Vindication Over Arbitration: How Disparate Treatment Pattern or Practice Claims Render Arbitration Agreements Unenforceable

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VINDICATION OVER ARBITRATION:
HOW DISPARATE TREATMENT PATTERN OR PRACTICE CLAIMS RENDER ARBITRATION AGREEMENTS UNENFORCEABLE

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ABSTRACT

The Supreme Court has consistently held that the Federal Arbitration Act embodies a federal policy favoring arbitration. Despite this policy, the Court also holds that arbitration agreements are unenforceable when individual plaintiffs cannot vindicate their statutory rights in arbitration. Additionally, the Court has emphasized that plaintiffs cannot arbitrate as a class unless the parties agreed to do so in the arbitration agreement. Certain claims, such as pattern or practice claims under Title VII, must be heard as a class. This Comment, therefore, argues that the inability to vindicate Title VII statutory rights in a class action renders arbitration clauses in certain employment contracts unenforceable where an employee alleges a pattern or practice of disparate treatment. The inherent conflict between pattern or practice claims and individual arbitration demonstrates that Congress intended to preclude the waiver of the judicial remedies in pattern or practice claims.

INTRODUCTION

Goldman Sachs and most of the financial industry have been the target of much ire for their roles in causing the United States’ worst financial crisis since the Great Depression. A major complaint has been the financial firms’ treatment of their employees. The complaints have not been focused on how badly the firms treated the employees. On the contrary, many have railed against the Wall Street firms for over compensating their executives with new offices and “golden parachutes” while their Main Street investors lost money.\(^1\) Although few would think that a firm like Goldman Sachs would ever treat its employees poorly or unfairly.

Christina Chen-Oster (Chen-Oster), a former vice president at Goldman Sachs, would disagree. In September 2010 she, alongside several other women, submitted a class action complaint alleging that Goldman Sachs violated Title VII of the Civil Rights Act of 1964 (Title VII) by systematically favoring male professionals at the expense of their female counterparts, otherwise known as a Title VII pattern or practice claim.

At trial Chen-Oster faced a problem. As a condition of working at Goldman Sachs, Chen-Oster signed an employment contract containing an arbitration clause. The contract stated that “[a]ny dispute, controversy or claim arising out of or based upon or relating to Employment Related Matters will be finally settled by arbitration… and binding upon [all] parties.” Goldman Sachs, therefore, moved that the court order Chen-Oster and the other named class members to submit to individual arbitration.

The district court, however, faced a unique issue of law. Precedent holds that Title VII complaints alleging intentional employer patterns or practices of discrimination, as opposed to

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individual instances, can only be heard on a class basis. The Supreme Court, however, has held that class arbitration can only occur if allowed in the arbitration clause itself. Additionally, the Supreme Court has repeatedly emphasized a federal policy favoring individual arbitration over class actions under the Federal Arbitration Act. Thus, the court faced a dilemma of whether it should allow the class action to continue despite the employment contract’s arbitration clause.

This Comment argues that even with a federal policy favoring arbitration, the inability to vindicate Title VII statutory rights in a class action renders arbitration clauses in employment contracts unenforceable where an employee alleges a pattern or practice of disparate treatment. Part I of this Comment discusses the development of the federal policy favoring arbitration and how courts have applied that policy when confronted with class actions. Additionally, Part I examines the types of claims a plaintiff may bring under Title VII. Part II of this Comment generally analyzes the jurisprudence surrounding the arbitrability of statutory rights and then analyzes its application to Title VII. Part II then shifts to a discussion of how circuit courts hold that pattern or practice claims of disparate treatment can only be heard in class action. Part III of this Comment argues that Congress precluded the waiver of a judicial forum in Title VII pattern or practice claims. Because of the inherent conflict between arbitration and a Title VII pattern or

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practice claim’s underlying purpose, an employee cannot vindicate her rights in individual arbitration and must be able to proceed in a class action lawsuit. Part III concludes with a brief examination of future congressional action that may impact this Comment’s analysis.

I. BACKGROUND

This Comment investigates the interplay between the Federal Arbitration Act, class actions, and pattern or practice claims of disparate treatment under Title VII. Such an investigation requires an understanding of each area’s development. Section A of this Part discusses the background environment and early applications of the Federal Arbitration Act. Section B of this Part then examines the interaction between arbitration and class action jurisprudence. Section C of this Part discusses Title VII and how an employee may bring a claim under the statute.

A. Federal Arbitration Act

Arbitration allows contractual parties to agree to resolve future disputes by submitting their disputes to an extra-judicial forum.\(^\text{11}\) It is an informal process that works as an alternative to litigation but is still judicially binding on all parties.\(^\text{12}\) Instead of appearing before a judge and jury, parties agree to give the arbitrator or arbitration panel full legal authority to resolve their dispute.\(^\text{13}\) The proceeding follows rules agreed by the parties, usually in accordance with the procedures of an identified arbitral institution.\(^\text{14}\) Once the arbitration begins, arbitrators typically


\(^{12}\) 1 Alt. Disp. Resol. § 1:1 (3d ed.).

\(^{13}\) 1 Alt. Disp. Resol. § 6:1 (3d ed.).

have the procedural authority to fashion flexible proceedings to resolve the dispute.\textsuperscript{15} After the parties have presented their evidence and positions, the arbitrator deliberates and announces her decision and award.\textsuperscript{16}

Courts, however, were initially hostile to the use of arbitration.\textsuperscript{17} Common law courts considered binding arbitration as a usurpation of their jurisdiction.\textsuperscript{18} In response to this hostility, Congress passed the Federal Arbitration Act (FAA) in 1925 to put arbitration agreements on an equal footing with any other aspect of contract law.\textsuperscript{19} The passage of the FAA created “a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.”\textsuperscript{20} Overall, the Supreme Court has read the FAA as “a congressional declaration of a liberal federal policy favoring arbitration agreements.”\textsuperscript{21} A court should enforce agreements made by private parties.\textsuperscript{22} Agreeing to arbitrate does not, however, change any party’s substantive rights afforded by the law.\textsuperscript{23} An arbitration agreement merely dictates the forum of any future dispute resolution.\textsuperscript{24}

\textsuperscript{15} 1 Alt. Disp. Resol. § 8:30 (3d ed.).

\textsuperscript{16} 1 Alt. Disp. Resol. § 9:50 (3d ed.).


B. Class Actions and Arbitration

The class action is an important aspect of the American judicial system that serves as a vehicle for vindicating statutory rights.\(^\text{25}\) It allows aggrieved parties to consolidate their claims into one action.\(^\text{26}\) The consolidation allows for the efficient use of judicial resources while ensuring fairness to all class members.\(^\text{27}\) The class action mechanism overcomes the lack of incentive an individual claimant might have to vindicate her rights when there might be a relatively low recovery not worth the cost of litigating.\(^\text{28}\) With these “negative-value claims,” the expected recovery does not justify the cost of litigating individually.\(^\text{29}\) For example, a lawyer might not take a case where the value of the claim at issue was only $70, but the same claim in a class action with 1000 claimants would create a $70,000 case.\(^\text{30}\)

Some commentators view class actions as a type of blackmail, where plaintiffs can extort defendants into settling claims or otherwise risk a higher value judgment at court.\(^\text{31}\) To avoid the high stakes of class action litigation, parties can include terms within their contracts that dictate


\(^\text{30}\) See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974). “A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.”

the kinds of procedures used in future disputes arising from the contract. Courts allow this kind of specialized procedure because contracting “parties are generally free to structure their… agreements as they see fit.” Allowing parties to design their own method of dispute resolution creates “efficient, streamlined procedures tailored to the type of dispute.” Examples of specialized procedures include class action waivers and agreements to use arbitrators rather than the courts. Contracts can even allow parties to arbitrate as a class, with procedures very similar to class action lawsuits.

Nevertheless, the one party cannot compel the other into class arbitration when the arbitration agreement at issue is silent on the use of class procedures. The Supreme Court has held that parties are not required to submit to class arbitration “unless there is a contractual basis for concluding that the party agreed to do so.” In so holding, the Court reasoned that courts and arbitrators must “give effect to the contractual rights and expectations of the parties.”

