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Going, Going, Almost Gone: The Loss of Employees' Rights to Bring Statutory Discrimination Claims in Court

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Going, Going, Almost Gone: The Loss of Employees' Rights to Bring Statutory Discrimination Claims in Court.

Patterson v. Tenet Healthcare, Inc.[1]

I. INTRODUCTION

With the rise in employment related litigation in recent years, arbitration of employment discrimination claims has become increasingly important.[2] In *Alexander v. Gardner-Denver Co.*,[3] the United States Supreme Court held that an arbitration clause in a collective bargaining agreement did not bar an employee from separately pursuing a claim under Title VII of the Civil Rights Act of 1964 in court.[4] In 1988, the Eighth Circuit Court of Appeals affirmed this view in *Swenson v. Management Recruiters International Inc.*[5] Then, in 1991, the Supreme Court looked at the issue in an individual employment context. In *Gilmer v. Interstate/Johnson Lane Corp.*,[6] the Court held that a statutory claim, under the Age Discrimination in Employment Act (ADEA), was subject to arbitration under the Federal Arbitration Act (FAA). This holding precluded an individual from bringing a separate claim in a judicial forum.[7]

In *Patterson v. Tenet Healthcare, Inc.*, the Eighth Circuit addressed the issue of *Gilmer's* application to Title VII.[8] In a case of first impression as to the interpretation of Section 1 of the FAA (Section 1),[9] the court extended the Supreme Court's ruling and followed the majority of circuits in holding that an employee's Title VII and state employment discrimination claims were subject to enforceable mandatory arbitration.[10]

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1. 113 F.3d 832 (8th Cir. 1997).

2. See Evan J. Spelfogel, *Legal and Practical Implications of ADR and Arbitration in Employment Disputes*, 11 HOFSTRA LAB. L.J. 247, 248 (1993), for a discussion of the recent increase in employment related litigation.

3. 415 U.S. 36 (1974).

4. *Id.* at 49.

5. 858 F.2d 1304 (8th Cir. 1988).

6. 500 U.S. 20 (1991).

7. *Id.* at 26.

8. 113 F.3d 832, 832 (8th Cir. 1997).

9. 9 U.S.C. § 1 (1994) provides in relevant part: "[N]othing herein shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."

10. *Patterson*, 113 F.3d at 837.

II. FACTS AND HOLDING

Debra Patterson began employment with Columbia Regional Hospital in 1989 as a medical technologist.[11] Columbia Regional is owned and operated by Tenet Healthcare, Inc.[12] On March 5, 1993, Patterson signed an arbitration agreement which was on the last page of the employee handbook she received from Tenet.[13] However, page three of the handbook contained a statement that the handbook was not intended to be a legal contract.[14]

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11. *Id.* at 833.

12. *Id.*

13. *Id.* at 834-35. Page thirty-one of the handbook contained the following language:

IMPORTANT!

Acknowledgment Form

Upon receipt, please sign and present the acknowledgment form of this handbook to the Human Resources Department.

. . .

No written agreement concerning employment terms or conditions is valid unless signed by a facility executive director, and senior officer of AMI, and no written statement or agreement in this handbook concerning employment is binding, since provisions are subject to change, and as all AMI employees are employed on an "at will" basis .... The company reserves the right to amend, supplement, or rescind any provisions of this handbook as it deems appropriate in its sole and absolute discretion.

I understand AMI makes available arbitration for resolution of grievances. I also understand that as a condition of employment and continued employment, I agree to submit any complaints to the published process and agree to abide by and accept the final decision of the arbitration panel as ultimate resolution of my complaints(s) for any and all events that arise out of employment or termination of employment.

14. *Id.* at 834. Page three of the handbook provided as follows:

[This handbook] is not intended to constitute a legal contract with any employee or group of employees because that can only occur with a written agreement executed by a facility Executive Director and an AMI Senior Executive Officer. As regards the Fair Treatment Procedure, AMI is committed to accepting the obligation to support and assure access to binding arbitration procedure for solving disputes, if necessary. Situations may arise from time to time which, in the Company's judgment require procedures or actions different than those described in this document or other written policies. Since the Company maintains the sole and exclusive discretion to exercise the customary functions of the management in all areas of employment and the Company operations, the judgment of management shall be controlling in all such situations. Employees have access to a grievance procedure described in this document that affords the opportunity to have any employment related disputes submitted to binding arbitration.

On July 26, 1993 and January 18, 1994, Patterson filed charges with the Equal Employment Opportunity Commission (EEOC) and the Missouri Commission on Human Rights (MCHR) based on treatment Patterson received which she believed was "discriminatory and retaliatory."[15] "On December 8, 1994, Patterson filed a grievance through Tenet's internal grievance apparatus, the 'Fair Treatment Procedure.'"[16] The Fair Treatment Committee investigated and discussed Patterson's grievance at a hearing.[17] However, Tenet terminated Patterson nine days before the hearing, at which time the grievance was amended to include the termination.[18] The Fair Treatment Committee later denied her grievance.[19]

Patterson did not submit her claim to binding arbitration—the final step of the Fair Treatment Procedure.[20] Instead, she filed suit in district court, alleging violations of Title VII of the Civil Rights Act of 1964 (Title VII)[21] and the Missouri Human Rights Act (MHRA).[22] The district court held that the arbitration clause, set out on page thirty-one of the handbook and signed by Patterson, created a binding contract to arbitrate.[23] The district court also held that the Federal Arbitration Act (FAA) governed her claims and that the claims were arbitrable.[24] The district court then dismissed Patterson's complaint.[25]

Patterson appealed, claiming that "she did not agree to arbitrate and that the FAA [did] not govern her claims."[26] In support of her argument, she pointed to the statements that "[the handbook] is not intended to constitute a legal contract" and that "no written statement or agreement in this handbook concerning employment is binding," from pages three and thirty-one of the handbook, respectively.[27] Additionally, she argued that the legislative history of the FAA indicated that Congress intended to exclude all employment contracts from its scope.[28]

