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ESSAY

STATE ACTION AND THE ENFORCEMENT OF COMPULSORY ARBITRATION AGREEMENTS AGAINST EMPLOYMENT DISCRIMINATION CLAIMS

Jeffrey L. Fisher*

For the past few years, the federal courts of appeal have been struggling with the issue of whether employers may enforce compulsory arbitration clauses against employees who bring employment discrimination claims under Title VII or the Americans with Disabilities Act of 1990 ("ADA"). Compulsory arbitration clauses require prospective employees, as a condition of obtaining employment, to sign a contract waiving their rights to a jury trial regarding all future causes of action. The debate in the federal courts thus far has focused on whether Congress intended in passing the Civil Rights Act of 1991 ("1991 Act"), which amended Title VII, and the ADA, to preclude the compulsory arbitration of Title VII and ADA claims.

Section 118 of the 1991 Act and section 12212 of the ADA each state that “[w]here appropriate and to the extent authorized by law, the use of . . . arbitration, is encouraged to resolve disputes arising under . . .” these Acts.1 Despite weighty indications in the Acts’ legislative histories that Congress understood only employees’ voluntary decisions to arbitrate existing claims—and not employers’ imposition of contracts mandating compulsory arbitration of any prospective claims—to be “appropriate” and “authorized by law,”2 five of the six federal

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circuits to address the issue have held otherwise. Each of these five
circuits has ruled that the “plain language” of the statutes evinces a
congressional will to favor arbitration under any circumstances and thus
trumps any contrary suggestions in the Acts’ legislative histories. To
date, the Supreme Court has declined to enter the fray.

The majority rule—that the 1991 Act and the ADA support
compulsory and binding arbitration—presents a second, perhaps more
difficult, issue that courts are just beginning to grapple with: whether the
process of compulsory arbitration imposes an unconstitutional condition
of employment in violation of the constitutional right to an Article III
tribunal or the Seventh Amendment’s jury-trial guarantee. While both

Report on the bill that became the Act states that:
the Committee [on Education and Labor] believes that any agreement to submit disputed
issues to arbitration, whether in the context of a collective bargaining agreement or in an
employment contract, does not preclude the affected person from seeking relief under the
enforcement provisions of Title VII. This view is consistent with the Supreme Court’s

Id. The same Committee rejected a proposal under which “employers could refuse to hire workers
unless they signed a binding statement waiving all rights to . . . [judicial resolutions of] Title VII
complaints” because that “rule would fly in the face of Supreme Court decisions holding that
workers have the right to go to court, rather than being forced into compulsory arbitration, to
(1974).”). Id. at 104. See also H.R. REP. No. 101-485, pt. 3, at 77 (1990), reprinted in 1990
U.S.C.C.A.N. 445, 499-500 (explaining that the ADA’s arbitration provision is intended to be
consistent with Gardner-Denver).

3. See Desiderio v. Nat’l Ass’n of Sec. Dealers, 191 F.3d 198, 206 (2d Cir. 1999) (holding
that compulsory arbitration agreements are enforceable under the 1991 Act); Rosenberg v. Merrill
Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 11 (1st Cir. 1999) (holding “that neither the
language of the statute nor the legislative history demonstrates an intent in the 1991 CRA to
preclude [compulsory] pre-dispute arbitration agreements”); Koveleskie v. SBC Capital Mkts., Inc.,
167 F.3d 361, 365 (7th Cir.) (holding “that Congress did not intend Title VII to preclude
enforcement of [compulsory] pre-dispute arbitration agreements . . .”); cert. denied, 120 S. Ct. 44
(1999); Seus v. John Nuveen & Co., 146 F.3d 175, 182 (3d Cir. 1998) (holding that “Title VII [is]
entirely compatible with enforcing compulsory agreements to arbitrate Title VII claims”),
cert. denied, 525 U.S. 1139 (1999); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 886
(4th Cir.) (“[f]inding that Congress did not intend to preclude arbitration of claims under Title VII
Stephens & Co., 144 F.3d 1182, 1199 (9th Cir.) (holding that the 1991 Act precludes the
“compulsory arbitration of Title VII claims”), cert. denied, 525 U.S. 982, and motion granted and

4. See Desiderio, 191 F.3d at 204-05; Rosenberg, 170 F.3d at 8; Koveleskie, 167 F.3d at 365;
Seus, 146 F.3d at 182; Austin, 78 F.3d at 885-86.