34 AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1749 (2011).
central expectation in a contract is the ability to “specify with whom [the parties] choose to arbitrate their disputes” and to designate the procedures used.\(^\text{40}\)

The Court found that the fundamentally different natures of individual and class arbitration create no expectation of class arbitration when parties generally agree to arbitrate their claims.\(^\text{41}\) Individual arbitration forgoes “the procedural rigor and appellate review of the courts” for the supposed benefits of “lower costs, greater efficiency and speed.”\(^\text{42}\) According to the Court, class arbitration is less likely to lead to these supposed benefits due to increased procedure.\(^\text{43}\) Class arbitration, like judicial class actions, requires procedures to determine class certification, including “whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted.”\(^\text{44}\)

Another difference between individual and class arbitration is that a class arbitration decision applies to absent parties, similar to a class action in court.\(^\text{45}\) The greater scope of class

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\(^{45}\) Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1776 (2010). Compare Am. Arbitration Ass’n, Supplementary Rules for Class arbitrations available at http://www.adr.org/sp.asp?id=21936, with Fed. R. Civ. P. 23. In agreeing to arbitrate, a party does not forgo their substantive rights; therefore, if a party would have had the right to bring or defend against a class action claim binding all non present class members in court, she would have that same right in arbitration. See infra Part II.A.
arbitration increases the financial stake of the defending party like in a class action in court.\textsuperscript{46} Despite the higher financial stake, class arbitrations, like all arbitration, have limited judicial review.\textsuperscript{47} The Supreme Court posits that these crucial differences between individual and class arbitrations show that a party could not have the same expectations for both forms of arbitration; therefore, an arbitrator cannot imply consent to class arbitration without evidence of a specific agreement to class procedures.\textsuperscript{48}

\textbf{C. Title VII of the Civil Rights Act of 1964}

Title VII prohibits certain employer practices that are motivated by race, color, religion, sex, or national origin.\textsuperscript{49} The Equal Employment Opportunity Commission (EEOC) is the federal government agency primarily responsible for enforcing Title VII violations against employers.\textsuperscript{50} Title VII, however, gives individuals the right to pursue their claim in court if they follow certain procedures.\textsuperscript{51} An individual must file a complaint with the EEOC within a certain timeframe.\textsuperscript{52} If the EEOC pursues a civil action against the employer, the individual may


\textsuperscript{52} 42 U.S.C.A. § 2000e-5(e)(1) (West 2012); 42 U.S.C.A. § 1981a(a)(1) (West 2012). An employee must generally file a charge with the EEOC within 180 days after the alleged unlawful employment practice occurred. 42 U.S.C.A. § 2000e-5(e)(1) (West 2012). However, if the employee initially brings her claim to an appropriate State or local agency, she has 300 days or 30 days after the State or local agency concludes it proceeding, whichever is sooner, to file the charge with the EEOC. \textit{Id}. 
intervene as a party.\textsuperscript{53} If the EEOC does not pursue the claim, the EEOC must notify the individual that she may then pursue her own civil action.\textsuperscript{54}

There are generally two categories of Title VII claims of discrimination: (1) disparate impact and (2) disparate treatment.\textsuperscript{55} Disparate impact occurs where employer practices or policies are facially neutral, but nevertheless adversely affect a protected Title VII group more than a non-protected group and the practices cannot be adequately justified.\textsuperscript{56} Since the practices are facially neutral, disparate impact claimants do not have to prove intent.\textsuperscript{57} Instead, a claimant establishes a prima facie case by showing preponderant evidence that the employer practice has a disparate impact on a protected class.\textsuperscript{58} The defendant can then disprove the plaintiff’s allegation by showing that no disparity exists or that the practice is based on a business necessity.\textsuperscript{59} If defendant asserts a business necessity, the plaintiff must show an existing alternative practice that would satisfy the alleged necessity without causing a disparate impact.\textsuperscript{60}


\textsuperscript{54} 42 U.S.C.A. § 2000e-5(f)(1) (West 2012). Within 180 days after receiving the complaint, the EEOC must notify the complainant of her right to sue, even if the EEOC has yet to make its decision to pursue the claim or not. \textit{Id}.


Disparate treatment occurs where an employer intentionally treats protected class member employees differently than non-class member employees. A plaintiff must prove an employer’s intent through direct evidence, inference, or establishing a pattern or practice of discrimination.

Where an employee shows direct evidence of disparate treatment against her, the employer must prove that he would have treated the employee with the same employment practice despite the alleged discrimination. The plaintiff must prove that the employer’s discrimination was a “motivating” factor in the employment decision. The direct evidence must show that discrimination caused the different practice, without inference or presumption. Since “employers now know better, direct evidence of employment discrimination is rare.”

In *McDonnell Douglas Corp. v. Green*, the Supreme Court established a burden-shifting framework whereby an employee may establish a rebuttable inference of disparate treatment. To utilize the framework, a plaintiff must initially establish a prima facie case of discrimination by demonstrating that (1) she belongs to a protected class, (2) she applied and was qualified for a job for which the employer was seeking applicants, (3) she was rejected despite her

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64 42 U.S.C.A. § 2000e-2(m) (West 2012)

65 *Brown v. E. Mississippi Elec. Power Ass’n*, 989 F.2d 858, 861 (5th Cir. 1993).

66 *Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654, 662 (9th Cir. 2002).

qualifications,\(^{68}\) and (4) non-protected class members with similar qualifications received the job at the time the plaintiff’s request was denied.\(^{69}\) The burden of production then shifts to the employer to explain a legitimate, nondiscriminatory reason for its actions.\(^{70}\) The plaintiff retains the burden of persuasion to show that employer’s given reason was not the true reason for the employment decision.\(^{71}\)

The other standard for proving disparate treatment is by establishing that the employer exhibits a systematic “pattern or practice of resistance to the full enjoyment” of an employee’s Title VII rights.\(^{72}\) A plaintiff must prove by preponderant evidence that discrimination was a part of the employer’s “regular operating procedure.”\(^{73}\) Proof of isolated instances of discriminatory incidents is not enough.\(^{74}\) In *International Brotherhood of Teamsters* the Supreme Court set out a two stage framework for proving a pattern or practice claim.\(^{75}\)


\(^{69}\) *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 575 (6th Cir. 2004). *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The *McDonnell Douglas* test has evolved overtime, becoming flexible to ever changing situations. *See Texas Dept. of Cnty. Affairs v. Burdine*, 450 U.S. 248, 254 n. 6 (1981) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n. 13 (1973)). Circuit courts have applied the *McDonnell Douglas* prima facie test of disparate treatment for other adverse employment actions, including significant changes in employment status, such as firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits applies *See Semsroth v. City of Wichita*, 304 F. App’x 707, 718 (10th Cir. 2008)


The first stage determines the liability of the employer.\textsuperscript{76} The plaintiff has the initial burden of showing the employer engaged in systematic unlawful discrimination as its “standard operating procedure.”\textsuperscript{77} Evidence is typically shown through strong statistical data with anecdotal support.\textsuperscript{78} If the plaintiff satisfies this initial burden, she creates a rebuttable inference of a pattern or practice of discrimination.\textsuperscript{79} The burden of production then shifts to the employer to disprove the plaintiff’s evidence.\textsuperscript{80}

If the defendant fails to rebut the plaintiff’s inference, the trial then enters into the second, remedial stage.\textsuperscript{81} The finding of a pattern or practice alone justifies the award of prospective relief such as an injunction against further discrimination or other orders necessary to ensure the protection of the employees’ rights under Title VII.\textsuperscript{82} When employees also seek individual relief for being victims of the discriminatory practice, the court must hold additional proceedings “to determine the scope of individual relief.”\textsuperscript{83} The pattern or practice established during the liability stage creates the rebuttable inference that the employer engaged in individual instances of discrimination pursuant to the discriminatory practice.\textsuperscript{84} As in the liability stage, an

\begin{thebibliography}{9}
\bibitem{76} \textit{Int'l Broth. of Teamsters v. United States}, 431 U.S. 324, 336 (1977).
\bibitem{77} \textit{Int'l Broth. of Teamsters v. United States}, 431 U.S. 324, 3336 (1977).
\bibitem{78} \textit{Mozee v. Am. Commercial Marine Serv. Co.}, 940 F.2d 1036, 1051 (7th Cir. 1991) \textit{opinion supplemented on denial of reh’g}, 963 F.2d 929 (7th Cir. 1992).
\bibitem{80} \textit{Int'l Broth. of Teamsters v. United States}, 431 U.S. 324, 360 (1977).
\bibitem{81} \textit{Int'l Broth. of Teamsters v. United States}, 431 U.S. 324, 361 (1977).
\end{thebibliography}
employer may bring evidence that its actions against the specified individual were not made pursuant to the practice. 85

II. ANALYSIS

This Part discusses the vindication of statutory rights in arbitration and in disparate treatment pattern or practice claims. Section A of this Part examines how the arbitration of statutory rights was initially very restricted. 86 As time passed, the Court eventually embraced the arbitrability of statutory claims. 87 Section B of this Part discusses how the Court applied this new view of arbitrability to Title VII claims. The key requirement of arbitrability was that a claimant must be able to successfully pursue her claim. 88 With this emphasis on vindication in mind, Section C of this Part then shifts to a discussion on vindicating pattern or practice claims of disparate treatment in class action.

