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Pre-Dispute Mandatory Arbitration
in
Employment Agreements

Bee Moradi
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Introduction

This paper will focus on mandatory arbitration clauses in employment agreements that require prospective employees to agree to arbitrate any potential future disputes, including discrimination and sexual harassment claims, as a condition of employment. I chose this topic in order to learn more about the cross section of two areas of the law in which I have a strong interest, employment law and alternative dispute resolution. I approached this issue objectively, researching the writings and opinions of legal scholars representing both employers' and employees' views of the issues. Additionally, I learned that legislative efforts have failed to keep pace with the increasing number of private employers moving towards including mandatory arbitration clauses in employment agreements. Thus, through research of Supreme Court jurisprudence and scholarly analysis, I formed my own conclusion about the effectiveness of mandatory arbitration in an employment context and specifically with regard to claims of discrimination and sexual harassment in violation of federal statutes.

Section I of this paper provides a brief history and overview of the U.S. approach to mandatory arbitration, focusing on the employment context rather than in commercial disputes. Section II analyzes the current debate among employers and employees for and against mandatory arbitration. Section III explores the U.S. Equal Employment Opportunity Commission's (EEOC) position against mandatory arbitration and its 1997 policy guidelines, which are still in effect. Section IV reviews the approaches of six other industrialized nations. Finally, in sections V and VI, I make predictions on where

the Supreme Court and Congress may be headed with regard to mandatory arbitration, followed by a short conclusion.

I) History of Mandatory Arbitration in the U.S. Employment Context

The Federal Arbitration Act (FAA), enacted in 1925, set forth a legislative mandate for state and federal courts to uphold arbitration clauses in private contracts pertaining to foreign or interstate commerce.¹ In other words, the FAA established a federal policy in favor of arbitration.² The statute explicitly mentions certain areas of employment as exempt from binding arbitration³ and legislative history indicates that the intent of the act was never to be used as a condition of employment.⁴ As Jean Sternlight writes,

Indeed, to the limited extent that the possibility of such arbitration was considered by Congress in 1925, when it passed the FAA, those few who spoke on the issue made clear that they did not view such a use of arbitration as appropriate. For example, when one Senator voiced a concern that arbitration contracts might be "offered on a take-it-or-leave-it basis to captive customers or employees," the Senator was reassured by the bill's supporters that they did not intend for the bill to cover such situations.⁵

The Court's initial response to the FAA was to largely ignore the federal policy in favor of arbitration by refusing to enforce arbitration agreements under a general public

¹ 9 U.S.C. § 1.

² Beth M. Primm, *A Critical Look at the EEOC's Policy Against Mandatory Pre-Dispute Arbitration Agreements*, 2 U. Pa. J. Lab. & Emp. L. 151, 153 (1999).

³ 9 U.S.C. § 1.

⁴ Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 Stan. L. Rev. 1631, 1636 (2004).

⁵ Id. citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) (Black, J., dissenting) and *Hearing on S. 4213 and S. 4214 Before the Subcomm. Of the Senate Comm. on the Judiciary*, 67th Cong. 9-11 (1923).

policy exception.⁶ The Court continued to allow litigation despite arbitration clauses, including in discrimination cases, anti-trust cases, and others based on this broad public policy exception to the FAA.⁷ The most prominent of these cases was *Wilko v. Swan* where the Court held that the Securities Act recognized the imbalance of power between investors and stockbrokers and declined to enforce arbitration in a claim of misrepresentation.⁸ Later in *Alexander v. Gardner-Denver Co.*, the Court declined to enforce the mandatory grievance process in the Steelworkers' Union collective bargaining agreement, effectively allowing an African-American member of the union to litigate a race discrimination claim.⁹ In his opinion for a unanimous Court, Justice Powell wrote, "we think it clear that there can be no prospective waiver of an employee's rights under Title VII."¹⁰ Title VII established an administrative process through which victims of employment discrimination or harassment can file charges with the EEOC against their employers.¹² The EEOC then investigates the charges and decides whether to attempt conciliation, pursue a lawsuit, or permit the individual claimant to pursue a lawsuit on his/her own behalf.¹³

Unlike other group activities, such as striking that can be waived in a collective bargaining agreement, Justice Powell wrote,

⁶ Primm, *supra* note 2, at 151.

⁷ *Id.* at 154-55.

⁸ *Wilko v. Swan*, 346 U.S. 427 (1953).

⁹ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

¹⁰ *Id.* at 51.

¹¹ 42 U.S.C. § 2000e et seq (1964).

¹² *Id.*

¹³ U.S. Equal Employment Opportunity Commission, *Filing a Charge*, <http://www.eeoc.gov/employees/charge.cfm> (last visited May 2, 2014).

Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII.¹⁴

In other words, the Court explicitly barred waiver of an employee's right to file a charge under Title VII, as part of a collective bargaining agreement. The Court continued in this vein in other cases related to employment including a claim brought under the Fair Labor Standards Act and another claim of wrongful discharge.¹⁵¹⁶

A short time later, the Court shifted its position on preserving litigation as an option for plaintiffs, towards the federal policy favoring arbitration without first establishing a rule one way or the other in cases where there is a question of a federal civil rights statute violation. While Justice Powell's opinion in *Alexander* sent a strong message in favor of protecting plaintiffs' rights, the Court continued to treat each statute

¹⁴ 415 U.S. at 51.

¹⁵ *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (Petitioners filed suit against their employer for unpaid wages after the employer's arbitration panel dismissed the claims without explanation. Per a collective bargaining agreement, the petitioners' union submitted the claims to the arbitration panel before the petitioners filed suit. The Eighth Circuit upheld the district courts decision to dismiss the claim but the Supreme Court granted certiorari and reversed).