5. “Article III . . . preserves to litigants their interest in an impartial and independent federal
judicature of claims within the judicial power of the United States . . ..” Commodity Futures
suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by
jury shall be preserved . . .” U.S. CONST. amend. VII. A thorough consideration of the strength of
the substantive argument that applying compulsory arbitration agreements to employment
Title VII and the ADA both provide for the right to a jury trial, and the Supreme Court has made it clear that Article III rights and the Seventh Amendment apply, at least to some degree, to employment discrimination claims, the first few federal courts to confront these constitutional provisions in the compulsory arbitration context have sidestepped considering their application to such arbitration. Instead these courts have held that enforcing a private arbitration agreement in federal court does not amount to the "state action" necessary to trigger constitutional protections in Article III and the Bill of Rights. If there is no state action, there can be no constitutional violation. The unconstitutional conditions argument becomes a nonstarter.

Plaintiffs have attempted to establish state action in the compulsory arbitration context by making three general arguments: (1) that adjudicating and enforcing federal civil rights laws is traditionally an exclusive governmental function; (2) that federal law requires certain employees to abide by the rules of professional associations such as the national securities exchanges, which in turn mandate compulsory discrimination claims imposes an unconstitutional condition of employment is beyond the scope of this essay, but (putting aside the issue of whether making arbitration a condition of employment or statutorily encouraging it is analytically equivalent to mandating it by statute) one commentator has noted that "[i]f there is any trend to be divined from the cases, the trend may well be against [the constitutionality of] statutes that compel arbitration." Morris B. Hoffman, The Constitutionality of Mandatory Arbitration, 18 COLO. LAW. 455, 455 (1989). See also New Eng. Merchs. Nat'l Bank v. Hughes, 556 F. Supp. 712, 714-15 (E.D. Pa. 1983) (inferring that compulsory arbitration schemes are constitutional if they are not binding); Healy v. Onstott, 237 Cal. Rptr. 540, 542 (Cal. Ct. App. 1987) (stating that compulsory arbitration statutes "deprive[] an affected party of his constitutional right to trial.").

6. Title VII (as amended by the 1991 Act) and the ADA expressly provide for the right of a trial by jury. See 42 U.S.C. § 1981a(c) (1994).


8. The First, Second and Seventh Circuits are the only circuits to address and reject state action arguments with regard to Title VII or ADA claims. See Desiderio, 191 F.3d at 206-07; Rosenberg, 170 F.3d at 17 n.12; Koveleskie, 167 F.3d at 368; see also Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc., 957 F. Supp. 1460, 1465-69 (N.D. Ill. 1997) (finding no state action, but considering the issue at length). The Ninth Circuit rejected some general state action arguments against compulsory arbitration, but did not address the question with regard to Title VII or the ADA because it had already refused to require the arbitration of those claims. See Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1200-02 (9th Cir. 1998).

9. See Desiderio, 191 F.3d at 206-07; Rosenberg, 170 F.3d at 17 n.12; Koveleskie, 167 F.3d at 368; Cremin, 957 F. Supp. at 1465-69; Duffield, 144 F.3d at 1200-02.

arbitration;\(^{11}\) and (3) that federal agencies like the SEC have approved of industries’ practices of compulsory arbitration.\(^2\) None has worked. Well-established law holds that dispute resolution, even in the federal civil rights context, is not an “exclusive” governmental function,\(^3\) and nothing about the intricacies of federal regulation in the securities industry (or any other industry) has convinced the federal courts that a private industry’s unprompted decision to require arbitration is fairly attributable to the government. Even if the second or third arguments eventually succeed, only securities-industry personnel would likely benefit, leaving plaintiffs who are required to sign garden-variety compulsory arbitration agreements to fend for themselves.

