

# BALANCING EFFICIENCY AND JUSTICE: IN SUPPORT OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION’S POLICY STATEMENT REGARDING MANDATORY ARBITRATION AND EMPLOYMENT CONTRACTS

GINA K. JANEIRO\*

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## INTRODUCTION

A woman applies for a job.<sup>1</sup> A condition stipulated on the applica-

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\* J.D. Candidate, Washington College of Law at American University, 1999; B.S. Univer-

tion for employment states that as an employee of the company, she must,

submit any dispute related to my employment, or the termination of my employment, to final and binding arbitration (thus waiving any right to pursue any other administrative and/or legal proceeding), and, as a condition of my employment, I agree to sign [this] Arbitration Agreement upon commencement of my employment, and to abide by the Arbitration Agreement and . . . Binding Arbitration Policy and Procedures.<sup>2</sup>

She signs the application.<sup>3</sup> A few weeks after the company hires her, it requires her signature on an additional "Arbitration Agreement," described in the aforementioned application.<sup>4</sup> The "Arbitration Agreement" requires her to resolve all employment discrimination claims, including statutory claims based on sex, through binding arbitration.<sup>5</sup> She again signs the agreement.<sup>6</sup> Regretfully, however, as with many employees, she signs the agreement without a complete understanding of the rights she is waiving under Title VII of the Civil Rights Act of 1964 ("Title VII").<sup>7</sup>

Soon after beginning work, and signing the agreement, her supervisor begins to sexually harass her.<sup>8</sup> The branch manager is aware of the harassment, but does nothing to stop it.<sup>9</sup> She retains counsel and files an action in state court pursuant to the state employment anti-discrimination law.<sup>10</sup> The district court grants the employer's motion to compel arbitration, based on her signed "Arbitration Agreement."<sup>11</sup> She is left with only one option: to arbitrate her sexual har-

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city of Wisconsin-La Crosse, *highest honors*, 1996. I would like to thank my family, friends and the staff of the *American University Journal of Gender, Social Policy & the Law* for their assistance and support.

1. *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 224 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 299 (1997). The facts described in the introduction are the facts found by the court in *Peacock*. See also *infra* Part IV.A.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 224 (3d Cir. 1997).

7. See 42 U.S.C. §§ 2000e-1-17 (1994) (protecting employees against discrimination by providing remedial measures).

8. See *Peacock*, 110 F.3d at 225 (including making unwanted sexual advances and threatening revenge should she report his behavior).

9. See *id.* (noting that the manager engaged in questionable sexual behavior herself by suggesting that Peacock use sexual advances to improve business results).

10. See *Peacock*, 110 F.3d at 225 (relying on New Jersey anti-discrimination law, N.J. STAT. ANN. § 10:5-1 (West 1993)).

11. *Id.*

assessment charge in front of an arbitrator who may be biased<sup>12</sup> and who may have little or no training or practice in arbitrating Title VII sexual harassment claims.<sup>13</sup>

The aforementioned situation is not uncommon. An increasing number of employers require their employees to sign pre-dispute agreements<sup>14</sup> mandating that all employment disputes be resolved through binding arbitration.<sup>15</sup> As a result, employers win suits more often than employees through the use of arbitration procedures.<sup>16</sup>

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12. See William M. Howard, *Arbitrating Employment Discrimination Claims: Do You Really Have To? Do You Really Want To?*, 43 DRAKE L. REV. 255, 287 (1994) (stating that employees who use mandatory arbitration may be hampered by the lack of diversity among arbitrators in regards to ethnicity, gender, educational background, financial resources, and social status, where arbitrators are typically chosen from a panel composed of 97% white males with an average age of 60).

13. See Deborah Masucci & Robert S. Clemente, *Securities Arbitration at Self Regulatory Organizations: New York Stock Exchange, Inc., and National Association of Securities Dealers, Inc.—Administration and Procedure*, in 1 SECURITIES ARBITRATION 1994, 44, 66-70 (PLI Corp. Law & Practice Course Handbook Series No. B-851, 1994) (indicating that arbitrators are not required to have knowledge of civil rights law); see also Helen R. Neuborne, *Arbitration of Sexual Harassment*, in ARBITRATING SEXUAL HARASSMENT CASES, 1-49 (Vern E. Hauck ed., 1995) (arguing that arbitrators need to take responsibility for understanding workplace dynamics and the problems women face regarding sexual harassment).

