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Gnawing at Gilmer: Giving Teeth to "Consent" in Employment Arbitration Agreements

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Gnawing at *Gilmer*: Giving Teeth to "Consent" in Employment Arbitration Agreements

Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 1999 WL 80964 (1st Cir. 1999).

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At the age of forty-five, Susan Rosenberg began a new career in the securities industry and entered Merrill Lynch's twenty-four-month training program for financial consultants in 1992.[1] She signed a standard "U-4" securities industry application form, which contained a provision requiring arbitration of "any dispute, claim or controversy that may arise" with her employer in accordance with policies of the various stock exchanges.[2] When Merrill Lynch terminated her employment two years later, Rosenberg sued, claiming age discrimination under the Age Discrimination in Employment Act ("ADEA")[3] and sexual harassment under Title VII.[4] She asserted that her job performance was superior to that of at least four younger, male consultants who remained employed and alleged that a supervisor had once handed her a phallus-shaped vibrator when she collected documents from his office.[5] Merrill Lynch moved to stay her suit and compel arbitration under the dispute resolution system of the New York Stock Exchange ("NYSE").[6]

Whatever the merit of Rosenberg's claims, her prospects of proceeding in federal court appeared bleak in light of the Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*,[7] which compelled arbitration of a securities dealer's ADEA claims based on the U-4 form's arbitration clause. For all practical purposes, Rosenberg was relitigating

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1. *See* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 1999 WL 80964, at *2 (1st Cir. 1999). An opinion in this case was initially filed on December 22, 1998, printed at 163 F.3d 53, and subsequently withdrawn at the request of the court. It still can be viewed at 1998 U.S. App. LEXIS 32522. The superseding modified opinion, cited here, was filed February 24, 1999.

2. *See id.* at *2.

3. 29 U.S.C. §§ 621-634 (1994).

4. 42 U.S.C. §§ 2000e(1) to (17) (1994); *see id.* at *3.

5. *See id.* at *2.

6. *See id.* at *1.

7. 500 U.S. 20 (1991).

the substance of *Gilmer*, with a Title VII claim thrown into the mix. Yet the First Circuit allowed Rosenberg's suit to proceed both because of Merrill Lynch's breach of a narrow minimal "notice" requirement the Court inferred from the Civil Rights Act of 1991 ("CRA")[8] and the Supreme Court's recent refusal to enforce the arbitration clause of a collective bargaining agreement in *Wright v. Universal Maritime Corp.*[9] The First Circuit held that Rosenberg's waiver of a judicial forum in her U-4 application was not a valid contract because Merrill Lynch had not acquainted her with the NYSE rules and had thus failed to define the range of claims subject to arbitration.[10]

This Case Note argues that while the *Rosenberg* court ruled correctly, the contract doctrine and notice requirement that it applied were too narrow and, as the dissent pointed out, lacking support in the factual record. Instead, particularly given the importance of judicial procedural protections and the right to a jury trial under Title VII, it should have imposed a more stringent requirement of "voluntary and knowing"[11] consent to trim the excesses of *Gilmer* and its progeny.

Part I of this Case Note describes the basic legal framework governing mandatory arbitration of statutory employment claims. Part II explores the circuit split over enforceability of arbitration clauses in collective bargaining agreements. This split ironically centers on the notion of informed consent to arbitrate, even as *Gilmer* and its progeny rendered consent meaningless. Part III outlines the circuit split over the enforceability of arbitration in Title VII cases generally. Part IV reviews tentative steps to limit *Gilmer* and restore a role for consent in evaluating the validity of arbitration agreements, particularly in Title VII actions. It places the *Rosenberg* decision in context and outlines the informed consent standard that the court should have adopted.

I.

The enforceability of mandatory arbitration clauses in workplace disputes over statutory rights has become one of the most unsettled and

8. Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991) (reprinted in notes to 42 U.S.C. § 1981 (1994)).

9. 119 S. Ct. 391 (1998).