¹⁶ *McDonald v. City of West Branch* 466 U.S. 284 (1984) (Petitioner brought a wrongful discharge claim against his employer after an arbitrator ruled he was not wrongfully discharged. After a jury found for the petitioner, the Court of Appeals reversed stating that the claims could not be litigated per the Full Faith and Credit Statute. The Supreme Court reversed saying that arbitration is not a judicial proceeding under the Full Faith and Credit Statute.

separately.¹⁷ Eventually, this led to a complete change in the Court’s approach to arbitration – one in which the Court began to favor the FAA.

Justice Blackmun’s opinion in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*¹⁸ summarized the Court’s new approach of interpreting arbitration clauses in favor of enforcement and treating each statute separately based on congressional intent. The *Mitsubishi Motors* case includes a complex set of facts in which the parties sued and countersued in federal court for claims of breach of contract and antitrust activities. The parties’ agreed to arbitration in their sales agreement but the lower courts did not allow the antitrust claims under the Sherman Act to go to arbitration. In his opinion for the majority, Justice Blackmun emphasizes the “liberal federal policy favoring arbitration,”¹⁹ and reduces the Court’s role to enforcer of private contracts, unless the plaintiff can demonstrate congressional intent to prohibit mandatory arbitration or waiver of the right to litigation. The Court establishes that it is the plaintiff’s burden and that “[congressional] intention will be deducible from text or legislative history.”²⁰ The Court goes on to say that arbitration is just as effective as litigation and should not be considered an underdeveloped system.²¹ The Court emphasizes that a party who chooses arbitration over litigation is still afforded the same substantive statutory rights available –

¹⁷ Primm, *supra* note 2, 156.

¹⁸ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

¹⁹ *Id.* at 625 citing *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U. S. 24 (1983).

²⁰ 473 U.S. at 628.

²¹ *Id.* at 627.

just in a different forum.²² Despite language asserting that litigation and arbitration are equally fair and that both provide for just outcomes, Justice Blackmun also states that some statutory rights may not be appropriate for arbitration.

That is not to say that all controversies implicating statutory rights are suitable for arbitration . . . Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.²³

Thus, the Court left the door open for refusing to enforce mandatory arbitration in future statutory claims. Furthermore, given the strong statement in *Alexander*, one could assume that discrimination cases would be considered among these future statutory claims. But a few years later, the Court took a strong position on the arbitrability of statutory rights in an age discrimination case brought under the Age Discrimination in Employment Act (ADEA). *Gilmer v. Interstate/Johnson Lane Corp.* was a watershed case that involved a sixty-two year old plaintiff who signed a pre-dispute mandatory arbitration agreement with a third party (a stock exchange) as a condition of employment with a brokerage firm.²⁴ After being terminated from his job, Gilmer filed a charge with the EEOC for age discrimination.²⁵ The Court applied the approach it adopted in two

²² *Id.* at 628.

²³ *Id.* at 627.

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

²⁵ *Id.*

previous cases in which it placed the onus on the plaintiff to show that the statute under which the plaintiff brought the claim explicitly bars mandatory arbitration.²⁶

Gilmer is a significant case for several reasons. First, the Court increased the plaintiff's burden from the standard set forth in *Mitsubishi Motors* where a plaintiff could provide evidence that would allow a court to deduce congressional intent in a particular federal statute, to a showing of explicit congressional intent.²⁷ Second, the Court negates the plaintiff's arguments that arbitration is an inadequate proceeding for discrimination cases because of biased arbitrators, limited discovery, confidential rulings (so that the public is not informed), and insufficient damages.²⁸ Third, the Court enforced mandatory arbitration in a claim brought under the ADEA, a federal civil rights statute that mirrors Title VII in many ways – particularly in the employment context. Nevertheless, because *Gilmer* did not sign the mandatory arbitration clause directly with his employer, the question of whether arbitration could be enforced in workplace discrimination and sexual harassment cases remained open.

After *Gilmer*, the Court ruled against enforcement of an arbitration clause in a case claiming violation of the Americans with Disabilities Act (ADA).²⁹ The Court held that because the waiver of the right to litigate in the collective bargaining agreement was “very general,”³⁰ the claimant was not bound by contract and could proceed to litigation.

²⁶ *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

²⁷ 500 U.S. at 29.

²⁸ *Id.* at 30-32.

²⁹ *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998).

³⁰ *Id.* at 80.

Although the Court avoided the question of whether the FAA applied, the Court did say that such a right is important enough that any potential waiver must be “clear and unmistakable.”³¹

Not only is petitioner's statutory claim not subject to a presumption of arbitrability; we think any [collective bargaining agreement] requirement to arbitrate it must be particularly clear. In *Metropolitan Edison Co. v. NLRB* . . . we stated that a union could waive its officers' statutory right . . . to be free of antiunion discrimination, but we held that such a waiver must be clear and unmistakable. “[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is ‘explicitly stated.’ More succinctly, the waiver must be clear and unmistakable.” We think the same standard applicable to a union-negotiated waiver of employees' statutory right to a judicial forum for claims of employment discrimination. Although that is not a substantive right . . . the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a [collective bargaining agreement].³²

In *Wright*, the Court emphasized the importance of the right to go to court in employment discrimination cases by requiring an explicit, “clear and unmistakable” waiver of such a right in collective bargaining agreements.³³

Ten years after *Gilmer* in *Circuit City Stores, Inc. v. Adams*, the Court affirmed its position on the federal policy favoring arbitration in another employment case.³⁴ *Circuit City* addressed whether the FAA applied to employment agreements or whether per § 1 of the FAA, employment agreements are exempt.³⁵ Section 1 of the FAA says, “but nothing herein contained shall apply to contracts of employment of seamen, railroad

³¹ *Id.* at 82.

