

ARBITRATING EMPLOYMENT DISCRIMINATION AND WRONGFUL DISCHARGE CLAIMS: POSSIBILITIES AND PRACTICALITIES

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ABSTRACT

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 US __, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), the United States Supreme Court held that age discrimination claims brought pursuant to the Age Discrimination in Employment Act, 29 USC §§621 *et seq.*, were subject to arbitration under the Federal Arbitration Act, 9 USC §§ *et seq.* This decision raises the prospect that all statutory and common law employment-based claims may be subjected to arbitration: a less expensive, less time-consuming, and often more predictable process than litigation. This article reviews the history of the arbitrability of employment claims, the Supreme Court's decision in *Gilmer*, and questions left unanswered by that decision. The author concludes that most employers will benefit from arbitrating employment-based claims.

Human resource professionals have more than passing familiarity with the explosion of employment litigation during the past decade. Many of these cases are brought under federal statutes intended to prevent discrimination in the workplace. Additionally, several states have passed comprehensive employment discrimination statutes that provide, in many cases, significantly broader coverage and more liberal remedies to prevailing plaintiffs. State courts have also fashioned common law contract and tort theories designed to protect employees from "wrongful discharge." Almost any personnel decision, in this context, can result in a lawsuit.

Litigation, when it comes, is costly in terms of money, time, employee morale and, in some cases, a money judgment. Wrongfully discharged employees and actual victims of employment discrimination are also required to wait years while their cases wind slowly toward settlement or judgment. The cost and delay

experienced by employers and employees alike is the inevitable result of resolving disputes in court.

The United States Supreme Court has recently suggested an intriguing solution to the high cost of employment-based litigation: arbitration. In *Gilmer v. Interstate/Johnson Lane Corp.* [1], decided on May 13, 1991, the Court held that age discrimination claims, brought under the Age Discrimination in Employment Act (ADEA) [2], were subject to arbitration pursuant to the Federal Arbitration Act (FAA) [3]. It appears that *Gilmer* will also permit the arbitration of employment claims based on other federal antidiscrimination statutes, including Title VII of the Civil Rights Act of 1964 (Title VII) [4] and the newly enacted Americans with Disabilities Act (ADA) [5]. *Gilmer* has significant potential to direct employers and employees away from litigation and toward less formal, less expensive, and more speedy arbitration.

This article reviews legal developments leading to *Gilmer*, and the potential impact of *Gilmer* on employment-based litigation. The article concludes with a discussion of questions left unanswered by *Gilmer*.

ARBITRATION OF EMPLOYMENT CASES BEFORE GILMER

Arbitration has a checkered legal history. Originally, courts were hostile to arbitration, believing that arbitration worked to "oust" the courts of their proper jurisdiction [6]. This reluctance to enforce arbitration agreements apparently stemmed from the fact that English common law courts were concerned about losing fees for hearing cases to arbitrators [6]. Later, established judicial salaries and burgeoning dockets persuaded judges to take a more tolerant view of arbitration. The movement toward arbitration took a quantum leap forward in 1925, with the passage of the FAA [3].

It was not clear, however, whether statutory claims such as employment discrimination claims were subject to arbitration. A series of decisions in the mid- and late 1980s made it increasingly apparent that virtually any statutory claim was potentially subject to arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.* [7] held that antitrust claims brought under the Sherman Act [8] were subject to arbitration. *Mitsubishi* was followed, in short order, by decisions holding that claims brought under the Securities and Exchange Act of 1934, RICO and the Securities Act of 1933 [9, 10] were also arbitrable.

By contrast, movement toward the arbitration of employment discrimination cases had ground to a halt. The United States Supreme Court had issued three decisions [11-13] holding that employment discrimination claims were not subject to binding arbitration. The leading case, *Alexander v. Gardner Denver Co.* [11] had held that Title VII race discrimination claims were not subject to binding arbitration. Significantly, each of these cases arose in the collective bargaining context, a fact that proved important in *Gilmer*.

