High Court to Revisit Issue Of Mandatory Arbitration

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WHEN IT BEGINS its fall term, the U.S. Supreme Court will address the circumstances under which an agreement to arbitrate an employment dispute may be binding. The specific issue in Wright v. Universal Maritime Service Corp.[1] is whether an employee must exhaust the arbitration provision of a collective-bargaining agreement before bringing a lawsuit. But the broader issue and policies embedded in the case deal with the exclusivity of the arbitration forum for employment disputes in both the union and the nonunion setting, and these may well also be addressed by the court.

The explosion of employment litigation, its cost, delay, potential liability and contentiousness, has increasingly led parties to adopt ADR processes, including arbitration, to resolve employer-employee disputes. The legal environment surrounding the resolution of employment-related disputes has been evolving toward favoring such tribunals as the exclusive forum for resolving such disputes. But legal uncertainty has held employers back from broad adoption of such methods. Two federal appellate courts have recently joined the controversy over whether employees can be required to arbitrate workplace disputes, including statutory claims, as a condition of employment.

In Duffield v. Robertson Stephens & Co.,[2] the 9th U.S. Circuit Court of Appeals found that the legislative history of the 1991 amendments to Title VII of the Civil Rights Act of 1964 confirmed that an employee's statutory right to litigate his or her federal statutory claims cannot be negated by substituting arbitration as the employee's exclusive recourse. The court observed that while the 1991 amendments encourage arbitration, it can only be a supplement to resolving employment discrimination claims, not the exclusive remedy.

Exactly one month later, the 3d Circuit rejected this interpretation and held that an employee's statutory claims can be subject to arbitration as a term and condition of employment as long as the arbitration procedures meet certain standards of voluntariness, fairness and due process.[3] More recently, the 4th Circuit upheld an employer's position that an applicant who signs an arbitration agreement as part of the application process is required to arbitrate his race discrimination claim. The court found consideration in the fact that the employer also had agreed to be bound by the procedure.[4]

These cases, along with hundreds of others, either pending or already decided by federal and state tribunals, raise the issue of whether employees can be required to arbitrate claims as a term or condition of their employment.

Supreme Court Precedents

This issue finds its genesis in two Supreme Court decisions. In 1974, the court, in Alexander v. Gardner-Denver Co.,[5] held that a union could not waive its members' right to litigate their statutory discrimination claims, even if the collective-bargaining agreement's arbitration clause covered those issues and even if the individual member had already lost before an arbitrator. This is the issue once again before the court in Wright.

The second Supreme Court decision addressing the subject of mandatory arbitration of employment disputes, Gilmer v. Interstate Johnson Lane Corp.,[6] was decided 17 years after the court's decision in Gardner-Denver. In Gilmer, the court ruled that a nonunion employee who signed a Securities Registration Agreement containing an employment-related arbitration clause was bound by the clause and could be required to arbitrate all employment-related claims, including those involving statutory claims of age discrimination.

Although the Gilmer decision held that the agreement to arbitrate was valid and enforceable under the Federal Arbitration Act, it noted that a contrary congressional intent in the statute at issue could render the arbitration unenforceable. In Duffield, the company argued that the "plain text" of the 1991 act evidenced a congressional intent not to preclude arbitration of employment discrimination claims: "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 Acts or provisions of Federal Law amended by this title."[7]

The 9th Circuit rejected the company's view, however, as being "at odds with Congress' directive to read Title VII broadly so as to best effectuate its remedial purposes." The court concluded that the plaintiff had succeeded in showing that the Civil Rights Act of 1991 prohibits compulsory arbitration of Title VII disputes. The context, language, legislative history and purpose of the Civil Rights Act of 1991, the court reasoned, show that "Congress' intent was to preclude the enforceability of arbitration agreements imposed as a condition of employment."[8] The court interpreted the phrase concerning arbitration in the 1991 act to mean that only after a claim has arisen should an employee be free to choose arbitration over often protracted and expensive litigation in court.

Although the Supreme Court's decision in Gilmer was issued just before the passage of the Civil Rights Act of 1991, the 9th Circuit concluded that Congress did not intend to include Gilmer within "what was authorized by law," since Congress specifically rejected a proposal that would have allowed employers to enforce compulsory arbitration agreements. Thus, despite the trend of enforcing mandatory arbitration agreements of employment disputes by many post-Gilmer courts, the 9th Circuit, using the 1991 act as its sword, has changed the ability of employers in its circuit to bind employees to prospective waivers of a judicial forum for a Title VII claim.