A. Arbitrating Statutory Rights

The Supreme Court was initially resistant to allow parties to arbitrate their statutory rights such as those present in Title VII. 89 In Alexander v. Gardner-Denver Co., the Supreme Court held that arbitration was a “comparatively inappropriate forum for the final resolution of rights created by Title VII.” 90 The Alexander Court explained that the “purpose and procedures”

of Title VII show that Congress intended the courts, not arbitrators, to enforce Title VII.\textsuperscript{91} Arbitration is an appropriate forum for an employee’s contract dispute, but not for vindicating her statutory rights.\textsuperscript{92} The arbitral forum and its inadequate procedures invariably affect the scope of the substantive right at issue.\textsuperscript{93} Through the early 1980s, Court continually held that arbitral procedures were not as effective in protecting individual statutory rights as judicial procedures.\textsuperscript{94}

While the Alexander Court did not directly address the FAA in its opinion,\textsuperscript{95} the Court did hold that the federal policy favoring arbitration and the federal policy against discrimination would best be fulfilled by allowing employees to pursue their claims in arbitration and then in court.\textsuperscript{96} A claimant would arbitrate her claim first in order to facilitate voluntary settlement.\textsuperscript{97} If no settlement occurred, a court would hear the claim de novo and the arbitration decision could be admitted as evidence.\textsuperscript{98} Although a court would weigh an arbitral decision in its ruling,

\begin{itemize}
\item \textsuperscript{91}Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974).
\item \textsuperscript{92}Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974).
\item \textsuperscript{95}R. Gaull Silberman et. al., \textit{Alternative Dispute Resolution of Employment Discrimination Claims}, 54 La. L. Rev. 1533, 1543 (1994).
\end{itemize}
Congress intended for the courts to decide the “ultimate resolution of discriminatory employment claims.”

As time passed arbitral procedural protections began to improve. For example, after *Alexander* the American Arbitration Association revised its rules to provide greater procedural protection for claimants. Recognizing these improvements, some lower courts began to find arbitration agreements binding against individuals with statutory claims. In the 1980s a “radical change” occurred in the Court’s receptivity of arbitrating statutory rights, ending the “judicial hostility” against arbitration. By 1985, the Supreme Court espoused that it was “well past the time [of]… judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals.”

In *Mitsubishi Motors Corp. v. Soley Chrysler-Plymouth, Inc.*, the Supreme Court held that parties to a contract are generally required to arbitrate their statutory claims under the

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[n]ew [s]ystem [p]roposed… would be attractive to both the employee and the employer. Such a system would be a great boon to millions of Americans… In claims between individual employees and their employer, a sensitivity to the human concerns involved will also be important. The Arbitrator must not only be capable of reaching a fair decision, but must also appear to be fair to both individual claimants and to the interests of the defending parties.


106 The Mitsubishi case involved a contract dispute between a Japanese car manufacturer and a regional distributor.107 The contact included an agreement to arbitrate all “disputes, controversies or differences which may arise between” the two parties.108 The distributor brought a claim in federal court against the manufacturer for violating the Sherman Antitrust Act, 15 U.S.C. §§ 1-38, and the manufacturer wished to compel arbitration.109 Before this case, all Supreme Court decisions that enforced arbitration agreements under the FAA involved only contract claims.110 The Court had never previously found that an “arbitration clause referring to claims arising out of or relating to a contract” covered statutory claims indirectly related to the contract.111

The key to the Mitsubishi Court’s ruling was its application of the FAA. The FAA makes arbitration agreements involving commerce “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”112 The Court found that the FAA’s “liberal federal policy favoring arbitration agreements” embodies the principle that courts should enforce the agreements into which private parties enter.113 Absent claims such as

fraud or “overwhelming economic power” which would render any contract unenforceable, the FAA applies to disputes over contractual and statutory rights equally.\textsuperscript{114}

In contrast to the Supreme Court’s decision in \textit{Alexander}, which rejected arbitration of Title VII claims,\textsuperscript{115} the \textit{Mitsubishi} Court held:

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.\textsuperscript{116}

Looking prospectively, the arbitral forum serves the same remedial and deterrent function as a court because claimants can still vindicate their statutory rights.\textsuperscript{117} If a contract provision “operated in tandem as a prospective waiver of a party's right to pursue statutory remedies… [the Court] would have little hesitation in condemning the agreement as against public policy.”\textsuperscript{118}

Parties should be held to their agreements; however, the \textit{Mitsubishi} Court cautioned that not all disputes regarding statutory rights are suitable for arbitration.\textsuperscript{119} Congressional intent within other statutes may preclude the use of arbitration to settle disputes related to those claims.\textsuperscript{120} Congress may not want parties to be able to relinquish their federal statutory rights by


\textsuperscript{116} \textit{Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.}, 473 U.S. 614, 628 (1985).

\textsuperscript{117} \textit{Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.}, 473 U.S. 614, 637 (1985).

\textsuperscript{118} \textit{Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.}, 473 U.S. 614, 637 n. 19 (1985).

\textsuperscript{119} \textit{Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.}, 473 U.S. 614, 627, 628 (1985).

\textsuperscript{120} \textit{Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.}, 473 U.S. 614, 627 (1985).
agreeing to arbitrate. A court can deduce congressional intent from a statute’s text and legislative history. The Court, however, added another method of determining congressional intent. The congressional intent to prohibit the waiver of a judicial forum can also be found from an “inherent conflict between arbitration and the statute’s underlying purposes.” There is an inherent conflict between arbitration and a statute’s underlying purpose when a party may not effectively vindicate her statutory claim in an arbitral forum.

B. Arbitrating Title VII Claims After Mitsubishi

After Mitsubishi, some circuits continued to follow the Alexander Court’s holding that arbitration agreements were not binding on claims of employment discrimination. These circuits distinguished employment discrimination from claims arising out of business contracts like in Mitsubishi since the Supreme Court had yet to explicitly overturn Alexander. These

courts believed that the presumption of arbitrarily under the FAA was overridden by congressional intent in employment discrimination statutes.\(^{128}\) Congress precluded the waiver of judicial forum since employment discrimination “involve[s] adjudication of the rights of an individual under the Constitution, an inquiry that, with all due respect to arbitration, has historically been the sole province of Article III adjudication.”\(^{129}\) Other circuits, however, did not find an inherent conflict between the FAA and employment discrimination statutes.\(^{130}\)

With this circuit split, the Supreme Court granted certiorari to *Gilmer v. Interstate/Johnson Lane Corp.*\(^ {131}\) The *Gilmer* Court held that claims alleging employer violations of the Age Discrimination in Employment Act of 1967 (ADEA) could be arbitrated.\(^ {132}\) The Court reaffirmed its holdings that parties may agree to arbitrate statutory claims without foregoing their statutory rights and that there is a presumption of arbitrability unless otherwise evidenced by congressional intent.\(^ {133}\) Without any text or legislative history to preclude waiver, the issue was whether arbitration was inconsistent with the purposes of the ADEA.\(^ {134}\) Congress designed the ADEA to address both individual grievances and further important social

\(^{128}\) *Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 186 (1st Cir. 1989).