14. For example, Michael F. Hoellering, General Counsel of the American Arbitration Association (“AAA”), the country’s largest provider of alternative dispute resolution (“ADR”) services, stated that, “95% of the arbitrations handled by the AAA are submitted by parties who have agreed on arbitration before a dispute arose.” *AAA General Counsel Discusses Nonunion Employment Disputes*, EMPL. POL. & L. DAILY (BNA) at D9 (Feb. 17, 1995). See also R. Gaull Silberman, Susan E. Murphy, & Susan P. Adams, *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1533, 1536 (1994) (noting that employers are increasingly adopting internal ADR methods, and stating “[a]s ADR procedures [such as arbitration] have improved and litigation grown more time-consuming and costly, doubts about whether ADR should play any role in civil rights enforcement have significantly diminished”).

15. See *EEOC Policy Statement on Mandatory Arbitration*, 133 Daily Lab. Rep. (BNA) at E-4 (July 11, 1997) [hereinafter *EEOC Policy*] (taking the position that agreements mandating binding arbitration of discrimination claims as a condition of employment are contrary to the policy of employment discrimination laws, yet the number of these agreements continues to increase); see also Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims With Special Reference to the Three As—Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231 (1996) (observing that more and more companies are using mandatory arbitration); John Finotti, *Locked Out: Many Employers Require Workers to Sign Away Their Right To Sue*, THE FLA. TIMES-UNION (Jacksonville), Aug. 31, 1997, at G1, available in 1996 WL 11325012, at \*1 (stating that over the past few years, 300 companies, employing three million people nationwide, have implemented various alternative dispute employment programs, and the number is estimated to continue to grow); Roy Furchgott, *Binding Arbitration Contracts Putting Employees in Bind*, AUSTIN AM. STATESMAN, Aug. 4, 1996, at H5, available in 1996 WL 3439510, at \*1 (discussing a study conducted by the head hunting firm of Robert Half International, which concluded that “30% of U.S. companies with 20 or more employees planned to increase their use of employment contracts, compared with 17% that said they would decrease the use of the contracts”); Barry S. Shanoff, *Arbitration Stacks the Deck Against Employee Rights*, WORLD WASTES, Dec. 1, 1996, at 15, available in 1996 WL 9605439, at \*1 (mentioning the results of a poll commissioned by an executive search firm in which it was found that one-third of American companies with twenty plus employees intended to expand their use of employment contracts restricting the right to take discrimination claims to federal court).

16. In reviewing different sources of arbitral awards, including published awards of: American Arbitration Association (AAA), Arbitration in Schools (AIS), Federal Labor Relations Report (FLRR), Government Employee Relations Reporter (GERR), Industrial Relations Re-

The result leaves the employee/victim with little avenue for appeal,<sup>17</sup> because Congress limited the grounds on which federal courts may vacate an arbitral award.<sup>18</sup>

All types of employment settings use arbitration agreements.<sup>19</sup> The practice is problematic, given the rise of employment discrimination claims.<sup>20</sup> Arbitration agreements destroy the right of a victim to bring an action for sexual harassment in federal district court pursuant to

port (Indus. Rel. Rep.), Labor Arbitration Awards (ARB), Labor Arbitration in Government (LAIG), Labor Arbitration Information System (LAIS), and Labor Arbitration Reports (LAR), it appears that arbitrators considering sexual harassment claims regularly find in favor of management. However, more than half of the time, discharge is overturned or reduced to suspensions, illustrating the flexibility in arbitral awards. Vern E. Hauck, *Introduction, in ARBITRATING SEXUAL HARASSMENT CASES 1-1, 1-5* (Vern E. Hauck ed., 1995). Termination of an employee will undoubtedly stand only when there is a finding of excessive harassment that significantly impacts the working environment. *Id.*

17. Arbitrators issue thousands of arbitration decisions every year and very few judicial forums elect to review arbitral decisions. See Hauck, *supra* note 16, at 1-1. In the *Steelworkers Trilogy* (United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)), the Supreme Court held that a reviewing court should not change a judgment based on an agreement of bargained rights unless there was a "serious miscarriage of justice." *Id.* at 1-4. *But see id.* at 1-3 (stating that some courts have ignored the final, binding nature of the decision and instead, reversed the decision because the remedy violated public policy).

18. Congress has limited a federal court's right to vacate an arbitral award to the following situations:

"(1) where the award was procured by corruption, fraud or undue means; (2) where there was evident partiality or corruption in the arbitrators; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of the parties have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that they made no mutual, final and definite award upon the subject matter submitted."

