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Mandatory Arbitration of Title VII Claims: A New Approach - Prudential Insurance Co. of America v. Lai

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Mandatory Arbitration of Title VII Claims: A New Approach

Prudential Insurance Co. of America v. Lai[1]

I. INTRODUCTION

Many employees sign arbitration agreements as part of the hiring process. Often, these agreements are standardized forms composed by an employer or industry, and presented to the prospective employee as yet another form essential to employment. When the dispute that arises involves Title VII claims, should the employee be compelled to arbitrate those claims? This note examines one court's approach to safeguarding judicial resolution of Title VII claims, as well as alternative approaches.

II. FACTS AND HOLDING

Appellants Justine Lai and Elvira Viernes were employed by the Prudential Insurance Co. of America ("Prudential") as sales representatives.[2] On November 30, 1990, they sued Prudential and their immediate supervisor in state court, alleging that the supervisor had raped, harassed, and sexually abused them.[3] Prudential then filed a claim in federal district court to compel arbitration of Ms. Lai's and Ms. Viernes' claims pursuant to an agreement that each woman signed when applying to Prudential for employment.[4] This agreement, called the Standard Application for Securities Industry Registration ("U-4 form"), provided that any employment-related claim would be arbitrated under the rules of the organizations with which the employee registered.[5] Ms. Lai and Ms. Viernes registered with the National Association of Securities Dealers ("NASD"), which requires arbitration of disputes originating from the business of its members.[6]

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1. 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S.Ct. 61 (1995).

2. Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1301 (9th Cir. 1994), *cert. denied*, 116 S.Ct. 61 (1995).

3. *Id.*

4. *Id.*

5. *Id.* at 1302. The relevant clause of the U-4 form states: "I agree to arbitrate any dispute, claim or controversy that may arise between me or my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or bylaws of the organizations with which I register. . . ." *Id.*

6. *Id.* at 1301. The NASD Manual and Code of Arbitration Procedure provides: "Any dispute, claim or controversy eligible for submission under part I of this Code between or among members and or associated persons . . . arising in connection with the business of such members or in connection with the activities of such associated person(s), shall be arbitrated under this Code. . . ." *Id.* at 1302.

In federal district court, Prudential moved to stay the state court proceedings and to compel arbitration of appellants' claims.[7] The district court granted both motions, agreeing with Prudential's position that the enforceability of the arbitration agreement was a question for the arbitrator to decide.[8]

On appeal, Ms. Lai and Ms. Viernes argued that they could not be bound by the arbitration agreement because they were unaware of it.[9] They claimed that the nature of the U-4 form was not explained and that they did not have a chance to read it.[10] Furthermore, they never received a copy of the NASD manual containing its arbitration agreement.[11]

The United States Court of Appeals for the Ninth Circuit defined the major issue before the court as whether the appellants entered into a binding arbitration agreement, and in consequence, waived rights available to them under Title VII[12] and similar state statutes.[13] The court held that when an individual has not knowingly agreed to waive her Title VII rights and remedies, she cannot be compelled to arbitrate those claims.[14]

III. LEGAL HISTORY

The Ninth Circuit decision came down in the context of a number of decisions compelling arbitration of claims based on Title VII and the Age Discrimination in Employment Act ("ADEA")[15] pursuant to the ubiquitous Securities Registration Form U-4.[16] Courts have based their decisions on the United States Supreme Court's influential 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*[17] To understand the significance of the Ninth Circuit's heightened standard for the validity of agreements to arbitrate certain

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7. *Id.* at 1301.

8. *Id.* at 1301, 1303.

9. *Id.* at 1303.

10. *Id.* at 1301.

11. *Id.*

12. 42 U.S.C. §§ 2000e - 2000e-17 (1988).

