I. INTRODUCTION

The Federal Arbitration Act (FAA) has been a saving grace to the litigation process. However, there has been quite an ordeal regarding the scope of the Act. Since the enactment of the FAA, it has been omnipresent in employment contracts. Due to the infamous history of discrimination, the rights of employees have been greatly enhanced since the introduction of the Civil Rights Act (CRA) of 1991. Enhanced employee rights have, in turn, created havoc concerning the proper interpretation to be given arbitration agreements that relate to such rights. Passage of the FAA was

3. Id. at 1886.
motivated by the goal of eliminating courts historic hostility toward arbitration agreements.4 However, due to differing judicial interpretations of the FAA, the hostility is now directed toward employment contracts, causing the FAA to be in direct conflict with Title VII.5 Following the footsteps of the FAA, Texas and other states have adopted their own versions of the Act. Nevertheless, there remain questions regarding the inclusion of Title VII claims within the scope of arbitration clauses in employment contracts.

Part II of this Note introduces the background of the FAA, TAA and Title VII. Part III provides a synopsis of Fernandes, where the issue presented was whether the Texas Arbitration Act (TAA) bound Fernandes to arbitration when she asserted Title VII and unconscionability claims.6 Part IV compares various case law to the decision in that case. Finally, Part V provides recommendations as to how Texas courts should narrow their interpretation and application of the TAA. The recommendations are either for Texas to adhere to the original intent of arbitration or for the legislature to create an exception for Title VII claims from arbitration clauses.

II. BACKGROUND ON THE FAA, TAA, AND TITLE VII

A. Background on the FAA

The FAA establishes a strong, broad federal policy in favor of arbitration.7 The reason behind the preference for arbitration is to resolve disputes between quarreling parties efficiently and inexpensively.8 The FAA was broadened to apply to the ever-growing field of employment-related cases.9 The FAA “reflects the overarching principle that arbitration is a matter of contract,” and requires courts to “rigorously enforce” arbitration agreements according to [their] terms.”10 However, courts are still split on the scope of the FAA.11 The United States Supreme Court has emphasized that “principles of state contract law control the determination of whether a valid agreement to arbitrate exists.”12 Thus, Texas applies its

4. Id. at 1895.
5. Id.
8. Goodman, supra note 1, at 681.
9. Id. at 679.
11. Goodman, supra note 1, at 673.
own contract laws to ascertain the validity and scope of arbitration agreements in the context of employment contracts.

B. Background on the TAA

The TAA requires that a valid and enforceable arbitration agreement “(1) exists at the time of the agreement; or (2) arises between the parties after the date of the agreement.”¹³ If an agreement exists, then a “party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a contract.”¹⁴ According to Texas law, “[a]rbitration is a matter of contract between the parties, [therefore], a court cannot compel a party to arbitrate a dispute unless . . . the parties agreed to arbitrate the dispute in question.”¹⁵ Texas applies a two-step analysis, which is consistent with the FAA’s policy favoring arbitration.¹⁶ Thus, both the FAA and the TAA can apply. There are situations where the TAA may be preempted by the FAA.¹⁷ Texas courts have expressed that any uncertainties relating to the scope of the arbitration agreement must be construed in favor of arbitration.¹⁸

C. Title VII’s Relationship with the FAA

The purpose of Title VII is to “promote equality in the workplace.”¹⁹ It prohibits employment discrimination based on an individual’s “race, color, religion, or national origin.”²⁰ It also bars discrimination against an employee who opposes unlawful employment practices.²¹

It is clear from Title VII’s language that Congress regards a policy against discrimination to be of the utmost priority.²² However, it is not clear whether such claims are subject to mandatory arbitration under the FAA. Although the FAA does not explicitly include employment claims related to

---

¹³. TEX. CIV. PRAC. & REM. ANN. § 171.001(a) (West 2011).
¹⁴. Id. § 171.001(b).
¹⁶. Jones v. Halliburton Co., 583 F.3d 228, 233 (5th Cir. 2009). The two-step analysis makes it quite easy to uphold an arbitration. All that is needed is an agreement to arbitrate and a claim that is within the scope of arbitration. Id.
¹⁷. In re D. Wilson Constr. Co., 196 S.W.3d 774, 780 (Tex. 2006) (“The FAA only preempts the TAA if: ‘(1) the agreement is in writing, (2) it involves interstate commerce, (3) it can withstand scrutiny under traditional contract defenses [under state law], and (4) state law affects the enforceability of the agreement.’” (quoting In re Nexion Health at Humble, Inc., 173 S.W.3d 67, 69 (Tex. 2005) (per curiam))).
¹⁹. Goodman, supra note 1, at 674.
²¹. Id. § 2000e-3(a).
²². Goodman, supra note 1, at 675.
Title VII, different judicial interpretations have raised brows on this issue.²³ Plausible and convincing arguments can be made to tip the scale on either side.

