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Myers: Myers: Mandatory Arbitration of an Employee's Statutory Rights

Mandatory Arbitration of an Employee's Statutory Rights: Still a Controversial Issue or are We Beating the Proverbial Dead Horse?

*Penn v. Ryan's Family Steakhouse, Inc.*¹

I. INTRODUCTION

Since the early 1980s, the Supreme Court has espoused a strong preference for arbitration in the employment setting. Despite this general preference, the Supreme Court has never clearly stated that mandatory arbitration of statutory rights is always reasonable. This omission has led to much controversy about whether this preference permits the mandatory arbitration of all statutory rights or only those that are amenable to arbitration as defined by the Supreme Court.

II. FACTS AND HOLDING

Craig Penn applied for a position at Ryan's Family Steakhouse, Inc. ("Ryan's") in Fort Wayne, Indiana.² As part of the application process, Ryan's submitted to Penn a form entitled "Job Applicant Agreement to Arbitration of Employment Related Disputes" ("Agreement").³ Penn's hiring was conditioned upon his signing the Agreement.⁴ Penn signed the Agreement and was ultimately hired by Ryan's.⁵ Two years later, Penn filed a charge with the Equal Employment Opportunity Commission, alleging discrimination and retaliation under the Americans with Disabilities Act ("ADA").⁶ The issue to be resolved by the United States District Court, Northern District of Indiana was whether a binding arbitration agreement

1. 95 F. Supp. 2d 940 (N.D. Ind. 2000).

2. *Id.* at 941.

3. *Id.* The agreement was between the employee and Employment Dispute Services, Inc. ("EDS"), which had a contract with Ryan's. The agreement stated, in pertinent part:

Your potential Employer ("signatory company" or "Company") has entered into an agreement with Employment Dispute Services, Inc. to arbitrate and resolve any and all employment-related disputes between the Company's employees (and job applicants) and the Company. . . . The decision of an EDS arbitrator is binding on all parties. There is no appeal by any party on the merits of the dispute either to State or Federal court.

Id.

4. *Id.*

5. *Id.* At no time did Penn enter into an employment contract with Ryan's. *Id.*

6. *Id.* at 941.

existed between Penn and Ryan's, and if so, did it compel Penn to submit his ADA claim to arbitration.⁷

Penn had three arguments as to the unfitness of Employment Dispute Services, Inc. ("EDS") as the arbitrator.⁸ First, Penn argued that the procedures EDS used to select arbitrators "allowed for potential abuse and biased decision makers."⁹ Second, Penn argued that the Agreement should be void because it failed to state an exact location for the arbitration hearing or whether it would take place in a location convenient to Penn.¹⁰ This omission meant that EDS controlled the location of the proceeding and this could possibly place an undue burden on any plaintiff.¹¹ Third, Penn argued that the EDS rules provide for insufficient discovery.¹²

Ryan's responded by arguing that the EDS system was capable of providing a fair and neutral arbitration panel because there are various safeguards built into the selection process that will protect the plaintiff.¹³ Ryan's next argued that EDS' control of the location of the hearing did not burden the plaintiff because the location was to be in the city or county where the employee worked.¹⁴ Lastly, Ryan's argued that the discovery provision of the Agreement was proper.¹⁵

The District Court of Indiana held that the EDS system of arbitration could not produce a fit arbitration panel.¹⁶ Further, the court also held that even if the Agreement provided for a fair and unbiased arbitration proceeding, it would not be binding on Penn because he did not make a knowing and voluntary waiver of his right to a judicial forum.¹⁷

7. *Id.* at 943. The court first had to determine that ADA claims were arbitrable. Here the court established that the Seventh Circuit impliedly allowed ADA claims to be arbitrated in *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126 (7th Cir. 1997). Further, the court cited the ADA statute itself as allowing arbitration; "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged." *Id.* See Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12212 (1994).

8. *Penn.*, 95 F. Supp. 2d at 944.

9. *Id.* at 945.

10. *Id.* at 948.

