J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 2(4) 305-312, 1993-94

GARDNER-DENVER TO *GILMER* : THE FACTS AND POSSIBILITIES FOR ARBITRATION

KURT H. DECKER, ESQ.
Stevens & Lee, Reading, Pennsylvania

ABSTRACT

In *Alexander v. Gardner-Denver,* the United States Supreme Court found that the Civil Rights Act of 1964 (Title VII) did not bar the arbitration of employment discrimination claims relating to sex, race, color, religion, or national origin or a subsequent Title VII suit. Recently, in *Gilmer v. Interstate Johnson Lane Corp.,* the United States Supreme Court found that claims arising under the Age Discrimination in Employment Act of 1967 (ADEA) could be subject to a compulsory arbitration agreement precluding further litigation. This article reviews the facts of *Gardner-Denver* and *Gilmer* to determine whether the Supreme Court's decisions in these cases can be reconciled to determine the scope of arbitration under the federal fair employment practice (FEP) statutes and an employer's alternative dispute resolution (ADR) procedure.

In *Alexander v. Gardner-Denver* [1], the United States Supreme Court found that: 1) the Civil Rights Act of 1964 (Title VII) [2] did not bar the arbitration of employment discrimination claims relating to sex, race, color, religion, or national origin, and 2) the arbitration of a Title VII claim would not bar a subsequent Title VII suit, even if the complainant lost in arbitration. In so holding, the Court, in the arbitration context, rejected not only the election of remedies and waiver arguments but also the traditional preclusion doctrines of collateral estoppel and *res judicata* [1].

Subsequently, in *Gilmer v. Interstate/Johnson Lane Corp.* [3], the United States Supreme Court addressed the compulsory arbitration of claims arising out of the Age Discrimination in Employment Act (ADEA) of 1967 [4]. Neither the ADEA's history or text explicitly precluded the compulsory arbitration of claims. The Court found there was no inconsistency between the important social policies furthered by the ADEA in enforcing agreements to arbitrate age discrimination claims and precluding a subsequent statutory ADEA suit [3]. This article reviews

doi: 10.2190/0QN4-NDNY-Y9KH-Q7BL
http://baywood.com

each of these decisions and their relation to final and binding arbitration under the fair employment practice (FEP) statutes [5] and pursuant to an employer's alternative dispute resolution (ADR) procedure [6].

ALEXANDER v. GARDNER-DENVER

In May 1966, Harrell Alexander, Sr., a black, was hired by Gardner-Denver Co. to perform maintenance work at its plant in Denver, Colorado. In June 1968, Alexander was awarded a trainee position as a drill operator. He remained at that job until his employment termination on September 29, 1969. The company informed Alexander he was being terminated for producing too many defective or unusable parts that had to be scrapped.

On October 1, 1969, Alexander filed a grievance under the collective bargaining agreement between the company and the union, Local No. 3029 of the United Steelworkers of America. The grievance claimed an unjust termination. No explicit claim of racial discrimination was made.

Under the collective bargaining agreement, the company retained the right to hire, suspend, or terminate employees for proper cause. Another article provided, however, that there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry. The agreement also contained a broad arbitration clause covering differences arising between the company and the union as to the agreement's meaning and application. Disputes were to be submitted to a multistep grievance arbitration procedure. If the dispute remained unresolved, it was to be submitted to compulsory arbitration. The company and the union were to select and pay the arbitrator. This decision was to be final and binding upon the company, the union, and any employee or employees involved.

The union processed Alexander's grievance through the grievance arbitration procedure. In the final prearbitration step, Alexander raised, apparently for the first time, the claim that his termination resulted from racial discrimination. The company rejected all of Alexander's claims, and the grievance proceeded to arbitration. Prior to the arbitration hearing, Alexander filed a racial discrimination charge with the Colorado Civil Rights Commission, which referred the complaint to the Equal Employment Opportunity Commission (EEOC) on November 5, 1969.

At the arbitration hearing on November 20, 1969, Alexander testified that his termination was the result of racial discrimination. He informed the arbitrator that he had filed a charge with the Colorado Commission because he could not rely on the union. The union introduced a letter in which Alexander stated he knew that in the same plant others had scrapped an equal amount of metal and had not been terminated. A union representative also testified that the company's usual practice was to transfer unsatisfactory trainee drill operators back to their former positions.

On December 30, 1969, the arbitrator ruled that Alexander had been terminated for just cause. He made no reference in his decision to Alexander's claim of racial discrimination. The arbitrator stated that the union had failed to produce evidence of a practice of transferring rather than terminating trainee drill operators who accumulated excessive scrap. However, he suggested that the company and the union confer on whether this arrangement was feasible for Alexander.