9 U.S.C. § 10(a) (1994). See also Jennifer N. Manuszak, *Pre-Dispute Civil Rights Arbitration in the Non-Union Sector: The Need for a Tandem Reform Effort at the Contracting, Procedural and Judicial Review Stages*, 12 OHIO ST. J. ON DISP. RESOL. 387, 400 (1997) (discussing how federal courts are not using what limited power they have for reviewing issues regarding procedural fairness in arbitral decisions). *But see* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987) (stating that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.").

19. See *Employment Discrimination - Most Private-Sector Employers Use Alternative Dispute Resolution*, GAO/HEHS 95-150 (July 5, 1995) (indicating that almost all employers with over 100 employees use ADR resources in one or more avenues including: 80% for fact finding; 90% for mediation; and 10% for mandatory arbitration); see also *EEOC Policy*, *supra* note 15, at E-4 (offering some examples of industries in which such agreements are employed including: securities, retail, restaurant, hotel chains, health care, broadcasting, and security services); Turner, *supra* note 15, at 264-65 (discussing the different types of employers who utilize the arbitration system).

20. See Carrie A. Bond, Note, *Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace*, 65 FORDHAM L. REV. 2489, 2489 (1997) (discussing a study claiming that 50-85% of women in the workplace are victims of sexual harassment). Despite the low numbers of reports and claims made each year by victims of sexual harassment, the EEOC has a backlog of over 80,000 cases. *Id.* at 2490.

Title VII.<sup>21</sup> The Supreme Court currently allows employers to implement pre-dispute agreements requiring mandatory binding arbitration. However, the Court has not yet clarified whether the Federal Arbitration Act<sup>22</sup> applies to all employment settings and disputes.<sup>23</sup>

This Comment advocates the adoption of the Equal Employment Opportunity Commission's ("EEOC") 1997 policy opposing pre-dispute, mandatory binding arbitration agreements for employee's statutory rights, as a condition of employment. Part I explains the scope and purpose behind Title VII of the Civil Rights Act of 1964. Part II demonstrates how employers use and the Supreme Court treats arbitration and employment contracts. Part III explains the EEOC's position and policy statement concerning mandatory arbitration, and the effect that pre-dispute, mandatory arbitration agreements have on Title VII sexual harassment claims. Part IV recommends that courts adopt the EEOC's policy statement. This Comment ultimately argues that at a minimum, procedural changes must be made to the arbitration process in order to make arbitration of Title VII rights more equitable for the victims of sexual harassment.

#### I. THE SCOPE AND PURPOSE OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Congress enacted Title VII of the Civil Rights Act of 1964<sup>24</sup> to end employment discrimination<sup>25</sup> based on "race, color, religion, sex, or national origin."<sup>26</sup> Title VII grants employees three options for en-

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21. See 42 U.S.C. §§ 2000e-1-17 (1994) (establishing the right as part of Title VII of the 1964 Civil Rights Act); see also *infra* Part I.

22. See 9 U.S.C. § 10 (1997) (encouraging and enforcing the use of arbitration in certain circumstances); see also *infra* Part II.B.

23. The question is whether this exclusion applies to all employment contracts, or whether it should be narrowly construed to apply only to workers engaged directly in interstate commerce. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (holding that the statutory rights established by the Age Discrimination in Employment Act of 1967 can be subjected to compulsory arbitration pursuant to a securities regulation agreement). This decision left many questions unanswered regarding compulsory arbitration of employment agreements. See also *Wright v. Universal Maritime Serv. Corp.*, No. 97-889, 1998 U.S. LEXIS 7270 (U.S. Nov. 16, 1998) (holding a collective bargaining agreement containing an arbitration clause does not require the employee to use the arbitration procedure provided in the collective bargaining agreement, because the agreement itself did not specifically preclude the employee from using the judicial forum provided under the Americans with Disabilities Act); *infra* Part II.C-D.

24. 42 U.S.C. §§ 2000e-1-17 (1994).

25. See 42 U.S.C. § 2000e-2 (1994) (mandating that no employer shall hire or fire, or otherwise discriminate against an individual in any way, to adversely affect their employment under Title VII).

26. *Id.* See H.R. REP. NO. 88-914, pt. 2, at 15 (1964) *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401 (stating that "[t]he purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, relig-