But, under the majority’s construction of the 1991 Act and the ADA, there is a stronger, more straightforward argument in favor of finding state action in these cases. The text of the Acts’ arbitration provisions, which expressly “encourage[s]" such arbitration,\(^4\) constitutes state action. Lest this proposition seem too simplistic to be compelling, bear in mind that the Supreme Court has long recognized that statutes encouraging or supporting private conduct can represent state action.\(^5\) Some thirty years ago, for instance, the State of California enacted a constitutional amendment that authorized private individuals to discriminate on the basis of race in selling and renting their property.\(^6\)

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11. See Duffield, 144 F.3d at 1200-01 (rejecting Plaintiff’s argument that state action is present because “federal law requires all broker-dealers to register with a national securities exchange . . . and to abide by the rules of that exchange — including its mandatory arbitration rules — as a condition of their continued employment.”).
12. See id. at 1201-02 (dissenting Plaintiff’s claim that state action exists because national securities exchanges are required to get their rules approved by the SEC).
15. For older decisions holding that state laws or policies effectively supporting racial discrimination constituted state action, see Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (holding that the restaurant’s refusal to serve African Americans constituted state action because the State, by leasing its premises to a private party and declining to prohibit the discrimination, “elected to place its power, property and prestige behind the admitted discrimination”); Nixon v. Condon, 286 U.S. 73, 76 (1932) (holding that a statute empowering the executive committee of a political party to prescribe the qualifications of its members constituted state action because it gave the party the legal authority, which it may not have had previously, to bar African Americans from voting in primaries); McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151, 162 (1914) (holding that a statute that authorized carriers to provide railroad cars for Whites but not for African Americans constituted state action because carriers refusing to serve African Americans would be “acting in the matter under the authority of a state law”).
16. The amendment read in relevant part:
The Supreme Court found that this law constituted state action because the effect of the law was that it "changed the situation from one in which discrimination was restricted [under state law] 'to one wherein it [was] encouraged . . . ." "Those practicing racial discriminations need no longer rely solely on their personal choice," the Court explained. "They could now invoke express constitutional authority, free from censure or interference of any kind from official sources." To be sure, the Court's decision, and others like it, were rendered during the high water mark of its state action jurisprudence and hinged to a significant degree on what it viewed as a pressing need to eradicate pervasive race discrimination. The basis for the rulings nevertheless remains sound: Placing the legislative imprimatur of the government behind a socially disdained, or even controversial, practice can deflect accountability of a private actor so substantially as to make its decision to adopt that practice fairly attributable to the state.

The Supreme Court's more recent state-action decisions, even as they have restricted the scope of this doctrine, have carried forward this principle of governmental "encouragement." In Blum v. Yaretsky, the modern blueprint for the Rehnquist Court's state action doctrine, the Court explained that "a State normally can be held responsible for a private decision only when it... has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." Applying this principle in 1989, the Court found state action in a private railroad's drug testing program in large part because the Federal Railroad Administration had drafted regulations expressing a "strong preference for [drug] testing" and had

neither the State nor any agency thereof 'shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.'


17. Reitman, 387 U.S. at 375 (quoting a decision of the California Supreme Court); see also id. at 381 (emphasizing that the California Supreme Court believed that the law would "significantly encourage and involve the State in private discriminations").

18. Id. at 377.

19. Id.

20. See generally Burton, 365 U.S. at 725-26 (holding that the government violated the Constitution by for failing to prohibit discrimination by a restaurant); Nixon, 286 U.S. at 76 (holding that the Equal Protection Clause prohibited political parties from barring African Americans from voting in primaries).