10. *See Rosenberg*, 1999 WL 80964, at *20-21.

11. Heightened scrutiny of consent is commonly applied to waivers of substantive rights. *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458, 465 (1938) (requiring an "intelligent and competent" waiver of the right to counsel in a federal criminal trial). In the arbitration context, a "knowing and voluntary" standard was first suggested by a footnote in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974).

controversial questions in employment law.[12] One strand of debate focuses on the procedural merits of alternative dispute resolution ("ADR") mechanisms and their capacity to dispense substantive justice.[13] Like it or not, however, ADR has rapidly become a privatized parallel justice system, a major instrument for resolving disputes that would otherwise end up in litigation.[14] The Supreme Court has ruled that litigants may waive their rights to adjudication in Article III courts,[15] and legal controversy thus hinges on the standards of consent to a valid waiver and the circumstances under which courts can compel arbitration. In the employment context, federal appeals courts have split over the enforceability of arbitration clauses both in collective bargaining agreements and with regard to claims brought under Title VII.[16]

Relevant case law has developed between the goalposts of two Supreme Court precedents: *Alexander v. Gardner-Denver*[17] and *Gilmer*. In *Gardner-Denver*, a unanimous Court ruled that an employee's submission of a discrimination claim to arbitration under a collective bargaining agreement ("CBA") did not preclude him from bringing a lawsuit under Title VII.[18] The arbitration clause in question required that the arbitrator's decision "be based solely upon an interpretation of the provisions" of the contract.[19] The arbitrator could not "invoke public laws."[20] While the contract contained its own anti-discrimination clause, the Court held that "the distinctly separate nature of... contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence."[21] Moreover, the Court explained, "an employee's rights under Title VII are not susceptible of prospective waiver" in a collective bargaining agreement.[22] Finally, the Court expressed grave res-

12. *See generally* Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 COOLEY L. REV. 1 (1998).

13. For a critique of ADR, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). In support of ADR, see St. Antoine, *supra* note 12, at 7–8 (explaining that pre-dispute mandatory arbitration agreements may promote the greatest good for the greatest number of plaintiffs because lawyers are unlikely to bring most meritorious but small claims in court, while employers are unlikely to offer post-dispute arbitration of small claims knowing that they are unlikely to make it into court).

14. *See* Vicki Zick, *Reshaping the Constitution To Meet the Practical Needs of the Day: The Judicial Preference for Binding Arbitration*, 82 MARQ. L. REV. 247, 247 (1998).

15. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986).

16. *See infra* Parts II and III, respectively.

17. 415 U.S. 36 (1974).

18. *See id.*

19. *Id.* at 42.

20. *Id.* at 53.

21. *Id.* at 50.

22. *Id.* at 52.

ervations about the fairness of arbitration, finding it unlikely that "arbitral processes are commensurate with judicial processes."[23]

In *Gilmer*, the Court held that the broadly worded arbitration agreement in a securities representative's U-4 license application form compelled him to arbitrate statutory claims against his employer under the ADEA.[24] The majority opinion abandoned the Court's previous "suspicion of arbitration as a method of weakening the protections afforded in the substantive law."[25] The decision reflected the growing popularity of ADR as a means to clear crowded federal court dockets and marked a natural extension of the "liberal federal policy favoring arbitration" that the Court had announced as early as 1983.[26]

Still, the Justices did not explicitly repudiate *Gardner-Denver* and distinguished *Gilmer* on three grounds. First, unlike *Gilmer*, *Gardner-Denver* "did not involve the issue of the enforceability of an agreement to arbitrate statutory claims."[27] In the U-4 form *Gilmer* had signed, he agreed to arbitrate all employment-related claims and thus did not "forgo the substantive rights afforded by the statute ... [but] submits to their resolution in an arbitral, rather than judicial, forum."[28] Second, *Gardner-Denver* involved arbitration under a collective bargaining agreement, raising the specter of "tension between collective representation and individual statutory rights, a concern not applicable" in *Gilmer*.[29] Third, the Federal Arbitration Act ("FAA"),[30] which had not applied in *Gardner-Denver*, lent an additional presumption for enforcement of mandatory arbitration in *Gilmer*.[31]

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23. *Id.* at 56.

