

RECENT SUPREME COURT DECISIONS
AFFECTING THE EMPLOYER-EMPLOYEE
RELATIONSHIP: ARBITRATION OF
EMPLOYMENT DISPUTES, THE SCOPE AND
REMEDIES OF THE AMERICANS WITH
DISABILITIES ACT, AND AFFIRMATIVE ACTION

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I. INTRODUCTION

The employment law arena has been one of fertile ground for the United States Supreme Court in its most recent terms. The Supreme Court has actively interpreted employer and employee rights and obligations with respect to employment relations. As a result, employee job security, protection from wrongful discharge, unjust dismissal and

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employer prerogatives are in the balance. During this period, the Supreme Court has affirmed the trend toward utilizing arbitration to settle disputes concerning the employment relationship. The result has been that arbitration is increasing in both scope and reach. Conversely, recent United States Supreme Court decisions interpreting the Americans with Disabilities Act of 1990 (“ADA”),¹ which sought to expand employment protections for individuals with disabilities, reflects a pendulum swing in the other direction. Specifically, recent United States Supreme Court decisions have limited the scope and application of the ADA. The scope of both the Age Discrimination in Employment Act of 1967 (“ADEA”)² and Title VI of the Civil Rights Act³ have also been limited by recent United States Supreme Court decisions. Moreover, the Supreme Court decided a case in its 2002 term in which Nevada unsuccessfully attempted to limit the applicability of the Family Medical Leave Act (“FMLA”)⁴ to the states.⁵ Last, the future of affirmative action was the subject of a pair of consolidated cases before the Supreme Court in 2003. In these cases, the court decided whether the Fourteenth Amendment prohibits the use of race in the admission of students to a university, or whether diversity can provide a compelling government interest sufficient to meet the Fourteenth Amendment standard followed by the courts.⁶ Ultimately, these decisions will affect the future of affirmative action not only in higher education, but also in the employment arena.

This article explores recent developments in the areas of arbitration in employment disputes and the scope and reach of the ADA. Also, included is a brief discussion of the recently decided cases regarding affirmative action, as those decisions may have an impact on the future of employment relations.

II. ARBITRATION

The Federal Arbitration Act (“FAA”)⁷ addresses the validity and enforceability of arbitration agreements in employment contracts. Its

1. 42 U.S.C. §§ 12101–12213 (2001).

2. 29 U.S.C. §§ 621–634 (2000).

3. 42 U.S.C. §§ 2000d to 2000d-7 (2000).

4. 29 U.S.C. §§ 2601–2654 (2000).

5. *Nevada Dep’t of Human Res. v. Hibbs*, 123 S. Ct. 1972 (2003).

6. *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003); *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).

7. 9 U.S.C. §§ 1–14 (2000). Chapter 1, section 14 of the FAA applies to contracts made on or after January 1, 1926.

purpose is twofold; (1) it makes arbitration agreements in cases involving interstate commerce or maritime law as enforceable as other contracts and (2) it makes the arbitration procedure, “when selected by the parties to a contract, [] speedy and not subject to delay and obstruction in the courts.”⁸

Since the purpose of the FAA is “to place arbitration agreements on equal footing with other contracts,”⁹ duties to enforce arbitration agreements are not diminished when a party, bound by the agreement, raises a claim based on statutory rights, unless there is a well-founded claim that such agreement resulted from any grounds that would otherwise invalidate a contract.¹⁰ Similarly, the duty to arbitrate can be overridden by specific contrary Congressional command, but the burden is on the party opposed to arbitration to prove that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.¹¹

American courts have consistently enforced arbitration provisions in employment agreements pursuant to the FAA, so long as the employee is not in an excluded class such as seamen or transportation workers involved in interstate commerce.¹² Courts have narrowly defined the excluded groups as those “directly engaged in the channels of interstate commerce, i.e. workers employed in the transportation industries.”¹³

In 1991, the United States Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.*, that employment contracts compelling arbitration of all claims arising out of employment, including claims for violation of the ADEA, are enforceable.¹⁴ The Court determined that the

8. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, 405–06 (1967) (holding that arbitrators could decide a claim of fraud in the inducement of a contract in an agreement that contained an arbitration clause covering any controversy or claim relating to the agent); see also *Citizens Bank v. Alafabco, Inc.*, 123 S. Ct. 2037 (2003); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

9. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002) (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

10. *Id.* at 289–90 (“[T]he FAA’s proarbitration policy does not operate without regard to the wishes of the contracting parties.” (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995))).

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

12. See *Tonetti v. Shirley*, 219 Cal. Rptr. 616, 618 (4th Dist. 1985). (holding that a stockbroker is not exempted from the FAA under section 1, but that only seamen, railroad employees and those workers employed in the transportation industries are exempted pursuant to 9 U.S.C. § 1); see also *Circuit City Stores, Inc. v. Saint Clair Adams*, 532 U.S. 105, 118–19 (2001) (holding that the language of 9 U.S.C. § 1 was not open to the broad interpretation put forth by the lower court, rather § 1 was limited to transportation workers).

13. *Tonetti*, 219 Cal. Rptr. at 618 (citing 9 U.S.C. § 1).

14. *Gilmer*, 500 U.S. at 23. In *Gilmer*, a financial services manager was required to register as

FAA establishes a strong federal policy favoring arbitration to enforce private contractual rights.¹⁵ During its past three terms, the United States Supreme Court has analyzed and expanded the relationship of the FAA to a variety of contracts, including employment agreements.¹⁶ In its examination of these relationships, the Supreme Court addressed the scope of the FAA, the extent to which parties can be bound by the FAA, and substantive issues of subject agreements.¹⁷

In the 2000-2001 term, the Court decided *Circuit City Stores, Inc. v. Adams*¹⁸ and reviewed to what extent, if any, the FAA applies to contracts of employment.¹⁹ The lower court ordered arbitration pursuant

a securities representative with the New York Stock Exchange. *Id.* The registration application included an arbitration clause wherein he agreed to arbitrate any disputes between himself and his employer arising out of his employment or a term of his employment. *Id.* at 23. When the plaintiff was terminated seven years later, he brought suit alleging a violation of the ADEA. *Id.* at 23. The employer filed a motion to compel arbitration. *Id.* at 24. The district court denied the employer's motion, ruling that arbitration procedures were inadequate for final resolution of rights created by the ADEA and that Congress had intended to protect the ADEA plaintiffs from waiver of their rights to a judicial forum. *Id.* at 24. The Fourth Circuit Court of Appeals upheld the agreement as enforceable when ADEA issues were alleged. *Id.* The United States Supreme Court found that Gilmer did not meet his "burden of showing that Congress . . . intended to preclude arbitration" of ADEA claims, and thus affirmed the 4th Circuit. *Id.* at 35.

