Arbitration of Title VII and Parallel State Discrimination Claims: A Proposal

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Valerie accepts a job at Designworks Furniture as a showroom manager. On the first day of her job, she signs an employment agreement containing an arbitration clause. The arbitration clause requires Valerie to arbitrate any claim which arises out of her employment with Designworks. Two months later, Valerie becomes engaged to Donald, another Designworks employee. Once Valerie and Donald announce their engagement, a Designworks supervisor immediately demotes Valerie to a stock manager position saying, "We can't have you parading around the showroom looking for lovers."

Valerie decides to pursue a sex discrimination claim against Designworks. Instead of arbitrating her claim under the arbitration clause in her employment contract, Valerie files her claim with the Equal Employment Opportunity Commission ("EEOC") alleging a violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). Once the EEOC notifies Designworks of the claim, 

1. "Arbitration is the submission of a dispute to one or more impartial persons for a final and binding decision." AMERICAN ARBITRATION ASSOCIATION, RESOLVING EMPLOYMENT DISPUTES: MODEL EMPLOYMENT ARBITRATION PROCEDURES 3 (1989).

Commercial arbitration is dispute resolution between private individuals and private businesses pursuant to a private arbitration agreement, whereas labor arbitration is dispute resolution between unions and employers pursuant to a collective bargaining agreement. See M. Dome, COMMERCIAL ARBITRATION § 1.01 (G. Wilner rev. ed. 1988 & Supp. 1989) (for a discussion of the general scope of commercial arbitration).


This Comment focuses on arbitration of Title VII and parallel state claims in the commercial arbitration context. However, references are made to arbitration in the labor arbitration context when necessary to aid the discussion.

2. The EEOC is the federal agency created by Title VII to process discrimination charges. The procedure for processing EEOC charges is discussed in the text accompanying notes 121-135, infra.

Valerie's work situation becomes unbearable. Both Valerie and Donald terminate their employment with Designworks and immediately find other employment with Shaw's Furniture.

Six months pass and the EEOC finally issues Valerie a right-to-sue notice in federal court. If Valerie files her complaint against Designworks and waits two years to litigate her claim. At trial, the court finds that Designworks' comments and behavior violate Title VII and awards Valerie attorney's fees and backpay for the two week interval when Valerie was between jobs. If Valerie had arbitrated her claim, she probably would have received a higher award and the dispute would have been resolved more quickly and cheaply. This Comment addresses Valerie's situation and illustrates why arbitration should play a more direct role in resolving Title VII and parallel state discrimination claims.

I. STATEMENT OF THE PROBLEM

Historically, Title VII claims and parallel state employment discrimination claims have not been subject to resolution through binding arbitration. Although recent United States Supreme Court cases affirm and endorse arbitration of federal and state statutory rights in general, lower federal and state courts continue to affirm policies which override the mandate to arbitrate under the Federal Arbitration Act ("FAA"). Specifically, both federal and state courts have held that the federal policy favoring judicial resolution of employment discrimination claims outweighs the policy favoring arbitration.

This affirmation is justified when arbitration procedures are deficient because arbitration may then fail to redress rights founded upon Title VII and parallel

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4. See infra note 134.
5. See infra notes 158-59 and accompanying text.
6. See infra text accompanying notes 34-59.
7. 9 U.S.C. §§ 1-14. The FAA makes all arbitration agreements involving interstate commerce and maritime transactions enforceable. Section 2 of the FAA provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

To meet this goal, the FAA provides two enforcement mechanisms. The court can stay court proceedings involving any matter referable to arbitrate under the FAA. 9 U.S.C. § 3. The court can also compel parties to arbitrate upon a showing that the dispute is arbitrable under the FAA. 9 U.S.C. § 4.

For cases which hold that certain statutory rights cannot be subject to binding arbitration, see note 24, infra.

state statutes. However, when arbitration procedures provide adequate protection of statutory rights, lower courts must not ignore the United States Supreme Court's approval of arbitration as an acceptable forum for resolving statutory claims.9

This Comment suggests that the Supreme Court's recent endorsement of arbitrating complex statutory claims should lead to an approval of arbitrating Title VII as well as parallel state antidiscrimination claims.10 Section II discusses the advantages and disadvantages of arbitration, and the growing acceptance of arbitrating statutory claims. Section III reviews the language in several recent United States Supreme Court cases which explicitly rejects the presumption that arbitration is an inferior forum for resolving statutory rights. Section IV discusses and criticizes a recent Eighth Circuit case where the court held that a judicial forum must be preserved for Title VII and parallel state discrimination claims notwithstanding the existence of a valid arbitration agreement. Section V proposes an amendment to Title VII which would accommodate both the policy against employment discrimination and the policy favoring arbitration. Section V also suggests ways employers could make arbitration a more adequate and attractive forum for resolving federal and state discrimination claims, and appeals to organizations to encourage and facilitate arbitrating these claims.

This Comment concludes that arbitration can, under certain conditions, provide an adequate forum for vindicating federal and state discrimination rights. However, until employers make arbitration an even more attractive forum for resolving discrimination claims, and Congress enacts laws consistent with the FAA to enforce arbitration agreements when conditions warrant, employees will lose the benefits of the arbitration for which they bargained.

II. ARBITRATION AS AN ALTERNATIVE TO LITIGATING DISCRIMINATION DISPUTES

The suitability of arbitration as a forum for resolving statutory claims has received much attention recently. The legal community has recognized that arbitrators can complement the courts' traditional role in interpreting and applying state and federal statutes.

Arbitration has developed over time as a viable alternative to litigation.11 The enactment of the FAA in 1925 was a milestone in reversing the traditional

9. See infra text accompanying notes 34-59. But see Lieberman, supra note 3, at 1853 (advocating that discrimination claims should be an exception to the "Court's celebration of arbitral competence").

10. This Comment focuses on arbitration of employment discrimination claims pursuant to private agreements negotiated before the alleged discrimination takes place. This Comment does not discuss voluntary submission of discrimination claims to arbitration after the alleged discrimination takes place.

hostility toward arbitration\textsuperscript{12} and signaled the birth of a national policy favoring arbitration.\textsuperscript{13} The FAA makes all arbitration agreements affecting interstate commerce and maritime transactions "valid, irrevocable, and enforceable,"\textsuperscript{14} and places arbitration agreements "upon the same footing as other contracts. . ."\textsuperscript{15}

\textit{A. Advantages and Disadvantages of Arbitration}

Arbitration offers several advantages which make it an attractive forum for both employers and employees to resolve discrimination claims.\textsuperscript{16} First, arbitration is simple and efficient. Second, arbitration is relatively inexpensive compared to the costs of a full-blown court trial. Third, the process is speedy and final, avoiding the delay caused by trial procedures and crowded court dockets.\textsuperscript{17} Fourth, the arbitrator selected to resolve the dispute may be a technical specialist in the field of the dispute.\textsuperscript{18} Finally, arbitration proceedings are informal, private, and confidential, which increases the possibility of more amicable dispute resolution.\textsuperscript{19}

\textsuperscript{12} The courts routinely refused to enforce agreements to arbitrate because arbitration was considered an attack on the court's jurisdiction. "Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived . . . and was adopted . . . by the American courts." H.R. Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924), \textit{quoted in} Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 n.6 (1985). \textit{See Comment, Arbitrability of Disputes Under the Federal Arbitration Act, 71 Iowa L. Rev. 1137, 1139-1141 (1986); Faure, supra note 11, at 201. See generally T. OeNKE, COMMERCIAL ARBITRATION § 2:3 (1987 & Supp. 1990) (for a general history of arbitration); Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 205 (1926).}

\textsuperscript{13} \textit{See supra} note 7.


\textsuperscript{16} \textit{See infra} note 25 and accompanying text.

\textsuperscript{17} The parties to an arbitration usually choose the arbitrator so they benefit from the "acceptability factor," whereas in court, cases may be won or lost by the luck of the draw in judge assignments. Edwards, \textit{Reflections}, supra note 16, at 25. "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." Newman, supra note 16, at 42 ("quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)).

\textsuperscript{18} "[T]he employee . . . has a strong incentive to arbitrate grievances, and arbitration may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum." Alexander, 415 U.S. at 55. \textit{See} Carmell & Westercamp, \textit{The Arbitration of EEO Claims: A Decade After Gardner-Denver}, 60 N.Y. St. B.J. 26, 28 (Jan. 1988).
However, where public policy issues like employment discrimination are concerned, these advantages may become obstacles. First, arbitrators are not required to apply substantive or procedural law. Second, arbitrators are not required to apply the rules of evidence. Third, arbitrators do not have to give reasons for their decisions. Finally, arbitration awards are subject to judicial review only upon narrow grounds. Considering these factors, courts have held that arbitration is not binding for certain statutory rights.

