J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 9(4) 267-286, 2000-2001

MANDATORY ARBITRATION OF STATUTORY DISPUTES: THE VIEW FROM THE FOURTH CIRCUIT

CHARLES J. COLEMAN

GEORGE M. PANGIS

Rutgers University School of Law at Camden

ABSTRACT

In 1991, the U.S. Court of Appeals for the Fourth Circuit vaulted to a position of leadership in cases involving mandatory arbitration of statutory disputes when the Supreme Court upheld the decision made by that circuit in *Gilmer v. Interstate/Johnson Lane Corp.* [1]. In that case, the Fourth Circuit stood alone in holding that 1) statutory claims under the Age Discrimination in Employment Act (ADEA) may be subject to an arbitration agreement signed at the time of a person's employment; and 2) such an agreement may be enforced under the terms of the Federal Arbitration Act of 1925 (FAA) [2]. In subsequent years, the *Gilmer* decision has been extended by the entire judiciary to a vast array of cases involving a variety of statutes. The Fourth Circuit has decided a number of these cases, sometimes leading the other circuits, sometimes following them, sometimes affirmed by the Supreme Court, and sometimes reversed. This article examines those decisions and provides an assessment of the role that has been played by the Fourth Circuit on this topic.

Until the 1930s, the arbitration of employment disputes was in a relatively undeveloped state. Almost all nonunionized employees worked under the doctrine of "employment at will" and very few had access to arbitration. The number of unionized employees was very small and, thus, the number of arbitration cases was correspondingly low [3]. In the 1930s, however, legislation was enacted that

helped to establish the organized labor movement in the United States. The subsequent development of collective bargaining led to the spread of contract clauses that called for the arbitration of disputes that arose between employers and their represented employees [4].

But arbitration did not take hold in the nonunion sector even though a number of laws were passed later to protect employees from discrimination in employment over such factors as age, race, gender, religion, national origin, and disability status. However, because these rights had been granted, the number of employment-related lawsuits steadily rose. There was a twenty-fold increase in such lawsuits between 1970 and 1989, as opposed to a 125 percent increase in other cases [5], and the pace probably quickened in the 1990s. Burgeoning court dockets, with the attendant increase in costs and delay, undoubtedly encouraged advocates and courts alike to think about nonjudicial means of resolving employment disputes, and arbitration began to appear as a worthy alternative.

Arbitration was seen by most as being a neutral process with decisions made by a person usually chosen by both sides. It had a history of acceptability to employers, employees, and labor organizations, and it was faster, less formal, and less expensive than the courts. The critics raised questions about whether the process compelled employees to surrender too many statutory rights, the potential for bias, and the reluctance of arbitrators to render awards comparable to those often given by juries [6]. Until 1991, however, these arguments were moot because there was so little employment arbitration in the nonunion arena. The decision made by the Fourth Circuit in *Gilmer* and its subsequent endorsement by the Supreme Court changed that situation.

For several reasons this article examines the post-1991 decisions on employment arbitration cases that have been made by the Fourth Circuit. As noted above, this court was the first to authorize the use of preemployment arbitration agreements to resolve statutory disputes. This court has been controversial: It stood alone in attempting to extend the initial *Gilmer* decision into labor arbitration and, more recently, attempted to limit the power of the Equal Employment Opportunity Commission (EEOC). And it has been an active court, filling in much of the law that has developed in this area. Studying the Fourth Circuit, furthermore, provides a basis for subsequent comparative examinations of other circuits. We approach the topic by examining the context within which *Gilmer* was decided, the court's efforts to extend *Gilmer* into labor arbitration, and then, its attempts to fill in the gaps in the law.

THE CONTEXT FOR *GILMER*

The Federal Arbitration Act and Judicial Hostility

Private agreements for parties to resolve disputes through arbitration have traditionally been viewed with great suspicion by the courts. Before arbitration

statutes appeared in the twentieth century, courts generally refused to enforce arbitration promises unless an arbitrator's award had already been rendered [7]. The Federal Arbitration Act of 1925 was supposed to change that condition [2].

The FAA made arbitration agreements in commercial contracts enforceable in the federal courts. The core of the statute is in Sections 2 through 4, with Section 2 making arbitration clauses "valid, irrevocable and enforceable," except "upon such grounds as exist at law or in equity for the revocation of any contract"; Section 3 requiring courts to stay a trial on an issue subject to arbitration under a contract calling for such arbitration; and Section 4 allowing a contracting party to apply to a federal district court for an order enforcing an agreement to arbitrate when the other party fails to do so [8]. However, even after the passage of the FAA, courts remained reluctant to enforce both the agreement to arbitrate and the awards themselves. As one distinguished commentator noted:

> Despite the enactment of the Federal Arbitration Act, the courts remained hostile to it. Agreements to arbitrate would not be enforced in the federal courts unless the party seeking arbitration could "produce evidence which tends to establish his claim: before a court would compel it" [9]. . . . The then hostility to arbitration was exemplified in the Supreme Court of the United States by the 1953 decision in *Wilko v. Swan* [10]. In that case a customer sought damages for fraud from a brokerage firm under the Securities Act of 1933. The defendant claimed that arbitration, as provided in the agreement with the firm, was required. The court held that it was not and that the plaintiff could sue [11, p. 2].

The Labor Arbitration Context

From the 1930s to the 1960s, the number of unionized employees in the United States grew many times, and the use of arbitration to resolve disputes that arose under collective bargaining agreements became commonplace [12]. Despite the pallid support given to arbitration generally, the U.S. Supreme Court provided unqualified support of labor arbitration in a series of decisions announced between 1957 and 1960. The first decision, *Lincoln Mills,* arose from a company's refusal to arbitrate several grievances concerning workload and work assignments [13]. The case was ultimately appealed to the Supreme Court, which held that the agreement to arbitrate employee grievances expressed in a collective bargaining agreement should be enforced because the employer's agreement was a *quid pro quo* for the union's surrender of the right to strike.

