both the private and the public sectors, more claims are filed each year than either system can manage efficiently or effectively. The number of employment discrimination cases filed with the Equal Employment Opportunity Commission ("EEOC") continues to rise. Between the fiscal years 1991 and 1994, the number of discrimination suits filed with the EEOC increased by forty-three percent. According to data released by the EEOC, the federal agency needed 305 days on average to close an employment discrimination claim in 1995. The average processing and closing time for cases that involved hearings and later appeals was 801 days.

The surging number of cases filed each year in the federal court system threatens to overwhelm the federal docket with an unmanageable caseload. The number of employment discrimination cases filed in federal court has risen twenty percent each year over the past four years. In 1996, American employees brought 23,000 lawsuits alleging discrimination on the basis of sex, age, race, or disability—more than double the number brought in 1992, 10,711. The judiciary has begun to look outside its borders for a solution to this ever-growing dilemma, and many within the judicial community have recognized and heralded the need to divert a large portion of the caseload to some alternative means of dispute resolution. Mandatory pre-dispute arbitration agreements provide the judiciary with just such a dispute resolving alternative. By ensuring that parties resolve their disputes within the arbitration process instead of the court system, mandatory pre-dispute arbitration agreements provide a reliable and equitable arena to wronged employees while offering an outlet of relief for the desperately overcrowded federal judiciary.

92. Id.
93. Id.
94. Id.
95. Id.
97. Id.
B. Mandatory Pre-Dispute Arbitration Agreements
Within Traditional Contract Law

1. Mandatory Pre-Dispute Arbitration
Agreements Are Supported By the
Basic Principles of Contract Law

Traditional contract law requires two minimum conditions to create a valid and binding contract. First, both parties must consent to be bound by the terms and conditions of the contract in question. Second, the agreement must be definite enough to be enforceable. Well-written mandatory pre-dispute arbitration agreements fulfill both of these common law requirements, and, therefore should be considered enforceable contracts within the eyes of the law. The first traditional contract requirement, assent, is often analyzed by evaluating three separate, but related, components: offer, consideration, and acceptance. An offer is where one party, the offeror, manifests his or her assent to enter into a bargain with another party, the offeree, conditional on a manifestation of assent in the form of some action by the offeree. In the case of most mandatory pre-dispute arbitration agreements, the employer generally advertises an employment position, interviews potential candidates, and then extends an offer of employment to the most qualified individual. The verbal or written invitation to work with the organization is the offer.

The second component within the assent requirement is consideration. Consideration is broadly defined as the common act of trading one thing for another. In other words, it is the substance of the contract. Employees are looking for the best bargain, or consideration, during their search for employment. They are interested in such things as monetary compensation, geographic location, vacation time, insurance, and personal investment plans. In exchange for these benefits, employers demand competence, time, and energy to benefit their operations. Before

99. Neff v. World Pub. Co., 349 F.2d 235 (8th Cir. 1965); Joseph v. Donover Co., 261 F.2d 812 (9th Cir. 1958); see also supra text accompanying notes 95, 96.
103. Newman v. Schiff, 778 F.2d 460 (8th Cir. 1985); Lucas v. United States, 25 Ct. Cl. 298 (1992); Heydt v. United States, 38 Fed. Cl. 286 (1997); see also Fosson v. Palace (Waterland) Ltd., 78 F.3d 1448, 1452 (9th Cir. 1996) (offer is manifestation of willingness to enter into a bargain so that other person understands the offer as understanding of offeror's assent to bargain).
105. Id.
accepting the employer's offer of employment, the third component of assent, the employee not only looks at the potential benefits of the position, but also presumably looks to what demands the employer is making and determines the viability of the proposed contractual relationship.

The mandatory pre-dispute arbitration agreement often contained within the master employment contract is one part of the consideration that the employer demands before entering into an employment relationship. A prospective employee is allowed to choose whether to accept the offer and receive the numerous benefits associated with the position in exchange for conceding to the demand for arbitration. The employee is also free to reject the offer and either make a counteroffer to the employer demanding the same contract without the mandatory pre-dispute arbitration clause or simply refuse the offer and seek employment with another organization that does not require such consideration.