Despite these limitations, arbitration is still considered an attractive forum for resolving discrimination claims, especially since the EEOC and courts have been hampered by huge, unmanageable caseloads. The long delay in reaching a
resolution through the EEOC,\textsuperscript{26} and finally through the courts,\textsuperscript{27} discourages victims of discrimination from utilizing the Title VII scheme.\textsuperscript{28}

The competence of arbitrators is another important factor to consider when evaluating the feasibility of arbitrating discrimination claims.\textsuperscript{29} The arbitrator's role has expanded beyond mere contract interpretation.\textsuperscript{30} This new role reflects the growing consensus that arbitrators are competent to decide statutory issues if they are adequately trained and familiar with the surrounding law.\textsuperscript{31} Arbitrators are finding themselves in positions where they must refer to statutes to decide discrimination issues.\textsuperscript{32} Some arbitrators have even indicated in their

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\item \textsuperscript{26} See infra text accompanying notes 121-35. The EEOC received 66,305 charges of employment discrimination against private-sector employees in 1986-1987. During the same period, state and local fair employment agencies received 52,139 charges. A. Westin & A. Feld, Resolving Employment Disputes Without Litigation 1 (1988). See Newman, supra note 16, at 37 ("The relative speed of the arbitral solution affords tremendous advantages as compared with the delays imposed by the tremendous backlog of cases before the EEOC, other federal and state civil rights agencies, and the courts, especially in view of the inevitable additional problems generated by uncertainty during periods of delay.").
\item \textsuperscript{27} During 1986-1987, private individuals, or government antidiscrimination agencies suing on behalf of private individuals, filed over 10,000 employment discrimination cases in federal or state courts. A. Westin & A. Feld, supra note 26, at 1.
\item \textsuperscript{28} See R. Coulson, Business Arbitration, supra note 16, at 28 ("Americans are losing patience with judicial solutions that take years in coming and leave both parties exhausted by delays and legal expenses.").
\item \textsuperscript{29} See Carmell & Westercamp, supra note 19, at 30 n.32 (citing statistics from a survey where 659 labor attorneys indicated that the most important qualifications for an arbitrator of Title VII claims is prior experience with discrimination claims and Title VII law).
\item \textsuperscript{30} But see Alexander, 415 U.S. at 53-54 ("[T]he arbitrator has authority to resolve only questions of contractual rights . . . ."); United States Commission on Civil Rights, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1224 (1971) [hereinafter Commission on Civil Rights] (the arbitrator's sole function is interpretation of contract provisions, not statutory law).
\item \textsuperscript{31} One commentator noted:

I believe that arbitration should be explored as a mechanism for the resolution of individual claims of discrimination in unorganized, as well as unionized, sectors of the employment market.

As for concerns about the competence of arbitrators to hear such claims, I have no doubt that there are many highly qualified arbitrators who could easily be trained to deal with this limited category of public law issues.

\item \textsuperscript{32} See Edwards, Reflections, supra note 16, at 21-22 ("Arbitrators frequently must consider public laws in order to resolve private disputes."); St. Antoine, Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny, 1975 Proc. 30th Ann. Meeting Nat'l Acad. Arb. 29, 35-36 ([R]ecent statutes [such as Title VII . . . are so interwoven in the fabric of collective bargaining agreements that it is simply impracticable in many cases for arbitrators to deal with contractual provisions without taking into account statutory provisions. . . ."); Newman, supra note 16, at 48 (footnote omitted) ("In the past decade . . . arbitrators have frequently cited Title VII and held that they must apply it, although the collective bargaining contract had no language referring to Title VII or any other law."); Commission on Civil Rights, supra note 30, at 1224 (most arbitrators
awards that they researched cases under the federal law to guide their decisions.33

III. THE SUPREME COURT ENDORSES ARBITRATION

In recent cases,34 the Supreme Court has supported arbitration of federal statutory claims pursuant to the FAA in two ways. First, the Supreme Court has created a rebuttable presumption in favor of arbitrating federal statutory claims.35 Second, the Supreme Court has endorsed arbitration as a proper forum for resolving complex federal statutory claims.36

Recognizing that the FAA mandates rigorous enforcement of arbitration agreements,37 the Court has created a presumption that, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ."38 To implement this presumption, the Court suggests that "questions of arbitrability must be resolved with a healthy regard for the federal policy favoring arbitration."39 The Court reasons that "the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights"40 because an arbitration agreement merely dictates the type

34. Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917 (1989) (holding that claims under the Securities Act of 1933 are arbitrable, and overruling Wilko v. Swan, 346 U.S. 427 (1953)); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (holding that claims under § 10(b) of the Securities and Exchange Act and claims under RICO are arbitrable); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (holding that federal antitrust violations arising in the international context are arbitrable); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985) (rejecting the intertwining doctrine where the federal courts would permit all arbitrable and nonarbitrable claims to be tried together if the claims arise out of the same transaction and if the claims were legally and factually related); Moses, 460 U.S. at 29 (upholding the court of appeals' sua sponte determination of arbitrability under § 4 of the FAA because the parties were not prejudiced thereby, and the determination facilitated "the prompt arbitration that Congress envisaged.").
35. See infra text accompanying notes 37-42.
36. See infra text accompanying notes 43-52.
37. Byrd, 470 U.S. at 221. See supra note 34. Specifically, see McMahon, 482 U.S. at 226 (The FAA "standing alone . . . mandates enforcement of agreements to arbitrate statutory claims.").
39. Id.
40. McMahon, 482 U.S. at 232.
of forum without altering the substantive rights afforded by the statute. This presumption is in line with the "emphatic policy in favor of arbitral dispute resolution" underlying the FAA.

In addition, the Supreme Court has affirmed its confidence in arbitration as an appropriate forum for resolving federal statutory issues. Most recently, the Court noted the erosion of "the old judicial hostility to arbitration" which dominated older decisions, and rejected the argument that arbitration is inferior as an "outmoded presumption." The Court has found "the mistrust of arbitration that formed the basis for the Wilko opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time." Determined to reverse the negative preconceptions about arbitration, the Court has stressed that the judicial suspicion of arbitration and the competence of arbitrators should no longer inhibit the development of arbitration.

Also, the Court now accepts the reality that in most cases arbitrators follow the law, especially when arbitrating complex statutory issues. Thus, the Court will not presume that arbitrators will ignore applicable statutes. Even when arbitrators do not follow the law, the Court is satisfied that the FAA's provision granting judicial review of arbitration awards will protect the grievant's statutory rights. Furthermore, the Court notes that the "adaptability and access to expertise" available in arbitration facilitate the resolution of complex statutory

41. Mitsubishi, 473 U.S. at 628 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."). See also Rodriguez de Quijas, 109 S. Ct. at 1920; McMahon, 482 U.S. at 229-30.

42. Mitsubishi, 473 U.S. at 631. See generally Burger, supra note 16.

43. Rodriguez de Quijas, 109 S. Ct. at 1920 (quoting Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942)). See supra note 12.

44. Id. The Rodriguez de Quijas Court was specifically referring to its decision in Wilko v. Swan, 346 U.S. 427 (1953). In Wilko, the plaintiff sued a securities brokerage firm for damages under section 12(b) of the Securities Act of 1933. Although the plaintiff signed an arbitration agreement enforceable under the FAA, the United States Supreme Court held that the arbitration agreement could not be enforced because it violated the policies behind the Securities Act. Also, the Wilko Court noted that arbitration was inferior because: (1) arbitration is not appropriate for subjective inquiries; (2) arbitrators are not instructed on the law; (3) the arbitrator is not required to give reasons for his awards; (4) the record in arbitration is incomplete; and (5) power to vacate the award is limited and there is no judicial review for error in interpretation. McMahon, 482 U.S. at 231 (quoting Wilko v. Swan, 346 U.S. 427, 435-37 (1953)). Wilko was overruled by the Supreme Court in Rodriguez de Quijas, 109 S. Ct. 1917.

45. Rodriguez de Quijas, 109 S. Ct. at 1920 ("To the extent that Wilko rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.").

46. See supra note 44.

47. McMahon, 482 U.S. at 233.


49. McMahon, 482 U.S. at 232.

50. Id. ("[T]here is no reason to assume at the outset that arbitrators will not follow the law.").

51. Id. See supra note 23.
issues.\textsuperscript{52} As the foregoing illustrates, the policy against arbitrating statutory issues is no longer a firm principle.\textsuperscript{53} The Supreme Court's recent pronouncements suggest that arbitration plays a useful role in resolving federal statutory issues. Many federal statutes which were considered policy exceptions to the FAA's application have been either judicially or legislatively overruled.\textsuperscript{55} However, the Court has recognized that where the congressional intent to preserve a judicial forum is clear, "the Arbitration Act's mandate may be overridden by a contrary congressional command."\textsuperscript{57} The Supreme Court has outlined a two-step test which defeats the application of the FAA to statutory rights: (1) Congress must have intended to make an exception for the statutory claim, and (2) the intention must be "discernable from the text, history, or purposes of the statute."\textsuperscript{58}

IV. Swenson: A Break in the Trend

In a seminal case, the Eighth Circuit Court of Appeals was confronted with the issue of whether a state statutory sex discrimination claim was subject to arbitration under the FAA. In \textit{Swenson v. Management Recruiters Int'l, Inc.}, the Eighth Circuit boldly disregarded the Supreme Court's recent decisions encouraging arbitration of statutory rights\textsuperscript{60} and concluded that Title VII and