The lower courts, on the other hand, perceived a larger role for arbitration of employment discrimination claims. Courts were unanimous in holding that common law contract and tort claims were subject to arbitration. However, a split developed as to whether employment discrimination claims could also be arbitrated. The First [14], Third [15], Fifth [16], Eighth [17] and Tenth Circuits [18] held that employment discrimination claims based on federal statutes were not arbitrable. The Fourth Circuit however, held that age discrimination claims could be arbitrated [19]. The district courts were also divided. Against this background, the Supreme Court chose to review the Fourth Circuit's decision in *Gilmer* [19].

THE SUPREME COURT'S DECISION IN GILMER

The facts were straightforward. The plaintiff, Robert Gilmer, was hired by Interstate/Johnson in 1981. Gilmer was required to register as a securities representative with several stock exchanges, including the New York Stock Exchange (NYSE). Gilmer's NYSE registration application contained a provision by which he "agree[d] to arbitrate any dispute, claim or controversy" arising between himself and Interstate/Johnson "that [was] required to be arbitrated under the rules, constitutions or bylaws of the organization with which I register" [1, p. 1650]. Significantly, NYSE Rule 347 provided for arbitration of "[a]ny controversy between a registered representative [Gilmer] and any member or member of an organization [Interstate/Johnson] arising out of the employment or termination by employment of such registered representative" [1, p. 1650-51].

Interstate/Johnson terminated Gilmer's employment six years later, when he was sixty-two years old. Predictably, Gilmer filed an age discrimination claim with the Equal Employment Opportunity Commission (EEOC) and later filed a lawsuit. In response, Interstate moved to compel arbitration. The district court refused to compel arbitration on the grounds that the Supreme Court's decision in *Alexander v. Gardner Denver Co.* [11] prohibited the binding arbitration of employment discrimination claims. The Fourth Circuit reversed, setting the foundation for Gilmer's appeal to the Supreme Court.

The Court declined to address the threshold issue of whether the FAA covers employment contracts, an issue that is dealt with below, and went straight to the merits. The Court recognized that the FAA was a congressional manifestation of a liberal federal policy favoring arbitration agreements [1, p. 1651], and that its recent decisions had approved the arbitrability of statutory claims in a wide variety of circumstances [1, p. 1652-54]. Turning to ADEA, the Court discerned nothing in its text or legislative history that evinced congressional intent to preclude arbitration [1, pp. 1652-54]. To the contrary, the Court felt that ADEA envisaged a flexible approach to dispute resolution that was entirely consistent with arbitration [1, p. 1653-54].

The Court also dispatched Gilmer's argument that arbitration was an inadequate substitute for litigation due to the absence of provisions for discovery or broad equitable and class relief. The Court noted that there was no more need for discovery in age discrimination cases than in other types of statutory claims that it had previously held were arbitrable and, in any event, NYSE rules did provide for limited discovery [1, p. 1654-55]. The Court also observed that the EEOC retained the ability to bring actions for broad equitable and class-wide relief, regardless of whether individuals chose to subject their claims to arbitration [1, p. 1655]. The Court further rejected Gilmer's contention that arbitration agreements between employers and employees are not enforceable due to the parties' inequality in bargaining power [1, p. 1655-56].

The Court had more difficulty trying to finesse its relatively recent decisions in *Alexander v. Gardner Denver Co.* [11] and its progeny [12-13], which had clearly held that statutory employment discrimination claims were not subject to binding arbitration. The Court handled the issue in two ways: by dropping a footnote admitting that its formerly stated position that arbitration was inferior to the judicial process for resolving statutory employment claims had been undermined by its more recent decisions [1, p. 1656, n. 5], and by drawing a distinction between arbitration under a collective bargaining agreement and arbitration of individual claims. *Alexander* and subsequent cases all involved arbitration under collective bargaining agreements. Arbitration, in the traditional labor setting, remains an inadequate substitute for the judicial process, stated the Court, because the arbitrator's authority is typically limited to interpreting the collective bargaining agreement, and the arbitrator has no authority to invoke standards imposed by anti-discrimination statutes [1, p. 1656]. Additionally, a grievance brought under a collective bargaining agreement usually belongs to the union, not the employee, and may be compromised to promote the interests of the union as a whole at the expense of a particular employee [1, p. 1656]. For these two reasons, *Alexander* was distinguished from *Gilmer*.