13. *Lai*, 42 F.3d at 1303. Parallel state anti-discrimination laws are included in Title VII's enforcement scheme by its terms. *Id.*

14. *Id.* at 1305. The appealability of the district court's order compelling arbitration was a threshold issue before the Ninth Circuit. The court noted the Federal Arbitration Act's ("FAA") general rule that an order compelling arbitration is not an appealable final judgment. However, the FAA makes an exception for "final judgment with respect to an arbitration." The Ninth Circuit held that where the motion to compel arbitration is the only claim before the court, the order compelling arbitration settles all claims before that court, and is an appealable final judgment. *Id.*

15. 29 U.S.C. §§ 621-634 (1988).

16. *See, e.g.*, Kidd v. Equitable Life Assurance Soc'y of United States, 32 F.3d 516 (11th Cir. 1994); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991).

17. 500 U.S. 20 (1991).

statutory claims, it is important to understand the impact of *Gilmer* and how it changed the law that appellate courts were applying to arbitration and statutory discrimination claims.

A. Alexander and the Law Prior to Gilmer

Prior to *Gilmer*, potential plaintiffs could rely on the United States Supreme Court's decision in *Alexander v. Gardner-Denver Co.*[18] to preserve a judicial forum for their Title VII or ADEA complaints despite arbitration agreements such as that contained in the U-4 form.[19] *Alexander* held that there could be no prospective waiver of an employee's Title VII rights.[20] In that case, arbitration had taken place in accord with a collective bargaining agreement, but the plaintiff in *Alexander* also wished to pursue a private civil action.[21]

The Court focused on the purpose and procedures of Title VII to find that Congress intended federal courts to retain final authority over enforcement of Title VII.[22] The Court described the private cause of action as "essential" to the enforcement of Title VII and noted that such claimants "vindicate the important Congressional policy against discriminatory employment practices" as well as their own claims.[23] The Court also pointed out that the language of Title VII itself does not preclude private action when the parties have availed themselves of arbitration.[24]

Furthermore, while acknowledging the value of arbitration for contract disputes, the Court questioned the suitability of arbitral procedures for enforcement of Title VII rights.[25] The Court said that arbitration does not take adequate notice of judicial construction; is more likely to focus on giving effect to the contract involved rather than legislation; and the entire fact finding process is too limited.[26]

After *Alexander*, appellate courts embraced the Court's reasoning to hold that the Title VII cause of action could not be prospectively waived and that employees could not be compelled to arbitrate those claims pursuant to U-4 or other commercial arbitration agreements.[27]

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18. 415 U.S. 36 (1974).
19. Alexander v. Gardner-Denver Co., 415 U.S. 36, 59-60 (1974).
20. *Id.* at 51.
21. *Id.* at 38, 43.
22. *Id.* at 56.
23. *Id.* at 45.
24. *Id.* at 47.
25. *Id.* at 56.
26. *Id.* at 57. Deficiencies in the fact-finding process include the curtailment or elimination of the record, the rules of evidence, discovery, cross-examination and testimony. *Id.* at 57-58.
27. *See e.g.*, Swenson v. Management Recruiters Int'l, Inc., 858 F.2d. 1304 (8th Cir. 1988); Utley v. Goldman Sachs & Co., 883 F.2d. 184 (1st Cir. 1989); Schwartz v. Florida Bd. of Regents, 807 F.2d. 901 (11th Cir. 1987).

In *Swenson v. Management Recruiters International, Inc.*,[28] the Eighth Circuit relied on *Alexander* to hold that Swenson could not be compelled to arbitrate her Title VII racial and sexual discrimination claims even though she had signed an agreement with her employer containing an arbitration clause.[29] The Eighth Circuit agreed with the Supreme Court that the arbitral forum had deficiencies making it inadequate for the vindication of Title VII rights.[30] The court reiterated that the substantial public interest in preventing employment discrimination could best be served by keeping the judicial forum available to Title VII claimants.[31] The court went on to say that although *Alexander* involved a collective bargaining agreement, the decision turned on "the unique nature of Title VII" rather than the type of agreement.[32]

