New York Law Journal®

NEW YORK, WEDNESDAY, DECEMBER 2, 1998

OUTSIDE COUNSEL

By Mark P. Zimmett

Court Leaves Waiver Issue Unresolved In Arbitration of Discrimination Claims

IN A DECISION more noteworthy for what it left undecided, the U.S. Supreme Court last month unanimously held that a union member could not be compelled under a broad-form arbitration agreement to arbitrate his statutory claim for employment discrimination. *Wright v. Universal Maritime Service Corp.*[1]

More specifically, the Court held that a collective bargaining agreement requiring arbitration of "matters under dispute" and a grievance provision in a labor management seniority plan broadly requiring arbitration of "any dispute" may not be enforced to compel arbitration of a union member's claim for alleged violation of the Americans with Disabilities Act.[2]

Petitioner Wright, a longshoreman, alleged that a number of stevedore companies and their trade association had violated the ADA by refusing him work. The defendants would not hire him because, following his settlement of a previous workers' compensation claim for permanent disability, they regarded him as permanently disabled and, therefore, not qualified to perform longshore work under the collective bargaining agreement.

Wright filed charges of discrimination with the Equal Employment Opportunity Commission and the South Carolina State Human Affairs Commission. He received a right-to-sue letter from the EEOC and brought an action in the U.S. District Court for the District of South Carolina.

The district court dismissed the case because Wright had failed to pursue the grievance procedure provided by the collective-bargaining agreement. The U.S. Court of Appeals for the Fourth Circuit affirmed the dismissal. The Supreme Court vacated the court of appeals' judgment and remanded the case.

Although the Court's decision is unanimous, its opinion is narrow. It does not reconcile two lines of cases

Continued on page 4, column 4

Mark P. Zimmett, *of the Law Offices of Mark P. Zimmett, practices commercial and international litigation.*

Continued from page 1, column 2

between which, as the Court acknowledges, "[t]here is obviously some tension . . . ." [3]

The first is represented by *Alexander v. Gardner-Denver Co.*,[4] which held that an employee does not forfeit his right to a judicial forum for claimed discriminatory discharge in violation of Title VII of the Civil Rights Act of 1964 [5] if "he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." [6] In *Gardner-Denver*, the Court reasoned that the statutory cause of action was not waived by the union's agreement to the arbitration provision in the collective bargaining agreement, since "there can be no prospective waiver of an employee's rights under Title VII." [7]

The 'Gilmer' Line

The second line of cases is represented by *Gilmer v. Interstate/Johnson Lane Corp.*[8] which held that a claim brought under the Age Discrimination in Employment Act [9] could be subject to compulsory arbitration pursuant to an arbitration provision in a securities registration form. Relying upon the federal policy favoring arbitration embodied in the Federal Arbitration Act (FAA),[10] the Court said that "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." [11]

Whereas *Gardner-Denver* stated that "an employee's rights under Title VII are not susceptible of prospective waiver," [12] *Gilmer* held that the right to a federal judicial forum for an ADEA claim could be waived. In *Wright*, the Court found it unnecessary to resolve the question of a union-negotiated waiver, because it found that, in that case, there had been no waiver.

Although there is a presumption of arbitrability under §301 of the Labor Management Relations Act,[13] the Court in *Wright* stated, "[t]hat presumption . . . does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts to interpret the terms of a [collective bargaining agreement] . . . The dispute in the present case . . . ultimately concerns not the application or interpretation of any [collective bargaining agreement], but the meaning of a federal statute." [14]

In addition to there being no presumption of arbitrability of Wright's statutory claim, the broad (and vague) contract language providing for arbitration of all "matters under dispute" and "any disputes" does not evidence a "clear and unmistakable" waiver required to enforce a union-negotiated waiver of a member's statutorily protected right.[15] Noting that *Gilmer* also involved a broad arbitration clause applying to "any dispute, claim or controversy," the Court distinguished *Gilmer* as having involved an individual's waiver of his own rights, rather than a union's waiver of the rights of its members. Therefore, the "clear and unmistakable" standard did not apply in *Gilmer*.[16]

A Narrow Holding

Wright's narrow holding is confined to the facts of the case. "We hold that the collective-bargaining agreement in this case does not contain a clear and unmistakable waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination." [17] The Court expressly left undecided whether such a waiver would be enforceable.[18]

Also left unclear is the extent to which an employee can be required by his or her own individual employment agreement to forego a judicial forum and arbitrate statutory employment discrimination claims. *Gilmer* did not decide this issue. *Gilmer* held that compulsory arbitration of an ADEA discrimination claim pursuant to the securities industry's registration Form U-4 was enforceable under the FAA that embodies a liberal policy favoring arbitration.[19] The case did not involve arbitration under a private employment contract. "Contracts of employment" are expressly excluded from coverage of the FAA.[20]

