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## FAA and the USERRA: Pro-Arbitration Policies Can Undermine Federal Protection of Military Personnel

Laura Bettenhausen

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# NOTES

## The FAA and the USERRA: Pro-Arbitration Policies Can Undermine Federal Protection of Military Personnel

*Garrett v. Circuit City Stores, Inc.*<sup>1</sup>

### I. INTRODUCTION

According to the United States Supreme Court, statutory claims may be the subject of an arbitration agreement contained in an individual employment contract. In *Garrett v. Circuit City Stores, Inc.*,<sup>2</sup> the United States Court of Appeals for the Fifth Circuit analyzed whether claims brought under the Uniformed Services Employment and Reemployment Rights Act (USERRA) are subject to arbitration under the Federal Arbitration Act (FAA). The applicability of the FAA to employment contracts is an integral part of the analysis in this case. To determine whether arbitration is an appropriate forum for the plaintiff's claim, discussion of both the structure and purpose of the USERRA is necessary. In the instant decision, the Fifth Circuit adopted the Supreme Court's pro-arbitration stance, but the question of whether an agreement to arbitrate may, in some cases, be an inappropriate waiver of substantive statutory rights remains.

### II. FACTS AND HOLDING

Michael T. Garrett (Garrett), a Marine Reserve Officer, was hired by Circuit City in 1994.<sup>3</sup> After Garrett began working for Circuit City, the company implemented an "Associate Issue Resolution Program" for resolving employment-related disputes.<sup>4</sup> When Circuit City adopted the dispute resolution program, each employee, including Garrett, received a receipt form, a list of the program's rules, and an Arbitration Opt-Out Form.<sup>5</sup> The information given to each employee stated that claims regarding the termination of employment would be settled by final and binding arbitration.<sup>6</sup> Garrett acknowledged, in writing, that he received the policy information, and he did not opt-out of the arbitration provision within the allotted time period.<sup>7</sup>

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1. 449 F.3d 672 (5th Cir. 2006).

2. *Id.*

3. *Id.* at 674.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

Garrett alleged that his supervisors began to unjustifiably criticize and discipline him during the period in which the United States military was preparing for combat in Iraq, between December 2002 and March 2003.<sup>8</sup> He was fired in March 2003, and he attributes this action to his status as a Marine Reserve Officer.<sup>9</sup> Garrett brought suit against Circuit City under the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>10</sup> Garrett alleged that section 4302(b) of the USERRA precluded the enforcement of the arbitration agreement.<sup>11</sup> Section 4302(b) provides that the Act supersedes any contract or agreement that reduces, limits, or eliminates any right or benefit provided by the USERRA.<sup>12</sup> Garrett claimed that a “right or benefit provided by” the USERRA includes a plaintiff’s right to bring suit in federal court.<sup>13</sup> Circuit City filed a motion to compel arbitration, in accordance with the Associate Issue Resolution Program.<sup>14</sup>

The district court denied Circuit City’s motion to compel arbitration, holding that section 4302(b) of the USERRA overrode the enforcement of the arbitration agreement.<sup>15</sup> Circuit City appealed to the Fifth Circuit Court of Appeals.<sup>16</sup> The Fifth Circuit concluded that the district court erred in refusing to compel arbitration and, therefore, reversed.<sup>17</sup> In reversing the district court’s decision, the Fifth Circuit held that when parties have made a pre-dispute agreement to arbitrate, USERRA claims are subject to arbitration under the FAA.<sup>18</sup>

### III. LEGAL BACKGROUND

#### A. Governing Law

The Federal Arbitration Act (FAA) was enacted to counter judicial hostility toward arbitration agreements and to hold such agreements equal to other contracts.<sup>19</sup> The FAA provides that written arbitration agreements are “valid, irrevocable, and enforceable,” unless grounds exist that would provide for the revocation of any contract.<sup>20</sup> The Supreme Court has interpreted the FAA as a manifestation of a “liberal federal policy favoring arbitration agreements.”<sup>21</sup> In fact, the

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8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. 38 U.S.C. 4302(b) (2006).

13. *Garrett*, 449 F.3d at 676.

14. *Id.* at 674.

15. *Id.*

16. *Id.*

17. *Id.* at 681.

18. *Id.*

19. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted). The FAA, originally enacted in 1925, 43 Stat. 883, was reenacted and codified in 1947 as Title 9 of the United States Code. *Id.*

20. *Id.* at 24-25.

21. *Id.* at 25 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

Supreme Court has held that statutory claims may be the subject of an arbitration agreement.<sup>22</sup>

In *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>23</sup> the United States Supreme Court dealt with the issue of whether Age Discrimination in Employment Act (ADEA) claims can be subjected to compulsory arbitration.<sup>24</sup> Gilmer's employer required him to register as a securities representative, and his registration application contained an agreement to arbitrate.<sup>25</sup> When Gilmer was fired at the age of 62, he brought suit against his employer alleging that his termination violated the Age Discrimination in Employment Act (ADEA).<sup>26</sup> His employer moved to compel arbitration, relying on the agreement in Gilmer's application and the FAA.<sup>27</sup> The United States Supreme Court recognized that statutory claims may be the subject of an arbitration agreement and that once such an agreement has been made, it is enforceable unless Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.<sup>28</sup> The court noted that the burden is on the party seeking to avoid arbitration to show that Congress intended to preclude a waiver of a judicial forum for statutory claims.<sup>29</sup> The Supreme Court concluded that the ADEA claim was arbitrable and that Gilmer did not meet his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under the Act.<sup>30</sup> The Supreme Court held that when parties have made an agreement to arbitrate, as in the registration application, ADEA claims are subject to arbitration.<sup>31</sup>