24. *See Gilmer*, 500 U.S. at 21.

25. *Id.* at 30 (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989)).

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

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

28. *Id.* at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

29. *Id.* at 35.

30. 9 U.S.C. §§ 1-16 (1994). Section 2 states that "an agreement in writing to submit to arbitration ... shall be valid, irrevocable, and enforceable." Section 3 authorizes a stay of any proceedings in federal court pending arbitration.

31. *See Gilmer*, 500 U.S. at 35. In his *Gilmer* dissent, Justice Stevens argued that the legislative history of the FAA shows that Congress sought to exclude employment contracts from the purview of the statute altogether. *See Gilmer*, 500 U.S. at 39 (Stevens, J., dissenting). Circuit courts are split on the applicability of the FAA in different employment contexts. *See* Pryner v. Tractor Supply Co., 109 F.3d 354, 357 (7th Cir. 1997) (surveying various circuits' interpretations of FAA applicability to employment). Debate over interpretation of the FAA is beyond the scope of this Case Note and is likely to be of limited importance in an age where ADR has become a widely used and accepted parallel justice system. *See generally* Zick, *supra* note 14. The initial purpose of the FAA, adopted in 1925, was "to reverse the longstanding judicial hostility to arbitration agreements." *Gilmer*, 500 U.S. at 24. Today, even if particular employment con-

II.

In cases with broadly worded arbitration clauses, courts have reconciled *Gardner-Denver* and *Gilmer* by drawing a bright-line distinction between individual employment contracts and collective bargaining agreements. Circuit courts have tended mechanically to apply the holding in *Gilmer* to enforce arbitration clauses in cases of individual employee contracts.[32] A series of opinions likewise follows *Gardner-Denver*, rejecting arbitration clauses in collective bargaining agreements.[33]

The courts have distinguished these cases in terms of valid "consent" to forgo a judicial forum and arbitrate statutory claims. For instance, the *Gilmer* Court declared simply, "[h]aving made the bargain to arbitrate, the party should be held to it."[34] Whereas individual employees such as the plaintiff in *Gilmer* can choose to arbitrate, a "union cannot consent *for* the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement."[35]

This consent-based distinction rings hollow upon thoughtful examination, however. A modicum of "consent" is more likely to exist in the context of a union contract, where any arbitration clause has probably resulted from an actual bargaining process. Union negotiators seem at least likely to be aware of any arbitration provisions and may even have extracted reciprocal concessions from the employer in exchange for consent on behalf of employees to arbitrate. The arbitration agreement at issue in *Gilmer*, by contrast, was essentially a contract of adhesion contained in the fine print of a standardized form required of all applicants to the position of securities representative. The Court did not inquire whether Mr. Gilmer knew of and explicitly accepted the arbitration clause, and it summarily dismissed concerns about the disparity of bargaining power

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tracts fall outside the scope of the FAA, "it is unclear what difference it would make .... The parties' agreement [to arbitrate] would still be a contract." Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1472 (D.C. Cir. 1997). "An agreement to arbitrate is treated like any other contract." Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1130 (7th Cir. 1997) (quoting Kresock v. Bankers Trust Co., 21 F.3d 176, 178 (7th Cir. 1994)).

32. *See, e.g.*, McWilliams v. Logicon, Inc., 143 F.3d 573, 576 (10th Cir. 1998); *Gibson*, 121 F.3d 1126, 1130 (rejecting arbitration agreement on other grounds); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 837 (8th Cir. 1997); Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 229 (3d Cir. 1997); *Cole*, 105 F.3d 1465, 1467; Rojas v. TK Communications, Inc., 87 F.3d 745, 748 (5th Cir. 1996); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 307 (6th Cir. 1991).

