RECENT DEVELOPMENTS

*Cole v. Burns International Security Services**

> Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens.[1]

I. INTRODUCTION

In the six years since it was handed down, the U.S. Supreme Court's landmark decision in *Gilmer v. Interstate/Johnson Lane Corporation*[2] has generated much discussion, most of it centered around a perceived erosion of the civil rights of employees who, as a condition of their employment, agree to pursue employment disputes, including those involving statutory claims based on discrimination, through arbitration rather than through the traditional judicial forum.[3] Of central concern is the notion, on the one hand, that such agreements are usually drafted by employers and offered on a take-it-or-leave-it basis and, on the other, that arbitration offers too few procedural safeguards to protect employees' statutory rights or to promote the public values embodied in civil rights legislation.

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* 105 F.3d 1465 (D.C. Cir. 1997).

[1] Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting), *quoted in* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 42 (1991) (Stevens, J., dissenting).

[2] 500 U.S. 20 (1991).

[3] *See generally* Sarah R. Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449 (1996); Pierre Levy, Comment, *Gilmer Revisited: The Judicial Erosion of Employee Statutory Rights*, 26 N.M. L. REV. 455 (1996); *cf.* Jennifer A. Marler, Note, *Arbitrating Employment Discrimination Claims: The Lower Courts Extend Gilmer v. Interstate/Johnson Lane Corp. to Include Individual Employment Contracts*, 74 WASH. U. L.Q. 443 (1996) (supporting the extension of *Gilmer* but advocating procedures to protect employees' civil rights).

The Court in *Gilmer* did not reach the issue of whether such mandatory arbitration agreements were lawful in the context of employment contracts;[4] the Court limited its decision to holding that a claim under the Age Discrimination in Employment Act of 1967 (ADEA)[5] can be subjected to compulsory arbitration.[6] Nevertheless, the Court's reasoning did seem to imply that arbitration could be compelled on the basis of an arbitration clause in an employment contract.[7] In that case, petitioner Gilmer filed an age discrimination charge with the Equal Employment Opportunity Commission (EEOC) after being fired by respondent Interstate Johnson/Lane Corporation (Interstate).[8] Gilmer, who had worked as a Manager of Financial Services for Interstate, had been required, as a condition of his employment, to register as a securities representative with the New York Stock Exchange.[9] In his registration application, Gilmer agreed to arbitrate any employment controversies that might arise between him and his employer.[10] After he filed his charge with the EEOC and brought suit in federal district court, Interstate filed a motion to compel arbitration,[11] relying on the Federal Arbitration Act (FAA).[12] The district court denied Interstate's motion, based on its interpretation of the U.S. Supreme Court's holding in *Alexander v. Gardner-Denver Co.*[13] that "Congress intended to protect ADEA claimants from the waiver of a judicial forum."[14] The Fourth Circuit reversed,[15] and the Supreme Court affirmed.[16]

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[4] *See Gilmer*, 500 U.S. at 25 n.2.

[5] 29 U.S.C. §§ 621-634 (1994).

[6] *See Gilmer*, 500 U.S. at 35.

[7] Indeed, in his dissent, Justice Stevens argues that the Court should have decided the question of whether the Federal Arbitration Act, 9 U.S.C. § 1-16 (1994), applies to employment contracts. Although the issue had not been raised by the parties, it was "clearly antecedent to disposition of this case." *Gilmer*, 500 U.S. at 36-37.

[8] *See id.* at 23.

[9] *See id.*

[10] *See id.*

[11] *See id.* at 24.

[12] 9 U.S.C. §§ 1-16.

[13] 415 U.S. 36 (1974).

[14] *Gilmer*, 500 U.S. at 24.

[15] *See* Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195 (4th Cir. 1990).

[16] *See Gilmer*, 500 U.S. at 23.