15. *Id.* at 24. The Court stated that the purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Id.*

16. See generally, *EEOC v. Waffle House*, 534 U.S. 279 (2002) (stating that arbitration clauses in employment contracts do not preclude the EEOC from pursuing remedies authorized by statute); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (reversing the lower court and limiting the exemptions found in Section 1 of the FAA to most employment agreements of transportation workers), *Green Tree Fin. Corp., v. Randolph*, 531 U.S. 79, 92 (2000) (finding that the trial court's decision ordering the arbitration was final for purposes of the FAA; the lower court erred when it determined that the arbitration clause, which was silent as to costs and fees, was unenforceable; and that the consumer failed to meet its burden of showing that arbitration would be prohibitively expensive).

17. See *Waffle House*, 534 U.S. at 279; *Circuit City Stores, Inc.*, 532 U.S. at 105; *Green Tree Fin. Corp.*, 531 U.S. at 79.

18. 532 U.S. at 105.

19. *Id.* at 109. In this case, the United States Supreme Court granted certiorari to decide whether the FAA applies to all contracts of employment. *Id.* Here, the employee claimed he was discriminated against and harassed by his employer based on his sexual orientation. See *Circuit City Stores, Inc. v. Adams*, No. C98-0365CAL, 1998 U.S. Dist. LEXIS 62155, at * 5 (N.D. Cal. Apr. 29, 1998). The employee asserted that the arbitration agreement he signed was a contract of adhesion, therefore unconscionable and unenforceable since the agreement limited his recovery. *Id.* at *7. The district court held that the limitations on recovery did not amount to the "extreme one-sidedness [] required for a finding of unconscionability as a matter of law . . ." *Id.* The district court ordered arbitration pursuant to the dispute resolution agreement. *Id.* at *7. On remand, the Ninth Circuit held that the Dispute Resolution Agreement "is an unconscionable contract of adhesion under California law" and reversed the order compelling arbitration. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 896 (9th Cir. 2002).

to the dispute resolution agreement that the employee signed, but the Ninth Circuit Court of Appeals reversed and remanded, holding that the FAA did not apply to employment contracts.²⁰ The Ninth Circuit's decision was reversed by the United States Supreme Court, which definitively stated that the FAA applies to contracts of employment, and that only employment contracts of transportation workers are exempt.²¹ This case clarified and solidified the application of the FAA to employment contracts in general.

In *Green Tree Financial Corp.-Alabama v. Randolph*,²² decided in December of 2000, the United States Supreme Court held that an agreement to arbitrate under the FAA was enforceable despite the fact that it did not specify who bore the costs of arbitration.²³ The Court indicated that a party who resists arbitration, due to claims of steep arbitration costs, bears the burden of showing the likelihood of incurring the costs and that their claims are unsuitable for arbitration.²⁴

In the 2001-2002 term, the United States Supreme Court decided *EEOC v. Waffle House, Inc.*²⁵ In that case, the Court held that an agreement between an employer and an employee to arbitrate employment-related disputes does not bar the Equal Employment Opportunity Commission ("EEOC") from pursuing victim-specific judicial relief, such as back-pay, reinstatement and money damages, in an ADA based suit.²⁶ In *Waffle House*, the employer contended that the EEOC was also bound by the arbitration agreement between Waffle House and the employee.²⁷ The United States Supreme Court determined

20. *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1071-72 (9th Cir. 1999).

21. *Circuit City Stores, Inc. v. Adams*, 532 U.S. at 109. Section 1 of the FAA excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (2000). The Court addressed the exclusion by holding that the congressional decision to exempt these workers from the FAA was due to "Congress' undoubted authority to govern the employment relationships at issue by the enactment of statutes specific to them." *Circuit City Stores, Inc.*, 532 U.S. at 121.

22. 531 U.S. 79 (2000).

23. *See id.* at 91-92. Here the plaintiff was the purchaser of a mobile home, who claimed that the petitioners violated the Truth in Lending Act, 15 U.S.C. 1601. *Id.* at 82-83. The agreement with the financial institutions required the buyer to purchase insurance protecting lenders from the costs of default and stated that all disputes were to be resolved by binding arbitration. *Id.* at 82-83. The agreement was silent as to the apportionment of the arbitration costs and fees. *Id.* at 84.

24. *Id.* at 91-92.

25. 534 U.S. 279 (2002).

26. *Id.* at 279, 294, 295, 297, 298. The employee was not a party to the EEOC claim. *Id.* at 283.

27. The employee alleged claims under the ADA, Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1991. *EEOC v. Waffle House, Inc.*, No. 3:96-2739-0, 1998 U.S. Dist. LEXIS 23245, at **1-2 (D. S.C. Mar. 24, 1998). The United States District Court of South Carolina

that despite a strong policy favoring the FAA, “nothing in the statute authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement.”²⁸ Furthermore, the Court noted that “[t]he FAA does not mention enforcement by public agencies; it ensures the enforceability of private agreements to arbitrate, but otherwise does not purport to place any restriction on a nonparty’s choice of a judicial forum.”²⁹ The Court recognized the ability of an employer and an employee to bind themselves to an arbitration agreement, but not the ability to bind a federal agency that oversees the rights and interests of the public.³⁰

Subsequent to the 2002 term, the American courts have continued to review cases that question the applicability and adequacy of the FAA. In *Mercurio v. Superior Court*,³¹ the plaintiff sought to have the arbitration agreement rendered invalid on the basis that it was unconscionable.³² The California Court of Appeals for the Second District held that in order to determine if an arbitration agreement is unconscionable, both procedural and substantive elements must be

denied the employer’s motion to compel arbitration because the employment application and job offer were both oral. *Id.* at *6. The Fourth Circuit Court of Appeals was presented with the issue of “whether, and to what extent the Equal Employment Opportunity Commission (“EEOC”), in prosecuting a suit in its own name, is bound by a private arbitration agreement between the charging party and his employer.” *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 806 (4th Cir. 1999). The Fourth Circuit held that the EEOC is not bound by the private arbitration agreement when seeking broad-based injunctive relief in the public interest, but it is precluded from seeking “make-whole” relief in a judicial forum. *Id.* at 807. For an analysis on whether arbitration provides an adequate remedy to Title VII discrimination claimants, see Sarah Johnston, *ADR in the Employment Discrimination Context: Friend or Foe to Claimants*, 22 *HAMLIN J. PUB. L. & POL’Y* 335, 374–80 (Spring 2001).

28. *Waffle House*, 534 U.S. at 289.

29. *Id.*

30. *Id.*

31. 116 Cal. Rptr. 2d 671 (2002). In *Mercurio*, the court held that an arbitration agreement provision for fee sharing of arbitrator’s fees prevented plaintiff from having an adequate opportunity to vindicate his unwaivable statutory rights and created a chilling effect. *Id.* at 681–82 (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 681 (Cal. 2000)).

