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Mandatory Arbitration and Title VII: Can Employees Ever See Their Rights Vindicated through Statutory Causes of Action - Metz v. Merrill Lynch, Pierce, Fenner & (and) Smith

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NOTES

Mandatory Arbitration And Title VII: Can Employees Ever See Their Rights Vindicated Through Statutory Causes of Action?

Metz v. Merrill Lynch, Pierce, Fenner & Smith[1]

I. INTRODUCTION

Through the Civil Rights Act of 1991, Title VII and the Americans with Disabilities Act, Congress has granted American employees an increased number of potential statutory causes of action. At the same time, litigation has decreased with a rise in the popularity of alternative dispute resolution.[2] Thus, it is no surprise that many modern employment contracts require employees to stipulate a dispute resolution forum through which any future legal conflict may be resolved, usually at the bequest of the prospective employer. The legal trend is to enforce mandatory arbitration and mediation clauses when a statutory cause of action is at issue or the employer has full say over the terms of the "voluntary" contractual agreement. Can employer-mandated arbitration truly protect the rights of minority employees and applicants as intended by the drafters of Title VII? This Note examines that question by evaluating how the Tenth Circuit interpreted the most recent United States Supreme Court findings on the issue.

II. FACTS AND HOLDING

Kelli Lyn Metz worked for Merrill Lynch in its Oklahoma City office for approximately five years before she was fired in September 1988.[3] Metz informed Merrill Lynch's management that she was pregnant about one month

1. 39 F.3d 1482 (10th Cir. 1994).

2. Susan P. Adams et al., *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1533, 1535 (1994).

3. *Metz*, 39 F.3d at 1485. After graduation from the University of Oklahoma, Metz was hired by Merrill Lynch as a sales assistant. She was promoted about nine months later to the position of account executive, otherwise known as a stock broker. Her production was recognized as sufficient in 1985 and 1986, even though it was generally lower than that of other brokers with similar experience. Yet, in 1987 and 1988, she was placed on probation for poor production. *Id.*

prior to being fired.[4] When company officials learned of her pregnancy, they told her that workers taking maternity leave typically did not keep up with production schedules upon their return to the company or did not return at all.[5] Although other company employees on leave were allowed to decide how their accounts would be handled when they took leave, Metz's supervisor informed her that he would decide how her accounts were distributed among other employees during her maternity leave.[6]

In September 1989, Metz filed a complaint in district court asserting Title VII, ERISA, and state common law claims against Merrill Lynch.[7] Merrill Lynch responded by filing a motion to stay the district court proceedings and a motion to compel arbitration.[8] The mandatory arbitration claim was based on the application Metz signed when she became a broker with the company.[9] In addition, her registration with the National Association of Securities Dealers ("NASD") included a clause mandating arbitration of any claims or disputes between Metz and Merrill Lynch.[10]

The district court sided with Merrill Lynch on the mandatory arbitration of the ERISA and common law claims, but declined to force the Title VII claim into arbitration.[11] The Tenth Circuit found that arbitration was an inappropriate forum to decide the issue of rights created by Title VII and denied Merrill Lynch's motion for reconsideration.[12]

Merrill Lynch filed an interlocutory appeal to the district court's order denying arbitration in March 1990.[13] The company withdrew the appeal several months later because numerous circuits had found that Title VII claims were not arbitrable.[14] The Tenth Circuit quickly entered an order dismissing the appeal.[15]

Following a bench trial, the district court awarded Metz a $53,746.67 judgment on her Title VII claim in July 1991.[16] Merrill Lynch made a motion to appeal the judgment which was denied by the district court.[17] In May 1991, one month prior to the bench trial on Metz's Title VII claim resulting in the July ruling in her favor, the United States Supreme Court handed down two major rulings directly affecting cases dealing with the issues of arbitration and Title VII

4. *Id.*

5. *Id.* Metz's firing followed a heated discussion with her immediate supervisor regarding a problem with one of her accounts. *Id.*