III. SYNOPSIS OF THE COURT’S ANALYSIS IN FERNANDES v. DILLARD’S, INC.

After moving to Texas, Fernandes submitted an employment form to work at a Dillard’s located at the Baybrook Mall in Houston.²⁴ Fernandes signed her name below the arbitration clause and submitted the application.²⁵ The scope of this arbitration clause covered any legal claims that could arise out of the application process.²⁶ Fernandes was not hired for the position at Dillard’s but accepted a job at an independent cosmetic vendor within Dillard’s.²⁷ After the position at Dillard’s remained open for more than two months and noticing that all the employees were “tiny, young and non-Black,” Fernandes brought Title VII and unconscionability actions.²⁸ Dillard’s filed a motion to compel arbitration.²⁹ Fernandes contended that a valid arbitration agreement did not exist because the arbitration clause was unconscionable since she was unaware that she had agreed to arbitration and thereby waived judicial review of her Title VII claim.³⁰

In Fernandes, Texas’s contract law governs the scope of the contract between Fernandes and Dillard’s. Contrary to Fernandes’s Title VII and unconscionability allegations, the Fernandes court held that a valid and enforceable arbitration agreement existed.³¹ In addition, the court held that Fernandes’s defense of unconscionability was meritless on the basis that she is presumed to have read and understood the agreement before signing.³² The fact that Fernandes did not read the agreement before signing it does not necessarily make the agreement invalid.³³ The court emphasized

²⁵. Id.
²⁶. Id.
²⁷. Id. at 609.
²⁸. Id.
²⁹. Id.
³⁰. Id.
³¹. Id. at 612.
³². Id.
³³. Id.
that Fernandes failed to discharge her burden that she was tricked into signing the contract.34

IV. APPLYING PRECEDENT REGARDING UNCONSCIONABILITY AND TITLE VII TO FERNANDES

A. Fernandes Correctly Applied an Unconscionability Analysis

Courts have set a clear precedent that failure to read and understand an arbitration agreement does not render the agreement unconscionable.35 In a Fifth Circuit case, illiterate borrowers signed a loan agreement with Washington Mutual Finance Group (WM Finance) to arbitrate any disputes that could arise out of the transaction.36 When a dispute arose, the indigent borrowers claimed that they were not aware of the arbitration clause nor were they informed of the existence of such a clause.37 The Fifth Circuit, applying Mississippi law (which is consistent with Texas law), concluded that the illiterate borrowers did not prove that they were coerced into signing the arbitration clause, nor was the verbiage of the clause difficult or in a font so small to render it unreasonable.38 Consequently, the borrowers’ defense of unconscionability was unsuccessful.39 The court further reasoned that to allow a party to contest that it signed the contract, but did not read or understand it, would denigrate the significance of contracts.40

Similar to Washington Mutual Finance Group, Fernandes’s defense of unconscionability failed.41 Quite understandably and rationally, the mere failure to read and understand a contract is insufficient; otherwise, most arbitration clauses would be invalid.42 Even the suggestion of illiteracy cannot prevail or else one set of laws would be applied to those who are educated and another to those who are uneducated.43 This policy was astutely implemented in Fernandes. An opposite decision would have a snowball effect: all Title VII claimants would then purport to be willfully blind to arbitration clauses, leaving valid arbitration agreements unenforceable.

34. Id.
36. Id. at 262.
37. Id. at 262–63.
38. Id. at 264–65.
39. Id.
40. Id. at 265.
41. Id. at 264.
42. Id.
43. Id.; see Mixon v. Sovereign Camp, W. O. W., 125 So. 413, 415 (Miss. 1930).
B. Fernandes Should Have Found an Exception to Arbitration Clauses Regarding Title VII

The First Circuit decided that the silence of the scope of an arbitration clause should be construed against the employer. Hermas v. Career Systems Development Corp., applying Maine law, held that the applicant was not obligated to arbitrate her Title VII claims. In Fernandes, an applicant for a position with Career Systems Development claimed that she was denied the job because she was female and pregnant. The arbitration clause that she signed was silent as to whether it applied to Title VII claims. The court held that the applicant was not obligated to arbitrate her claims because the arbitration clause was ambiguous. The court noted that ambiguities in contracts are interpreted against the drafter. The court stated that where a standard contract is proposed on a “‘take it or leave it’ basis,” the provisions of the contract are read in favor of the party “‘in the inferior bargaining position.’” The court reasoned that the parties did not have equal bargaining power, and the language of the arbitration provision did not explicitly cover all pre-employment and employment disputes.