³² *Id.* at 79-80.

³³ *Id.*

³⁴ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

³⁵ *Id.*

employees, or any other class of workers engaged in foreign or interstate commerce” (emphasis added).³⁶ The Court held that employment contracts in general are not exempt except those categories that are specifically listed in the statute.³⁷ Nevertheless, the Court did not explicitly address whether mandatory arbitration would be enforceable against claims of discrimination in the workplace.

In 2011, the Supreme Court decided a commercial arbitration case in which the plaintiff filed suit against AT&T for being charged taxes on a free cellular phone.³⁸ Under the terms of the sales contract, consumers were barred from filing suit and from forming a class.³⁹ In other words, consumers had to resolve disputes using individual mandatory arbitration. Although this case is an example of mandatory arbitration imposed on consumers, many labor and employment legal teams quickly took note of the Court’s enforcement of the prohibition on forming a class. This is particularly troublesome for plaintiff-employees who want to file systemic discrimination or pattern or practice claims under Title VII against their employers since these types of cases typically require broad discovery and can develop into class action suits.

Despite this line of cases, the Court still has not directly addressed whether the FAA broadly applies to statutorily protected rights, like those under Title VII, the Americans with Disabilities Act (ADA) and the Equal Pay Act (EPA). Specifically, the

³⁶ 9 U.S.C. § 1.

³⁷ 532 U.S. at 119.

³⁸ *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011).

³⁹ *Id.* at 1751.

Court has not addressed whether rights under these statutes are be subject to mandatory arbitration clauses that employees agree to pre-dispute.

II.) The Debate Surrounding Mandatory Arbitration in Employment Agreements

The current debate surrounding pre-dispute mandatory arbitration in an employment context has taken shape with employers on one side and employees and plaintiffs' advocates on the other.

A. The Case for Mandatory Arbitration – An Employer's Perspective

From the point of view of many employers, mandatory arbitration is a safe and sound way of avoiding litigation while ensuring potential disputes are legally resolved. Employers are concerned that the expense and length of litigation can be exorbitant and that juries can be inconsistent and fickle in their findings.⁴⁰ Furthermore, as the drafters of mandatory arbitration clauses, employers have the ability to control the process by identifying and selecting an arbitrator, though some allow for mutual selection of an arbitrator by the disputants, and setting forth the guidelines of the arbitration.⁴¹ Because of the perceived benefits of arbitration, some employers are willing to pay for the entire cost of the proceeding.⁴² In essence, arbitration can be customized to the preferences of the parties to the dispute.

Additionally, as legal scholars have recognized, some employers, known as “repeat players,” actually gain an advantage as they gain more experience with

⁴⁰ Alexander J.S. Colvin, *From Supreme Court to Shopfloor: Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution*, 13 Cornell J. L. & Pub. Pol'y 581 (2003).

⁴¹ Sternlight, *supra* note 4, at 1650.

⁴² Primm, *supra* note 2, at 157.

arbitration.⁴³ Opponents cite the consequence of repeat players as the “repeat provider bias,” or “selection bias,” and claim that it benefits the employers over the employees.⁴⁴ As Sternlight describes, organizations like the American Arbitration Association (AAA) and others are incentivized to ensure that companies are satisfied with their arbitration services because such organizations must compete for contracts with companies to provide those services.⁴⁵ Thus, if a company is dissatisfied with the outcomes of an arbitration for which they used an AAA arbitrator, they may be inclined to choose an arbitrator from a different organization in the future.⁴⁶ But from the employer’s perspective, unlike fickle juries, an employer can rely on its familiarity with the arbitration process and with an objective, neutral arbitrator or arbitration organization that is often more legally sophisticated than the average juror. Additionally, regardless of which organization they belong to or whether they are independently hired, arbitrators are required to be neutral and objective decision makers.

Finally, employers view arbitration as a means through which they can resolve a potential employment dispute in a private manner. Typically, companies and business entities are concerned with their reputations. A potential legal battle over an employment dispute can seriously threaten an employer’s public image and have negative ramifications for years after a jury finding or settlement agreement that results in the midst of litigation. Arbitration allows employers to mandate confidentiality agreements

⁴³ Colvin, *supra* note 37, at 583.

⁴⁴ Sternlight, *supra* note 40.

⁴⁵ *Id.*

⁴⁶ *Id.*

on all parties involved with the proceedings, limiting public knowledge of the sordid details of any dispute.

B. The Case Against Mandatory Arbitration – An Employee’s Perspective

Employers draft employment agreements and the mandatory arbitration clauses therein, which often define the procedures, scope, and location of the potential arbitration as well as the process through which arbitrators will be identified. The case against mandatory arbitration often revolves around concerns related to bias or lack of due process, private or confidential arbitrations that further taint the process as unfair because of a lack of public scrutiny, limited discovery, and insufficient damages. Although the Supreme Court has disagreed, some legal scholars speculate that offers of employment on the condition that the prospective employee accept pre-dispute mandatory arbitration result in a “take or leave it” approach to employment are unconscionable and equivalent to contracts of adhesion.⁴⁷

The Supreme Court has created a monster. With the Court's enthusiastic approval, pre-dispute arbitration clauses – agreements to submit future disputes to binding arbitration – have increasingly found their way into standard form contracts of adhesion . . . Given the Supreme Court's blessing in the name of a "national policy favoring arbitration," adhesive pre-dispute arbitration clauses should expand beyond their current strongholds in consumer contracts in health insurance, banking and securities investing to other areas of the economy and society.⁴⁸

The argument is that employees who are faced with either turning down a job or taking one on the condition that they agree to mandatory arbitration in the case of a

⁴⁷ Primm, *supra* note 39.