Even where a contract has fulfilled the necessary assent requirements, it must also be definite in nature. The terms within a contract must "provide a basis for determining the existence of a breach and for giving an appropriate remedy." Otherwise, the contract is indefinite and therefore unenforceable. For example, if a party promises to pay another party a "fair share" of the profits from a specified endeavor, the contract may be deemed indefinite and unenforceable. Opponents of mandatory pre-dispute arbitration agreements may attempt to argue that such agreements should be deemed indefinite contracts because employees are only preliminarily "agreeing to agree" to arbitration after employment disputes arise. However, preliminary agreements are narrowly construed within contract law; they normally contain either open terms or merely express the parties interest in negotiation. A well-drafted mandatory pre-dispute arbitration agreement rarely contains uncertain terms, and clearly states that the employee is waiving his or her right to court in exchange for the ability to resolve all conflicts within the arbitration arena. Mandatory pre-dispute arbitration agreements do not fit within the common law's restricted definition of indefiniteness, and therefore such agreements clearly also meet the second requirement of an enforceable contract.

108. RESTATEMENT (SECOND) OF CONTRACTS § 33(2).
109. Id.
111. See, e.g., Adjutrice Sys. Inc. v. Gab Bus. Servs., Inc., 145 F.3d 543, 547 (2d Cir. 1998) (agreement to agree is created where parties agree on certain major terms but leave other terms open for future negotiation).
112. See, e.g., Rennich v. O.P.T.I.O.N. Case, Inc. 77 F.3d 309, 312 (9th Cir. 1996) (letter of intent refers to writing documenting preliminary understandings of parties who intend to enter into future contract).
2. Mandatory Pre-Dispute Arbitration Agreements Withstand Potential Contract Defense Challenges

After determining that mandatory pre-dispute arbitration agreements fulfill both the assent and definiteness common law requirements of a proper contract, it becomes important to consider potential contract defenses. There are four major defenses used to oppose enforcement of a contract: duress, incapacity, fraud/misrepresentation, and unconscionability.\textsuperscript{113} Although many opponents of mandatory pre-dispute arbitration may argue that these defenses defeat such agreements, a careful analysis of each of these defenses indicates a complete absence of common law support for such claims.

a. Duress and Incapacity

The first two potential defenses, duress and incapacity, are not viable in most challenges to arbitration agreements. Duress requires that the acceptance of an offer was extorted by violence or threat of violence.\textsuperscript{114} The incapacity defense requires proof that one of the contracting parties is either an infant, under the influence of an illegal substance, or mentally ill.\textsuperscript{115} Therefore, aside from these rare occurrences, these traditional contract defenses offer little support to opponents of mandatory pre-dispute arbitration agreements.

b. Misrepresentation/Fraud

Misrepresentation/fraud nullifies contracts formed where one party either fraudulently represents the terms, conditions, and consideration of the contract to the other party or withholds material information in bad faith.\textsuperscript{116} Proponents of the Rosenberg and Duffield decisions may argue that employees should be able to successfully employ this defense to challenge mandatory pre-dispute arbitration agreements. Such an argument would be based upon the employee’s lack of sophistication and the employer’s failure to openly disclose the practical implications of such arbitration agreements. However, such an argument misconstrues the meaning of the misrepresentation/fraud defense. Employers are neither providing misinformation to prospective employees, nor are they withholding information from employees in bad faith. The misrepresentation/fraud defense does not place any proactive responsibility on the employer. Rather, they are only obligated to set forth this requirement of dispute resolution within the body of the written employment agreements.

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\textsuperscript{113} See infra text accompanying notes 128-42.
\textsuperscript{114} Williamson v. Bendix Corp., 289 F.3d 389 (7th Cir. 1961); Brown v. United States, 30 Fed. Cl. 227 (1993); see also United Intern. Investigative Servs. v. United States, 33 Fed. Cl. 363, 366 (1995) (to prove duress must show one side involuntary accepted term of other, circumstances permitted no alternatives, and circumstances were result of coercive acts of opposite party but economic pressure is not duress).
\textsuperscript{115} Cundick v. Broadbent, 383 F.2d 157 (10th Cir. 1967).
contract in the same manner as any other consideration within the agreement. Again, the employee is provided with a sufficient opportunity to review the offer of employment expressed in the contract before deciding whether to accept the offer. Mandatory pre-dispute arbitration agreements do not fall within the scope of the misrepresentation/fraud defense.

c. Unconscionable Contracts of Adhesion

The argument that employees simply cannot understand what they are signing when entering into employment agreements is better founded within the fourth and final potential contract defense - unconscionability in adhesion contracts.117 This expansive doctrine has affected many aspects of traditional contract law118 and, perhaps provides the most convincing argument against the use of mandatory pre-dispute arbitration agreements.