6. *Id.*

7. *Id.* at 1486.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

claims.[18] Merrill Lynch appealed the district court's rejection of the lower court's decision in Metz's favor on the Title VII claim, arguing that the applicable case law changed and that Title VII claims could now be subject to compulsory arbitration.[19]

On appeal to the Tenth Circuit Court of Appeals, Circuit Judge Holloway held that Title VII claims, like age discrimination claims, are subject to mandatory arbitration agreements.[20] The court, however, went on to find that Merrill Lynch had actually waived its right to compel arbitration on the facts of this case.[21] In holding that compulsory arbitration extended to Title VII discrimination claims, the Tenth Circuit declared that the "aims and substantive prohibitions" of both Title VII and the Age Discrimination and Employment Act ("ADEA") were similar.[22] Therefore, having previously held compulsory arbitration proper in ADEA cases, the Tenth Circuit reasoned that mandatory arbitration also properly applied to Title VII claims.[23]

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18. *Id.* at 1490. In May 1991, the United States Supreme Court held in Gilmer v. Interstate Johnson Lane Corp., 500 U.S. 20 (1991), that age discrimination claims could be subject to mandatory arbitration agreements. One week later, the Court vacated and remanded the Fifth Circuit's decision in Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104 (5th Cir. 1990); *see* 500 U.S. 930 (1991) (the United States Supreme Court's remand of *Alford*). The Fifth Circuit expressly held there was no right to compel arbitration in Title VII cases; the United States Supreme Court clearly came to the opposite conclusion regarding the same issue. *Id.*

19. *Metz*, 39 F.3d at 1485. Metz cross-appealed to the Tenth Circuit Court of Appeals, arguing that even if Title VII claims can be subject to mandatory arbitration clauses, those clauses must be included in the employment contract between the company trying to mandate arbitration between itself and the fired employee. Metz argued that the clause in question was written in her registration form to become a licensed broker, not in her employment contract. While Metz's argument cites a major issue in this case and others affecting the statutory and contractual rights of employees filing Title VII claims, it is not central to the topic of this Note and will not be addressed in detail. *Id.* at 1486.

20. *Id.* at 1487.

21. *Id.* at 1490.

22. *Id.* at 1487.

23. *Id.* (citing Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544 (10th Cir. 1988)). In the *Cooper* case, the Tenth Circuit applied the rule denying the preclusive effect of an arbitration hearing award in Title VII cases to ADEA cases. The Tenth Circuit now uses the analogy to extend mandatory arbitration to both types of claims. *Cooper*, 836 F.2d at 1553-54.

III. LEGAL BACKGROUND

From 1974 to 1990, the United States Supreme Court's stance on the arbitration of Title VII discrimination cases by private claimants was set out in the case of *Alexander v. Gardner-Denver Co.*[24] The *Alexander* court held that Congress intended for the federal courts to have final responsibility for enforcing Title VII claims and that deferral to arbitration would be inconsistent with those goals.[25] The Court further noted that "there can be no prospective waiver of an employee's rights under Title VII."[26] In deference to the applicability of the *Alexander* opinion to employment issues, the Eighth Circuit has held that the Court's reasoning turned on "the unique nature of Title VII."[27]

In the past decade, other decisions have mitigated the harshness of the United States Supreme Court's anti-arbitration stance as expressed in *Alexander*.[28] The Court openly weakened its stance on the non-arbitrability of statutory claims by recognizing a presumption of arbitrability for commercial contracts arising under the Sherman Act in 1985.[29] While holding that the Federal Arbitration Act ("FAA") allowed some statutory claims to be the subject of prior arbitration agreements, the Court noted that not all statutory claims may be properly subjected to such agreements.[30]

The Court continued a trend of accepting the arbitration of statutory claims two years later in *Shearson/American Express, Inc. v. McMahon*.[31] The *Shearson* court held that Congress did not intend to preclude the option of waiving the right to a judicial forum (in favor of arbitration) for resolution of a statutory right

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24. Heidi M. Hellekson, *Taking the "Alternative" out of the Dispute Resolution of Title VII Claims: The Implications of a Mandatory Enforcement Scheme of Arbitration Agreements Arising out of Employment Contracts*, 70 N.D. L. REV. 435, 438 (1994). Hellekson notes that "as late as 1990, the federal circuit courts relied on *Alexander* as authority for allowing those who would had signed compulsory arbitration agreements to pursue their claims in court." *See generally* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

25. *Alexander*, 415 U.S. at 56.

