*EEOC v. Luce, Forward, Hamilton & Scripps**

I. INTRODUCTION

Employers seeking to include mandatory arbitration clauses in employment contracts have won a significant battle in the Ninth Circuit. In *Circuit City v. Adams*, the Supreme Court asserted that the Federal Arbitration Act (FAA) covers binding arbitration clauses in employment contracts, even if the clauses are mandatory.[1] Now, the Ninth Circuit has taken this decision one step further by not only allowing employers to maintain mandatory arbitration policies, but by also allowing employers to deny employment if a potential employee refuses to be bound by the arbitration agreement.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Luce, Forward, Hamilton & Scripps (Luce Forward), a San Diego-based law firm, offered Donald Scott Lagatree a position as legal secretary in September of 1997.[2] On his first day of work, Lagatree was presented with the firm's standard offer letter that included an arbitration provision in which the employee agrees to submit "all claims arising from or related to his employment" to binding arbitration.[3] Lagatree refused to sign the contract specifically due to the arbitration clause, and Luce Forward withdrew the job offer, asserting the clause was a non-negotiable condition of employment.[4] The employers do not dispute that they refused to hire Lagatree solely based on his refusal to agree to the arbitration provision.[5]

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* EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003).

[1] *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 122–23 (2001).

[2] *See* Perkins Coie, *Ninth Circuit Conforms (Finally); Allows Use of Arbitration Agreements*, 10 OR. EMP. L. LETTER, Jan. 2004, at Letter 4.

[3] *Luce Forward*, 345 F.3d at 745. The arbitration clause provided:

> In the event of any dispute or claim between you and the firm (including employees, partners, agents, successors and assigns), including but not limited to claims arising from or related to your employment or the termination of your employment, we jointly agree to submit all such disputes or claims to confidential binding arbitration, under the Federal Arbitration Act.

Id.

[4] *Id.*

[5] *Id.*

A. *Basis of the Suit and Lower Court Rulings*

Lagatree sued Luce Forward in state court after refusing to sign the arbitration agreement, which he claimed to be an "'unfair'" deprivation of "his 'civil liberties, including the right to a jury trial and redress of grievances through the government process.'"[6] In his suit, he alleged wrongful termination in violation of both the California Unfair Competition Law and public policy.[7]

The state court sustained Luce Forward's demurrer to the complaint, holding that Lagatree had not been unlawfully discharged when he refused to sign the arbitration agreement.[8] The California Court of Appeals agreed, and the California Supreme Court refused to review the case.[9]

B. *The Arrival of the Equal Employment Opportunity Commission (EEOC)*

While Lagatree's case in state court was still pending, but floundering, Lagatree filed a discrimination charge with the EEOC, and the Commission took on his case in the federal courts.[10] The EEOC presented two arguments on behalf of Lagatree. First, the EEOC claimed that the Ninth Circuit's previous holding in *Duffield v. Robertson Stephens & Co.* prohibited Luce Forward from requiring Lagatree to sign the mandatory arbitration agreement.[11] Second, the EEOC argued that, by denying Lagatree employment, the firm was retaliating against Lagatree for "asserting his constitutional right to a jury trial."[12] In addition to make-whole relief for Lagatree, including employment, back wages, and compensatory and punitive damages, the EEOC also sought a permanent injunction prohibiting

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[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *See id.*

[11] *Id.* In *Duffield*, the Ninth Circuit found that compulsory arbitration agreements conflicted with the purpose of the 1991 Act, which was to "*expand* employees' rights and to '*increase* the possible remedies available to civil rights plaintiffs.'" Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1192 (9th Cir. 1998) (emphasis original). Rather than requiring employees to surrender their right to a jury trial for the resolution of employment cases, it "seems far more plausible that Congress meant to encourage *voluntary* agreements to arbitrate . . . ." *Id.* at 1193 (emphasis original).

[12] *Luce Forward*, 345 F.3d at 746.

Luce Forward from using mandatory arbitration agreements in the future, thus preventing future unlawful retaliation.[13]

The district court held that the state court judgment precluded the EEOC from receiving monetary benefits on behalf of Lagatree.[14] However, the EEOC's claims for injunctive relief did not present the same problem, because, although the EEOC was in privity with Lagatree with respect to claims for individual relief, "the same is not true for the EEOC's claims for injunctive relief pursuant to its duty to vindicate the public's interest in preventing employment discrimination."[15] Accordingly, the district court, confirming *Duffield* as the controlling law in the Ninth Circuit, permanently enjoined Luce Forward from requiring or even requesting that future employees sign mandatory arbitration agreements. In addition, the firm could not attempt to enforce such agreements against current employees.[16] Luce Forward appealed the district court's injunction and the EEOC cross-appealed solely on the unresolved issue of Luce Forward's unlawful retaliation practices.[17]

