University of Florida Journal of Law & Public Policy

Volume 11 | Issue 1 Article 6

1999

Arbitration Law: Jurisprudence of Uncertainty

Matthew L. Hicks

COMMENT

ARBITRATION LAW: JURISPRUDENCE OF UNCERTAINTY

Wright v. Universal Maritime Service Corp.
525 U.S. 70, 119 S. Ct. 391 (1998).

*Matthew L. Hicks**

Petitioner, who worked as a longshoreman for several stevedore companies,[1] filed a discrimination claim under the Americans with Disabilities Act (ADA)[2] in the United States District Court for the District of South Carolina.[3] In their answer, the South Carolina Stevedores Association and six separate stevedore companies[4] as Respondents raised several affirmative defenses that included Petitioner's failure to process his grievance through the collective bargaining agreement (CBA)[5] and Longshore Seniority Plan.[6] Respondents moved for summary judgment following discovery.[7] The district court dismissed the case without prejudice and denied Petitioner's motion for reconsideration.[8] On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the

---

* To Mary, with love. You inspire me everyday. This case comment received the Huber C. Hurst Award for the outstanding case comment for Spring 1999.

1. *See* Wright v. Universal Maritime Serv. Corp., 525 U.S. 70, 119 S. Ct. 391, 393 (1998).

2. *See id.* at 394. The Court declined to reconcile *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and instead established the clear and unmistakable standard for the waiver of statutory employment claims. *See id.* at 394-96. Despite the sense of fairness, the standard brought to employment contracts much remained unanswered. Visible benefits and uncertainty disguise the fact that *Gardner-Denver* has not been overruled. Applying the clear and unmistakable standard to arbitration clauses in collective bargaining agreements represents a net loss to union members. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12117 (1990).

3. *See Wright*, 119 S. Ct. at 394.

4. *See id.*

5. The CBA was between the International Longshoremen's Association, AFL-CIO, representing petitioner and the South Carolina Stevedores Association (SCSA), respondent. *See id.* at 393.

6. The Longshore Seniority Plan contained a grievance procedure distinct from that of the CBA. *See id.* at 393-94.

7. *See id.* at 394. Petitioner moved for partial summary judgment in response to some of Respondents' defenses. *See id.*

8. *See id.* The District Court's decision was based on a recommendation of the Magistrate Judge. *See id.*

holding that the CBA was voluntarily agreed to and therefore enforceable.[9] Petitioner appealed and the United States Supreme Court granted certiorari.[10] The Court vacated, remanded the Fourth Circuit's decision[11] and HELD that because the general arbitration clause included in the CBA did not contain a clear and unmistakable waiver of Petitioner's right to a judicial forum,[12] the arbitration clause did not require Petitioner to arbitrate his ADA claim.[13]

Two decades ago, federally created employment rights began to flood courts with claims and arbitration proved a convenient tool to relieve overcrowded dockets.[14] In order to expand arbitration, the Court had to streamline constitutional principles to accommodate non-judicial forms of dispute resolution.[15] However, streamlining constitutional principles meant bending the longstanding doctrines of separation of powers[16] and procedural due process.[17] For example, the Court strained the separation of powers doctrine by upholding legislation that permitted private citizens to remove cases from Article III courts to non-judicial forums.[18] The Court also developed a flexible due process approach that allowed for case-by-case modification of procedure to fit the needs of private parties and the circumstances of the case.[19] This approach is a departure from procedural due process principles since the Fifth Amendment does not guarantee due process of law to private agreements.[20]

Despite its questionable jurisprudence, the Court successfully expanded

---

9. *See* Wright v. Universal Maritime Serv. Corp., 121 F.3d 702 (4th Cir. 1997), *rev'd*, 525 U.S. 70, 119 S. Ct. 391 (1998).

10. *See Wright*, 119 S. Ct. at 394.

11. *See id.* at 397.

12. *See id.* The Court found that the Longshore Seniority Plan also lacked a clear and unmistakable waiver. *See id.*

13. *See id.*

14. *See* Vicki Zick, *Reshaping the Constitution to Meet the Practical Needs of the Day: The Judicial Preference for Binding Arbitration*, 82 MARQ. L. REV. 247, 247-48 (1998). The author attributes the heavy case loads in federal courts to a lack of funding combined with increasing statutory employment claims and decreasing collective bargaining. *See id.* at 248.