⁴⁸ Sternlight *supra* note 4, at 1633 citing David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. Rev. 49 (2003).

dispute, actually have no meaningful choice. Other arguments against mandatory arbitration state that employees often fail to read or understand the terms of their employment agreements, including any provisions mandating arbitration.⁴⁹ In fact, some mandatory arbitration clauses are issued after employment has begun, or are included in employee handbooks, and do not require employee signature or acknowledgment.⁵⁰ Generally, courts have still enforced these arbitration agreements.⁵¹

Beyond issues of fairness and repeat player bias, employees see other disadvantages to mandatory arbitration. Employees with claims of wrongdoing against their employers typically want to have their day in court recognizing the broader ability to conduct discovery and the likelihood that a jury of their peers will sympathize with them and maximize an award for damages, which can cause serious financial consequences for the employer.⁵² Moreover, parties to a suit are bound by the legal precedents of the jurisdiction and their claim can further contribute to the development of the law.

Additionally, employees find due process protections to be more explicitly instituted in the courts than in arbitration.⁵³ Due process arguments, however, are not likely to prevail since the claimant must first establish state action, which would be near impossible when the arbitration agreement is between an employee and a non-state actor

⁴⁹ *Id.* at 1641.

⁵⁰ *Id.* at 1640-41.

⁵¹ *Id.* at 1645.

⁵² *Id.* at 1644.

⁵³ *Id.* at 1642-43.

employer.⁵⁴ Nevertheless, a court is will likely find due process violations if the arbitration agreement is shown to be blatantly unfair such as selecting a biased arbitrator, limiting damages, unreasonably locating the arbitration, or forcing the employee to arbitrate but allowing the employer to litigate.⁵⁵

Typically, an employee is also likely to prefer litigating in open court where there is transparency and public scrutiny as compared to a closed-door arbitration.⁵⁶ The fact that litigation takes place in a public forum can be as beneficial to the employee as it is risky for an employer. The age-told tale of David and Goliath conjures up sympathy and support for the individual employee or class of employees who are perceived as wronged by a larger and more powerful employer. While these issues are largely based on human emotion, they are legitimate concerns for both employees and employers that have impassioned the debate further.

III) The EEOC's Position and 1997 Guidelines

In 1997, the EEOC took a strong position against pre-dispute mandatory arbitration by issuing broad policy guidance outlining its stance.⁵⁷ In the Background section, the policy explicitly states that it is incongruous with Supreme Court jurisprudence by noting that, “the Commission is not unmindful of the case law enforcing specific mandatory arbitration agreements, in particular, the Supreme Court’s decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 33 (1991). Nonetheless, for the

⁵⁴ *Id.*

⁵⁵ Colvin, *supra* note 37, at 585.

⁵⁶ Sternlight, *supra* note 4, at 1635.

⁵⁷ EEOC Notice No. 915.002, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (1997).

reasons stated herein, the Commission believes that such agreements are inconsistent with the civil rights laws.”⁵⁸ Despite a line of cases undermining this policy, it still stands today.

The EEOC’s main arguments are that federal civil rights laws are of national importance and that the federal government is uniquely responsible for the enforcement of federal employment anti-discrimination laws through the courts, which develop and interpret the law through a public judicial process.⁵⁹ Rooting federal civil rights laws in the constitutional, the EEOC guidelines identify Title VII, EPA, the ADA, and the ADEA as “part of a wider statutory scheme to protect employees in the workplace nationwide.”⁶⁰ The guidelines go on to say that Congress established the federal government as responsible for interpreting, administering, and enforcing this statutory scheme by creating the EEOC, authorizing the U.S. Department of Justice to litigate certain discrimination cases, and creating a private right of action in federal court for discrimination claims.⁶¹ The federal courts, the guidelines say, have been central to the development of the legal standards and doctrines in discrimination law through precedents.⁶² Moreover, it is the precedential value of litigation that allows the political process to function effectively. The guidelines emphasize that through public scrutiny of

⁵⁸ *Id.* at § I.

⁵⁹ *Id.* at § II-IV.

⁶⁰ *Id.* at § II citing *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 357 (1995), (a case in which the plaintiff was terminated and filed an ADEA claim against her employer before the employer discovered she been involved with legitimately terminable conduct).

⁶¹ *Id.* at § III.

⁶² *Id.* at § III. A.

judicial opinions in discrimination cases, the constitutional system of checks and balances triggers legislative action that advances the law.⁶³ Equally as important, court decisions in the public record can ensure remedies that are appropriate and encourage voluntary compliance by entities covered under the statutes.⁶⁴

The guidelines also assert that mandating arbitration for employment discrimination claims effectively “privatizes” enforcement of federal employment anti-discrimination laws into an inherently flawed system, thereby negatively impacting the federal government’s ability to enforce civil rights laws.⁶⁵ Without any critique of the justice system as having its own set of flaws, the guidelines denounce arbitration as an insufficient means of protecting federal rights because arbitration is different from litigation.⁶⁶ The guidelines then describe the major differences between arbitration and litigation that make arbitration an inadequate method of resolving employment discrimination claims.⁶⁷ These differences include the private versus public nature of the two forums, with a preference for public litigation, which allows for public scrutiny and accountability of both the process and the outcome.⁶⁸ The guidelines also claim that private mandatory arbitration stunts the progression of the law by failing to require arbitrators to publish decisions and reasoning, which can be particularly critical to the

⁶³ *Id.* at § III. B.

⁶⁴ *Id.* at § IV. C.

⁶⁵ *Id.* at § V.