The three cases that make up the 1960 Steelworkers Trilogy extended this decision in several ways. In *American Manufacturing,* the Supreme Court decided that when a contract clause requires the submission of a dispute to arbitration, the function of the court is limited to determining whether the party seeking arbitration is making a claim that is governed by the contract [14]. The court has no business evaluating the merits of the claim [14]. In the *Warrior and Gulf* dispute, which centered on management's right to contract out work, the Court ordered arbitration

and required that any doubts concerning arbitrability under a collective bargaining agreement be decided in favor of arbitration, unless the contract clearly excluded the dispute from the coverage of the arbitration clause [15]. In the third Steelworkers Trilogy case, *Enterprise Wheel and Car,* the Supreme Court reversed a decision of the Fourth Circuit Court of Appeals and in the process formulated what has become the well-known "essence test" [16]. Arbitrators are given broad remedial authority because of their expertise in "the law of the shop," but they are not to dispense their "own brand of industrial justice" [16, at 597]. The arbitration award is legitimate, "only so long as it draws its essence from the collective bargaining agreement" [16, at 597].

Alexander v. Gardner Denver

In 1973, the Supreme Court provided another contextual element for *Gilmer* in its consideration of a collective bargaining case, *Alexander v. Gardner-Denver* [17]. The petitioner was an African-American who was hired by the Gardner-Denver Company to perform maintenance work. Two years later, he was awarded a trainee position as a drill operator, and he held this position until he was discharged for producing too many defective or unusable parts that had to be scrapped [17, at 38].

Alexander filed a grievance under the nondiscrimination clause of the collective bargaining agreement and also filed a racial discrimination complaint with the Equal Employment Opportunity Commission. Pursuant to his collective bargaining agreement, Alexander's claims brought him to arbitration, where the arbitrator found that the firing met just-cause requirements and was not racially motivated. Alexander then filed suit in the U.S. District Court, alleging racial discrimination under Title VII of the Civil Rights Act of 1964 [18]. The district court granted summary judgment to the company, and the court of appeals affirmed, holding that Alexander was precluded from litigating his Title VII claim because of the arbitrator's ruling against him. Alexander then appealed to the U.S. Supreme Court, which granted certiorari [17].

In a unanimous decision, delivered by Justice Powell, the Supreme Court reversed the lower courts, holding that Alexander, in submitting his grievance to arbitration, was seeking to vindicate his contractual rights under the collective bargaining agreement and was not precluded from asserting his independent statutory fights under Title VII [17, at 49-50]. The Supreme Court also rejected respondent's suggestion that the courts should defer to an arbitrator's decision and held that a federal court should consider a claim under Title VII *de novo,* while according such weight to an arbitral decision as the court deemed proper [17, at 49]. This decision did not upset the fundamental teachings of the Trilogy but it carved out an important exception. Where arbitration includes a statutory and a contractual issue, the grievant may have the right to take bites from two separate apples [19].

The Mitsubishi Trilogy

In the late 1980s, the Supreme Court revisited the topic of arbitration outside the labor arena in a series of cases commonly referred to as the "Mitsubishi Trilogy" [20, 21, 22]. Through these cases, the Court pushed aside the concept that arbitration was a lesser forum for the resolution of disputes and embraced the theory that it is an alternate forum. The Court essentially held that the pursuit of statutory rights through arbitration does not alter the substance of the rights being resolved [20, at 625]. "As long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent functions" [20, at 637].

Mitsubishi signaled a change in the judicial attitude toward arbitration's ability to resolve statutory claims. Furthermore, the cases introduced a presumption of arbitrability in statutory matters in claims under the FAA. Under this presumption, the FAA may compel the arbitration of statutory claims under a mandatory, binding arbitration agreement unless the language of the statute, its legislative history, or the statute's underlying purpose indicates otherwise. In the Mitsubishi case itself, a Sherman Act case, the Court concluded that the FAA created a "body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate" [20, at 625].

GILMER: A SUCCESSFUL ATTEMPT AT LEADERSHIP

Gilmer addresses whether a statutory claim arising out of an alleged incident of age discrimination must be arbitrated [1]. Robert Gilmer was hired as a manager of financial services by a securities brokerage, Interstate/Johnson Lane Corporation, in May 1981. As a condition of his employment, he was required to register as a securities representative with several stock exchanges. In his registration application for the New York Stock Exchange (NYSE), he agreed to arbitrate any "claim, dispute or controversy" that arose between him and his employer under the "rules, constitutions or by-laws" of the exchange. In turn, NYSE Rule 347 provided for "arbitration of any controversy arising out of the registrant's employment or its termination" [1, at 196].

Gilmer was terminated from Interstate in 1987, when he was 62 years old. He filed an age discrimination charge with the EEOC and later brought suit in United States District Court alleging that he was discharged in violation of the Age Discrimination in Employment Act (ADEA). Interstate responded by filing a claim in district court, seeking to compel arbitration. The company relied on the arbitration agreement in Gilmer's registration application and the FAA.

The district court, relying on the authority of *Alexander v. Gardner-Denver* [17], denied Interstate's motion. The court concluded, "arbitration procedures are inadequate for the final resolution of rights created by the ADEA and that

Congress intended to protect ADEA claimants from the waiver of a judicial forum" [1, at 196]. Interstate appealed to the Fourth Circuit, and this court made the decision that ultimately created the current law of employment arbitration [1].