The theory that mandatory pre-dispute arbitration agreements are adhesion contracts, and, therefore, are per se unconscionable is founded in a belief that employees have no choice in accepting employment with a prospective employer. In reality, however, "adhesion" contracts are merely offers which an employee has the freedom to either accept or reject.119 These contracts are quite common and are seen in everyday agreements such as mortgage and bank loan documents, automotive and real property rental agreements, and any other standard agreements in which the terms are preprinted in the sales contract. Hence, individuals freely chose to enter into a wide variety of "adhesion" contracts every day. The mere fact that mandatory pre-dispute agreements to arbitrate contain non-negotiable terms and are conditions of employment, does not necessarily mean they are unenforceable, unconscionable contracts of adhesion. Using this rationale, courts have found that where an arbitration policy was a compulsory condition of employment, the agreement is not automatically an unconscionable adhesion contract.120

Further, the recent court decisions finding mandatory pre-dispute arbitration agreements unenforceable encourage prospective employees to behave irresponsibly and ignore express contract promises. Individuals, in and out of the employment context, need to be encouraged to both read and understand the legal contractual relationships into which they enter.

Opponents of mandatory pre-dispute arbitration agreements argue that prospective employees are incapable of understanding the complex language and substance of such agreements.121 The employees contesting mandatory pre-dispute arbitration agreements, however, are usually highly sophisticated parties with

117. See Klos v. Lotnicze, 133 F.3d 164 (2d Cir. 1997) (stating that a contract of adhesion is contract founded as product of gross inequality of power between parties); Doctor's Ass'n, Inc. v. Jabush, 89 F.3d 109, 114 (2d Cir. 1996) (stating that an unconscionable bargain is one which no man in his senses and not under delusion would make on the one hand and no honest and fair man would accept on the other).
118. See generally GRANT GILMORE, DEATH OF CONTRACT (1974).
121. See Sternlight, supra note 83, at 673; see also Sternlight, supra note 85, at 26.
extensive educational backgrounds. Considering most employers' unwillingness to form express employment contracts with non-professional employees, employees with little formal education will not be subjected to the potential complexities of a mandatory pre-dispute arbitration agreement. Additionally, even if employers were to utilize mandatory pre-dispute arbitration agreements with non-professional employees, these unsophisticated employees would be able to use the strength of union organization to gain the requisite knowledge and ability to bargain with their employers.

The courts have also held that even where employees have the necessary abilities to completely comprehend and understand mandatory pre-dispute arbitration agreements, they still may not be able to freely bargain with the employer or seek equivalent employment with another employer within the respective industry. For example, as in Rosenberg and Duffield, the entire securities industry required that the employees agree to mandatory pre-dispute arbitration agreements prior to working as securities dealers. Opponents of mandatory pre-dispute arbitration agreements argue that individuals interested in working as securities dealers are, therefore, forced into waiving their rights to gain employment within the industry. If enough prospective employees value their ability to bring their future employment actions in federal court, however, the free market economy will intervene. A rogue dealer acting rationally will begin to offer an employment contract that does not require a mandatory pre-dispute arbitration agreement to attract quality employees away from the dealer's competitors. This natural market response will only occur, however, if prospective employees value a contract without such a provision. If employees value salary, investment plans, and other employment benefits over mandatory pre-dispute arbitration agreements, the law should not penalize employers for including such arbitration agreements within the employment contract. Mandatory pre-dispute arbitration agreements are not unconscionable adhesion contracts, but rather are only part of the employer's requested consideration within the contract between the employer and the employee.

