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NOTES

Elevator Company Goes Down: Mandatory Arbitration Provisions as Applied to Pending Civil Rights Claims in the Employment Context

Goldsmith v. Bagby Elevator Co.[1]

I. INTRODUCTION

In *Goldsmith v. Bagby Elevator Company*, the Eleventh Circuit Court of Appeals carved a distinction in the employment context between mandatory pre-dispute arbitration agreements and compulsory arbitration agreements as applied to pending claims of discrimination. In doing so, the court warns employers that any effort to terminate an employee's rights with respect to a pending Equal Employment Opportunity Commission ("EEOC") claim by instituting a mandatory arbitration provision will be seen as impermissibly retaliatory. Amid the backdrop of a case in which supervisors routinely called black employees "monkeys," "slaves," and "niggers," the court makes a well-meaning attempt at preserving employees' statutorily protected "day in court" for already-filed discrimination claims. However, by reaffirming the universal judicial acceptance of the validity of pre-dispute mandatory arbitration provisions in employment contracts, even for discrimination claims, *Goldsmith* creates confusion about the purpose of distinguishing between pre-dispute agreements and those that apply to pending claims. The case unwittingly reopens the door for additional inquiry into whether an arbitral forum can ever adequately address the most heinous of civil rights violations.

II. FACTS AND HOLDING

In late March or April 1998, Bagby Elevator Company, Inc. hired Greg Goldsmith, a black man, as an elevator fabricator in its Birmingham, Alabama shop.[2] Goldsmith's supervisor and shop foreman, Ron Farley, recommended him for several pay raises and later designated Goldsmith as the lead man in the shop, assigning him the majority of the duties for manufacturing specialty elevator parts.[3]

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1. 513 F.3d 1261 (11th Cir. 2008).

2. *Id.* at 1268. As an elevator fabricator, Goldsmith delivered parts to various job sites and assisted with installation. *Id.* He also built elevator parts in the Birmingham shop and performed special projects. *Id.*

3. *Id.* at 1268-69. In fact, Goldsmith performed his job so well that Arthur Bagby, owner of Bagby Elevator, asked him to install the lighting system in Bagby's own home. *Id.* at 1268.

Despite recognition for performing his job well, Goldsmith felt uncomfortable in Bagby Elevator's racially hostile atmosphere.[4] In February 2001, Curlie Thomas, another black employee at Bagby Elevator, told Goldsmith that Farley uttered racial slurs at work.[5] Farley purportedly asked Thomas, "If I give a nigger ice cream, would he eat it?"[6] Also, while on an errand with Thomas, Farley told the store cashier, "Look, I bought me a slave."[7] Goldsmith reported Farley's comments, but Bagby Elevator Vice President Arthur Steber rebuffed the complaint, telling Goldsmith, "Well Goldie, you know, that's just the way Ron [Farley] is. You are just going to have to accept it."[8]

Farley continued to utter racial slurs at work in Goldsmith's presence.[9] However, Goldsmith did not report any additional comments, since Steber told him he would have to accept Farley's behavior.[10]

Farley's nephew, David Walker, worked in the shop with Goldsmith and furthered the racially hostile work environment at Bagby Elevator.[11] Walker frequently called Anthony Jemison, a black employee, a "monkey," and once said to him, in front of Goldsmith, "Monkey, get back in your cage."[12] Walker also told Goldsmith and others, "You know, I really never liked black folks no how."[13] In addition to making racial slurs, Walker threatened Goldsmith with violence, saying he was going to make Goldsmith's son an orphan.[14]

When Goldsmith later applied for a higher paying field position through his union representative, Larry Gardner, the purchasing manager at Bagby Elevator, Johnny Bowden, told Gardner that they would not interview Goldsmith for the position because "they don't mix the front and the back."[15] The majority of the workers in the shop were black; Bagby Elevator did not have a single black employee working in the field.[16]

On October 5, 2001, Goldsmith filed race discrimination charges with the EEOC.[17] In November 2001, Bagby Elevator responded to Goldsmith's charge, along with other EEOC charges filed by his coworkers.[18]

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4. *Id.* at 1269.
5. *Id.*
6. *Id.*
7. *Id.* at 1272.
8. *Id.* at 1269.
9. *Id.* During a telephone conversation with a white employee, Farley said, "Howard, them niggers are crazy. Them some of the dumbest niggers I ever seen in my life." *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* Other black employees testified at trial that they suffered harassment and discrimination. *Id.* at 1272. Although Bagby Elevator published and maintained an anti-discrimination policy, there was no evidence that the company ever enforced it. Arthur Bagby, the company president, admitted that he was "not that good on the [anti-discrimination] policy," and that he did not know how he would discipline a supervisor for making racial slurs. *Id.* at 1270.
17. *Id.* at 1271. Goldsmith alleged that Bagby Elevator subjected him to a racially hostile work environment and failed to promote him to a field position on the basis of race. *Id.* He named Farley as the harasser and Steber for failing to respond to Goldsmith's first complaint. *Id.*
18. *Id.*

On June 6, 2002, Bagby Elevator circulated a mandatory arbitration policy to arbitrate all "past, present and future claims," and ordered Goldsmith and his coworkers to sign it on threat of termination.[19] Goldsmith and a white coworker, Larry Isbell, refused and packed their bags to leave.[20]

After Goldsmith and Isbell packed their belongings, Bowden stopped Isbell and urged him to talk to his union representative about the agreement.[21] Isbell signed the agreement after being urged to reconsider, but Bowden did not try to stop Goldsmith from leaving the shop.[22]

Later in the day on June 6, 2002, Goldsmith asked that the policy be amended so as not to apply to his pending charge.[23] Goldsmith's lawyer prepared a revised agreement, which excluded Goldsmith's pending claims from the policy's scope by omitting the words "past" and "present."[24] However, Bagby Elevator refused to accept the rewritten agreement Goldsmith proposed.[25] When Goldsmith again refused to sign the original agreement, Steber fired him.[26]

The following day, June 7, 2002, Goldsmith filed his second EEOC charge, alleging discrimination on the basis of race, wrongful termination, and retaliatory termination.[27] On September 30, 2002, the EEOC issued a cause determination in favor of Goldsmith on all three counts.[28] Goldsmith filed his complaint with the U.S. District Court for the Northern District of Alabama on May 2, 2003.[29] The trial began on June 13, 2006.[30]