The court had two options. One was to follow the thinking in *Gardner-Denver* and give the plaintiff the right to bring his statutory claim to the judicial system. The other was to extend the thinking expressed in the Mitsubishi Trilogy [20-22] and enforce the agreement to arbitrate. The Fourth Circuit took the second choice. It reversed the district court, finding "nothing in the text, legislative history, or underlying purposes of the ADEA indicated a Congressional intent to preclude enforcement of arbitration agreement" [1, at 197]. Certiorari was granted in 1990, and the Supreme Court affirmed the decision by a 7-2 majority in 1991.

The Supreme Court's decision in *Gilmer* did not overrule *Gardner-Denver.* The decision simply created two different and separate legal situations: one for employees covered by collective bargaining agreements and a different one for employees not so covered. The Court dismissed any reliance on the *Gardner-Denver* line of cases for the reasons previously noted by the circuit court: 1) *Gilmer* involved the enforceability of an agreement to arbitrate statutory claims rather than contract-based claims; 2) *Gardner-Denver* involved a collective bargaining agreement, which was not the issue in *Gilmer;* and 3) *Gilmer* was decided under the rules of the FAA, and *Gardner-Denver* was decided under the rules of the National Labor Relations Act.

The Fourth Circuit explicitly quoted the Supreme Court's ruling in *Mitsubishi* [20]. "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitration tribunals inhibited the development of arbitration as an alternative means of dispute resolution" [1, at 201]. The Supreme Court repeated those words in its oft-quoted footnote 5 to its *Gilmer* decision.

AUSTIN AND *WRIGHT:* A FAILED ATTEMPT AT LEADERSHIP

Austin v. Owens-Brockway Glass Containers, Inc. [23]

In 1996, the Fourth Circuit extended its decision in *Gilmer* to collective bargaining agreements. The case began when Linda Austin suffered an on-the-job injury in June 1992. She had been working for the company for 14 years when she was hurt. Two months after the injury, her physician released her for light-duty work, but since the company had none available, she was placed on medical leave and provided with workers' compensation benefits. While on leave, the company eliminated her job and terminated her services [23].

Austin filed suit in the United States District Court for the Western District of Virginia. She claimed the company had violated Title VII of the Civil Rights Act and the Americans with Disabilities Act (ADA) because it refused to assign her to

light-duty work and later terminated her while reassigning a male employee in her job description to another position. The company filed a motion to dismiss for a number of technical reasons but also because it claimed that Austin was precluded from filing suit because her dispute was subject to arbitration under a collective bargaining agreement. Austin's collective bargaining agreement contained: 1) a grievance procedure that required binding arbitration, and 2) a provision that rendered claims of both gender and disability discrimination subject to that procedure [23].

The district court granted summary judgment in favor of the company because of Austin's failure to process her claims under the grievance-arbitration procedure. Austin appealed that decision to the Fourth Circuit and, in a 2-1 decision, that court extended its earlier decision in *Gilmer* to include collective bargaining agreements. The court cited the Supreme Court's words in both *Mitsubishi* and *Gilmer:*

> Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. . . . If such an intention exists, it will be discoverable in the text of the statute, its legislative history, or in an "inherent conflict" between arbitration and the statute's underlying purposes [1, at 26; cited in 23, at 886].

The *Austin* court stated further "whether the dispute arises under a contract of employment growing out of securities registration application, a simple employment contract or a collective bargaining agreement, an agreement has yet been made to arbitrate the dispute. So long as the agreement is voluntary, it is valid, and we are of the opinion it should be enforced" [23, at 885]. The court, strangely, found that Austin was a "party to a voluntary agreement to submit statutory claims to arbitration." [This is strange because Austin made no agreement to arbitrate. Her union and her employer did so, and she had no choice but to be bound by that agreement.] Because her union had explicitly agreed to the arbitration of the statutory complaints that gave rise to her grievance, that agreement was to be enforced [23, at 885]. The Supreme Court denied *certiorari* [24].

Wright v. Universal Maritime Service Corp. [25]

The question presented under *Austin* was revisited two years later in *Wright.* Wright had been a longshoreman. He was subject to a collective bargaining agreement and a Longshore Seniority Plan, both of which contained an arbitration clause. In February 1992, he injured his right heel and back at work. He sought workers' compensation for permanent disability and settled the claim for $250,000 and attorney's fees. He was also awarded Social Security disability benefits [25].

In January 1995, Wright returned to the hiring hall with a note from his doctor approving him to work. He briefly worked for several stevedoring companies, but

once they found out about his settlement, they advised the union that he would not be kept on because he was "permanently disabled." Following advice given to him by his union, Wright did not grieve but instead hired an attorney and filed charges with the EEOC and the South Carolina State Human Affairs Commission alleging violations of the ADA. After receiving a right-to-sue letter, he filed suit in the United States District Court for the District of South Carolina in January 1996 [25].

Despite some factual differences between *Wright* and *Austin,* such as the hiring hall issue and the failure of the collective bargaining agreement to specify the affected statutes, the Fourth Circuit enforced the agreement to arbitrate. This time, however, the Supreme Court granted *certiorari* and reversed the circuit. The critical concept in the Supreme Court's mind was the failure of the arbitration clause to provide a "clear and unmistakable waiver" of the employee's statutory rights [25, at 77]. The Court did not answer whether *Gilmer* can be extended to collective bargaining agreements or whether a union has the power to waive an individual member's right to sue in court on a statutory claim. In delivering the opinion of a unanimous Court, Justice Scalia wrote that it was "unnecessary to resolve the question of the validity of a union-negotiated waiver, since . . . no such waiver occurred" [25, at 77-78].

> Wright teaches us that while an *individual* may be able to waive a statutory right under *Gilmer* through a generally worded arbitration agreement, that is a different situation from a *union* prospectively waiving the statutory rights of the employees it represents. In the latter situation, the waiver, at a minimum, must be clear and unmistakable [26, at 233].