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\item \textit{Mitsubishi}, 473 U.S. at 633. Furthermore, "potential complexity should not suffice to ward off arbitration." \textit{Id}. The \textit{Mitsubishi} Court also noted that the streamlined procedures and lower cost offered in arbitration actually create an incentive to vindicate statutory rights in arbitration. \textit{Id}.
\item See Rodriguez de Quijas, 109 S. Ct. 1917 (claims under the Securities Act of 1933 are arbitrable, overruling \textit{Wilko}); \textit{McMahon}, 482 U.S. 220 (claims under § 10(b) of the Securities Exchange Act of 1934 and RICO are arbitrable); \textit{Mitsubishi}, 473 U.S. 614 (claims under the Sherman Antitrust Act are arbitrable in international disputes).
\item "If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history' or from an inherent conflict between arbitration and the statute's underlying purpose." \textit{McMahon}, 482 U.S. at 227 (citation omitted) (quoting \textit{Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.}, 473 U.S. 614, 628 (1985)).
\item \textit{Id}. at 226.
\item \textit{Id}. at 227.
\item \textit{Swenson}, 858 F.2d 1304 (8th Cir. 1988), \textit{motion denied, reh's denied}, 872 F.2d 264 (8th Cir. 1989), \textit{cert. denied}, 110 S. Ct. 143 (1989). Before \textit{Swenson}, no federal court had ever decided the arbitrability of state antidiscrimination claims in the commercial arbitration context. Although several recent Supreme Court cases dealing with the FAA boldly affirmed and endorsed the arbitration of federal and state statutory rights, see \textit{supra} note 34, none of these cases dealt with arbitration of employment discrimination claims. \textit{See also} Brief for Appellant at ii, \textit{Swenson v. Management Recruiters Int'l, Inc.}, 858 F.2d 1304 (8th Cir. 1988) (No. 87-5465-MN) [hereinafter Appellant's Brief].
\item \textit{See supra} text accompanying notes 34-52.
\end{itemize}
parallel state statutes are not subject to binding arbitration under the FAA. Management Recruiters International\textsuperscript{62} ("MRI") employed Deborah Swenson as a manager in one of its subsidiary employment agencies. Prior to beginning work for MRI, Swenson signed an employment agreement which contained a broad arbitration clause.\textsuperscript{63} Subsequently, Swenson claimed that her supervisor violated the Minnesota Human Rights Act\textsuperscript{64} by: (1) sexually harassing her during her employment,\textsuperscript{65} and (2) ordering her not to hire black employees.\textsuperscript{66}

Swenson sued her supervisor and MRI in district court.\textsuperscript{67} Both defendants moved to stay proceedings pending arbitration of all issues pursuant to section 3 of the FAA.\textsuperscript{68} The district court granted the defendants' motion on all of the

\begin{footnotes}
\item[61.] Swenson, 858 F.2d 1304.
\item[62.] Management Recruiters International is a company specializing in personnel placement and is a wholly-owned subsidiary of CDI Corporation.
\item[63.] The arbitration clause read as follows:
\begin{enumerate}
\item [10.] Arbitration
\begin{enumerate}
\item [(a)] Except as provided in Subsection 10(b) hereof, all controversies, claims, disputes and matters in question arising out of, or relating to, this Agreement or the breach thereof, or the relations between the parties, shall be decided by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The parties agree that the arbitration shall take place in Cleveland, Ohio, and shall be governed by the law of the State of Ohio. The award rendered by the arbitrator shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof, including a federal district court, pursuant to the Federal Arbitration Act. The arbitrator may grant the Company injunctive relief, including mandatory injunctive [sic] relief, in order to protect the rights of the Company pursuant to sections 5, 6, and 7 hereof, but shall not be limited to such relief. The parties specifically agree that this provision for arbitration shall not preclude the Company from seeking injunctive relief in a court in order to protect its rights under said section 5, 6, and 7, nor shall the filing of such an action constitute waiver by the Company of its right to seek arbitration hereunder. In preparation for the arbitration hearing, each party may utilize all methods of discovery authorized by the Ohio rules of Civil Procedure, and may enforce the right to such discovery in the manner provided by said Rules and/or by the Ohio Arbitration Law.
\item [(b)] The right of the Company to terminate this agreement shall not be subject to arbitration.
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\item[64.] MINN. STAT. ANN. § 363.03 (West 1966 & Supp. 1990).
\item[65.] Swenson alleged that the harassment created a "hostile environment" which caused her to terminate her employment with MRI. This type of harassment is recognized as a form of sex discrimination. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986). See generally Monat & Gomez, Sexual Harassment: The Impact of Meritor Savings Bank v. Vinson on Grievance and Arbitration Decisions, 41 Atm. J. 24 (Dec. 1986).
\item[66.] Subdivision 6(2) of the Minnesota Human Rights Act prohibits aiding and abetting employment discrimination. MINN. STAT. ANN. § 363.03 subd. 6(2).
\item[67.] Swenson v. CDI Corp., 670 F. Supp. 1438 (D. Minn. 1987). Section 363.14 subd. 1(a) of the Minnesota Human Rights Act permits the victim of discrimination to bypass administrative proceedings and file suit directly in district court.
\item[68.] 9 U.S.C. § 3. This section requires the court to order a stay of proceedings when presented with an issue referable to arbitration under a valid arbitration agreement.
\end{footnotes}
Swenson appealed, claiming that the district court erred in finding the sex and race discrimination claims arbitrable. Specifically, she argued that judicial remedies provided under the Minnesota Human Rights Act were not preempted by the FAA. Accepting Swenson's argument, the Eighth Circuit reversed that part of the district court's order which granted a stay of the two state employment discrimination claims. Relying on Alexander v. Gardner-Denver Co., a 1974 Supreme Court case, the Swenson court held that the text and legislative history of Title VII indicated that Congress intended to preserve a judicial forum for violations of both Title VII and parallel state statutory rights.

In Alexander, the Supreme Court considered the arbitrability of a Title VII race discrimination claim pursuant to a collective bargaining agreement. A unanimous Court in Alexander plainly rejected the idea that prior submission of a discrimination claim to arbitration pursuant to a grievance arbitration clause in a collective bargaining agreement would bar a subsequent suit under Title VII.

70. Swenson, 858 F.2d at 1305.
72. Swenson, 858 F.2d at 1309.
73. Alexander, 415 U.S. 36. In Alexander, a black union employee claimed his discharge was racially motivated and submitted his complaint under the grievance arbitration procedure provided in the collective bargaining agreement. The agreement contained a broad arbitration clause and also an antidiscrimination clause. Prior to the arbitration hearing, the employee filed a charge of racial discrimination with the state civil rights commission. The state agency referred the complaint to the EEOC. After investigating the complaint, the EEOC found no "reasonable cause to believe that the charge was true." The EEOC dismissed the complaint and issued Alexander a right-to-sue notice in federal court. See infra note 134.

This is the first time the United States Supreme Court considered the arbitrability of Title VII claims. See generally Carmell & Westercamp, supra note 19 (for a discussion of the development of Alexander and its potential impact on present discrimination arbitration).

In 1981, the Supreme Court extended its Alexander nonwaiver rule in Barrentine, 450 U.S. 728 (holding that prior submission of FLSA claims to arbitration pursuant to a collective bargaining agreement does not preclude subsequent judicial resolution). Again, in 1984, the Supreme Court extended its Alexander nonwaiver rule in McDonald, 466 U.S. 284 (holding that prior submission of a civil rights claim under 28 U.S.C. § 1983 to arbitration pursuant to a collective bargaining agreement does not preclude final resolution of the claim in court). More recently, in 1987, the Supreme Court reinforced the validity of Alexander, Barrentine, and McDonald in Atchison, T. & S.F.R. Co. v. Buell, 480 U.S. 557 (1987) (holding that prior submission of a claim under the Railway Labor Act did not deprive the employee of his right to bring an action under the Federal Employer's Liability Act).

Most courts have rejected the argument that Mitsubishi and McMahon limit the effect of Alexander. Udey, 883 F.2d at 186 ("the Court has done nothing to disturb its prior ruling in Alexander. . . "); Nicholson, 877 F.2d at 224 ("Nothing in Mitsubishi or Shearson suggests that the Court was overruling its prior holdings in Alexander, Barrentine, and McDonald. . . "); Alford, 712 F. Supp. at 548 ("Neither Shearson nor Mitsubishi overrules Alexander."); DeSapio, 143 Misc. 2d at 611, 540 N.Y.S.2d at 935 (Alexander is not in conflict with the ruling in Mitsubishi).

74. See supra note 1.
The Alexander Court reasoned that federal courts were ultimately responsible for enforcing Title VII, not arbitrators whose decisions are binding. The Court stressed that the private cause of action plays a central role in Title VII's enforcement scheme. In addition, the Alexander Court examined the legislative history of Title VII and found that Title VII "manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." Also, the Court reasoned that Alexander's contractual right to arbitrate was independent of his statutory rights under Title VII.

Finally, the Alexander Court offered several reasons why arbitration is not an appropriate forum for resolving Title VII claims. First, the arbitrator's role is limited to interpreting the contract, not to applying laws. Second, arbitrators are not competent to resolve complex discrimination disputes. The Alexander Court stressed that courts hold the primary responsibility for resolving statutory issues. Third, the factfinding process in arbitration is usually not as complete as judicial factfinding. Finally, "[a]rbitrators have no obligation . . . to give their reasons for an award."