On July 25, 1970, the EEOC determined that there was not reasonable cause to believe that a Civil Rights Act of 1964 (Title VII) [2] violation had occurred. Title VII prohibits employers from discriminating on the basis of sex, race, color, religion, or national origin [2]. The EEOC later notified Alexander of his rights to institute a civil action in federal court within thirty days. Alexander then filed an action in the United States District Court for the District of Colorado, alleging that his termination resulted from a racially discriminatory employment practice in violation of Title VII [7].

The district court granted the company's motion for summary judgment and dismissed the action [7]. The court found the claim of racial discrimination had been submitted to the arbitrator and resolved adversely to Alexander. It then held that Alexander, having voluntarily elected to pursue his grievance to final arbitration under the nondiscrimination clause of the collective bargaining agreement, was bound by the arbitral decision and precluded from suing his employer under Title VII. On appeal, the Court of Appeals for the Tenth Circuit affirmed *per curiam* on the basis of the district court's opinion [8].

The United States Supreme Court granted Alexander's application for certiorari and reversed [1]. It held that an employee's statutory right to a trial de novo under Title VII is not foreclosed by prior submission of a claim to final arbitration under the nondiscrimination provision of a collective bargaining agreement [1].

In *Gardner-Denver* [1], the Court reviewed the arbitration process' limits [1]. The *Gardner-Denver* [1] Court faced the specific issue of whether the arbitral forum was suitable for resolving Title VII claims. It concluded it was not, determining that an arbitrator's special competence did not extend to unique federal statutory rights involving discrimination [1, at 56]. Moreover, the arbitral forum was found inadequate due to its informality, deficient factfinding capabilities, and incomplete recordkeeping [1, at 57]. Yet, the Court indicated in a footnote that under clearly defined circumstances, an arbitrator's award dealing with Title VII issues could be given "great weight" [1, at 60 n.21]. This footnote opened the door for further court review of arbitration's effectiveness in resolving statutory fair employment practice (FEP) claims [5] and precluding subsequent statutory litigation [9].

GILMER v. INTERSTATE/JOHNSON LANE CORP.

Interstate/Johnson Lane Corporation hired Robert Gilmer as a manager of financial services in May 1981. Gilmer's employment required that he register as

a securities representative with several stock exchanges, including the New York Stock Exchange (NYSE). His NYSE registration application, entitled "Uniform Application for Securities Industry Registration or Transfer," provided that Gilmer agreed to arbitrate any dispute, claim, or controversy arising between him and Interstate that was required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which he registered. Rule 347 of the NYSE provided for arbitration of any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of the registered representative.

Interstate terminated Gilmer's employment in 1987, at which time Gilmer was sixty-two years of age. After first filing an age discrimination charge with the Equal Employment Opportunity Commission, Gilmer brought suit in the United States District Court for the Western District of North Carolina. Gilmer alleged that Interstate had terminated him because of his age, in violation of the Age Discrimination in Employment Act of 1967 [4]. In response to Gilmer's complaint, Interstate filed in the district court a motion to compel arbitration of the ADEA claim. In its motion, Interstate relied upon the arbitration agreement in Gilmer's registration application, as well as the Federal Arbitration Act (FAA) [10]. The district court denied Interstate's motion, based on the Supreme Court's decision in *Alexander v. Gardner-Denver Co.* [1]. It concluded that Congress intended to protect ADEA claimants from the waiver of a judicial forum and arbitration could not be compelled.

The United States Court of Appeals for the Fourth Circuit reversed, finding "nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements" [11, at 197]. On appeal, the United States Supreme Court affirmed that a claim under the ADEA [4], can be subject to compulsory arbitration pursuant to an arbitration agreement in a securities registration application [3].

In *Gilmer* [3], the employee argued that: 1) he could not waive his statutory rights [3, at 1656]; 2) public policy supported judicial resolution of his claim; 3) the arbitration forum was inadequate [3, at 1654-55]; and 4) the arbitration agreement was the product of his unequal bargaining power with his employer [3, at 1655]. The Court rejected each argument. It noted that the employee had failed to show: 1) a congressional intent to preclude waiver of statutory ADEA litigation rights [3, at 1657] and 2) that the ADEA's public policy could not be vindicated through arbitration [3, at 1653]. The Court also discussed that: 1) suspicions about the inadequacy of arbitration had been rejected in other business and employment contexts [3, at 1654]; and 2) that the unequal bargaining in the employment context did not make an agreement unforceable, except on grounds that were generally available to revoke contracts [3, at 1646].