\(^{130}\) See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 197 (4th Cir. 1990).

\(^{131}\) *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (involving the discharge of a 62 year old employee who had signed an arbitration agreement).


\(^{133}\) *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“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.”)).

policies. The Court did not find arbitration to be inconsistent with promoting these social policies. As in Mitsubishi, the Court held that as long as a claimant may vindicate her statutory rights in arbitration, the statute still serves its remedial and deterrent function. In addition, the inability to utilize a judicial forum does not prevent a claimant from filing a charge with the EEOC for the agency to pursue.

Although Gilmer dealt with the interactions between the FAA and the ADEA, the decision immediately caused an abrupt change in the circuit courts’ treatment of arbitration agreements and Title VII. Seven days after Gilmer, the Supreme Court vacated and remanded a case involving the arbitrability of a Title VII claim back to the Fifth Circuit in light of its Gilmer opinion. In Dean Witter, an employee subject to an arbitration agreement brought a Title VII sex discrimination claim against her employer. The Fifth Circuit initially found that Alexander controlled the issue of the claim’s arbitrability, despite the more recent Supreme Court

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138 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991). The Supreme Court further explored the impact of arbitration agreements and the role of the EEOC in E.E.O.C. v. Waffle House, Inc. 534 U.S. 279 (2002). The Court held that the EEOC’s statutory authority to vindicate the public interest of eliminating employment discrimination allowed the agency to seek injunctive relief against an employer despite an employee’s arbitration agreement. Id. at 290 (quoting E.E.O.C. v. Waffle House, Inc., 193 F.3d 805, 810 (4th Cir. 1999)). An employee’s ability to seek specific relief through the EEOC would not “significantly trample” the strong federal policy favoring arbitration” despite previously agreeing to submit her claim to arbitration. Id. Once an employee submits her claim to the EEOC, she has no control over her claim or the relief the EEOC seeks. See Waffle House, 534 U.S. at 291. Additionally, since the EEOC was not a party to the arbitration agreement, the FAA’s policy favoring arbitration cannot force the EEOC to relinquish its statutory authority to prosecute discrimination claims. Id. at 293.

139 Michelle Hartmann, A Myriad of Contradiction with Title VII Arbitration Agreements-Duffield As the Past, Austin As the Future, and the EEOC As the Target of Restructuring, 54 SMU L. REV. 359, 364 (2001).
decisions allowing for the arbitration of statutory claims.\textsuperscript{142} On remand, however, the Fifth Circuit held that because Title VII and the ADEA have similar civil rights purposes and joint private-EEOC enforcement, arbitrability of claims under those statutes should be analyzed in the same manner.\textsuperscript{143}

Six months after \textit{Gilmer}, Congress passed the Civil Rights Act of 1991 (Amendment), amending Title VII and the ADEA.\textsuperscript{144} Section 118 of the Amendment states: “[w]here appropriate and to the extent authorized by law, the use of alternative dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under” Title VII and the ADEA.\textsuperscript{145} Circuit courts read the text of the Amendment to show the clear intent to encourage the arbitration of Title VII statutory claims.\textsuperscript{146} The courts continued to emphasize, however, that a party agreeing to arbitrate does not forgo the substantive statutory rights in Title VII which, when effectively vindicated, serves the statute’s remedial and deterrent function.\textsuperscript{147}

\footnotesize
\textsuperscript{142} \textit{Alford v. Dean Witter Reynolds, Inc.}, 905 F.2d 104, 106 (5th Cir. 1990) cert. granted, judgment vacated, 500 U.S. 930 (1991).

\textsuperscript{143} \textit{Alford v. Dean Witter Reynolds, Inc.}, 939 F.2d 229, 230 (5th Cir. 1991). \textit{See also Mago v. Shearson Lehman Hutton Inc.}, 956 F.2d 932, 935 (9th Cir. 1992) (“both statutes are similar in their aims and substantive provisions”).


\textsuperscript{146} \textit{See, e.g., Seus v. John Nuveen & Co., Inc.}, 146 F.3d 175, 182 (3d Cir. 1998).

\textsuperscript{147} \textit{Seus v. John Nuveen & Co., Inc.}, 146 F.3d 175, 182 (3d Cir. 1998) (quoting \textit{Gilmer v. Interstate/Johnson Lane Corp.}, 500 U.S. 20, 26, 28 (1991)). \textit{See also Shankle v. B–G Maint. Mgmt. of Colo., Inc.}, 163 F.3d 1230, 1234 (10th Cir. 1999) (citations omitted) (“\textit{Gilmer} reaffirmed the Arbitration Act’s presumption in favor of enforcing agreements to arbitrate-even where those agreements cover statutory claims. While we recognize this presumption, we conclude that it is not without limits. As \textit{Gilmer} emphasized, arbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. This supposition[ ] falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights.”). \textit{Cf. Sutherland v. Ernst & Young LLP}, No. 10 Civ. 3332 (KMW) (MHD), 2012 WL 130420, at *6 (S.D.N.Y. Jan. 17, 2012) (holding that the right to collective action under the Fair Labor Standards Act cannot be vindicated in individual arbitration); \textit{Owen v. Bristol Care, Inc.}, 11-04258-CV-FJG, 2012 WL 1192005, at *4 (W.D. Mo. Feb. 28, 2012) (same); \textit{Raniere v. Citigroup Inc.}, 827 F. Supp. 2d 294, 309 (S.D.N.Y. 2011) (same).
is unable to pursue her Title VII claim in arbitration, the arbitration agreement becomes unenforceable.\(^{148}\)

C. Vindicating Disparate Treatment Pattern or Practice Claims in Class Action

Disparate treatment in the context of hiring, firing, and promotion is “easy to conceptualize and identify.”\(^{149}\) It “is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.”\(^{150}\) In *Teamsters*, the Supreme Court set out a burden-shifting framework for proving that an employer utilizes a system-wide pattern or practice of disparate treatment.\(^{151}\) The Court has only applied the *Teamsters* pattern or practice standard to discrimination claims pursued by the government or class actions, but has not explicitly held that individuals cannot pursue pattern or practice claims.\(^{152}\) Even without clear instruction from the Supreme Court, circuit courts hold that pattern or practice claims of disparate treatment can only be brought by the government or through class actions.\(^{153}\) Subsection 1 addresses why the circuit courts preclude individuals from using pattern or practice claims to prove individual instances of

\(^{148}\) *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 126 (2d Cir. 2010).


\(^{152}\) See *Celestine v. Petroleos de Venezuela* SA, 266 F.3d 343, 355 (5th Cir. 2001).

discrimination. Subsection 2 then discusses how certain circuit opinions have been misinterpreted as allowing individual use, but in fact allow only class use.

I. Justifications for Class Action Use Only

Although the Supreme Court has not explicitly precluded the use of pattern or practice claims by individuals, the circuits hold that the “manifest” and “crucial” differences between an individual and class action claim of employment discrimination correlate to the differing natures of the McDonnell Douglas and Teamsters frameworks. The circuit courts focus on the Supreme Court’s statement made while holding that a judgment that finds no pattern or practice of discrimination does not preclude class members from initiating subsequent individual claims of discrimination against their employer:

The crucial difference between an individual’s claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual’s claim is the reason for a particular employment decision, while at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking.

In a class action pattern or practice case, the court considers the question of fact common to all class members, namely, whether there was an employer policy of discrimination.

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154 Celestine v. Petroleos de Venezuela SA, 266 F.3d 343, 355 (5th Cir. 2001).

155 Celestine v. Petroleos de Venezuela SA, 266 F.3d 343, 355 (5th Cir. 2001) (quoting Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 876 (1984); Babrocky v. Jewel Food Co., 773 F.2d 857, 866-67 n. 6 (7th Cir.1985)).


prove that such a policy exists through statistical evidence. If a plaintiff establishes a pattern or practice, she creates a presumption that all the class members were victims of the discriminatory practice under the Teamsters framework.