⁶⁶ *Id.* at § V. A.

⁶⁷ *Id.* at § V.

⁶⁸ *Id.* at § V. A. 1.

enforcement of anti-discrimination laws.⁶⁹ Moreover, the guidelines state that the lack of juries, limited discovery, and resolution of cases in isolation rather than as a class (especially for claims of a pattern or practice discrimination where there is likely more than one plaintiff who has been adversely impacted by the employer's actions, policies, or procedures), further demonstrate arbitration as an inadequate means of resolving employment discrimination claims.⁷⁰

Next, the guidelines proclaim that arbitration is inherently biased against the individual employee because of the “repeat player” theory and because the employer, as the drafter of the arbitration provision in the employment agreement, is consequently in control of the process of arbitration.⁷¹ The EEOC points to a number of studies and statements that demonstrate inconsistent and unfair practices by employers who mandate pre-dispute arbitration as a condition of employment and ultimately concludes that mandatory arbitration should not be enforced in employment discrimination cases.⁷²

Another of the EEOC's concerns is that mandatory arbitration will negatively impact employees' awareness of a legislatively designed grievance system for employment discrimination claims – namely, filing a charge with the EEOC.⁷³ While this is a valid and important concern, pro-arbitration experts have countered by suggesting that mandatory arbitration does not preclude filing a charge with the EEOC and that the Court in *Gilmer* held as much when it said, “An individual ADEA claimant

⁶⁹ *Id.* at §. V. A. 2.

⁷⁰ *Id.* at V. A. 3.

⁷¹ *Id.* at V. B.

⁷² *Id.*

⁷³ *Id.* at V. C.

subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action.”^{74 75}

Finally, the EEOC guidelines support voluntary arbitration that is engaged in post-dispute as an alternative to mandatory arbitration.⁷⁶ It is not until nearly the end of the guidelines that the EEOC recognizes the court system has its own challenges such as prohibitive cost and unreasonable time spent in litigation and identifies these as benefits of arbitration; however, the guidelines still emphasize the judicial process as preferable to any form of arbitration.⁷⁷ The key factor highlighted in the guidelines is that the employee be able to freely decide which forum to use.⁷⁸ To that end, EEOC field offices “are instructed to closely scrutinize each charge involving an arbitration agreement to determine whether the agreement was secured under coercive circumstances (e.g., as a condition of employment)” and that charges will be filed despite any arbitration agreement.⁷⁹

IV) Congressional Response to the Expansion of Mandatory Arbitration

For several years after the guidelines were issued, the debate continued in this way, with parties on both sides fairly strong in their beliefs, and no clear bright-line rule from the Supreme Court or Congress. Eventually, an emotional and morally reprehensible case gained the attention of Congress. This case led to the passage of an

⁷⁴ Primm, *supra* note 4, at 168.

⁷⁵ *Gilmer* at 28.

⁷⁶ EEOC Notice No. 915.002 at § VI.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at § VII. 1.

amendment to the 2010 Defense appropriation bill that prohibited federal contracts of more than one million dollars to companies who mandated arbitration for any employment discrimination claim brought under Title VII or any sexual harassment or assault claims. Additionally, Senator Al Franken introduced new legislation barring all pre-dispute mandatory arbitration in certain contexts, including in employment disputes.⁸⁰

The story of Jamie Leigh Jones is both shocking and repugnant. At the age of 19, Jones went to Iraq to work for Kellogg Brown and Root (KBR), a former subsidiary of Halliburton. While there, Jones claims to have been drugged and gang-raped by seven of her male coworkers. After reporting the crime, Jones was examined by a medical doctor who provided the forensic evidence to her employer, KBR. Jones was then isolated and guarded until she was able to convince a guard to let her use his cell phone to call her father. Her father contacted his Congressional representative who requested that the local U.S. embassy intervene, which they did by removing Jones from the KBR facility.⁸¹

After the Fifth Circuit allowed Jones to litigate instead of enforce the mandatory arbitration in her employment contract, Jones filed a civil suit for 114 million dollars in damages.⁸² Because of the graphic nature of the alleged crimes and the high dollar figure Jones sought in damages, the case quickly garnered media attention, bringing the debate

⁸⁰ Arbitration Fairness Act of 2013 One-pager
<http://www.franken.senate.gov/files/documents/130507ArbitrationFairness.pdf> (last visit April 30, 2014).

⁸¹ *Jones v. Halliburton, Co.*, 583 F.3d 228, 230-32 (5th Cir. 2009).

⁸² *Woman loses Iraq rape case against contractor*, Associated Press (July 8, 2011),
http://www.nbcnews.com/id/43681446/ns/world_news-mideast_n_africa/t/woman-loses-iraq-rape-case-against-contractor/#.U2BT0q1dXXE.

about mandatory arbitration into the mainstream. The legislature was eventually forced to act and in 2008 Senator Al Franken (D-MN) introduced the Arbitration Fairness Act, which intends to amend the FAA such that pre-dispute mandatory arbitration would be prohibited in employment, antitrust, or civil rights disputes.⁸³ The bill garnered 23 co-sponsors and was referred to committee in 2013 but remains stalled in Congress to this day.⁸⁴ In response to the bill, the American Bar Association (ABA) issued a resolution supporting international commercial arbitration and opposing “federal, state and territorial legislation or regulations that would invalidate pre-dispute agreements to arbitrate international commercial disputes . . . [and] the enactment of any federal legislation intended to protect discrete classes as an amendment to the Federal Arbitration Act.”⁸⁵ In 2011, Jones’ lost her civil suit against KBR after a jury found against her and a few months later, the court ordered her to pay nearly \$150,000 in court costs.⁸⁶ On the day that the trial ended, a scathing article in Mother Jones claimed to disprove her allegations.⁸⁷

V) Future Predictions Based on Supreme Court Jurisprudence

⁸³ Arbitration Fairness Act of 2013 One-pager, *supra* note 75.