The jury returned a verdict in favor of Goldsmith on his claims for wrongful termination based on race and retaliatory termination for filing an EEOC charge, awarding him $27,160.59 in back pay, $27,160.59 in damages for mental anguish, and $500,000 in punitive damages.[31] The court affirmed the verdict and Judge Inge Prytz Johnson entered judgment.[32] Bagby Elevator appealed, arguing that the time lapse between Goldsmith's filing of his first EEOC claim and his subsequent termination eight months later was too remote a gap to be considered retaliatory.[33]

The Eleventh Circuit affirmed the district court's judgment, holding that because the arbitration agreement would have encompassed Goldsmith's pending racial discrimination charge with the EEOC, and since there was a causal relationship between the EEOC charge and Goldsmith's termination, Bagby Elevator's

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19. *Id.*
20. *Id.* No other employee had a pending charge when Goldsmith was terminated, although other employees with pending charges had been terminated earlier. *Id.* at 1279.
21. *Id.* at 1271.
22. *Id.*
23. *Id.* at 1271-72.
24. *Id.* at 1271.
25. *Id.* at 1272.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 1274.
30. *Id.* at 1275.
31. *Id.*
32. *Id.* The district court also awarded $151,210 in attorney's fees and $9,328.17 in costs to Goldsmith, though after Bagby Elevator moved for reconsideration of this order, the court reduced the award of costs to $8,755.74. *Id.*
33. *Id.* at 1278.

discharge of Goldsmith for his refusal to sign the mandatory arbitration agreement was retaliatory.[34]

III. LEGAL BACKGROUND

This section first discusses the legislative history and intent behind Title VII and the Civil Rights Act of 1964, along with the creation and function of the EEOC in general. It then addresses the permissibility of retroactive application of arbitration provisions and how courts have examined their applicability to pending claims in general. Finally, this section examines the progression of case law towards the resolution of a longstanding circuit split regarding mandatory arbitration provisions in the employment context.

A. The Civil Rights Act of 1964: Title VII and EEOC Claims

On July 2, 1964, President Lyndon B. Johnson signed the Civil Rights Act of 1964 into law.[35] The legislation, originally the brainchild of President John F. Kennedy, quashed the Jim Crow Laws in the southern United States by prohibiting racial discrimination in public accommodations, schools, government, and employment practices.[36] The Civil Rights Act of 1991 amended the Civil Rights Act of 1964 to provide monetary damages in cases of intentional employment discrimination.[37] To enforce the new federal laws prohibiting job discrimination under the Civil Rights Act, Congress created an independent federal agency, the U.S. Equal Employment Opportunity Commission ("EEOC").[38]

Before a private lawsuit may be filed in court, the laws which the EEOC enforces require a claimant to first file a charge with the Commission.[39] These laws include Title VII of the Civil Rights Act ("Title VII"), which prohibits employment discrimination based on race, color, religion, sex, or national origin, as well as the Age Discrimination in Employment Act of 1967 ("ADEA"), and the Americans with Disabilities Act of 1990 ("ADA").[40]

The EEOC is responsible for establishing equal employment policy and approving and conducting litigation on behalf of claimants.[41] Any individual who wants to make a claim for employment discrimination may file a charge with the EEOC.[42] In addition, an individual, organization, or agency may file a charge on

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34. *See id.* at 1277-79.
35. The Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000).
36. *See id.; see also* The Dirksen Congressional Center, *A Case History: The 1964 Civil Rights Act*, (2006), *available at* http://www.congresslink.org/print_basics_histmats_civilrights64text.htm; Ronald L. F. Davis, *The Transition from Segregation to Civil Rights, available at* http://www.jimcrowhistory.org/history/transition.htm; Tsahai Tafari, *The Rise and Fall of Jim Crow*, (2002), *available at* http://www.pbs.org/wnet/jimcrow/print/p_struggle_congress.html.
37. The U.S. Equal Employment Opportunity Commission, *Federal Laws Prohibiting Job Discrimination: Questions And Answers* (2002), http://www.eeoc.gov/facts/qanda.html.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*

behalf of a third person in order to protect the claimant's confidentiality.[43] To file a charge, a claimant can make a complaint by mail or in person at one of fifty EEOC offices nationwide.[44] The EEOC notifies the employer when a charge is filed and, if the initial facts appear to support a violation of law, the Commission will conduct an investigation.[45] If the EEOC concludes that a violation has occurred, the agency will decide whether to attempt conciliation or bring a suit in federal court on behalf of the claimant.[46] If the EEOC decides not to sue under Title VII, it will issue a notice closing the case, but giving the claimant 180 days in which to file a lawsuit on his or her own behalf—called a "Right to Sue Letter."[47]

Regardless of whether an employee pursues an individual right-to-sue or the EEOC files suit on behalf of the employee, damages may be available to compensate for actual monetary losses, future monetary losses, and mental anguish and inconvenience.[48] Punitive damages also may be available if an employer acted with malice or reckless indifference.[49] "Under most EEOC-enforced laws, compensatory and punitive damages also may be available where intentional discrimination is found."[50]

Although Title VII and the Civil Rights Act have granted employees nondiscriminatory treatment in hiring, firing, and promotion decisions, these bills have created "an explosion" in lawsuits against employers, with twenty times more employment discrimination claims filed in 1990 than in 1970.[51] In addition, estimates show that the EEOC has a backlog of nearly 125,000 employee complaints.[52] Because litigation is expensive, this increase in the number of employees recognizing their rights through EEOC claims has prompted many employers to institute mandatory arbitration provisions as a way to avoid going to court.[53]

Although employers may attempt to protect themselves against the threat of discrimination claims by having employees enter mandatory arbitration agreements, "the employer is not immune from an EEOC suit to enjoin violations of Title VII."[54] For instance, in *EEOC v. Waffle House, Inc.*, the United States Supreme Court held that when the EEOC is not a party to the original arbitration agreement, the agency may pursue victim-specific relief on behalf of the employee in court, even where the employee is bound by the arbitration agreement.[55] The Federal Arbitration Act's ("FAA") pro-arbitration policy goals do not

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43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. Donna K. McElroy, *Compulsory Arbitration Agreements . . . Issues Concerning the Enforcement of Compulsory Arbitration Agreement Between Employers an Employees*, 31 ST. MARY'S L.J. 1015, 1016 (2000).
52. *Id.*
53. *Id.* at 1016-17.
54. Matthew B. Schiff et al., *Recent Developments in Employment Law*, 37 TORT & INS. L.J. 391, 394 (Winter 2002) (citing EEOC v. Waffle House, Inc., 534 U.S. 279, 297 (2002)).
55. *Waffle House Inc.*, 534 U.S. at 288-92.