32. *Id.* at 675. Upon employment, the employee signed a National Association of Securities Dealers (NASD) form U-4 in which he agreed to arbitrate covered disputes between himself and his employer in accordance with the NASD. *Id.* at 674. One year later, plaintiff-employee signed a contract with defendant in which he agreed to arbitrate employment related disputes including discrimination, but excluded other claims and injunctive relief for unfair competition, unauthorized disclosure of trade secrets or violation of intellectual property rights. *Id.* Plaintiff was offered consideration of one vacation day or twenty-five shares of stock. *Id.* Plaintiff claimed he only signed the agreement because he was coerced and under duress. *Id.* at 675. Plaintiff subsequently quit and filed suit against his employer claiming age and disability discrimination, fraud and wrongful termination in violation of public policy. *Id.* at 673. The trial court granted defendant-employer’s motion to compel arbitration. *Id.* at 675.

reviewed.³³ The procedural elements look to the adhesiveness of the arbitration agreement and whether the weaker party was presented with a “take it or leave it” contract drafted by the stronger party.³⁴ Ostensibly, the court looks to the “oppressiveness of the stronger party’s conduct.”³⁵ The substantive element looks at the terms of the contract itself to determine whether the contract fails to guarantee a neutral arbitrator and whether the contract is unfairly one-sided, such as where claims of the employee are subject to arbitration, while some or all of the claims of the employer are exempt from it.³⁶ The court found that the arbitration agreement between the employee and Countrywide was “permeated with unconscionability and illegality. . . .”³⁷ The court held that the “threats and cajoling” used to convince the employee to sign the arbitration agreement, “together with the lack of mutuality as to arbitrable claims, the unlawful fee-sharing provision and the disadvantages to the employee in using NAF [National Arbitration Forum] as the arbitrator,” all combined to “create an ‘inferior forum’ for the employee that work[ed] to the employer’s advantage.”³⁸

In *Blair v. Scott Specialty Gases*,³⁹ an employee of Scott argued that the arbitration clause of her employment agreement violated public policy because it required her to pay one-half the arbitrator’s fees.⁴⁰ The District Court rejected Blair’s argument; however, the Third Circuit noted that arbitration agreements should be liberally enforced, but “arbitration is only appropriate ‘so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum.’”⁴¹ The court stated, “arbitration costs are directly related

33. *Id.* at 675–76 (relying on the California Supreme Court decision in *Armendariz v. Found. Health Psychcare Services, Inc.*, 6 P.3d 669 (2000)).

34. *Id.* at 676.

35. *See Id.*; *see also* *Griffin v. Semperit of Am., Inc.*, 414 F. Supp. 1384, 1387 (S.D. Tex. 1976) (determining that the FAA “creates a basis for federal substantive law under the commerce clause . . .” and that the “courts must therefore look to federal common law for interpretation of the arbitration agreement. . . .”) (construing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967)).

36. *Mercuro*, 116 Cal. Rptr. 2d at 676.

37. *Id.* at 684.

38. *Id.* The court noted a “repeat player effect” is created when there are limited numbers of eligible arbitrators to hear a particular issue through the NAF program. *Id.* at 678. An employer who would likely be using the services of the same arbitrators on a more regular basis than employees could gain some benefit from repeat use. *Id.* at 678–79.

39. 283 F.3d 595 (3d Cir. 2002).

40. *Id.* at 597.

41. *Id.* at 605 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)) (alteration in original).

to a litigant's ability to pursue the claim."⁴² *Blair* also relied on *Green Tree Financial Corp.-Alabama*, where the United States Supreme Court "acknowledged that 'the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum.'"⁴³ In *Green Tree Financial Corp.-Alabama*, the Court found that the party initially resisting arbitration has the burden of proof to show that arbitration would be prohibitively expensive.⁴⁴ Relying on these principles, the Third Circuit in *Blair* ordered limited discovery regarding the costs of arbitration and plaintiff's financial capacity in order to determine whether arbitration is a forum in which plaintiff can vindicate her rights.⁴⁵ The court also provided the employer with "the opportunity to meet its burden to prove that the costs will not be prohibitively expensive, or . . . offer to pay all of the arbitrator's fees."⁴⁶

As courts continue to validate the FAA and the broad scope of its applicability, the American Arbitration Association ("AAA") has developed guidelines for employers and employees seeking to resolve their employment related disputes.⁴⁷ These rules attempt to "ensure fairness and equity in resolving workplace disputes."⁴⁸ As previously discussed, fees can often be the determining factor in whether an employee seeks arbitration of a dispute with an employer.⁴⁹ While arbitration is viewed as a faster and more efficient means to settle employment disputes,⁵⁰ the fees associated with arbitration can be most

42. *Id.* at 605.

43. *Id.* at 605 (citing *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000)).

44. *Id.* at 607 (citing *Green Tree Fin. Corp.-Alabama*, 531 U.S. at 91). In *Green Tree Financial Corp.-Alabama*, the plaintiff could not meet this burden because the plaintiff did not present evidence "to show she would 'be saddled with prohibitive costs.'" *Id.* at 607.

45. *Id.* at 610.

46. *Id.*

47. American Arbitration Association, *National Rules for the Resolution of Employment Disputes* (effective January 1, 2004), available at <http://www.adr.org>. (last visited Jan. 4, 2003).

48. *Id.*

49. *Blair*, 283 F.3d at 609. In *Blair*, the court found that

[t]he appropriate inquiry is one that evaluates whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation, i.e., a case-by-case analysis that focuses, among other things, upon the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims.

Id. (quoting *Bradford v. Rockwell Semiconductor Sys. Inc.*, 238 F.3d 549, 556 (4th Cir. 2001)). *Bradford* did not meet this test because he "initiated arbitration before litigation and proceeded through a full arbitration hearing on the merits of his claim, demonstrating conclusively that he was not deterred from entering into arbitration." *Id.* The court also found that *Bradford* earned a salary of \$115,000 plus yearly bonuses prior to his discharge. *Id.*

50. See 9 U.S.C. §§ 1-14 (2000); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d

prohibitive to certain types of employees, such as a factory worker, who would otherwise be able to file a lawsuit represented by counsel on a contingency basis while suffering no out-of-pocket expenses. Conversely, the impact of the fees associated with arbitration upon a large employer is minimal, as it can easily assume the expenses.⁵¹

Even though arbitration is itself a method by which parties can seek an efficient and cost effective adjudication of issues, the AAA provides expedited employment arbitration procedures in response to parties' concerns about rising costs and delays of litigation. Specifically, rules effectuated by the AAA focus on the fee structure of agreements that are employer-promulgated, as well as those that are individually negotiated.⁵² In agreements promulgated by the employer, employees only need to pay a filing fee to the AAA of \$125, whereas the employer may be required to pay up to \$1,375 for filing fees in addition to the entire remaining costs of the arbitration, including arbitrator compensation.⁵³ Employers are spared the full weight of the fees only if it is found that the employee brought a frivolous or harassing claim.⁵⁴ If the agreement containing the arbitration provision was negotiated between an employee and employer, a filing fee is paid by the filing party and fees are ultimately subject to allocation by the arbitrator in the award.⁵⁵

Fees have been added to the selection process of arbitrators since parties began requesting several lists of multi-panel arbitrators.⁵⁶ This may be an indicator that employers and employees are looking to broaden the scope of eligible arbitrators for a particular issue.⁵⁷ This action seems to indicate that parties to an arbitration proceeding are

195, 196 (4th Cir. 1990), *aff'd*, 500 U.S. 20 (1991).