The McDonnell Douglas framework creates different inferences. An employee who utilizes the McDonnell Douglas burden-shifting framework establishes a presumption of specified instances of discrimination. To use the McDonnell Douglas framework, a plaintiff must first establish a prima facie case on individual disparate treatment. The plaintiff must show that non-protected class members with similar qualifications received different treatment than the plaintiff. While a pattern or practice could establish circumstantial evidence of discrimination to satisfy this requirement, it does not by itself establish a prima facie case of individual discrimination. A plaintiff must still show that (1) she belongs to a protected class, (2) she applied and was qualified for a job for which the employer was seeking applicants, and

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159 Mozee v. Am. Commercial Marine Serv. Co., 940 F.2d 1036, 1051 (7th Cir. 1991) opinion supplemented on denial of reh’g, 963 F.2d 929 (7th Cir. 1992).


161 See supra Part I.C.


(3) she was rejected despite her qualifications to create the rebuttable inference of individual disparate treatment.\textsuperscript{166}

In addition, individual and class action disparate treatment claims differ in the nature of the remedies sought.\textsuperscript{167} Class action lawsuits “primarily seek to redress widespread discrimination.”\textsuperscript{168} Class action lawsuits typically accomplish this prospective goal through injunctive relief such as affirmative action plans or the altering of a seniority system.\textsuperscript{169} By contrast, individual claims of disparate treatment generally seek to remedy individual harm via monetary damages.\textsuperscript{170} Under the \textit{Teamsters} framework, a pattern or practice of disparate treatment, by itself, is enough to award prospective relief through injunctive measures.\textsuperscript{171} Individual remedies only occur in the second, remedial stage.\textsuperscript{172}

In the 2011 case of in \textit{Wal-Mart v. Dukes}, the Supreme Court implicitly affirmed that pattern or practice cases may only be heard in a class action.\textsuperscript{173} In \textit{Dukes}, the Court reversed a district court’s certification of a class comprising approximately 1.5 million employee alleging


\textsuperscript{167} \textit{Lowery v. Circuit City Stores, Inc.}, 158 F.3d 742, 761 (4th Cir. 1998) vacated on other grounds, 527 U.S. 1031 (1999).

\textsuperscript{168} \textit{Lowery v. Circuit City Stores, Inc.}, 158 F.3d 742, 761 (4th Cir. 1998) vacated on other grounds, 527 U.S. 1031 (1999).

\textsuperscript{169} \textit{Lowery v. Circuit City Stores, Inc.}, 158 F.3d 742, 761 (4th Cir. 1998) vacated on other grounds, 527 U.S. 1031 (1999).

\textsuperscript{170} \textit{Lowery v. Circuit City Stores, Inc.}, 158 F.3d 742, 761 (4th Cir. 1998) vacated on other grounds, 527 U.S. 1031 (1999).


\textsuperscript{172} \textit{Int'l Broth. of Teamsters v. United States}, 431 U.S. 324, 361 (1977).

\textsuperscript{173} \textit{Wal-Mart Stores, Inc. v. Dukes}, 131 S. Ct. 2541, 2552 (2011)
gender discrimination in violation of Title VII. While discussing certification’s commonality requirement, the Supreme Court stated that: “proof of commonality necessarily overlaps with respondents' merits contention that Wal–Mart engages in a pattern or practice of discrimination.” The Court stated that if a class representative succeeds in establishing a pattern or practice, she creates the “rebuttable inference that all class members were victims of the discriminatory practice, and will justify ‘an award of prospective relief,’ such as ‘an injunctive order against the continuation of the discriminatory practice.’”

2. Individual Use Allowed? A Misreading of Circuits

Despite the overwhelming support from courts that pattern or practice claims may only be heard in class action, some believe that claimants can utilize that the Teamsters framework to prove individual claims of discrimination. These proponents argue that individual use of the Teamsters standard promotes the antidiscrimination policy and goals of Title VII. If individuals can only use the McDonnell Douglas burden-shifting mechanism, then employers have the advantage. Despite strong statistical evidence of an overall discriminatory policy, an

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178 See supra Part II.C.1.


individual claimant fails under *McDonnell Douglas* if there is no specific evidence of discrimination against the claimant.\(^\text{182}\) Allowing individuals shift the burden to employers after showing a pattern or practice of discrimination would prevent employees with otherwise strong cases from losing.\(^\text{183}\) Permitting these strong cases to move forward would supposedly promote Title VII’s goal of preventing employment discrimination.\(^\text{184}\)

The proponents of individual use of pattern or practice claims attempt to find support of their argument from the D.C. and Eleventh Circuits.\(^\text{185}\) This is a misreading of those courts’ holdings. As courts from within each of those circuits would later confirm, claimants cannot use the *Teamsters* burden-shifting framework to prove individualized discrimination.\(^\text{186}\)

In *Davis v. Califano* the D.C. Circuit held individuals may use statistical evidence to establish a prima facie case of individualized employment discrimination.\(^\text{187}\) The plaintiff in this case alleged that her employer discriminated against her due to her gender.\(^\text{188}\) As evidence of discrimination, the plaintiff presented statistical data showing disparities in grade, salary


\(^{186}\) *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 969 (11th Cir. 2008); *Schuler v. PricewaterhouseCoopers, LLP*, 739 F. Supp. 2d 1, 6-7 (D.D.C. 2010) aff’d on other grounds, 421 F. App’x 1 (D.C. Cir. 2011).

\(^{187}\) *Davis v. Califano*, 613 F.2d 957, 962 (D.C. Cir. 1979).

\(^{188}\) *Davis v. Califano*, 613 F.2d 957, 958 (D.C. Cir. 1979).
structure, and promotion rates between male and female employees.\textsuperscript{189} The D.C. Circuit held that the inferences that apply when using statistical data in class action lawsuits, apply equally well to individual cases.\textsuperscript{190} Statistical proof of a discriminatory policy creates reasonable grounds to infer that a claimant more likely than not was the victim of discrimination.\textsuperscript{191} Such an inference requires the employer to produce evidence to the contrary.\textsuperscript{192}

Despite the D.C. Circuit’s endorsement using statistical evidence to show the inference individual employment discrimination, D.C. district courts do not read \textit{Califano} as holding that individuals may use the \textit{Teamsters} pattern or practice burden-shifting framework to prove their claim.\textsuperscript{193} Instead, the district courts note that \textit{Califano} was discussing the use of statistical evidence within the \textit{McDonnell Douglas} framework,\textsuperscript{194} not under the \textit{Teamsters} framework.\textsuperscript{195} While an individual can use the same type of information to prove their individual claim as class action pattern or practice claim, she cannot use a pattern or practice claim to prove individual discrimination.\textsuperscript{196}

\textsuperscript{189} \textit{Davis v. Califano}, 613 F.2d 957, 960 (D.C. Cir. 1979).
\textsuperscript{190} \textit{Davis v. Califano}, 613 F.2d 957, 963 (D.C. Cir. 1979).
\textsuperscript{191} \textit{Davis v. Califano}, 613 F.2d 957, 963 (D.C. Cir. 1979) (quoting \textit{Int'l Broth. of Teamsters v. United States}, 431 U.S. 324, 359 (1977)).
\textsuperscript{192} \textit{Davis v. Califano}, 613 F.2d 957, 963 (D.C. Cir. 1979) (quoting \textit{Int'l Broth. of Teamsters v. United States}, 431 U.S. 324, 359 (1977)).
\textsuperscript{193} See, e.g., \textit{Schuler v. PricewaterhouseCoopers, LLP}, 739 F. Supp. 2d 1, 6-7 (D.D.C. 2010) aff’d on other grounds, 421 F. App’x 1 (D.C. Cir. 2011) (citing \textit{Davis v. Califano}, 613 F.2d 957, 962-63 (D.C. Cir. 1979)).
\textsuperscript{194} See supra Part II.A.1.
\textsuperscript{195} \textit{Schuler v. PricewaterhouseCoopers, LLP}, 739 F. Supp. 2d 1, 6-7 (D.D.C. 2010) aff’d on other grounds, 421 F. App’x 1 (D.C. Cir. 2011) (citing \textit{Davis v. Califano}, 613 F.2d 957, 962-63 (D.C. Cir. 1979)).
\textsuperscript{196} \textit{Lowery v. Circuit City Stores, Inc.}, 158 F.3d 742, 762 (4th Cir. 1998) vacated on other grounds, 527 U.S. 1031 (1999) (citing \textit{Davis v. Califano}, 613 F.2d 957, 962 (D.C. Cir. 1979)).
Like the D.C. Circuit’s *Califano* opinion, the some read the Eleventh Circuit’s 1986 opinion in *Cox v. Am. Cast Iron Pipe Co.* as allowing for the individuals use of pattern or practices claims.\(^{197}\) The Eleventh Circuit, however, clarified *Cox* in 2008 and held that individuals could not bring pattern or practice claims.\(^{198}\)