33. *See, e.g.*, Penny v. United Parcel Serv., 128 F.3d 408, 412 (6th Cir. 1997); Brisentine v. Stone & Webster Eng'g Corp., 117 F.3d 519, 525 (11th Cir. 1997); Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1454 (10th Cir. 1997); *Pryner*, 109 F.3d 354, 365; Varner v. National Super Markets, Inc., 94 F.3d 1209, 1213 (8th Cir. 1996).

34. 500 U.S. at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

35. *Pryner*, 109 F.3d at 363.

between the parties.[36] Even if Gilmer did knowingly waive his right to a judicial forum for statutory claims, his consent can hardly be called part of a "bargain."

Some courts have acknowledged that the issue of consent may not distinguish *Gardner-Denver* from *Gilmer*, but have refrained from abandoning this approach altogether. As Judge Posner wrote in *Pryner v. Tractor Supply Co.*,[37] perhaps the real "tension between collective representation and individual statutory rights" separating *Gardner-Denver* from *Gilmer* lies not in consent to arbitrate, but in the conduct of arbitration procedures.[38] In *Gardner-Denver*, the union controlled access to grievance and arbitration procedures, and it would represent the employee in all proceedings, whereas "Gilmer's access to arbitration, if a dispute arose, was not controlled by a union, or any other entity or individual."[39] Judge Posner did not probe this possibility further, however, and simply concluded that "[a]t all events the Court treated his [Gilmer's] situation as different from Alexander's."[40] While "consent" might not define the issue, Judge Posner declined to find that *Gilmer* overruled *Gardner-Denver* without a clear signal from the Supreme Court and did not enforce the arbitration clause of the instant CBA.[41]

The Fourth Circuit has been less timid in discarding "consent" analysis, and has held that *Gilmer* effectively overruled *Gardner-Denver*. It consistently enforces arbitration of statutory claims that arise under collective bargaining agreements. In *Austin v. Owens-Brockway Glass Container, Inc.*,[42] the court simply declared that a collective bargaining agreement to arbitrate is voluntary and no different from an individual employee's: "Whether the dispute arises under a contract of employment growing out of securities registration application [sic], a simple employment contract, or a collective bargaining agreement, an agreement has yet been made to arbitrate the dispute . . . and we are of opinion it should

36. *See Gilmer*, 500 U.S. at 33.

37. 109 F.3d 354 (7th Cir. 1997).

38. *See id.* at 364.

39. *Id.* at 364; *see also Gilmer*, 500 U.S. at 35 ("[B]ecause the arbitration . . . occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings."); *Gardner-Denver*, 415 U.S. at 58 n.19 ("A further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented.").

40. *Pryner*, 109 F.3d at 364.

41. *See id.* at 365.

42. 78 F.3d 875 (4th Cir. 1996).

be enforced."[43] The Fourth Circuit has applied this holding consistently in a series of per curiam opinions.[44]

III.

Beyond this dispute over consent, a circuit split has also emerged over differences between Title VII rights and other statutory claims. In *Duffield v. Robertson Stephens & Co.*,[45] the Ninth Circuit concluded that Title VII claims should not be subjected to mandatory arbitration.[46] Section 118 of the Civil Rights Act of 1991, amending Title VII, provides that "Where *appropriate* and to the extent *authorized by law*, the use of alternative means of dispute resolutions, including... arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title."[47] The holding in *Gardner-Denver* effectively prohibited enforcement of arbitration agreements at the time when this statutory text was drafted, and thus the *Duffield* court concluded that Congress sought only to encourage arbitration by mutual choice of the parties after a dispute had arisen; enforcement of pre-dispute arbitration agreements would not be "appropriate" or "authorized by law" under the prevailing *Gardner-Denver* regime.[48] *Duffield* also cited a congressional committee report that stated that arbitration agreements should not preclude potential plaintiffs from pursuing other Title VII enforcement remedies.[49]

The opinion in *Gilmer* does not, on its face, exclude the possibility that mandatory arbitration agreements could be treated differently in Title VII cases. The view that Title VII claims are somehow unique finds support in dicta from *Gardner-Denver*: "The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal."[50] Without referencing specific statutes, *Gilmer* left open the possibility of rejecting an arbitration agreement if "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.... If such an intention

43. *Id.* at 885.