mandate that the EEOC surrender its statutory authority to the employer without the agency's consent.[56]

While mandatory arbitration agreements do not always bar employees from seeking redress in court, claimants bear the burden of proof for the elements of each charge alleged.[57] It is well established in the Eleventh Circuit that to successfully allege a prima facie retaliation claim under either Title VII, the ADEA, or the ADA, a plaintiff must show that: (1) she engaged in statutorily protected expression; (2) she suffered an adverse employment action; and (3) the adverse action was causally related to the protected expression.[58] Additionally, to establish that a plaintiff engaged in statutorily protected expression under *Little v. United Technologies, Carrier Transicold Division*, the Eleventh Circuit has held that a plaintiff must show that she had a good faith and objectively reasonable belief that the employer was engaged in unlawful or discriminatory employment practices.[59]

B. Pending Claims and Retroactive Arbitration Provisions

While most federal circuits and the U.S. Supreme Court have analyzed the issue of whether an employer can mandate pre-dispute arbitration agreements, even as a condition of continued employment, only a handful of cases prior to *Goldsmith* have addressed arbitration agreements that apply to pending charges in general. Because the FAA's language expressly permits parties to submit an existing controversy to arbitration, pursuant to a written agreement, the controversy is considered somewhat settled.[60] However, when an arbitration provision is successfully challenged, plaintiffs typically argue that retroactive application of an arbitration provision needs independent consideration from each party.[61] A unifying theme has emerged: courts interpret the FAA as requiring mutual assent for provisions with retroactive effective dates which apply to pending claims.

For instance, courts have looked for mutual assent, or lack thereof, in the context of changes to telecommunication contracts. In *Powertel, Inc. v. Bexley*, Florida's First District Court of Appeals analyzed mutual assent when it declined to apply an arbitration clause retroactively to Bexley's pending class action suit for wrongly charged long-distance calls.[62] The original service agreement did not contain an arbitration provision, and Ms. Bexley filed the suit before the arbitration clause was added in the amended terms and conditions of service.[63] In rejecting Powertel's arguments, the court further held that, "Assuming for the sake of argument that the arbitration clause is valid and that it can reach back to pre-

56. *Id.* at 294.
57. *Id. See also* Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1277 (11th Cir. 2008).
58. *Id.*
59. Little v. United Tech., Carrier Transicold Div., 103 F.3d 956, 960 (11th Cir. 1997).
60. Specifically, the FAA provides for the enforceability of "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2006).
61. Zawikowski v. Beneficial Nat'l Bank, No. 98 C 2178. 1999 WL 35304, at *2 (N.D. Ill. Jan. 11, 1999).
62. Powertel, Inc. v. Bexley, 743 So. 2d 570, 574-77 (Fla. Dist. Ct. App. Dist. 1 1999).
63. *Id.*

existing disputes, it was not intended to apply to a dispute that has already ripened into a lawsuit."[64]

Similarly, in *Bilbrey v. Cingular Wireless, L.L.C.*, the Oklahoma Supreme Court held that it would be unconscionable to retroactively apply an arbitration agreement that mandated a class waiver to a class action lawsuit that was pending when the agreement was signed.[65] In that case, Bilbrey entered into a cell phone contract with Southwestern Bell Mobile Services, to which Cingular became a successor in interest.[66] Bilbrey initiated a class action lawsuit against Cingular, alleging that the company overcharged its customers by calculating the duration of answered calls from the time the phone began ringing, as opposed to when the customer actually answered the call.[67] Several months after filing the lawsuit, Bilbrey sought to replace a stolen cell phone, and he signed a new contract, which contained an arbitration provision.[68] Ten months after Bilbrey signed the new contract, Cingular moved to compel arbitration for the pending lawsuit, but the trial court denied the motion.[69] On appeal, the Oklahoma Supreme Court held that "the attempt to have an actively prosecuted class action dismissed because of a subsequently signed adhesion contract with a consumer is unconscionable."[70] Specifically, the court held that Bilbrey did not assent to the new arbitration provision, finding it unfathomable that Bilbrey would willingly give up his right to the class action suit in exchange for a free phone.[71]

Several courts have found mutual assent to a retroactive arbitration provision that applies to pending claims by examining the language of the parties' agreement. Specifically, in *Beneficial National Bank, U.S.A. v. Payton,* the U.S. District Court for the Southern District of Mississippi held that if an arbitration clause contains time-specific retroactive language, then the court may apply the clause retroactively, covering pending claims.[72] One case that found expressly time-specific retroactive contractual terms is *In re Universal Service Fund,* in which the U.S. District Court for the District of Kansas held and the Tenth Circuit affirmed that the contract language "plainly and unambiguously" included preexisting claims, where the agreement stated that all claims, controversies, or disputes between the parties will be resolved by arbitration "*regardless of the date of accrual* of such claim, controversy or dispute."[73] Courts have also been persuaded by a converse argument. One court held that contracts that fail to limit the time frame of the agreement at all, using general terms in which the arbitration applies "to all transactions between us" or "all business with us," also suffice to cover pending claims with retroactive effect.[74]

64. *Id.* at 577.
65. Bilbrey v. Cingular Wireless, L.L.C, 164 P.3d 131, 136 (Okla. 2007).
66. *Id.* at 132.
67. *Id.*
68. *Id.* at 132-33.
69. *Id.* at 133-34.
70. *Id.* at 137.
71. *Id.* at 136.
72. Beneficial Nat'l. Bank, U.S.A. v. Payton, 214 F.Supp. 2d 679, 689 (S.D. Miss. 2001).
73. *In re* Universal Serv. Fund Tel. Billing Practices Lit., 300 F.Supp. 2d 1107, 1122-24 (D. Kan. 2003).
74. MCA Fin. Group v. Gardere Wynne Sewell, L.L.P., No. 05-2562, 2007 WL 951959, at *5 (D. Ariz. Mar. 27, 2007).