22. Id. at 1004.
explicitly conferred on railroads the authority to perform such tests.\textsuperscript{23} The Court concluded that the Administration’s written regulations moved beyond mere approval of the challenged action into the realm of “encouragement, [and] endorsement” of that action.\textsuperscript{24} And just two terms ago, the Court reaffirmed these tenets by holding that a Pennsylvania law that authorized insurance companies to unilaterally withhold payment of disputed medical services did not amount to state action because the law merely “authorized” the companies’ conduct consistent with the status quo.\textsuperscript{25} “Such permission of a private choice,” the Court repeatedly emphasized, fell critically short of “encourag[ing]” that choice.\textsuperscript{26}

Under the majority interpretation of the ADA and the 1991 Act, Congress has not only authorized, but—by its own words—has “encouraged” employers to condition employment on prospective employees’ waiving their right to pursue prospective ADA or Title VII claims in federal court.\textsuperscript{27} This difference between statutorily allowing and “encouraging,” as should now be apparent, is not mere semantics. To allow a course of conduct is to watch from the stands; to encourage it is to go down to one sideline and whisper in the coach’s ear. To “encourage” conduct, in other words, is to endorse it as the preferred option. It is to put the weight of the state behind its use.

Assuming that the majority rule is correct that Congress sought to “encourage” the compulsory arbitration of Title VII and ADA claims, Congress’ pronouncement was especially significant, for it ran contrary to, and effectively overruled, the universally accepted judicial presumption of over fifteen years that arbitration could not “provide an adequate substitute for a judicial proceeding in protecting the federal statutory” rights embodied in statutes like Title VII.\textsuperscript{28} It reversed it with a wallop. From the Supreme Court’s 1974 decision in \textit{Alexander v. Gardner-Denver Co.},\textsuperscript{29} until 1990, the year the ADA was enacted and the 1991 Act was drafted, every circuit court to address the issue held that Title VII and statutes with comparable enforcement mechanisms forbade all forms of compulsory arbitration.\textsuperscript{30} Even apart from the

\begin{thebibliography}{99}
\bibitem{24} \textit{Id.} at 615-16 (emphasis added).
\bibitem{26} \textit{Id.} at 54 (emphasis added).
\bibitem{27} \textit{See, e.g., Desiderio v. Nat’l Ass’n of Sec. Dealers,} 191 F.3d 198, 204-05 (2d Cir. 1999).
\bibitem{29} 415 U.S. 36 (1974).
\bibitem{30} \textit{See id.} at 56; \textit{see, e.g., Alford v. Dean Witter Reynolds, Inc.,} 905 F.2d 104, 106 (5th Cir.
\end{thebibliography}
judiciary, the desirability of employers’ conditioning employment on the signing of compulsory arbitration contracts was in 1990 and 1991—and continues to be today—a matter of deep disagreement among scholars and society at large. But like the dramatic action by the California electorate in Reitman v. Mulkey, Congress—according to the majority rule—not only decided to allow arbitration of Title VII and ADA claims to be binding, but it “encouraged” the arbitral resolution of such prospective disputes, even to the point of pushing employers to make the point a condition of employment. Employers that formerly would not have thought to require all employees to sign away their right to bring discrimination lawsuits in federal court, or at least would have been quite wary of doing so for fear of generating ill will amongst its current and potential workforce, suddenly found themselves “encouraged” by Congress to adopt such policies.

One may nevertheless believe—and I must confess that I have sympathy for the view—that pinning a state-action argument on one word in a statute seems a bit overly formalistic. Congress, after all, might have achieved the same substantive legal result in the Acts (i.e., permitting the enforcement of compulsory arbitration contracts) simply by using the word “authorized” instead of “encouraged.” But the circuits that have determined that Congress blessed compulsory arbitration in the 1991 Act and the ADA have been heavily influenced by the textual

1990); Utley v. Goldman Sachs & Co., 883 F.2d 184, 185-87 (1st Cir. 1989); Swenson v. Mgmt. Recruiters Int’l, Inc., 858 F.2d 1304, 1305-07 (8th Cir. 1988); Rosenfeld v. Dep’t of Army, 769 F.2d 237, 239 (4th Cir. 1985); see also EEOC v. Children’s Hosp. Med. Ctr., 719 F.2d 1426, 1431 (9th Cir. 1983) (en banc) (Fletcher, J., concurring) (stating that a prior approved consent decree cannot preclude an employee’s right to judicial resolution under Title VII).