44. *See, e.g.*, Gingles v. Bethlehem Steel Corp., No. 97-2168, 1998 WL 196606 (4th Cir. Apr. 22, 1998) (per curiam); Wright v. Universal Maritime Serv. Corp., No. 96-2850, 1997 WL 422869 (4th Cir. July 29, 1997) (per curiam), *rev'd*, 119 S. Ct. 391 (1998).

45. 144 F.3d 1182 (9th Cir. 1998).

46. *See id.* at 1194.

47. Pub. L. 102-166, § 118, 105 Stat. 1071, 1081 (1991) (reprinted in notes to 42 U.S.C. § 1981 (1994)) (emphasis added).

48. *See Duffield*, 144 F.3d at 1194-95.

49. *Id.* at 1195-96 (quoting H.R. REP. NO. 40(I), at 97 (1991)).

50. 415 U.S. at 56.

exists, it will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes."[51]

But *Duffield*'s holding of Title VII exceptionalism breaks a strand of post-*Gilmer* cases that began with *Alford v. Dean Witter Reynolds, Inc.*[52] *Alford* was remanded by the Supreme Court for reconsideration in light of *Gilmer*, and it ultimately enforced mandatory arbitration of Title VII claims.[53] While the strong wording of the congressional committee reports cited in *Duffield* might seem compelling, the Ninth Circuit itself had ruled earlier that Title VII and the ADEA, at issue in *Gilmer*, "are similar in their aims and substantive provisions."[54] Moreover, Congress repeatedly rejected legislation that would have barred pre-dispute arbitration agreements explicitly.[55] Finally, despite murky legislative history, the text of the 1997 amendments to Title VII nevertheless "encourage" arbitration.[56] Thus a blanket Title VII exception seems unlikely to gain currency in other circuits or withstand Supreme Court scrutiny if and when the issue is taken up.

IV.

Several courts have sought to stem the sweep of compulsory ADR by conducting an inquiry into "consent"—of the kind *Gilmer* ignored—based on the text and circumstances of arbitration agreements. *Rosenberg* falls squarely in this tradition and could have marked new limits on the reach of *Gilmer* if it had synthesized a "knowing and voluntary" standard for arbitration agreements from the Supreme Court's decision in *Wright v. Universal Maritime Service Corp.*[57] and evolving Title VII case law.

Before *Duffield's* broad exclusion of Title VII claims from mandatory arbitration, another Ninth Circuit panel also invoked special qualities of

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

52. 939 F.2d 229 (5th Cir. 1991).

53. *See id*; *see also* Mouton v. Metropolitan Life Ins. Co., 147 F.3d 453 (5th Cir. 1998); Seus v. John Nuveen & Co., 146 F.3d 175 (3d Cir. 1998); Patterson v. Tenet Healthcare Inc., 113 F.3d 832 (8th Cir. 1997); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1472 (D.C. Cir. 1997); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994).

54. Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 935 (9th Cir. 1992).

55. *See* Civil Rights Procedures Protection Act of 1997, H.R. 983, 105th Cong. (1997); S. 63, 105th Cong. (1997); Civil Rights Procedures Protection Act of 1996, H.R. 3748, 104th Cong. (1996); Civil Rights Procedures Protection Act of 1994, H.R. 4981, 103d Cong. (1994); S. 2405, 103d Cong. (1994).

56. Pub. L. 102-166, § 118, 105 Stat. 1071, 1081 (1991) (reprinted in notes to 42 U.S.C. § 1981 (1994)).

57. 119 S. Ct. 391, 396-97 (1998); *see supra* text accompanying note 9.