11. *Id.*

12. *Id.* Penn stated that he needed depositions from at least three to four individuals because his allegations involved a customer, a coworker and two managers; however, Article XII of the Agreement stated that each party may only schedule a deposition of one individual. Either party had the ability to request further depositions, but they were discouraged and were to be granted in "extraordinary fact situations only and for good cause shown." *Id.*

13. *Id.* at 947. Ryan's refers to the fact that the panel includes three neutral adjudicators. The first adjudicator is a respected attorney. The second adjudicator is an employee who is a signatory to the EDS Agreement, but not employed by Ryan's and is in no way involved in the dispute. The third adjudicator is a manager who also is a signatory to the Agreement, but again not employed by Ryan's and not involved in the dispute. *Id.*

14. *Id.* at 948. This argument was based on an affidavit of a manager at Ryan's but was not found anywhere in the actual Agreement. *Id.*

15. *Id.*

16. *Id.* at 943.

17. *Id.* at 943, 953-55.

III. LEGAL BACKGROUND

Since its passage in 1925, the Federal Arbitration Act ("FAA") has undergone many changes.¹⁸ The main thrust of change has come from the United States Supreme Court and its varying opinions about how broad the FAA should be and its policies on arbitration in general. When Congress first passed the FAA in 1925 the original purpose was to compel federal courts to recognize and accept agreements to arbitrate that were entered into by parties of equal bargaining power.¹⁹ Since that time, the Supreme Court has gradually strayed from the original purpose of the FAA in an attempt to further advance the pro-arbitration sentiment and lighten the burden on the court system.²⁰

The first line of cases dealing with the scope of the FAA strongly supported the original purpose of the FAA. These cases interpreted the FAA as allowing agreements to arbitrate so long as the parties' individual rights were protected; however, these cases also held that the FAA only applied to federal courts.²¹ *Wilko v. Swan* was the first such case to address the scope of the FAA.²² The Supreme Court's decision in *Wilko* furthered the general skepticism toward arbitration at that time by ruling that the arbitration forum would not provide adequate resolution of statutory rights and that a person could not waive their right to a judicial forum for a statutory claim.²³

In the 1960s, the Court moved away from considering only individual consent in determining the validity of arbitration agreements and began to focus on other policy issues.²⁴ During this time, social policies were used to narrow further the scope of the FAA, beginning with the Supreme Court case of *Alexander v. Gardner-Denver Co.*²⁵

In *Alexander*, the Court was required to "determine whether the arbitration of individual employees' statutory claims looked more like labor grievance arbitration

18. The FAA provides, in pertinent part:

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 . . . 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 (1994).

19. Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

20. *Id.* at 642.

21. *Id.* at 641. See Sternlight, *supra* note 19, at 650-51. See also *Marine Transit Corp. v. Dreyfus*, 284 U.S. 601 (1932). The Court in *Marine* implied that the FAA was a procedural statute applicable only in federal courts. This reference was to the decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), which held that federal courts should apply federal procedural law, but state substantive law, when deciding a diversity case. The implication of this decision was that the FAA would be applicable only in federal courts if procedural, but if substantive, it would be allowed in state and federal courts. Thus a federal court, if the FAA was substantive, would have to apply state law in determining the validity of an arbitration agreement.

22. 346 U.S. 427 (1953).

23. *Id.*

24. Sternlight, *supra* note 19, at 653.

25. 415 U.S. 36 (1974).

. . . or like individual or commercial arbitration.”²⁶ The Court found that when a statutory claim was involved it was more like an individual arbitration setting and a union had no power to waive individual employees’ statutory rights.²⁷ The Court then went on to determine whether a broader social policy existed that would require an employee to arbitrate their individual statutory claims.²⁸ The Court found that no such policy existed. Because an individual with a statutory claim “not only redresses his own injury, but also vindicates the important congressional policy against discriminatory employment practices,” he could not be required to waive his right to a judicial forum by way of an arbitration agreement.²⁹

During this era, however, the Court began to change its view somewhat about the arbitration setting. In *Prima Paint Corp. v. Flood & Conklin Manufacturing*, the Supreme Court changed its mind about the arbitration forum’s inferiority to the judicial forum.³⁰ The Court found that there were certain instances in which the arbitration forum could provide adequate resolution to a statutory claim.³¹