On appeal, the Eighth Circuit held that the arbitration clause was separate and apart from the employee handbook and thus, constituted an enforceable

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15. *Id.* at 834.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. 42 U.S.C. § 2000e-5 (1994).
22. Patterson v. Tenet Healthcare, Inc. 113 F.3d 832, 834 (8th Cir. 1997). The Missouri Human Rights Act is codified at MO. REV. STAT. § 213.010-213.137 (1994 & Supp. 1997).
23. *Patterson*, 113 F.3d at 834.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 834-35.
28. *Id.* at 836.

contract; that Section 1 of the FAA should be read narrowly, excluding from the scope of the FAA only those classes of employees "engaged directly in the movement of interstate commerce;" and that an employee's statutory discrimination claims under Title VII and the MHRA were subject to arbitration, enforceable pursuant to the FAA.[29]

III. LEGAL BACKGROUND

A. Contractual Enforceability of Arbitration Clauses In Employee Handbooks

The Federal Arbitration Act (FAA)[30] was originally enacted in 1925 and later reenacted in 1947 as Title 9 of the United States Code.[31] The purpose of the act was to "reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."[32]

Section 2 of the FAA states that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[33] However, Section 1 of the FAA includes an exception which exempts certain employment contracts from its scope.[34]

The Eighth Circuit has held that under the FAA, "ordinary contract principles govern whether parties have agreed to arbitrate,"[35] principles which, in this case, come from Missouri law.[36] In Missouri, the traditional required elements of a valid contract are an offer, acceptance, and bargained—for consideration.[37]

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29. *Id.* at 832.

30. 9 U.S.C. §§ 1-14 (1994).

31. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

32. *Id.* (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-20 (1985)).

33. 9 U.S.C. § 2 (1994).

34. *See supra* note 9.

35. Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 834 (8th Cir. 1997); *see* Daisy Mfg. Co., Inc., v. NCR Corp., 29 F.3d 389, 392 (8th Cir. 1994).

36. *Patterson*, 113 F.3d at 834; *see also* First Options, Inc. v. Kaplan, 514 U.S. 938, 943-45 (1995).

37. Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661, 662 (Mo. 1988) (citing Thacker v. Massman Constr. Co., 247 S.W.2d 623, 629 (Mo. 1952)).

In *Johnson v. McDonnell Douglas Corp.*,[38] an employee brought a wrongful discharge action against her employer.[39] The Missouri Supreme Court found that Johnson's employee handbook was not an enforceable contract. The court stated that "McDonnell's unilateral act of publishing its handbook was not a contractual offer to its employees. The handbook was merely an informational statement of McDonnell's self-imposed policies, providing a nonexclusive list of acts for which an employee might be subject to discipline."[40] Absent a valid contract, the employer could discharge the employee "for cause or without cause."[41]

While *McDonnell Douglas* held that an employee handbook did not constitute an enforceable contract[42] because it lacked the traditional elements of a valid contract, other jurisdictions, interpreting state law, have gone both ways on this issue, often depending on the factual circumstances.[43]

Once the threshold issue of whether there is a valid agreement to arbitrate is settled, the next issue is the enforceability of this agreement. The FAA governs enforceability, but the key question is what types of agreements are subject to arbitration under the FAA.

B. Scope of the FAA in the Context of Employment Contracts

A number of courts have addressed the issue of how broadly to construe the exemption in Section 1 of the FAA. The general consensus is to construe it narrowly, applying the exclusion only to contracts for employment of workers involved directly in the movement of interstate commerce.[44]

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38. 745 S.W.2d 661 (Mo. 1988).
39. *Id.* at 661.
40. *Id.* at 662.
41. *Id.* at 663.
42. *Id.* at 662.
43. *See* Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1131 (7th Cir. 1997) (holding contract terms can be incorporated into employee handbook); Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756, 762 (9th Cir. 1997) (stating unilateral promulgation by an employer of arbitration provisions in an employee handbook does not constitute a "knowing agreement"); Norton v. Caremark, Inc., 20 F.3d 330, 334 (8th Cir. 1994) (stating employee handbook and guidelines can be part of employment contract under Minnesota law). *But see* Hoffman v. Aaron Kahmi, Inc., 927 F. Supp. 640, 644 (S.D.N.Y. 1996) (holding handbook did not supercede plaintiff's original employment contract); Phipps v. IASD Health Servs. Corp., 558 N.W. 2d 198, 204 (Iowa 1997) (finding handbook did not constitute enforceable contract).
44. *See* Rojas v. TK Communications, Inc., 87 F.3d 745, 748 (5th Cir. 1996) (holding Section 1 exempts only contracts of employment of workers engaged in the movement of goods in interstate commerce); Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 600-01 (6th Cir. 1995) (holding Section 1 "should be narrowly construed to apply to employment contracts of seamen, railroad workers, and any other class of workers actually engaged in the movement of goods in interstate commerce"); Miller Brewing Co.