The First Circuit addressed one such example of general retroactive terms that apply to pending claims in *Kristian v. Comcast Corp.*[75] There, the court found the arbitration agreements between the cable television provider and customers applied retroactively to pre-contract antitrust claims where arbitration applied "if we are unable to resolve informally any claim or dispute related to or arising out of this agreement *or the services provided*."[76] In this case, the court reasoned that "read most naturally, the phrase 'or the services provided' covers claims or disputes that do not arise 'out of this agreement' and hence are not limited by the time frame of the agreements."[77] Similarly, in *Belke v. Merrill Lynch, Pierce, Fenner & Smith,* the parties' arbitration agreement recited that "any controversy between us arising out of your business *or* this agreement, shall be submitted to arbitration."[78] Here, the Eleventh Circuit specifically found retroactivity, and thus, applicability to pending claims, holding that "an arbitration clause covering disputes arising out of the contract or business between the parties evinces a clear intent to cover more than just those matters set forth in the contract."[79]

Regardless of whether a court finds retroactivity in a specific arbitration provision, based on its language and the mutual assent of the parties, courts have uniformly recognized that retroactivity to cover pending claims is not prohibited. In its analysis in *Kristian*, the First Circuit recognized that parties are free both to mutually assent to a retroactive application of the arbitration provision, and to expressly reject retroactive effect.[80] The First Circuit concluded that where the language in an arbitration clause unmistakably limits arbitration to what is covered by the agreements—"pursuant to this Agreement"—the parties expressly rejected retroactive application, despite the freedom to choose otherwise.[81] Similarly, in *Security Watch, Inc. v. Sentinel Systems,* the Sixth Circuit declined to find retroactivity in an arbitration clause that read "[t]he parties shall follow these dispute resolution processes in connection with all disputes, controversies or claims ... arising out of or relating to the Products furnished pursuant to *this* Agreement or acts or omissions of Distributor or AT & T under *this* Agreement."[82]

Though not binding authority, one unreported California court of appeals case expressly recognizes the appropriateness of retroactive application in general, while specifically excluding pending claims from its holding.[83] In *Gregory v. Sprint Spectrum,* the court held that the 2004 amendment to a cellular telephone contract was actually an amendment to a completely new service agreement which was signed after the plaintiff filed suit, and thus could not be retroactive, since the customer had not agreed to apply the provision to his pending claim.[84] Nonetheless, the court acknowledged that retroactivity was acceptable if both parties

75. 446 F.3d 25 (1st Cir. 2006).
76. *Id.* at 33 (emphasis added).
77. *Id.*
78. Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1026 n.4 (11th Cir. 1982), *abrogated by* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985).
79. *Id.* at 1028.
80. *See Kristian*, 446 F.3d at 33.
81. *Id.*
82. Security Watch, Inc. v. Sentinel Sys., 176 F.3d 369, 372 (6th Cir. 1999) (emphasis added).
83. Gregory v. Sprint Spectrum L.P, No. D047083, 2006 WL 2497781 (Cal. Ct. App. Aug. 30, 2006).
84. *Id.* at *9.

agreed, holding that "our interpretation does not mean that parties may not agree to a retroactive arbitration provision," although "to enforce an arbitration provision to litigation already pending, the provision should contain some language reflecting the parties' intent to do so."[85]

It is especially important for employers to consider employees' intent to assent to arbitration when determining the timing of instituting a new, mandatory arbitration policy. "To the extent these [matters] are pending claims on litigation, the employer should proceed with caution to avoid looking like they are taking retaliatory action."[86]

C. Mandatory Arbitration in the Employment Context: Ninth and Eleventh Circuit Split and Reconciliation

Despite some initial resistance to compulsory arbitration provisions in the employment context and a hold-out on this issue in the Ninth Circuit, the federal preference for arbitration established by the U.S. Supreme Court has prompted the circuits to recently resolve the matter. Currently, there is universal acceptance of mandatory arbitration provisions in employment contracts among the courts.[87] However, employees, their unions, and even Congress continue to debate the issue.

In *Weeks v. Harden Manufacturing Corp.*, the Eleventh Circuit held that because plaintiffs did not engage in any protected activity when they refused to sign a compulsory arbitration agreement with their employer, they could not claim retaliatory discharge.[88] Plaintiffs worked for Harden Manufacturing, which instituted a new mandatory dispute resolution policy when it published a revised handbook.[89] As a condition of continued employment with Harden Manufacturing, the company required all employees to sign the arbitration agreement.[90] Those who refused were immediately terminated.[91] After their discharge for refusing to sign the new agreement, five employees filed a complaint claiming retaliation under Title VII, the ADEA, and the ADA.[92] Plaintiffs argued that the provision constituted an unenforceable, unfair employment practice and that Harden Manufacturing violated Title VII when it fired employees who refused to comply with the new policy.[93] Harden moved for summary judgment on all counts.[94] The district court granted summary judgment on all claims except the retaliatory discharge claim, concluding that while the arbitration provision was legal, the plaintiffs reasonably, though mistakenly, believed that the arbitration provision was illegal and unfair.[95]

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85. *Id.*
86. McElroy, *supra* note 51, at 1034.
87. Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1312 (11th Cir. 2002).
88. *Id.* at 1310.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 1310-11.
93. *Id.* at 1311.
94. *Id.*
95. *Id.*

On appeal, the Eleventh Circuit agreed with Harden Manufacturing, holding that plaintiffs "could [not] have 'reasonably believed' that such agreements were an unlawful employment practice at the time they refused to agree to the policy."[96] Furthermore, the Eleventh Circuit recognized that arbitration agreements, including those in employment contracts, have by now received "near universal approval."[97] Additionally, the court concluded that "nothing in . . . Title VII, the ADEA or the ADA identifies compulsory arbitration agreements to be an unlawful employment practice."[98] However, the court did not consider this issue with respect to an outstanding claim of discrimination.[99]

In *Weeks*, the losing plaintiffs and the district court relied upon the rationale in *Duffield v. Robertson Stephens & Co.*, in which the Ninth Circuit refused to enforce an agreement mandating employees to submit any federal Title VII claims to arbitration.[100] There, plaintiff Tonyja Duffield signed a NYSE Form U-4, which included an agreement to arbitrate employment-related disputes, as a condition of her employment as a securities broker.[101] When Duffield later sued her employer under Title VII, alleging sexual discrimination and sexual harassment, the trial court issued an order compelling arbitration per her employer's request.[102] The Ninth Circuit held that the Title VII "knowing and voluntary waiver" requirement altogether prohibits pre-dispute agreements to arbitrate Title VII cases, and that under the Civil Rights Act of 1991, employees may not be required, as a condition of employment, to waive their right to bring future Title VII claims before the court.[103] The Ninth Circuit largely based its conclusion on the language of Title VII, Section 118, reasoning that, because this section provided for "the use of alternative means of dispute resolution . . . including arbitration" to resolve disputes arising under Title VII "where appropriate and to the extent authorized by law," it limited the scope of arbitration provisions to certain "appropriate" circumstances and thus barred *mandatory* arbitration across the board.[104]