(1960).

76. Alexander, 415 U.S. at 45; Swenson, 858 F.2d at 1305.
77. Title VII does not provide the EEOC with direct powers of enforcement. The EEOC's enforcement power is restricted to engaging in conference, conciliation, and persuasion. 42 U.S.C. § 2000e-4(g). In utilizing Title VII's procedure, "the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." Alexander, 415 U.S. at 45.
78. Alexander, 415 U.S. at 48 (footnote omitted); Swenson, 858 F.2d at 1308.
79. The Court in Alexander distinguished contract rights from statutory rights:

In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right. . . . By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.

Moreover, a contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination. Both rights have legally independent origins and are equally available to the aggrieved employee.

Alexander, 415 U.S. at 49-50, 52.
80. Id. at 57-58. The Alexander Court referred to its decision in Wilko, 346 U.S. at 435-37, as a basis for its reasoning. See supra note 44.
81. Alexander, 415 U.S. at 56-57. Traditionally, the arbitrator is confined to interpret contract terms and need not apply law outside of the contract. Id. at 53-54.
82. Alexander, 415 U.S. at 57 & n.18; Swenson, 858 F.2d at 1306 & n.6.
83. Alexander, 415 U.S. at 57.
84. Id. at 57-58 (The Alexander Court noted that the record of arbitration is not complete, rules of evidence are not applied, and common trial procedures are not available.); Swenson, 858 F.2d at 1306-07 & n.7.
After considering the independent nature of Title VII rights, the legislative history of Title VII, and the inappropriateness of resolving complex Title VII claims in arbitration, the *Alexander* Court concluded that "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII."\(^8^6\)

The *Swenson* court was persuaded by the Court's reasoning in *Alexander* and concluded that Congress did not intend employment arbitration agreements enforceable under the FAA to supplant federal judicial proceedings under Title VII.\(^8^7\) The Eighth Circuit adopted the *Alexander* Court's mistrust of arbitration and concluded "arbitration is poorly suited as a forum for the final resolution of rights created by Title VII"\(^8^8\) because arbitration would not address the important public policy embodied in Title VII.\(^8^9\) The *Swenson* court ignored the recent Supreme Court decisions holding that the FAA preempts both state and federal remedies\(^9^0\) because none of these cases involved employment discrimination.\(^9^1\) The *Swenson* court reasoned that "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers."\(^9^2\)

After deciding *Alexander* applied,\(^9^3\) the *Swenson* court then had to determine

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86. *Alexander*, 415 U.S. at 59-60. In addition, the *Alexander* Court provided lower courts with discretion to admit the arbitral decision as evidence and to accord it appropriate weight depending on the arbitrator's consideration of Title VII rights. Id. at 60 n.21. However, the Court still warned that "courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims." Id. But see Silver, *In Lieu of Preclusion: Reconciling Administrative Decisionmaking and Federal Civil Rights Claims*, 65 Ind. L.J. 367 (1990) (arguing that courts should give preclusive effect to agency determinations in subsequent litigation under any federal civil rights statute).

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

88. *Id.*

89. *Id.* at 1306-07.


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

92. *Id.* (quoting Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 737 (1981)).

93. The defendants argued that *Alexander* did not apply because it involved a collective bargaining agreement not subject to the FAA whereas *Swenson* involved a commercial arbitration agreement binding under the FAA. *Swenson*, 858 F.2d at 1306; Brief for Appellee's at 22, *id.* (No. 87-5465-MN) ("the reasoning of *Alexander* should not be mechanically applied here."). Accord *Nicholson*, 877 F.2d at 233 (Becker, J., dissenting); *Pihl v. Thomson McKinnon Securities*, 48 F.E.P. Cas. 922, 926 (E.D. Pa. 1988) (finding *Alexander* applied only to cases involving collectively bargained rights, not individually bargained agreements); cf. *Baker v. Aubry*, 216 Cal. App. 3d 1259, 265 Cal. Rptr. 381 (1989) (the reasoning in *Barrentine* does not apply in privately negotiated arbitration agreements).

The *Swenson* court rejected this argument explaining that the Court in *Alexander* focused on the "unique nature of Title VII" rather than the fact that a collective bargaining agreement was involved. *Swenson*, 858 F.2d at 1306. See Lieberman, supra note 3, at 1820 (*Alexander*, *Barrentine*, and *McDonald* "may be read to support the proposition that discrimination cases generally should be
whether Congress intended to preserve a judicial forum for state anti-discrimination claims as well. The Swenson court found two anti-preemption provisions of the Civil Rights Act of 1964 ("the Act") persuasive in determining the important role state law plays in the Title VII scheme.\textsuperscript{94} In addition to the text of the Act, the Swenson court examined the United States Supreme Court's interpretation of the states' role in enforcing Title VII.\textsuperscript{95} The Swenson court treated different from cases arising in commercial contexts when a court is determining arbitrability.

See also Utley, 883 F.2d at 187 ("The fact that [the plaintiff] signed an individual employment agreement rather than a collective bargaining agreement as in Alexander is not significant."); Alford, 712 F. Supp. at 548-49 (relying on Swenson in holding that Alexander has not been impliedly overruled by the Supreme Court's recent decisions; thus, an employee's sex discrimination suit under Title VII is entitled to a judicial forum notwithstanding a commercial agreement to arbitrate under the FAA); DeSapio, 143 Misc. 2d at 611, 540 N.Y.S.2d at 935 (Alexander is not in conflict with the ruling in Mitsubishi.). Cf Nicholson, 877 F.2d at 224, 229 (concluding that age discrimination claims arising outside the collective bargaining context should be treated differently from those arising in commercial contexts, preserving a judicial forum for discrimination claims).

\textsuperscript{94} Section 2000e-7 which applies only to Title VII of the Act provides:

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State . . . other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

Section 2000h-4 applies to all titles of the Act and it provides:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

Swenson, 858 F.2d at 1308.

\textsuperscript{95} Kremer v. Chemical Construction Corp., 456 U.S. 461, 468-69 (1982) ("State anti-discrimination laws . . . play an integral role in the congressional scheme."). In Kremer, the Court held that a state court decision upholding an administrative agency's rejection of a discrimination claim must be given preclusive effect in a subsequent action in federal court. In ascertaining the interaction of state law in the Title VII scheme, the Kremer Court summarized the enforcement scheme of Title VII as follows:

Whenever an incident of alleged employment discrimination occurs in a State or locality which by law prohibits such discrimination and which had established an "authority to grant or seek relief from such [discrimination] or to institute criminal proceedings with respect thereto,\textsuperscript{9} no charge of discrimination may be actively processed by the EEOC until the state remedy has been invoked and at least 60 days have passed, or the state proceedings have terminated. Only after providing the appropriate state agency an opportunity to resolve the complaint may an aggrieved individual press his complaint before the EEOC. In its investigation to determine whether there is reasonable cause to believe that the charge of employment discrimination is true, the Commission is required to "accord substantial weight to final findings and orders made by State and local authorities in proceedings commenced under State or local law" pursuant to the limited deferral provisions of § 706, but is not bound by such findings. If the EEOC finds reasonable cause to believe that discrimination has occurred, it undertakes conciliation efforts to eliminate the unlawful practice; if these efforts fail, the Commission may elect to bring a civil action to enforce the Act. If the Commission declines to do so, or if the Commission finds no reasonable cause to believe that a violation has occurred, "a civil action" may be brought by an aggrieved individual.
found that Congress contemplated a "prominent state law role" and a "mixed federal-state scheme" allowing individuals the freedom to pursue their rights under other "applicable state and federal statutes" as well as under Title VII.\textsuperscript{96}

In finding that Congress clearly preserved the right to judicial remedies in employment discrimination cases, and that Congress designed Title VII's enforcement scheme to utilize state antidiscrimination systems when possible,\textsuperscript{97} the Swenson court reasoned that Congress also intended to preserve judicial remedies for violations of state statutory rights parallel to Title VII. Thus, the Swenson court concluded state discrimination claims were not subject to the FAA.\textsuperscript{98}

Notwithstanding the United States Supreme Court's overwhelming approval of arbitrating statutory claims,\textsuperscript{99} Swenson was able to persuade the Eighth Circuit that Congress did not intend arbitration to replace the judicial forum provided by Title VII and parallel state statutes.

\textbf{A. Criticism of Swenson}

The Swenson court made three mistakes. First, it failed to consider that the Alexander reasoning no longer applies to arbitration of statutory rights, especially in the commercial arbitration setting. Second, it failed to recognize the recent Supreme Court decisions as controlling.\textsuperscript{100} Third, it failed to recognize the reality that the purpose of Title VII is frustrated when Title VII claims covered by arbitration clauses are deferred first to a judicial forum.