31. Compare, e.g., Samuel Estreicher, Predispute Agreements to Arbitrate Statutory Employment Claims, 72 N.Y.U. L. REV. 1344, 1344-50 (1997) (arguing that compulsory arbitration is an acceptable means of resolving employment disputes where proper procedural safeguards are in place and setting forth the recent history of debate on this topic) with Katherine Van Wezel Stone, Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s, 73 DENV. U. L. REV. 1017, 1020 (1996) (opposing mandatory arbitration in employment disputes). Of course, I do not mean to imply that those supporting compulsory arbitration were in 1990-91, or are today, taking a position approximating those who support race discrimination. The right to a jury trial, however, is—like the right to equal protection—a fundamental constitutional right, and should not, until a person voluntarily decides to surrender it, be dismissed lightly. In addition, while we all may generally agree today that race discrimination by private parties is wrong, it is important to recall that the desirability of segregation was very much an open issue at the time the Supreme Court issued its decisions finding state action in the public support and authorization of discrimination. The Civil Rights Acts, in which the federal government finally decided to hold many private actors to constitutional standards, were not passed until the 1960s.

32. 387 U.S. 369 (1967) (holding that state action was present where the electorate passed a California constitutional amendment that authorized private individuals to discriminate on the basis of race in selling and renting their property).
They have perceived Congress' use of the term "encouraged" as fatally incompatible with suggestions that Congress intended to preserve the judicial presumption against the validity of practices as coercive as compulsory arbitration.34 The Second Circuit reasoned, "[B]arring the application of mandatory arbitration agreements to Title VII claims[,]" the Second Circuit reasoned, "would conflict with the express statutory term 'encouraged' in §118" and with "Congress' aim to foster arbitration."35 The Third Circuit likewise explained in a passage later agreed with by the Seventh Circuit: "On its face, the text of § 118 evinces a clear Congressional intent to encourage arbitration . . . not to preclude such arbitration."36 In the Fourth Circuit's view, "[t]he meaning of [the Acts'] language is plain—Congress is in favor of arbitration," including compulsory arbitration.37

I am not a strict adherent to the "plain language" method of statutory interpretation, but I gather that one of the principal justifications for ignoring other indicia of statutory meaning or congressional intent is that the words that Congress enacts in statutes enjoy a unique status. Our national government speaks most forcefully through the language of its laws. This, I take it, is the impetus behind the majority's view that Congress would not have used the strident word "encouraged" if it intended to place (or preserve) restrictions on employers' ability to impose arbitration on their employees.38 But if the plain meaning of Congress' word "encouraged" is powerful enough to squelch any suggestion that compulsory arbitration clauses remain unenforceable against certain employment discrimination claims, surely

33. See generally Desiderio v. Nat'l Ass'n of Sec. Dealers, 191 F.3d 198, 205-06 (2d Cir. 1999) (holding that the use of "the word 'encouraged' is free of ambiguities when viewed in the context of the purpose of [Title VII] and must be construed to condone the waiver of judicial remedies); Koveleskie v. SBC Capital Mkts., Inc., 167 F.3d 361, 365 (7th Cir.) (holding that the text of the Act encourages arbitration and the words "authorized by law" are merely references to the FAA), cert. denied, 120 S. Ct. 44 (1999); Seus v. John Nuveen & Co., 146 F.3d 175, 183 (3d Cir. 1998) (holding that the phrase "authorized by law" is only a reference to the FAA), cert. denied, 525 U.S. 1139 (1999); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 881-82 (4th Cir.) (holding that the use of the word "encourage" within the plain language of the Act favors arbitration), cert. denied, 519 U.S. 980 (1996).

34. See, e.g., Desiderio, 191 F.3d at 205-06.
35. Id. at 205.
36. Seus, 146 F.3d at 182; Koveleskie, 167 F.3d at 365 (quoting Seus).
37. Austin, 78 F.3d at 881-82.
that word is sufficient to make an employer's decision to honor Congress' "plainly" expressed preference in this regard fairly attributable to the federal government.