26. *Id.* at 51.

27. Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304, 1306 (8th Cir. 1988). The *Alexander* court itself noted that employees exercising their right to a judicial forum in Title VII cases were not only redressing their own injuries, but were also vindicating "the important congressional policy against discriminatory employment practices." *Alexander*, 415 U.S. at 45.

28. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (noting that any intent to expressly prevent arbitration of Title VII claims would have been apparent in the language or legislative history of the act); *see also* Rodriguez de Quijas v. Shearson/Am. Express, Inc. 490 U.S. 477, 481 (1989) (noting a strong endorsement of the federal statutes favoring arbitration as a method of resolving disputes).

29. *See generally Mitsubishi Motors Corp.*, 473 U.S. 614.

30. *Id.* at 627.

31. 482 U.S. 220 (1987). In *McMahon*, the United States Supreme Court enforced an arbitration agreement for a claim arising under the Securities Exchange Act of 1934 and those arising under the Racketeer Influence and Corrupt Organization Act ("RICO").

absent an inherent conflict between arbitration and the statute's underlying purposes.[32]

The United States Supreme Court took a further step away from *Alexander* in *Rodriguez de Quijas*, holding that an agreement made pursuant to the Securities Act of 1933 could be arbitrated despite a non-waiver provision in the act.[33] The *Rodriguez de Quijas* Court also found that unequal bargaining power between employees and employers did not make agreements per se unenforceable in the employment context.[34]

The Court consistently recognized the significance of the FAA in the context of mandatory arbitration of statutory claims in opinions throughout the 1980's. For instance, the United States Supreme Court, in *Perry v. Thomas*,[35] referred to the FAA as the embodiment of congressional intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause.[36] In *Southland Corp. v. Keating*,[37] the United States Supreme Court held that "in enacting § 2 of the FAA, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[38]

Neither the *Perry* nor *Southland* decision drew unanimous approval from the Court.[39] In his *Perry* dissent, Justice Stevens noted that the FAA is over fifty years old, yet it was "only in the last few years that the Court has effectively rewritten the statute to give it a preemptive scope that Congress certainly did not intend."[40] Justice O'Connor, also dissenting in *Perry*, complained that the majority's interpretation of the FAA was "unfaithful to congressional intent, unnecessary, and in light of the [Act's] antecedents and the intervening contraction

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32. *Id.* at 225-27.

33. *See generally Rodriguez de Quijas*, 490 U.S. 477.

34. *Rodriguez de Quijas*, 490 U.S. at 483-84. The Court stated that there was no factual showing below that the agreement to arbitrate "was adhesive in nature." *Id.* at 484.

35. 482 U.S. 483 (1987).

36. *Perry*, 482 U.S. at 490; *see also* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983). In *Mercury Constr.*, the Court held that Section 2 of the FAA represents a congressional declaration of the federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. *Id.*

37. 465 U.S. 1 (1984).

38. *Id.* at 10. Section 2 of the FAA reads:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1982).

39. Justices Stevens and O'Connor each dissented from both decisions. *Southland*, 465 U.S. at 17-36 (O'Connor, J., & Stevens, J., dissenting); *Perry*, 482 U.S. at 493-95 (O'Connor, J., & Stevens, J., dissenting).