⁸⁴ S. 878: Arbitration Fairness Act of 2013, (last updated May 7, 2013), <https://www.govtrack.us/congress/bills/113/s878>.

⁸⁵ F. Peter Phillips, *ABA Resolution on “Arbitration Fairness Act,”* Business Conflict Blog (August 25, 2009), <http://businessconflictmanagement.com/blog/2009/08/aba-resolution-on-fairness-in-arbitration-act/> citing ABA House of Delegates Recommendation 2009 AM 114, August 3-4, 2009.

⁸⁶ *Jones v. Halliburton Co.*, No. 4:07-cv-271, 2011 WestLaw 4479119, (S.D.Tex. September 26, 2011).

⁸⁷ Stephanie Mencimer, *Why Jamie Leigh Jones Lost Her KBR Rape Case*, Mother Jones, July 7, 2011, available at <http://www.motherjones.com/politics/2011/07/kbr-could-win-jamie-leigh-jones-rape-trial>.

Despite the EEOC guidelines and indications of congressional intent, the Court under Chief Justice Roberts, has leaned towards the employer's position in the debate surrounding mandatory arbitration. Although the Court has not established a bright-line rule with regard to civil rights cases against employers, the Court does have the power to influence employer implementation of mandatory arbitration. After the 1991 *Gilmer* decision, employers quickly began including mandatory arbitration clauses in employment agreements such that in telecommunications field, for example, mandatory arbitration jumped from approximately two percent in 1992 to over sixteen percent in 1998.⁸⁸ Similarly, after *Concepcion*, legal advisers for large companies took notice of the opportunity to bar class-action employment claims by implementing pre-dispute mandatory arbitration and advocated for the inclusion of such provisions into employment agreements.⁸⁹

The ideal plaintiff to bring suit to resolve whether an employee can litigate a civil rights violation despite a pre-dispute mandatory arbitration agreement will present a set of facts that strongly persuade the Court one way or the other. For the individual employee and employee advocate groups, the ideal plaintiff would have to sway the Court to broadly ban pre-dispute mandatory arbitration in employment agreements. The plaintiff-employee would need to be able to demonstrate that his or her claims are of such egregious violations of constitutionally protected rights that they demand the review and

⁸⁸ Colvin, *supra* note 37, at 586-87.

⁸⁹ Arbitration Activism: How the Corporate court Helps Business Evade Our Civil Justice System, Alliance for Justice, 2013, <http://www.afj.org/wp-content/uploads/2013/12/Arbitration-Activism-Report-12162013.pdf>.

oversight of a judge – someone who is publicly authorized through election or appointment to uphold the constitution and the federal laws guaranteeing the rights that the plaintiff-employee claims were violated. In the workplace, as well as in other contexts, victims of sexual assault and sexual violence as well as victims of racial discrimination are among protected classes of plaintiffs under the law. Jamie Leigh Jones was the ideal plaintiff-employee for the Fifth Circuit not to enforce the mandatory arbitration provision in her employment contract⁹⁰ and to spur congressional action⁹¹; however, the Court dismissed the case⁹² at the request of both parties⁹³ and the cause for employee advocates fell short when her story began to fall apart.

For employers who are concerned with the expense and negative affect of litigation on their reputation, the ideal plaintiff would convince the Court that arbitration is a more efficient yet equally fair and adequate alternative to litigation. An employer defendant would be able to show that arbitration should be allowable based on principles of judicial efficiency as well as the benefits to the plaintiff him or herself. The employer-defendant would also argue that a blanket rule barring all arbitration in employment discrimination and civil rights cases would unnecessarily deny these benefits to both parties.

Nevertheless, given the history and make-up of the current Court, it is unlikely that the ideal plaintiff exists to persuade the Court to establish a bright-line rule opposing

⁹⁰ See generally *Jones v. Halliburton*, supra note 76.

⁹¹ See Arbitration Fairness Act of 2013, supra note 75.

⁹² Sup. Ct. R. 46.1.

⁹³ *KBR Technical Services Inc. v. Jones*, 130 S.Ct. 1756 (2010)

pre-dispute mandatory arbitration in employment discrimination cases. Additionally, the Court would likely hesitate to establish a blanket rule allowing mandatory arbitration in employment agreements due to strong opposition from employee advocacy groups and members of Congress. The more likely scenario is one in which Congress takes action by passing a new law banning this practice. In fact, some legal scholars have argued that Congress should amend the FAA to exclude pre-dispute mandatory arbitration for employees and consumers, thereby allowing states to regulate this phenomenon and ensuring that parties who do participate in pre-dispute arbitration agreements are on relatively equal footing.⁹⁴

Another alternative would be for Congress to establish a legislatively sanctioned arbitrating body that manages disputes through an administrative process. The process would be conducted by a federal agency such as the EEOC, which already attempts mediation and conciliation in all charges and adjudicates cases of discrimination against federal agencies, or the Department of Justice, which has special authorization under Title VII to enforce anti-discrimination laws against state and local government actors.⁹⁵ This is a model adopted by Great Britain⁹⁶ that allows for continued development of the law and ensures a public forum that is transparent and accessible by all, while still

⁹⁴ Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration: Towards a Preemptive Federal Arbitration Procedural Paradigm*, 42 Sw. L. Rev. 131 (2012).

⁹⁵ EEOC Notice No. 915.002, *supra* note 52, at § III.