The *Gilmer* Court, noting that "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement,"[17] rejected Gilmer's argument that "compulsory arbitration of ADEA claims pursuant to arbitration agreements would be inconsistent with the statutory framework and purposes of the ADEA"[18] as well as his contention that mandatory arbitration would deprive ADEA claimants such as himself of a judicial forum.[19] The Court agreed with Gilmer's contention that the ADEA was designed to further important social policies as well as address individual grievances but saw no "inherent inconsistency between those policies . . . and enforcing agreements to arbitrate age discrimination claims,"[20] noting that other statutes had been deemed appropriate for arbitration.[21]

In *Cole v. Burns International Security Services*,[22] the D.C. Circuit both extended and refined—or arguably limited—*Gilmer*. Chief Judge Harry T. Edwards, writing for the majority, held that section 1 of the FAA[23] excludes only employment contracts for employees directly engaged in the transportation of goods in commerce, not contracts for all employees who affect commerce.[24] The court also outlined, in greater detail than did the *Gilmer* Court, the minimum requirements for an enforceable mandatory arbitration agreement in the employment context.[25] In reaching its conclusions, the court surveyed the extensive scholarship regarding the concerns raised by allowing mandatory arbitration of statutory claims in the employment setting,[26] and it addressed those concerns directly.[27] The court concluded that such an arbitration agreement, to be enforceable, must provide significant protections for the rights of employees, protection that is comparable to what they would receive in a judicial forum. Specifically,

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[17] *Id.* at 26.

[18] *Id.* at 27.

[19] *See id.* at 29.

[20] *Id.* at 27.

[21] For example, arbitration has been condoned under the Sherman Act, the Securities Exchange Act of 1934, Racketeer Influenced and Corrupt Organizations Act and the Securities Act of 1933. *See id.* at 28.

[22] 105 F.3d 1465 (D.C. Cir. 1997).

[23] 9 U.S.C. § 1.

[24] *See Cole*, 105 F.3d at 1470.

[25] *See id.* at 1480-1487.

[26] *See id.* at 1473-1479.

[27] *See id.* at 1479-1488.

a valid mandatory arbitration agreement must provide procedural protections—such as adequate discovery,[28] judicial review[29] and reasonable access for the complainant[30]—as well as substantive protections, ensured by a right to counsel[31] and by the use of competent arbitrators who are familiar with employment law.[32] In what will doubtless be regarded as the most controversial aspect of the case, the court also held that a mandatory arbitration agreement will be unenforceable unless the employer pays the arbitrator's entire compensation and expenses.[33]

II. THE ENFORCEABILITY OF THE ARBITRATION AGREEMENT IN *COLE*

The plaintiff in this case, Clinton Cole, who worked as a security guard at Union Station in Washington, D.C., was required to sign a "Pre-Dispute Resolution Agreement" when the company he worked for was taken over by the defendant, Burns Security.[34] The agreement stipulated that the employee, in consideration for his employment, agreed to waive his right to a jury trial and to arbitrate, at the company's option, any disputes governed by the agreement, including "claims involving laws against discrimination whether brought under federal and/or state law . . . ."[35] After Cole was fired in 1993, he filed charges with the EEOC and a complaint in the District Court for the District of Columbia alleging, *inter alia*, race discrimination and harassment based on race.[36] The district court granted defendant's motion to compel arbitration and dismissed Cole's complaint.[37]

Cole argued that section 1 of the FAA excludes all employment contracts that even tangentially affect interstate commerce. That section states, in part, 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."[38] The court, noting that this issue had

[28] *See id.* at 1478-1479.
[29] *See id.* at 1486-1487.
[30] *See id.* at 1482-1483.
[31] *See id.* at 1483 n.11.
[32] *See id.* at 1488.
[33] *See id.* at 1485.
[34] *See id.* at 1469.
[35] *Id.*
[36] *See id.* at 1469-1470.
[37] *See id.* at 1470.
[38] 9 U.S.C. § 1.

been raised but not decided in *Gilmer*, ruled that section 1 does not apply to all employment contracts that affect commerce.[39] Acknowledging that the legislative history of that provision could "be read to indicate that Congress intended to exclude all contracts of employment from the coverage of the FAA," the court, drawing on two canons of statutory construction, nevertheless concluded that the Act does not exclude such contracts.[40] The first canon holds that a court must avoid a reading of a statute that "renders some words altogether redundant."[41] The court noted that if "any class of workers engaged in foreign or interstate commerce" included "all workers whose jobs have any effect on commerce," then "seamen" and "railway workers" would be redundant.[42] The second canon "limits general terms which follow specific ones to matters similar to those specified";[43] here, "any other class of workers" takes its meaning from "seamen" and "railway workers." The court concluded that although *Gilmer* did not reach the issue of section 1's scope, the reasoning of the majority "indicates that the Court would be inclined to read section 1 narrowly."[44]