The First Circuit interpreted *Alexander* the same way in *Utley v. Goldman Sachs & Co.*[33] *Utley*, like the instant case, involved the U-4 form.[34] The First Circuit refused to compel arbitration of a sales associate's Title VII claims based on the reasoning in *Alexander*.[35] The court noted that recent United States Supreme Court decisions asserted a federal policy favoring arbitration, placing the burden on the party opposing arbitration to show Congress intended that judicial remedies could not be waived by arbitration agreements.[36] The court found the necessary congressional intent in the text of Title VII itself, which expressly provided a private cause of action without mandating arbitration, and also in the tradition of preserving the adjudication of Constitutional rights in the Article III courts.[37]

Like the Eighth Circuit, the First Circuit found the type of employment agreement involved was irrelevant to the proposition in *Alexander* that the importance of Title VII enforcement and the drawbacks of the arbitral forum precluded the prospective waiver of the judicial forum.[38]

B. Gilmer and Subsequent Decisions

The United States Supreme Court's decision in *Gilmer* made a dramatic change in the way the federal courts approached agreements to arbitrate statutory

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28. 858 F.2d 1304 (8th Cir. 1988).
29. *Swenson*, 858 F.2d at 1306-07.
30. *Id.*
31. *Id.* at 1305.
32. *Id.* at 1306.
33. 883 F.2d 184 (1st. Cir. 1989).
34. *Utley*, 883 F.2d at 185.
35. *Id.* at 187.
36. *Id.* at 186 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).
37. *Id.* at 187.
38. *Id.*

claims in the context of employment discrimination.[39] The plaintiff in *Gilmer* was a securities representative who signed the U-4 registration application.[40] When Gilmer brought a claim under the ADEA, his employer moved to compel arbitration pursuant to the U-4 agreement.[41]

In *Gilmer*, the Court emphasized the congressional purpose in enacting the Federal Arbitration Act ("FAA")[42] to promote arbitration by treating arbitration agreements as having the same status as any other contract.[43] Under the FAA, a party is bound by an arbitration agreement unless she can show that Congress intended to preclude waiver of a judicial forum for the statutory rights involved.[44] The claimant may rely on the statutory text, legislative history, or an "inherent conflict" between arbitration and the statute's purpose.[45] The Court observed that statutory claimants do not give up substantive rights when they abide by their arbitration agreements; they are merely determined through arbitration rather than a judicial forum.[46] Apparently, in this decision, the FAA was accorded the high priority that Title VII was accorded in the *Alexander* decision. Therefore, the Court took a new approach to the suitability of arbitration procedures, finding them sufficient both to protect individual rights and to generally promote the purposes of the ADEA.[47]

The Court did not go so far as to over-rule *Alexander*, but sharply distinguished it and essentially limited it to its facts.[48] The opinion identified the issue in *Alexander* as whether the arbitration of contract-based claims under a collective bargaining agreement precluded bringing statutory claims based on the same events in court, while *Gilmer* regarded the enforceability of an arbitration agreement.[49] Furthermore, the Court emphasized that collective bargaining agreements raise concerns that private agreements do not.[50] The point was to "ensure that an individual's statutory rights were not lost in the collective

39. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
40. *Id.* at 23.
41. *Id.* at 23-24.
42. 9 U.S.C. §§ 1 *et seq.* (1988).
43. *Gilmer*, 500 U.S. at 24.
44. *Id.* at 26.
45. *Id.*
46. *Id.*
47. *Id.* at 30-32.
48. *Id.* at 35.
49. *Id.*
50. *Id.* Of primary concern was that the interests of the individual might be secondary to the interests of the group of employees that were party to the collective bargaining agreement. *Id.* at 34.

bargaining process."[51] Finally, the Court noted that *Alexander* was not decided under the FAA, which states a strong presumption in favor of arbitrability.[52]

The Court signalled the effect of this decision by remanding *Alford v. Dean Witter Reynolds, Inc.*,[53] a Fifth Circuit decision decided under the *Alexander* standard, for reconsideration in light of *Gilmer*.[54] The Fifth Circuit had originally held that Alford could not be compelled to arbitrate her Title VII claims.[55] On remand, the Fifth Circuit noted that the applicable policy arguments had been dismissed by *Gilmer*, and reversed the earlier decision.[56] While *Gilmer* involved the ADEA, the Fifth Circuit found that it was pertinent to Title VII claims because the statutes at issue were similar civil rights statutes with similar enforcement schemes.[57]