51. See *Blair*, 283 F.3d at 610. In *Blair*, the court ordered a remand and [l]imited discovery into the rates charged by the AAA and the approximate length of similar arbitration proceedings [so that the plaintiff could have the opportunity to] adequately establish the costs of arbitration, and give Blair the opportunity to prove, as required under *Green Tree*, that resort to arbitration would deny her a forum to vindicate her statutory rights.

Id. at 610. The employer was also "given the opportunity to meet its burden to prove that arbitration [would] not be prohibitively expensive, or as has been suggested in other cases, offer to pay all of the arbitrator's fees." *Id.* The court believed this would level the playing field as related to expenses. *Id.* at 610.

52. American Arbitration Association, *National Rules for the Resolution of Employment Disputes* (effective January 1, 2004), available at <http://www.adr.org>. (last visited Jan. 4, 2003).

53. *Id.*

54. *Id.*

55. *Id.* Either the employer or the employee can pay more if the agreement so provides. *Id.*

56. *Id.*

57. *Id.*

seeking to void the appearance of repeat player advantage,⁵⁸ and are looking to ensure that the arbitration is effective.⁵⁹

In addition to the potentially prohibitively expensive nature of arbitration costs, fundamental issues relating to the adhesive nature of mandatory dispute resolution still arise. The cases that followed the implementation of the FAA broadened the scope of persons who are bound by arbitration clauses within employment contracts, absent contractual defenses such as duress, fraud or undue influence. The very notion of arbitration clauses within certain employment contracts insinuates a “take it or leave it” approach. A prospective employee, who will be joining the workforce, certainly does not have the ability to negotiate many, if any, terms of his or her employment. As such, the arbitration clause of the employment contract or agreement can be seen as *pro forma*. Perhaps in employment contracts for professional services, such as the financial industry, one could presume a higher bargaining position for the financial professional versus the union laborer. Courts have consistently upheld arbitration clauses in financial services contracts where it seems likely that an educated professional would have the appropriate bargaining power to overcome a presumed “take it or leave it” contract.⁶⁰ Specifically, courts have found that such elements of

58. Fee arrangements such as these provide the employee with a basis for showing that arbitration is prohibitively expensive. See *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 96 (2000) (5-4 decision) (Ginsburg, J., dissenting in part) (stating that “[a]s a repeat player in the arbitration required by its form contract, Green Tree has superior information about the cost to consumers of pursuing arbitration”); see also *Mercurio v. Superior Court of L.A. County*, 116 Cal. Rptr. 2d 671, 678-79 (Cal. Ct. App. 2002) (noting that the employer’s repeated appearance “before the same group of arbitrators conveys distinct advantages over the individual employee,” including “knowledge of the arbitrators’ temperaments, procedural preferences, styles and the like and the arbitrators’ cultivation of further business by taking a ‘split the difference’ approach to damages”). The *Mercurio* court also acknowledged that “[v]arious studies show that arbitration is advantageous to employers . . . because it reduces the size of the award that the employee is likely to get, particularly if the employer is a ‘repeat player’ in the arbitration system.” *Mercurio*, 116 Cal. Rptr. 2d at 679 (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000)).

59. Courts have addressed parties’ claims of biased arbitration panels by applying various levels of scrutiny. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (“We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.” (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985))). The *Gilmer* court noted that “[t]he FAA also protects against bias, by providing that courts may overturn arbitration decisions ‘[w]here there was evident partiality or corruption in the arbitrators.’” *Id.* (citing 9 U.S.C. § 10(b)).

60. The *Gilmer* court also addressed unequal bargaining power, wherein it stated that “[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.” *Id.* at 33. Thus, “arbitration agreements are enforceable ‘save upon such grounds as exist at law or in equity for the revocation of any contract.’” *Id.* (citing 9 U.S.C. § 2). However, the Supreme Court, in referring to *Mitsubishi*,

employment contracts do not constitute contracts of adhesion, that could otherwise invalidate such terms or the contract in its entirety.⁶¹

In *Tupper v. Bally Total Fitness Holding Corp.*,⁶² two aggrieved employees filed wrongful termination suits claiming that there was no consideration bargained for when they accepted the terms of arbitration to resolve employee disputes.⁶³ One party also alleged coercion and that the arbitration agreement limited statutory remedies that may otherwise be available to the employees.⁶⁴ The employer relied upon the fact that the employees had signed an Employee Dispute Resolution Procedure Agreement which provided that all disputes were to be resolved through arbitration.⁶⁵ In fact, the *Tupper* court held that the consideration supporting the agreement was the mutually agreed upon promise to submit any disputes to arbitration.⁶⁶ The suits were dismissed and arbitration compelled.⁶⁷ The court enunciated a strong presumption in favor of arbitration and required that the objecting party provide strong evidence that the party compelling arbitration waived its right to arbitration.⁶⁸

In *Adkins v. Labor Ready, Inc.*,⁶⁹ employees filed suit against their employment agency for violations of the Fair Labor Standards Act (“FLSA”)⁷⁰ and West Virginia state statutes relating to unpaid wages for travel time, call time, training and overtime.⁷¹ The district court ruled that these claims must be resolved through arbitration, as the elements of the contract included arbitration clauses and the contract was not

notes that, “courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract.” *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985)). “As with the claimed procedural inadequacies. . . [the] claim of unequal bargaining power is best left for resolution in specific cases.” *Id.*

61. See, e.g., *id.*; *Mitsubishi Motors Corp.*, 473 U.S. at 627.

62. 186 F. Supp. 2d 981 (2002).

63. *Id.* at 985–86.

64. *Id.* at 986.

65. *Id.* at 984.

66. *Id.* at 988; see also *Blair*, 238 F.3d at 603 (finding that the consideration for agreeing to arbitrate was in fact the employment opportunity itself).

67. *Tupper*, 186 F. Supp. 2d at 993.

68. *Id.* at 990–91; see also Carlton J. Snow, *Collective Agreements and Individual Contracts Employment in Labor Law*, 50 AM. J. COMP. L. 319, 321 (2002) (discussing a proposed bill in the House of Representatives, H.R. 2282: Preservation of Civil Rights Protections Act, which would amend the FAA to require arbitration only if both parties voluntarily consent after a statutory claim has arisen).

69. 185 F. Supp. 2d 628 (S.D. W. Va. 2001), *aff'd*, 303 F.3d 496 (4th Cir. 2002).

70. 29 U.S.C. §§ 201–262 (2001).