In the aftermath of Gilmer, the judiciary has been flooded with cases challenging the right of employers to impose mandatory arbitration of claims arising from the employment relationship or the termination thereof, including statutory claims. Aside from the 9th Circuit, the vast majority of courts that have addressed the issue have upheld an employer's right to enforce such agreements, at least in a nonunion setting, as a valid term and condition of employment, provided the procedures specified for arbitration of these claims are fair, meet minimal standards of due

process, are voluntarily entered into and do not impose any undue financial hardships upon the employee. The D.C. Circuit joined this majority in Cole v. Burns International Security Services.[9]

Customary Requirements

As a general rule, courts enforcing mandatory arbitration agreements have required that the agreements:

•Provide the arbitrator with the authority to award employees the same relief that would have been available had they gone to court to pursue their claims under state, federal or local laws (including attorney and expert-witness fees).

•Provide a fair procedure for the selection of a neutral arbitrator.

•Support procedural fairness allowing for some pre-hearing discovery rights.

•Provide limited judicial review of an arbitrator's decision, in order to ensure that the decision is in accordance with the law and that the arbitrator acted within the scope of his or her authority.

•Allow the parties to have representation of their own choosing, including legal counsel.

•Do not impose an undue financial burden on the employee for pursuing the specified arbitration process. In Cole v. Burns International Security Services,[10] the D.C. Circuit held that the employer must pay the entire cost of the arbitrator's fee because, had the case gone to court, the employee would not have been required to pay any fees other than minimal court costs. Other courts have expressed similar concerns.

Since Gilmer, several circuit courts have expanded that holding to include not only Age Discrimination in Employment Act claims, but also federal statutory employment claims under Title VII, the Americans With Disabilities Act, the Employee Polygraph Protection Act and the Fair Labor Standards Act. Since Gilmer, numerous employers have required their employees to be bound by mandatory arbitration agreements for employment disputes.

Recently, the incentive for companies to adopt ADR procedures for disputes received a boost in two high court decisions dealing not with the procedural choice-of-forum issue, but with substantive Title VII issues of proof.

In Burlington Industries Inc. v. Ellerth[11] and Farragher v. City of Boca Raton,[12] the court expanded employer liability for sexual discrimination. In Ellerth, in which an employee refused the unwelcome and threatening sexual advances of a supervisor, yet suffered no adverse tangible job consequences, she could recover against the employer without showing that the employer had been negligent, was at fault or even had known of the supervisor's conduct.

What is significant about this case in terms of ADR is the court's holding that an employer may raise an affirmative defense to such charges if it can prove two necessary elements: that the employer exercised reasonable care to prevent and promptly correct any sexual harassing

behavior and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise.

While Ellerth arose in the context of a case of quid pro quo sex discrimination (threat of adverse job action or promise of benefit), the court specifically allowed for the same employer defense in Farragher, which involved a hostile work environment, the other general category of sex discrimination cases. This employer's defense to strict liability reflects Title VII's strong encouragement of employer-implemented sexual harassment prevention policies with an emphasis on prompt investigation and resolution of complaints. The availability of ADR, including arbitration, combined with the adoption and dissemination of valid sex harassment policies, could constitute a strong basis for satisfying the predicates of such an affirmative defense.

The Court Comes Full Circle

The court has thus brought its endorsement of ADR full circle: While in Gilmer, the procedural issue of choice of forum was decided in favor of arbitration, in Ellerth and Farragher, the substantive determination of discrimination may be defeated, in part, by an effective arbitration program. In Wright, the odds are that the court will reject mandatory arbitration of statutory employment disputes in the union setting, based on the theory that only an individual employee, not his or her union, may waive the employee's right to sue.

Yet Wright provides the court with the opportunity again to endorse mandatory arbitration of employment disputes in the nonunion setting and to part company with the Duffield approach. If so, mandatory arbitration may attain solid enough legal footing to become broadly adopted by corporate America as a real alternative to litigation.