40. *Perry*, 482 U.S. at 493 (Stevens, J., dissenting).

of federal power, inexplicable."[41] Justice O'Connor further argued that if Congress has the power to expressly limit the scope of the FAA mandate over statutory causes of action, state lawmakers ought to be able to limit the use of mandatory arbitration in regard to defining the contractual rights and obligations of state citizens as well.[42] The majority of the Court, however, maintained that the FAA mandates the enforcement of contractual arbitration agreements between contracting parties, absent a few exceptions.[43]

Meanwhile, through the late eighties and early nineties, the expansion of statutory rights and remedies accorded to employees in discrimination disputes continued to grow.[44] A resulting "litigation explosion" followed along with corresponding acceptance of the widespread use of alternative dispute resolution ("ADR") methods.[45] These changes solidified the general judicial trend toward recognizing contractual agreements to arbitrate workplace conflicts.[46]

The trend was marked most significantly by the United States Supreme Court in the majority's opinion in the 1991 case of *Gilmer v. Interstate/Johnson Lake Corp.*[47] In *Gilmer*, the Court held that an employer could compel a fired employee to arbitrate his claim filed under the ADEA pursuant to a contractual agreement to do so.[48] The Court also distinguished *Gilmer* from its decision in *Gardner-Denver* by differentiating the collective bargaining agreement at issue in the earlier case from the contract at issue in *Gilmer*.[49]

The *Gilmer* majority cited *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, stating "[w]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited alternative means of dispute resolution."[50] The majority rejected the employee's argument that the possibility of a biased panel, less rigorous discovery and limited available remedies all worked against the proper vindication of his rights under the ADEA when a dispute was arbitrated.[51] The dissent in *Gilmer* argued that the FAA specifically exempted private employment agreement from the scope of its

41. *Id.* at 494 (O'Connor, J., dissenting) (citing her own dissent in *Southland*, 465 U.S. at 36).

42. *Perry*, 482 U.S. at 494 (O'Connor, J., dissenting).

43. *Id.* at 489. The exceptions according to the majority interpretation being "such grounds as exist at law or in equity for the revocation of any contract," citing the FAA, 9 U.S.C. § 2 (1982).

44. Adams et al., *supra* note 2, at 1535. This article notes in particular the passage of the Americans with Disabilities Act and the Civil Rights Act of 1991. The latter amended Title VII to authorize jury trials and compensatory and punitive damages. *Id.*

45. *Id.* at 1535-36.

46. *Id.* at 1536.

47. 500 U.S. 20 (1991).

48. *Id.*

49. *Gilmer*, 500 U.S. at 33-35.

50. *Id.* at 34 n.5 (citing *Mitsubishi Motors Corp.*, 473 U.S. at 626-27).

51. *Id.* at 30-32. The plaintiff also argued that the unequal bargaining power between employees and employers at the time of contract and the lack of public knowledge of claims and awards, were problematic aspects of vindicating ADEA rights through mandatory arbitration agreements. *Id.* at 31, 33.

requirements compelling the enforcement of arbitration clauses.[52] Before *Metz*, the Tenth Circuit Court of Appeals had not made a clear statement on the applicability of the *Gilmer* decision to cases involving mandatory arbitration.

IV. INSTANT DECISION

In *Metz*, the Tenth Circuit applied its own past reasoning and that of the United States Supreme Court to resolve the issue of mandatory arbitration and the vindication of Title VII rights.[53] The court acknowledged that a change in the law had occurred since Metz initiated her action and that the change was marked by the Court's May 1991 decision in *Gilmer*.[54] In the instant case, the Tenth Circuit held that the Court "explicitly eschewed its prior 'mistrust of the arbitral process,' emphasizing instead the 'liberal federal policy favoring arbitration agreements' reflected in the Federal Arbitration Act. . . ."[55]

The Tenth Circuit coupled the decision in *Gilmer* with the remand of the Fifth Circuit case of *Alford v. Dean Witter Reynolds, Inc.*[56] one week later to support its conclusion that Metz's Title VII claim was subject to compulsory arbitration.[57] The *Metz* court agreed with the Fifth Circuit's revised opinion in *Alford*, which found a sexual discrimination and harassment case filed pursuant to Title VII was subject to mandatory arbitration.[58] The *Metz* court inferred from the Court's remand of *Alford* that future United States Supreme Court decisions would generally subject Title VII claims to mandatory arbitration.[59]

In *Metz*, the Tenth Circuit also referenced its own likening of the policy concerns prompting the enactment of the ADEA to those which brought about Title VII under *Cooper v. Asplundh Tree Expert Co.*[60] in 1988.[61] The court reasoned that since the statutes have similar goals and "substantive prohibitions" the arbitration issues facing the two acts should be evaluated similarly.[62]

The Tenth Circuit distinguished the earlier importance of *Alexander*, since that case concerned an arbitration agreement in the context of a collectively bargained contract.[63] The United States Supreme Court in *Gilmer* distinguished

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52. *Id.* at 36 (Stevens, J., & Marshall, J., dissenting).