The present disposition of the Court began in 1983 with the Supreme Court case of *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*³² In *Moses*, the Court stated that § 2 of the FAA was a “congressional declaration of a liberal federal policy favoring arbitration agreements.”³³ The Court further stated that any questions concerning the arbitrability or scope of arbitrable issues should be resolved in favor of arbitration.³⁴ Solidifying this pro-arbitration sentiment was *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*³⁵ In that case the Supreme Court firmly stated that there was nothing in the FAA that created a presumption against arbitration of statutory claims.³⁶ Further, the Court held that because of this strong preference for arbitration, an agreement to arbitrate will be enforced absent any showing that would render a normal contract invalid.³⁷

26. *Id.* at 51. See generally *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997), which states:

The courts have long favored arbitration in the collective bargaining situation because it is seen as a substitute for “industrial strife.” In the collective bargaining agreement the rights and duties of the parties are stated. Further, arbitration in the collective bargaining situation is seen as a “means of solving the unforeseeable by molding a system of private law . . . in a way which will generally accord with the variant needs and desires of the parties.” Contrast this to the individual employee context where arbitration works as a substitution not for industrial strife, but for litigation.

Id. at 1473-76.

27. *Alexander*, 415 U.S. at 51.

28. *Id.* at 55.

29. *Id.* at 44.

30. 388 U.S. 395 (1967).

31. *Id.* at 404.

32. 460 U.S. 1 (1983).

33. *Id.* at 24.

34. *Id.*

35. 473 U.S. 614 (1985).

36. *Id.* at 625.

37. *Id.* at 628. The Court also rejected the idea that the arbitral forum provides an insufficient means for deciding statutory claims, stating:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that if Congress intended . . . to include protection against waiver of the right to a judicial

Finally, in 1991 the Supreme Court revisited the *Alexander* issue—whether an individual could be required to arbitrate a statutory claim—in *Gilmer v. Interstate/Johnson Lane Corp.*³⁸ In *Gilmer*, the Court significantly narrowed *Alexander* by holding that an individual may contract to arbitrate any employment dispute and thereby waive their statutory rights (even in a collective bargaining situation), unless the statute in question prohibited such a waiver.³⁹

In light of the Supreme Court's recent decisions, courts must now use a two-pronged analysis when making a decision about whether to enforce an agreement to arbitrate a statutory right.⁴⁰ First, the court must study the statute in question to see if Congress intended to “preclude a waiver of judicial remedies for the statutory rights at issue.”⁴¹ If such an intent exists, it should be ascertainable from the text of the statute, its legislative history, or in any conflicts between the purpose of the statute and arbitration.⁴² Second, the court must study the agreement between the parties to determine if it included the “statutory issues” in question.⁴³

IV. INSTANT DECISION

In *Penn*, the district court had to decide whether the Agreement between Ryan's and Penn was valid and enforceable thus requiring them to dismiss Penn's action and compel arbitration.⁴⁴

Following the Supreme Court's mandate for determining whether an arbitration agreement is enforceable, the district court first had to decide if ADA claims were arbitrable.⁴⁵ The court cited *Bercovitch v. Baldwin School, Inc.*⁴⁶ and *Miller v. Public Storage Management, Inc.*⁴⁷ as authority for the proposition that ADA claims were arbitrable.⁴⁸ The Court also referred to the fact that the Seventh Circuit had impliedly approved of the arbitration of ADA claims in *Gibson v. Neighborhood Health Clinics, Inc.*⁴⁹ by ignoring the threshold question of whether ADA claims

forum, that intention will be deducible from the text or legislative history.

Id.

38. 500 U.S. 20 (1991). It is important to note that the Court did not decide the issue of whether the FAA excludes all employment contracts or just those involving actual interstate commerce. There has been much controversy over this issue; however, the majority of the courts dealing with this issue have construed the FAA narrowly to exclude only contracts involving interstate commerce. There has been much criticism of the Court's avoidance of this issue. *Id.* at 24-25 (Stephens, J., dissenting). See also 9 U.S.C. § 1.

39. *Gilmer*, 500 U.S. at 26 (allowing arbitration of ADEA claims). See also *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 760 (9th Cir. 1997) (extending *Gilmer* to allow arbitration of ADA claims); *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1304 (9th Cir. 1994) (holding that Title VII does not prohibit waiver of its statutory remedies).

40. *Mitsubishi Motors*, 473 U.S. at 628.

41. *Gilmer*, 500 U.S. at 26. See also *Mitsubishi Motors*, 473 U.S. at 628.