In *Weeks*, the Eleventh Circuit concluded that the U.S. Supreme Court holding in *Circuit City Stores, Inc. v. Adams* implicitly overruled *Duffield*.[105] In *Circuit City*, the Supreme Court held that arbitration agreements do not contravene the policies of congressional enactments or the protections of federal law, and that the FAA is applicable to all employment contracts except those contracts involving transportation workers.[106]

Plaintiff Adams was an employee of Circuit City Stores.[107] Adams signed a pre-dispute arbitration agreement with the company, but when he later sued the company for employment discrimination, Adams claimed that his employment

96. *Id.* at 1315.
97. *Id.* at 1313.
98. *Id.* at 1316.
99. *Id.*
100. Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1185 (9th Cir. 1998), *overruled by* EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003).
101. *Duffield*, 144 F.3d at 1185.
102. *Id.* at 1186.
103. *Id.* at 1199.
104. *Id.* at 1191.
105. Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1315 (11th Cir. 2002).
106. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001).
107. *Id.* at 109-110.

with Circuit City, which arguably dealt with interstate commerce, fell into one of the categories excluded from the FAA's scope in its exemption clause.[108] Adams argued that as a member of an exempted class, he could not be forced to arbitrate his claim.[109] However, when Circuit City moved to compel arbitration, the district court issued the order as requested.[110] In reversing the order to compel arbitration, the Ninth Circuit analyzed Section 1 of the FAA's exemption clause, which exempts "contracts of employment of seaman, railroad employees or any other class of workers engaged in foreign or interstate commerce."[111] Adams argued, and the Ninth Circuit agreed, that under this provision, all employment contracts involving commerce fall outside the FAA's scope.[112] The U.S. Supreme Court heard the case, but disagreed both with the Ninth Circuit's expansive reading of Section 1, and with Adams' alternative argument that arbitration agreements in the context of employment contracts are inherently unfair.[113]

Relying on its 1991 holding in *Gilmer v. Interstate/Johnson Lane Corp.*, the U.S. Supreme Court affirmed that "[t]the Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law."[114] Additionally, the Supreme Court rejected the argument that the exemption clause applied to any employee involved in commerce, and instead interpreted the statute as confining the exemption to transportation workers.[115]

In the post-*Circuit City* era, the Ninth Circuit overruled its own decision in *Duffield* with its holding in *EEOC v. Luce, Forward, Hamilton & Scripps*, concluding that an employer can, in fact, compel an employee to arbitrate future discrimination claims brought under Title VII.[116] The case began when *Luce Forward* withdrew a job offer for Donald Lagatree after he refused to sign the firm's standard binding arbitration agreement for all claims related to his employment.[117] Lagatree filed an EEOC charge alleging retaliatory discharge.[118] The EEOC brought suit on Lagatree's behalf, seeking reinstatement for Lagatree and an injunction prohibiting the firm from requiring employees to sign mandatory arbitration agreements as a condition of employment.[119]

The district court, believing itself bound by *Duffield,* issued the injunction and the firm appealed.[120] In reversing the trial court's order, the Ninth Circuit

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108. *Id.* at 109-110, 112.
109. *Id.* at 113.
110. *Id.* at 110.
111. *Id.* at 110-12.
112. *Id.* at 113.
113. *Id.* at 119.
114. *Id.* at 123 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)).
115. *Id.* at 118. Most Courts of Appeal had already interpreted the FAA exemption applying to "contracts of employment of seaman, railroad employees or any other class of workers engaged in foreign or interstate commerce" as only including workers in the transportation industry, and not those involved in commerce, but not transportation. 9 U.S.C. § 1.
116. EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 747-49 (9th Cir. 2003).
117. *Id.* at 745.
118. *Id.* at 745-46.
119. *Id.* at 746.
120. *Id.*

held that the firm could compel Lagatree to arbitrate his Title VII claims.[121] While the court in *Duffield* interpreted the language in Title VII as barring mandatory arbitration, here the court reached the opposite conclusion just five years later, construing the meaning of that section as being consistent with, and perhaps even encouraging mandatory arbitration agreements.[122] The court noted that the *Duffield* decision stands alone among the other federal appeals courts, as well as the U.S. Supreme Court, all of which had decided that Title VII does *not* bar compulsory arbitration agreements.[123] Moreover, the court also considered the legislative history behind Title VII, reasoning that Congress could have clearly stated its intention to bar enforcement of arbitration agreements if it had wanted to, but declined to do so.[124]

While the Ninth Circuit was slow in finding that Title VII is not a bar to mandatory arbitration agreements, the Eleventh Circuit first reached that conclusion in the 1992 case *Bender v. A.G. Edwards & Sons, Inc.*[125] The case involved an employee who, like the plaintiff in *Duffield*, agreed to arbitrate any employment-related claims when she signed a Form U-4 in her application for registration as a stock broker.[126] When Bender filed a sexual harassment suit in federal court, her employer moved to compel arbitration.[127] The district court found that Bender's claims were subject to arbitration, but dismissed the claims rather than staying them.[128] On appeal, the Eleventh Circuit found that Title VII claims can be subject to compulsory arbitration and remanded the case with orders that the district court stay federal court proceedings pending arbitration, rather than dismiss them, reasoning that "if the arbitration proceedings are somehow legally deficient, she may return to federal court for review."[129]

As the legal history indicates, there exists near universal approval for the arbitration of employment-related disputes now that the Ninth Circuit has abandoned its position in *Duffield.* The preceding line of cases established that while courts have by now recognized retroactive arbitration provisions, even the unifying holdings in *Weeks* and *Luce, Forward* fail to answer the question of how subsequently signed mandatory arbitration agreements in the employment context may affect pending discrimination claims. The recent Eleventh Circuit case, *Goldsmith v. Bagby Elevator Co. Inc.*, is the first to address this issue.