A three-judge panel of the Ninth Circuit concluded that *Duffield* no longer remains good law and that, "an employer may require employees to arbitrate Title VII claims as a condition of employment."[18] Subsequently, Luce Forward could not have unlawfully retaliated against Lagatree by denying him employment for refusing to sign a legally-acceptable mandatory arbitration clause.[19] The Ninth Circuit, however, decided that this issue was so important that the case should be heard by a twelve-judge panel, and the three-judge ruling was withdrawn once the Ninth Circuit agreed to hear the case en banc.[20]

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[13] *See id.*

[14] *See id.*

[15] EEOC v. Luce Forward, Hamilton & Scripps, LLP, 122 F. Supp. 2d 1080, 1088 (C.D. Cal. 2000).

[16] *Id.* at 1093. The district court failed to address the EEOC's retaliation argument, possibly because it considered it a subset of the question of monetary relief. *Luce Forward*, 345 F.3d at 746.

[17] *See Luce Forward*, 345 F.3d at 746.

[18] *See* Coie, *supra* note 2.

[19] *Id.*

[20] Justin Kelly, *Ninth Circuit Overrules* Duffield, *Title VII No Bar to Arbitration* (Oct. 2, 2003), *available at* http://www.adrworld.com.

III. COURT'S HOLDING AND REASONING

On September 30, 2003, the Ninth Circuit, by a sharply divided nine to three vote, overruled *Duffield*.[21] This decision aligned the Ninth Circuit with the rest of the country on this issue, as the Ninth Circuit had previously been the only circuit to hold that arbitration clauses could not be a condition of employment.[22] The court found that mandatory arbitration clauses do not take away an employee's substantive rights, but rather influence the choice of forum for receiving that justice.[23] The dissenting judges argued that the majority opinion is the type of anti-civil rights, pro-employer opinion that the Civil Rights Act of 1991 was enacted to prevent.[24] However, supported by a textual analysis of the Civil Rights Act of 1991 and the Supreme Court's decision in *Circuit City*, the majority overruled *Duffield* and, in so doing, relinquished its title as the last holdout on the issue of employment arbitration clauses.

A. Duffield *Overruled*

In *Duffield*, the Ninth Circuit held that "employers may not require that workers agree to resolve Title VII claims through arbitration as a condition of employment."[25] In *Luce Forward*, it found that the presumption in *Duffield* that mandatory arbitration agreements weaken the Civil Rights Act of 1991 is inconsistent with the Supreme Court's endorsement of arbitration in *Gilmer*.[26] In addition, the right to a jury trial granted in Title VII cases is not a general barrier to voluntary arbitration, as the Ninth Circuit acknowledged in *Duffield*.[27] With regards to mandatory arbitration agreements, *Gilmer* established that such agreements were enforceable under

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[21] *See* Coie, *supra* note 2.

[22] *Id.*

[23] EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 750 (9th Cir. 2003).

[24] *Id.* at 762. "It makes no sense that Congress would have given civil rights victims their much desired victory only to have taken it away from them in the very same bill. Yet that is what the majority concludes." *Id.*

[25] *See* Coie, *supra* note 2.

[26] *Luce Forward*, 345 F.3d at 750. As previously mentioned, the majority also argued that mandatory arbitration agreements do not weaken Title VII because they only affect the choice of forum, not substantive rights. *Id.*

[27] *Id.*

the Age Discrimination in Employment Act (ADEA)—legislation that also provides the right to trial by jury.[28]

1. *The Civil Rights Act of 1991*

The Civil Rights Act of 1991 was enacted to "strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination."[29] For the first time, a right to a jury trial was guaranteed.[30] However, the 1991 Act also included a "polite bow to the popularity of 'alternative dispute resolution.'"[31] Section 118 of the 1991 Act provides that, "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title."[32]

Six months before the enactment of the Civil Rights Act of 1991, the Supreme Court decided *Gilmer*.[33] This case is instrumental in the Court's reasoning because it established steps Congress may take to guarantee that a judicial forum is available. While the *Gilmer* Court held that a party does not forgo substantive rights by agreeing to arbitrate a statutory claim, mandatory arbitration clauses may be prohibited if "Congress itself has evinced an intention to preclude a waiver of judicial remedies."[34] The Court placed the burden on Gilmer to demonstrate an "'inherent conflict' between arbitration and the ADEA's underlying purposes," or that Congress intended to preclude a waiver of judicial remedies, as seen in either the text of the legislation or the legislative history.[35] In the case of the Civil Rights Act of 1991, the Ninth

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[28] *Id.* at 750. "There is no 'inherent conflict' between the goals of Title VII and the goals of the FAA, as *Gilmer* used that phrase." *Id.*

[29] *Id.* at 747.

[30] *Id.*

[31] *Id.* (quoting Pryner v. Tractor Supply Co., 109 F.3d 354, 363 (7th Cir. 1997)).