15. *See id.*

16. *See id.* at 262-63. For example, in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), the Court held that a statute allowing private citizens to invoke the Commodity Futures Trading Commission (CFTC) to settle common law claims was valid. *See id.* at 257. Also, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court held in part that the Federal Communications Commission (FCC) encouraged the arbitration of statutory employment claims. *See id.* at 263.

17. *See Gilmer*, 500 U.S. at 30-31; Brock v. Roadway Express, Inc., 481 U.S. 252, 263 (1987); Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 326 (1985); Mathews v. Eldridge, 424 U.S. 319, 322 (1976); *see also* Zick, *supra* note 14, at 248 & 258.

18. *See* Zick, *supra* note 14, at 257-60.

19. *See id.* at 257-58.

20. *See id.* at 259.

arbitration into the realm of employment contracts.[21] Employers usually agreed to include arbitration clauses in employment contracts in exchange for the union's promise not to strike.[22] Employees have argued that, under CBAs, individual member interests can be subordinated to the collective interests of the members,[23] and that this subordination can result in a lost claim due to union negligence or reasons affecting the collective good.[24] Critics also have argued that CBAs use boilerplate language and thus the waivers derived from them are less than voluntary.[25] Sometimes drafters of arbitration clauses have included the phrases "knowing waiver"[26] and "clear and unmistakable" waiver[27] to prevent unconscionability.[28] According to some critics, employers have coerced employees to agree to arbitration as a condition of employment.[29] In order to avoid these unfair practices, employees should be given the option to arbitrate after a claim arises rather than be mandated through pre-employment agreements.[30]

Early cases, such as *Alexander v. Gardner-Denver Co.*,[31] held that arbitration clauses did not prevent employees from bringing statutory claims in federal court.[32] In *Gardner-Denver*, the petitioner filed a Title VII employment discrimination claim after being fired.[33] After the arbitrator denied the petitioner relief, petitioner brought the Title VII claim in federal court and appealed to the United States Supreme Court.[34] In the statute's history, the Court found that Title VII gave federal courts plenary power to settle employment discrimination disputes.[35] Next, the Court distinguished a statutory right asserted under Title VII from a contractual right arising under a union-negotiated contract.[36] According to the Court,

---

21. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 54 (1974).

22. *See id.*

23. *See id.* at 58, n.19.

24. *See* John-Paul Motley, *Compulsory Arbitration Agreements in Employment Contracts from* Gardner-Denver *to* Austin: *The Legal Uncertainty and Why Employers Should Choose Not to Use Preemployment Arbitration Agreements*, 51 VAND. L. REV. 687, 707 (1998).

25. *See id.* at 710-13.

26. *See id.* at 699.

27. *See* Metropolitan Edison Co. v. National Labor Relations Bd., 460 U.S. 693, 708 (1983).

28. *See* Motley, *supra* note 24, at 707.

29. *See id.* at 710.

30. *See id.* at 711.

31. 415 U.S. 36, 59-60 (1974).

32. *See id.; see also* McDonald v. City of West Branch, 466 U.S. 284, 288 (1984) (rejecting the claim that an award in arbitration precludes a federal suit); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 749 (1981) (holding that the fundamental right to a discrimination free workplace cannot be bargained away in arbitration).

33. *See Gardner-Denver*, 415 U.S. at 42.

34. *See id.* at 43.

35. *See id.* at 45.