QUESTIONS AFTER GILMER

Gilmer establishes the arbitrability of statutory employment discrimination claims. Common law contract and tort claims arising from employment are also arbitrable. Still, certain questions remain unanswered. First, *Gilmer* left unanswered the crucial question of the FAA's applicability to employment contracts. Additionally, there are other, though less fundamental, issues outstanding. Are posttermination torts such as defamation arbitrable? Can discrimination claims based on state statutes be arbitrated? Are agreements to arbitrate always wise? Can arbitration agreements be used to limit employees' statutory remedies? Is it possible to arbitrate the employment discrimination claims of unionized employees? Finally, and perhaps most significantly, what effect will the

arbitrator's decision have in subsequent litigation? These issues are addressed in the final section of this article.

The FAA's Applicability to Employment Contracts

Section 1 of the FAA contains an exclusion providing:

Nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate commerce [3].

This exclusion, at first blush, seems to preclude arbitration of most disputes arising out of employment contracts, at least under the FAA.

The Court did not directly address this issue in *Gilmer* because it had not been presented to the lower courts and was deemed waived [1, p. 1651-52, n. 2]. However, there are several reasons to proceed on the assumption that the FAA does apply to disputes arising from employment contracts. At the outset, the Court indicated that it had previously assumed that employment disputes were not exempted by the FAA [1, p. 1651-52, n. 2]. Furthermore, prior to *Gilmer*, lower courts had uniformly held that employment disputes were arbitrable, and that Section 1 only applied to the contracts of employees who were directly involved in the actual movement of goods in interstate commerce, such as railroad workers and truckers [20]. Additionally, it seems unlikely that the Court would have subjected Robert Gilmer's ADEA claim to arbitration if a majority of the justices were of the opinion that employment disputes were not covered by the FAA.

Even if the FAA is not applicable to employment disputes, virtually every state has enacted a similar arbitration statute under which such an agreement could be enforced [21]. The applicability of these statutes to employment contracts must be reviewed on a state-by-state basis.

The Arbitrability of Postemployment Tort Claims

Occasionally, employees seek to litigate posttermination tort claims. Typical is the scenario where the employer has made a comment about the terminated employee to a customer or potential new employer, that the employee perceives as defamatory. The question arises whether such claims are arbitrable, since they occur after the employment contract has terminated.

The results of these cases have not been entirely consistent. Some courts find that posttermination claims are arbitrable [22, 23], while others reach the opposite result [24]. The outcome tends to turn on the breadth of the arbitration clause. The broader the arbitration clause, the more likely a court is to require arbitration.

The Arbitrability of Claims Based on State Statutes

The arbitrability of a claim based on California's minimum wage statute was considered by the Supreme Court in *Perry v. Thomas* [25]. The Court held that the claim was arbitrable, despite a provision in the statute prohibiting arbitration. The Court concluded that the prohibition ran afoul of the FAA and was preempted [25, p. 2526].

Cases decided before *Gilmer* had been divided on the issue of whether state law discrimination claims were arbitrable. Some courts reasoned that since federal employment discrimination claims were not subject to arbitration under *Alexander v. Gardner Denver Co.*, neither were substantially identical state claims [18]. Other courts held that state employment discrimination statutes were subject to arbitration under the FAA, regardless of the law concerning federal claims [26]. *Gilmer* has apparently resolved this issue in favor of the arbitrability of state law statutory claims.

The Wisdom of Arbitrating Employment-Based Claims

Ordinarily, arbitration has advantages for employer and employee alike. Both benefit from the quick and relatively inexpensive resolution of their disputes. But there are legitimate reasons to consider carefully before agreeing to arbitration.

The employee may be reluctant to give up his/her right to a trial by jury, available in ADEA actions and under many state employment discrimination statutes thinking that a jury may be more sympathetic and generous than an arbitrator. Additionally, both parties may be reluctant to relinquish the open discovery that is sometimes necessary to establish or defend against claims, and that lends some semblance of certainty to the litigation process. However, the benefits of discovery must be balanced against its high costs.