The United States Supreme Court, in *Allied-Bruce Terminix Cos., Inc. v. Dobson*,[45] dealt directly with the construction of Section 2 of the FAA. The Court began by looking at the language of Section 2, specifically at the words "involving commerce." The Court interpreted these words in a broader sense than the words "in commerce."[46] The Court found that a broad interpretation was consistent with the FAA's basic purpose to put arbitration agreements on the "same footing" as other contracts. The Court determined that broad construction allows the FAA to cover contracts in a broad array of contexts.[47]

While *Allied-Bruce* did not speak to the differences in construction between Section 2 and Section 1 of the FAA, the District of Columbia Circuit, in *Cole v. Burns International Security Services*,[48] did address how broadly the language in Section 1 should be interpreted.[49] The appellant in *Cole* argued that Section 1 exempted all contracts of employment, consistent with a broad reading of the language in Section 2.[50] However, the court held that Section 1 "does not exclude all contracts of employment that affect commerce."[51] Instead, it agreed with the circuits that hold that "section 1 of the FAA exempts only those employment contracts of workers actually engaged in the movement of goods in interstate commerce."[52] The court's rationale for the narrow reading of Section 1 came from two "well-established canons of statutory construction."[53]

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v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1162 (7th Cir. 1984) (holding Section 1 applies only "to workers employed in the transportation industries"); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972) (holding Section 1 applies "only to those actually in the transportation industry"); Dickstein v. duPont, 443 F.2d 783, 785 (1st Cir. 1971) (holding Section 1 is limited to employees "involved in, or closely related to, the actual movement of goods in interstate commerce"); Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers, Local 437, 207 F.2d 450, 452 (3d Cir. 1953) (holding Section 1 applies only to workers "who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it"); *see also* Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 227 (3d Cir. 1997) (reaffirming the holding in *Tenney Engineering*). *But see* United Elec., Radio & Mach. Workers v. Miller Metal Prods., Inc., 215 F.2d 221, 224 (4th Cir. 1954) (questioning the narrow interpretation of Section 1).

45. 513 U.S. 265 (1995).

46. *Id.* at 273.

47. *Id.* at 275 (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974).

48. 105 F.3d 1465 (D.C. Cir. 1997).

49. *Id.* at 1470-72.

50. *Id.* at 1470.

51. *Id.* at 1470.

52. *Id.* at 1471. *See supra* note 44.

53. *Id.* at 1470. *See generally* WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION, ch. 8, § 1 (2d Ed. 1995) (discussing canons of statutory interpretation).

First, the court in *Cole* observed that courts should "avoid a reading [of statutory language] which renders some words altogether redundant."[54] It noted that if the final exclusionary clause of Section 1 applied to all workers engaged in foreign or interstate commerce, there would be no need to specifically exclude seamen and railroad workers.[55] Instead, a broad exclusion could have stated, "nothing herein shall apply to contracts of employment."[56]

The second canon of statutory construction which the court utilized, *ejusdem generis*, "limits general terms which follow specific ones to matters similar to those specified."[57] In this case, the court found that the general phrase, "any other class of workers engaged in foreign or interstate commerce," derived its meaning from the more specific terms, "seamen" and "railroad employees." Thus, the exclusion includes only those classes of workers who are similarly engaged in the direct movement of interstate commerce.[58] Additionally, the court noted that the narrow interpretation of the Section 1 exclusionary clause was consistent with the *Allied-Bruce* interpretation of the FAA; the words "involving commerce" in Section 2 were broader than the words "in commerce" in Section 1.[59]

In addition to the District of Columbia Circuit, the First, Second, Third, Fifth, Sixth, and Seventh Circuits have all held that the exclusion in Section 1 should be narrowly construed.[60] The Ninth Circuit characterized the question as unresolved[61] and the Fourth Circuit questioned the narrow interpretation.[62]

Construing Section 1 narrowly allows the FAA to cover a broad range of employment situations.[63] However, a question remains as to which statutory claims must be arbitrated, given a valid arbitration clause in an employment contract governed by the FAA.

C. Arbitration of Statutory Discrimination Claims

In 1974, in *Alexander v. Gardner-Denver Co.*,[64] the United States Supreme Court held that an employee's submission of a claim to final arbitration under the nondiscrimination clause of a collective bargaining agreement did not

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54. Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465, 1470 (D.C. Cir. 1997) (quoting Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 574 (1995)).

55. *Id. See* Rojas v. TK Communications, Inc., 87 F.3d 745, 748 (5th Cir. 1996).

56. *Cole*, 105 F.3d at 1470-71.

57. *Id.* at 1471 (quoting Gooch v. United States, 297 U.S. 124, 128 (1936)).

58. *Id.*

59. *Id.* at 1471-72.

60. *See supra* note 44.

61. *See* Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 934 (9th Cir. 1992).

62. *See* United Elec., Radio & Mach. Workers v. Miller Metal Prods., Inc., 215 F.2d 221, 224 (4th Cir. 1954).

63. *See infra* notes 112-18 and accompanying text.

64. 415 U.S. 36 (1974).

foreclose that employee's statutory right to a trial under the equal employment opportunity provisions of the Civil Rights Act.[65] In reaching this holding, the Court stated that the purpose of Title VII of the Civil Rights Act of 1964 (Title VII)[66] was "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin."[67] The Court also stated that the federal courts maintained final responsibility for enforcement of Title VII.[68] Additionally, the Court found that the legislative history of Title VII indicated that Congress intended to allow individuals to independently pursue their rights under Title VII as well as other state and federal statutes.[69] Title VII "was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination."[70]

The Court rejected the lower courts' reasoning that allowing an employee's claims to be considered in both arbitral and judicial forums put "two strings to [the employee's] bow" while giving the employer only one.[71] When an employee submits a grievance to arbitration, the employee seeks to resolve a "contractual right under the collective bargaining agreement."[72] However, in filing a Title VII lawsuit, the employee is asserting an independent statutory right given to the employee by Congress.[73] The separate nature of these rights is not changed by the fact that they arose out of the same facts, and there is no inconsistency in allowing each to be enforced in its respective forum.[74]

For almost twenty years after *Gardner-Denver*, courts interpreted its holding to allow employees with valid arbitration agreements to bring independent statutory discrimination claims against their employers in court, in both the collective bargaining and individual employment contexts.