53. *See generally,* Metz v. Merrill Lynch, Pierce, Fenner & Smith, 39 F.3d 1482 (10th Cir. 1994).

54. *Metz*, 39 F.3d at 1490 ("The Supreme Court's actions in *Gilmer* and *Alford* clearly signaled a change in the law governing the arbitrability of Title VII claims. . . .").

55. *Id.*

56. 939 F.2d 229 (5th Cir. 1991).

57. *Metz*, 39 F.3d at 1487.

58. *Id.*

59. *Id.*

60. 836 F.2d 1544 (10th Cir. 1988).

61. *Metz*, 39 F.3d at 1487.

62. *Id.*

63. *Id.*

Alexander in the same manner.[64] Further deferring to the *Gilmer* opinion, the Tenth Circuit agreed with the majority's finding that Gilmer was subject to the FAA, while *Alexander* was not.[65] The *Metz* court also deferred to the *Gilmer* logic that the *Alexander* view of arbitration as "inferior to the judicial process for resolving statutory claims" has been "undermined" by subsequent Court opinions.[66]

Thus, the Tenth Circuit position on the arbitrability of Title VII cases was driven primarily by the United States Supreme Court majority in *Gilmer*. Based on its interpretation of that leading case, the *Metz* court held that Title VII claims in the Tenth Circuit, like age discrimination claims, are subject to mandatory arbitration agreements.[67]

V. COMMENT

The *Metz* case marks a solid Tenth Circuit affirmation of the United States Supreme Court majority opinion in *Gilmer* that mandatory arbitration can be the first and final forum for Title VII disputes. In its agreement with that opinion, the Tenth Circuit neglected to examine the merits of the minority position in *Gilmer*, as well as the possibility that Title VII exists uniquely and independently of the ADEA and other statutory relief mechanisms in both its purpose and construction.[68]

The court correctly emphasized the modern acceptance of the arbitration forum and its increased popularity, but virtually ignored several other issues which have a direct bearing on Metz's constitutional and Title VII proscribed rights. For instance, the court brushed aside the issue of whether a brokerage application containing the mandatory arbitration clause may be a contract of adhesion because employees of brokerage houses have little choice whether or not to sign on as a broker.[69]

Like Metz, the plaintiffs in *Gilmer* tried unsuccessfully to argue that the securities dealer registration form, which contained the arbitration clause, was a condition of employment and was unenforceable as a contract of adhesion.[70] Since the contract was signed voluntarily, the majority found that adhesion was

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64. *Gilmer*, 500 U.S. at 35.

65. *Metz*, 39 F.3d at 1487 (citing *Gilmer*, 500 U.S. at 35).

66. *Id.* (citing *Gilmer*, 500 U.S. at 33 n.5).

67. *Id.* at 1487-88. The Tenth Circuit held generally that mandatory arbitration agreements pursuant to Title VII claims are enforceable. On the facts of this case, however, the court refused to mandate arbitration of the Title VII claim at issue, because it held that Merrill Lynch had waived its opportunity to compel arbitration by going forward with the litigation of the case via the June 1991 bench trial. *Id.* at 1490.

68. *See generally Metz*, 39 F.3d at 1482.

69. *Gilmer*, 500 U.S. at 39.