36. *See id.* at 49-50.

an arbitrator exceeds the scope of his powers to interpret and to apply the CBA if he decides questions of public law.[37]

Cases following *Gardner-Denver* resisted the arbitration of statutory employment claims.[38] The Court persisted, however, and declared a new "liberal federal policy favoring arbitration" in the first four sections of the 1925 Federal Arbitration Act (FAA).[39] Section 1 of the FAA excludes certain employment contracts from its rules.[40] The application of section 1 by lower courts has led to inconsistent results.[41] For example, some circuits interpret the exclusion clause generally to include all types of employment contracts.[42] Conversely, the Fourth Circuit interprets section 1 to exclude all employment contracts.[43] The Sixth Circuit strikes a balance by interpreting section 1 to include all individual contracts, but to exclude CBAs.[44]

Despite the conflicting interpretations of the section 1 exclusions, arbitration of statutory employment claims began to take hold.[45] In *Gilmer v. Interstate/Johnson Lane Corp.*,[46] petitioner filed an age discrimination claim under the Age Discrimination in Employment Act (ADEA).[47] The Court decided the issue of whether an arbitration clause in a securities registration application compelled an employee to arbitrate an ADEA claim.[48] The Court determined that the burden was on the petitioner to show that Congress intended the ADEA to compel arbitration and to forbid a waiver to a judicial forum.[49] In holding that parties did not give up their statutory rights by settling their claims in a non-judicial forum,[50] the Court

---

37. *See id.* at 53.

38. *See* McDonald v. City of West Branch, 466 U.S. 284 (1984); Barrentine v. Arkansas-Best Freight Systems, Inc., 450 U.S. 728 (1981).

39. *See* Federal Arbitration Act (FAA) of 1925, 9 U.S.C. § 1 et seq. (1925); Gilmer v. Interstate/Johnson Lane, Inc., 500 U.S. 20, 25 (1991).

40. *See* Federal Arbitration Act (FAA) of 1925, 9 U.S.C. § 1 (1925). Section 1 reads in part, "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id.*

41. *See* Motley, *supra* note 24, at 691-92.

42. *See id.* at 692. The First, Second, Third, Fifth, Seventh, Eighth, and D.C. Circuits are of this type. *See id.*

43. *See id.*

44. *See id.*

45. See *id.* at 695 (citing Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 486 (1989); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 241-42 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)).

46. 500 U.S. 20 (1991).

47. *See id.* at 23-24.

48. *See id.* at 23.

49. *See id.* at 26. The text, legislative history, and general purpose of the statute proved the burden. *See id.*

50. *See id.* at 35.

identified three major distinctions between *Gilmer* and *Gardner-Denver*.[51] First, *Gardner-Denver* decided the issue of whether arbitration of a claim under a CBA waived resolution of a statutory claim in federal court.[52] *Gilmer*, on the other hand, decided the issue of whether an agreement to arbitrate a statutory claim was enforceable.[53] Second, *Gardner-Denver* involved a union-negotiated CBA, whereas, *Gilmer* involved an individual employment contract between an employee and the NYSE.[54] Finally, the Court noted that *Gardner-Denver* was not decided in light of the federal policy favoring arbitration espoused in the FAA.[55]

Since *Gilmer* distinguished *Gardner-Denver* without overruling it, lower court decisions following *Gilmer* lacked consistency.[56] The Fourth Circuit attempted to settle the *Gardner-Denver/Gilmer* debate by enforcing voluntary waivers in both individual employment contracts and CBAs.[57] Few courts followed the Fourth Circuit,[58] however, and the state of employment contracts remained in flux. The circuits were waiting for a clear signal from the nation's highest Court.

In the instant case, the Court had the opportunity to pacify the circuits and to put the *Gardner-Denver/Gilmer* debate to rest by deciding whether the law would treat arbitration clauses under individual employment contracts the same as those under CBAs.[59] The Court, however, chose another course. Instead of focusing on what type of contract parties entered, the court focused on how the parties entered the contract.[60]

In deciding whether Petitioner's ADA claim could properly be settled under the CBA, the Court first looked for a presumption of arbitrability in the Labor Management Relations Act[61] (LMRA).[62] The presumption of arbitrability provides that arbitration procedures should be followed in labor disputes unless the nature of the claim is not subject to interpretation

---

51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.*

55. *See id.*

56. *See* Motley, *supra* note 24, at 698-99. The Fifth, Sixth, Tenth, and Eleventh Circuits have generally restricted the enforcement of arbitration clauses to securities registration applications. *See id.* at 698. Most of the remaining circuits enforce arbitration clauses included in individual employment contracts when the contracts are knowingly and voluntarily entered. *See id.*

57. *See* Austin v. Owens-Brockway Glass Container, 78 F.3d 875, 885 (4th Cir.), *cert. denied*, 519 U.S. 980 (1996).