In *Barrantine v. Arkansas-Best Freight System, Inc.*,[75] the Supreme Court upheld its decision in *Gardner-Denver* and allowed a group of employees to bring an action in federal court alleging a violation of the minimum wage provisions of the Fair Labor Standards Act.[76] The employees previously and

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65. *Id.* at 49.

66. 42 U.S.C. §§ 2000e-5 (1994).

67. *Gardner-Denver*, 415 U.S. at 44 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)).

68. *Id.*

69. *Id.* at 48. In a footnote, the Court quoted a statement by one of the sponsors of Title VII and cited a Senate report indicating intent that Title VII not affect rights which exist under any other laws. *Id.* at 49 n.9.

70. *Id.* at 48-49.

71. *Id.* at 54.

72. *Id.* at 49.

73. *Id.* at 49-50.

74. *Id.* at 50.

75. 450 U.S. 728 (1981).

76. *Id.* at 745-46.

unsuccessfully submitted their claim to a joint grievance committee pursuant to the provisions of their collective bargaining agreement.[77]

In *McDonald v. City of West Branch*,[78] the Supreme Court again followed *Gardner-Denver* and allowed a police officer to institute a federal civil rights action after having already pursued the claim in an arbitral forum pursuant to a collective bargaining agreement.[79]

In *Swenson v. Management Recruiters International, Inc.*,[80] the Eighth Circuit followed *Gardner-Denver*, holding that an employee's discrimination claims against her employer under Title VII and the Minnesota Human Rights Act were not subject to compulsory arbitration.[81] The court pointed out that cases where the FAA preempted state and federal remedies did not involve employment discrimination claims.[82] Additionally, the court expressed its view that the fact that *Gardner-Denver* involved a collective bargaining agreement was not a dispositive factor in the decision.[83] Instead, the holding turned upon

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77. *Id.*

78. 466 U.S. 284 (1984).

79. *Id.* at 288-89.

80. 858 F.2d 1304 (8th Cir. 1988).

81. *Id.* at 1307-09. *See also* Wilmington v. J.J. Case Co., 793 F.2d 909 (8th Cir. 1986) (holding that arbitral award did not foreclose employee's rights under Section 1981 of the Civil Rights Act). Other circuits followed *Gardner-Denver* in similar cases. *See, e.g.*, Utley v. Goldman Sachs & Co., 883 F.2d 184, 185-86 (1st Cir. 1989) (holding that an employee was not required to pursue arbitration before a judicial hearing on her civil rights claim even though she signed an agreement to arbitrate disputes with her employer); Nicholson v. CPC Int'l, Inc., 877 F.2d 221 (3d Cir. 1989) (holding that an arbitration clause in a former employee's contract was inconsistent with the statutory scheme for enforcement of the Age Discrimination in Employment Act); Darden v. Illinois Bell Tel. Co., 797 F.2d 497, 504 (7th Cir. 1986) (stating that while an arbitrator's decision in a Title VII case could be accorded "great weight," final authority rested with the judiciary).

82. *Swenson*, 858 F.2d at 1306 n.5 (citing Perry v. Thomas, 482 U.S. 483 (1987) (holding that claim for wages under the California Labor Code must be arbitrated, despite California statute which invalidated arbitration agreements in wage collection cases); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (holding that claims under Section 10(b) of the Securities Exchange Act and RICO claims were arbitrable under predispute arbitration agreements); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (holding that federal anti-trust claims must be arbitrated under an arbitration agreement involving international transaction); Dean Witter Reynolds, Inc., v. Byrd, 470 U.S. 213 (1985) (rejecting the "intertwining" doctrine in holding that state law claims, pendent to non-arbitrable federal securities claims, must be arbitrated); Southland Corp. v. Keating, 465 U.S. 1 (1984) (holding that claims asserted under California Franchise Investment Law were arbitrable, despite California law invalidating arbitration clause)).

83. *Swenson*, 858 F.2d at 1306.

"the unique nature of Title VII" and the fact that "'Congress indicated that it considered the policy against discrimination to be of the highest priority.'"[84]

As many of these post-*Gardner-Denver* cases were being decided, the United States Supreme Court also began a line of three cases which have become known as the Mitsubishi Trilogy. In the first of these, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[85] a dispute arose between a Japanese auto-maker and a distributorship in Puerto Rico.[86] The auto-maker sought to compel arbitration under the FAA and the distributor counterclaimed, alleging violations of the Sherman Act.[87] The Supreme Court held that because the arbitration clause in the parties' contract encompassed statutory claims, the antitrust dispute was subject to arbitration under the Arbitration Act.[88]

In the second case, *Shearson/American Express, Inc. v. McMahon*,[89] the Supreme Court extended the holding in *Mitsubishi* to allow arbitration of claims arising under the Racketeer Influenced and Corrupt Organizations Act (RICO)[90] and the Securities Exchange Act of 1934.[91] The Court stated that the burden was on the party opposing arbitration of the statutory claim to demonstrate Congressional intent to exempt a claim from the scope of the FAA.[92]

In the final case of the trilogy, *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[93] the Court held that an agreement to arbitrate a statutory claim under the Securities Exchange Act of 1933[94] was enforceable. In so holding, the Court overruled *Wilko v. Swan*,[95] a case on which *Gardner-Denver* relied to some extent. However, the Court did not mention the direct effect of its decision on *Gardner-Denver*.[96]

The Mitsubishi Trilogy provided a new foundation for the Supreme Court's evolving view on the role of arbitration in the employment context. These cases established that statutory claims were arbitrable. The next step was to allow arbitration of statutory employment discrimination claims.