IV. INSTANT DECISION

In *Goldsmith v. Bagby Elevator Co.*, the Eleventh Circuit considered two related issues with respect to Goldsmith's claim of retaliation: 1) whether sufficient evidence of a causal relationship existed between the filing of Goldsmith's EEOC

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121. *Id.* at 754.
122. *Id.*
123. *Id.* at 748.
124. *Id.* at 749-50.
125. 971 F.2d 698 (11th Cir. 1992). The Eleventh Circuit reiterated its conclusion in *Bender* in 2002. Weeks v. Harden Mfg. Corp., 291 F.3d 1307 (11th Cir. 2002).
126. *Bender*, 971 F.2d at 699.
127. *Id.*
128. *Id.*
129. *Id.* at 700-701.

charge and his subsequent termination and, if so, 2) whether Bagby Elevator had a legitimate, non-retaliatory reason for Goldsmith's termination.[130]

For the first issue, the court determined that sufficient evidence existed to establish a causal link between Goldsmith's filing of his pending EEOC claim and his later termination.[131] In refuting Bagby Elevator's argument that the gap of eight months between the two events was too large to draw a causal relation, the court called the employer's rationale a "straw man."[132] It is undisputed that Bagby Elevator terminated Goldsmith "immediately after and because" he declined to sign the arbitration agreement.[133] The court reasoned that the relationship between Goldsmith's filing of a discrimination claim and his subsequent termination established the circumstantial evidentiary requirement that the plaintiff merely prove that the protected activity and the adverse action were "not wholly unrelated."[134]

The court also noted that Goldsmith was willing to arbitrate any future claims, but Bagby Elevator insisted that his pending EEOC claim be included in the scope of the agreement.[135] Furthermore, when Steber terminated Goldsmith, he was aware both of Goldsmith's pending EEOC charge and that Goldsmith was the only employee with a discrimination charge in process when the company instituted a new, mandatory dispute resolution policy.[136] Finally, in agreeing with Goldsmith's argument on appeal, that his termination was retaliatory, the court also considered the evidence that a white employee who initially refused to sign the arbitration agreement was urged to reconsider, while Goldsmith was not.[137] For these reasons, the court concluded that Goldsmith met the burden of proving that filing the EEOC discrimination charge, which was a protected activity, was not "wholly unrelated" to his termination.[138] Since a reasonable jury could find that a causal relation existed, the employer was not entitled to a judgment as a matter of law.[139]

In analyzing the second issue, whether Bagby Elevator had a legitimate non-retaliatory reason for Goldsmith's termination, the court noted that although Bagby Elevator had the right to implement a mandatory arbitration procedure, Goldsmith could not be forced to relinquish his right to a jury trial in his pending racial discrimination charge.[140] The court acknowledged that under *Weeks*, an employee could in fact be terminated for refusing to sign an employer's arbitration agreement without the termination being considered "retaliatory," since refusal to sign such an agreement is not a statutorily protected activity under Title VII.[141] In other words, refusal to sign a mandatory pre-dispute resolution agreement is not a

130. Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1277-79 (11th Cir. 2008).
131. *Id.* at 1278-79.
132. *Id.* at 1278.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 1278-79. Goldsmith contended during trial that Bowden's failure to ask Goldsmith to reconsider suggested that supervisors at Bagby Elevator wanted to convince white employees, but not black employees, to remain at Bagby Elevator. *Id.* at 1271.
137. *Id.* at 1278-79.
138. *Id.* at 1278.
139. *Id.* at 1279.
140. *Id.* at 1278-79.
141. *Id.* at 1278.

protected activity for a claim of retaliation.[142] However, the court distinguished the instant case from *Weeks, which* did not address the termination of an employee with a pending charge of discrimination against the employer.[143] Since the compulsory arbitration agreement would have affected Goldsmith's course of action with respect to his pending charge of discrimination, Bagby Elevator could not claim that terminating Goldsmith because he refused to sign the agreement was non-retaliatory.[144]

Because Bagby Elevator was not entitled to a judgment as a matter of law on the issue of Goldsmith's retaliation claim, the court concluded that it need not consider any issue with respect to Goldsmith's alternative claims of wrongful termination based on race and racial discrimination.[145] The jury found that Goldsmith's termination was both based on race and was retaliatory, and awarded damages based upon both theories. Upon review, the Eleventh Circuit affirmed, holding that because sufficient evidence supported a verdict on the retaliation claim alone, the court need not address Goldsmith's alternative claims.[146]

V. COMMENT

Courts have established that both pre-dispute arbitration provisions and those that have a retroactive effective date can be applied to employment contracts, as long as each party assents to the terms of the agreement, and that refusal to sign a mandatory pre-dispute arbitration provision is not a statutorily protected activity that supports a claim of retaliatory discharge under Title VII. Thus, employers are free to encourage their employees to agree to arbitrate both pending and future claims, and they can rightly fire employees who refuse to sign mandatory *pre*-dispute arbitration agreements. However, prior to *Goldsmith,* no court had addressed the issue of whether an employer can force an employee to sign an arbitration provision that applies to an existing claim of discrimination, or whether a refusal to sign an agreement that applied retroactively to a pending claim is a statutorily protected activity under Title VII.

After the Ninth Circuit finally resolved the circuit split *Duffield* created regarding the permissibility of compulsory arbitration provisions in the employment context in favor of arbitration, the Eleventh Circuit's holding in *Goldsmith* limited the scope of this universal acceptance of such agreements. While the federal presumption in favor of arbitration and the case law suggest that employers have a great deal of leeway in encouraging arbitration for pending claims and mandating pre-dispute compliance with company arbitration provisions, *Goldsmith* draws a line at giving employers similar control over their employees' existing claims.

From a management perspective, the case has several implications. *Goldsmith* serves as a warning to employers that they should not attempt to institute a mandatory arbitration provision in an effort to terminate an employee's rights with respect to a pending EEOC claim—a concept that, by its very nature, eschews the notion of mutual assent. The case establishes that, at least in the Ele-

142. *Id.*
143. *Id.*
144. *Id.* at 1278-79.
145. *Id.* at 1279.
146. *Id.* at 1279-80.

venth Circuit, employees have a statutorily protected right to proceed in court with already-filed charges covered by Title VII, and that efforts to force pending employment proceedings into arbitration, under threat of termination, will be seen as impermissibly retaliatory. Employers may still require employees to sign dispute resolution agreements as a condition of their continued employment, but only if the agreement does not cover claims that are currently pending. Because *Goldsmith* clarifies that filing a discrimination complaint is indeed a protected activity, firing an employee for refusing to sign an arbitration provision that impacts that claim is retaliation. In other words, employers can no longer turn to arbitration provisions as a quick-fix for keeping existing disputes out of court. Employers may also fear that this decision will lead to a surge in litigation, with disgruntled employees racing to file charges with the EEOC before their companies can institute new arbitration policies. However, *Goldsmith* indicates that the much broader civil rights concerns associated with compulsory arbitration for pending Title VII claims should outweigh procedural inconveniences for employers.