71. *Adkins*, 185 F. Supp. 2d at 631.

unconscionable.⁷² When the plaintiffs moved to join the customers of Labor Ready as defendants, the court denied that motion on procedural grounds, but found that since the claims could not be separated from those against Labor Ready, those too could be resolved through arbitration.⁷³ Significantly, the court, after mentioning that employees signed a release of claims against Labor Ready's customers, did not explore the validity of those releases.⁷⁴ The customers of Labor Ready could seemingly be relieved of liability if the releases could be used as a contractual defense for the customers.⁷⁵

After *Adkins*, the question of whether an employee or contracted third party can waive their own bargaining power relative to an arbitration clause seems to remain open. Effectively, to gain a more favorable position, contractors may provide form contracts in which subcontractors accept terms that may not be advantageous to their own position. The district court added that, unless the terms rise to the levels of "gross inadequacy in bargaining power" and "terms unreasonably favorable to the stronger party," a finding of unconscionability could not be made.⁷⁶

On April 7, 2003, the United States Supreme Court decided *PacifiCare Health Systems, Inc. v. Book*,⁷⁷ in which physicians alleged that insurers delayed or denied payment per contract agreement and violations of Racketeer Influenced Corrupt Organization Act ("RICO").⁷⁸ The physicians challenged arbitration provisions in their contracts on the basis that if they submit their disputes to arbitration, punitive damages would be waived.⁷⁹ The Eleventh Circuit Court of

72. *Id.* at 636–37.

73. *Id.* at 640–41.

74. *Id.* at 631.

75. *Id.* at 641.

76. *Id.* at 636. The court rejected employee-plaintiff's argument that he would suffer financial hardship as he produced no evidence to substantiate the claim. *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002). This analysis caused the court to reject the position of the courts in *Giordano v. Pep Boy-Manny, Moe & Jack, Inc.*, No. 99-1281, 2001 U.S. Dist. LEXIS 5433 (E.D. Pa. Mar. 29, 2001) and *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91 n.6 (2000) wherein arbitration fees and costs can be grounds to consider the agreement unconscionable based on specific cost-sharing provisions. *Id.*

77. 123 S. Ct. 1531 (2003), *rev'g and remanding In re Humana Inc. Managed Care Litig.*, 285 F.3d 971 (11th Cir. 2002). On remand, the Eleventh Circuit reversed and remanded this case to the District Court with instructions for additional proceedings in accordance with *PacifiCare Health Sys., Inc. In re Humana Inc. Managed Care Litig.*, 333 F.3d 1247, 1248 (11th Cir. 2003).

78. *PacifiCare Health Sys., Inc.*, 123 S. Ct. at 1531, 1533; 18 U.S.C. §§ 1961–1968 (2003).

79. *In re Managed Care Litig.*, 132 F. Supp. 2d 989, 997, 998, 1005 (S.D. Fla. 2000), *aff'd*, *In re Humana Inc. Managed Care Litig.*, 285 F.3d 971 (11th Cir. 2002), *rev'd PacifiCare Health Sys., Inc.*, 123 S. Ct. at 1536.

Appeals agreed, holding the agreements were unenforceable because punitive damages, available under RICO, were excluded by the arbitration provisions.⁸⁰ The United States Supreme Court reversed and upheld the arbitration agreement on the basis that the uncertainty of whether an arbitrator would award punitive damages was not enough to void arbitration agreements.⁸¹

Looking to the future, employees will have few grounds upon which to challenge an arbitration agreement. The United States Supreme Court, in *Gilmer v. Interstate/Johnson Lane Corp.*, held that the provisions of the FAA, “manifest[] a liberal federal policy favoring arbitration”⁸² and that “generalized attacks on arbitration ‘res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,’ and as such, they are ‘far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.’”⁸³ Likewise, the Court held that “‘questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.’”⁸⁴ However, from *Gilmer* through recent district and circuit court decisions,⁸⁵ there appears to be a trend of common law claims, such as unconscionability, upon which an employee could build a challenge.⁸⁶ Issues of public policy and common law claims that address inherent fairness in contracts will continue to be at the forefront of arbitration disputes in the future.

80. *In re Humana Inc. Managed Care Litig.*, 285 F.3d at 973, 974.

81. *PacifiCare Health Sys., Inc.*, 123 S. Ct. at 1535–36. The Court stated, “‘mere speculation that the foreign arbitrators *might* apply Japanese law which . . . *might* reduce respondents’ legal obligations, does not in and of itself lessen liability . . .’ nor did it provide an adequate basis upon which to declare the relevant arbitration agreement unenforceable.” *Id.* at 1534 (citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995)). “[T]he proper course is to compel arbitration.” *Id.* at 1536.

82. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (citing *Moses H. Cone Mem’l Hosp. v. Mercury Contr. Corp.*, 460 U.S. 1, 24 (1983)).

83. *Id.* at 30 (citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989)).

84. *Id.* at 26 (citing *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24).

85. Arbitration agreements are unenforceable “only if Congress has evinced an intention to preclude waiver of a judicial forum for a particular statutory right, or if the agreement was procured by fraud or use of excessive economic power.” *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 196–97 (4th Cir. 1990).

86. *See, e.g.*, *Circuit City Stores, Inc., v. Mantor*, 335 F.3d 1101, 1107 (9th Cir. 2003); *Geiger v. Ryan’s Family Steak Houses, Inc.*, 134 F. Supp. 2d 985, 999 (S.D. Ind. 2001); *Cheek v. United Healthcare of the Mid-Atlantic, Inc.*, No. 141, 2003 WL 22669518, *12 (Md. Ct. App. Nov. 13, 2003) (holding an employment arbitration agreement unenforceable for lack of consideration, where employer reserved the right to alter, amend, modify or revoke the arbitration agreement at any time and without prior notice).

III. AMERICANS WITH DISABILITIES ACT

The Americans With Disabilities Act of 1990 (“ADA”)⁸⁷ was passed for several reasons, including: (1) to more effectively integrate people with disabilities into society in order to countervail the isolation of disabled persons, (2) to enable people with disabilities to become more economically independent, and (3) to allow people with disabilities to contribute to their overall economic prosperity.⁸⁸ The non-discrimination standard imposed by the ADA is one of “reasonable accommodation.”⁸⁹ The reasonable accommodation standard varies by the ability of the facility employing the individual with a disability to pay for the costs of the accommodation;⁹⁰ the obligation to accommodate the disability is limited by “undue hardship.”⁹¹ Early ADA

87. 42 U.S.C. §§ 12101–12213 (2001).

88. See *id.* § 12101(a)(7); see also Ken Matheny, *Guest Writers: Cleveland v. Policy Management Systems Corp. and the Need for a Consistent Disability Policy*, 21 *HAMLIN J. PUB. L. & POL’Y* 283, 314 (2000) (explaining that “the ADA’s goal [was to] encourage [] economic self-sufficiency and independent living for the disabled”). The ADA seemingly has had the effect of shifting dependency costs related to disabilities from the public sector to the private sector.

89. The ADA defines “reasonable accommodation” as:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Id. § 12111(9)(A)–(B).

90. The ADA acknowledges that an employer has limited financial resources and therefore allows such an employer to, “demonstrate that the [proposed] accommodation would impose an *undue hardship* on the operation of the business of such covered entity . . .” *Id.* § 12112(b)(5)(A) (emphasis added).

91. The ADA defines “undue hardship” as, “an action requiring significant difficulty or expense, when considered in light of the factors set forth in paragraph (B).” *Id.* § 12111(10)(A). These factors include:

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workplace of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Id. § 12111(10)(B)(i)–(iv).

cases clarified the definition of disability and many expanded the employers' obligations.⁹² More recently, however, cases are narrowing and limiting the coverage of the ADA.