The Swenson court erred in adopting the Alexander Court's reasoning, which is clearly out of line with the current Supreme Court position on arbitration.\textsuperscript{101} In Alexander, the Court relied on the reasoning in Wilko v. Swan, a case which has been recently overruled.\textsuperscript{102} Thus, it is questionable whether the holding in

\textsuperscript{96} See supra text accompanying notes 34-52.
\textsuperscript{97} See supra text accompanying notes 57-58.
\textsuperscript{98} See supra text accompanying notes 34-52.
\textsuperscript{99} Rodriguez de Quijas, 109 S. Ct. 1917. See supra note 54.
Alexander is still valid when its reasoning is now outdated. The Supreme Court and many commentators have rejected the Wilko and Alexander Courts' reasons for defeating arbitration. Moreover, the Alexander Court relied on outdated assumptions about arbitrators—namely, that arbitrators lack expertise in handling discrimination disputes. The Swenson court adopted this assumption even after the Supreme Court hailed the competence of arbitrators.

The Swenson court mechanically applied Alexander and rejected the recent cases reflecting the contemporary view of arbitration. The Swenson court distinguished the recent Supreme Court decisions which applied the standard because "none of these cases... involved employment discrimination claims." Yet, these cases are controlling because they directly address arbitration of statutory rights under the FAA. To escape binding application of the FAA, the current standard is clear. Congress must have intended to make an exception to the FAA, and that the intent must be "discernable from the text, history, or purposes of the statute." Although the Swenson court arguably applied the proper standard in reaching its decision, two facts put in question the viability of Alexander in a modern commercial arbitration setting: (1) Alexander is a labor arbitration case where the FAA did not apply; and (2) Alexander's reasoning is no longer sound. After Swenson, courts are split on Alexander's validity in the commercial or discrimination context.

103. See supra text accompanying notes 34-52. See also supra note 93.
104. Alexander, 415 U.S. at 57.
105. See supra text accompanying notes 34-52.
106. Id.
107. Swenson, 858 F.2d at 1306 (footnote omitted). See supra note 34.
108. McMahon, 482 U.S. at 227. See supra text accompanying note 58.
109. See cases cited supra note 93. Also, the Alexander Court's analysis of Title VII may have failed to satisfy the Supreme Court test—that Congress evince a "contrary command" not to arbitrate Title VII claims which is discernable from the text, history, or purpose of the statute. See supra text accompanying note 57. Cf. Lieberman, supra note 3, at 1853-54 (arguing that under the FAA, discrimination claims should not be treated the same as claims involving routine commercial transactions).

Arguably, there is no "contrary command" because the 68th Congress never mentioned the FAA or arbitration in the text of Title VII or in the 7,000 plus pages of the Congressional Record. Statutory History of the United States: Civil Rights, Part II 1089 (B. Schwartz ed. 1970). The absence of discussion probably does not prove a "contrary command." The FAA was enacted in 1925, followed by the Civil Rights Act in 1964. By failing to mention arbitration or incorporate it in its scheme, Congress probably did not intend to disturb its policies or its operation.

This interpretation is consistent with "evolutive constructivism," a practical theory of statutory construction which demonstrates "the greatest promise for effecting sound interpretation..." Fish, The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories, 88 Kan. L. Rev. 815, 860 (1990). Evolutive constructivism recognizes that oftentimes, "particular legislative intention does not manifest itself clearly from the statutory language or legislative history... This is especially the case when the legislature did not anticipate a particular set of circumstances or conditions and there is no single, clear understanding of the statute's application to those unanticipated situations." Id. at 850. This method "views the statute as a living, evolving document [and] permits judges to view statutes through the prism of their understanding of the current context." Id. at 857. In sum, evolutive constructivists recognize "the frequent necessity of interpreting a statute in accord with evolving societal and legal conditions." Id. at 853.

Applying this interpretative theory to Title VII is appropriate because "the text is ambiguous and the intent expressed in the legislative history has been overtaken by subsequent events..." Id. at
Finally, the Swenson court erroneously concluded that arbitration is unable to serve the public interest and that arbitration may hinder efforts to assist victims of discrimination. Arbitration is just as capable of providing a fair, responsive forum as a court. The purpose for providing a judicial forum for Title VII claims is to help the individual grievant vindicate important rights. However, in reality, Title VII procedures more often than not provide headaches rather than assistance. The current backlog at the EEOC and the crowded court dockets actually discourage victims of discrimination from seeking relief under Title VII. In contrast to delayed litigation, arbitration could assist discrimination victims by facilitating a fair and speedy resolution of discrimination claims.

The Swenson decision reintroduced the notion that arbitration is an inferior forum for resolving statutory rights. Lower federal and state courts are embracing Swenson as the appropriate guide without considering the outdated reasoning which supports its holding. However, there are some fundamental gaps which need to be addressed before Swenson is considered sound law: (1) whether old notions of judicial hostility should be tolerated in an era where these views are obsolete; (2) whether Alexander is applicable in a modern commercial arbitration context, or even a discrimination context; and (3) whether preserving a judicial forum in every case where there is a valid, enforceable arbitration agreement is the best way to achieve the purposes of Title VII.

Employers with fair, comprehensive arbitration policies should be concerned with the precedent set by Swenson. To avoid the Swenson situation, Congress and employers should take action to maximize the probability that a valid employment arbitration agreement will result in final, binding arbitration of Title VII and parallel state discrimination claims.

854. The "old judicial hostility toward arbitration" has crumbled, the backlog at the EEOC and the overcrowded federal courts are frustrating prompt vindication of Title VII rights, and commercial arbitration is increasingly encouraged as a favorable substitute for litigating statutory rights. Title VII should be interpreted in light of these legal developments, which evolved subsequent to the enactment of Title VII and the Alexander decision. The Supreme Court should apply the evolutive constructivist theory to resolve whether Alexander's analysis of Title VII is the appropriate reference for finding an exception to the FAA because the Alexander Court's evaluation of congressional intent may not be sufficient to satisfy the threshold requirements necessary to defeat arbitration under the FAA.

110. Swenson, 858 F.2d at 1307. Accord Lieberman, supra note 3, at 1841-42 ("enforcing private agreements to arbitrate ADEA claims, particularly those arising out of broad arbitration clauses in employment contracts, represents a threat to fulfilling the purposes of the ADEA.").

111. See supra text accompanying note 25.

112. See supra text accompanying notes 25-28.

113. Utley, 883 F.2d at 187 ("employee cannot waive prospectively her [Title VII] right to a judicial forum at any time, regardless of the type of employment agreement she signs."); Alford, 712 F. Supp. 547 (plaintiff's Title VII sex discrimination claim is not subject to arbitration under the FAA despite privately negotiated arbitration agreement); Anderson, 449 N.W.2d 468 (plaintiff's sex discrimination claims under Minnesota Human Rights Act are arbitrable despite privately negotiated arbitration agreement). Cf. DeSapio, 143 Misc. 2d 611, 540 N.Y.S.2d 932 (plaintiff's state disability discrimination claim is arbitrable because Title VII does not include disability; thus, there is no congressional intent to exempt the claim).
V. RECOMMENDATIONS AND PROPOSALS

This Section suggests ways Congress, employers, and organizations can work together to bridge the gap between Title VII and the FAA. Arbitration procedures can be improved to protect victims of discrimination, and Title VII can be amended to require arbitration when these procedures have been made adequate. Congress and the business community should recognize that a balance can be reached and take appropriate action.

A. Congress' Role: Amend Title VII And Empower the EEOC to Oversee Arbitration

Title VII does not mention the FAA, nor does it expressly contemplate arbitration in its scheme. Since the United States Supreme Court has never decided whether the FAA mandates arbitration of Title VII and parallel state discrimination claims, state and lower federal courts have been left with the job of reconciling the intent of Congress in enacting the FAA and subsequently, Title VII to determine whether Congress intended to preserve a judicial forum for Title VII rights. This gap between the FAA and Title VII can be cured by Congress. United States arbitration law is among the most progressive in the world, and Congress should be able to develop a way to protect workers from employment discrimination without disturbing the strong policy favoring arbitration. An amendment to Title VII is one way Congress can respond. Congress should take heed of the Supreme Court's direction and amend Title VII to reflect the current trend of arbitrating statutory claims. With the Civil Rights Act of 1991 before Congress, now is the appropriate time to act.

114. See STATUTORY HISTORY OF THE UNITED STATES, supra note 109, at 1089.
115. Lieberman, supra note 3, at 1833. Alexander involved arbitration under the grievance-arbitration provision in a collective bargaining agreement. See supra text accompanying notes 73-86.
116. See supra note 98.
117. Hoellering, supra note 53, at 89.
118. See Mitsubishi, 473 U.S. at 637 ("so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."). Cf. Nicholson, 877 F.2d at 231-44 (Becker, J., dissenting) (compelling arbitration of ADEA claim would not conflict with the purposes of the ADEA).
119. See supra text accompanying notes 34-58.
120. S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S9896-S9970 (discussed in scattered parts) (daily ed. July 18, 1990). After much debate, Congress passed the bill, which President Bush vetoed. The 101st Congress failed to override the veto, so the bill will be carried over to the 102d Congress for consideration. CONG. INDEX, Oct. 26, 1990, at 1 (CHI). For the text of the bill, see 136 CONG. REC., supra, at S9966-S9968.
The following simplified explanation of Title VII's enforcement scheme is necessary to provide the foundation for discussing the proposed amendment to Title VII.