This was just the first of several similar appellate court decisions to compel arbitration of Title VII claims after *Gilmer*.[58] These cases tend to be factually similar to the instant case; all involve Title VII claimants whose employers sought to compel arbitration of those claims pursuant to a U-4 agreement.[59]

The Sixth Circuit's reasoning in *Willis v. Dean Witter Reynolds, Inc.*[60] is representative.[61] The court stated that *Alexander* could no longer be read to proscribe arbitration of Title VII claims pursuant to agreements, and that it had been effectively distinguished from the type of case before the court.[62] The court found that *Gilmer* controlled for that reason, and because of the Supreme Court's remand of *Alford*.[63]

Following *Gilmer*, the Sixth Circuit found that Willis' arguments based on the important policy concerns embodied by Title VII, its enforcement scheme, and the importance of judicial review (which is absent from the arbitral procedure) were foreclosed.[64] It appeared that if an employee had signed the U-4 or a similar form in order to do his job, and his employer invoked the arbitration

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51. Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 700 (11th Cir. 1992).
52. *Gilmer*, 500 U.S. at 35.
53. 939 F.2d 229 (5th Cir. 1991).
54. Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991).
55. *Id.*
56. *Id.* at 230.
57. *Id.*
58. *See e.g.*, Metz v. Merrill Lynch, Pierce, Fenner & Smith, 39 F.3d 1482 (10th Cir. 1994); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991).
59. *Willis*, 948 F.2d at 306; *Metz*, 39 F.3d at 1486; *Bender*, 971 F.2d at 699.
60. 948 F.2d 305 (6th Cir. 1991).
61. *Willis*, 948 F.2d at 305.
62. *Id.* at 308.
63. *Id.*
64. *Id.*

clause, then there was no avenue left for him to get his claim to court as a Title VII claimant.[65]

IV. INSTANT DECISION

Since *Gilmer* and subsequent lower court decisions such as *Willis* have effectively concluded that statutory discrimination claims can be subject to mandatory arbitration, the Ninth Circuit took a novel approach in *Lai*.[66] The Ninth Circuit first framed the issue as whether there was a binding agreement, and then set a high standard for concluding that the agreement was binding.[67]

The court adopted the position that Congress intended that there be at least knowing agreement to arbitrate claims such as those covered by Title VII before the rights, remedies, and procedural protections detailed in Title VII can be waived.[68] Drawing support for this position from the text and legislative history of Title VII, the court revived many of the policy arguments utilized in the *Alexander* opinion.[69] Like the United States Supreme Court in *Alexander*, the Ninth Circuit emphasized that Congress, in the Civil Rights Act of 1964, intended the policy against discrimination to be of the "highest priority."[70] Title VII provided for several forums to better carry out this policy and generally preserved access to other options when a claimant had taken advantage of one of the forums.[71]

The court found further support in the legislative history of the Civil Rights Act of 1991 ("Act"),[72] which amends Title VII, particularly in a related House

65. One circuit court refused to compel arbitration of an ADEA claim pursuant to a U-4 agreement based on the language of the NASD Code of Arbitration Procedure. Farrand v. Lutheran Bhd., 993 F.2d 1253 (7th Cir. 1993). The Seventh Circuit read the agreement language to exclude arbitration of employee disputes between a member of NASD and one of the member's registered representatives. *Id.* at 1255. The court also said that *Gilmer* did not stand for a blanket presumption in favor of arbitration; rather, it construed a specific contract. *Id.* at 1255. This decision has been criticized. *Kidd*, 32 F.3d at 519; O'Donnell v. First Investors Corp., 872 F. Supp. 1274, 1278 (S.D.N.Y. 1995); Strappes Group, Inc. v. Siedle, No. CV 93-11385-K, 1993 WL 443926, at *4 (D. Mass. Nov. 22, 1993). The Seventh Circuit's approach is probably of limited availability to future cases anyway since the NASD amended the Code in 1993 to expressly include arbitration of employee related disputes. *Kidd*, 32 F.3d at 518.