In *Cox*, a group of women brought a class action against their employer for gender discrimination.\(^{199}\) The trial court decertified the class and only three of the claimants received a favorable judgment.\(^{200}\) The Eleventh Circuit reversed the trial court’s decertification and individual judgments, including vacating the awards for the three victorious plaintiffs.\(^{201}\) While explaining its reversal against the defeated individuals, the *Cox* court held that an individual may prevail by showing a pattern or practice of discrimination.\(^{202}\) When an individual alleges a policy of discrimination, it is different than a claim alleging one instance of individual discrimination.\(^{203}\) When an individual shows that that discrimination was an employer’s standard operating procedure, she creates a rebuttable presumption of individual discrimination.\(^{204}\) Since the *Cox* court could not determine from the record whether the employer met its burden of showing that its actions were undertaken for lawful reasons under the


\(^{198}\) *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 969 (11th Cir. 2008).

\(^{199}\) *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1549 (11th Cir. 1986).

\(^{200}\) *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1549 (11th Cir. 1986).

\(^{201}\) *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1549 (11th Cir. 1986).


\(^{203}\) *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1559 (11th Cir. 1986).

Teamsters standard, the court reversed the judgments for and against the plaintiffs. This case seemed to indicate that individuals in Eleventh Circuit could bring pattern or practice claims of discrimination.

The Eleventh Circuit in *Davis v. Coca-Cola*, however, determined that the issue of the individual use of pattern or practice was not resolved by Cox. The *Davis* court said that Cox was merely an odd class action and that all class members “were entitled to the presumption that the complained-of employment practices violated Title VII.” The *Cox* court never affirmatively decided that individual plaintiffs may prove individual discrimination by showing a pattern or practice of discrimination.

Although previous Eleventh Circuit precedent had not explicitly foreclosed individual use of pattern or practice claims, the *Davis* court found serious faults with individual use pattern or practice claims and held that such claims could only be heard in class action. The main fault with the individual use of pattern or practice claims was the problem of claim and issue preclusion for the non-represented similarly situated class members. If a certified class action prevails on the pattern or practice issue against an employer, unnamed class members are barred by the doctrine of claim preclusion from asserting the pattern or practice claim in a separate

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208 *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 967 n. 24 (11th Cir. 2008).
209 *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 967 (11th Cir. 2008).
210 *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 968-69 (11th Cir. 2008).
The members could still assert individual claims of disparate treatment. A victorious individual claim of a pattern or practice discrimination, however, might bar similarly situated employees from asserting their pattern or practice claims under the doctrine of issue preclusion. Thus, the Eleventh Circuit found that individuals could not bring a pattern or practice claim of Title VII discrimination.

With its holding in *Davis*, the Eleventh Circuit joined its sister circuit courts by affirming that pattern or practice claims of disparate treatment utilizing the *Teamsters* framework may only be vindicated in class action. Having examined the vindication of pattern or practice claims, this Comment now shifts to a discussion on the arbitrability of such claims. This Comment argues that since pattern or practice claims must be heard as a class, a claimant cannot vindicate her rights in individual arbitration when an arbitration agreement is silent on or precludes of class procedures.

### III. ARGUMENT

The Supreme Court has stated that the arbitration of statutory rights is valid unless Congress has precluded the waiver of judicial remedies. Evidence of congressional intent comes from the statute’s text, legislative history, or the inherent conflict between the statute’s

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211 *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 969 (11th Cir. 2008). The unnamed class members would not be barred by claim preclusion if they are able to opt out of the class action. *See* Fed. R. Civ. P. 23(c)(2)(B)(iv).

212 *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 969 (11th Cir. 2008).

213 *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 969 (11th Cir. 2008).

214 *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 969 (11th Cir. 2008).

purpose and arbitration.\textsuperscript{216} Section A of this Part explains that neither the texts of the FAA nor Title VII directly address the arbitrability of disparate treatment pattern or practice claims. Section B of this Part examines how the legislative histories of each statute are equally unclear. Section C of this Part argues, however, that there is an inherent conflict between the purposes of Title VII and the FAA in allegations of pattern or practice disparate treatment. Section D of this Part then examines whether upcoming congressional action will potentially impact the arbitrability of pattern or practice claims under Title VII.

A. Text

The Federal Arbitration Act states that an arbitration provision in a contract “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”\textsuperscript{217} A plain reading of the FAA treats arbitration clauses the same in law or in equity as any other contract terms, including the clauses’ ability to become unenforceable due to fraud, duress, unconscionability,\textsuperscript{218} or public policy.\textsuperscript{219} Public policy is manifest in state and federal legislation.\textsuperscript{220} If legislation supports an action that conflicts with a contract term, a court may render that term unenforceable.\textsuperscript{221}


\textsuperscript{219} See, e.g., Restatement (Second) of Contracts § 178(1) (1981).

\textsuperscript{220} Restatement (Second) of Contracts § 178(1) (1981).

\textsuperscript{221} Restatement (Second) of Contracts § 178(1) cmt. a (1981).
If an employer exhibits a pattern or practice of discrimination in its employment decisions, the EEOC and/or a complaining party may bring a civil action against the employer. When Congress amended Title VII in 1991, it explicitly endorsed the use of arbitration to resolve disputes Title VII claims. Although Congress generally encourages the use of arbitration, the Amendment states that arbitration should only be utilized “[w]here appropriate and to the extent authorized by law.”

The text of the Amendment shows that Congress intentionally placed Title VII within the existing body law surrounding the FAA. If there was any ambiguity about the arbitrability of Title VII claims before or after the Gilmer decision, the Amendment clarifies congressional intent. The Amendment declares that a Title VII claim may be arbitrated, but only if the claim meets the general arbitrability standards the Court has developed since Mitsubishi. Just as the FAA put arbitration agreements on equal footing as any other aspect of contract law, the Amendment affirmed that Title VII claims are on equal footing as any other aspect of statutory arbitrability. The FAA and Title VII, however, do not explicitly address the arbitrability of disparate treatment pattern or practice claims. Consequentially, one must then look to their legislative histories.


223 Civil Rights Acts of 1991 Pub.L. 102-166, § 118 (1991) (“Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.”).


226 See Parts II.A, II.B.

B. Legislative History

The record surrounding the legislative history of the FAA is “quite sparse”.\textsuperscript{228} This has not presented much of a problem to the Supreme Court due to the FAA’s clear text.\textsuperscript{229} Title VII, conversely, has a voluminous legislative record.\textsuperscript{230} The history includes materials discussing both pattern or practice claims of disparate treatment and arbitrability.\textsuperscript{231} Title VII’s legislative history shows that Congress intended for pattern or practice claims to be heard in class action, but does not directly address pattern or practice claims’ arbitrability.

Title VII does not explicitly define when a pattern or practice claim should be used.\textsuperscript{232} Title VII’s legislative history, however, shows that pattern or practice claims are not intended for individual charges.\textsuperscript{233} During congressional debates, future Vice President and then Senator Hubert Humphrey stressed that individual claims of discrimination would not justify the use of a pattern or practice allegation: “[A] pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine or of a generalized nature.”\textsuperscript{234} In a related piece of legislation, Deputy Attorney General Lawrence


\textsuperscript{232} United States v. Ironworkers Local 86, 443 F.2d 544, 552 (9th Cir. 1971).

\textsuperscript{233} Int'l Broth. of Teamsters v. United States, 431 U.S. 324, 336 n. 16 (1977) (quoting 110 CONG. REC. 14, 270 (1964)).