70. Maureen McClain, *California MCLE Marathon 1994: Employment Law Update, in* EMPLOYMENT DISCRIMINATION 1994, at 135 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5189 1994).

a non-issue, while the *Gilmer* minority found the issue was an important one.[71] Justice Stevens, joined by Justice Marshall, argued that the FAA was specifically designed to prevent contractual agreements which force arbitration by employers of employee's grievances and preclude subsequent statutory action.[72] The dissenters cited the 1923 Senate Committee notes for the legislative history of the FAA.[73] In these notes, Senator Walsh said:

> The trouble about the matter is that a great many of these contracts that are entered into are not [voluntary] things at all. . . . A man says, "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except sign it; and then he surrenders his right to have a case by court. . . .[74]

Commentators since the *Gilmer* decision have also questioned the level of autonomy potential employees have when entering into contracts with their employers. One author has argued that "those with greater bargaining power will take advantage of those with little or no bargaining power. Unfortunately, most employees who are offered arbitration agreements have no bargaining power."[75]

Commentators have also questioned the appropriateness of arbitration as a forum for discrimination issues in the work place. Since arbitration is a binding, private process, employers found guilty of discrimination will not be named to the public as they would be following a court procedure.[76] The trial-like process, with fewer rules, may exacerbate the adversarial aspects of the parties' relationship.[77] The more procedural rules and safeguards exercised by the courts, such as discovery requirements or hearing all available witnesses, the higher the costs for the parties.[78] In addition, since arbitration rulings are limited to the issues at hand, the same employers may be willing to continue in a cycle of discrimination.[79]

Gilmer did not address exact standards for deciding whether an agreement to arbitrate is entered into knowingly and voluntarily.[80] Given an opportunity to

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71. *Gilmer*, 500 U.S. at 39.

72. *Id.* at 40. The FAA section applicable to the above issue is found in Section 1: "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1988). The section indicates the available exclusions to the general rule stated in the statute that contractual agreements to arbitrate "shall be valid, irrevocable, and enforceable" unless equity requires a different result. 9 U.S.C. § 2 (1988).

73. *Id.* at 39.

74. *Id.*

75. Hellekson, *supra* note 23, at 452.

76. Adams et al., *supra* note 2, at 1539.

77. *Id.*

78. *Id.*

79. *Id.* at 1540.

80. *Id.* at 1547.

elaborate or comment on the United States Supreme Court's failure to address certain standards for voluntary agreement, the Tenth Circuit neglected to do so.[81] Perhaps, the Tenth Circuit felt the need to address these standards was moot, due to the United States Supreme Court's vacation and remand of the *Alford* case and given the fact that a waiver of the arbitration option was found. Instead of questioning the issue of voluntary agreement, the *Metz* court quickly agreed with the *Gilmer* majority, brushing aside any debate on the issue despite the split of lower courts on the meaning of the FAA's ambiguous language.[82] The *Gilmer* court also decided to "leave for another day" the decision of whether the FAA exclusion clause would apply to all employment contracts.[83]

One thing that the FAA is clear about, and which the *Metz* and *Gilmer* decisions seem to disregard, is the extremely limited review accorded commercially arbitrated decisions.[84] Under the FAA, courts may only vacate an award in situations involving fraud, misconduct or corruption on the part of the arbitrator.[85] Courts can modify such awards only in the case of "manifest disregard" for the law.[86] Thus, the FAA prevents a prospective plaintiff from bringing suit if the award were based on a misinterpretation of Title VII law by the arbitrator. As one commentator wrote, "it is most certain that the FAA's system of review will not allow these claimants adequate review of their arbitral awards."[87]

In its blanket endorsement of *Gilmer*, the *Metz* court also fails to recognize that the Fourth Circuit Court of Appeals case that the *Gilmer* decision arose out of was an anomaly among the circuits.[88] The trend among the other circuits was to allow discrimination claims into the federal court system, despite previously signed arbitration agreements.[89]

The *Metz* ruling creates a rule in the Tenth Circuit that arbitration clauses in employees' contracts with their employers will be enforced even when the employee's claim involves essential statutory rights contained in Title VII, even when the contract was not voluntary. This rule ignores the fact that keeping employees' discrimination claims in the judicial forum would assure public

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81. *See generally Metz*, 39 F.3d 1482.