66. 42 F.3d 1299.

67. *Id.* at 1303, 1304.

68. *Id.* at 1304.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* (citing Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended).

of Representative's report.[73] Speaking of section 118, which encourages the use of arbitration to settle claims under the Act, the House report explains that alternative dispute resolution should supplement rather than replace Title VII civil remedies.[74] The court quoted Senator Dole's comments on section 118, saying that arbitration would be appropriate only "where the parties knowingly and voluntarily elect to use these methods."[75]

The Ninth Circuit adopted "knowing waiver" as the appropriate standard for a valid arbitration agreement when Title VII rights are at stake.[76] The court said that this was consistent with the paramount public policy in favor of aiding victims of sexual discrimination and harassment.[77] The Ninth Circuit stated that this public policy "is at least as strong as our public policy in favor of arbitration."[78]

The court went on to discuss the significance of the procedural protections unique to adjudication, which had been down-played in *Gilmer*.[79] The court noted that this could be particularly important in the context of the instant sexual harassment claims.[80] For example, California statutes (analogous to Title VII) limit the admissibility of a plaintiff's sexual history in judicial proceedings.[81] Furthermore, a sexual harassment claimant might especially value a jury of her peers over a NASD panel.[82] The court indicated that it was not enough to say, as did the Supreme Court in *Mitsubishi Motors* and *Gilmer*, that claimants merely utilize a different forum by submitting to arbitration and do not forego substantive rights.[83]

Applied to the instant case, the court found that the claimants could not have been bound by the arbitration agreement because they did not knowingly give up their statutory remedies.[84] The court based this finding not only on the fact Ms. Lai and Ms. Viernes had no opportunity to read the terms of the agreement and were misled as to its contents,[85] but also on the U-4 form's failure to describe what disputes were arbitrable under the agreement.[86]

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73. *Id.* (citing H.R. REP. NO.40(I), 102d Cong., 1st Sess. (1991), *reprinted in* 1991 U.S.C.C.A.N. 549).

74. *Id.* (citing 137 CONG. REC. S15472 (daily ed. October 30, 1991)(statement of Sen. Dole)).

75. *Id.* at 1305 (citing 137 CONG. REC. S15472 (daily ed. October 30, 1991)(statement of Sen. Dole)).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 1305 n.4.

82. *Id.*

83. *Id.* at 1305 (citing *Mitsubishi Motors*, 473 U.S. at 47). *See also Gilmer*, 500 U.S. at 26.

84. *Id.*

85. *Id.*

86. *Id.*

In short, the court held that a Title VII plaintiff may only be compelled to arbitrate statutory claims if he or she has knowingly agreed to arbitrate that type of dispute.[87] The *Lai* court did not find that the plaintiffs "knowingly agreed" to, or were given notice, that they were giving up Title VII adjudication because the agreement did not specify the types of disputes subject to arbitration.[88]

V. COMMENT

In *Alexander*, the Supreme Court articulated persuasive policy reasons for preserving the right to judicial resolution of Title VII claims.[89] Primary among these were the importance of "an individual's right to equal employment opportunity"[90] and the fact that, through the courts, not only is the wrong individual compensated, the general policy against employment discrimination is advanced.[91] As one author pointed out, the public nature of court proceedings, discovery, and reported decisions play a significant role in furthering Title VII policies.[92] Discovery, in particular, can be useful in revealing a pattern of discrimination.[93] Reported decisions provide for the accumulation of a body of law that Title VII plaintiffs can depend on and that can shape employers' behavior.[94]

These policies would seem to transcend the facts of *Alexander*, but *Gilmer* apparently removed them from the analysis. *Lai* reintroduced them, not in the analysis of whether Title VII claimants can be compelled to arbitrate statutory claims, but in deciding whether the underlying agreement is valid. For the immediate future, *Lai* could be a useful tool for courts that are reluctant to deprive plaintiffs of a judicial forum for statutory discrimination claims.