In *Board of Trustees v. Garrett*,⁹³ the United States Supreme Court held that pursuant to the Eleventh Amendment, individuals do not have the right to sue states in federal court for alleged violations of the ADA.⁹⁴ The Court decided in *Garrett* that Congress had exceeded its authority under section 5 of the Fourteenth Amendment when it allowed state employees to bring damage actions against the state for violations of the ADA.⁹⁵ In this 5-4 decision, the Supreme Court invoked the Eleventh Amendment to bar state employees from recovering damages from state employers who failed to comply with ADA regulations.⁹⁶ The *Garrett* decision followed on the heels of *Kimel v. Florida Board of Regents*, a case decided during the prior term, also by a 5-4 vote, holding that the ADEA does not apply to state employers.⁹⁷ In *Kimel*, the Court rejected a disparate impact theory of discrimination when Florida State University failed to make market-based adjustments to the salaries of eligible employees.⁹⁸ Furthermore, in *Alexander v. Sandoval*,⁹⁹ the United States Supreme Court decided by a 5-4 vote that there is no private right of action under Title VI of the 1964 Civil Rights Act.¹⁰⁰

92. See, e.g., *Bragdon v. Abbott*, 524 U.S. 624, 641, 655 (1998) (ruling that HIV-positive individuals are disabled under the meaning of the ADA). *But see* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442, 446-47 (1985) (holding that mental retardation was not a quasi or suspect classification under the Fourteenth Amendment's Equal Protection Clause, and that a "rational basis" test to determine the constitutionality of state regulation applies to state classifications of mentally retarded individuals).

93. 531 U.S. 356 (2001).

94. *Id.* at 360, 363. Although Congress extended application of the ADA to employees of state and local governments, as well as private employers with fifteen or more employees, "in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation." *Id.* at 374.

95. *Id.* at 374.

96. *Id.* at 360. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.* at 363 (quoting the U.S. CONST. amend XI).

97. *Kimel*, 528 U.S. 62, 91 (2000).

98. *Id.* at 70. Disparate impact discrimination occurs when a "facially neutral" employment practice causes an adverse impact on a protected class. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 985-87 (1988).

99. 532 U.S. 275 (2001).

100. *Id.* at 277, 293. Title VI prohibits racial discrimination in any education program funded by federal financing. See 42 U.S.C. §§ 2000d to 2000d-7 (2000). However, in contrast to *Garrett*, *Kimel*, and *Alexander*, the Supreme Court found that Nevada attempted to limit the applicability of the FMLA to states, holding that section 5 of the Fourteenth Amendment permits individuals to sue

In *Toyota Motor Manufacturing, Inc. v. Williams*,¹⁰¹ a unanimous United States Supreme Court ruled on the definition of disability applicable to the ADA.¹⁰² The touchstone of disability is whether the individual suffers a substantial impairment in a major life activity.¹⁰³ In *Toyota Motor Manufacturing*, the individual seeking accommodations suffered from carpal tunnel syndrome, caused by repetitive tasks.¹⁰⁴ However, the Court decided that the employee was not entitled to accommodations at work because her carpal tunnel syndrome did not impair her ability to perform ordinary daily functions.¹⁰⁵ *Toyota Motor Manufacturing* follows on the heels of a trilogy of cases decided in 1999, all of which determined that an individual whose physical impairment could be corrected was not disabled under the meaning of the ADA.¹⁰⁶

In *Chevron U.S.A., Inc. v. Echazabal*¹⁰⁷ a unanimous United States Supreme Court ruled that an employer can deny a job to a disabled employee if the employer reasonably believes that performing the job would impair the employee's personal health.¹⁰⁸ The *Chevron U.S.A.* decision contrasts with *International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Johnson Controls, Inc.*,¹⁰⁹ in which the Court held that Title VII of the 1964 Civil Rights Act prohibits employers from barring women of childbearing age from jobs which pose a threat of harm to their fetuses, based on OSHA standards.¹¹⁰ *Chevron U.S.A.* is distinguishable from *Johnson Controls* because it is based on an individualized risk of harm, whereas the prohibition in *Johnson Controls* applied only to women of childbearing age, unless the individual woman could prove that she was unable to bear children.¹¹¹

their state employer in federal court for damages if the state violates the FMLA. *Nevada Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1976-77 (2003).

101. 534 U.S. 184 (2002).

102. *Id.* at 186, 187.

103. *Id.* at 187.

104. *Id.*

105. *Id.* at 202.

106. See *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565-66 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 520, 525 (1999), *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999).

107. 536 U.S. 73 (2002).

108. *Id.* at 75, 78, 86.

109. 499 U.S. 187 (1991).

110. *Id.* at 211.

111. *Chevron, Inc.*, 536 U.S. at 85-86; *Johnson Controls, Inc.*, 499 U.S. at 211.

In *US Airways, Inc. v. Barnett*,¹¹² a divided United States Supreme Court decided that a disabled employee's right to "reasonable accommodation" ordinarily cannot trump the employer's seniority system for assigning jobs.¹¹³ Finally, in *Barnes v. Gorman*,¹¹⁴ the United States Supreme Court unanimously ruled that punitive damages cannot be awarded under Title II of the ADA or its predecessor Section 504 of the Rehabilitation Act of 1973.¹¹⁵

Overall, the thrust of United States Supreme Court's decisions in recent terms with respect to the ADA has been to limit its scope, as well as the remedies available under it.¹¹⁶ Individuals are limited in that they are typically not permitted to sue their state employers in federal court for ADA violations, and the definition of a person with a disability has been narrowly interpreted to exclude those whose impairments can be corrected.

IV. AFFIRMATIVE ACTION

In June 2003, the United States Supreme Court decided the constitutionality of affirmative action programs regarding the admission of students to institutions of higher education.¹¹⁷ Two remarkably similar cases with conflicting results between two courts,¹¹⁸ as well as the twenty-four year old *Regents of the University of California v. Bakke* case,¹¹⁹ provide the context in which the United States Supreme Court

112. 535 U.S. 391 (2002).

113. *Id.* at 393, 405–06. *See Int'l Bhd of Teamsters v. United States*, 431 U.S. 324, 352–54 (1977) (reconciling seniority rules with the 1964 Civil Rights Act and addressing whether the union seniority system perpetuates the past effects of discrimination).

114. 536 U.S. 181 (2002).

115. *Id.* at 182, 185, 189. The Court reached its decision in *Barnes* by analogizing Title VI of the 1964 Civil Rights Act to the application of Title II of the ADA.

116. Although the cases discussed above are more relevant to general employer-employee relations, the Court decided in *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), that participation in the Professional Golf Association Tour was governed by the public accommodations provisions of Title III of the ADA, and that golfer Casey Martin was entitled to the use of a golf cart, as a reasonable accommodation to his disability. *Id.* at 676–77, 681, 690.

117. *Gratz v. Bollinger*, 123 S. Ct. 2411, 2417 (2003); *Grutter v. Bollinger*, 123 S. Ct. 2325, 2338 (2003).

118. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *aff'd Grutter*, 123 S. Ct. at 2347; *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd* 78 F.3d 932 (5th Cir. 1996), *rev'd in part and remanded* by 236 F.3d 256 (5th Cir. 2000), *cert. denied*, 533 U.S. 929 (2001), *overruled in part by Grutter* 123 S. Ct. 2325. However, since *Hopwood* was reversed in 1996, the Sixth Circuit and the Fifth Circuit are now in accord. *Hopwood*, 78 F.3d 932, 962.

119. 438 U.S. 265 (1978).

decided *Grutter v. Bollinger*¹²⁰ and *Gratz v. Bollinger*,¹²¹ *Grutter*'s companion case.

Bakke arguably established diversity in student admissions as a constitutionally permissible goal in higher education.¹²² While the actual procedures used by the University of California were prohibited as violating constitutional standards,¹²³ Justice Powell, writing for the plurality of the Court, found that universities have an interest in creating a diverse student body.¹²⁴ This interest, was found to be grounded in the First Amendment.¹²⁵

Hopwood v. Texas challenged the constitutionality of procedures for admission to the University of Texas Law School.¹²⁶ The University of Texas Law School utilized a dual track system for admissions, whereby a minority admissions subcommittee of the full admissions committee evaluated minority students separately from non-minority students.¹²⁷ This procedure was found by the trial court to serve a compelling government interest under *Bakke*, but was unconstitutional as a violation of the equal protection clause of the Fourteenth Amendment because the admissions procedures were not narrowly tailored to meet the government's interest in diversity.¹²⁸ The Fifth Circuit reversed the trial court's conclusion that diversity served as a compelling government interest without reaching the issue of whether the University of Texas Law School's admissions procedures were narrowly tailored.¹²⁹ The United States Supreme Court refused to grant

120. *Grutter*, 123 S. Ct. at 2335–36.

121. *Gratz*, 123 S. Ct. at 2428.

122. *Bakke*, 438 U.S. at 311–12.

123. *Id.* at 319–20.

124. *Id.* at 312–13.

125. *Id.*

The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. . . .

The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.

Id. at 311–12 (footnote omitted). The United States Supreme Court has since "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." *Grutter*, 123 S. Ct. at 2337.

126. *Hopwood v. Texas*, 861 F. Supp. 551, 554 (W.D. Tex. 1994), *rev'd* 78 F.3d 932 (5th Cir. 1996), *rev'd in part and remanded* by 236 F.3d 256 (5th Cir. 2000), *cert. denied*, 533 U.S. 929 (2001), *overruled in part by Grutter* 123 S. Ct. 2325.

127. *Id.* at 558, 559, 560, 562.

128. *Id.* at 579, 582.

129. *Hopwood v. Texas*, 78 F.3d 932, 945–46, 948, 955, 962 (5th Cir. 1996), *rev'd in part and*

certiorari in the *Hopwood* case.¹³⁰

In the aftermath of the *Hopwood* case, many universities stopped considering race in admissions.¹³¹ California even passed a referendum, Proposition 209,¹³² prohibiting the consideration of race. As a result, minority admissions have dropped dramatically in California and elsewhere where race is not a factor in admissions.¹³³

The University of Michigan developed and used an admission procedure that included the consideration of race as a factor in admission of students to the Law School.¹³⁴ Its procedures, however, were different from those utilized at the University of Texas Law School and purported to follow the Harvard Plan, which Justice Powell approved of in *Bakke*. The University of Michigan Law School considered race as a “plus” factor in admissions, without separate tracks or scoring systems for minority students.¹³⁵ Nevertheless, these procedures were challenged by non-minority students denied admission to the Law School.¹³⁶

The trial court decided that the University of Michigan violated the Fourteenth Amendment by its consideration of race in admission to the

remanded by 236 F.3d 256 (5th Cir. 2000), *cert. denied*, 533 U.S. 929 (2001), *overruled in part by Grutter* 123 S. Ct. 2325.

130. *Texas v. Hopwood*, 518 U.S. 1033 (1996); *Texas v. Hopwood*, 533 U.S. 929 (2001).

131. See CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 68 (Gary Orfield & Edward Miller eds., 1998).

132. Proposition 209 was approved on November 1996 and amended the California State Constitution: “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” CAL. CONST. art. I, § 31. For cases holding that Proposition 209 is constitutionally sound, see *Coalition for Econ. Equal. v. Wilson*, 122 F. 3d 692, 711 (9th Cir. 1997) and *Hi-Voltage Wire Works Inc. v. City of San Jose*, 12 P.3d 1068, 1088 (Cal. 2000).

133. See *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 840 (E.D. Mich. 2001) (stating that members of minority groups are granted preference because these minorities “would not be admitted in significant numbers unless race is explicitly considered.”), *cert. granted in part* 537 U.S. 1044 (2002), *rev'd in part, vacated in part*, 288 F.3d 732 (6th Cir. 2002), *aff'd* 123 S. Ct. 2325 (2003). For commentary on this topic, see Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 14 (1997) (hypothesizing that abandoning consideration of race would result in “a substantial reduction in the overall number of applicants of color who [would be] offered admission into ABA-approved law schools”); Jesse Jackson, *No Time to Alter Affirmative Action*, CHI. SUN TIMES, Dec. 10, 2002, at 25 (noting that according to the University of Michigan, “only about 3 percent of black students would be admitted if determination were left solely to grades and test scores”).

134. See *Grutter*, 137 F. Supp. 2d at 827.

135. See *Grutter*, 288 F.3d at 746.

136. *Grutter*, 137 F. Supp. 2d at 823–24; see also *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 814 (E.D. Mich. 2000), *rev'd in part, remanded by* 123 S. Ct. 2411 (2003).

Law School.¹³⁷ However, the Sixth Circuit Court of Appeals specifically relied on the *Bakke* case to overrule the trial court, holding that the means used to meet the state's compelling interest in achieving student body diversity were narrowly tailored.¹³⁸

The United States Supreme Court granted certiorari in *Grutter v. Bollinger* to resolve the question of whether diversity is a constitutionally permissible basis for the consideration of race in the admission of students to public universities.¹³⁹ The standard for constitutional inquiry became strict scrutiny following the *Adarand v. Peña* case.¹⁴⁰ The writ of certiorari also presented the opportunity for re-evaluating the *Bakke* case.¹⁴¹

Diversity, a constitutionally based interest that is grounded in the First Amendment, has been found to be a compelling government interest in prior cases,¹⁴² such as *Bakke*¹⁴³ and *Metro Broadcasting v. FCC*.¹⁴⁴ This view holds that the range of views expressed in a university (resonating in the marketplace of ideas) is broadened by the inclusion of individuals with varied characteristics, backgrounds and experiences. Thus, a constitutionally based interest grounded in the First Amendment might supply the compelling government interest required under an *Adarand* analysis of the equal protection clause of the Fourteenth Amendment¹⁴⁵ in an admission procedure that considers race

137. *Grutter*, 137 F. Supp. 2d at 853.