Title VII—not to bar arbitration entirely, but simply to raise the standard for any waiver that is proffered. In *Prudential Insurance Co. of America v. Lai*,[58] the court held that procedural protections of a judicial forum may be "particularly significant" in a sexual harassment context.[59] The court therefore concluded that "a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration."[60] This holding finds support in language from *Gardner-Denver* suggesting that any waiver of rights and remedies under Title VII must be "voluntary and knowing."[61]

In *Seus v. John Nuveen & Co.*,[62] the Third Circuit rejected the "knowing and voluntary" standard as "inconsistent" with the FAA and *Gilmer*.[63] Yet nothing in *Gilmer* explicitly prohibits this kind of inquiry, and the Ninth Circuit has continued to apply this standard in subsequent cases.[64]

The Supreme Court recently faced an opportunity to explore issues of consent when it granted certiorari to one of the Fourth Circuit's per curiam opinions enforcing the arbitration clause of a CBA in a suit under the Americans with Disabilities Act ("ADA").[65] Rather than directly confronting the issues dividing the circuits, however, the *Wright* Court limited its review to the specific wording of the arbitration clause itself. The Court held that "any CBA requirement to arbitrate must be particularly clear," and a waiver of any statutory right must be "clear and unmistakable."[66] While the right to a judicial forum to litigate discrimination claims is "not a substantive right,"[67] it is at least "of sufficient importance to be protected against less-than-explicit union waiver in a CBA."[68] In this case, the Court found that the CBA, which provided for arbitration of "[m]atters under dispute," might refer only to disagreements under the contract.[69] Of course, the arbitration clause in *Gilmer*, which applied to "any dispute, claim or controversy" was no more explicit and yet "was held to embrace federal statutory claims."[70] The difference, the

58. 42 F.3d 1299 (9th Cir. 1994).
59. *Id.* at 1305.
60. *Id.*
61. 415 U.S. at 52 n.15.
62. 146 F.3d 175 (3d Cir. 1998).
63. *See id.* at 184-85.
64. *See, e.g.*, Renteria v. Prudential Ins. Co. of America, 113 F.3d 1104 (9th Cir. 1997).
65. 42 U.S.C. §§ 12,101-12,213 (1994).
66. *Wright*, 119 S. Ct. 391, 396 (1998).
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 397.

Court explained, was that the "clear and unmistakable" standard applies only in the collective bargaining context.[71]

While *Wright* thus imposes more stringent requirements on the text of CBA arbitration clauses, Justice Scalia's coy language implies an endorsement of mandatory arbitration agreements that explicitly implicate statutory claims.

> Our conclusion that a union waiver of employee rights to a federal judicial forum for employment discrimination claims must be clear and unmistakable means that, absent a clear waiver, it is not "appropriate" ... to find an agreement to arbitrate. We take no position, however, on the effect of this provision in cases where a CBA clearly encompasses employment discrimination claims, or in areas outside collective bargaining.[72]

Although the Court declined to state a position, it would be odd to impose requirements on CBA arbitration clauses if such provisions would be ultimately unenforceable. The amicus brief of the National Academy of Arbitrators that proposed the "clear and unmistakable" standard adopted by the Court[73] expressed support for enlarging the jurisdiction of CBA arbitrators to statutory claims if "it is genuinely the intention of the parties to confer that jurisdiction."[74] Still, despite appearances that the scope of compulsory ADR might now extend into collective bargaining agreements, the Court balked at mechanical enforcement of arbitration clauses and appeared to sanction case-by-case scrutiny.[75]

Rosenberg distilled a minimal "notice" requirement to validate an arbitration agreement out of the Supreme Court's holding in *Wright*.[76] Justice Scalia explained in *Wright* that an arbitration clause in a collective bargaining agreement would not be "appropriate," as required by language in the ADA that is identical to that in the CRA, absent a "clear and unmistakable" waiver of a judicial forum.[77] While acknowledging that Scalia stipulated a lesser standard than "clear and unmistakable" would apply in private agreements, the *Rosenberg* court reasoned that Scalia had found "teeth," or concrete significance, in the CRA's use of the word "appropriate" that would require "some minimal level of notice

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71. *See id.*

72. *Id.* at n.2.