42. *Mitsubishi Motors*, 473 U.S. at 627.

43. *Id.* at 628.

44. *Penn*, 95 F. Supp. 2d at 940.

45. *Id.* at 942.

46. 133 F.3d 141, 150 (1st Cir. 1998).

47. 121 F.3d 215, 218 (5th Cir. 1997).

48. *Penn*, 95 F. Supp. 2d at 942.

49. 121 F.3d 1126, 1130 (7th Cir. 1997).

were arbitrable and only analyzing the validity of the agreement.⁵⁰ Finally, the court looked at the text of the ADA as being arbitration friendly.⁵¹ However, the court did not make a thorough analysis of the complete text of the ADA or its history or purpose.⁵²

Recognizing the unfitness of an arbitrator as grounds for invalidating an arbitration agreement, the court evaluated the Agreement to determine if it was capable of providing a fair forum to decide Penn's statutory claim under the ADA.⁵³ The court found that EDS' system of arbitration could not produce a fit arbitration panel.⁵⁴ The court noted that although on its face the rules governing the arbitration panel seemed fair, upon closer inspection they revealed a bias in favor of Ryan's.⁵⁵ Given the relationship between EDS and Ryan's (Ryan's, unlike Penn, was a repeat customer of EDS who provided a lot of potential business), it was unlikely that Penn would get a fair hearing.⁵⁶ The court stated specifically, that the Ryan's-EDS relationship provided incentive for EDS to load the three lists from whom the three arbitrators were chosen with names of arbitrators that have sided with Ryan's in the past.⁵⁷

The court agreed with Penn's second argument that the Agreement did not state that the proceedings would take place in a neutral location convenient to the plaintiff.⁵⁸ Given that the panel procedures were already found unfit, the court cited this as further proof of the invalidity of the agreement.⁵⁹

Lastly, the court agreed with Penn's assertion that under the agreement the parties had almost no discovery available to them.⁶⁰ Although agreeing with Ryan's argument that limited discovery was allowed in the arbitration setting, in this case the availability of more discovery was dependent upon the "good graces of an arbitration panel stacked against the employee in the first place."⁶¹

The court also discussed a second reason for invalidating the Agreement, one not advanced by the parties; Penn's waiver of his right to a judicial forum was not knowing and voluntary.⁶² Although the court found that no case in the Seventh Circuit had directly required that an individual had to make a knowing and voluntary waiver for a pre-dispute arbitration agreement to be valid, it decided to follow the

50. *Penn*, 95 F. Supp. 2d at 942-43.

51. *Id.* at 943. *See also* ADA, 42 U.S.C. § 12212, which states: "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 this chapter."

52. *Penn*, 95 F. Supp. 2d at 943.

53. *Id.* at 944-45.

54. *Id.* at 943.

55. *Id.* at 947.

56. *Id.* at 946-47.

57. *Id.*

58. *Id.* at 948. The court also stated that the EDS rules gave them control over the time, date, and place for the hearing, thus enabling them to choose a forum inconvenient to Penn or any potential plaintiff.

59. *Penn*, 95 F. Supp. 2d at 948.

60. *Id.* *See supra* note 12.

61. *Penn*, 95 F. Supp. 2d at 948. *See Gilmer*, 500 U.S. at 31 (stating that limited discovery was appropriate in the arbitration setting).

62. *Penn*, 95 F. Supp. 2d at 949.

reasoning of the Ninth Circuit in requiring this type of waiver.⁶³ The court cited *Nelson v. Cyprus Bagdad Copper Corp.*, which found that the differences in remedies and procedural protections available in an arbitrable forum from that of a judicial forum meant that a plaintiff may only be forced to forgo her statutory remedies if she has knowingly agreed to do so.⁶⁴

Using this logic, the court referred to the fact that the EDS rules and procedures were never explained to Penn and that it was unlikely to be understood by the typical job applicant at Ryan's as reasons for finding that Penn's waiver was not knowing.⁶⁵ The court also found the burden placed on Penn (or any applicant) to question the arbitration process and its intricacies, was too high given the fact that he was trying to get a job from Ryan's and was unlikely to question the process so as not to make a bad impression.⁶⁶ Given that the Agreement provided for an unfair and biased arbitration panel and the fact that Penn never knowingly waived his statutory rights, the court determined that the Agreement was invalid and denied Ryan's motion to dismiss and compel arbitration.⁶⁷

V. COMMENT

The court in *Penn* clearly followed the majority position by using the two-pronged analysis created in *Mitsubishi* and *Gilmer*. However, the court's application of this analysis to Penn's case was inadequate in respect to the first prong—whether ADA claims were arbitrable.