1. **Title VII's Present Enforcement Scheme.** Under Title VII, a grievant may file a discrimination charge with either the EEOC or a state agency qualified to handle the claim. If the EEOC first receives the Title VII charge, it must defer it to a qualified state agency for sixty days. Once the EEOC has authority to process the claim, the EEOC notifies the employer of the charge and conducts an investigation to determine whether there is "reasonable cause to believe the charge is true." The EEOC may dismiss a charge at any point in the investigation if it finds no "reasonable cause to believe the charge is true" and for various other reasons. However, when the EEOC dismisses the charge, it must issue a right-to-sue notice which entitles the complainant to sue in federal court.

If the EEOC finds there is "reasonable cause to believe the charge is true," it will try to eliminate the discriminatory practice by engaging in "conference, conference, conference."
conciliation, and persuasion" with the employer. If the conciliation attempts fail, the EEOC may elect to file a civil suit on behalf of the grievant. The EEOC will issue a right-to-sue notice in federal court if it decides not to bring a civil suit against the employer. Also, the grievant may request a right-to-sue notice in writing before the EEOC terminates the administrative process. Finally, once the EEOC issues a right-to-sue notice, the grievant may file a civil action in the appropriate federal court within ninety days after the receipt of the notice.

2. Summary of the Proposed Amendment to Title VII. Under the proposed amendment, as set forth in Appendix A, Title VII's enforcement scheme would remain basically the same. The amendment would only affect treatment of the charge once the individual is entitled to a right-to-sue notice. Also, the amendment would only apply to employers and individuals who negotiate a commercial arbitration agreement before the alleged discrimination.

129. Id. § 1601.24. If the EEOC and employer reach an acceptable resolution of the charge, the conciliation agreement is reduced to a writing and the EEOC terminates processing the claim. Id.

130. Id. § 1601.25 (either the employer will not agree to a resolution acceptable to the EEOC, or the employer makes conciliation unreasonably difficult).

131. 42 U.S.C. § 2000e-5(q)(1); 29 C.F.R. § 1601.27. In cases involving charges against government, government agencies, or political subdivisions, the case is referred to the Attorney General who has the authority to file a civil suit on behalf of the grievant. 42 U.S.C. § 2000e-5(q)(1).

132. 29 C.F.R. § 1601.28(b). After attempts at conciliation fail, the charge is forwarded to a district EEOC office to determine whether litigation on behalf of the EEOC is recommended. If the district office decides the case is not appropriate for litigation by the EEOC, the aggrieved receives a right to sue notice. B. SHLEF & P. GROSSMAN, supra note 121, at 966.

133. The EEOC will issue a right-to-sue notice upon written request if the EEOC failed to file a civil suit or enter into a conciliation agreement within 180 days from the date the charge is deemed filed with the EEOC. 28 C.F.R. § 1601.28(a)(1). Also, the EEOC will issue a right-to-sue notice upon written request before the 180-day period expires if the EEOC determines that it will not be able complete processing of the charge before the 180-day period expires. Id. § 1601.28(a)(2). The United States Supreme Court has interpreted the statute in a way that requires the Commission to issue a right-to-sue letter after the 180-day processing period expires "regardless of the posture of any state proceedings." New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 65 n.5 (1980).

134. Issued when: (1) the EEOC dismisses the charge; (2) the charging party requests a right-to-sue notice after the EEOC's 180-day processing period expires; or before the 180-day period expires when the EEOC determines it will not be able to timely process it; (3) the EEOC makes a determination of no reasonable cause; or (4) the EEOC determines there is reasonable cause, attempts at conciliation fail, and the EEOC declines to litigate the claim on behalf of the aggrieved. B. SHLEF & P. GROSSMAN, supra note 121, at 967.

135. 29 C.F.R. § 1601.28(e)(1). State agencies have similar administrative procedures and issue right-to-sue notices, but for state court rather than for federal court litigation. An aggrieved who files with both the state agency and the EEOC may receive a right-to-sue notice in both state and federal court, and then may choose the best forum.

136. Appendix A contains a detailed text of the proposed amendment, not in statutory form. This Comment discusses only an amendment to Title VII. However, federal and state statutes protecting against discrimination in areas not covered by Title VII could be amended utilizing a scheme similar to the one proposed in this Comment.

137. See supra text accompanying notes 121-35.

138. See supra notes 132-33 and accompanying text.
ARBITRATION OF DISCRIMINATION CLAIMS

tion takes place.\textsuperscript{139}

After the EEOC notifies an employer of a charge, an employer who wants to enforce its arbitration agreement would submit to the EEOC a request-to-arbitrate notice, along with proof of the arbitration agreement and other documentation which pertains to the employer's arbitration policies. These documents would become part of the grievant's permanent EEOC file. Once the EEOC determines the grievant is entitled to a right-to-sue notice, it would defer the charge, accompanied by the request-to-arbitrate notice, to a special arbitration department for a determination of whether a right-to-arbitrate notice should be issued in the place of a right-to-sue notice. The EEOC arbitration department would examine the employer's documentation to determine whether the arbitration agreement, in the context of the employment contract and company arbitration policies, satisfies the following statutory requirements:\textsuperscript{140}

1. The arbitration agreement contemplates resolution of discrimination claims.
2. The arbitration agreement expressly permits the arbitrator to decide statutory discrimination claims.
3. The arbitration agreement empowers the arbitrator to award the same relief available under Title VII and similar state laws.
4. The arbitration agreement provides each party with the right to representation by counsel during the arbitration hearing.
5. The arbitration agreement provides the aggrieved party with a convenient location to arbitrate the discrimination claim.

If the arbitration department finds that the above requirements are satisfied, it would issue a right-to-arbitrate notice to both parties instead of a right-to-sue notice. Along with the right-to-arbitrate notice, the EEOC would include a list of EEOC-approved arbitrators from which both parties would be required to select an arbitrator.

The EEOC would have discretion to withhold a right-to-arbitrate notice when it determines: (1) the charge will require statutory construction of Title VII which should be addressed by a court; (2) the charge involves important policy issues which warrant resolution by a court; or (3) the charge involves an area of employment discrimination where the law is not sufficiently developed to guide the arbitrator.

Under the proposed scheme, the grievant would have an incentive to file the claim with the EEOC only when: (1) the employer failed to incorporate into its agreement the minimum protections enumerated in the proposed amendment; (2) resolution of the charge requires statutory construction, raises important policy issues, or involves a case of first impression which a court should decide;

\textsuperscript{139} See supra note 1. There would be no reason to deny enforcement of the arbitration agreement as long as the aggrieved made a knowing and intelligent waiver of his or her statutory right to a judicial forum. See \textit{Alexander}, 415 U.S. at 52 & n.15.

\textsuperscript{140} For a more detailed outline of the proposed statutory requirements, see Appendix A.

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or (3) the grievant wants an agency investigation of the employer's discriminatory practices. In all other cases, the grievant could anticipate the EEOC issuing a right-to-arbitrate notice. If the arbitration agreement provides the minimum statutory requirements for issuing a right-to-arbitrate notice and the charge does not fall within one of the prescribed exceptions, the grievant would only delay his or her arbitration of the dispute by filing a claim with the EEOC.\footnote{141}

In addition, the proposed amendment would encourage employers to adopt arbitration procedures which satisfy the statutory scheme. Consequently, more grievants would probably choose to bypass filing with the EEOC and resolve their discrimination claims pursuant to their arbitration agreements. Ultimately, the backlog of charges waiting for investigation at the EEOC and the dockets of federal courts should get some relief.

3. **EEOC Powers and Duties.** To implement this amended enforcement scheme, the EEOC’s powers and duties should be expanded. First, the EEOC should be empowered to determine which charges qualify for arbitration under the amended scheme.\footnote{142} Second, the EEOC should maintain area-specific lists of qualified arbitrators to include with the right-to-arbitrate notices. Finally, the EEOC should develop a model arbitration agreement which would satisfy the amended statutory requirements.