In *Alexander v. Gardner-Denver Co.*,<sup>32</sup> the United States Supreme Court dealt with the issue of whether an employee's rights under Title VII are subject to prospective waiver.<sup>33</sup> The court was asked to determine whether an employee's statutory right to trial de novo under Title VII of the Civil Rights Act of 1964 is foreclosed by prior submission of the employee's claim to arbitration under a collective bargaining agreement.<sup>34</sup> The court reasoned that Title VII provides for an individual's right to equal employment opportunities and that Title VII represents a congressional command that "each employee be free from discriminatory practices."<sup>35</sup> It follows, the court determined, that the rights conferred by Title VII cannot be part of the collective bargaining process because waiver of these rights would defeat the purpose of Title VII.<sup>36</sup> The court therefore concluded that an

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22. *Gilmer*, 500 U.S. at 26. The Supreme Court has held enforceable, arbitration agreements relating to claims arising under the Sherman Act, 15 U.S.C. §§ 1-7; § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(b); the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961; and § 12(2) of the Securities Act of 1933, 15 U.S.C. § 771(2). *Id.* (citations omitted).

23. 500 U.S. 20 (1991).

24. *Id.* at 23.

25. *Id.*

26. *Id.* at 23-24.

27. *Id.* at 24.

28. *Id.* at 26.

29. *Id.*

30. *Id.* at 35.

31. *Id.*

32. 415 U.S. 36 (1974).

33. *Id.* at 38.

34. *Id.*

35. *Id.* at 51.

36. *Id.*

employee's rights under Title VII are not subject to prospective waiver.<sup>37</sup> Thus, the Supreme Court held that the employee did not waive his cause of action under Title VII due to previous submission of his claim to arbitration.<sup>38</sup>

Eleven years later, in *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*,<sup>39</sup> the Supreme Court concluded that an agreement to arbitrate statutory claims is *not* a relinquishment of the substantive rights provided by the statute, but is instead a forum selection clause.<sup>40</sup> In analyzing which forum is appropriate, a court shall assume that if Congress intended to preclude waiver of the right to a judicial forum, that intention will be evident in the statutory text or legislative history.<sup>41</sup> The party who disfavors the arbitration agreement must show that Congress intended to preclude waiver of the right to a judicial forum; otherwise, that party is held to arbitration.<sup>42</sup>

The United States Supreme Court affirmed the right of companies to require employees to arbitrate, rather than litigate, employment discrimination claims in *Circuit City Stores, Inc. v. Adams*.<sup>43</sup> Employee Adams signed an employment application which included an agreement to arbitrate all claims relating to employment at Circuit City.<sup>44</sup> Adams later filed an employment discrimination lawsuit against Circuit City.<sup>45</sup> The district court held that Adams was obligated by the agreement to submit his claims against Circuit City to arbitration.<sup>46</sup> While Adams' appeal was pending in the Ninth Circuit Court of Appeals, the Ninth Circuit held, in *Craft v. Campbell Soup Co.*,<sup>47</sup> that the FAA does not apply to contracts of employment.<sup>48</sup>

Based on its ruling in *Craft v. Campbell Soup Co.*,<sup>49</sup> the Ninth Circuit held that the arbitration agreement between Adams and Circuit City was contained in a "contract of employment" and, therefore, was not subject to the FAA.<sup>50</sup> The Supreme Court, however, determined that section 1 of the FAA only exempts contracts of employment of transportation workers from the FAA.<sup>51</sup> Based on its determination that the exemption only applies to transportation workers, the Supreme Court reversed the Ninth Circuit's decision and remanded the case for further proceedings.<sup>52</sup>

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37. *Id.* at 51-52.

38. *Id.* at 51.

39. 473 U.S. 614 (1985).

40. *Id.* at 628 (emphasis added). The agreement specifies an arbitral, versus judicial, forum for dispute resolution. *Id.* See also *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295-96 (2002).

41. *Mitsubishi*, 473 U.S. at 628.

42. *Id.*

43. 532 U.S. 105 (2001).

44. *Id.* at 109-10.

45. *Id.* at 110.

46. *Id.*

47. 177 F.3d 1083 (9th Cir. 1999).

48. *Adams*, 532 U.S. at 110.

49. 177 F.3d 1083 (9th Cir. 1999).

50. *Adams*, 532 U.S. at 110.

51. *Id.* at 119. Section 1 of the FAA provides that the Act shall not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id.* at 112.

52. *Id.* at 119, 124.