Comparable to Gove, the arbitration agreement in Fernandes was silent regarding Title VII. Also like the applicant in Gove, Fernandes did not have equal bargaining power as she was not aware that she was waiving her Title VII rights. Thus, the contract should have been construed in favor of Fernandes’s Title VII claim. The Fernandes court should have realized that certain situations fall outside the scope of arbitration. In determining when to compel arbitration, the court should have considered the adverse impact arbitration has on the party resisting its enforcement. Although arbitration offers an expedited and cheaper method of resolving disputes, the party that drafts the agreement often “maximize[s] its advantages to the detriment of the other party.” Title VII is a substantive, fundamental right. To include this right within the scope of an arbitration clause leads to the belief that a claim can easily avoid courts of law; tipping the entire process in favor of the drafter. Enforcement of arbitration clauses should not be

45. Id.
46. Id. at 2.
47. Id. at 6.
48. Id. at 7.
49. Id.
50. Id. at 4–5 (quoting Barrett v. McDonald Invs., Inc., 870 A.2d 146, 150 (Me. 2005)).
51. Id. at 6–7.
52. Siderman, supra note 2, at 1892.
black and white. It has many layers and facets to its application; thus, its enforceability should not be applicable in all contract situations.

V. RECOMMENDATIONS FOR A MORE EFFECTIVE USE OF ARBITRATION CLAUSES

A. Texas Should Adhere to the Original Intent of Arbitration

Even Julius Henry Cohen, the principal drafter of the FAA, noted that not every dispute arising out of a contract needs to be arbitrated.\textsuperscript{53} The original legislative intent of the FAA is apparent: arbitration is well suited for the disposition of ordinary disputes between merchants.\textsuperscript{54} Cohen expressed that arbitration “is not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes.”\textsuperscript{55} He emphasized that arbitration is not the appropriate grounds for the resolution of “questions with which the arbitrators have no particular experience and which are better left to the determination of skilled judges . . . and established systems of law.”\textsuperscript{56}

Thus, it can be inferred that not all disputes that arise out of a contract between an employee and employer are appropriate for arbitration. “While arbitration can be beneficial in some contexts, it has many disadvantages” as well.\textsuperscript{57} A prime example of such a disadvantage is evident in \textit{Fernandes}. \textit{Fernandes} was denied a chance to assert her Title VII claim in front of a jury of her peers. Taking away this matter from the jury significantly deteriorated her chance of recovery and the possibility for large damages.\textsuperscript{58} Without juries, the opinions of local citizens are replaced by the professional judgment of an arbitrator, who may not have any local experience.\textsuperscript{59} Thus, where issues such as Title VII rights are at stake, Texas courts should narrow their approach and assess the applicability of arbitration on a case-by-case basis instead of construing the FAA so broadly through the TAA.

\begin{itemize}
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} \textit{Id.}
\item \textsuperscript{57} Pennzoil Co. v. Arnold Oil Co., 30 S.W.3d 494, 502 (Tex. App.—San Antonio 2000, no pet.) (Hardberger, C.J., concurring).
\item \textsuperscript{58} Siderman, \textit{supra} note 2, at 1914–15.
\item \textsuperscript{59} \textit{Id.} at 1915.
\end{itemize}
B. Texas Must Make Exception to Arbitration in Regards to Title VII Claim

The original intent of the FAA does not subject Title VII claims to either the FAA or TAA. The legislative history of the CRA suggests that Congress did not intend to permit binding arbitration agreements. Texas has nonetheless twisted the legislative history of the CRA to endorse such agreements. Unsuccessful in resolving this discrepancy, the United States Supreme Court has left circuits, like the 1st Circuit in Gove, to create their own elucidations on whether arbitration should include Title VII claims.

This ongoing debate has left employees in a precarious position, as illustrated in Fernandes. To mitigate the unfairness, Texas needs to adopt a coherent arbitration system to ensure fairness and justice. One possible solution is for courts to compel employers to explain arbitration provisions and recommend that employees review the clause with an attorney. The general population does not immediately know what their substantive rights are, let alone Title VII rights. It is only after conference with legal personnel following alleged violation of these rights that a person is informed of what Title VII entails. However, by then it is too late because the contract has already been signed, sealed, and delivered.

Inclusion of Title VII claims in an arbitration provision encourages misrepresentation of law. Because judicial review of arbitrators’ decisions is limited, arbitration presents no opportunity for the development of the law. Therefore, not only is the law stifled, arbitrators can make decisions with almost no review of whether their decision was fair. “Higher courts and Congress are therefore unable to correct the errors of statutory interpretation made by arbitrators.” This fickle application increases the chances of undermining anti-discrimination laws because employers, just like Dillard’s, could get away with discrimination.

VI. CONCLUSION

The court in Fernandes correctly found that the mere fact that Fernandes did not read the arbitration clause did not invalidate it. However, arbitration clauses must not be construed so broadly as to deny a person of the chance to litigate Title VII claims in court. Texas law should follow the footsteps of Maine in regard to Title VII claims, and conduct a case-by-case

60. Goodman, supra note 1, at 666.
61. Id. at 680; see Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 36 (1991) (Stevens, J., dissenting) (stating that the majority declined to elucidate how arbitration agreements relate to certain subject matter like Title VII claims).
62. Siderman, supra note 2, at 1910.
63. Id. at 1911.
64. Id. at 1912.
65. Id.
analysis to impartially decipher whether a harmed party is owed a right to appear in front of a judge or jury. In essence, without the guidance of judicial review, arbitrating Title VII claims increases the possibility of incorrectly applying the guarantees against discrimination.

Salma Charania