> [W]hether or not *Gardner-Denver's* seemingly absolute prohibition of union waiver of employees' federal rights survives *Gilmer, Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to protect against a less-than-explicit union waiver in a CBA [25, at 79].

FILLING IN THE GAPS: THE POST-*WRIGHT* CASES

What Is a Clear and Unmistakable Waiver?

Generally, all courts apply contract principles and examine the terms of the agreement to determine whether the parties intend a particular dispute to be arbitrated. The words of the agreement provide the key to the parties' intent. The Supreme Court's decision in *Wright* [25], for example, turned on words in the collective bargaining agreement (CBA). The Fourth Circuit has subsequently dealt with at least three cases that were based on the critical words that came down in *Wright:* that the waiver of statutory rights must be "clear and unmistakable" [27].

Carson v. Giant Food, Inc. [28]

This case dealt with eleven employees who had filed claims of racial and disability discrimination against their employer. The employer argued that the claims should be settled through the grievance-arbitration procedures of their collective bargaining agreements, but the district court refused to compel arbitration. The Fourth Circuit upheld the decision of the district court, for several reasons, one of which was because the bargaining agreements did not "clearly and unmistakably" require the arbitration of statutory discrimination claims [28].

The eleven appellants were covered by four different collective bargaining agreements. The contracts were similar in prohibiting discrimination against any employee for race, color, religious creed, origin, age, or sex, and all four arbitration clauses required the arbitration of "any controversy, dispute, or disagreement . . . concerning the interpretation of the provisions of this Agreement" [28, at 328]. The Fourth Circuit held that these provisions did not meet the "clear and unmistakable" test set forth in *Wright.* The court then defined two tests for determining ways in which the requisite degree of clarity could be achieved. The first test involves drafting an arbitration clause that contains "a clear and unmistakable provision under which employees agree to submit to arbitration all federal causes of action arising out of their employment" [28, at 331]. The second test deals with contracts where the arbitration clause is not so clear, but another clause within the contract makes it unmistakably clear that the discrimination statutes at issue are part of the agreement [28, at 332]. The court found that the bargaining agreements involved in this case failed to meet these requirements.

Brown and Safrit

The court subsequently applied these tests in *Brown v. AFB Freight System* [29] and in *Safrit v. Cone Mills* [30]. The *Brown* claim involved the Americans with Disabilities Act. The CBA contained: 1) a general arbitration clause providing that all grievances and questions of interpretation of the CBA be arbitrated; and 2) an antidiscrimination clause that paralleled or parroted the language of the federal civil rights statutes. The court found that these clauses were not sufficient to pass the tests noted above. Because the contract did not "explicitly incorporate" any of the statutes, "by reference or otherwise," the court could not conclude that the union had clearly and unmistakably waived the employees' right to a statutory forum [29, at 322-323].

The *Safrit* case involved a charge of sex discrimination. The contract stated: 1) that the company and the union "agree that they will not discriminate against any employee with regard to race, color, religion, age, sex, national origin or disability"; 2) that the parties would abide by all of the requirements of Title VII of the Civil Rights Act; and 3) in the same section of the CBA, that: "Unresolved

grievances arising under this Section are the proper subjects for arbitration" [30, at 307]. The court concluded that the specificity of the antidiscrimination clause, its reference to the statute (i.e., its specific mention of "all of the requirements of Title VII) [30, at 308], and its clear connection to the arbitration process satisfied the requirements of the test. The court drew this conclusion with repeated citations to *Austin v. Owens Brockway* [23]:

> An agreement to arbitrate statutory claims is part of the natural tradeoff that a union must make in exchange for other benefits. . . . And since the right to arbitrate is a term or condition of employment, the union may bargain for this right as well. . . . Indeed, no reason exists for distinguishing between "a union bargaining away the right to strike and a union bargaining for the right to arbitrate." In both cases, the union and its members decide that the price of giving up the right to strike or the right to litigate is worth the benefits they will receive in return [30, at 308].

Consideration

The basic idea that underlies the concept of "consideration" is exchange. People who surrender something, such as the ability to enforce an employment right in court, should receive something in exchange, such as a proper agreement to arbitrate disputes that arise out of employment. Most courts have concluded that employment (for new employees) or continued employment (for those already on payroll) constitutes adequate consideration for an employee agreement to arbitrate employment disputes. In *O'Neil v. Hilton Head Hospital,* Diane O'Neil attempted to extend that concept [31].

O'Neil signed an agreement to arbitrate her complaints while she was on leave under the Family Medical Leave Act (FMLA). She was terminated before returning to work and then sought to sue the employer for violating the FMLA. She argued, in part, that the arbitration agreement was invalid because it was not supported by consideration. She contended that the agreement was contingent upon the hospital's commitment to provide her with continued employment, and without that, there was no consideration [31].

The district court accepted this argument, but the Fourth Circuit reversed its decision. The court concluded that an arbitration agreement is supported by adequate consideration when both parties agree to be bound by the arbitration process. "If an employer asks an employee to submit to binding arbitration, it cannot turn around and slip out of the arbitration process itself" [31, at 274]. A mutual promise to arbitrate constitutes sufficient consideration for the arbitration agreement [31, at 275]. A few months later, the same court used the same reasoning in a gender-discrimination case to uphold the validity of an arbitration clause in an employment application when an applicant appealed her denial of employment [32].

A Fair Procedure: *Hooters of America. Inc. v. Phillips* [33]

One of the problems that arises in many employment arbitration cases comes from the unequal bargaining power of the parties. The employer has all of the powers vested in it by the law, by practice, and by the corporation's ruling body. The employee's only power is a threat to resign or to refuse a job offer. In the *Hooters* case, the Fourth Circuit addressed issues of fairness that stemmed from the inequality of bargaining power [33].