73. Brief of the National Academy of Arbitrators as Amicus Curiae in Support of Petitioner at 15, Wright v. Universal Maritime Serv. Corp., 119 S. Ct. 391 (1998) (No. 97-889).

74. *Id.* at 3.

75. *See Wright*, 119 S. Ct. at 395.

76. *See Rosenberg*, 1999 WL 80964, at *22.

77. *Wright*, 119 S. Ct. at 397 n.2. In relevant part, the ADA, like the CRA, states, "Where *appropriate* and to the extent authorized by law, the use of alternative means of dispute resolution, including...arbitration, is encouraged to resolve disputes arising under this chapter." 42 U.S.C. § 12212 (emphasis added).

to the employee that statutory claims are subject to arbitration."[78] Because Merrill Lynch did not acquaint Rosenberg with the NYSE arbitration rules, the court held that Merrill Lynch has to bear the risk of contractual incompleteness and could not enforce the arbitration agreement.[79]

The majority opinion in *Rosenberg* repeatedly emphasized the "limited"[80] nature of its ruling and explicitly declined to adopt a "knowing and voluntary" consent standard.[81] The court stated that Merrill Lynch would have prevailed had it "taken the modest effort required to make relevant information regarding the arbitrability of employment disputes available to Rosenberg."[82] The dissent highlighted the weakness of this position by pointing out that discovery was ongoing and the factual record as to "notice" provided by Merrill Lynch was incomplete.[83] There was no evidence that Merrill Lynch actively withheld information, and under traditional contract principles "Rosenberg was presumed to understand, and to be bound by, the plain terms of her U-4 agreement even if she were not furnished copies of the exchange rules at the time of signing."[84]

Rosenberg might have more compellingly required "knowing and voluntary" consent for arbitration of Title VII claims above and beyond traditional contract "notice" requirements. Explaining its reluctance to adopt this heightened standard, the court noted that while "[i]t is commonplace that waivers of certain rights, particularly substantive rights, are enforceable only if they are knowing and voluntary[,] . . .[w]hether a standard similar to the one that applies to rights such as the right to counsel should apply to waivers of a judicial forum is an open question."[85] The court rejected *Rosenberg*'s *Duffield*-inspired argument for the absolute exclusion of Title VII claims from mandatory arbitration,[86] but it would not have been inconsistent with this holding for it to find, on the basis of *Gardner-Denver* and *Lai*, that Title VII claims require heightened scrutiny for informed consent.

The Supreme Court in *Wright* found that access to a judicial forum was worth protecting in an ADA case.[87] Such access would seem even

78. *Rosenberg*, 1999 WL 80964, at *21-22.
79. *See id.* at *20.
80. *Id.* at *22.
81. *See id.* at *19.
82. *Id.* at *22.
83. *See id.* at *23 (Wellford, J., dissenting).
84. *Id.* at *24.
85. *Id.* at *18 (citations omitted).
86. *See id.* at *17.
87. *See Wright v. Universal Maritime Serv. Corp.*, 119 S. Ct. 391, 396 (1998)

more fundamental in a Title VII context, where employees subjected to arbitration "would be surrendering their right to trial by jury—a right that civil rights plaintiffs . . . fought hard for and finally obtained in the 1991 amendments to Title VII."[88] A ruling imposing a "knowing and voluntary" standard on arbitration agreements would have been consistent with the ruling in *Gilmer* and yet preserved for employees whose civil rights have been violated their statutorily guarded day in court.

88. Pryner v. Tractor Supply Co., 109 F.3d 354, 362 (7th Cir. 1997).