58. *See* Motley, *supra* note 24, at 705.

59. *See* Wright v. Universal Maritime Serv. Corp., 119 S. Ct. 391, 395 (1998).

60. *See id.* at 396-97.

61. *See id.* at 395.

62. *See* Labor Management Relations Act of 1947, 29 U.S.C. §§ 171-187 (1947); *Wright*, 119 S. Ct. at 395.

under the arbitration terms.[63] The rationale behind the presumption is that arbitrators are better able to interpret CBAs than the courts.[64] The LMRA provides that arbitration is intended for questions concerning application and interpretation of a CBA.[65] According to the instant Court, the CBA settled questions of whether an employee was qualified for the job, whereas, the ADA settled questions of whether the refusal to hire an employee was a statutory violation.[66] In the instant case, the Court identified the cause of action as arising out of a statutory right, not a contractual right.[67] Since the statutory cause of action was not susceptible to an interpretation under the arbitration clause[68] and the arbitration clause did not incorporate the ADA by reference,[69] the Court denied Respondents the benefit of the presumption of arbitrability.[70]

The Court then considered whether unions could waive employee rights to a judicial forum in statutory causes of action.[71] *Gardner-Denver* held that a union could never waive an employee's statutory rights to a judicial forum.[72] In *Metropolitan Edison Co. v. National Labor Relations Bd.*, a company could waive its employee's statutory rights if that waiver was clear and unmistakable.[73] In *Gilmer*, the Court found that the ADEA was subject to compulsory arbitration.[74] In attempting to reconcile these cases, the Court distinguished *Gilmer* by pointing out that the case involved an employee's voluntary waiver of individual rights.[75] According to the Court, the clear and unmistakable standard only applied to a union's waiver of employee rights.[76] Individual employees could not voluntarily waive their statutory rights.[77] Instead of buttressing the *Gilmer* holding, the instant Court carved out a procedural exception for union-negotiated

---

63. *See Wright*, 119 S. Ct. at 395 (citing AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 650 (1986)).

64. *See id.* (citing *AT&T*, 475 U.S. at 650).

65. *See id.* at 396 (citing 28 U.S.C. § 173(d)).

66. *See id.*

67. *See id.*

68. *See id.*

69. *See id.* Clause 17 of the CBA reads, "It is the intention and purpose of all parties hereto that no provision or part of this Agreement shall be violative of any Federal or State Law." *Id.* at 393.

70. *See id.* at 396.

71. *See id.* at 396-97.

72. *See id.* at 394 (citing *Gardner-Denver Co.*, 415 U.S. at 51).

73. *See id.* at 396 (citing Metropolitan Edison Co. v. National Labor Relations Bd., 460 U.S. 693, 708 (1983)).

74. *See id.* at 394-95 (citing *Gilmer*, 500 U.S. at 23).

75. *See id.* at 397.

76. *See id.*

77. *See id.*

contracts.[78] The Court entertained arguments of whether *Gilmer* overruled *Gardner-Denver*.[79] The Court declined to decide this question but said that even if it was weakened, *Gardner-Denver* still supported a clear and unmistakable requirement.[80] Ultimately, the Court left the issue of whether Gilmer overruled Gardner-Denver in mid-argument, deciding the instant case instead by finding an absence of a clear and unmistakable waiver.[81]

The Court's holding seems innocent enough: avoid deciding whether a union's waiver of an employee's statutory rights is enforceable by finding that no waiver existed.[82] However, by incorporating the requirement that waivers in union-negotiated contracts meet a clear and unmistakable standard to be enforceable, the Court may have exposed union members to a greater likelihood of compulsory arbitration.