[32] Civil Rights Act of 1992, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (codified at Notes to 42 U.S.C. § 1981).

[33] *Luce Forward*, 345 F.3d at 747 (discussing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)).

[34] *Id.* (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1965)).

[35] *Gilmer*, 500 U.S. at 26. The court made it clear, however, that in addition to having the burden of proof, the plaintiff must also be aware that there is a "'healthy regard for the federal policy favoring legislation.'" *Id.*

Circuit found that there is no express statement by Congress that mandatory arbitration agreements should be prohibited, as is the case with the ADEA.[36]

2. *Statute Text and Legislative History*

The Ninth Circuit found the language of the Civil Rights Act of 1991 unambiguous, and therefore did not need to look further to the legislative history. Additionally, the legislation in *Gilmer*, the ADEA, contains a clause about arbitration identical to that found in the Civil Rights Act of 1991.[37] The Supreme Court in *Gilmer* allowed for mandatory arbitration agreements, and the majority argued that, since the language is identical, these agreements are also valid under Title VII.[38] Finally, the majority in *Luce Forward* agreed with other courts that point out the irony of a statutory interpretation that "encourage[s] the use of arbitration and contain[s] no prohibitory language as evincing Congress' intent to preclude arbitration of Title VII claims."[39] Congress could simply have included a clause prohibiting mandatory employment arbitration of Title VII claims if such was its intent.[40]

While the legislative history includes language suggesting that Congress intended to prohibit mandatory arbitration agreements, the majority in *Luce Forward* discounted this information because the statutory language is clear and unambiguous.[41]

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[36] *Luce Forward*, 345 F.3d at 751. "Nothing in the text directly demonstrates a congressional intent to preclude compulsory arbitration agreements." *Id.*

[37] *Id.* "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration is encouraged to resolve disputes arising under this chapter." 42 U.S.C. § 12212 (2004).

[38] *Luce Forward*, 345 F.3d at 751. While the *Gilmer* Court did not have to interpret the text because Gilmer conceded that nothing in the text precluded arbitration, it "squarely held that claims under the ADEA can be subjected to compulsory arbitration." *Id.*

[39] *Id.* at 752.

[40] *See id.* "It is difficult to believe that Congress would have chosen to ban mandatory arbitration by means of a clause that encourages the use of arbitration and has no explicit prohibitory language . . . ." *Id.* (quoting Almendariz v. Found Health Serv., Inc., 6 P.3d 669, 677 (Cal. 2000)).

[41] *Id* at 752–53. Additionally, although there are Committee Reports which oppose mandatory arbitration agreements, other courts have noted that "additional statements by members of Congress expressed the view that section 118 did not preclude binding arbitration." Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc., 170 F.3d 1, 10 (1st Cir. 1999).

IV. IMPACT OF THE *LUCE FORWARD* DECISION

While having an impact on employment law in states within the Ninth Circuit, perhaps more importantly the *Luce Forward* decision makes it clear that arbitration is supported by all circuits and has emerged as a viable option to litigation. Now there is no question that mandatory arbitration clauses are permitted nationwide. Until Congress or the Supreme Court act contrary to these decisions, employees can be required to sign arbitration agreements if they wish to obtain employment.

A. *Employees Lose Right to Choose Venue*

This verdict provides a substantial obstacle for employees who seek to retain their rights to a jury trial. More employees will face the decision of signing a mandatory arbitration agreement or forgoing an employment opportunity, as companies who may have been hesitant before will increasingly institute mandatory arbitration clauses as a condition of employment.[42]

Employees can only hope that this decision, bringing all circuits into agreement on the issue of arbitration clauses, will motivate Congress to take action if indeed their legislative intent was to prohibit mandatory employment agreements. The Supreme Court could also accept a case to clarify the matter, ruling specifically on the issue of employees who refuse to sign mandatory arbitration agreements and are subsequently denied employment.[43] One ray of hope for employees in the state of Oregon is pending legislation that would "ban the use of arbitration provisions for discrimination claims filed under state law."[44] However, for the time being, arbitration may be the only form of recourse for employees nationwide when discrimination problems arise at work.

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[42] *See* Coie, *supra* note 2. The Ninth Circuit in its decision eliminated a significant hurdle to the use of arbitration agreements, and management employment attorneys are already "encouraging the business community to consider adopting arbitration agreements with employees." *Id.*

[43] Previously, the Supreme Court dealt with an individual who agreed to arbitrate a statutory claim, but then asserted his right to a jury trial. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

[44] *See* Coie, *supra* note 2.