Even assuming arguendo that mandatory pre-dispute agreements to arbitrate do meet the traditional definition of contracts of "adhesion," employees still enjoy significant protection from courts in that there are judicial limitations on the enforceability of these types of contracts. The enforceability of a contract of adhesion hinges on a determination of whether the clause in question is within the reasonable expectations of the parties. Thus, courts do take equity concerns into consideration in making determinations as to the enforceability of these contracts

122. In Rosenberg and Duffield, the plaintiffs were broker-dealers in the securities industry, therefore each was college educated. See Rosenberg, 995 F. Supp. at 193.
123. Employers would presumably prefer to maintain an at-will employment relationship with their employees to avoid potential breach of contract claims.
124. Duffield, 144 F.3d at 1185; Rosenberg, 995 F. Supp. at 192.
126. See, e.g., Seus, 146 F.3d 175 (3d Cir. 1998) (under Pennsylvania law, contract of adhesion is invalid where terms unrealistically favor other party); see also Klos v. Lotniczke, 133 F.3d 164 (2d Cir. 1997) (contract of adhesion is invalid where one party seeking to rescind contract establishes that other party used high pressure tactics, deceptive language, or contract is unconscionable).
and do examine the extent to which a party was aware of what he was signing.128

Further, courts also consider whether the terms of the agreement are "unconscionable."129 An agreement is deemed unconscionable where it contains terms that unreasonably favor the non-adhering party, and which demonstrates a lack of meaningful choice on the part of the adhering party.130

When parties to an employment contract come to a mutual decision to arbitrate any disputes that may arise between them, such an agreement does not necessarily benefit either one party over the other. The Eleventh Circuit recognized this fact in Coleman v. Prudential Bache Securities, Inc., when it noted that "there is nothing inherently unfair or oppressive about arbitration clauses."131 Opponents of mandatory pre-dispute agreements to arbitrate contend that the mere fact that the parties to an employment contract do not have equal bargaining power renders such an agreement unconscionable. However, the Supreme Court rejected this argument in Gilmer, holding that unequal bargaining power, in and of itself, is not enough to permit a claimant to invalidate an agreement to arbitrate employment disputes.132

Mandatory pre-dispute arbitration agreements meet the requirements of traditional contract law. Further, an analysis of the four potential common law contract defenses provides little support for the opposition to such agreements. The basic principles of contract law supports the use of mandatory pre-dispute arbitration agreements within employment contracts.

C. Mandatory Pre-Dispute Arbitration Agreements
And Economic Efficiency

Mandatory pre-dispute arbitration agreements are also supported by the doctrine of economic efficiency. To understand why such agreements are efficient, it is helpful to consider three ways to resolve the perplexing questions of employment arbitration.

1. The No-Arbitration Model of Arbitration

In the first option, the No-Arbitration Model, courts would find employment arbitration agreements unenforceable in every case. This alternative would allow either party to breach the agreement and to seek relief of the employment dispute in federal court. In practice, the statutorily enacted Federal Arbitration Act prevents such a model.133 Even if this model were to be found legally permissible, however, it would act to further aggravate an already overcrowded American court system.134 With this increased number of employment claims placed back into the judicial system, the judiciary would be forced to increase the use of summary judgment, and

128. Id.
129. Id. at 173.
130. Id.
131. 802 F.2d 1350, 1352 (11th Cir. 1986).
134. See U.S. GENERAL ACCOUNTING OFFICE, supra note 91.
therefore deprive otherwise actionable claimants of the opportunity to litigate their cases. Opponents of arbitration would likely disfavor the use of such a model, as it would lessen an employee’s ability to recover.

In addition to these equitable concerns, the No-Arbitration Model would also place unnecessary economic restraints on an economy which depends heavily on a court system to enforce property rights.\textsuperscript{135} If such market enforcement mechanisms are not readily available, economic actors will be deterred from conducting business within the market. This model would have fewer immediate effects on ultimate societal economic efficiency. For example, when it is more difficult for employees to recover, overall employee morale is likely to decrease, resulting in a decrease in production and, over time, a less efficient overall market.\textsuperscript{136}

The other potential response to the No-Arbitration Model is for the government to appoint additional judicial positions to counter the additional claims, creating expensive administrative costs which would be incurred by American taxpayers. It is economically inefficient for the government to expend exorbitant financial resources to hire, train, and house additional judges. This argument is even more compelling when one notes that the private sector is willing to internalize the costs of their disputes in the form of arbitration.

2. The Post-Dispute Employee Choice Model of Arbitration

The Post-Dispute Employee Choice Model provides a second potential solution to the arbitration dilemma. Under this model, courts would implicitly find a choice provision within every arbitration clause of an employment contract. Employees would be permitted to consult with an attorney and then decide whether they would rather pursue their employment claim within the arbitration arena or instead opt to file a claim in the federal court system. The Post-Dispute Employee Choice Model is the very solution that the \textit{Rosenberg} and \textit{Duffield} courts seem to suggest.\textsuperscript{137} In theory, the solution proposed by this model is an appealing compromise for employees and employer alike - employers will continue to be able to utilize existing arbitration processes, and employees are able to freely choose the arena in which to argue their rights.