The clear and unmistakable waiver requirement brings a sense of fairness to arbitration of CBAs. One way to make the process more fair for employees is to shift the burden of waiver from the employee back to the employer. In *Gilmer*,[83] the Court held that the burden was on the petitioner to show that Congress intended the ADEA to forbid a waiver.[84] Looking at the text, legislative history, and the general purpose of the statute proved the burden.[85] In the instant case, the requirement for a clear and unmistakable waiver places the burden on the employer to find a waiver supported by the language of the CBA.[86] Because the arbitration clause in the instant case made no mention of a waiver either directly or through statutory reference, the Court found for the Petitioner.[87]

The clear and unmistakable waiver requirement also makes the CBAs entered more fair. Critics have argued that CBAs use boilerplate language and that the waivers derived from the agreements are less than voluntary.[88] A clear and unmistakable waiver requirement should make employees more aware that their rights are at stake when they enter pre-employment contracts. Such a requirement might not go far enough, however. Some critics have argued that requiring employees to agree to arbitration as a

---

78. *See id.*

79. *See id.* at 395.

80. *See id.* at 396.

81. *See id.* The Court interprets Clause 15(F) of the CBA to exclude anything not made part of the agreement. *See id.* at 397. Since the CBA did not include anti-discrimination requirements the Court found no waiver. *See id.* The Court also interpreted Clause 17 to strengthen agreements and found no waiver. *See id.*

82. *See id.* at 395.

83. *See Gilmer* 500 U.S. at 35.

84. *See id.* at 26.

85. *See id.*

86. *See Wright*, 119 S. Ct. at 396.

87. *See id.* at 395.

88. *See* Motley, *supra* note 24, at 710-13.

condition of employment is a form of coercion.[89] In order to avoid these unfair practices, employees should be allowed to decide whether to arbitrate after a claim arises rather than be compelled through pre-employment agreements.[90]

Regardless of how fair the clear and unmistakable waiver requirement might be to union members, it does not apply equally to employees under individual employment contracts.[91] In the instant case, the Court held that an individual employment contract was not susceptible to the clear and unmistakable standard.[92] In doing so, the Court showed a preference for union-negotiated contracts. To be sure, the rights of employees under CBAs need to be protected since those rights may be subordinated to the collective interests of all employees.[93] *Gardner-Denver* held that an arbitrator exceeds the scope of his powers to interpret and to apply a CBA if he decides questions of public law, regardless of whether he is arbitrating under a CBA or an individual employment contract.[94] Equity suggests that all employment contracts be afforded the right to a federal forum for statutory claims.

In its decision, the Court failed to reconcile the disparate circuits.[95] A major source of confusion is the section 1 exclusion clause of the FAA.[96] Some circuits interpret the exclusion clause to mean that individual contracts and not CBAs are included within the FAA section 1,[97] while other circuits interpret the exclusion clause to include all types of employment contracts.[98] Amidst the uncertainty, the circuit courts of appeal might grasp the clear and unmistakable waiver as an interpretation of section 1. One possible interpretation is that CBAs with a clear and unmistakable waiver must be arbitrated and thus fall outside of section 1. But such an interpretation ignores the fact that *Gardner-Denver* has not been overruled.[99] By applying the clear and unmistakable waiver requirement to CBAs, the Court invites the possibility that waivers in CBAs might be more enforceable if employers were more explicit.[100]

The Court declined to reconcile *Gilmer* and *Gardner-Denver* and

---

89. *See id.* at 710.
90. *See id.* at 711.
91. *See Wright*, 119 S. Ct. at 395.
92. *See id.*
93. *See Gardner-Denver Co.*, 415 U.S. at 58.
94. *See id.* at 53.
95. *See* Motley, *supra* note 24, at 692.
96. *See* Federal Arbitration Act (FAA) of 1925, 9 U.S.C. § 1 (1925).
97. *See* Motley, *supra* note 24, at 692.
98. *See id.*
99. *See Gilmer*, 500 U.S. at 35 (holding that agreement to arbitrate a statutory claim was enforceable).
100. *See* Wright v. Universal Maritime Serv. Corp., 119 S. Ct. 391, 395 (1998).

instead established the clear and unmistakable standard for the waiver of statutory employment claims. Despite the sense of fairness this standard brought to employment contracts, much remains unanswered. Superficial benefits and uncertainty disguise the fact that *Gardner-Denver* has not been overruled. Yet, the instant Court has given employers party to union-negotiated employment contracts clearance to waive their employees' rights to a judicial forum as long as the employer does so expressly. As a result, applying the clear and unmistakable standard to arbitration clauses in CBAs represents a net loss to union members.