III. ENFORCEABILITY OF MANDATORY ARBITRATION AGREEMENTS IN AN EMPLOYMENT SETTING

Having thus determined that employment contracts are not excluded from the FAA, the court turned its attention to what it called "the heart of the problem in this case, i.e., the enforceability of conditions of employment requiring individual employees to use arbitration in place of judicial fora for the resolution of statutory claims."[45] Noting that the case did *not* concern either a bilateral, "mutually voluntary decision to pursue arbitration" or "the enforcement of arbitration under a collective bargaining agreement,"[46] the court proceeded into a detailed analysis of the problems raised by mandatory arbitration agreements such as the one endorsed by the *Gilmer* Court.

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[39] *See Cole*, 105 F.3d at 1470.
[40] *Id.* at 1472.
[41] *Id.* at 1470 (quoting Gustafson v. Alloyd Co., 513 U.S. 561 (1995)).
[42] *Id.*
[43] *Id.* at 1471 (quoting Gooch v. United States, 297 U.S. 124, 128 (1936)).
[44] *Id.* at 1472.
[45] *Id.*
[46] *Id.* at 1472–1473.

The court vigorously rejected applying to employment contracts the justifications traditionally offered for arbitration in collective bargaining agreements,[47] noting that, absent fraud, arbitrators in such agreements serve simply as the "readers" of the contracts.[48] Arbitrators in collective bargaining agreements have a strong incentive to satisfy both parties to the arbitration—the employer and the union—because both parties are repeat players who will participate in selecting the arbitrator for future disputes. Furthermore, the rights created in a collective bargaining agreement are contractual rights created by the parties rather than statutory rights designed to reflect public values.[49]

Unlike a collective bargaining agreement, an arbitration agreement in the context of an employment contract does not provide these procedural and substantive safeguards. While the union can negotiate terms to the collective bargaining agreement, for example, an employee such as Cole is typically confronted with a contract of adhesion, which he can take or leave,[50] and the fact that employers typically draft the agreements creates the further danger that employers will "structure arbitration in ways that may systematically disadvantage employees."[51] Additionally, the employer enjoys the twin advantages of being more sophisticated than its employees in selecting arbitrators, by virtue of the employer's experience, and of

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[47] *See id.* at 1473.

[48] *See id.* at 1474–1475 (quoting Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, 75 MICH. L. REV. 1137, 1140 (1977).

[49] *See id.* at 1475.

[50] *Id.* at 1477. The agreement that Cole signed stated, in part, that:

> In consideration of the Company employing you, you further agree that, in the event that you seek relief in a court of competent jurisdiction for a dispute covered by the Agreement, the Company may, at any time within 60 days of the service of your complaint upon the Company, at its option, require all or part of the dispute to be arbitrated by one arbitrator in accordance with the rules of the American Arbitration Association. You agree that the option to arbitrate any dispute is governed by the Federal Arbitration Act, and fully enforceable.

Id. at 1469.

[51] *Id.* at 1477. As an example of systematic disadvantage, the court notes that "a company might impose a requirement that the employee pay the fees for an arbitrator's time in order to discourage or prevent employees from bringing claims." *Id.*

being the sole repeat player, an advantage that can lead arbitrators to favor employers, who can be expected to hire the arbitrators in the future.[52]

The court also noted concerns that many arbitrators are not qualified to decide "purely legal issues" with respect to statutory claims and that many arbitrators are not lawyers.[53] Furthermore, public disclosure, less important in the context of collective bargaining because decisions are monitored by both unions and employers, is much more important in the context of individual statutory claims; binding precedent, the court observed, "prevents a recurrence of statutory violations" and thus diminishes the danger of a system that "systematically favor[s] companies over individuals."[54]

IV. THE *COLE* SOLUTION TO *GILMER*

Despite these numerous misgivings, the court in *Cole* acknowledged that under *Gilmer* "statutory claims are fully subject to binding arbitration, at least outside of the context of collective bargaining."[55] Recognizing this fact, the court endeavored to articulate standards of arbitration that diminish the hazards that it had outlined. The court's starting point was an unambiguous statement of the law: "Clearly, it would be unlawful for an employer to condition employment on an employee's agreement to give up the right to be free from racial or gender discrimination."[56] To ensure that the employee does not give up that right, the court outlined several procedural criteria by which to evaluate an arbitration arrangement.