Lai has been raised by some Title VII claimants with mixed results.[95] The Northern District of California fully adopted the reasoning and holding in *Lai* to preserve the judicial forum for a Title VII plaintiff who had signed the U-4

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87. *Id.* at 1304.

88. *Id.* at 1305.

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

90. *Id.*

91. *Id.* at 45.

92. 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 NOTRE DAME L. REV. 435, 449-51 (1994).

93. *Id.* at 449, 50.

94. *Id.* at 451.

95. Hurst v. Prudential Sec. Inc., No. C-90-2930, 1995 WL 419742 (N.D. Cal. Jul. 10, 1995); Lomeli v. North Cent. Conn. Anesthesia Assoc., No. CV94 0541335, 1995 WL 370785 (Conn. Super. Ct. Jun. 9, 1995); Hall v. Metlife Resources, No. 94 Civ. 0358, 1995 WL 258061 (S.D.N.Y. May 3, 1995).

agreement.[96] In *Hurst v. Prudential Securities Inc.*, a different panel of the Ninth Circuit rendered a decision compelling arbitration based on *Gilmer* and prior to *Lai*.[97] The district court held that *Lai* constituted a change in the law that "altered or called attention to a rule of law concerning the necessity that employees understand that U-4 Forms compel arbitration" and restored the case to the trial calendar.[98]

The Ninth Circuit's *Lai* decision has, of course, great weight in the Northern District of California. Perhaps what is most significant is that the Ninth Circuit when deciding *Hurst*, refused to distinguish the case before it on the basis that there was no misrepresentation of the U-4 agreement as was alleged in *Lai*.[99] "Knowing agreement" is a tougher standard under this broad interpretation of *Lai*.

The Superior Court of Connecticut took a much narrower view in *Lomeli v. North Central Connecticut Anesthesia Associates*.[100] In that case, a discrimination plaintiff relied on *Lai* to argue against having her claim referred to an arbitrator pursuant to an employment contract.[101] The court found the cases to be factually distinguishable.[102] The court noted that the plaintiffs in *Lai* allegedly had not read their contract and didn't know that it contained an arbitration clause.[103] This ignores the language in the *Lai* opinion that points out that even if the plaintiffs had read the relative agreements, they could not be put on notice that they would be required to arbitrate Title VII claims. Given the opportunity, the *Lomeli* court declined to adopt the reasoning in *Lai* and preserve the judicial forum for statutory discrimination claims.

The Southern District of New York explicitly rejected the reasoning of the *Lai* court in *Hall v. Metlife Resources*.[104] Like *Lai*, *Hall* also involved a Title VII claim and a U-4 agreement.[105] Early in its discussion, the court established that there is a "strong presumption in favor of arbitrability."[106] The court said that *Gilmer* made it clear that the U-4 binds an employee to arbitrate a statutory discrimination claim.[107] Furthermore, the court did not agree with the Ninth Circuit that an arbitration agreement amounted to a waiver of substantive statutory

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96. *Hurst*, 1995 WL 419742 at *6.
97. *Id.* at *4.
98. *Id.* at *6.
99. *Id.*
100. *Lomeli*, 1995 WL 370785 at *1.
101. *Id.* at *1.
102. *Id.*
103. *Id.*
104. *Hall*, 1995 WL 258061 at *4.
105. *Id.*
106. *Id.* at *2.
107. *Id.* at *4. The Eastern District of New York also rejected the *Lai* court's reasoning as contrary to *Gilmer* in a decision dated November 20, 1995. Pitter v. The Prudential Life Ins. Co. of Am., 906 F. Supp. 130, 139 (E.D.N.Y. 1995).

rights.[108] This is reminiscent of the *Gilmer* Court's assertion that claimants do not forgo substantive rights when signing arbitration agreements, but merely agree to their resolution in another forum.[109]

It is unclear whether courts will embrace the *Lai* court's analysis as a means to avoid compelling the arbitration of statutory discrimination claims. Should they do so, it is still an open question what factors would make the waiver of Title VII rights "knowing." One commentator predicts that those factors would be the language of the arbitration agreement, the employee's awareness of the agreement, and the employee's understanding of what the agreement required.[110] These factors would require extensive fact-finding.[111]