⁹⁶ See generally Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. Miami L. Rev. 831, 849-50 (2001).

providing a less formal, more efficient system than litigation. The next section explores this model further as well as the approaches adopted by other countries.

V) Mandatory Arbitration in Employment Agreements: An Analysis of Brazil, France, Germany, South Africa, Spain, and the United Kingdom

The idea of a special tribunal or administrative system for adjudicating employment disputes is common in many other countries. For example, in Brazil, France, Germany, South Africa, Spain, and the United Kingdom, specialized labor courts have jurisdiction over employment disputes.⁹⁷ In Brazil, France, Germany, and the United Kingdom, there are either absolute prohibitions or otherwise restrictive measures placed on pre-dispute arbitration in employment disputes.⁹⁸

A. Arbitration v. Specialized Adjudicative Bodies

Brazil, France, and Germany, which all prohibit arbitration in employment disputes, have set up special labor courts – Superior Labor Court in Brazil, Conseils de Prud’homme in France, and Arbeitsgerichte in Germany – each with its own unique set of processes and procedures. In Brazil, the Superior Labor Court has jurisdiction over all employment and labor disputes.

In France, the Conseils de Prud’homme have primary jurisdiction over individual claims of statutory violations in employment cases, and five other courts have jurisdiction

⁹⁷ International Trends in Employment Dispute Resolution – Counsel’s Perspectives, *Worlds of Work: Employment Dispute Resolution Systems Across the Globe*, St. Johns Univ. Sch. of Law. and Fitzwilliam Coll., Cambridge Univ. (2011), 7-10, <http://www.proskauer.com/files/Event/f4ce52c8-78cb-4634-993f-6a188b827e63/Presentation/EventAttachment/18218ba8-fba8-4d9d-85e7-717a66791533/Agenda.pdf>.

⁹⁸ *Id.* at 1-5.

over specialized claims related to the equivalent of worker's compensation cases in the United States (Social Security Tribunal/Tribunal des Affaires de Sécurité Sociale), union representation claims (Lower Civil Court/Tribunal d'Instance), claims related to collective bargaining agreements (Higher Civil Court/Tribunal de Grande Instance) claims involving the Labor Inspection (Administrative Tribunal/Tribunal Administratif), and claims related to workplace crimes, including discrimination and harassment disputes (Criminal Court/Tribunal de Police and Tribunal Correctionnel).⁹⁹ The Conseils de Prud'homme are comprised of four panel member judges who are elected every four years, with equal representation for employee and employer advocacy.¹⁰⁰ The labor courts are further divided into five categories based on the professional fields and type of employment (executive, diverse activities, agriculture, commerce, and industry).¹⁰¹ Unique to the French model, the disputants may argue their cases orally, without the need for any submitted briefings or legal representation.¹⁰² Mediation is allowable but is typically managed by a judge. While pre-dispute arbitration is generally prohibited, disputants may voluntarily enter into arbitration after the employment relationship has ended.¹⁰³

The German Arbeitsgerichte and the UK Employment Tribunals are both presided over by three judges.¹⁰⁴ In the German context the three judges include an employee

⁹⁹ *Id.* at 7.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 2.

¹⁰³ *Id.* at 3.

¹⁰⁴ *Id.* at 7,9.

advocate, an employer advocate, and a neutral, and have jurisdiction over claims based on breach of contract, collective bargaining and union disputes, and claims between coworkers.¹⁰⁵ In the UK, the three judges include an employment lawyer and two “lay members,” one who represents the employee and the other who represents the employer perspective based on their own professional backgrounds, and have jurisdiction over statutory claims.¹⁰⁶ Disputes beyond those based on statutory violations are generally dealt with in civil courts.¹⁰⁷ Similar to the German model, the Spanish system includes a special court (Juzgados de lo social) to adjudicate employment disputes.¹⁰⁸

Most interestingly, the South African model of an independent administrative agency authorized to conduct alternative dispute resolution closely resembles the work of the EEOC. In South Africa, the Commission for Conciliation, Mediation and Arbitration (CCMA) serves as the primary adjudicator in workplace disputes.¹⁰⁹ Similar to EEOC field offices, individuals can submit their claims to their provincial CCMA office, which then attempts conciliation before arbitrating the dispute.¹¹⁰ Additionally, under the Labor Relations Act, Bargaining Councils and private agencies may be authorized and licensed to adjudicate employment disputes through the same process of conciliation and arbitration.¹¹¹ Finally, a special court exists to decide cases related to freedom of

¹⁰⁵ *Id.* at 8.

¹⁰⁶ *Id.* at 9.

¹⁰⁷ *Id.* at 10.

¹⁰⁸ *Id.* at 9.

¹⁰⁹ *Id.* at 4.

¹¹⁰ *Id.* at 8.

¹¹¹ *Id.* at 8-9.

association and termination.¹¹² In cases related to discrimination, including sex-based discrimination, the court steps in as soon as conciliation by the CCMA or the Bargaining Council fails.¹¹³

B. Adjudication Process Length

As evidenced by a snapshot look at these six countries, there are many alternative approaches to pre-dispute mandatory arbitration that can be as efficient and cost-effective without forcing employees to waive their right to use the judicial system. The length of time to resolve a claim varies from one month to several years across the six countries, with the more inclusive and developed process in South Africa being the most efficient, despite a backlog of one to three months for conciliation conducted by the provincially-based CCMA offices.¹¹⁴ In Brazil, France, and the UK it can take from six months to four years (Brazil) to resolve an issue, while in Germany it takes between two to six months, and Spain it takes about seven months.¹¹⁵

C. Right to Appeal

Parties have the right to appeal in all of special tribunal established in Brazil, France, Germany, Spain and the UK.¹¹⁶ In South Africa, appeals of CCMA decisions are only allowed in certain circumstances related to procedural error, arbitrator misconduct,

¹¹² *Id.* at 9.