The Court distinguished Gilmer's case from *Gardner-Denver* [1]. It reasoned that the employee in *Gardner-Denver* [1] did not choose to limit his statutory rights by agreeing to arbitrate only his Title VII claim [3, at 1657]. The Court

observed that in *Gardner-Denver* [1] the collective bargaining agreement did not require that statutory claims be arbitrated.

In *Gilmer* [3], the Court relied on the FAA's proarbitration posture [12]. Independent of the FAA, the Court documented a healthy regard for arbitration of employment disputes under other statutes [12, at 792, 13]. For example, deference [14] to arbitration awards under the Labor Management Relations Act (LMRA) [15] by the National Labor Relations Board (NLRB) is similar to the principles developed by the courts under the FAA for commercial arbitration [12, at 792, 16].

FINAL AND BINDING ARBITRATION OF FAIR EMPLOYMENT PRACTICE (FEP) CLAIMS

The United States Supreme Court's decision in *Gilmer* [3] represents a departure from the position of some federal courts which had interpreted *Gardner-Denver* [1] to mean that federal civil rights actions were not subject to compulsory arbitration [9]. *Gilmer* [3] decided that employees in the securities industry whose registration agreements included a compulsory arbitration provision could be required to arbitrate age discrimination claims [3, at 1650]. *Gilmer* [3], however, may also support a more expansive role for arbitration in fair employment practice [5] or other employment dispute matters [6]. It is arguable that under the Federal Arbitration Act (FAA) [10] or a state's arbitration statute where it is not in conflict with the FAA [17], that an employer may enforce a compulsory arbitration agreement that is required as an employment condition [3, at 1661] to preclude subsequent litigation of federal fair employment practice (FEP) claims [5, 18].

In recent years, employers have increasingly evaluated the benefits of alternative dispute resolution (ADR) procedures to resolve employment-related claims [6]. ADR offers the advantages of decreased litigation costs, minimized back pay awards due to a quicker resolution of termination claims, removal of cases from high-risk jury trials, and a private proceeding not open to the public [19]. Final and binding arbitration may be an important component of an ADR procedure.

One disadvantage to the inclusion of compulsory arbitration clauses in employment agreements or handbooks has been the perception that arbitration would be of little benefit if employees could bypass arbitration and still independently litigate federal or state statutory discrimination claims or other employment claims in court. Employers fear that an arbitrator's decision on statutory claims might not receive any deference in a later litigation.

It is also unclear whether all employment contracts that contain compulsory arbitration provisions are enforceable under the Federal Arbitration Act (FAA) [10]. Even if the courts determine that, in general, employment contracts that include arbitration clauses are enforceable, they must still decide whether employment contracts relating to industries involved in interstate commerce are excepted under the FAA's provision that it does not apply to contracts of employment of

seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce [10, at § 1]. In *Gilmer* [3], this was not considered because the argument was not raised in the court below and Gilmer's arbitration agreement was not contained in an employment contract. Gilmer's arbitration agreement was part of a securities registration application [3, at 1651 n.2]. However, if the FAA [10] is not relevant, it may be argued that a state's arbitration act is sufficient to compel arbitration of employment claims where it does not conflict with the FAA [17]. Likewise, for claims involving sex, race, color, religion, or national origin, the recent amendments to the Civil Rights Act of 1964 [2] by the Civil Rights Act of 1991 [20] may support some form of arbitration.

Based on recent decisions [18], *Gilmer* [3] may now make it worthwhile for employers to reconsider compulsory arbitration of FEP and employment-related disputes as a term and condition of employment. Where employers use ADR procedures that procedure should: 1) be contained in the employment handbook; 2) be documented that an employee made a knowing and voluntary waiver of any federally protected statutory rights at the time the agreement was signed; 3) provide for the employer and the employee to select the neutral third party; 4) allow for the employee to be represented by an attorney; 5) permit the presentation of witnesses and documentary evidence; and 6) state that it is the sole and exclusive remedy for employment disputes and that the results are final and binding for the employee and the employer [18, 21].

CONCLUSIONS

After *Gilmer* [3], a number of questions remain concerning the ability of employees and employers to enter into compulsory arbitration agreements that bypass statutory procedures under the fair employment practice (FEP) statutes [5]. Until these questions are answered, employers should proceed cautiously. *Gilmer* [3] may not have given a clear signal concerning the compulsory arbitrability of FEP claims until further litigation decides these questions [21, p. 333].