In *Equal Employment Opportunity Commission v. Waffle House, Inc.*,<sup>53</sup> the United States Supreme Court clarified limitations on the applicability of the FAA.<sup>54</sup> In this case, the employee signed an application for employment which provided that any dispute regarding his employment would be resolved by binding arbitration.<sup>55</sup> The issue was whether the arbitration agreement barred the Equal Employment Opportunity Commission (EEOC) from pursuing victim-specific judicial relief in an enforcement action alleging that the employer violated the Americans with Disabilities Act (ADA).<sup>56</sup> The court noted that the language of the contract defines the scope of disputes subject to arbitration, and that nothing in the FAA authorizes a court to compel arbitration of any issues that are not covered in the agreement.<sup>57</sup> The court stated that arbitration under the FAA is a matter of consent, not coercion.<sup>58</sup> Furthermore, a contract cannot bind a nonparty and, in this case, the EEOC was not a party to the contract.<sup>59</sup> Therefore, the FAA did not require the EEOC to relinquish its statutory authority when it had not agreed to do so.<sup>60</sup> The Supreme Court thus concluded that the arbitration agreement at issue did not bar the EEOC from pursuing victim-specific judicial relief on behalf of the employee.<sup>61</sup>

The Supreme Court distinguishes between cases involving collective bargaining arbitration agreements and individually executed pre-dispute arbitration agreements.<sup>62</sup> When individuals are represented by a union, the collective interest of the bargaining unit may encroach upon individual substantive rights.<sup>63</sup> However, in an individual employment contract, there is no tension between collective representation and individual substantive rights.<sup>64</sup> Thus, the Supreme Court concluded that collective bargaining agreements are not subject to arbitration, while individual agreements are subject to arbitration.<sup>65</sup>

Notably, in subjecting individual agreements to arbitration, the Supreme Court focuses on the four corners of the written document without considering the context in which those agreements were made.<sup>66</sup> Some individual arbitration agreements are contained in employment contracts of adhesion, and are, therefore, non-negotiable.<sup>67</sup> A prospective employee cannot bargain for the terms of the agreement.<sup>68</sup> These agreements waive an employee's statutory rights to litigate discrimination claims.<sup>69</sup> It is problematic for the court to look solely at the docu-

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53. 534 U.S. 279 (2002).

54. *See id.* at 289.

55. *Id.* at 282.

56. *Id.*

57. *Id.* at 289.

58. *Id.* at 294 (quotation and citation omitted).

59. *Id.*

60. *Id.*

61. *Id.* at 297-98 (citations omitted).

62. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33-34 (1991).

63. *See id.* at 34-35.

64. *See id.* at 35.

65. *See Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004).

66. Carol Van Sambeek, *The Four Corners Approach to Judging the Enforceability of Arbitration Agreements, Which Waive Statutory Rights to Litigate Employment Discrimination Claims*, 5 APPALACHIAN J.L. 247, 247 (2006).

67. *Id.*

68. *See id.*

69. *Id.*

ment itself when determining whether the agreement is enforceable.<sup>70</sup> In doing so, the court fails to acknowledge the circumstances in which the agreement was made.<sup>71</sup> By enforcing employment arbitration agreements under the four corners approach, the court prevents workers from vindicating their rights in court.<sup>72</sup>

### B. *The Uniformed Services Employment and Reemployment Rights Act*

The USERRA protects the employment rights of members of the armed forces.<sup>73</sup> Section 4311(a) of the USERRA provides that a person who is a member of a uniformed service shall not be denied retention in employment on the basis of that membership.<sup>74</sup> Section 4302(a) provides that nothing in the USERRA shall supersede or nullify any contract that is more beneficial to a member of a uniformed service.<sup>75</sup> The USERRA supersedes any state law, contract, or agreement that reduces or eliminates any right or benefit provided by the USERRA.<sup>76</sup>

In *Peel v. Florida Dep't of Transp.*,<sup>77</sup> the plaintiff, a former employee of the State of Florida, was fired because he was absent from work to attend National Guard training.<sup>78</sup> The plaintiff filed suit under the Veterans' Reemployment Rights Act (VRRA) (the predecessor to the USERRA) to gain reemployment and to receive lost wages.<sup>79</sup> The Fifth Circuit determined that, "[a]lthough states are free to establish additional rights and protections supplemental to those the Act [VRRA] provides, . . . they are not free to restrict the reemployment rights that the Act has created."<sup>80</sup>

The USERRA allows for two methods in which a protected person may enforce his or her substantive rights against a private employer.<sup>81</sup> The first method provides that a person may file a complaint with the Secretary of Labor and request that the Secretary refer the complaint to the Attorney General for prosecution.<sup>82</sup> The second method provides that a person may file a civil action without

70. *Id.*

71. *Id.*

72. *Id.*

73. See 38 U.S.C. § 4311(a) (2000). The USERRA's antidiscrimination provision prohibits an employer from denying initial employment, reemployment, or any other benefit of employment to a person on the basis of membership in a uniformed service. *Id.*

74. *Id.*

75. "Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter." 38 U.S.C. § 4302(a) (2000).

76. See *id.* § 4302(b).

This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

*Id.*

77. 600 F.2d 1070 (5th Cir. 1979).

78. *Id.* at 1073.

79. *Id.*

80. *Id.* at 1073-74.