The United States Supreme Court took this step in *Gilmer v. Interstate/Johnson Lane Corp.*[97] *Gilmer* held that a claim by a registered securities representative against his employer for violation of the Age

84. *Id.* (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974)).
85. 473 U.S. 614 (1985).
86. *Id.* at 616-17.
87. 15 U.S.C. §§ 1-36 (1994).
88. *Mitsubishi Motors*, 473 U.S. at 628.
89. 482 U.S. 220 (1987).
90. 18 U.S.C. §§ 1961-1968 (1994).
91. 15 U.S.C. §§ 78a-78mm (1994).
92. *McMahon*, 482 U.S. at 227.
93. 490 U.S. 477 (1989).
94. 15 U.S.C. §§ 77a-77aa (1994).
95. 346 U.S. 427 (1953).
96. *Rodriguez*, 490 U.S. at 485.
97. 500 U.S. 20 (1991).

Discrimination in Employment Act (ADEA)[98] "was subject to compulsory arbitration pursuant to [the] arbitration agreement in [his] securities registration application."[99] The Court stated that it was "by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."[100] The Court reasoned that "in agreeing to arbitrate a statutory claim, a party does not forego his substantive rights," he merely submits them to an arbitral forum.[101] Additionally, the Court cited *McMahon* to assert that the burden is on the claimant to show "Congress intended to preclude waiver of a judicial forum for ADEA claims."[102] Furthermore, the Court noted that in considering if preclusion of waiver was intended, a court should bear in mind the "federal policy favoring arbitration."[103] Even considering the purpose behind enactment of the ADEA, the court held that the "remedial and deterrent" functions of the statute could still be served so long as the claimant could effectively vindicate his claims in an arbitral forum.[104] Further, the Court stated that "inequality of bargaining power" was insufficient to hold arbitration agreements not enforceable in the employment context.[105] In support, it cited language from Section 2 of the FAA that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[106]

The *Gilmer* court did not expressly overrule its earlier decision in *Gardner-Denver*. Instead, the Court distinguished the two cases on several grounds.[107] First, the Court stated that *Gardner-Denver* "did not involve the issue of enforceability of an agreement to arbitrate statutory claims," but instead involved the issue of "whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims."[108] Second, the Court pointed out that *Gardner-Denver* occurred "in the context of a collective bargaining agreement," while *Gilmer* dealt with an individual employment situation.[109]

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98. 29 U.S.C. §§ 621-634 (1994).

99. *Gilmer*, 500 U.S. at 20.

100. *Id.* at 26-27.

101. *Id.* (quoting Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc, 473 U.S. 614, 628 (1985)).

102. *Id.* (quoting Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987)).

103. *Id.* (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

104. *Id.* at 28 (quoting *Mitsubishi*, 473 U.S. at 637).

105. *Id.* at 33.

106. *Id.* (quoting 9 U.S.C. § 2 (1994)).

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

108. *Id.*

109. *Id.*

Last, the Court noted that *Gardner-Denver* was "not decided under the FAA," which changed the policy towards arbitration agreements.[110]

Although *Gilmer* clearly stated that "statutory claims may be the subject of an arbitration agreement," it left a few issues unresolved, including the question of whether its holding is limited to securities licensing and the ADEA or whether it can be extended to other statutes affecting employment.[111] Several courts have since extended *Gilmer's* holding beyond the ADEA to several other statutes, including the Americans With Disabilities Act (ADA),[112] the Equal Pay Act,[113] the Employee Polygraph Protection Act,[114] and Title VII.[115] Post-*Gilmer* cases have also held arbitration clauses enforceable in contexts other than securities licensing agreements, including employment contracts,[116] employee handbooks,[117] and employment applications.[118]

In *Austin v. Owens-Brockway Glass Container, Inc.*,[119] the Fourth Circuit extended the *Gilmer* ruling into the collective bargaining arena. The court held that an arbitration provision in a collective bargaining agreement was enforceable and forced an employee to arbitrate her Title VII and ADA claims against her employer.[120] However, several other circuits reject this view and continue to follow *Gardner-Denver* with respect to collective bargaining agreements. These courts find that employees are not precluded from bringing statutory claims in court even though the agreement contains an arbitration

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110. *Id.* Note that the court in *Gilmer* did not address the scope of Section 1 of the FAA because it was not raised on appeal. *Id.* at 25 n.2.

111. *Id.* at 26. *See* Donna Meredith Matthews, Note, *Employment Law After Gilmer: Compulsory Arbitration of Statutory Antidiscrimination Rights*, 18 BERKELEY J. EMP. & LAB. L. 347, 366-67 (1997) (pointing out five issues the author believes *Gilmer* has left unresolved).

112. *See* Solomon v. Duke Univ., 850 F. Supp. 372 (M.D.N.C. 1993).

113. *See* Hurst v. Prudential Securities, Inc., 21 F.3d 1113 (9th Cir. 1994); Kinnebrew v. Gulf Ins. Co., No. 3:94-CV-1517-R, 1994 WL 803508, (N.D. Tex. Nov. 28, 1994).

114. *See* Saari v. Smith Barney, Harris Upham & Co., 968 F.2d 877, 881-82 (9th Cir.), *cert. denied*, 506 U.S. 986 (1992).

115. *See* Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 882 (4th Cir. 1996) (holding that arbitration of employee's Title VII and ADA claims was mandatory under collective bargaining agreement); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1487 (10th Cir. 1994); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 700 (11th Cir. 1992); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 935 (9th Cir. 1992); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 308 (6th Cir. 1991); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991).

116. *See* Maye v. Smith Barney, Inc., 903 F. Supp. 570 (S.D.N.Y. 1995); Crawford v. West Jersey Health Sys., 827 F. Supp. 1232 (D.N.J. 1994).

117. *See* Lang v. Burlington N. R.R., 835 F. Supp. 1104 (D. Minn. 1993).

118. *See* Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992).

119. 78 F.3d 875 (4th Cir. 1996).