While *Goldsmith* focuses on wrongful retaliation, pointing to the unfairness of mandatory arbitration as applied to pending discrimination claims, the Eleventh Circuit left intact its recent decision approving compulsory arbitration for future claims. In doing so, the Eleventh Circuit carved a distinction in the employment context between mandatory pre-dispute arbitration agreements and compulsory arbitration agreements as applied to pending claims of discrimination. The *Weeks decision characterized an employee's refusal to sign a mandatory pre-dispute arbitration agreement as an unprotected activity, and the employer's decision to terminate the employee, based on the refusal to sign, as a non-retaliatory reason supporting discharge.*[147] *However,* opponents of the judicial acceptance of mandatory pre-dispute arbitration provisions argue that there is no meaningful distinction between the two claims in *Weeks* and *Goldsmith*, calling the compulsory arbitration of statutory anti-discrimination rights pursuant to pre-dispute employment agreements unconscionable and contrary to public policy.[148]

Goldsmith reopens the door for these pre-*Circuit City,* pre-*Gilmer* arguments against forced arbitration for employment discrimination claims in general, whether pending or future. Although the court acknowledges the unfairness of arbitrating pending claims, the court's reasoning for why compulsory arbitration of future claims is fair is an arbitrary distinction. The difference rests simply on *when* the claimant filed his charge. The court concluded that firing Goldsmith for his refusal to sign the agreement was retaliatory, since the new provision would have affected Goldsmith's pending claim.[149] In doing so, the court implies that forced arbitration of a pending claim is unlawful since the claimant has not assented to the agreement. Conversely, the court implies, with reference to its *Weeks* decision, that a pre-dispute agreement is not prohibited because the employee assents to the terms as a condition of employment before a dispute arises.[150] Thus, employers are prevented from instituting mandatory arbitration poli-

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147. *See* Weeks v. Harden Mfg. Corp., 291 F.3d 1307 (11th Cir. 2002).
148. Donna Meredith Matthews, Note, *Employment Law After Gilmer: Compulsory Arbitration of Statutory Antidiscrimination Rights*, 18 BERKELEY J. EMP. & LAB. L. 347, 351-52 (1997).
149. *Goldsmith,* 513 F.3d at 1279.
150. *Id.* at 1278.

cies simply to thwart a specific employee's particular claim from going to court. With this rationale, however, the court fails to consider that the employer responsible for policing abuses controls when the abuse occurs. Claimants have no say in whether discrimination occurs before or after their employer forces a compulsory arbitration provision upon them. With this logic, there are no safeguards at all to prevent employers who wish to engage in discrimination from refraining from blatant abuses until an arbitration provision is instituted.

All of the cases addressing retroactively applied mandatory arbitration provisions in general have focused on the presence of mutual assent between the parties to submit disputes to arbitration. Where courts have struck down an arbitration provision, courts have pointed to the employee's lack of knowing waiver of their right to a judicial forum under Title VII. In *Goldsmith*, the court weighed heavily the fact that Goldsmith's attempt to amend the agreement, in terms that he would mutually assent to, was rejected, and that his employer subsequently terminated him for refusing to assent to the agreement.[151] But even if Goldsmith had not yet filed his claim, his lack of bargaining power to amend the agreement remains the same. The power to put forth a mutually agreeable mandatory arbitration provision lies solely with the employer, and does not turn on whether the employee has filed a discrimination claim or not. *Furthermore,* the choice between signing the agreement and being terminated arguably is not meaningful assent. This distinction in the court's reasoning between the permissibility of pre-dispute agreements, and the impermissibility of provisions that apply retroactively to pending discrimination claims seems at odds with the established requirement that each party must mutually agree.

Additionally, since the FAA expressly permits retroactive application of an arbitration provision to existing claims in general, *Goldsmith's* conclusion that it was unlawful to force Goldsmith to arbitrate his pending *discrimination* claim begs the question: why is a pending discrimination claim so different from a future, potential discrimination claim when both types of claims invoke the same crucial civil rights concerns?

Although *Goldsmith* is a step in preserving employees' rights to their "day in court" with respect to already-filed charges, it does little to address the underlying racial tensions that gave rise to this case and to most EEOC racial discrimination claims in general. Giving protected status to already-filed pending claims while allowing compulsory arbitration of future claims does nothing to protect against the abuses Goldsmith suffered, or to preserve statutory rights for all employees facing similar abuse. *Goldsmith* is a particularly heinous example of the facts that can prompt a claim of racial discrimination under Title VII, with Goldsmith and his coworkers repeatedly referred to as "slaves" and "monkeys," and denied advancement opportunities because of their race. It is precisely because of these egregious affronts to the Civil Rights Act that employees seek to retain their right to litigation for both pending and future charges, as opposed to being forced to conciliate their claims in a less adversarial dispute resolution process that often times favors the employer. While Goldsmith himself was "lucky enough" to have a pending claim, employees can suffer equally horrific workplace abuses *after* having signed a mandatory arbitration agreement. Under the new distinction, the

151. *Id.*

atrocious facts weighed so heavily by the court in *Goldsmith* would be irrelevant to determining the permissibility of a mandatory arbitration provision, so long as the employee is forced to sign the agreement prior to suffering abuse and filing a claim.

Though well-meaning, *Goldsmith* is simply another case in a line of recent court decisions that have "weakened America's civil rights laws in ways that Congress never intended."[152] While in theory, EEOC claimants can and do voluntarily assent to mandatory pre-dispute arbitration provisions, these agreements directly conflict with employees' right to litigate discrimination claims pursuant to the original congressional intent of Title VII. If the intent of Title VII and the creation of the EEOC was to pave the way for disadvantaged minorities to be heard in court, then employers should not be allowed to circumvent the vehicle established for that purpose with an arbitration provision. More so than for general pending claims—telecommunications contracts, for instance—meaningful assent is utterly crucial to arbitration provisions covering discrimination claims. Congress never contemplated that, absent meaningful choice that does not place refusing arbitration at odds with keeping one's job, employers could force employees to waive their right to have their claim heard by a jury, before the claim even exists.