82. Adams et al., *supra* note 2, at 1546. Some courts have narrowly construed the language of FAA Section 1 to apply only to employees in the interstate commerce business of moving goods. Others have read the clause broadly like the dissent in *Gilmer*. "No doubt Congress or the Supreme Court will revisit this issue since no sound rationale is apparent for varying the rules on the arbitration of civil rights claims depending on the industry in which the plaintiff works." *Id.*

83. *Gilmer*, 500 U.S. at 25 n.2. The issue of the FAA exclusion for "contracts of employment" was not brought out by the plaintiff in *Gilmer*, which is one of the reasons the Court gives for not deciding this issue.

84. *See* 9 U.S.C. §§ 10-11 (1988) (explaining the standards for a vacation or modification of an arbitral award).

85. 9 U.S.C. § 10 (1988).

86. 9 U.S.C. § 11 (1988).

87. Hellekson, *supra* note 23, at 441.

88. *Id.* at 440.

89. *Id.*

accountability for guilty employers and would prevent stagnation of employment discrimination law.[90] Beyond ignoring consistent application of the law, the court quickly extinguishes a party's right to the protections of a trial. Employees should voluntarily relinquish the judicial forum, with its mandatory due process and discovery requirements, in order for arbitration to legitimately be considered a fair "alternative."[91]

The Tenth Circuit virtually discounted the possibility that Metz's registration contract could have been one of adhesion and deferred to *Gilmer* to find such contracts generally enforceable.[92] By focusing instead on whether the employer in this case had actually waived its right to demand arbitration, the *Metz* court not only ignored the possibility that the "agreement" to arbitrate was involuntary, but presumed that such an agreement could adequately assure the rights guaranteed by Title VII.

The *Gilmer* decision left many questions unanswered concerning the arbitration of employee/employer conflicts. The *Metz* court had the opportunity to clarify some of those issues for future application in the Tenth Circuit. Instead, the court skirted the question by calling the right to mandate arbitration a given and shifting the focus to the question whether Merrill Lynch waived its right to arbitration. *Metz* could forbode a post-*Gilmer* trend of creating contracts in which employees sign away their rights of judicial enforcement of Title VII guarantees, the very laws designed to help level the skewed work-place playing field.

VI. CONCLUSION

This Note is not to suggest that alternative dispute resolution can never properly vindicate a claimant's rights given statutory causes of action. Indeed, it has been argued that the cost, efficiency and accessibility of arbitration in comparison to litigation means that more people with legitimate complaints are able to have their grievances heard and resolved.[93] But, the issue of whether an agreement to arbitrate is truly voluntary or whether the discovery and evidentiary requirements of the arbitration forum adequately enforce a claimant's Title VII rights are too important to be taken out of the judicial setting.

The *Gilmer* court's enforcement of mandatory arbitration purported to be an endorsement of arbitration's merits, finding the alternative forum capable of vindicating the rights of a statutory claimant. The *Metz* court's endorsement of the same view came without justification, yet extended the logic to subject Title VII claims to mandatory arbitration. The *Gilmer* court attempted to leave the issue of unequal bargaining power for lower courts to decide. However, applying

90. *Id.* at 451.

91. *Id.* at 457.

92. *Metz*, 39 F.3d at 1488.

93. Adams et al., *supra* note 2, at 1558. The writers note that "[t]he reality is that a more informal, simpler and less confrontational system like ADR will encourage more valid complaints of discrimination to come forward. For many individuals, ADR expands access to the legal system." *Id.*

the *Metz* court's extension of that decision, there is nothing left for the lower courts to decide. At least in the context of securities registration application, the only thing a Tenth Circuit claimant needs to do to forfeit the judicial forum, and get hired, is sign on the dotted line.[94]

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94. Ms. Metz signed as a registered broker with the National Association of Securities Dealers. Presumably, as a stock broker for Merrill Lynch, such registration was required for her to continue her employment there. This is the contract which contained the mandatory arbitration clause at issue in the case.