120. *Id.* at 885-86.

clause.[121] Additionally, the Ninth Circuit, in *Prudential Ins. Co. of America v. Lai*,[122] narrowly interpreted *Gilmer* and held that, in an individual employment context, there must be a "knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived" her statutory rights prescribed by Title VII.[123]

IV. INSTANT DECISION

Patterson v. Tenet Healthcare, Inc.[124] was the Eighth Circuit's first look at the questions raised by *Gilmer* in the individual employment context. The court found that the arbitration clause, which Patterson signed, was separate from the other terms of her employee handbook and constituted an enforceable contract, that the FAA covered the arbitration agreement at issue, that as a matter of first impression, Section 1 of the FAA was to be given a narrow reading, exempting only those classes of employees engaged directly in the movement of interstate commerce, and therefore, that Patterson's Title VII discrimination claims were subject to enforceable arbitration under the FAA.[125]

The court first examined whether Patterson and Tenet agreed to arbitrate their dispute.[126] The court observed that "[u]nder Missouri law, employee handbooks generally are not considered contracts, because they normally lack the traditional prerequisites of a contract."[127] Considering the provisions in Patterson's handbook on pages three and thirty-one,[128] the court concluded that the arbitration clause on page thirty-one was separate and apart from the other provisions of the handbook; therefore, the clause constituted an enforceable

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121. *See* Brisentine v. Stone & Webster Eng'g Corp., 117 F.3d 519, 526-27 (11th Cir. 1997) (holding that employee's ADA claim was not subject to compulsory arbitration pursuant to arbitration clause in collective bargaining agreement); Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997) (holding that employee was not required to exhaust arbitration remedies under collective bargaining agreement prior to bringing suit under Title VII); Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997) (holding union cannot consent for employee by signing collective bargaining agreement which requires arbitration of statutory claims); Varner v. Nat'l Super Mkts., Inc., 94 F.3d 1209 (8th Cir. 1996) (holding that employee was not required to exhaust arbitration remedies under collective bargaining agreement prior to bringing suit under Title VII).

122. 42 F.3d 1299 (9th Cir. 1994).

123. *Id.* at 1304. *See* Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756 (9th Cir. 1997).

124. 113 F.3d 832 (8th Cir. 1997).

125. *Id.*

126. *Id.* at 834.

127. *Id.* at 835 (quoting Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661, 662 (Mo. 1988)).

128. *See supra* notes 13-14.

contract.[129] The court pointed out that the clause was "set forth on a separate page of the handbook and introduced by [a] heading,"[130] that the page on which the clause was located was removed from the handbook and stored in a file after the employee signed it, and that there was "a marked transition in language and tone from the paragraph preceding the arbitration clause."[131] Furthermore, although the handbook contained language to the effect that the company reserved the right to modify or rescind any of the terms of the handbook, the arbitration clause used sufficient contractual language to put the employee on notice that the clause was separate and distinct, and therefore, not subject to the reservation of rights.[132]

Next, the court addressed the issue of whether the FAA governed the agreement to arbitrate.[133] This presented a question of first impression for the Eighth Circuit as to whether Section 1[134] should be interpreted broadly to exempt all employment contracts from the scope of the Act or narrowly to exempt only those classes of employees that are engaged directly in the movement of interstate commerce.[135] The court sided with those circuits that give Section 1 a narrow reading.[136] The court cited *Cole v. Burns International Security Services*[137] and its discussion of two statutory interpretation canons which support the narrow construction.[138] Furthermore, the court agreed with *Cole* that the Supreme Court's decision in *Allied-Bruce Terminix Cos. v. Dobson*[139] supported a narrow reading of the exemption in Section 1.[140] The court disagreed with Patterson's argument that the legislative history of Section 1 revealed a congressional intent to exempt all employment contracts from the FAA, stating that "[i]n a case such as this, where the statutory text does not admit of serious ambiguity, and where firmly established case law is absolutely

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129. *Patterson*, 113 F.3d at 835 (citing Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805, 808-09 (2d Cir. 1960)).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *See supra* note 9 and accompanying text.

135. Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 835 (8th Cir. 1997).

136. *See supra* note 44. The court noted that only the Fourth Circuit has interpreted Section 1 broadly. *Patterson*, 113 F.3d at 836; *see* United Elec. Radio & Machine Workers of Amer. v. Miller Metal Prods., 215 F.2d 221, 224 (4th Cir. 1954). The *Patterson* court noted that the Fourth Circuit decision was "explicitly limited to the collective bargaining context." *Patterson*, 113 F.3d at 836.

137. 105 F.3d 1465 (D.C. Cir. 1997).

138. *See supra* notes 54-59 and accompanying text.

139. 513 U.S. 265 (1995).

140. Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 836 (8th Cir. 1997); *see supra* notes 45-47 and accompanying text for the *Allied-Bruce* court's discussion of this issue.

clear on the meaning of the statute, legislative history is, at best, secondary, and, at worst, irrelevant."[141] Thus, the court concluded that Section 1 does not exclude the arbitration agreement at issue and therefore, it is enforceable under the FAA.[142]

Finally, the court decided whether Patterson's statutory discrimination claims were arbitrable.[143] The court began by pointing to *Gilmer v. Interstate/Johnson Lane Corp.*[144] as controlling.[145] It noted that *Gilmer* distinguished its holding from *Gardner-Denver* in that *Gardner-Denver* occurred in the context of a collective bargaining agreement (CBA), while *Gilmer* was decided in an individual employment situation.[146] The *Patterson* court acknowledged that, in enforcing arbitration under a collective bargaining agreement, the agreement obtained by a union represents the interest of the majority, creating "tension between collective representation and individual statutory rights."[147] It also recognized that "labor arbitrators are generally only authorized under CBAs to resolve contractual, and not statutory, claims."[148] In recognition of these concerns, the court noted that the Eighth Circuit, after *Gilmer*, held that arbitration agreements within a CBA do not bar statutory claims under Title VII.[149] However, the instant case involved an arbitration agreement which represented the interests of an individual, and the arbitration agreement at issue did not "limit the arbitrator solely to interpretation of the contract."[150] Therefore, the court followed the post-*Gilmer* cases which hold that Title VII claims are subject to arbitration agreements in the individual employment context.[151] As further support, the court cited language from the Civil Rights Act of 1991 that "the use of alternative means of dispute resolution,

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141. *Patterson*, 113 F.3d at 836 (quoting Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1472 (D.C. Cir. 1997)).