* * *

Kurt H. Decker is a partner with the law firm of Stevens & Lee in Reading, Valley Forge, Allentown, and Harrisburg, Pennsylvania. He serves as an adjunct professor with the School of Law, Widener University in Harrisburg, Pennsylvania and as an adjunct professor with the Graduate School of Industrial Relations, Saint Francis College in Loretto, Pennsylvania. Mr. Decker is the author of numerous books published by John Wiley & Sons, including *Employee Privacy Law and Practice, Employee Privacy Forms and Procedures, A Manager's Guide to Employee Privacy Laws, Procedures and Policies, Drafting and Revising Employment Contracts, Drafting and Revising Employment Handbooks,* and *Covenants Not to Compete.* He is also the co-editor of *The Journal of Individual Employment*

Rights and the author of the *Individual Employment Rights Primer* (1991), published by Baywood Publishing Company, Inc.

ENDNOTES

1. *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974).
2. 42 U.S.C. §§ 2000e-1 to 2002-17 (1988).
3. *Gilmer v. Interstate/Johnson Lane Corp.,* ____ U.S. ____, 111 S.Ct. 1647 (1991).
4. 29 U.S.C. §§ 621-634 (1988).
5. *See, e.g.,* 42 U.S.C. §§ 2000e-1 to 2002-17 (1988) (Civil Rights Act of 1964); 29 U.S.C. §§ 621-634 (1988) Age Discrimination in Employment Act of 1967); 29 U.S.C. §§ 701-796i (1988) (Vocational Rehabilitation Act of 1973); 42 U.S.C. §§ 12101-12213 (Supp. 1991) (Americans with Disabilities Act of 1991).
6. *See* A. Westin & A. Feliu, Resolving Employment Disputes Without Litigation (1988).
7. *Alexander v. Gardner-Denver Co.,* 346 F. Supp. 1012 (D. Colo. 1971).
8. *Alexander v. Gardner-Denver Co.,* 466 F.2d 1209 (10th Cir. 1972).
9. *See, e.g., Nordia v. NutriSys.,* Inc., 897 F.2d 339 (8th Cir. 1990) (denying employee's motion to compel arbitration despite mandatory arbitration clause in settlement agreement).
10. 9 U.S.C. §§ 1-16 (1988 & Supp. II 1990).
11. *Gilmer v. Interstate/Johnson Lane Corp.,* 895 F.2d 195 (4th Cir. 1990).
12. *See* S. Plass, "Arbitration, Waiving and Defending Title VII Claims," 58 *Brooklyn L. Rev.* 779, 786 (1992).
13. *See United Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers v. Warrior Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel and Car Corp.,* 363 U.S. 593 (1960).
14. *See* Collyer Insulated Wire, 192 N.L.R.B. 837 (1971) (prearbitration deferral); Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955) (postarbitration deferral).
15. 29 U.S.C. §§ 151-168 (1988).
16. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985).
17. *See, e.g.,* Pa. Stat. Ann. tit. 42, §§ 7301-7320 (1982) (Pennsylvania's arbitration act).
18. *See, e.g., Delaney v. Continental Airlines, Corp.,* 8 I.E.R. Cas. (BNA) 1170 (C.D. Cal. 1993) (court confirmed award issued by an appeal board under an employer appeal procedure dismissing employee's wrongful termination suit where the confirmed award had the effect of a final order in a civil suit under the doctrines of res judicata and collateral estoppel); *see also Fletcher v. Kidder, Peabody & Co.,* 62 F.E.P. Cas. (BNA) 599 (App. Ct. N.Y. 1993) (compulsory arbitration bars judicial resolution of state FEP claims); *Duello v. Board of Regents of the University of Wisconsin,* 176 Wis.2d 961, 501 N.W.2d 38 (1993) (Title VII attorney's fees denied for internal employee ADR procedure).
19. R. Duston, "*Gilmer v. Interstate/Johnson Lane Corp.,*:A Major Step Forward for Alternative Dispute Resolution, or a Meaningless Decision?" 7 *Labor Lawyer* 823 (1991).
20. 42 U.S.C. § 1981 note (Civil Rights Act of 1991—Alternative Means of Dispute Resolution Encouraged; P.L. 102-166, § 118 (November 21, 1991)) (1991 Supp.).

21. M. Weisel, "After the Gilmer Decision: Effectiveness of Arbitration Clauses in Employment Contracts," 1 *J. of Individual Employment Rights, 1*:4, p. 323, 1992-93.

Direct reprint requests to:

Kurt H. Decker, Esquire
Stevens & Lee
P.O. Box 679
607 Washington Street
Reading, PA 19601