It is clear under the *Gilmer* test that courts determining the validity of an agreement to arbitrate a statutory claim would have to interpret the statute in question.⁶⁸ The Supreme Court not only created this requirement, but also gave instructions on how to effectively interpret the statute in order to determine if Congress expressly precluded a waiver of the statute's judicial remedies.⁶⁹ In order to effectively determine Congress' intent, a court needs to study the text, the legislative history of the statute, and its underlying purposes.⁷⁰

The court in *Penn* did not truly analyze the text of the ADA. Its only reference to the text was a citation to 42 U.S.C. §12212 as evidence that the text of the ADA was arbitration friendly because it encouraged the use of arbitration to resolve disputes arising under the statute.⁷¹ By its very terms, §12212 does not provide for mandatory arbitration of ADA claims.⁷² The words "where appropriate" used at the beginning of that section imply that use of alternative means of dispute resolution,

63. *Id.* at 950-55.

64. *Nelson*, 119 F.3d at 762.

65. *Penn*, 95 F. Supp. 2d at 954-55.

66. *Id.*

67. *Id.* at 955.

68. *Gilmer*, 500 U.S. at 26.

69. *Id.*

70. *Id.*

71. *Penn*, 95 F. Supp. 2d at 942.

72. ADA, 42 U.S.C. § 12212.

such as arbitration, are not always appropriate.⁷³ The text is not clear enough to show that mandatory arbitration is always allowed, nor is it sufficient to show that a waiver is precluded, something more is needed.

If the court in *Penn* had completed its analysis of the first prong of the test by studying the legislative history, it would have discovered strong support for the proposition that the judicial rights guaranteed under the ADA could not be waived.⁷⁴ When Senate Bill 933 came to the House, the Alternative Dispute Resolution (“ADR”) provision was added.⁷⁵ The Judiciary committee adopted the ADR provision (codified as §12212) but limited its scope.⁷⁶ The Judiciary committee explicitly stated that “the use of alternative dispute mechanisms is intended to supplement, not supplant, the remedies provided by this Act.”⁷⁷ The committee also clearly considered problems such as *Penn*’s when they stated:

any agreement to submit disputed issues to arbitration . . . in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of this Act . . . [and the Committee] does not intend that the inclusion of [this section] be used to preclude rights and remedies that would otherwise be available to persons with disabilities.⁷⁸

Because the House amended the original bill, it had to go to a conference committee to resolve the differences.⁷⁹ When considering the ADR provision, the conference committee clearly adopted the reasoning of the Judiciary Committee:

It is the intent of the conferees that the use of . . . alternative dispute resolution procedures is completely voluntary. *Under no condition would an arbitration clause in a[n] . . . employment contract prevent an individual from pursuing their rights under the ADA.* The conferees adopt by reference the statement of the House Judiciary Report regarding this provision.⁸⁰

73. *Id.* See also *LaChance v. Northeast Publ’g, Inc.*, 965 F. Supp. 177, 187 n.20 (D. Mass. 1997).

74. The current version of the ADA began as Senate Bill 933. The House version, which significantly amended the Senate version, was H.R. 2273. After a conference committee analyzed the two versions and reconciled the differences, it was passed by both the Senate and the House to become the Americans with Disabilities Act of 1990. H.R. CONF. REP. NO. 101-596, at 57 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 565-66.

75. *Id.* See also H.R. 2273 101st Cong. (1990).

76. H.R. REP. NO. 101-485, pt. 3, at 76 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 499.

77. *Id.*

78. *Id.* The Committee also stated that the reasoning the Supreme Court used in *Alexander*, 415 U.S. 36, to preclude a waiver of Title VII rights also applied to the ADA.