142. *Id.* at 836-37.

143. *Id.* at 837-38.

144. 500 U.S. 20 (1991).

145. Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 837 (8th Cir. 1997).

146. *Id.*

147. *Id.* at 837 (citing *Gilmer*, 500 U.S. at 35; Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974); Pryner v. Tractor Supply Co., 109 F.3d 354, 364 (7th Cir. 1997)).

148. *Id.* (quoting *Gilmer*, 500 U.S. at 34).

149. *Id.* (citing Varner v. National Super Mkts., Inc., 94 F.3d 1209, 1213 (8th Cir. 1996); Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1326 n.3 (8th Cir. 1994)).

150. *Id.*

151. *Id.* (citing Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1481-82 (D.C. Cir. 1997); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 882 (4th Cir. 1996); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1487 (10th Cir. 1994); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 700 (11th Cir. 1992); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 935 (9th Cir. 1992); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 308 (6th Cir. 1991); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991)).

including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of federal law amended by this title."[152]

Patterson overruled the prior Eighth Circuit decision in *Swenson v. Management Recruiters International, Inc.*,[153] which held that an employee was not barred from bringing an action under Title VII even though she had signed an individual arbitration agreement.[154] The court in *Swenson* had been concerned about the arbitral forum being adequate to assist the claimant and paying "sufficient attention to the transcendent public interest in the enforcement of Title VII."[155] In the instant case, the court cited statements from *Gilmer* that arbitration effectively vindicates an employee's statutory cause of action through the use of neutral arbitrators, adequate discovery, and adequate types of relief.[156] Furthermore, the public policy of Title VII is carried out through the suits of employees who are not subject to arbitration agreements, through EEOC actions, and through individual arbitration claims.[157]

Because *Gilmer* "effectively overruled" the Eighth Circuit's holding in *Swenson*, the court held that Patterson's Title VII claim was subject to arbitration.[158]

V. COMMENT

Not surprisingly, the court in *Patterson* followed the post-*Gilmer* trend of allowing arbitration of Title VII claims, and in interpreting the Section 1 exemption to apply only to those employment contracts dealing with workers engaged directly in the movement of interstate commerce. *Patterson* may, in fact, be a logical extension of *Gilmer* from ADEA claims to Title VII claims, and several courts have supported this proposition.[159] Indeed, the court cited *Gilmer* as controlling of its analysis.[160] However, the question is then whether *Gilmer* stands on solid ground.

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152. *Id.* (quoting The Civil Rights Act of 1991, Pub.L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991)).

153. 858 F.2d 1304 (8th Cir. 1988).

154. *Id.* at 1306-09.

155. Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 837 (8th Cir. 1997).

156. *Id.* at 838 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28, 30-33 (1991)).

157. *Id.* (citing *Gilmer*, 500 U.S. at 31-32).

158. *Id.*

159. *See supra* note 115. *But see* Heidi M. Hellekson, Note, *Taking the "Alternative" Out of the Dispute Resolution of Title VII Claims: The Implications of a Mandatory Enforcement Scheme of Arbitration Agreements Arising Out of Employment Contracts*, 70 N.D. L. REV. 435, 453-56 (1994) (arguing the differences between Title VII and the ADEA).

160. Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 837 (8th Cir. 1997).

The court in *Gilmer* made a significant leap forward in relying on the Mitsubishi Trilogy, which dealt with antitrust and securities violations, to reach the conclusion that employment discrimination claims under the ADEA were arbitrable. Whether this was a logical step is somewhat questionable, especially given that the *Gardner-Denver* collective bargaining cases present a closer analogy to the situation in *Gilmer*. It appears that the only reasonable way to reach the result in *Gilmer* was through the FAA and the narrow interpretation of the exemption in Section 1.

Many courts have previously dealt with the interpretation of Section 1, and have held the narrow view to be proper,[161] but *Gilmer* did not directly address the issue.[162] The Supreme Court in *Allied-Bruce* addressed the question of the interpretation of Section 2.[163] Subsequent courts have utilized *Allied-Bruce*'s broad interpretation of that section to interpret Section 1 narrowly,[164] but there are still some arguments that Section 1 should be interpreted broadly.

In *Willis v. Dean Witter Reynolds, Inc.*,[165] the Sixth Circuit stated that "all employment contracts with employers subject to regulation under Title VII" fell within the Section 1 exclusion, and therefore, such employment contracts were not within the scope of the FAA.[166] Additionally, some argue that it is not logical to interpret Section 1 more narrowly than Section 2 when Section 2 is said to have the same scope as the Commerce Clause, because the result is a paradox that those who are more involved in the movement of interstate commerce are excluded from the scope of the Act.[167]

Another argument against the narrow interpretation of Section 1 is that the legislative history of the FAA indicates an intent to exclude all employment contracts from its scope.[168] The original bill was drafted by an American Bar Association committee and was entitled, "Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration."[169] At a hearing before a Senate committee, the Secretary of Commerce, Herbert Hoover proposed the exclusionary language found in Section 1 to avoid the

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161. *See supra* note 44.

162. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 n.2 (1991).

163. Allied-Bruce Terminix Cos., v. Dobson, 513 U.S. 265, 273 (1995).

164. *See supra* note 44.

165. 948 F.2d 305 (6th Cir. 1991).

166. *Id.* at 311.