81. See 38 U.S.C. § 4323 (2006).

82. § 4323(a)(1).

the involvement of the Secretary of Labor and the Attorney General.<sup>83</sup> Section 4323(b) grants the district courts of the United States jurisdiction over actions against private employers.<sup>84</sup>

In *Yellow Freight Sys., Inc. v. Donnelly*,<sup>85</sup> the Supreme Court dealt with whether Title VII of the Civil Rights Act provided for exclusive or concurrent jurisdiction.<sup>86</sup> Title VII provides that “[e]ach United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter.”<sup>87</sup> The court noted that Title VII does not contain language confining jurisdiction to federal courts, and the omission of such a provision is evidence that Congress had no such intent.<sup>88</sup> The court concluded that the language in Title VII conferred concurrent jurisdiction on federal and state courts rather than exclusive federal jurisdiction.<sup>89</sup> In *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>90</sup> the Supreme Court noted that concurrent jurisdiction serves to advance the objective of allowing parties a broad right to select a forum.<sup>91</sup> Furthermore, the court likened arbitration agreements to provisions for concurrent jurisdiction, in that they, too, advance the objective of allowing parties a broader right to select a forum.<sup>92</sup>

The legislative history of USERRA § 4302 provides a starting point for determining which forums Congress considered appropriate for resolution of disputes arising under the USERRA. The House Committee Report states that section 4302(b) reaffirms a general preemption as to State and local laws, as well as to employer agreements, which provide fewer rights than are prescribed under the USERRA.<sup>93</sup> The Report affirms that resort to mechanisms, such as arbitration, is not required.<sup>94</sup> Furthermore, the Report provides that even if a person protected under the USERRA resorts to arbitration, any arbitration decision shall not be binding as a matter of law.<sup>95</sup> The Committee stated that rights under chapter 43 belong to the claimant, and the claimant may waive those rights, either explicitly or impliedly, through his or her conduct.<sup>96</sup> However, because of the remedial purposes of chapter 43, any waiver must be “clear, convincing, specific, unequivocal, and not under duress.”<sup>97</sup> Only known rights which are already in existence may be waived.<sup>98</sup> Finally, the report provides that “*an express waiver of future statutory rights, such as one that an employer might wish to require as a*

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83. § 4323(a)(2).

84. § 4323(b).

85. 494 U.S. 820 (1990).

86. *Id.* at 823.

87. *Id.*

88. *Id.*

89. *Id.* at 826.

90. 500 U.S. 20 (1991).

91. *Id.* at 29 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989)).

92. *Id.*

93. H.R. REP. NO. 103-65(I) (1994), reprinted in 1994 U.S.C.C.A.N. 2449, 2453.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*



condition of employment, would be contrary to the public policy embodied in the Committee bill and would be void.”<sup>99</sup>

The USERRA was preceded by the Veteran’s Reemployment Rights Act (VRRRA). The Veteran’s Reemployment Rights Handbook (VRR Handbook), a guide published by the Department of Labor under the VRRRA, provided that a person protected by the VRRRA could not unconsciously waive his or her rights.<sup>100</sup> The VRR Handbook specified that: “Rights generally do not mature until the veteran requests reinstatement, and rights not yet matured will not readily be considered to have been waived.”<sup>101</sup> Then, in the language later adopted by the drafters of the USERRA, the VRR Handbook stated: “An express waiver of future statutory reemployment rights, if required by the employer as a condition of employment, is contrary to the public policy embodied in the statute and is void.”<sup>102</sup>

In *Leonard v. United Airlines, Inc.*,<sup>103</sup> the Seventh Circuit Court of Appeals cited the anti-waiver language of the VRR Handbook in support of its holding that the plaintiff did not waive his VRRRA pension rights when he withdrew his pension contributions.<sup>104</sup> Similarly, in *Lapine v. Town of Wellesley*,<sup>105</sup> the First Circuit Court of Appeals noted “the strong policy against finding a prospective waiver of a service person’s reemployment rights,” and held that plaintiff’s pension withdrawal did not amount to an effective waiver of such rights.<sup>106</sup>

The United States Supreme Court has provided that although legislative history may be relevant, the authoritative statement of a law is the statutory text, not the history.<sup>107</sup> Not all extrinsic materials, including legislative history, are reliable sources of insight into Congressional intent.<sup>108</sup> Legislative history is itself often ambiguous and contradictory.<sup>109</sup>

### C. Supreme Court Analysis of Legislation Regarding the Uniformed Services

In *Fishgold v. Sullivan Drydock & Repair Corp.*,<sup>110</sup> the United States Supreme Court analyzed the purpose and application of the Selective Training and Service Act (Act).<sup>111</sup> The Act provides employment protections for veterans returning from military service.<sup>112</sup> In its analysis, the court stated that the Act was designed to protect veterans.<sup>113</sup> Members of the uniformed services are not to be

99. *Id.* (emphasis supplied).

100. See Brief of Plaintiff-Appellee at 14, *Garrett v. Circuit City Stores, Inc.*, No. 04-11360 (5th Cir. May 17, 2005).

101. *Id.*

102. *Id.*

103. 972 F.2d 155 (7th Cir. 1992).

104. *Id.* at 159.

105. 304 F.3d 90 (1st Cir. 2002).

106. *Id.* at 108.

107. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

108. *Id.*

109. *Id.*

110. 328 U.S. 275 (1946).