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[52] *See id.* at 1476, 1485 n.18.

[53] Statistics cited by the court indicate that

> [A]t least 16% of arbitrators have never read any judicial opinions involving Title VII; 40% do not read labor advance sheets to keep abreast of developments under Title VII; and of those arbitrators who have never read a judicial opinion on employment discrimination and who do not read advance sheets, 50% nonetheless feel professionally competent to decide legal issues in cases involving employment misconduct.

Id. at 1478 (quoting Harry T. Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, PROC. OF THE 28TH ANN. MEETING OF THE NAT'L ACAD. OF ARB. 59, 71-72 (1976)).

[54] *Id.* at 1477.

[55] *Id.* at 1478 (citing *Gilmer*, 500 U.S. at 26, 34-35).

[56] *Id.* at 1482 (citing *Gardner-Denver*, 415 U.S. at 51).

Important to the court's analysis were the rules promulgated by the American Arbitration Association (AAA), which require minimum standards of discovery and stipulate, *inter alia*, that awards be put into writing.[57] Citing *Gilmer*, the court noted that an arbitration agreement, to be enforceable, must represent simply a change of forum and cannot result in a complainant's foregoing his or her substantive rights under a statute.[58] Accordingly, under *Gilmer*, the arbitration arrangement must ensure that the arbitrators are impartial and subject to meaningful judicial review; that discovery is adequate; that all types of relief are available that would otherwise be available in court; and that the employee not be required to pay unreasonable costs—in other words, that "an employee who is made to use arbitration as a condition of employment 'effectively may vindicate [his] statutory cause of action in the arbitral forum.'"[59]

Perhaps the most surprising standard established by the court is the requirement that employers pay all of the arbitrators' fees and expenses. One commentator has suggested that this requirement might be unique.[60] The court justified this ruling, over a vigorous dissent,[61] by stating that "we

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[57] *See id.* at 1480 (citing AMERICAN ARBITRATION ASSOCIATION, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES (effective June 1, 1996)).

[58] *See id.* at 1481.

[59] *Id.* at 1482 (quoting *Gilmer*, 500 U.S. at 28). In support of these principles, the court also cites 1994 DEPARTMENT OF LABOR COMMISSION OF THE FUTURE OF WORKER-MANAGEMENT RELATIONS REPORT AND RECOMMENDATIONS 30–31 and other studies and scholarly works. *See Cole*, 105 F.3d at 1483, n.11.

[60] *See* Thomas J. Stipanowich, *The Growing Debate Over "Consumerized" Arbitration: Adding* Cole *to the Fire*, 2 DISP. RESOL. MAG., Summer 1997, at 20, 21 (1997). In fact, at least two district courts have recently followed *Cole* in its approach to fees. *See* McWilliams v. Logicon, Inc., No. C.V.A. 95-2500, 1997 WL 383150 (D. Kan. June 4, 1997) (holding that despite arbitration award against employee, employer is responsible for paying arbitrator's fee); Shankle v. B-G Maintenance Management of Colorado, Inc., No. 96 CV 2932, 1997 WL 416405, at *3 (D. Colo. Mar. 24, 1997) (holding arbitration agreement unenforceable because of its requirement that employee pay one half of arbitrator's fees; requirement "operates as a disincentive to his submitting a discrimination claim to arbitration").

[61] The dissent argues, not unreasonably, that the issue of fees was not raised at trial or on appeal and suggests, perhaps less plausibly (given the majority's point that such agreements are often presented to employees on a take-it-or-leave-it basis), that the arbitration agreement was reached by mutual consent of the employee and employer and should, unless unconscionable or a product or duress, be enforced without the court's

are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case."[62] The court does not forbid charging the employee administrative and other fees that are similar to those assessed against parties appearing in federal court, but the court reasons that the additional arbitrators' fees, which can range from $500 to $1,000 per day, could have a chilling effect on employees' asserting their statutory claims.[63]

Finally, in its effort to ensure fairness in the arbitration of statutory claims, the court analyzes the standard of judicial review of arbitral proceedings and at least implies that the standard must be higher than the traditional "manifest disregard of the law" standard applied in the collective bargaining context.[64] Specifically, the court states that "the strict deference accorded to arbitration decisions in the collective bargaining arena may not be appropriate in statutory cases in which an employee has been forced to resort to arbitration as a condition of employment" and that the "manifest disregard" standard in this context must be "sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law."[65]

V. CONCLUSION

As suggested above, it is likely that the most controversial aspect of *Cole* will be the holding that an employer may not condition employment on an employee's acceptance of an arbitration agreement that requires the employee to submit his or her statutory claims to arbitration and to pay all or part of the arbitrators' fees. The court, somewhat puzzlingly, links this principle with a different issue: the concern that arbitrators will favor employers.[66]

It is probably true, as the court argued, that the mere fact that the employer pays the fees will not in itself create arbitrator bias. But neither is

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engaging in "contract modification." *Cole*, 105 F.3d at 1489-1491 (Henderson, C.J., dissenting).