Annette Phillips worked as a bartender at the Myrtle Beach franchise of the national restaurant, Hooters, from 1989 until June 1996. She alleged that her supervisor, a Hooters' official and brother of the principal owner, sexually harassed her. When she appealed to management, she was told to "let it go." Phillips then quit her job and hired an attorney who began an action under Title VII of the Civil Rights Act. The company responded by reminding Phillips of her agreement to submit her claims to arbitration, based on an individual employment contract implemented in 1994 [33].

The arbitration agreement covered all disputes arising out of employment, including "any claim of discrimination, sexual harassment, retaliation, or wrongful discharge, whether arising under federal or state law." Phillips signed this document in November 1994, and again in April 1995, when her file was updated. Phillips filed suit in the United States District Court, citing the Title VII allegations, and Hooters responded with motions to compel arbitration and to stay the proceedings [33].

In March 1998, the district court denied Hooters' motions and the company filed an appeal with the Fourth Circuit. The appellate court unanimously denied the appeal, claiming that while predispute agreements to arbitrate Title VII claims are valid and enforceable, Hooters "materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute default of its contractual obligation to draft arbitration rules and to do so in good faith" [31, at 938]. For example, one of the rules forced the petitioner to select from a panel of arbitrators chosen by Hooter; another permitted Hooters, but not the employee, to expand the scope of the proceedings; and still another permitted the company to eliminate or modify the rules of the program unilaterally. The court concluded that the "rules were so one-sided that their only possible purpose was to undermine the neutrality of the proceedings" [33, at 938; 34].

Impact on the Ability of the EEOC to Sue: That Pesky Supreme Court

The Equal Employment Opportunity Commission (EEOC) has consistently taken the position that it is not prevented from seeking remedies such as reinstatement, back pay, or punitive damages when it enters cases involving employees who have agreed to arbitrate their disputes with their employers. The Sixth Circuit

Court of Appeals sided with the EEOC on this matter, holding that the arbitration agreement did not bar the EEOC from pursuing Title VII claims for monetary relief [35]. The Fourth Circuit joined the Second Circuit in taking a different approach [36]. The case involved an employee, Eric Baker, who was discharged after he had a seizure at work. Baker had signed an agreement to arbitrate employment disputes. Nevertheless, he filed charges with the EEOC under the Americans with Disabilities Act (ADA). The EEOC prosecuted the suit in its own name seeking these remedies:

1) A permanent injunction barring Waffle House from engaging in employment practices that discriminated on the basis of disability;
2) An order to compel Waffle House to institute policies and practices that would eradicate the effect of past discrimination against the disabled;
3) Back pay and reinstatement for the petitioner; and
4) Compensation for his pecuniary and nonpecuniary losses and punitive damages [36, at 807].

The Fourth Circuit's opinion carefully distinguished between the EEOC's role as the enforcing agent for public policy and its role in representing individual interests. The court concluded that the EEOC was not bound by the agreement to arbitrate because it had not been party to that agreement, and it supported the EEOC in those aspects of this case where the public interest in a discrimination-free workplace was paramount. Thus, the court granted the EEOC's requests for the permanent injunction and the order to eliminate the effects of past discrimination. But with regard to the EEOC's attempt to enforce the petitioner's right to back pay, reinstatement, and compensatory and punitive damages, the court held that "it must recognize [the petitioner's] prior agreement to adjudicate these rights in the arbitral forum" [36, at 813].

The Supreme Court reversed [37]. The Court concluded that the EEOC has been granted the authority under Title VII and the ADA, not only to bring suits to enjoin an employer from engaging in unlawful practices, but to pursue the kind of individual relief sought in this case. The existence of an arbitration agreement between private parties does not change the EEOC's statutory function or the remedies available to it. Once a charge is filed, the EEOC is the master of its own case, with the right to determine whether victim-specific relief should be sought. The statute specifically grants the EEOC the exclusive authority over the choice of forum and the "prayer for relief" [37].

Sharing of the Costs of Arbitration

The circuit courts of appeal have taken two approaches to fee-splitting provisions in employment arbitration agreements. Some circuits have adopted *per se* rules against fee splitting, reasoning that requiring an employee to pay for arbitration would undermine congressional intent and deter employees from pursuing

their claims [38]. Other courts, however, have adopted a case-by-case approach that focuses on the claimants' ability to pay the fees and cost [39].

The Fourth Circuit addressed this issue in a case filed by John Bradford, an employee of the Brooktree Corporation, which had been acquired by Rockwell [40]. Bradford signed an agreement to arbitrate, which provided that the parties share the fees and costs of the arbitrator equally. The company later decided to close the Brooktree operation and told Bradford that he would not be employed on the day before the plant closed [40].

Bradford filed a charge of age discrimination with the EEOC and received a right to sue letter, but before doing so, he filed a demand for arbitration under the aforementioned agreement. While his arbitration was pending, Bradford brought his complaint to the federal district court. He alleged, among other things, that he could not afford to bear his share of the costs of the arbitration. The district court granted the company's motion for summary judgment, and Bradford appealed to the Fourth Circuit [40].

The Fourth Circuit placed itself in the "case-by-case inquiry" camp rather than that of the *per se* rule. The court held that the appropriate inquiry is whether the arbitral forum is an adequate and accessible substitute for litigation, based on a case-by-case analysis. This analysis includes, "among other things, the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims" [40, at 556]. The court determined that Bradford offered no evidence that he was unable to pay his share of the costs [41].

SUMMARY AND CONCLUSIONS

This article has examined the role that has been played by the Fourth Circuit Court of Appeals in developing the law relating to mandatory arbitration of statutory claims in the employment arena. We chose the Fourth Circuit because its decision in *Gilmer* opened up this aspect of the law; because of its leadership in this area; and because of the variety of arbitration cases that it has decided.