111. See *id.*

112. See *id.* at 278-81.

113. *Id.* at 284.

penalized when they return to their civilian jobs after serving in the military.<sup>114</sup> The court determined that the Act was to be “liberally construed for the benefit of those who left private life to serve their country in its hour of great need.”<sup>115</sup> Furthermore, the court determined its duty was to “construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.”<sup>116</sup> In its analysis, the court considered a Senate Committee Report, which stated, “The Congress, in this bill, has declared as its purpose and intent that every man who leaves his job to participate in this training and service should be reemployed without loss of seniority or other benefits upon his return to civil life.”<sup>117</sup> In sum, the court recognized the underlying purpose of the Act—to provide members of the uniformed services with job security—and ruled that a liberal interpretation of the Act was appropriate.<sup>118</sup>

More recently, in *Alabama Power Co. v. Davis*,<sup>119</sup> the United States Supreme Court analyzed the purpose and application of the Military Selective Service Act (the successor to the Selective Training and Service Act).<sup>120</sup> The court stated that the Military Selective Service Act “evidences Congress’ desire to minimize the disruption in individuals’ lives resulting from the national need for military personnel.”<sup>121</sup> The court insisted that the legislation be liberally construed for the benefit of those in the uniformed services.<sup>122</sup> In *Alabama*, the court ruled in favor of the employee.<sup>123</sup> The court ordered the employer to pay the employee the pension that the employee would have received if he had not been called to serve in the military.<sup>124</sup>

#### *D. Concerns Regarding the Enforcement of Arbitration Provisions in Employment Contracts*

Christine Godsil Cooper (Cooper) critiques *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>125</sup> in her article, *Where Are We Going with Gilmer?—Some Ruminations on the Arbitration of Discrimination Claims*.<sup>126</sup> Cooper proposes that the Supreme Court operated on several assumptions when it held that the Federal Arbitration Act (FAA) compelled arbitration of a claim under the Age Discrimination in Employment Act (ADEA).<sup>127</sup> The court assumed that (1) arbitration of statutory claims will not hinder the development of the law; (2) parties bargained for the arbitration agreement and it is fundamentally fair; and (3) because the statute pro-

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114. *Id.*

115. *Id.* at 285.

116. *Id.*

117. *Id.* at 289.

118. *See id.* at 285.

119. 431 U.S. 581 (1977).

120. *See id.* at 583-84.

121. *Id.* at 583.

122. *Id.* at 584.

123. *Id.* at 594.

124. *Id.*

125. 500 U.S. 20 (1991).

126. Christine Godsil Cooper, *Where Are We Going with Gilmer?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203 (1992).

127. *Id.* at 214.

vides for the possibility of settlement, it follows that arbitration is also appropriate.<sup>128</sup>

In response to the first assumption, Cooper alleges that the privacy inherent in arbitration programs is problematic because it prevents the development of the law.<sup>129</sup> Because arbitration proceedings are generally private, outside citizens do not know what circumstances gave rise to a dispute or what the arbitrator's decision was in such dispute.<sup>130</sup> Therefore, outside citizens do not have the opportunity to learn from arbitrated disputes, to learn what behavior is acceptable or sanctionable.<sup>131</sup> Furthermore, because arbitrators' decisions are generally shielded from review, a wrongful decision is likely to stand.<sup>132</sup>

The FAA provides for judicial review only in limited circumstances.<sup>133</sup> The court may vacate an arbitration award if the arbitrator made his or her decision with "manifest disregard" for the law or if the arbitrator "exceeded [his or her] powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."<sup>134</sup> Limited review raises the concern that not only will the law fail to develop further, but also that the law will simply not be followed.<sup>135</sup>

In response to the second assumption, that the arbitration agreement was freely bargained and is fair, Cooper argues that an employee, who must sign an application as a prerequisite to his or her employment, is unlikely to fully consider an arbitration agreement contained in the application.<sup>136</sup> Therefore, it is arguable that the inclusion of such boilerplate language amounts to coercion.<sup>137</sup> *Carnival Cruise Lines, Inc. v. Shute*,<sup>138</sup> was decided one month before *Gilmer*, and in *Carnival*, the United States Supreme Court upheld a forum selection clause contained on a cruise ticket.<sup>139</sup> The court upheld this boilerplate provision although it caused great inconvenience to the claimant, who had no opportunity to negotiate the terms of the contract provided on the ticket.<sup>140</sup> Due to the decision in *Carnival*, *Gilmer* could not prevail in an argument that the arbitration agreement was coerced or unfair.<sup>141</sup> However, an arbitration clause, as in *Gilmer*, may have a greater impact than a forum selection clause, as in *Carnival*.<sup>142</sup> While a forum selection clause selects from among equally qualified judges to hear a case pursuant to similar procedural rules, an arbitration clause selects a decision-making body which is allowed to exercise great discretion in determining statutory rights, leaves a limited record, and is shielded from review.<sup>143</sup>

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128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 214-15.

132. *Id.* at 215.

133. *Id.*

134. *Id.* at 216.

135. *Id.* at 217.

136. *Id.* at 220-21.

137. *Id.* at 221.

138. 499 U.S. 585 (1991).

139. Cooper, *supra* note 126, at 221.

140. *Id.*

141. *Id.*

142. *See id.* at 221-22.