79. See text *supra* note 74.

80. H.R. CONF. REP. NO. 101-596, at 89 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 598 (emphasis added).

Clearly, Congress encouraged the use of ADR, but did not intend for it to prevent an individual from using the judicial remedies available under the ADA.⁸¹ Other cases considering the arbitrability of ADA claims have held that Congress clearly precludes a waiver of judicial remedies available in the ADA after studying the legislative history.⁸²

Finally, the purpose of the ADA should have been studied by the court to see if there are any conflicts between the purpose of the statute and arbitration of claims arising under the statute.⁸³ The ADA states that one of the purposes of the statute was to ensure that the federal government played a central role in the enforcement of the ADA.⁸⁴ Seemingly, if the federal government is to be a key player in the enforcement of the ADA, mandatory arbitration would conflict with this purpose.⁸⁵ If mandatory arbitration is allowed, private parties are able to enforce the provisions of the ADA without the guidance of the federal government.⁸⁶

The Supreme Court in *Gilmer* stated that mandatory arbitration was not appropriate for all statutory rights.⁸⁷ The Court also stated that if it was clear from studying the text, legislative history and the underlying purpose of the statute that Congress precluded a waiver of judicial remedies under the statute, mandatory arbitration was not allowed.⁸⁸ In applying this analysis to the ADA, there are clear indications in the text and the legislative history that Congress did intend to preclude a waiver of the rights covered by the ADA.

Although it reached the right result, the court in *Penn* fell short of its duty in regard to analyzing the arbitrability of the ADA. By stating that ADA claims were arbitrable without actually applying the controlling *Gilmer* test, the court further confused an already perplexing area of law. Further, the possibility that other courts might use *Penn* as precedent is disturbing based upon the fact that the court used a somewhat short-sighted analysis.

The court's citation to *Bercovitch* and *Miller* as proof that ADA claims are subject to mandatory arbitration is also without much merit. In studying the analysis used in both cases, it is apparent that they both made the same mistake as the court

81. See Wendy S. Tien, *Compulsory Arbitration of ADA Claims: Disabling the Disabled*, 77 MINN. L. REV. 1443 (1993).

82. See *LaChance*, 965 F. Supp. at 186-87; *Devlin v. Arizona Youth Soccer Ass'n*, 1996 WL 118445 (D. Ariz. Feb. 8, 1996); *Riley v. Weyerhaeuser Paper Co.*, 898 F. Supp. 324, 326 (W.D.N.C. 1995).

83. *Gilmer*, 500 U.S. at 26.

84. ADA 42 U.S.C. § 12101(b). The statute provides:

It is the purpose of this chapter--(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Id.

85. See M. Lane Lowrey, *Arbitration or Adjudication?: The Trials and Tribulations of the Federal Circuit Split over Mandatory Arbitration of Employment Discrimination Claims*, 40 S. TEX. L. REV. 993 (1999).

86. *Id.* at 1009.

87. *Gilmer*, 500 U.S. at 26.

88. *Id.*

in *Penn*—they did not fully apply the *Gilmer* analysis, despite the fact that both held *Gilmer* to be controlling.⁸⁹

For example, the court in *Bercovitch* held that the legislative history should only be studied if the language was ambiguous.⁹⁰ The court found that the language of §12212 was unambiguous and that it clearly supported the use of arbitration of ADA claims, therefore no study of the history was necessary.⁹¹ The fact that the court did not even consider the meaning of the limitation “where appropriate” is strong evidence that they may not have fully considered the issue.⁹²

Further, although it found it unnecessary, the court did examine the legislative history. After studying the committee reports, the court ruled that in light of the “clear” language of the text, the reports were not enough to overrule the text.⁹³ Whether the language of the ADA is clear is a tenuous argument at best, given the “where appropriate” language. It seems obvious that the impreciseness of this phrase leaves open the possibility that there are situations where arbitration is not appropriate.⁹⁴ Because it is at least possible that the language is ambiguous, the court should have looked at the legislative history of the ADA to clarify any doubts. The court, however, clearly ignored the plain language of the reports which patently states that nothing in the ADR provision will work as a waiver of an individual’s statutory rights.⁹⁵

Although the current test adopted by the Supreme Court, if applied correctly, would have precluded a waiver of the judicial forum under the ADA in this case, this is not true for every statute protecting individual rights. Many people involved in employment arbitration feel that the Court’s preference for binding arbitration in the employment setting is not supported by any legitimate policy arguments.⁹⁶ The major policy arguments in favor of arbitration are freedom of contract and that arbitration is beneficial to society.⁹⁷