Moreover, the holding in *Gilmer* has recently been limited by lower courts narrowly construing it and is soon likely to be superseded by securities industry rule changes. Earlier this year, a federal district court in Massachusetts held that Title VII and ADEA claims were not required by Form U-4 to be arbitrated before the New York Stock Exchange for a reason that, the court stated, was not addressed by *Gilmer*: a "structural bias" favoring employers in stock exchange arbitrations.[21]

The Court of Appeals for the Ninth Circuit also declined to follow *Gilmer* in holding that a broker-dealer was not required to arbitrate Title VII claims. The court found that, in enacting the Civil Rights Act of 1991,[22] Congress intended to preclude compulsory arbitration of Title VII claims, an issue not addressed by *Gilmer*.[23]

More recently, the Securities and Exchange Commission approved a rule change proposed by the National Association of Securities Dealers that eliminates the requirement that registered employees, solely by reason of their association or registration with the NASD, arbitrate claims of statutory employment discrimination.[24] The rule change becomes effective January 1, 1999. The NASD takes no position on the desirability of private arbitration agreements, whether pre-dispute or post-dispute agreements, between member firms and their employees. Private agreements still will be permitted.

The NYSE filed proposed rule changes for approval by the SEC on September 15, 1998.[25] The proposed rule changes, now pending, exclude any claim of statutory employment discrimination from arbitration unless the parties have agreed to arbitrate the claim after it has arisen.

The position of the NYSE on the arbitration of statutory employment discrimination claims in the securities industry is similar to that of the EEOC as to the arbitration of such claims generally. The EEOC has been an active critic of mandatory pre-dispute agreements to arbitrate statutory employment discrimination claims. However, the EEOC is "in strong support of voluntary alternative dispute resolution programs [including binding arbitration] that resolve employment discrimination disputes in a fair and credible manner, and are entered into after the dispute has arisen." [26]

Unresolved Issues

What has the Supreme Court left unresolved after *Wright?*

First, as to union employees, it is unclear whether a clear and unmistakable union-negotiated waiver (as in a collective-bargaining agreement) of a covered employee's right to a judicial forum for federal claims of employment discrimination is enforceable.

Second, as to individual employment agreements, an open question exists over the extent to which such a waiver should be enforceable, an issue in the securities industry as to which the NASD and NYSE disagree.

An employer can offer employees a choice, either before or after a dispute has arisen, of pursuing their statutory claims in court or resolving them by arbitration. But the employer that wants to require its employees, as a condition of their employment, to waive their right to a judicial forum, including especially the right to a jury trial, and arbitrate any future claims for statutory employment discrimination, should draft an explicit waiver, clearly and unmistakably, and, in this very unclear enforcement environment, hope for the best.

(1) 1998 U.S. LEXIS 7270 (U.S., Nov. 16, 1998).
(2) 42 U.S.C. §12101 *et seq.*
(3) 1998 U.S. LEXIS 7270 at *11.
(4) 415 U.S. 36 (1974).
(5) 42 U.S.C. §2000e *et seq.*
(6) 415 U.S. at 49.
(7) Id. at 51.
(8) 500 U.S. 20 (1991).
(9) 29 U.S.C. §621 *et seq.*
(10) 9 U.S.C. §1 *et seq.*
(11) 500 U.S. at 26.
(12) 415 U.S. at 51-52.
(13) 29 U.S.C. §185. The Court expressly declined to consider whether the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, under which it has also "discerned a presumption of arbitrability," applied to *Wright.* 1998 U.S. LEXIS 7270 at *13, n.1.
(14) Id. at *14.
(15) Id. at *16 (citing, *inter alia, Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)).
(16) Id. at * 17-18.
(17) Id. at *20.
(18) Id.
(19) 500 U.S. at 25 (citing *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).
(20) 9 U.S.C. §1.
(21) *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 995 F.Supp. 190, 207 (D. Mass., 1998).
(22) Pub. L. No. 102-166, 105 Stat. 1071 (1991).
(23) *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1189-1190 (9th Cir., 1998).
(24) SEC Release No. 34-40109, "Order Granting Approval to Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims," File No. SR-NASD-97-77, June 22, 1998.
(25) SEC Release No. 34-40479 (Sept. 24, 1998), "Notice of Filing of Proposed Rule Changes by New York Stock Exchange, Inc. Relating to Arbitration Rules," File No. SR-NYSE-98-28.
(26) EEOC Notice, No. 915.002 (Jul. 10, 1997). See also SEC Release No. 34-40479, quoting Letter from Gilbert F. Casellas, Chairman, EEOC, to Jonathan G. Katz, Secretary, SEC, regarding NASD Proposed Rule Change on Arbitration of Employment Discrimination Claims, December 1997.