\textsuperscript{234} Int'l Broth. of Teamsters v. United States, 431 U.S. 324, 336 n. 16 (1977) (quoting 110 CONG. REC. 14, 270 (1964)).
Walsh testified that a pattern or practice of voter discrimination under the Civil Rights Act of 1960\footnote{42 U.S.C.A. § 1971(e) (West 2012) (“the court shall… make a finding whether such deprivation was or is pursuant to a pattern or practice”).} was “not an isolated or accidental or peculiar event; that it was an event which happened in the regular procedures.”\footnote{United States v. Ironworkers Local 86, 443 F.2d 544, 552 (9th Cir. 1971) (quoting Hearing on H.R. 1037 Before H. Comm. on the Judiciary, 86th Cong., 2nd Sess. 13 (statement of Lawrence Walsh, Deputy Attorney General Walsh)).}


The Amendment’s legislative history, however, does give some insight on the congressional intent of Title VII’s arbitrability. The House Committee on Education and Labor emphasized that “the use of [arbitration] is intended to supplement, not supplant, the remedies provided by Title VII. Thus… any agreement to submit disputed issues to arbitration… in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII.”\footnote{H.R. Rep. No. 102-40, pt. II, at 41 (1991), \textit{reprinted in} 1991 U.S.C.C.A.N. 694, 735.} The Amendment did not change the arbitrability of Title VII or any other statutory claims under the FAA. Both before and after the Amendment passage, if a claimant cannot vindicate her Title VII claim in arbitration, the arbitration agreement is unenforceable.
Like Title VII’s text, its legislative history does not address whether Congress precluded the use of arbitration in pattern or practice disparate treatment claims. With little guidance from text and legislative history, one must determine whether there is an inherent conflict between arbitration and Title VII pattern or practice claims.

C. **Inherent Conflict Between Arbitration and Title VII Pattern or Practice Claims’ Underlying Purpose**

The Supreme Court has consistently held that statutory claims may be arbitrated under the FAA “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.”

If a plaintiff cannot effectively vindicate her statutory claim in arbitration, the FAA inherently conflicts with the statute because the statute cannot serve both its remedial and deterrent function. A class action pattern or practice case serves as the “vehicle for vindicating statutory rights” under Title VII. Since a class action claim cannot be arbitrated unless agreed to, a prospective litigant cannot vindicate her rights in arbitration, creating the inherent conflict between the FAA and Title VII.

The Supreme Court has only once provided an example of how an arbitration agreement might prevent a plaintiff from “effectively vindicating” her statutory rights. In *Green Tree v. Randolph*, a plaintiff who had signed an arbitration agreement brought a class action lawsuit against a finance company for violating the Truth in Lending Act, 15 U.S.C. § 1601-1667F, and

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242 See *In re Am. Exp. Merchants’ Litig.*, 667 F.3d 204, 214 (2d Cir. 2012).

the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f. \(^{244}\) The Supreme Court held that “the existence of large arbitration costs could preclude a litigant… from effectively vindicating her federal statutory rights in the arbitral forum.”\(^{245}\) The plaintiff in the case, however, did not show that she would bear such costs.\(^{246}\) The risk that the plaintiff would have to bear such prohibitive costs was “too speculative to justify the invalidation of an arbitration agreement.”\(^{247}\)

Applying *Green Tree*, lower courts have invalidated specific arbitration agreements that included class action waivers after finding that individual claims would be cost prohibitive.\(^{248}\) These courts recognized that class actions are vehicles for vindicating statutory rights, especially when class actions are the only “economically rational alternative” for negative value individual claims.\(^{249}\)

A pattern or practice claim of disparate treatment under the *Teamsters* framework may be prohibitively expensive for an individual claimant to vindicate her claim. In a pattern or practice claim of discrimination, an employee has the initial burden to show that her employer engaged in systematic unlawful discrimination.\(^{250}\) The costs of proving an employers’ systematic


\(^{246}\) *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000). This sentiment was reaffirmed by the Supreme Court in *Concepcion, AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011). Despite the argument that class claims were required to incentivize the vindication of small dollar claims, the Court held that an arbitration agreement’s minimum award of $7,500 and double attorney's fees was enough of an incentive for individual plaintiffs to bring their claim. *Id.* A class remedy was not required to vindicate the claimants’ rights. *See id.*


\(^{248}\) *See, e.g., Kristian v. Comcast Corp.*, 446 F.3d 25, 50-52 (1st Cir. 2006); *In re Am. Express Merchants' Litig.*, 634 F.3d 187, 199 (2d Cir. 2011), affirmed by *In re Am. Exp. Merchants' Litig.*, 667 F.3d 204 (2d Cir. 2012).

\(^{249}\) *In re Am. Express Merchants' Litig.*, 634 F.3d 187, 194 (2d Cir. 2011).

discrimination through statistics, expert witnesses, and other information might be prohibitively expensive for an individual claimant. However, the cost of substantiating a pattern or practice claim would be “speculative,” depending on the specifics of the case.\(^\text{251}\) That is why cost is not the determining factor as to why circuits courts hold that pattern or practice claims under the \textit{Teamsters} framework must be brought in class action.\(^\text{252}\) Instead, pattern or practice claims must be heard as a class action due to the type of information sought,\(^\text{253}\) the presumptions that the information creates in the \textit{Teamsters} burden-shifting framework,\(^\text{254}\) and the judicial principles of claim and issue preclusion.\(^\text{255}\)

The conflict between Title VII and the FAA arises when an individual attempts to arbitrate their pattern or practice claim of disparate treatment. The pattern or practice claim must be brought as a class claim.\(^\text{256}\) Unless specified within the contract, however, class arbitration is prohibited under the FAA.\(^\text{257}\) Since a pattern or practice claim cannot be heard in an

\(^{251}\) In the Chen-Oster case, for example, the plaintiffs asserted their class complaint utilizing policies and statistics published by the Goldman Sachs. Class Action Complaint at ¶ 5, 7-9 \textit{Chen-Oster v. Goldman, Sachs & Co.}, 785 F.Supp.2d 394 (S.D.N.Y. 2011) reconsideration denied, 2011 WL 2671813 (S.D.N.Y. July 7, 2011) (No. 10CV06950), 2010 WL 3595826. Cost did not prevent the plaintiffs from gathering the information required to assert their claim. \textit{See also Davis v. Califano}, 613 F.2d 957, 960 (D.C. Cir. 1979) (Individual employee was able to produce “abundant statistical evidence” of a pattern or practice of disparate treatment.)

\(^{252}\) \textit{See supra} Part II.C.


\(^{255}\) \textit{See Davis v. Coca-Cola Bottling Co. Consol.}, 516 F.3d 955, 969 (11th Cir. 2008).

\(^{256}\) \textit{See supra} Part II.C.

individualized case, a pattern or practice claim cannot be vindicated in individual arbitration. In Green Tree, the court found that the potential for prohibitive costs were “too speculative” to find an inability to vindicate the plaintiff’s statutory rights. Where a party tries to arbitrate a pattern or practice claim there is no speculation. An employee trying to assert a pattern or practice claim cannot vindicate her rights in individual arbitration.

Nevertheless, one lower court has reached the opposite conclusion. In Karp v. CIGNA Healthcare, Inc., the district court compelled an individual plaintiff to bring her Title VII claims into individual arbitration despite her assertion that her employer engaged in a pattern or practice of discrimination. The court first acknowledged that since there was no mention of class proceedings in the arbitration agreement, the plaintiff’s claim could not be arbitrated on a class basis. The Karp court then held that a plaintiff’s inability to arbitrate a class claim does not necessarily mean that she may bring her class claim in the judicial forum. It is only when

258 Celestine v. Petroleos de Venezuela SA, 266 F.3d 343, 355 (5th Cir. 2001).


“arbitration prevents plaintiffs from vindicating their rights, it is no longer a valid alternative to traditional litigation.”

The district court held that the plaintiff in the case could vindicate her rights in arbitration since a pattern or practice claim is only one method of proving disparate treatment under Title VII. The pattern or practice claim is not a separate cause of action, only a method of proof for claims. The class mechanism, similarly, is merely a procedural device; it does not create substantive rights which trump the FAA. The pattern or practice burden shifting mechanism is only one method of proving a Title VII claim, and it used only by the government or in class actions. A non-class plaintiff must instead employ the traditional *McDonnell Douglas* method to prove her claim in individual arbitration, using the pattern or practice as evidence of individual discrimination. Therefore, the district court held that the individual plaintiff could vindicate her Title VII claim in individual arbitration, despite having originally asserted a pattern or practice claim.