In 1990, the Fourth Circuit decided that Robert Gilmer was bound by his individual agreement to arbitrate all of the disputes that arose from his employment, including statutory disputes. At the time, this court was the only one of the federal appellate courts to take that position. The following year the Supreme Court decided that the Fourth Circuit was correct, and that decision has become widely cited, settled law.

In subsequent years, this court has taken a consistently and decidedly pro-arbitration stance. In all but one of the cases featured in this article [33, *Hooters*], the court either ordered arbitration or made it difficult to avoid arbitration. The court has said, essentially, that as long as the arbitration process is fair, both individual and collective agreements to arbitrate statutory issues are to be honored.

The Supreme Court has twice struck down arbitration initiatives that were taken by the Fourth Circuit. In 1996 [23, *Austin*] and 1997 [25, *Wright*] the Fourth Circuit decided that the *Gilmer* doctrine applied to collective bargaining agreements. In 1998, however, the Supreme Court reversed the direction charted by this court, while avoiding a decision on the basic issue. The Court held that individual statutory rights could be waived through collective bargaining agreements, but that the waiver had to be "clear and unmistakable" [25].

In 1999, the Fourth Circuit held that certain enforcement powers of the EEOC were limited by an employer-promulgated arbitration process [37, *Waffle House*]. The court held that the agency was free to pursue its policy interests in matters involving basic federal policy. However, when the interests of the employee were paramount, as in back pay issues and other compensation, the arbitration process was to govern and the EEOC could not sue. In 2002, the Supreme Court concluded that the Fourth Circuit erred in denying the EEOC the power to seek individual remedies.

In other cases, the Fourth Circuit has helped to fill some of the gaps left by the *Gilmer* decision. The Supreme Court decided that for a waiver of statutory rights in a collective bargaining agreement to be valid, that waiver must be must be "clear and unmistakable." In several cases discussed above, the Fourth Circuit has provided operational tests for determining the meaning of those words, suggesting that the "clear and unmistakable waiver" test cannot be met unless the contract specifically incorporates or references the relevant federal statutes. The court has also made it somewhat easier to force reluctant employees or applicants to arbitration by determining that a mutual agreement to arbitrate is, in itself, a demonstration of the kind of consideration that renders the agreement valid. With regard to paying the fees for arbitration, the Fourth Circuit has joined several other circuits in holding that the legality of fee-splitting agreements over the costs of arbitration should be determined on a case-by-case basis.

Analysis: The Broad Picture

In the dozen years since its *Gilmer* decision, the Fourth Circuit Court of Appeals has consistently enforced pre-dispute agreements to arbitrate employment issues that involve statutory matters. If an individual or collective (before the *Wright* reversal) employment agreement specified that a given kind of dispute was to be arbitrated, and the arbitration process was fair, the court enforced that agreement to arbitrate. If the circuit courts of appeal were arranged on a spectrum with regard to their treatment of mandatory arbitration of statutory employment issues, the Fourth Circuit would probably be placed at the extreme "pro-arbitration" position. Since its *Gilmer* decision, that court appears to have enforced every employment

arbitration provision that has been presented to it, except for the egregiously one-sided process that came before it in *Hooters* [33].

We have some questions about this arbitration position because, in the end, we are dealing with a process that is entirely created and controlled by employers. Although employees are greatly affected, they rarely have any meaningful input into the creation of the process and they court the loss of their jobs if they refuse to sign on. On a legal basis, furthermore, we do not believe that Congress ever gave such blanket protection to the arbitration of statutory issues through these pre-dispute agreements. Section 118 of the 1991 Civil Rights Act provided that: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution . . . including arbitration is encouraged to resolve disputes arising under [the amended Civil Rights Act]" [43]. With Judge Posner of the Seventh Circuit, we see this as a "polite bow to arbitration," rather than a blanket endorsement [44]. The purpose of the 1991 Civil Rights Act was to expand the powers of women and minorities. Taking away their right to sue hardly does so.

Analysis: Some Specific Cases

We find much to admire much in many of the decisions of the Fourth Circuit. The court has paid careful attention to the language that defines the reach of the arbitration process and it has enforced that language assiduously. Once corrected by the Supreme Court [25, *Wright*], it has not only imposed the "clear and unmistakable" requirement placed on waivers of statutory rights in collective bargaining agreements, but it has established workable tests to clarify what "clear and unmistakable" means [28, *Carson*].

However, we wish that the court had established similar tests of the concept of fairness that underlies its *Hooters* decision [33]. In that case, the court determined that an extremely one-sided agreement to arbitrate was not worthy of enforcement, but it did not provide a "*Carson*" kind of test to determine the enforceability of a less one-sided process. It left open questions about the requirements a court can use to determine if an arbitration agreement or process is inherently unfair or too broad to be enforceable? There were many potential models that were available at the time, such as the "Due Process Protocol" signed by the American Bar Association, the National Academy of Arbitrators, the American Association, and the Federal Medication and Conciliation Service, among others [45]. The *Hooters* decision would have been much more helpful if the court had looked to such models to provide guidance for similar cases.

We also question whether the court went too far when it expanded the reach of an arbitration clause to the employment process itself. *Johnson v. Circuit City Stores* [32], dealt with a black female applicant who was denied a position.

She had filed several applications, at least one of which was "lost." The people that interviewed her apparently told her that she was qualified, but she was consistently denied employment even though the company continued to advertise the position opening. The application form included an agreement to arbitrate "any legal dispute related to your application for employment" [32, at 374]; and it instructed applicants to discontinue their attempt at employment if they decided, "**not** to agree to the terms" of the arbitration agreement [32, at 374, emphasis in original].

