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LABOR LAW

'Penn Plaza v. Pyett'

By Jay W. Waks and David B. Lipsky

Since *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991), federal courts have blessed individual arbitration agreements limiting court access to resolve statutory claims of employment discrimination, but have disagreed on whether similar provisions in labor agreements should be enforced. Those circuits denying enforcement, however, appear to have missed the message of the U.S. Supreme Court in *Wright v. Univ. Maritime Serv.*, 525 U.S. 70, 80 (1998), that union-negotiated court waivers, if "clear and unmistakable," could be enforceable. Their view fails to recognize, as did much pre-*Gilmer* jurisprudence, the myriad ways in which labor arbitration has improved since *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), on which those circuits generally rely in avoiding contractual labor arbitration of a worker's statutory discrimination claims. The Supreme Court is now poised to apply *Gilmer* to the organized workplace in *14 Penn Plaza v. Pyett*, 498 F.3d 88 (2d Cir. 2007), cert. granted 128 S. Ct. 1223 (U.S. Feb. 19, 2008) (No. 07-581), argued on Dec. 1, 2008, and to decide whether labor arbitration is hospitable to statutory claims.

Critics assume that collectively bargained arbitration is inherently inferior to court. They argue that labor arbitrators seek to be repeat players and, accordingly, are more interested in satisfying the parties than providing justice for the grievant, an aspect of what *Gilmer* termed "the tension between collective representation and individual statutory rights." Further, critics express concern that many labor arbitrators are not attorneys and may not have experience or training in handling statutory claims. See Michel Picher, et al., Arbitration Profession in Transition 12, 26 (2000), http://digitalcommons.ilr.cornell.-edu/icrpubs/1/ (reporting that only 61% of National Academy of Arbitrators members have law degrees, while 82% have arbitrated at least one statutory claim in preceding three years). Finally, some criticize procedural due process, pointing to lesser discovery in workplace arbitration and absence of rationale in some awards.

High court is now far more supportive of arbitration

Proponents point out that the Supreme Court no longer views arbitration as inferior. The court's strongest support of workplace arbitration dates to the *Steelworkers Trilogy* and the "specialized needs" that "[t]he ablest judge cannot be expected to bring." *USWA v. Warrior and Gulf Navigation*, 363 U.S. 574, 582 (1960). Proponents also assert that our busy judiciary cannot be expected to have instant familiarity with the workplace, whether the issue boils down to fairness or discrimination.

Although the court occasionally has criticized arbitration, the past 34 years have seen a sea change in the court's recognition of arbitration as a viable alternative. Eleven years after *Gardner-Denver*, the court observed: "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626-27 (1985). In *Gilmer*, the court affirmed the capability of arbitrators to decide both statutory and contractual workplace claims, noting that *Gardner-Denver*'s "mistrust of the arbitral process" had been "undermined" by more recent decisions. 500 U.S. at 34 n.5. In *Circuit City Stores v. Adams*, 532 U.S. 105, 123 (2001), the court held that most employment arbitration agreements could be enforced under the Federal Arbitration Act.

Critics assume that an employee with a valid statutory claim would be able to pursue it in court were it not for mandatory arbitration. Accessibility, however, is arbitration's virtue, according to *Circuit City*: "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." Workers are not assured of finding a private attorney willing to

Jay W. Waks *is litigation partner and chairman of the employment and labor law practice at New York's Kaye Scholer.* **David B. Lipsky** *is Estabrook Professor of Dispute Resolution at Cornell University's ILR School and director of its Scheinman Institute on Conflict Resolution. Neal Hampton, a third-year student at the University of Virginia School of Law and a 2008 summer associate at the firm, contributed to the article.*

pursue their claims in court, assuming that they are cognizable under law. See Elizabeth Hill, "Due Process at Low Cost: An Empirical Study of Employment Arbitration," 18 Ohio St. J. on Disp. Resol. 777, 782-83 (2003) (survey of plaintiffs' attorneys found they accepted only 5% of employment representations). Moreover, reasoned decisions are commonplace in labor arbitration, as are procedures to select arbitrators with reputations for knowledgably adjudicating statutory claims.

Studies comparing outcomes of litigation and arbitration indicate that criticism of arbitration is "overstated or simply wrong." David Sherwyn, et al., "Assessing the Case for Employment Arbitration," 57 Stan. L. Rev. 1557, 1567, 1578 (April 2005). These studies show that plaintiffs do not necessarily fare better in litigation. Also, the speedier resolutions of labor arbitrations place less of a financial and emotional burden on workers and enhance the chance of their retaining work relationships.