Employers should also be particularly careful about agreeing to arbitration with employees who possess important confidential information. There is a line of cases holding that arbitration agreements with such employees preclude the employer from obtaining an injunction against competition or disclosure until the arbitration proceedings are over [27-28]. Of course, by that time, the damage may well be done and irreparable.

Limiting Remedies

Employers who choose to arbitrate employment-based claims may be tempted to include contractual provisions limiting employees' remedies. This should be approached carefully, and may be impermissible. The Supreme Court and lower courts have repeatedly emphasized that arbitration is an acceptable substitute for litigation because claimants may fully vindicate their statutory rights in arbitration [1, p. 1653; 9]. An employer's attempt to limit statutory remedies may, therefore, render its arbitration clause unenforceable.

Arbitrating Claims Brought by Unionized Employees

The Supreme Court, as already noted, did not reverse *Alexander v. Gardner-Denver Co.* [11]. So, for the time being, statutory claims brought by unionized employees may not be subject to binding arbitration pursuant to the terms of a typical collective bargaining agreement. However, there is nothing, at least nothing in theory, that precludes the arbitration of statutory claims in the union setting. *Gilmer* upheld *Alexander* only to the extent that *Alexander* was premised on the fact that the arbitrator did not have authority to consider statutory issues, and the union controlled the grievance [1, p. 1656]. Both points can be addressed by appropriate contractual language. The real question is whether employers and unions will find it in their mutual interest to make such changes in their relationships.

The Effect of an Arbitrator's Decision on Subsequent Litigation Between the Parties

Gilmer simply held that an agreement to arbitrate an employment discrimination claim was binding. It did not determine the impact that the arbitrator's award would be given by the courts in subsequent litigation between the parties. This is a critical issue, since there is little benefit in arbitrating a claim if the employee is free to bring a civil action regardless of the arbitrator's award.

The preclusive effect of an arbitrator's award has yet to be conclusively addressed by the Supreme Court [29]. All signs, however, point to a rule that arbitrators' awards, and particularly those confirmed by federal or state courts, will bar subsequent employment discrimination litigation between the parties. *Alexander* and subsequent cases [11-13] involving arbitration pursuant to collective bargaining agreements held that such awards did not preclude subsequent litigation due to factors that are either inapplicable to individual arbitration agreements (e.g., the limited authority of the arbitrator and union control of the grievance), or to outdated concepts about the inferiority of the arbitration process for resolving statutory employment claims [1, p. 1656, n. 5]. These considerations have been obviated by *Gilmer*.

Other legal developments also strongly suggest that arbitration awards, confirmed or not, will receive preclusive effect in the courts. Certain circuits have already held that arbitration awards confirmed by state courts are binding in subsequent litigation involving the same parties [30-32]. Additionally, the Supreme Court has held that the results of administrative agency proceedings are binding on the parties in subsequent litigation, regardless of whether the results are confirmed by judicial review [32-34]. These developments, combined with *Gilmer's* endorsement of arbitration in the employment context, indicate that arbitration awards will be binding on the parties in subsequent litigation, although, for the time being, prudence dictates that the prevailing party obtain court confirmation of the award [29].

CONCLUSION

Gilmer has opened a door to the quick and inexpensive resolution of employment discrimination and wrongful discharge claims through the arbitration process. Certain employers and employees may conclude that litigation is the preferable alternative, but most should carefully consider whether they are not best served by arbitrating these claims.

POSTSCRIPT

Since this article was submitted for publication, Congress has noted its approval of the Supreme Court's *Gilmer* decision. Section 118 of the Civil Rights Act of 1991 authorizes the use of alternative means of dispute resolution for handling employment discrimination claims. Arbitration is specifically encouraged "where appropriate and to the extent authorized by law" [34], Section 118 will apply to cases brought under Title VII, ADEA, ADA, and Section 1981 of the Civil Rights Act of 1866, 42 USC §1981.

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