143. *Id.*

In response to the third assumption, that the statute's contemplation of settlement allows for the conclusion that arbitration is permissible, Cooper emphasizes the distinction between private settlement of a statutory claim and a pre-dispute agreement to arbitrate all future statutory claims.<sup>144</sup> Private settlement occurs after a dispute arises and after parties have analyzed the strengths and weaknesses of the case.<sup>145</sup> By contrast, when a pre-dispute arbitration agreement is made, the parties are not in conflict, they do not know what potential conflict they may have, and they do not know what the applicable state of the law will be if a dispute arises.<sup>146</sup> In the employment context, arbitration clauses may be included as a non-negotiable condition of employment due to the employer's prediction that he is more likely to win in arbitration than in litigation; thus, "settlement is based on a prediction of the outcome of litigation," while "arbitration is based on an avoidance of the outcome of litigation."<sup>147</sup>

Cooper suggests that while employment discrimination suits can be arbitrated, a mechanism is needed to redirect matters of public policy and statutory construction to the courts.<sup>148</sup> She suggests that such issues should be removed from arbitration or that judicial review of arbitration awards concerning such issues should be allowed.<sup>149</sup> Cooper asserts that full discovery is necessary in the arbitration context, due to the practical problems of proof of discrimination.<sup>150</sup> Also, an employment arbitration program must authorize the arbitrator to award the full relief available under statute or common law, to ensure that employers do not eliminate the possibility of punitive damages.<sup>151</sup> Lastly, employers should not unilaterally impose arbitration programs into a workplace, unless the program provides additional substantive rights to employees.<sup>152</sup>

The article, *Contract and Jurisdiction*<sup>153</sup> by Paul D. Carrington (Carrington) and Paul H. Haagen (Haagen) provides a critique of *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>154</sup> which is consistent with Christine Godsil Cooper's<sup>155</sup> critique discussed above. Carrington and Haagen note that the Supreme Court distinguished its earlier decisions, which held that employment discrimination claims arising under the Civil Rights Act are not subject to binding arbitration, on the ground that collective bargaining agreements were at issue in those cases.<sup>156</sup> While arbitrators have no authority to decide civil rights claims where collective bargaining agreements are involved, they do have the authority to enforce individual contracts.<sup>157</sup> The implication of this distinction is that "an arbitration clause in an individual contract of employment can extend arbitral jurisdiction to Title VII

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144. *Id.* at 222.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 241.

149. *Id.*

150. *Id.*

151. *Id.* at 241-42.

152. *Id.* at 242.

153. Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1997).

154. 500 U.S. 20 (1991).

155. Cooper, *supra* note 126.

156. Carrington & Haagen, *supra* note 153, at 369-70.

157. *Id.*

claims despite the FAA's explicit exclusion of employment contracts."<sup>158</sup> The authors note that the extension of arbitration into employment law has generated not only criticism, but also resistance.<sup>159</sup>

In 1994, a Special Task Force, created by leaders of organizations including the National Academy of Arbitrators and the Society of Professionals in Dispute Resolution, produced a protocol for the arbitration of statutory discrimination claims which would provide an equal role for the employee in arbitrator selection, discovery, and review for errors of law.<sup>160</sup> In 1996, The Equal Employment Opportunity Commission issued its own National Enforcement Plan in opposition to the use of arbitration; the Commission did not want the use of arbitration to undermine its authority to enforce civil rights laws.<sup>161</sup>

The authors propose that after the Supreme Court's recent decisions, including *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>162</sup> and *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>163</sup> "it is not clear that there remains any private claim of federal right that cannot be diverted into an arbitral tribunal."<sup>164</sup> The authors assert that under the arbitration law established by the Supreme Court, the following consequences arise: workers, consumers, shippers, passengers, and franchisees will all be harmed; the protective police power of the federal and state governments is weakened; and at least some, if not many, commercial arbitrations will be made more costly while courts determine whether arbitrators have been faithful to federal laws.<sup>165</sup>

#### IV. INSTANT DECISION

In *Garrett v. Circuit City Stores, Inc.*,<sup>166</sup> the Fifth Circuit Court of Appeals analyzed whether the Uniformed Services Employment and Reemployment Rights Act (USERRA) precludes the enforcement of arbitration agreements.<sup>167</sup> Initially, the court asserted that the Federal Arbitration Act (FAA) treats arbitration agreements as equal to other contracts.<sup>168</sup> Because Garrett and Circuit City agreed to arbitrate the present dispute,<sup>169</sup> the court determined that the agreement was enforceable unless Garrett could show that Congress intended to preclude arbitration by the enactment of the USERRA.<sup>170</sup> Although the USERRA provides that a person may pursue a civil action in federal court and Garrett sought to exercise

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158. *Id.* at 370.

159. *Id.* at 371.

160. *Id.* at 371-72.

161. *Id.* at 372.

162. 473 U.S. 614 (1985).

163. 500 U.S. 20 (1991).

164. Carrington & Haagen, *supra* note 153, at 377.

165. *Id.* at 401.

166. 499 F.3d 672 (5th Cir. 2006).

167. *Id.* at 673.

168. *Id.* at 674.

169. The parties concurred that Garrett had notice of Circuit City's arbitration policy and that Garrett could have opted-out, but did not do so. Garrett continued to work for Circuit City for several years after the policy was adopted. Texas law presumes that Garrett understood and accepted the policy terms. Therefore, Garrett and Circuit City agreed to arbitrate disputes regarding the termination of employment. *Id.* at 675-76.