¹¹³ *Id.* at 16.

¹¹⁴ *Id.* at 27.

¹¹⁵ *Id.* at 26-27.

¹¹⁶ *Id.* at 23-25.

or improper award.¹¹⁷ Cases that are heard by the Labor Court, however, are appealable.¹¹⁸

D. Discovery

Discovery rules vary from country to country but are generally liberal towards allowing discovery. In Brazil, the judge determines whether evidence is relevant to the case before compelling discovery and keeps sensitive evidence private at the request of either party.¹¹⁹ In France, Germany, and Spain, each disputant determines what evidence it wants to disclose; however, in France, one side may ask the court to compel disclosure by the other party and in Germany, where the employer has the burden of proof in discrimination cases, it must disclose negative evidence.¹²⁰ In South Africa, discovery rules vary between the CCMA, where disputants usually come to an agreement on discovery at a pre-hearing, and the Labor Court, where discovery rules are formal and require disclosure of all evidence that is not subject to attorney-client privilege or work-product protection.¹²¹ In the UK, discovery rules are formal and require disputants to submit evidence within their control as well as evidence for which they have made a “reasonable” search.¹²² Parties cannot object to discovery requests on the basis of

¹¹⁷ *Id.* at 24.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 20.

¹²⁰ *Id.* at 20-21.

¹²¹ *Id.* at 20.

¹²² *Id.* at 21.

confidentiality concerns, though parts of evidence may be redacted and the other party may not use the information outside of litigation.¹²³

E. Damages

The issue of damages varies across the six countries as well. While most do not allow punitive damages (France, Germany, Spain), South Africa and the United Kingdom have a more comprehensive system for determining damages, including punitive damages.¹²⁴ In Brazil, damages are awarded at the discretion of the judge.¹²⁵ In France, while there are no punitive damages available, the French system attempts to make the plaintiff whole through compensatory damages for which minimum amounts are pre-determined in employment cases.¹²⁶ Germany uses a similar approach to award damages and though there are not minimum amounts, plaintiffs can seek reinstatement and back pay.¹²⁷ Likewise in Spain, plaintiffs can receive compensatory damages based on their salary level as well as reinstatement and back pay.¹²⁸

The determination of damages in the United Kingdom and South Africa is more complex. In the UK, employees have a duty to mitigate potential damages and punitive damages are typically not awarded except if the employer-defendant is found to be guilty

¹²³ *Id.* at 21.

¹²⁴ *Id.* at 30-31.

¹²⁵ *Id.* at 30.

¹²⁶ *Id.*

¹²⁷ *Id.* at 30-31.

¹²⁸ *Id.* at 31.

of discrimination.¹²⁹ Additionally, although there is not a minimum amount for compensatory damages, there is a cap of £80,400 for non-discrimination cases.¹³⁰

Finally, in South Africa, the CCMA has the authority to award damages.¹³¹ The CCMA may reinstate the plaintiff-employee or pay compensatory damages, which are capped at twenty-four or twelve months' salary depending on the type of adverse employment action.¹³² Alternatively, if a case proceeds to the Labor Court, damages are statutorily pre-determined as being calculated from the day of termination to the day of adjudication and capped at twelve months' salary.¹³³

**F. Summary: Brazil, France, Germany, South Africa, Spain, and
the United Kingdom**

The above detailed data from the *Worlds of Work: Employment dispute Resolution Systems Across the Globe* report,¹³⁴ demonstrates that approaches to employment disputes vary among industrialized nations. Additionally, discrimination cases in the employment context are often treated separately to ensure a fair and just process. All six of the countries analyzed included special tribunals or administrative procedures to adjudicate employment disputes, including any alternative dispute resolution process allowed in each respective judicial system. Within each of these systems, however, rules regarding appeals, discovery, and damages ranged from formal

¹²⁹ *Id.* at 32.

¹³⁰ *Id.*

¹³¹ *Id.* at 31.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ International Trends in Employment Dispute Resolution – Counsel's Perspectives, *Supra* note 92.

timelines and rules to informal procedures based on pre-resolution agreements among the parties. Despite the differences among the six systems reviewed above, there was a common effort to ensure a fair and just process for both sides.

VI) Conclusion

This paper has analyzed pre-dispute mandatory arbitration clauses in employment agreements from the employee and employer perspectives, as well as the legislative and Supreme Court jurisprudence from the establishment of the FAA to the present. Through an objective analysis, as well as an exploration of six other industrialized nations' approaches to the topic, I have found that the U.S. approach is inadequate for both sides of the issue. While arbitration can be more efficient than court proceedings, it falls short of providing the constitutional protections necessary when there is a violation of federal civil rights statutes. Arbitration is in fact sometimes a more effective means of resolving employment disputes; however, federal statutes require government protections for claimants in disputes involving discrimination or sexual harassment. Therefore, these protections should be instituted in a more comprehensive arbitration system that is sanctioned by an existing independent federal agency – namely, the EEOC. An administrative adjudication process that involves arbitration of employment disputes related to discrimination would offer the same benefits as private arbitration – cost and time efficiency as well as more control over the process and outcomes – while continuing to protect the constitutional rights of claimants – both employees and employers who are concerned about restitution and impact of public opinion in this context. It is clear that private parties will continue to use arbitration as an alternative to litigation. The U.S.

Congress should take a proactive role in establishing a comprehensive process that provides consistent results for disputants. To that end, the U.S. Congress should consider the South African and UK models for employment disputes involving violations of federal civil rights statutes, and especially discrimination and sexual harassment claims.