Such an approach would be in keeping with other administrative concerns of the courts. Many courts have openly expressed frustration in policing workplace disputes. The 7th Circuit undoubtedly spoke for many courts when it complained that courts are now "almost a super personnel department, examining the employment history of various workers [and] reading about the risqué jokes they tell one another."[13]

Recently, Judge Stanley Sporkin, of the U.S. Court for the District of Columbia, echoed the sentiment when he criticized what he considered to be the growing number of frivolous employment-related suits. In response to one that he thought a misuse of the nation's anti-discrimination laws, he stated, "It would be hoped that at some point Congress would review the law in this area and make the necessary adjustments to eliminate these meritless, lottery-type cases."[14]

Further, courts and government agencies are being overwhelmed by more than 200,000 employment discrimination filings each year, increasing at a rate of about 23 percent a year. The legal costs of employment lawsuits average $100,000 for each side. Besides the high costs and delays, the litigation-based system is criticized as being distanced from the world of work, exalting generic legalisms over workplace realities and fostering a win-lose, adversary process that exacerbates work- place conflict. It is seen as producing hostility and mistrust in an environment in which people must continue to work together.

Internal corporate dispute resolution processes, on the other hand, are increasingly seen by corporate managements as recognizing the unique environment and relationships that characterize a particular workplace. In this view, employment cases, ostensibly based on allegations of discrimination (race, sex, age, religion, national origin or disability) or unlawful discharge (contrary to employment expectations or public policy), are really work complaints about demotions, promotions, pay, transfers, evaluations and ability. At the core of these suits is a search for fairness in the workplace.

ADR systems, rather than being "one size fits all," like litigation, are informal and adaptable dispute resolution methods. They can also address other job-related complaints that deeply affect employment but may not transgress em- ployment statutes. The advantages are speed of resolution, low cost (the average cost of arbitration is $4,000-$6,000), minimal disruption to employee and employer, and a sensitivity to workplace relationships, operating requirements and market concerns.

In the unionized environment, labor law has long recognized that corporate self-governance with limited outside intercession is a statutory and rational goal. ADR proponents agree that its processes, particularly arbitration, have evolved successfully in the union/management setting for more than 50 years and that these processes can be equally effective in resolving disputes in the nonunion setting, provided the proper safeguards are in place.

A Growing Backlash

On the other hand, there is a certain backlash growing against mandatory arbitration in the employment setting. While plaintiffs' attorneys have increasingly recognized that arbitration facilitates greater access to fair and timely resolution of discrimination claims, they are nonetheless troubled by the diminished likelihood of punitive damages in the absence of a jury and the concomitant loss of the deterrent effect of potential punitive damages.

As a result, legislation to prevent mandatory arbitration of employment disputes was introduced last year by several members of Congress. The proposed Civil Rights Procedures Protection Act would amend civil rights statutes and the Federal Arbitration Act expressly to prevent pre-dispute arbitration agreements from being enforced. Further, the Equal Employment Opportunity Commission adopted a policy supporting voluntary arbitration of employment disputes but opposing mandatory arbitration of employment disputes as a condition of initial or continued employment.

Similarly, the National Labor Relations Board's Office of General Counsel has taken the position, in at least two cases, that an employer violates the National Labor Relations Act when it requires employees and applicants to sign agreements requiring employees to submit employment claims to binding arbitration and agreeing not to file unfair labor practice charges with the NLRB. Finally, the Duffield court also noted that the securities industry recently voted to eliminate its mandatory arbitration requirement with regard to civil rights claims for registered brokers, the very one at issue in Duffield and Gilmer.

ADR, long on the cusp of popularity, still finds itself in legal limbo. The Supreme Court, however, has been steadily pushing the ADR boulder up the mountain, and may, through its

recent and pending decisions, provide the momentum needed to fulfill the higher expectations of its proponents.

ENDNOTES

(1) 1997 U.S. App. Lexis 19299 (4th Cir. July 29, 1997), cert. granted, 118 S. Ct. 1162 (1998).

(2) 144 F.3d 1182, 1998 U.S. App. Lexis 9284 (9th Cir. 1998).

(3) Seus v. John Nuveen & Co. Inc., 1998 U.S. App. Lexis 11907 (3d Cir. June 8, 1998).

(4) Johnson v. Circuit City Stores Inc., 148 F.3d 373 (4th Cir. 1998).

(5) 415 U.S. 36 (1974).

(6) 500 U.S. 20 (1991).

(7) 1998 U.S. App. Lexis 9284, at *18-*19.

(8) Id. at *31, *50.

(9) 105 F.3d. 1465 (D.C. Cir. 1997).

(10) Id.

(11) 118 S. Ct. 2257 (1998).

(12) 118 S. Ct. 2275 (1998).

(13) Skouby v. Prudential Ins. Co., 130 F.3d 794, 795 (7th Cir. 1997).

(14) King v. Georgetown Univ. Hosp., 1998 U.S. Dist. Lexis 8995, at *10-*11 (D.D.C. June 15, 1998).