[62] *Id.* at 1484.

[63] *See id.* at 1486.

[64] *See id.* at 1486–1487. Indeed, the court notes that the Supreme Court has not yet defined the "manifest disregard" standard and that it is applied differently in different circuits. *See id.*

[65] *Id.* at 1487.

[66] *See id.* at 1484–1486.

it clear that such a scheme will do anything to diminish the structural bias that such arbitration clauses invite. Requiring the employee to pay all or part of the fees will not alleviate the problem of repeat players one way or another. As the court noted, "[i]t is doubtful that arbitrators care about who pays them, so long as they are paid for their services."[67]

Nevertheless, while the employer's payment of all arbitration fees might not *exacerbate* repeat-player bias, neither does it in any way *diminish* the problem. The court does address this concern in some detail, noting that "there are several protections against the possibility of arbitrators systematically favoring employers because employers are the source of future business"[68]—including the scrutiny of plaintiffs' lawyers and the AAA; the possibility that employers who curry the favor of corrupt arbitrators "will simply invite increased judicial review of arbitral agreements";[69] and the notion that arbitrators can be expected to "adhere to the professional and ethical standards set by arbitrators in the context of collective bargaining."[70]

Yet as the court points out, arbitrators in the employment context are not subject to the same pressures as are arbitrators in the collective bargaining context. The "protections" the court lists do not fully answer the wider concerns raised (even by commentators cited by the court)[71] regarding the mandatory arbitration of statutory claims in the employment context. So long as employers have a say in selecting the arbitrators, and so long as they remain more sophisticated than their employees in this area (which they must, given their repeated experience), arbitrators will have an incentive to see, perhaps only somewhat more clearly, the merits of the employers' positions.

Arbitrators need not be "corrupt" to be subject to their own human biases or to trigger the heightened scrutiny of the AAA or the courts. Certainly the protections listed by the court can work to prevent obviously egregious arbitral decisions and awards, but it is difficult to see how they will guard against the more subtle biases that must almost certainly result when an arbitrator's future well-being depends, even in part, on an employer's good will.

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[67] *Id.* at 1485.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *See id.* at 1485 n.16.

The court cited two studies that indicate just such a bias, and yet concluded that "[i]t is hard to know what to make of these studies without assessing the relative merits of the cases in the surveys."[72] The studies would appear to indicate that repeat players, such as employers, enjoy an unfair advantage over nonrepeat players, such as employees.

Of course, the court in *Cole* has no alternative but to follow the strong implication in *Gilmer* that the Supreme Court will almost certainly uphold a mandatory arbitration arrangement as a condition of employment. In enforcing Cole's arbitration arrangement, it is possible that the court is simply attempting to control the damage to employees' statutory rights implied in *Gilmer*. The *Gilmer* Court upheld the arbitration clause in that case because it purportedly protected the employee's statutory rights. The court in *Cole* outlines in much greater detail than did *Gilmer* the prerequisites for enforcing such an arbitration agreement. In doing so, the court comes close to requiring procedural safeguards as demanding as those mandated by the judicial system, leaving one to question whether the Supreme Court's "current strong endorsement of the federal statutes favoring [arbitration]"[73] has gone too far and will simply result in the creation of a parallel, equally complex private judiciary.

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[72] *Id.* The studies indicate that employees recover less often on claims against repeat players than against nonrepeat players. *See* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 685 (1996). The studies also indicate that "repeat-player employers win in arbitration twice as often as nonrepeat players." David Segal, *Short-Circuiting the Courts: An Overburdened Legal System Has Turned Mediation into Big Business*, WASH. POST, Oct. 7, 1996, at F12.

[73] *Gilmer*, 500 U.S. at 30 (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481(1989)).