167. *See* Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Petitioner at 14, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (No. 90-18).

168. *See* Hellekson, *supra* note 159, at 446 (discussing the legislative history of Title VII).

169. Hearing on S. 4213 and S. 4214 before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 1 (1923); *see also Gilmer*, 500 U.S. at 39 (Stevens, J., dissenting).

possibility that contracts of all workers would be included in the FAA.[170] Furthermore, the ABA committee chairman assured Senators that the bill "[was] not intended to be an act referring to labor disputes at all."[171]

In addition to questions about the interpretation of the FAA, there are also procedural and other problems concerning arbitration of statutory employment discrimination claims.[172] First, arbitration deprives the claimant of the judicial forum provided by the statute.[173] The court in *Gilmer* responded to this problem by stating that "if Congress intended the substantive protection afforded to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history."[174] Is it not fair to say, however, that this might not be the case? If Congress had never envisioned arbitration of a particular statutory claim and the judicial forum was provided for in the statute, there would be no reason to include any language explicitly removing arbitration as a possible means of adjudication.

Next, arbitration places limits on discovery.[175] The *Gilmer* court responded to this concern by pointing out that it was unlikely that an age discrimination claim would "require more extensive discovery than other claims" which had been found arbitrable, "such as RICO and antitrust claims."[176] However, there is an argument that in an employment discrimination claim, the employer is likely to have exclusive access to the information necessary for the employee to bring a successful action. This limited discovery can create a substantial hardship for an employee in this position.

Another problem with enforcing arbitration agreements in the employment context is the unequal bargaining power between employers and employees.[177] *Gilmer* stated, in response to this problem, that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable . . . ," but then acknowledged that a claim of unequal bargaining power is best left to determination on a case-by-case basis, thereby leaving the door open.[178] The fact is that many employees have no meaningful choice in agreeing to arbitration; they must accept mandatory arbitration or risk being denied employment.[179]

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170. Hearing on S. 4213 and S. 4214 before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 14 (1923).

171. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 39 (1991).

172. *See id.* at 29-33.

173. *Id.* at 29.

174. *Id.*

175. *Id.* at 31.

176. *Id.*

177. *Id.* at 33.

178. *Id.*

179. *See* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 132 (discussing a General Accounting Office survey regarding the number

Gilmer conceded that all statutory claims may not be appropriate for arbitration,[180] and Title VII and other discrimination claims should be taken as good examples. The legislative history of Title VII in particular indicates an intent to allow individuals to pursue their rights under Title VII independent of other available remedies.[181] As the court in *Gardner-Denver* stated, it was designed to "supplement," not "supplant" existing laws.[182] Furthermore, the purpose of Title VII was to assure equality of employment opportunities by eliminating discriminatory practices. To that end, Title VII vested federal courts with the powers of enforcement.[183] The Eighth Circuit, in *Swenson v. Management Recruiters International, Inc.*, went so far as to say that *Gardner-Denver* was not decided based on the collective bargaining context, but instead because of the unique nature of Title VII.[184] *Patterson* does not reflect a continuation of that view.

A final point to consider is recent Congressional proposals to limit compulsory arbitration. In 1994, the Senate introduced a bill entitled the "Protection From Coercive Employment Agreements Act," which would amend Title VII, the ADEA, and the ADA among others.[185] The bill would make it illegal to condition employment on an employee submitting to mandatory arbitration and would have the effect of virtually eliminating such clauses from employment contracts.[186] Also in 1994, and again in 1995, a bill was introduced in the House and Senate called the "Civil Rights Procedures Protection Act of 1994."[187] This bill would amend Title VII, the ADEA, the ADA, and the FAA among others.[188] It would restrict arbitration of certain claims themselves, rather than concentrating on employment contracts.[189]

Given the arguments against requiring arbitration of statutory employment discrimination claims like Title VII, we are still left with the fact that the United States Supreme Court ruled such claims are arbitrable and the Eighth Circuit has followed this decision. As mentioned at the beginning of this Note, arbitration has become increasingly important with the increase in employment related

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of employers who require submission to arbitration as a condition of employment).

180. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

181. Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 (1974).

182. *Id.*

183. *Id.* at 44.

184. 858 F.2d 1304, 1306 (8th Cir. 1988).

185. S. 2012, 103d Cong. (1994).

186. S. 2012, 103d Cong. (1994).

187. H.R. 4981, 103d Cong. (1994); S. 2405, 103d Cong. (1994) (introduced again in 1995 as S. 366, 104th Cong. (1995)).

188. H.R. 4981, 103d Cong.(1994); S. 2405, 103d Cong. (1994) (introduced again in 1995 as S. 366, 104th Cong. (1995)).

189. H.R. 4981, 103d Cong.(1994); S. 2405, 103d Cong. (1994) (introduced again in 1995 as S. 366, 104th Cong. (1995)).

litigation.[190] However, as its importance grows for purposes of efficiency, the question of whether it properly serves the interests of the workers of America will surely be raised again.

VI. CONCLUSION

In *Patterson v. Tenet Healthcare, Inc.*, the Eighth Circuit extended the United States Supreme Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.* to require arbitration of Title VII claims, pursuant to a valid individual arbitration agreement and the Federal Arbitration Act.[191] The court established that Section 1 of the FAA should be read narrowly, excluding from the scope of the Act only those classes of employees "engaged directly in the movement of interstate commerce."[192] While the court clearly followed recent precedent, it brushed aside many of the problems that arbitration of statutory discrimination claims presents and ignored the legislative history of Title VII, which indicates congressional intent to exclude all employment contracts from the scope of the FAA. The effect of this decision is that many workers with little bargaining power have lost a fundamental right to pursue their grievances in a court of law.

JUSTIN M. DEAN

190. *See supra* note 2.
191. Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 838 (8th Cir. 1997).
192. *Id.* at 835.