The applicant, Dameka Johnson, joined a number of other Circuit City employees in a racial discrimination suit against the employer. In dealing with her case separately, the U.S. District Court for the District of Maryland at Baltimore held that the agreement Johnson signed was unenforceable for lack of consideration [32, at 374]. On appeal, the Fourth Circuit noted that because the decision of the district court was a legal one, its review was *de novo,* but then it chose to focus only on the issue of consideration. The court held that the employer's agreement to be bound by an arbitration decision was sufficient consideration and ruled against the plaintiff.

This decision seems to leave at least two fundamental questions unanswered:

1. Is it possible for an arbitration provision in an employment application process to meet even minimal tests of fairness when applicants are instructed to withdraw from consideration for the position if they do not waive their statutory rights in favor of arbitration?
2. Does the line of cases that began with *Gilmer* extend beyond the *actual* employment relationship to *potential* employment relationship? Do individual agreements to arbitrate extend beyond the workplace to the employment selection process? The decision seems to permit employers to use an arbitration provision to shield their hiring processes from the courtroom. By doing so, the *Johnson* decision appears to move the law of mandatory arbitration of employment disputes into a new arena, and we think one that goes beyond the boundaries set forth in *Gilmer.*

Although, as we stated above, there is much to admire in the body of law on mandatory arbitration of statutory disputes that the Fourth Circuit Court of Appeals has created. Our concern is whether the court has given a place to arbitration that Congress never intended.

ENDNOTES

1. *Gilmer v. Interstate/Johnson Lane Corp.,* 895 Fed. 2d 196 (4th Cir. 1990); 500 U.S. 20 (1991).
2. 9 U.S.C. § 2 (1994).

3. Dennis R. Nolan and Roger I. Abrams, American Labor Arbitration: The Early Years, *35 University of Florida Law Review* 3 (1983), pp. 373-421.
4. For discussion, Charles J. Coleman and Gerald C. Coleman, Toward a New Paradigm of Labor Arbitration in the Federal Courts, *Hofstra Labor Law Journal,* Vol. 13, No. 1, Fall 1995, pp. 1-74; C. J. Coleman and G. C. Coleman, Constructing a New Paradigm of Labor Arbitration, *Dispute Resolution Journal,* Vol. 51, No. 4, Oct. 1996, pp. 34-45.
5. The number of cases involving employment discrimination rose by two, 166 percent between 1970 and 1989 as compared to 125 percent for all other litigation [4, (1995) at p. 66].
6. For example, Paul R. Hayes, *Labor Arbitration: A Dissenting View,* New Haven and London, Yale University Press, 1966.
7. Generally, 80 *Cornell Law Rev.* 1665, at 1703 and Footnote 36. See also *Insurance Co. v. Morse* 87 U.S. 445, 451-453 (1874) (Arbitration agreements "oust the courts of the jurisdiction conferred by law."); *Lewis v. Brotherhood Accident Co.,* 79 N.E. 802, 803 (Mass. 1907) (A contractual term requiring disputes to arbitration "is void as an attempt to oust the courts of their jurisdiction."); *Pepin v. Society St. Jean Baptiste,* 49 A.387, 388 (R.I. 1901) (Prospective waiver of a judicial forum by agreement to arbitrate violates public policy.) This also follows a long history of similar sentiments in English courts, which have held that, regarding arbitration contracts, "an agreement of the parties cannot ouster the court of its jurisdiction." *King v. Hollister,* 95 Eng. Rep. 532, 532 (K.B. 1746).
8. Section I of the FAA is also relevant to the employment arena. This section provides that "nothing herein shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce, " without specifying what is meant by the phrase, "foreign or interstate commerce." The Supreme Court avoided this issue in its *Gilmer* decision [1] but mercifully put this issue to rest in *Circuit City Stores, Inc. v. Adams [121 S. Ct. 1302 (2001)],* in which it decided that FAA coverage is extended to all workers except those who are actually and directly engaged in the interstate commerce transportation industry.
9. *Engineers Assn. v. Sperry Gyroscope Co.,* 252 F.2d 133 (2d Cir. 1957). *Cert. denied,* 356 U.S. 932 (1958).
10. *Wilko v. Swan,* 346 U.S. 247 (1953).
11. David E. Feller, Presidential Address: Bye Bye Trilogy, Hello, Arbitration, *Arbitration 1993: Arbitration and the Changing World of Work,* Proceedings of the Forty-Sixth Annual Meeting of the National Academy of Arbitrators (Washington, D.C.: BNA, 1994).
12. Dennis R. Nolan and Roger I. Abrams, American Labor Arbitration: The Maturing Years, 35 *University of Florida Law Review* 4 (1983): pp. 557-632.
13. *Textile Workers Union v. Lincoln Mills,* 230 F.2d 81 (1956).
14. *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960).
15. *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960).
16. *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).
17. *Alexander v. Gardner-Denver,* 415 U.S. 36 (1973).
18. 42 U.S.C. § 2000c, et. Seq.
19. The authors acknowledge their debt to David E. Feller for this phrase.
20. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985).