The *Karp* court’s characterization of a pattern or practice claim as being “merely a method of proof” fails to see that a plaintiff’s use of the pattern or practice burden shifting mechanism accomplishes more than proving that the individual plaintiff was a victim of

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270 See id. at *9.

discrimination. A finding of a pattern or practice creates the presumption that all class members were victims of discrimination, with all the class remedies such a finding entails. The Karp court itself noted how individual arbitration would prevent an individual plaintiff from obtaining injunctive relief under Title VII for the benefit of other class members. A pattern or practice claim’s applicability to non-present class members is one of the key aspects of a pattern or practice claim under Title VII. Pattern or practice class actions “primarily seek to redress widespread discrimination” through injunctive relief applicable to all class members. An individual plaintiff in arbitration would not seek to redress for other class members and an arbitrator would not be empowered to grant such class wide relief. Although a plaintiff may possibly be able to vindicate her own rights in individual arbitration, she could not act on behalf of non-present class members and make all the victims of discrimination whole, the central purpose of Title VII.

The inability of victims of discrimination to vindicate their Title VII statutory rights creates an inherent conflict between the purposes of Title VII and the FAA in allegations of pattern or practice disparate treatment. This inherent conflict demonstrates that Congress

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272 Id. at *8.


278 Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)
intended to preclude the waiver of the judicial remedies in Title VII pattern or practice claims of disparate treatment. Consequently, arbitration clauses in pattern or practice claimants’ employment contracts become unenforceable.

D. Which Future Is the Fairest of Them All?

The law is constantly developing in the face of new applications and changes in policy. This Section address future congressional action which may impact the arbitrability of pattern or practice claims under Title VII. As discussed above, the Supreme Court has repeatedly held that the FAA evinces the congressional intent to promote a liberal policy favoring arbitration.\(^{279}\) In reaction to these holdings, members of Congress have introduced two contradictory pieces of legislation, the Fair Arbitration Act of 2011\(^ {280}\) and the Arbitration Fairness Act of 2011,\(^ {281}\) aimed at clarifying that intent.\(^ {282}\) The Fair Arbitration Act’s modest amendments to the FAA would probably not affect the current law on the arbitrability of Title VII pattern or practice claims. The Arbitration Fairness Act, on the other hand, would drastically affect the current legal landscape surrounding arbitration.

\(^{279}\) See supra Parts II.A, II.B.


The Fair Arbitration Act would, among other provisions, amend the FAA to state that arbitrations are “governed by the same substantive law” of the applicable jurisdiction and that arbitrators are “empowered to grant whatever relief would be available in court under law or equity.” The Fair Arbitration Act appears to codify the judicial principle that parties to arbitration do not forgo their substantive rights. The mere codification of judicial principle would likely not affect the current law surrounding the arbitrability of Title VII pattern or practice claims. An employee with a pattern or practice claim would still not be able to vindicate her rights in arbitration, rendering the agreement unenforceable.

In drastic contrast, Arbitration Fairness Act would amend the FAA to state that “no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute.” According to the bill, the FAA was intended to apply only to “disputes between commercial entities of generally similar sophistication and bargaining power.” By applying the FAA to employment and consumer disputes, the Supreme Court has extended the FAA into areas which Congress never intended. Since allegations of disparate treatment are both an employment and civil rights dispute, the Arbitration Fairness Act would leave no doubt that Title VII pattern or practice claims could not be arbitrated.


Neither the Fair Arbitration Act nor the Arbitration Fairness Act would affect this Comment’s analysis on the current law that pattern or practice claims cannot be heard in individual arbitration. Nevertheless, the passage of the Arbitration Fairness Act is necessary to ensure that victims of patterns or practices of employer discrimination remain able to vindicate their claims. Despite the Supreme Court’s past emphasis on a claimant being able to effectively vindicate their rights in arbitration, recent decisions by the Court enforcing individual arbitration over judicial relief may be indicating a shift in how the Court views the arbitrability of statutory rights. At least one commentator has noted that lower courts are increasingly imposing individual arbitration over class action lawsuits “even when a court finds that the evidence in a case has proven that the ban on class actions guts consumer protection or civil rights laws… [and claimants] are left with no means of vindicating their rights.” To prevent this disregard of a claimant’s inability to vindicate their rights in arbitration, Congress should pass the Arbitration Fairness Act and clarify Congress’ intent to protect employees’ rights under Title VII.

289 See supra Part III.C.

290 See CompuCredit Corp. v. Greenwood, No. 10-948, 2012 WL 43514 (U.S. Jan. 10, 2012); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758 (2010). Recently in CompuCredit Corp. v. Greenwood, a majority of the Court noted that the FAA mandates the fulfillment of an arbitration agreement unless “overridden by a contrary congressional command.” CompuCredit Corp. v. Greenwood, 10-948, 2012 WL 43514, at *3 (U.S. Jan. 10, 2012) (quoting Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 226 (1987)). The stronger language of “congressional command” as opposed to “congressional intent” may be a significant departure from precedent. See CompuCredit Corp. v. Greenwood, No. 10-948, 2012 WL 43514, at *8 (U.S. Jan. 10, 2012) (Sotomayor, J., concurring) (“I do not understand the majority opinion to hold that Congress must speak so explicitly in order to convey its intent to preclude arbitration of statutory claims. We have never said as much, and on numerous occasions have held that proof of Congress’ intent may also be discovered in the history or purpose of the statute in question”).

CONCLUSION

When an employee claims that she has been the victim of a pattern or practice of employer discrimination, a previous agreement to arbitrate all future employment claims becomes unenforceable. The arbitration agreement becomes unenforceable despite the current federal policy generally favoring arbitration. If an employee were required to submit her claim into arbitration, she would not be able to vindicate her statutory rights guaranteed to her by Title VII.

The ability to vindicate statutory rights has been a constant concern for the Supreme Court; however, where that vindication may take place as changed over time. Initially courts were extremely hostile to any judicially binding arbitration, believing it to be a usurpation of the courts’ role. That is why Congress passed the FAA in 1925 to place arbitration agreements on an equal footing as any other contract term. Nevertheless, courts continued through the 1980s to hold that statutory rights could not be effectively vindicated in arbitration and remained in the province of the court. In late 1980s to the early 1990s, the Supreme Court made a radical departure from this previous appraisal of arbitration by holding that statutory claims could be heard in arbitration. The Court, however, continually stated that when arbitration prevents a claimant from vindicating her statutory rights, the arbitration agreement becomes unenforceable.

When an employer engages in a pattern or practice of disparate treatment against her employees, those employees have a statutory cause of action against that employer under Title VII. In order to vindicate the statutory claim, the discriminated employees must be able to present their case as a class and utilize the burden-shifting framework first espoused by the Supreme Court in Teamsters. Pattern or practice claims of disparate treatment must be heard
using class procedures due to type of systemic information sought, the presumptions that the information creates in the *Teamsters* burden-shifting framework, and the judicial principles of claim and issue preclusion.

Normally, when an employee has signed an arbitration agreement she can assert any claim in arbitration that she could have in court, including allegations of disparate treatment. Some claims, however, cannot be arbitrated under the FAA if Congress intended to preclude the use of arbitration of those claims. While the texts and legislative histories of the FAA and Title VII are uninformative, the inherent conflict between pattern or practice claims and individual arbitration demonstrates that Congress intended to preclude the waiver of the judicial remedies in pattern or practice claims. Unless specified in the contract, an employee cannot arbitrate her claim using class procedures. Therefore, an employee alleging a pattern or practice claim cannot vindicate her statutory rights in arbitration since the claim can only be heard as a class. This inherent conflict between the purposes of Title VII and the FAA render the arbitration agreement unenforceable.

When faced with this issue, the Chen-Oster court properly found the arbitration agreement unenforceable. Arbitration would prevent an employee “from vindicating her statutory cause of action. *Only* by proceeding on a class basis can the totality of her substantive claims against the defendants be adjudicated.” 292 With this ruling, Chen-Oster now has the chance to vindicate her class action claim in court. She has the opportunity to get justice for herself and all women at Goldman Sachs who have allegedly been discriminated by the company’s practice of gender discrimination.

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