138. *Grutter*, 288 F.3d at 749 (opposing the “district court’s consideration of five factors not found in *Bakke*” and stating that the factors “relied on by the district court cannot sustain its holding”).

139. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2335 (2003).

140. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229 (1995).

141. *Grutter*, 123 S. Ct. at 2335–36.

142. See Paula Alexander Becker, *Affirmative Action and Reverse Discrimination: Does Taxman v. Board of Education of the Township of Piscataway Define the Outer Limits of Lawful Voluntary Race-Conscious Affirmative Action?*, 8 SETON HALL CONST. L.J., 13, 33–39 (1997).

143. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 311–13 (1978).

144. 497 U.S. 547, 600 (1990), *rev'd on other grounds*; *Adarand*, 515 U.S. at 227. The Court in *Adarand* stated:

What truly distinguishes *Metro Broadcasting* from our other affirmative action precedents is the distinctive goal of the federal program in that case. Instead of merely seeking to remedy past discrimination, the FCC program was intended to achieve future benefits in the form of *broadcast diversity*. Reliance on race as a legitimate means of achieving diversity was first endorsed by Justice Powell in . . . *Bakke* The proposition that fostering diversity may provide a sufficient interest to justify such a program is not inconsistent with the Court’s holding today—indeed, the question is not remotely presented in this case—and I do not take the Court’s opinion to diminish that aspect of our decision in *Metro Broadcasting*.

Adarand, 515 U.S. at 257–58 (Stevens, J., dissenting) (first emphasis added).

145. U.S. CONST. amend. XIV, § 1:

or other ascriptive characteristics of the individual. Courts would then determine, under the specific facts of a case, how to reconcile the two constitutionally based interests underlying the controversy, and whether the admissions procedures are narrowly tailored to meet the asserted Fourteenth Amendment interests implicated in the admissions procedures.¹⁴⁶ This fact sensitive inquiry into narrow tailoring allowed the Supreme Court to affirm both the *Hopwood* and *Grutter* Appellate Courts.¹⁴⁷

The United States Supreme Court holding in *Grutter* provides additional insight into affirmative action, wherein the Court decided, using a strict scrutiny standard of review, that student body diversity in public higher education is a compelling government interest.¹⁴⁸ It also decided in *Grutter* that the means used to achieve that interest were narrowly tailored.¹⁴⁹ However, the means used by the University for admission to the undergraduate College of Literature, Science and Art failed to pass constitutional muster, because they were not narrowly tailored.¹⁵⁰ Justice O'Connor, writing for the majority, "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."¹⁵¹ The *Grutter* case rejects the rule that "remedying past discrimination is the only permissible justification for race-based governmental action."¹⁵² Ultimately, the use of race in admissions decisions must be narrowly tailored to achieve a permissible government interest. In *Grutter*, the Court found that the law school admission procedure, which considered race a "plus" factor, required individualized review of each applicant's

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

146. Strict scrutiny requires not only a compelling government interest, but also narrow tailoring to meet the compelling interest. *See, e.g., Adarand*, 515 U.S. at 227.

147. *See Hopwood v. Texas*, 78 F.3d 932, 948 (5th Cir. 1996); *Grutter v. Bollinger*, 123 S. Ct. 2325, 2328 (2003).

148. *Grutter*, 123 S. Ct. at 2328, 2329, 2337.

149. *Grutter*, 123 S. Ct. at 2347.

150. *Gratz v. Bollinger*, 123 S. Ct. 2411, 2427–28 (2003).

151. *Grutter*, 123 S. Ct. at 2337.

152. *Id.* at 2338–39. This may have far-reaching implications in other contexts, particularly because, as Justice O'Connor notes, leadership of the American military and of American businesses, which is fostered in significant ways by institutions of higher education, requires "skills needed in today's increasingly global marketplace [that] can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* at 2340.

profile, and which required individuals to compete with each other for all open seats in a given class, passed constitutional muster.¹⁵³ However, the procedures for admission to the undergraduate college¹⁵⁴ were found unconstitutional where the school used a selection index that granted twenty points, of the required one hundred points to guarantee admission, to all minority applicants.¹⁵⁵ The United States Supreme Court found that the undergraduate college procedures were “not narrowly tailored to achieve the interest in educational diversity.”¹⁵⁶

V. CONCLUSION

As previously discussed, recent Supreme Court decisions have significantly affected the respective rights and responsibilities of employers and employees. Employer policies requiring arbitration of employment disputes have been affirmed by several Supreme Court cases. The reach of the ADA, as well as the remedies available to claimants under the ADA, have been limited by the Supreme Court. Recent decisions have also limited the scope of the ADEA and Title VI of the Civil Rights Act. In the Spring of 2003, the United States Supreme Court determined that the Family Medical Leave Act applies to states, through Congress’ valid exercise of its power granted to it under section 5 of the Fourteenth Amendment. The Supreme Court also decided in June of 2003 that the Fourteenth Amendment permits the University of Michigan to consider race as a factor in the admission of students because diversity can provide a compelling government interest sufficient to meet the Fourteenth Amendment standard of equal protection, provided that the method used in the admission of students is narrowly tailored to meet the University’s interest.

Employee access to arbitration of employment disputes, including claims of discrimination and unjust dismissal, arguably enhances employee job security. This provides a low-cost, expeditious forum for the adjudication of such disputes, provided that the arbitration agreement does not fail on grounds of unconscionability. Employers likewise benefit from the use of arbitration, rather than litigation. The ADA has

153. *Id.* at 2343.

154. These procedures were adopted in 1999. *Gratz*, 123 S. Ct. at 2421. From 1995 through 1998, the undergraduate school used a different program, where it reserved seats for underrepresented minority applicants, effectively keeping nonprotected applicants from competing for those slots. *Id.* The District Court found that program to be unconstitutional under *Bakke*. *Id.*

155. *Id.* at 2427.

156. *Gratz*, 123 S. Ct. at 2427 (5-4 decision) (Rehnquist, C.J.).

been narrowly interpreted to exclude state employers. Furthermore, recent Supreme Court cases have constricted the coverage of the ADA by limiting what qualifies as a disability under the meaning of the Act. Both trends follow a period of expansion of ADA coverage.¹⁵⁷

In 2003, the Supreme Court decided a pair of cases dealing with the use of affirmative action as a factor for admission in higher education. Although not directly involving the employment relationship, the outcome of the *Grutter v. Bollinger* and *Gratz v. Bollinger* cases will impact employer-employee relations because they clarified the scope of the Fourteenth Amendment and decided whether and to what extent the consideration of race to promote diversity is a constitutionally permissible goal. The extension of these cases to the employment arena is a likely development of the law, particularly in view of Justice O'Connor's reference to leadership skills required of individuals in our present global environment. Thus, while employees have significant statutory protection under the Civil Rights Act, the ADA, the FAA and other employment related statutes and administrative regulations, recent Supreme Court decisions on the whole have expanded management prerogatives, upholding the use of arbitration as a condition of employment, narrowing the scope and remedies available under the ADA, and deciding that diversity can serve as a compelling government interest supporting the consideration of race in the admission of students to public institutions of higher education.