Although the Post-Dispute Employee Choice Model initially appears to be a reasonable option, it runs counter to basic principles of the free market economy.\textsuperscript{138} Under this model, employees are free to choose the arena in where their disputes will be heard. In order to minimize their own costs, rational employees will always opt


\textsuperscript{138} For a general discussion of economic efficiency in the context of contract law, see \textsc{Robert Cooter \& Thomas Ulen, Law \& Economics} 10, 167-202 (2nd ed. 1997); \textsc{Robin Malloy, Law and Economics: A Comparative Approach to Theory and Practice} 20, 33, 104-12 (1990); \textsc{Thomas Miceli, Economics of the Law} 4, 93-114 (1997).
for the venue which provides the more favorable remedy.139 Employees who have a less significant claim will opt for arbitration where the chance for recovery is much higher despite a much lower average damage award. For example, an employee who experienced isolated vulgar comments by her coworkers would probably have her case dismissed on summary judgment, but would be guaranteed a hearing under the arbitration clause in the employment agreement. In contrast, an employee with a more actionable claim, such as a well-documented quid pro quo discrimination, would likely choose to ignore the arbitration agreement and pursue a civil action, as this approach allows the plaintiff to seek greater damages and present her claim in front of a jury.

A rational employer will never allow this employee-choice model to be implemented. Under the doctrine of economic efficiency, an employer will act to minimize potential losses by choosing to have all pending employment claims decided by the federal court system.140 Employers will act this way for two reasons. First, by eliminating the use of arbitration the employer will be able to avoid the unnecessary administrative costs of implementing an arbitration program that will only be used in half of the pending cases. Otherwise, the employer is forced to maintain a costly arbitration system in addition to paying for legal representation in the claims brought in federal court. Second, the employer would act to gain the advantage of the more stringent summary judgment standard available within federal court and avoid damage awards that employees could recover in a private arbitration system. The result of this rational behavior by private employers is societal inefficiency in the form of an overcrowded court system.141

The Post-Dispute Employee Choice Model also creates problems for the employee, who faces a stricter summary judgment standard. The employer and the American public, which must absorb the additional administrative expense of the abandoned arbitration system and courts that are even more overcrowded, are also losers.

3. The Mandatory Pre-Dispute Model of Arbitration is the Most Efficient Choice

After reviewing the three potential arbitration models, it is evident that the mandatory pre-dispute arbitration model presents the most economically efficient option. Further, implementation of the post-dispute employee choice model suggested in the Rosenberg and Duffield decisions would act to destroy the numerous benefits offered by the a private arbitration system.142 Under the mandatory pre-dispute arbitration model, employees are still provided with an opportunity to argue their claims, and the litigation system, which is in desperate need of alternative forums for resolving disputes, is given relief.

139. See COOTER & ULEN, supra note 138, at 167-202; MALLOY, supra note 138, at 33, 104-12; MICELI, supra note 138, at 93-114.
140. See COOTER & ULEN, supra note 138, at 167-202; MALLOY, supra note 138, at 33, 104-12; MICELI, supra note 138, at 93-114.
141. U.S. GENERAL ACCOUNTING OFFICE, supra note 91.
VII. CONCLUSION

The Civil Rights Act of 1991 was not intended to prohibit individuals from entering into mandatory pre-dispute arbitration agreements. The Act does not contain any conclusive evidence, either on its face or within the legislative history of the Act, that Congress intended to prohibit individuals from entering into such agreements. In finding that Congress evinced an intent to preclude the use of these arbitration agreements, the courts in Duffield and Rosenberg erroneously discounted the plain meaning of the Civil Rights Act of 1991 and critical aspects of the Act's legislative history. Further, both courts failed to recognize how arbitration of employment discrimination claims may achieve the purposes behind the 1991 Act more efficiently than can be done by the federal judiciary.

Moreover, under the doctrines of traditional contract law, fairness, and efficiency, pre-dispute arbitration agreements are vital, useful instruments for resolving suits brought pursuant to Title VII. This article does not suggest that arbitration should ever supplant agency or court adjudication of statutory claims. Arbitration should be recognized and encouraged, however, as a fair and adequate alternative, supplementary mechanism for resolving claims arising under Title VII.