The importance of the language of the agreement as a factor in determining whether there was knowing waiver points out one problem with the *Lai* analysis. In *Lai*, it was dispositive that the language of the U-4 form and the NASD manual did not specify that Title VII or any other particular type of dispute was subject to arbitration.[112] If these documents were amended to explicitly include Title VII disputes, there would apparently be a valid arbitration agreement under the *Lai* analysis. However, it would still be true that employees would have no meaningful choice as to signing these agreements. Since employees are often required to sign U-4 forms to obtain and keep certain jobs, they are seldom in a position to freely bargain the terms of these forms. Perhaps voluntariness should have been part of the standard for a valid agreement.[113] The importance of voluntary waiver also appears in the legislative history of the Civil Rights Act of 1991.[114] One commentator reports that the Clinton Administration Commission on the Future of Worker-Management Relations recommended in January 1995 that all employment arbitration should be voluntary.[115]

Since the U-4 and other arbitration agreements can be drafted to get around the *Lai* holding if that view becomes prevailing in the courts, the *Lai* approach may be useful only for the short term. One author has taken a longer view and recommended that Congress amend the Civil Rights Act of 1991, as well as the Americans with Disabilities Act.[116] The suggested amendment would provide for a judicial trial *de novo* following final arbitration conducted pursuant to pre-

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108. *Hall*, 1995 WL 258061 at *4.

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

110. *Arbitrability-Statutory Rights Waiver, Prudential Ins. Co. v. Lai*, 10 FED. LITIGATOR 119, 120 (June 1995).

111. *Id.*

112. *Lai*, 42 F.3d at 1305.

113. Hellekson, *supra* note 92, at 438.

114. *Lai*, 42 F.3d at 1305.

115. S. Gale Dick, *Court Limits Requirement to Arbitrate*, 13 ALTERNATIVES TO HIGH COST LITIG. 13, 19 (Feb. 1995).

116. Douglas E. Abrams, *Arbitrability in Recent Federal Civil Rights Legislation: The Need for Amendment*, 26 CONN. L. REV. 521 (1994).

dispute arbitration agreements.[117] This proposal is based on two considerations. First, the legislative history of the Civil Rights Act of 1991 indicates a concern that alternative dispute resolution not replace Title VII judicial remedies.[118] However, this concern is not reflected in the actual text of the Act.[119] Second, civil rights statutes such as Title VII serve a "unique" role in protecting equality and redressing past and present discrimination.[120]

Specifically, a prospective amendment should limit the right to a trial *de novo* to arbitration conducted pursuant to a pre-dispute arbitration agreement, and to the party who is a member of the statutorily protected class.[121] Post-dispute arbitration agreements are not included because they come about in a situation where both parties have had a chance to evaluate their particular case and to choose the appropriate course accordingly.[122] The reason for the second limitation is that arbitration may be the appropriate choice for a claimant who wishes to take advantage of its privacy, speed, and lower costs. If that is the case, the other party, normally in a stronger position, should not be able to insist on litigation and thereby run up expenses and delay resolution.[123]

VI. CONCLUSION

A Title VII claimant who finds herself held to an arbitration agreement contained in a form contract signed as a condition of employment may find it useful to rely on *Lai*. In addition to asserting that there must be knowing agreement for there to be a valid waiver of Title VII claims, a claimant should assert that it must be voluntary as well. While the *Lai* court did not make this part of their standard, it follows from the same legislative history and policy arguments utilized by the Ninth Circuit. Ultimately, it would be desirable to amend the statute so that the judicial forum is clearly and effectively preserved for Title VII claimants who choose it despite arbitration agreements. The importance of the individual's right to be free from discrimination and the necessity of developing a body of law that can affect employer behavior and further the goals of Title VII support this course.

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117. *Id.* at 578.
118. *Id.* at 558.
119. *Id.* at 584.
120. *Id.* at 578.
121. *Id.* at 578, 579.
122. *Id.* at 578.
123. *Id.* at 567.