The Court used the freedom of contract rationale on several occasions to uphold arbitration agreements in the employment setting.⁹⁸ Emphasis was placed on one’s right to enter into a private agreement and have it enforced according to its bargained-for terms. However, in many of these cases the Court was studying an arbitration agreement between two sophisticated corporations. It is true that such contracts should be enforced as written because the parties presumably were knowledgeable about the deal and what it entailed; however, this is not the case when dealing with the type of agreement *Penn* entered into. As in *Penn*’s case, many of these employment contracts are contracts of adhesion where the parties have

89. See *Bercovitch*, 133 F.3d at 150; *Miller*, 121 F.3d at 218.

90. *Bercovitch*, 133 F.3d at 149. A similar line of reasoning is used in *Miller*, but only *Bercovitch* will be analyzed because its analysis is more in-depth than *Miller*.

91. *Id.* at 149-50.

92. It has been argued that the motivation to clear the court dockets may have caused some judges to support the mandatory arbitration of statutory claims, even if Congress did not intend to allow this. Sternlight, *supra* note 19, at 639-42; Lowrey, *supra* note 85, at 1005-06.

93. *Bercovitch*, 133 F.3d at 150.

94. See *supra* notes 72-73.

95. See *supra* note 75.

96. See Sternlight, *supra* note 19, at 674.

97. See Sternlight, *supra* note 19, at 674.

98. See, e.g., *Mitsubishi Motors*, 473 U.S. at 630.

unequal bargaining power and the employee is forced to accept the agreement or lose the job.⁹⁹ By promoting a policy favoring binding arbitration, the Court is leaving these individuals without recourse.

The other reason used for validating binding arbitration is that it is beneficial to society. The rationale usually entails a discussion of how arbitration is less costly and more efficient and how it offers an atmosphere less combative than a courtroom, thus encouraging amicable resolutions to employment conflicts.¹⁰⁰ However, a close inspection of the arbitration process reveals that these statements are often not true.

In an arbitration hearing, the arbitrator is not required to write opinions nor do the opinions have any obligatory precedential value, making it impossible to form a cohesive body of law or create guidelines for future hearings.¹⁰¹ Also, arbitrators are allowed to consider statutory law; however, the courts are not allowed to reverse if the application of such law is incorrect.¹⁰² Further, it is not clear that arbitration is faster or cheaper than litigation in many instances due to the increased complexity of issues in the arbitration setting and the fact that many cases heard by an arbitrator would have been settled before going to trial.¹⁰³

Even if arbitration was clearly faster than litigation, it is precisely this attribute which makes arbitration inferior to judicial resolution when dealing with statutory rights. The ADA, like other civil rights statutes, implicates "the public's interest in its judicial enforcement."¹⁰⁴ These statutes were enacted to eradicate years of discrimination and to create more equality in the opportunities offered to those individuals who were being discriminated against. The means for enforcing such rights "must not rest with the arbitral process because . . . [they] involve questions of law, not of contract interpretation."¹⁰⁵

VI. CONCLUSION

Given the apparent conflict between Congress' intent and the courts' interpretation, the controversy over whether an employee's statutory rights can be subjected to mandatory arbitration will likely continue until Congress decides to act. It seems that the only way to finally resolve this issue is for Congress to clearly state that when dealing with a statutory right, arbitration is only appropriate after a dispute arises and when the parties voluntarily agree to arbitrate. It would also be wise to give explicit advice on how to deal with interpretation problems of such a provision so that there will be no room for doubt and no possibility for a court to read in any exceptions that would compromise an individual's statutory rights.

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99. See Sternlight, *supra* note 19, at 675-77. See also Tien, *supra* note 81, at 1463.

100. Sternlight, *supra* note 19, at 693-97; Tien, *supra* note 81, at 1467-68.

101. Tien, *supra* note 81, at 1467-68.

102. Tien, *supra* note 81, at 1467-68.

103. Sternlight, *supra* note 19, at 694-95.

104. Tien, *supra* note 81, at 1470-71.

105. Tien, *supra* note 81, at 1471.