**B. Employers' Role: Making Arbitration A More Attractive Forum**

The changing profile of the workforce is causing increased employee activity in the discrimination area\footnote{143} and employers are searching for better ways to handle the mounting charges. As the law stands, a grievant can bypass arbitration and pursue his or her discrimination claim in federal court under Title VII, or in state court under similar state laws.\footnote{144} A grievant may also choose to initially arbitrate his or her claim pursuant to a private arbitration agreement.

\begin{itemize}
  \item 1. Employees are more educated and assertive.
  \item 2. Companies are employing a higher proportion of minorities.
  \item 3. The value-oriented workers from the "baby-boom" generation expect fair treatment at work and resist "arbitrary" actions.
  \item 4. Modern workers are more concerned about protecting employment references because of the weak job market. Employees would rather resolve disputes internally and retain their jobs.
  \item 5. In order to compete in a competitive market, companies are forced to cut back the work force, which in turn, creates more wrongful termination disputes.
\end{itemize}

\\textit{Id.}

\footnote{141. \textit{See supra} notes 25-28 and accompanying text.}
\footnote{142. Appendix B contains a detailed text of the proposed amendments to the Procedural Regulations of the EEOC. 29 C.F.R. §§ 1601.01-.80 (revised as of July 1, 1990).}
\footnote{143. A. Westin & A. Pelfi, \textit{supra} note 26, at 3. The following are some causes of this rising employee activism:
  \begin{itemize}
    \item 1. Employees are more educated and assertive.
    \item 2. Companies are employing a higher proportion of minorities.
    \item 3. The value-oriented workers from the "baby-boom" generation expect fair treatment at work and resist "arbitrary" actions.
    \item 4. Modern workers are more concerned about protecting employment references because of the weak job market. Employees would rather resolve disputes internally and retain their jobs.
    \item 5. In order to compete in a competitive market, companies are forced to cut back the work force, which in turn, creates more wrongful termination disputes.
  \end{itemize}
  \textit{Id.}
\footnote{144. Swenson, 858 F.2d at 1304; Alexander, 415 U.S. at 36. See Oubichon v. North American Rockwell Corp., 482 F.2d 569, 572-74 (9th Cir. 1973). See also Williams v. Owens-Illinois, Inc., 665 F.2d 918, 932 (9th Cir. 1982) (The court expanded the Alexander principle stating "[t]his same policy argues in favor of permitting a Title VII claimant to recover even if he or she failed to exhaust any contractual remedies."); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 714-15 (7th Cir. 1969).}
agreement, and then subsequently pursue his or her separate statutory right in a judicial forum.\textsuperscript{145} Employers often complain that they must defend discrimination claims in two forums—first in arbitration, and then if the grievant is not happy with the award, in court.\textsuperscript{146} An employer who is committed to resolving discrimination disputes internally must confront the threat of outside litigation and compete with the agencies and courts to resolve the disputes. This requires the employer to make arbitration an even more attractive forum for resolving discrimination claims.\textsuperscript{147}

Since arbitration is purely a matter of contract,\textsuperscript{148} the employer has considerable control over the contents of the employment agreement, including the arbitration clause. To encourage arbitration of discrimination claims, the employer should provide as many of the procedural advantages and remedies available under antidiscrimination statutes as possible. At the same time, the employer would be increasing the probability that a court in a subsequent proceeding would defer to the arbitration award.\textsuperscript{149} The closer the arbitral forum resembles a court proceeding, the freer a court will be to defer to the arbitrator's decision.\textsuperscript{150}

A company committed to arbitrating discrimination claims should adopt company rules and procedures and refer to them in the employment contract. Thus, if Congress does adopt an amendment like the one suggested in this Comment,\textsuperscript{151} the chances of the EEOC and state agencies issuing a right-to-arbitrate notice will increase. Seven components, consistent with those enumerated in the proposed amendment, are particularly important to a company discrimination-arbitration policy.

First, the employer should insert an antidiscrimination clause in the employ-
ment agreement which incorporates the protective and remedial language of state antidiscrimination statutes, and in the alternative, Title VII. This measure serves two purposes: (1) it puts employees on notice that their statutory right to be free from discrimination is part of the contract, and that they can expect their discrimination claims to be arbitrated according to a state or federal statute; and (2) it provides authority and reference for the arbitrator to decide the statutory claim. If the statutory language is made a part of the contract, the arbitrator will defer to the contract terms specifying the controlling antidiscrimination statute in order to effectuate the intent of the parties. Also, the arbitration clause should grant the arbitrator explicit power to resolve the discrimination claim by reference to the state statute or Title VII. This express grant confirms the parties' intent that discrimination claims will be arbitrated, and frees the arbitrator to consider the statutory claim fully without fear of judicial review for exceeding the scope of the contract.

Second, the arbitration agreement should not limit the arbitrator's power to award statutory remedies. The availability of remedies will often determine which forum the grievant chooses. Thus, granting the arbitrator broad

152. "Where the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee." Alexander, 415 U.S. at 55.

153. The state law should be the primary reference in the contract because Title VII's scheme appeals to state laws and agencies to first handle the discrimination claim. See supra text accompanying notes 122-23. Title VII should be the secondary reference if the state law does not cover the type of discrimination alleged and Title VII does. Cf. Newman, supra note 16, at 51 ("All collective bargaining agreements should contain a clear, express provision for the application by the arbitrator of Title VII and other federal, state, and local statutes, regulations, guidelines, and decisions of courts and administrative agencies thereunder, according to the same weight and deference as a court would.").

154. See R. COULSON, BUSINESS ARBITRATION, supra note 16, at 21 ("The arbitrator must conform to the standards of justice as expressed in statutes and common law."). See also Newman, supra note 16, at 49. This commentator stressed the importance of empowering arbitrators to apply antidiscrimination statutes as follows:

If arbitrators refuse to apply Title VII ... and other federal, state, and local laws in resolving discrimination disputes, it will be impossible for anyone to contend seriously that arbitration is either a desirable or even an appropriate forum for the resolution of such disputes. We believe the importance of arbitration as the desirable and appropriate forum far outweighs any consideration that might be used in favor of arbitrators' not applying these statutes.

Id.

155. A court may vacate an arbitration award if "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(d).

156. The AAA's Commercial Arbitration Rules provide the arbitrator with broad remedial power. The Scope of Award Rule provides: "The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." AAA Rule 43. See Newman, supra note 16, at 47 ("To be acceptable, an award resolving an issue of discrimination ... must conform to the principles of equality set forth in Title VII ... ").

157. "The caliber of the awards that arbitrators are making in discrimination cases ... will be decisive in determining whether arbitration will prevail or the courts will take over." R. COULSON, BUSINESS ARBITRATION, supra note 16, at 21.
powers to fashion relief pursuant to the state statute or Title VII would increase the likelihood that the grievant will choose arbitration over the time-consuming and costly Title VII process. Under Title VII, remedies are generally limited to back pay, injunctive relief, attorney's fees, and compensatory damages. However, under state statutes, punitive and emotional damages are generally available. Although punitive damages are normally not awarded in arbitration, the growing trend is to permit courts to confirm arbitration awards which include punitive damages.

158. 42 U.S.C. § 2000e-5(g). This section provides: "[i]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may award, in addition to other legal remedies, back pay and compensatory and punitive damages to the complainant or to the complaining employees, the amount of such damages being equal in all circumstances to the amount of profit realized by the employer, or by his agents or representatives, from the unlawful practice..." See Williams v. Owens-Illinois, Inc., 665 F.2d 918, 931 (9th Cir. 1982) ("Congress has granted broad equitable powers to enable the courts to fashion the most complete relief possible.").

159. 42 U.S.C. § 2000e-5(k). This section provides: "[i]n any action or proceeding under [Title VII] the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs." See Newmark v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) (The Supreme Court instructed that "one who succeeds in obtaining an injunction under that Title should ordinarily recover his attorney's fees unless special circumstances would render such an award unjust.").


160. See e.g., MINN. STAT. ANN. § 363.071. In addition to remedies available under Title VII, the Minnesota Human Rights Act provides relief for mental anguish and distress caused by the discrimination, and provides three times the complainant's special damages. Also, punitive damages are allowed and a civil penalty may be awarded to the state's general revenue fund. Id.

161. See M. DOMKE, supra note 1 § 33.03 (An award for punitive damages is void as against public policy and will not be enforced.). But see cases cited, infra note 162; Anderson v. Nichols, 359 S.E.2d 117, 121 (W. Va. 1987) (The court upheld a claim for punitive damages and reasoned that "[a]rbitrators, like courts, are entitled to award punitive damages in appropriate circumstances as compensation of oppressive conduct."); Baker v. Sadick, 162 Cal. App. 3d 618, 208 Cal. Rptr. 676 (1984) (affirming an arbitrator's award of $300,000 for a medical malpractice claim).

162. See Penns., Punitive Damages and Public Policy, 1986 ARBITRATION & THE LAW 35, 35 (AAA General Counsel's Report). Consistent with the trend toward expanding arbitration, many federal and state courts are permitting arbitration awards including punitive damages where the arbitration clause is broad, or where the parties expressly agree to such a remedy. Id. "There is no public policy bar which prevents arbitrators from considering claims for punitive damages." Id. at 38 (quoting Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc., 598 F. Supp. 353, 361 (N.D. Ala. 1984)). See also Raytheon Co. v. Automated Business Systems, Inc., 882 F.2d 918, 931 (9th Cir. 1989) (The court affirmed an award of punitive damages granted pursuant to American Arbitration Association rules providing broad powers to fashion relief); Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 178 (11th Cir. 1988) (punitive damage award upheld absent any express prohibition on awarding punitive damages); Ehrich v. A.G. Edwards & Sons, Inc., 675 F. Supp. 559, 565 (W.D.S.D. 1987) ("the strong federal policy in favor of upholding an arbitrator's ability to fashion appropriate remedies permits arbitrators to award punitive damages"); Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc., 598 F. Supp. 353 (N.D. Ala. 1984), aff'd, 776 F.2d 269 (11th Cir. 1985) (punitive damage award upheld in a construction dispute under a broad arbitration clause).

Recently, an arbitrator granted $38.2 million in damages arising out of an employment contract dispute. One million of the award was punitive damages. Siconolfi, Former Officer of Kemper Unit Wins Big Award, Wall St. J., May 4, 1990, at A4, col. 1.
Third, the grievant must have the option to have counsel present at the arbitration hearing.  