1. *EEOC Retains Judicial Remedies*

The Ninth Circuit noted in its decision that the EEOC may still pursue judicial remedies because it is not a party to the mandatory arbitration agreements.[45] Although individual rights may be limited by this Ninth Circuit decision, the court recognized that "the pro-arbitration policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so."[46] Therefore, employees may still seek the help of the EEOC if they truly feel their rights have been violated. This admission by the Ninth Circuit leaves open speculation that if Lagatree had not sought individual relief before seeking help from the EEOC, he might have received monetary damages.

B. *Benefits to Employers*

While recent federal court decisions allowing mandatory employment agreements are seen as pro-employer, juries typically sympathize more with the employee.[47] However, the *Luce Forward* decision allows employers in the Ninth Circuit to take the decision away from traditionally anti-employer juries and place it in a forum more advantageous to employers.[48] In a society that is increasingly litigious, employers can avoid costly trials, as well as the defense costs that are necessary in settlements.[49]

The retaliation question still remains, but overall the decision is decisively pro-employer.[50] It allows Ninth Circuit employers to do what others across the country have been able to do without fear—require employees to sign mandatory arbitration agreements.[51]

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[45] Liane Jackson, *Court Supports Arbitration for Title VII Claims*, CORP. LEGAL TIMES, Dec. 2003, at 56. In another decision, the Supreme Court held that it "goes without saying that a contract cannot bind a nonparty." EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002).

[46] *Waffle House*, 534 U.S. at 294.

[47] *See* Coie, *supra* note 2.

[48] *Id.*

[49] *Id.*

[50] *Id.* "[M]ost lawyers who represent employers believe this is a significant victory for employers." *Id.*

[51] *Id.*

C. *EEOC Retaliation Claim Unresolved*

The EEOC appealed the district court's denial of a permanent injunction to "enjoin [Luce Forward] from engaging in an unlawful retaliatory practice by denying employment to any applicant or employee who refuses to waive his or her right to participate in statutorily protected enforcement proceedings under all the federal anti-discrimination laws: Title VII, the ADA, the ADEA, and the EPA."[52] The EEOC argued that even if *Duffield* were overruled, retaliation could still exist under the Civil Rights Act of 1991 if an employer refused to employ an individual for refusing to sign a mandatory arbitration agreement.[53] Even though the majority in the Ninth Circuit question this argument's likelihood of success, they remanded the retaliation claim to the district court.[54]

D. *Criticism of the* Luce Forward *Decision; Scathing Dissents*

The strong dissent in *Luce Forward* shows that the debate is not over, even if the case law in all of the circuits is currently in agreement. Most importantly, the dissent cited the majority's failure to address the only real issue in the case—"whether Luce Forward inappropriately retaliated against Lagatree."[55]

When considering the issue of arbitration, Congress rejected a "Republican substitute" of § 118 that would have allowed for mandatory arbitration agreements.[56] However, the majority in *Luce Forward* ignored this legislative history because it views the text of the statute as unambiguous.

In addition, the dissent argued that § 118 of the Civil Rights Act of 1991, which uses the language "where appropriate and to the extent authorized by law,"[57] should not be interpreted to allow for mandatory arbitration agreements. Nowhere is the term "mandatory" or "compulsory" used.[58] At the very least, the dissent argued, the language is ambiguous and the

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[52] EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 753–54 (9th Cir. 2003).

[53] *Id.*

[54] *Id.*

[55] *Id.* at 755.

[56] *Id.* Congress explained that "'American workers should not be forced to choose between their jobs and their civil rights.'" *Id.*

[57] *Id.* at 756 n.2.

[58] *Id.* at 763.

legislative history should be utilized.[59] Judge Reinhardt's dissent criticized the majority for trying to infer Congress' reading of Supreme Court cases, and for ignoring what members of Congress and "official committee reports *actually said* about those cases in the legislative history."[60] While the dissenters cannot influence the Ninth Circuit's decision, the arguments provided may encourage Congress to revise the Civil Rights Act of 1991, and the Supreme Court could further develop the arguments if it were to decide that all of the circuits have interpreted its decision in *Circuit City* incorrectly.

V. CONCLUSION

The Ninth Circuit's holding in *Luce Forward* signifies the increasing acceptance of the use of arbitration to settle employment disputes. It is clear from the now unanimous approval by the circuit courts that arbitration is considered a viable and respected alternative to litigation. Arbitration is credited for being less costly, eliminating the need for expensive trials.[61] However, the cost to employees—the effective denial of the right to a jury trial—is seen by many as too significant of a cost to bear.[62]

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[59] *Id.* at 764. The majority argues that the words "'authorized by law' are completely unambiguous in a bill designed to protect workers against race and sex discrimination." *Id.*

[60] *Id.*

[61] *See* Coie, *supra* note 2.

[62] *See Luce Forward*, 345 F.3d at 754. "[T]he majority opinion allows employers to force their employees to choose between their jobs and their right to bring future Title VII claims in court. That choice is no choice at all." *Id.*