The *Goldsmith* court had the best of intentions in preserving employees' statutorily protected "day in court" for already-filed discrimination claims. Calling the employer's actions "exceedingly reprehensible" and in "flagrant disregard" of Goldsmith's federal rights, the court took a noble stand against the pervasive racism that still exists in this country.[153] Unfortunately, however, the court's holding did not reach far enough to preserve claimants' statutorily protected civil rights in all respects because the limitation still allows future discrimination claims to be forced into arbitration at the employers' discretion. Moreover, the distinction that the holding created is arguably just as unfair as forcing pending claims into arbitration. In effect, the decision established a new classification of employees with future civil rights claims based on an arbitrary factor, the policy's effective date, which is outside the employee's control and at odds with the precedent requiring mutual assent.

As is evidenced by the facts in *Goldsmith*, the fight for civil rights in this country is far from over, despite Congress' clear expression that discrimination is unacceptable. In order to ensure that employees who suffer discrimination and workplace abuses are protected, to the extent Congress intended, the right to choose a judicial forum under Title VII must be preserved. Instead of reaffirming the universal judicial acceptance of the validity of pre-dispute mandatory arbitration provisions in employment contracts, and creating an arbitrary distinction between pending and future claims, the court should have overturned its decision in *Weeks* and drawn a bright line exception for all discrimination claims.

Although the court declined to carve an exception for civil rights claims, democratic congressional leaders in the 2008 legislative session proposed a remedy, introducing, for the second time, sweeping civil rights legislation that would,

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152. The Online Office of Congressman John Lewis, *Rep. Lewis, Sen. Kennedy Introduce Civil Rights Act of 2008*, http://johnlewis.house.gov/index.php?option=com_content&task=view&id=285&Itemid=1 (last visited Oct. 28, 2008).

153. *Goldsmith*, 513 F.3d at 1284.

in part, amend the FAA to create a broad exception for employment contracts and make mandatory pre-dispute arbitration provisions unenforceable.[154] While the legislation, dubbed the Civil Rights Act of 2008, failed to pass in 2008, it offers a plausible solution for restoring employees' rights to choose a judicial forum in discrimination cases.

The arbitration provision of the Civil Rights Act of 2008 sought to reestablish the guarantee to a right to choose a judicial forum under Title VII that the U.S. Supreme Court eliminated in *Circuit City Stores, Inc. v. Adams,* when it ruled that the FAA applies to the majority of employment agreements, and that only transportation workers are exempted from mandatory arbitration provisions.[155]

The legislation's supporters argue that judicial interpretation of the FAA's scope wrongly conflicts with the legislative purpose behind Title VII, and Congress' original intent for safeguarding civil rights.[156] The proposed bills called for the removal of certain language from the FAA, so that the act would no longer apply to employment contracts.[157] Essentially, the bill would uproot the resolution of the circuit split, and adopt the Ninth Circuit's overruled position in *Duffield.* In effect, the proposed legislation would reverse *Circuit City* and *Gilmer,* as well as the recent Eleventh Circuit decision in *Weeks, disallowing mandatory arbitration provisions altogether in the employment context.*

The proposed legislation did not, however, seek to overturn all case law in support of arbitration provisions in the employment context, only those that limit an employee's rights before any actual dispute exists.[158] In keeping with the established court preference for mutual assent and the EEOC's support for voluntary arbitration, under the proposed law, employees and employers would be allowed to agree to arbitration after a dispute arises.[159]

While *Goldsmith* moves towards preserving civil rights protections for employees with pending claims, its holding does not have a far-enough reach. In order to rid the workplace of unlawful discrimination and bigotry, Congress should restore the original intent of Title VII, to ensure accountability for discrimination and to protect all citizens, including those that may have future claims. With the beginning of the 2009 Legislative Session, the 2008 amendments to the Civil Rights Act should be reintroduced and passed with a similar provision securing employees' right to choose a judicial forum, at least for discrimination claims.

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154. The Civil Rights Act of 2008, S. 2554 § 422 & H.R. 5129, 110th Cong. (2008).

155. The Online Office of Congressman John Lewis, *supra* note 158. The Civil Rights Act of 2008, S. 2554 § 422 and H.R. 5129, 110th Cong. (2008), introduced in January 2008, by Sen. Edward Kennedy (D-Mass.) and Rep. John Lewis (D-Ga.), co-sponsored by twenty-six Members of the House of Representatives and more than a dozen Senators. *Id.*

156. *Id.* Senator Barack Obama stated:

> Too many hardworking Americans continue to face discrimination and unfair employment practices, and we must do everything we can to guarantee that all Americans receive fair and equal treatment under the law. . . . Civil rights have to be at the forefront of our national dialogue, and we must ensure that those who suffer discrimination, whether by the federal government or private employers, can protect themselves legally.

Id.

157. S. 2554 § 422 and H.R. 5129, *supra* note 154.

158. *Id.*

159. *Id.* If enacted, the proposed legislation would have retroactive effect, applying both to new employment agreements, as well as to agreements entered into prior to the enactment date. *Id.*

VI. CONCLUSION

Goldsmith established that while employers can rightly fire employees who refuse to sign mandatory pre-dispute arbitration agreements, terminating an employee for failure to sign an arbitration provision that applies to an existing claim of discrimination will be seen as impermissibly retaliatory under Title VII, at least in the Eleventh Circuit. Although the circuit split has been resolved in favor of universal acceptance of compulsory arbitration provisions in the employment context, *Goldsmith* limits the scope of such agreements from applying to pending discrimination claims. While *Goldsmith* moves towards preserving civil rights protections for employees with pending claims, its holding fails to adequately protect employees with future claims, whose civil rights are no less important. For this reason, despite agreement within the judicial arena, the debate over whether even pre-dispute mandatory arbitration provisions are consistent with the original intent of Title VII, and whether an arbitral forum can adequately address the most heinous civil rights violations, continues in the federal legislature. The proposed Civil Rights Act of 2008 could have been a crucial step towards restoring Congress' original intent with respect to Title VII, and ensuring accountability for discrimination and protection for all citizens, including those that may have future claims. The 111th Congress should pass similar legislation and right the wrongs that *Goldsmith* only partially rectified.

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