163 The grievant will feel more confident that his or her rights will be fully considered if an attorney presents the evidence. The right to counsel also ensures that the arbitrator will be presented with adequate factual information, and applicable statutory and case law.

Fourth, the company could offer to cover the cost of arbitration to encourage employees to first submit the discrimination claim to arbitration. In addition to saving litigation costs, absorbing the cost of arbitration may indirectly boost employee morale because employees would feel the employer is genuinely concerned about possible violations of the discrimination policy. Covering arbitration costs would also promote a discrimination-free workplace because more employees would present their claims to management if they have nothing to lose. As a result, the employer would be more aware of existing discriminatory practices and would be in a better position to remedy the situation before the practice affects more employees and generates more claims.

Fifth, the employer must make sure that the location of the arbitration hearing is convenient.  

164 Sixth, the arbitrators should be lawyers with special expertise in the field of employment discrimination.  

165 This measure is needed to ensure that the arbitrator’s decision is based on sound judgment and current legal principles. The grievant, with the advice of his or her lawyer, should be granted discretion in choosing the arbitrator. Finally, the employer should frequently inform its employees about the company arbitration policy.  

1. Organizations’ Role: Ensuring Quality of Arbitrators. Ensuring the quality of arbitrators in the discrimination area is an important step towards protecting the grievant’s rights at an arbitration hearing. Organizations such as the American Arbitration Association (AAA)  

166 National Association for the

163. The AAA Commercial Arbitration Rules provide for representation by counsel (AAA Rule 22). See Carmell & Westercamp, supra note 19, at 32 ("The appointment of independent counsel selected by the aggrieved employee would . . . appear to go a long way toward meeting judicial concerns.").

164. In Swenson, the employment agreement required that Swenson travel to Cleveland, Ohio, 740 miles from her home in Minnesota, to arbitrate her claim. Appellants Brief, supra note 59, at 22.

165. See supra note 29. Arbitrators not being lawyers concerned the Court in both Alexander and Barrentine. Alexander, 415 U.S. at 57 n.18; Barrentine, 450 U.S. at 743 n.21.

166. One company informed its employees about a new company complaint procedure by inserting a copy of the procedure with paycheques. Russell, The EEO Complaint System at Chicago and North Western Transportation Company, in A. WESMIN, & A. FEIbu, supra note 26, at 147. Motorola Inc. and Cigna circulate in-house alternative dispute resolution newsletters to their managers and have developed ADR training manuals for employees. Jacob, Controlling Costs with a Neutral Third Party, N.Y. Times, Sept. 23, 1990, at F12, col. 6.

167. The American Arbitration Association already maintains a listing of specialized arbitrators and provides the listing upon request to parties utilizing its rules. "Biographies of neutral [arbitrators], cross-indexed by occupation, special qualifications, and geographic availability, are maintained in the AAA’s computerized network for submission to the parties." AMERICAN ARBITRATION ASSOCIATION, RESOLVING YOUR DISPUTES 7 (1989). "The AAA's panel consists of expert and knowledgeable neutrals from many professions and industries." Id. at 6. The AAA’s listing includes nonlawyers. Id. at 6-7.
Advancement of Colored People (NAACP), and National Organization of Women (NOW) could generate and update lists of qualified arbitrators who have specialized competence and experience in the area of employment discrimination. The organizations should make these lists available to employers and employees for reference when choosing an arbitrator. The arbitrators listed should be lawyers who are familiar with the current status of the law.

CONCLUSION

Arbitration has survived years of criticism to evolve into a convenient alternative to litigation. The Supreme Court's recent decisions put to rest any suggestion that arbitration is an inferior forum for resolution of statutory claims. Private businesses, arbitration organizations, and government should take heed of the Supreme Court's gradual progression away from preserving a judicial forum for statutory rights, and prepare for an increased responsibility in resolving disputes derived from both state and federal statutes—specifically Title VII and parallel state statutes. Furthermore, the courts should purge the system of the lingering remnants of judicial hostility toward arbitration reflected in decisions like Wilko, Alexander, and Swenson. Congress should step in and amend Title VII to facilitate this process.

This Comment challenges Congress to integrate arbitration into the Title VII scheme, and challenges the business community to make arbitration clauses mean something more than an illusory statement of intent. When a binding arbitration agreement adequately protects the employee's rights, the employee should be bound by the agreement. However, it is imperative that individuals who are compelled to arbitrate their discrimination claims are assured that their statutory rights will be protected in arbitration. The proposals suggested in this Comment should achieve this goal. If Congress and employers do make the suggested changes, individuals like Valerie will choose to avail themselves of the benefits of arbitration rather than proceed through delay-ridden Title VII procedures.

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168. See generally Newman, supra note 16, at 37-38 (also proposing cooperation with organizations to facilitate arbitration of discrimination claims in the collective bargaining context).

169. See supra note 29. But see id. at 50 ("The necessity that arbitrators apply appropriate legal principles in no wise means that arbitrators should be lawyers.").

170. See supra text accompanying notes 1-5.

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APPENDIX A: Proposed Amendment to Title VII

The following is a model amendment, not in statutory form, which could be incorporated into Title VII.

Charges Governed by Valid Arbitration Agreements

1. The purpose of this section is to respect and enforce valid arbitration agreements governing the aggrieved party's discrimination claims.

2. Any employer who receives notice of a discrimination charge from the Commission pursuant to section 2000e-5(b)\(^{171}\) may submit a request-to-arbitrate to the Commission if the employer executed a valid arbitration agreement with the aggrieved party. The request must be received by the Commission within thirty days after the notice of the charge is received by the employer. The request shall include a copy of the arbitration agreement and any other documentation relating to the company policies and procedures for arbitrating discrimination claims. In connection with any request-to-arbitrate under this section, the employer must cooperate with the Commission in obtaining any additional information in the same manner as required under section 2000e-8.\(^{172}\) The request-to-arbitrate will become part of the aggrieved's file.

3. If the Commission determines that the aggrieved is entitled to receive a right-to-sue notice, the Commission shall consider the employer's request-to-arbitrate before issuing a right-to-sue notice. The Commission shall identify whether arbitration under the arbitration agreement will satisfy the following conditions:

   a. The arbitration agreement contemplates resolution of discrimination claims by making reference to Title VII or a similar state statute.

   b. The arbitration agreement expressly permits the arbitrator to decide statutory discrimination claims.

   c. The arbitration agreement empowers the arbitrator to award the same relief available under Title VII and equivalent state laws.

   d. The arbitration agreement provides each party with the right to representation by counsel during the arbitration hearing.

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\(^{172}\) Id. § 2000e-8. This section governs the scope and manner of Commission investigations.
e. The arbitration agreement provides the aggrieved party with a convenient location to arbitrate his or her discrimination claim.

4. If the Commission determines that all of the conditions in section 3 (a-e) would be satisfied in arbitration, the Commission must issue a right-to-arbitrate notice enforceable by the courts of the United States unless the Commission determines that resolution of the discrimination claim would involve (i) novel statutory construction of Title VII, (ii) important policy issues, or (iii) a case of first impression which requires resolution by a court. In these cases, the Commission shall issue a right-to-sue notice in federal court.

5. The Commission shall send the right-to-arbitrate notice to both parties. The notice shall include a list of qualified arbitrators within the state where the arbitration hearing will be held. The parties to the arbitration agreement must choose an arbitrator from the Commission’s list or obtain independent approval from the Commission to employ an arbitrator not named on the list.

6. Arbitration awards concerning discrimination claims are final and binding on the parties. The district court may vacate an award upon application of the parties pursuant to section 10 of the Federal Arbitration Act. When a party seeks to vacate an award on a charge first processed by the Commission under this section, and the award was rendered by an unapproved arbitrator, the district court shall direct a rehearing by a Commission approved arbitrator before reviewing the arbitration award.

APPENDIX B: Proposed Amendments to EEOC Regulations

The following are model amendments to the Procedural Regulations of the EEOC which should be implemented to clarify the EEOC's expanded powers and duties under the proposed amendment to Title VII.

Right-to-Arbitrate Determinations

1. To expedite resolution of discrimination claims, the Commission may establish a special division to handle charges submitted with requests-to-arbitrate. The Commission may delegate the responsibility to determine whether the conditions set forth in sections 1-5 of the Arbitration Amendment to Title VII warrant issuance of a right-to-arbitrate notice or a right-to-sue notice. The department making these determinations must refer to the Federal Arbitration Act and other relevant state arbitration statutes for guidance.

2. The Commission shall maintain an updated list of qualified arbitrators to submit with the right-to-arbitrate notice pursuant to section 5 of the Arbitration Amendment. To generate the listing, the Commission shall consult with state and local 706 agencies, private arbitration organizations, and civil rights organizations for defining standards of approval, acquiring resources, and compiling information.

3. To guide employers in drafting enforceable agreements to arbitrate statutory discrimination claims, the Commission shall develop a model Arbitration Agreement which satisfies the statutory conditions set forth under section 3 of the Arbitration Amendment to Title VII. The Commission shall consult with state and local 706 agencies, private arbitration organizations, and civil rights organizations for assistance in developing the model arbitration agreement.

174. 29 C.F.R. §§ 1601.01-.80.