21. *Shearson/American Express Inc. v. McMahon,* 482 U.S. 220 (1987).
22. *Rodriguez de Ouijas v. Shearson/American Express Inc.,* 490 U.S. 477 (1989).
23. *Austin v. Owens-Brockway Glass Containers, Inc.,* 78 F.3d 875 (4th Cir. 1996).
24. 519 U.S. 980 (1996).
25. *Wright v. Universal Maritime Service Corp.,* 525 U.S. 70 (1998).
26. Joan Parker, Arbitration of Statutory Employment Discrimination Claims: What Hath Gilmer Wrought, *Journal of Individual Employment Rights,* Vol. 8, No. 3, pp. 231-244 (1999-2000). Emphasis added.
27. Language issues were also significant in *Brown v. TWA,* 127 F.3d 337 (4th Cir. 1997), decided after *Austin* but *before the Supreme Court's decision in Wright.* This case dealt with a customer service agent who filed sexual harassment claims in federal district court under Title VII of the Civil Rights Act and the Family Medical Leave Act. She was covered by a collective bargaining agreement that prohibited discrimination on a number of grounds, including sexual harassment. The contract also contained an arbitration clause that provided an arbitration board with the power to decide disputes or grievances "which may arise under the terms of this Agreement" [p. 339]. The Fourth Circuit, relying on the language in the CBA, argued that: 1) the CBA included a nondiscrimination clause, part of which was directed to sexual harassment; 2) the arbitration board was limited by the contract to grievances that arose "with reference to interpretation and application of any provision of the agreement." However, because the agreement did not "purport to submit any noncontractual dispute or any statutory dispute to arbitration" [p. 341], the appellate court reversed the summary judgment of the district court that had ordered Brown to arbitration.
28. *Carson v. Giant Food, Inc.,* 175 F.3d. 325 (4th Cir. 1999).
29. *Brown v. AFB Freight Systems,* 183 F.3d 319 (4th Cir. 1999).
30. *Safrit v. Cone Mills Corp.,* 248 F.3d 306 (4th Cir. 2001).
31. *O'Neil v. Hilton Head Hosp.,* 115 F.3d 272 (4th Cir. 1997).
32. *Johnson v. Circuit City Stores,* 148 F.3d 373 (4th Cir. 1998).
33. *Hooters* of *America. Inc. v. Phillips,* 173 F.3d 933 (4th Cir. 1999).
34. For examples of the rules, see Charles J. Coleman, A Dialogue on a Contemporary Issue: The Hooters Case, *Journal of Individual Employment Rights,* Vol. 9, No. 2, 2001, pp. 163-169.
35. *EEOC v. Frank's Nursery & Crafts,* 177 F.3d 448 (6th Cir. 1999).
36. *EEOC v. Waffle House, Inc.,* 193 F.3d 805 (4th Cir. 1999); *EEOC v. Kidder, Peabody & Co.,* 156 F.3d 298 (2d Cir. 1998).
37. *EEOC v. Waffle House, Inc.,* No. 99-1823 (2002), with Justice Thomas dissenting joined by Justice Scalia and Chief Justice Rehnquist.
38. *Cole v. Burns Intl. Sec. Servs.,* 105 F.3d 1465 (D.C. Cir. 1997).
39. For example, *Williams v. Cigna Fin. Advisors, Inc.,* 197 F.3d 752, 763-64 (5th Cir. 1999).
40. *Bradford v. Rockwell Semi-Conductor Systems, Inc.,* 238 F.3d. 549 (4th Cir. 2001).
41. Which amounted to $4,470.88. The arbitrator decided against Bradford [35, at 558].
42. The Ninth Circuit Court of Appeals would undoubtedly occupy the other extreme because of its holding in *Duffield* that employers may not compel employees to waive their protection under Civil Rights legislation through predispute

agreements to arbitrate. *Duffield v. Robertson Stephens & Co.,* 144 F.3d. 1182 (9th Cir. 1998).

43. Pub. L. 102-166 § 118.
44. *Pryner v. Tractor Supply Co.,* 109 F.3d. 354, 363 (7th Cir. 1997).
45. A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship. Joyce M. Najita, Ed., Arbitration *1995: New Challenges and Expanding Responsibilities.* Proceedings of the Forty-Eighth Meeting of the National Academy of Arbitrators, BNA: Washington, D.C. 1996, pp. 298-304.

AFTERWORD: *MURRAY V. UFCWIU,* 289 F.3d 297 (2002)

On May 10, 2002, after this article had been completed, the Fourth Circuit revisited their *Hooters* decision [33] in *Daniel C. Murray v. United Food and Commercial Workers International Union, Local 400.* The elements of the decision, as it affects the arbitration of statutory disputes, are summarized below.

The employer in *Murray* was a local private sector labor organization with some 40,000 members. The plaintiff, Daniel C. Murray, had been an organizer in its employ. Murray, a white male, contended that he was terminated in violation of Title VII of the Civil Rights Act because he was white. In addition, Murray had been required to sign an agreement to arbitrate any claims of discrimination that were unresolved under the union's internal discrimination complaint process. This agreement, in turn, required that the arbitrator be selected by an alternate strike method from a list of arbitrators:

1. Provided by the office of the Union's President, where
2. The arbitrator was not granted the authority to alter, change, or diminish any power, right, or authority granted to the Union's President by the Bylaws of the organization.

The arbitrator ruled in favor of the employer. The arbitrator concluded that Murray failed to establish a prima facie case of unlawful discrimination and held further that Local 400 had articulated legitimate non-discriminatory reasons for his discharge. The plaintiff appealed and the federal district court, acting before the Fourth Circuit had rendered its decision in *Hooters,* confirmed the award. Murray appealed this decision to the Fourth Court which overturned the district court's decision to compel arbitration of his race discrimination claim.

The decision turned on the two elements from the arbitration clause that are highlighted above. The court was unhappy with the Union's degree of control over the list from which arbitrators were selected. The court also concluded that the limitation placed upon the arbitrator's power could be construed as

preventing a decision that would overturn a decision made by the local's President. The court, following its own reasoning in *Hooters,* refused to enforce this arbitration agreement because it was so "utterly lacking in the rudiments of evenhandedness" [33, at 936].

Direct reprint requests to:

Charles J. Coleman
19 Potter Street
Haddonfield, NJ 08033