Congress, to my knowledge, has never before statutorily "encouraged" a course of conduct regarding employment relations that potentially treads on employees' constitutional rights. But suppose that it enacted the following hypothetical statute: "The use of compulsory employment contracts that allow for random and suspicionless searches, including searches of employees' homes, automobiles, and other private effects, is encouraged to defer employees from engaging in misconduct." Or how about: "The use of compulsory employment contracts that require employees to refrain from engaging in public debate regarding politics is encouraged to promote tranquility in the workplace." The use of the word "encouraged" is jarring in both contexts, and I venture to say that courts faced with challenges to such provisions would not hesitate to find state action and unconstitutional conditions of employment. This is not to suggest that the substantive jury trial and Article II issues in the compulsory arbitration context are anywhere near as clear cut, but it is to say that the state action inquiry in all three cases is essentially the same.

If one believes that Title VII and ADA claims should preclude the enforcement of compulsory arbitration clauses, there is one final advantage to hinging the state-action argument to the statutory language. of the 1991 Act and the ADA: courts can, and should, construe statutes to avoid serious constitutional questions.39 No matter how resolutely some circuits maintain that the "plain language" of the Acts encourages compulsory arbitration, there is undeniable ambiguity in the Acts' "encourag[ement]" of arbitration "[w]here appropriate and to the extent authorized by law... ." Even putting aside the inherently opaque term "appropriate," there is, given the remedial purposes of the ADA and the 1991 Act,40 genuine room to dispute whether Congress was referring to

39. See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944) (stating that "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality... unless such adjudication is unavoidable").


41. Both statutes are "remedial" in that they seek to provide remedies for improper discrimination. The 1991 Act is "remedial" in an important additional sense as well: The purpose of the Act was to statutorily "overrule" a series of 1989 Supreme Court decisions that Congress thought unduly narrowed the reach of Title VII. See Landgraf v. USI Film Prods., 511 U.S. 244, 250-51 (1994). The 1991 Act also strengthened Title VII by making it easier to bring and to prove such lawsuits. For example, it afforded plaintiffs the right to jury trials, more expansive fee-shifting provisions, and the right to punitive damages. See id. at 252; Desiderio, 191 F.3d at 205.
the Supreme Court "law" of Gardner-Denver, which, since its pronouncement in 1974, was understood to preclude any binding arbitration of Title VII claims, or the new "law" of Gilmer v. Interstate/Johnson Lane Corp., which, in 1991, permitted the compulsory arbitration of age discrimination claims and signaled that the Court would likely rule the same way in the Title VII or ADA context. This is especially so due to the timing of the Acts' drafting and passages. The ADA was enacted in 1990, before Gilmer was decided. The 1991 Act was likewise reported out by the House Education and Labor Committee with the understanding that Gardner-Denver was the controlling law, but was enacted six months after Gilmer was decided. Faced with the serious question of whether the 1991 Act and the ADA impermissibly encourage employers to place an unconstitutional condition on employment, courts might be well advised to construe the Acts to encourage only voluntary arbitration, which is undoubtedly constitutionally permissible, and which Congress may well have intended anyway.

Justice Frankfurter was fond of saying that there are three cardinal principles of statutory construction: "(1) Read the statute; (2) read the statute; (3) read the statute!" By carefully applying these three principles, courts holding that the ADA and the 1991 Act authorize the compulsory arbitration of ADA and Title VII claims may well be required also to find that state action exists when employers invoke those Acts in order to compel such arbitration. That action exists in the most unsurprising place one might expect to find governmental action: in the laws it enacted.

43. See Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104, 106 (5th Cir. 1990); Udey v. Goldman Sachs & Co., 883 F.2d 184, 185-87 (1st Cir. 1989); Swenson v. Mgmt. Recruiters Int'l, Inc., 858 F.2d 1304, 1305-07 (8th Cir. 1988); Rosenfeld v. Dep't of Army, 769 F.2d 237, 239 (4th Cir. 1985).
45. See id. at 34-35. The Court in Gilmer distinguished Gardner-Denver primarily on the ground that it involved a collective bargaining agreement rather than an individual agreement to arbitrate; the Court did not comment on any differences between the ADEA and Title VII (or the ADA). See id. at 34-35. The Court has since observed that there is "obviously some tension" between Gardner-Denver and Gilmer, but has not had occasion to sort out where the current fault line of arbitrability lies. See Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 76-77 (1998).