The responsive, flexible nature of arbitration also means litigation's myriad procedures are not always needed. But those that are essential to due process are enforced. See American Arbitration Association, "Employment Due Process Protocol" and "Employment Arbitration Rules and Mediation Procedures," at www.adr.org; JAMS, "Employment Arbitration Rules and Procedures," www.jamsadr.com/rules/employment_arbitration_rules.asp.

Since *Gilmer*, *Wright* and *Circuit City*, thousands of employers have adopted predispute court waivers. Even the circuits that have banished union waivers would enforce compulsory arbitration in the nonunion workplace. See *ALPA v. Northwest Airlines*, 211 F.3d 1312 (D.C. Cir.), reinstating 199 F.3d 477, 484 (D.C. Cir. 1999); *Pryner v. Tractor Supply*, 109 F.3d 354 (7th Cir.), cert. denied 522 U.S. (1997); *Albertson's v. UFCW*, 157 F.3d 758 (9th Cir. 1998), cert. denied, 528 U.S. 809 (1999); *Harrison v. Eddy Potash*, 112 F.3d 1437 (10th Cir. 1997); *Brisentine v. Stone & Webster*, 117 F.3d 519 (11th Cir. 1997).

Labor arbitration negotiated bilaterally is at least as protective of workers as arbitration unilaterally promulgated by employers. A nonunion employee, faced with signing on to predispute arbitration, essentially has a binary choice: agree to arbitration designed by the employer or seek other employment. On the other hand, permitting statutory claims to be arbitrated under a labor agreement allows the union to negotiate sufficient safeguards for those it represents. Moreover, workers normally have the opportunity to give input to union bargainers, ratify the agreement, participate in electing their negotiators and access union counsel.

Workers whose unions have not pursued statutory grievances still have recourse. In *EEOC v. Waffle House*, 534 U.S. 279 (2001), the court held that an employee subject to mandatory arbitration may file a discrimination charge with the Equal Employment Opportunity Commission, which retains authority to pursue it. Furthermore, the union may be kept in check by its duty of fair representation and by its internal election or ratification processes. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998). Comparable to nonunion workplaces, there also are ample grounds to vacate an award. See Federal Arbitration Act, 9 U.S.C. 9-11 (2006); *Cole v. Burns Int'l*, 105 F.3d 1465, 1469 (D.C. Cir. 1997) ("Because the courts will always remain available to ensure that arbitrators properly interpret the dictates of public law, an agreement to arbitrate statutory claims of discrimination is not unconscionable or otherwise unenforceable").

High court is poised to apply 'Gilmer' to the union workplace and rule on whether arbitration is hospitable to statutory claims.

Courts presume waivers to be knowing and voluntary

Once the union negotiates a court waiver in favor of arbitration that "clear[ly] and unmistakabl[y]" covers workplace discrimination, that waiver should be presumed to be knowing and voluntary as to bargaining unit workers. See, generally, *Romano v. Canutsen*, 11 F.3d 1140, 1141 (2d Cir. 1993) ("New York State courts announced that due process requirements are not of controlling relevance if the party seeking to assert them has waived them in a voluntary agreement such as a collective bargaining agreement"); *Grandi v. New York Transit Authority*, 977 F. Supp. 590, 595 (E.D.N.Y. 1997) (employee who did not personally sign a collective bargaining agreement was still bound by that agreement's waiver of his due process rights). It certainly is as knowing and voluntary as the nonunion employee's "acceptance" of binding arbitration imposed unilaterally by an employer. See *Meyer v. Starwood Hotels & Resorts Worldwide*, No. 00 Civ. 8339, 2001 WL 396447 (S.D.N.Y. April 18, 2001). Nevertheless, a more enlightened practice, not required by law, would be to have represented workers signify the waiver in writing.

The solution to any perceived "tension between collective representation and individual statutory rights" is not to preclude enforcement. Even those in Congress who propose banning predispute arbitration agreements would exempt collectively bargained arbitration. See Arbitration Fairness Act of 2007, S. 1782, H.R. 3010, 110th Cong. § 4 (1st Sess. 2007); Civil Rights Act of 2008, S. 2554, H.R. 5129, 110th Cong. § 423 (2d Sess. 2008). The Supreme Court now has the opportunity to promote the advantages of arbitration, this time in the collective bargaining setting, and let the parties improve it. NLJ