170. *Id.*

this option, the court concluded that Congress did not intend to preclude arbitration by granting the *possibility* of a federal judicial forum.<sup>171</sup> The court noted that substantive statutory rights are enforceable through arbitration and, therefore, an agreement to arbitrate is, in effect, a forum selection clause rather than a waiver of substantive statutory rights.<sup>172</sup> USERRA § 4323(b)(3) provides for concurrent jurisdiction, and so the court reasoned that arbitration is a permissible forum choice.<sup>173</sup>

The Fifth Circuit disagreed with Garrett's argument that the legislative history of the USERRA confirms congressional intent to forbid binding arbitration.<sup>174</sup> Furthermore, the Fifth Circuit cited to Supreme Court authority which suggests that legislative history should rarely be used in statutory interpretation.<sup>175</sup> The Fifth Circuit adopted the Supreme Court's distinction between collective bargaining arbitration agreements, which are not subject to arbitration, and individual predispute arbitration agreements, which are subject to arbitration.<sup>176</sup> Consistent with Supreme Court precedent, the Fifth Circuit concluded that the legislative history did not support a finding that Congress intended to exclude all arbitration under the USERRA.<sup>177</sup>

The Fifth Circuit noted that under the Arbitration Rules relevant to this case, the arbitrator is authorized to award relief in accordance with applicable law.<sup>178</sup> The court concluded that Garrett did not show that arbitration under Circuit City's rules would not allow him a fair opportunity to present his claims.<sup>179</sup> Therefore, arbitration was not inconsistent with the purposes of the USERRA.<sup>180</sup> The court also rejected Garrett's argument that the public policy interest in protecting soldiers under the USERRA, and thus the security of the country, necessitates the denial of arbitration.<sup>181</sup> The court asserted that the enforcement of employment arbitration agreements does not inhibit the protections guaranteed by the USERRA.<sup>182</sup> The Fifth Circuit held that USERRA claims are subject to arbitration under the FAA and, therefore, reversed the district court's refusal to compel arbitration.<sup>183</sup>

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171. *Id.* at 676-77 (emphasis added).

172. *Id.* at 677-78.

173. *Id.* at 678. USERRA § 4323(b)(3) provides that United States district courts have jurisdiction of actions against private employers. *Id.* The court notes that this language does not guarantee a right to a federal court trial and does not prohibit arbitration as an alternative forum. *Id.*

174. In the House Committee Report, the Committee expressed the intent that even if a person protected under the USERRA resorts to arbitration, the arbitration decision is not binding as a matter of law. *Id.* at 679.

175. *Id.* (citing *Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546, 568 (2005)).

176. *Id.* at 680.

177. *Id.*

178. *Id.* at 681.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

## V. COMMENT

In *Garrett v. Circuit City Stores, Inc.*,<sup>184</sup> the United States Court of Appeals for the Fifth Circuit examined the FAA in the context of the uniformed services.<sup>185</sup> While the Supreme Court has addressed questions of the FAA's application, it has not ruled specifically on the application of the FAA to the USERRA.<sup>186</sup> By holding that USERRA claims are subject to arbitration under the FAA, the Fifth Circuit reinforces the established view that arbitration is an appropriate forum for statutory claims, and, therefore, the court validates the arbitration process. Today, arbitration is a widely used form of dispute resolution, and the instant decision will further promote its use.

The Fifth Circuit's determination that Garrett's claim was subject to arbitration would have been better supported if the court had relied more heavily upon the Supreme Court's decision *Circuit City Stores, Inc. v. Adams*.<sup>187</sup> The facts in *Adams* are strikingly similar to those in the instant case; in both cases an employee filed an employment discrimination lawsuit and the question was whether or not the FAA applied to an arbitration agreement at issue.<sup>188</sup> In *Adams*, the Supreme Court analyzed the FAA's coverage and concluded that only contracts of employment transportation workers are exempt from the FAA.<sup>189</sup> This conclusion implies that arbitration agreements in all other employment contracts are subject to the FAA. Because the reasoning and outcome of *Adams* support the conclusion in *Garrett v. Circuit City Stores, Inc.*,<sup>190</sup> the Fifth Circuit's opinion would have been much more convincing if it had discussed *Adams* rather than simply making note of it.<sup>191</sup>

The United States Supreme Court has consistently held that it is appropriate for statutory claims to be resolved through arbitration, and the instant decision contributes to this line of authority.<sup>192</sup> However, despite Supreme Court precedent, the opposing view—that arbitration is not an appropriate forum for statutory claims—is very much alive. In the instant case, by holding that claims arising under the USERRA are subject to pre-dispute arbitration agreements, the Fifth Circuit severely hampers the protections provided by the USERRA. Disallowing members of the uniformed services to pursue their statutory claims in court clearly limits the avenues in which such persons may vindicate their rights. A binding arbitration agreement is not merely a forum selection clause; it dictates the *process* through which a person may pursue his or her claim. Furthermore, arbitration agreements contained in employment contracts may be coercive; for example, if an employee must assent to the terms of the agreement as a condition of his or her employment. Submission to binding, coercive arbitration agreements is most certainly not what the drafters of the USERRA intended as they strove to formu-

184. 449 F.3d 672 (5th Cir. 2006).

185. *See id.*

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

187. 532 U.S. 105 (2001).

188. *See id.*

189. *Id.* at 111-12, 119.

190. 449 F.3d 672 (5th Cir. 2006).

191. *See id.* at 675.

192. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

late protections for members of the uniformed services. In a Reserve Officers Association Law Review article,<sup>193</sup> Captain Samuel F. Wright<sup>194</sup> echoed these sentiments; he stated that if the decision in *Garrett v. Circuit City Stores, Inc.*,<sup>195</sup> is allowed to stand, it could “gut the effective enforcement of USERRA.”<sup>196</sup>

The Fifth Circuit relied on *EEOC v. Waffle House, Inc.*,<sup>197</sup> in support of its conclusion that an agreement to arbitrate under the FAA is not a waiver of statutory rights. In doing so, the court blatantly omitted discussion of the “anti-waiver” language contained in the House Committee Report from its analysis. The House Committee Report provides that an express waiver of future statutory rights would be void.<sup>198</sup> This same anti-waiver language was used in the handbook accompanying the Veteran’s Reemployment Rights Act (VRRRA), which preceded the USERRA.<sup>199</sup> The appellate courts in both *Leonard v. United Airlines, Inc.*<sup>200</sup> and *Lapine v. Town of Wellesley*<sup>201</sup> adhered to the anti-waiver language and did not find waiver of the plaintiffs’ statutory rights.

In the instant decision, Garrett did not “opt-out” of the arbitration policy within the allotted time period.<sup>202</sup> By failing to opt-out, Garrett effectively waived his future right to bring suit under the USERRA. The Fifth Circuit neglects to address the strong argument that such waiver is void according to the language in the House Committee Report. The court was wrong to omit discussion of the anti-waiver language from its analysis. If the Fifth Circuit had addressed, and disposed of, the argument that waiver of future statutory rights is void, its decision in *Garrett v. Circuit City Stores, Inc.*, would have been much stronger; however, its failure to address this argument leaves a problematic gap in its reasoning.<sup>203</sup>

The Fifth Circuit failed to consider the Supreme Court’s analysis in both *Fishgold v. Sullivan Drydock & Repair Corp.*,<sup>204</sup> and *Alabama Power Co. v. Davis*,<sup>205</sup> which provides that legislation enacted to protect members of the uniformed services should be construed liberally for such members’ benefit. In both *Fishgold* and *Alabama*, the court recognized the importance of protecting those who serve in the military from being disadvantaged at home.<sup>206</sup> In *Garrett v. Circuit City Stores, Inc.*,<sup>207</sup> however, the Fifth Circuit adhered to the four corners of

193. Captain Samuel F. Wright, *Mandatory Arbitration Mandate: Court ruling sets back USERRA Enforcement*, Number 0619, July/August 2006, [http://www.roa.org/site/PageServer?pagename=law\\_review\\_0619](http://www.roa.org/site/PageServer?pagename=law_review_0619) (last visited Apr. 17, 2007).

194. Captain Samuel F. Wright was one of the U.S. Department of Labor lawyers who helped draft the USERRA. See *id.*

195. 449 F.3d 672 (5th Cir. 2006).

196. Captain Samuel F. Wright, *Mandatory Arbitration Mandate: Court ruling sets back USERRA Enforcement*, Number 0619, July/August 2006, [http://www.roa.org/site/PageServer?pagename=law\\_review\\_0619](http://www.roa.org/site/PageServer?pagename=law_review_0619) (last visited Apr. 17, 2007).

197. 534 U.S. 279 (2002).

198. H.R.REP. NO. 103-65(I) (1994), as reprinted in 1994 U.S.C.C.A.N. 2449, 2453.

199. See *supra* Part III.B.

200. 972 F.2d 155 (7th Cir. 1992).

201. 304 F.3d 90 (1st Cir. 2002).

202. *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 674 (5th Cir. 2006).

203. 449 F.3d 672 (5th Cir. 2006).

204. 328 U.S. 275 (1946).

205. 431 U.S. 581 (1977).

206. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946); *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977).

207. 449 F.3d 672 (5th Cir. 2006).



the Resolution Program paperwork, not to the main purpose of the USERRA: to protect the employment rights of members of the armed forces.<sup>208</sup> Although the Fifth Circuit's decision is in line with the Supreme Court's pro-arbitration stance, it is out of line with the Supreme Court's analysis of legislation concerning the uniformed services. Because the Fifth Circuit did not heed the anti-waiver language, and did not apply the Supreme Court's liberal construction analysis, the Fifth Circuit's ruling undermines the purpose of the USERRA by disallowing members of the uniformed services to vindicate their rights in court.

## VI. CONCLUSION

In *Garrett v. Circuit City Stores, Inc.*,<sup>209</sup> the Fifth Circuit adopted the Supreme Court's pro-arbitration stance without fully articulating the effects of compulsory arbitration in the context of the uniformed services. The Fifth Circuit omitted important legislative history from its analysis. The legislative history of the USERRA clearly states that an express waiver of future statutory rights would be void. The Fifth Circuit adopted a narrow view concerning the relevance of legislative history, specifically, that such history should rarely be used in interpreting the law. Even under this narrow view, the court is not excused from neglecting the anti-waiver provision all together.

In focusing on the arbitrability of statutory claims in general, the Fifth Circuit lost focus of the specific context: the uniformed services. The Supreme Court has shown a great interest in protecting those who serve in the military from discrimination at home. The Supreme Court has construed legislation liberally so as to benefit members of the uniformed services.

Due to the legislative history of the USERRA and the Supreme Court's liberal construction of legislation concerning the military, the Fifth Circuit should have held that claims arising under the USERRA are *not* subject to a pre-dispute individually contracted arbitration agreement. In doing so, the Fifth Circuit would have made an acceptable, and necessary, exception to the general arbitrability of statutory claims.

LAURA BETTENHAUSEN

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208. *See id.*

209. 449 F.3d 672 (5th Cir. 2006).