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MAKING ARBITRATION AN EQUITABLE ALTERNATIVE TO A DAY IN COURT

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ABSTRACT

Arbitration, long an important tool in settling labor disputes, is now being endorsed by the courts and the legislature as the panacea for settling employment disputes as well. However, this quasijudicial process, designed to resolve contractual disputes between organized labor and management, should not be presumed as equitable or effective a tool when used in its present form to settle employment disputes. This study analyzes the significant differences between labor and employment arbitration that must be addressed before employment arbitration can be a truly effective and equitable solution to the problems of the individual employee in the workplace.

The last decade has seen a steady decline in the unionization of this nation's workforce, and with that decline an erosion of the employment and civil rights of the individual employee. At present only 14.9 percent of the total workforce is organized for collective bargaining [1], and the security of a labor contract backed by union strength and numbers has been replaced with an increase in individual employment contracts. There is, however, a distinct inequity in the bargaining power of an individual employee faced with the ultimatum of unequivocally accepting a prospective contract as written, or declining an offer of employment. Nevertheless, a bird in hand is still worth two in the bush, and so employees blindly relinquish their rights in signing agreements that inevitably favor employers.

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It is, for example, a common practice in many businesses to require employees to agree in writing to submit all employment disputes, including those dealing with discrimination issues, to final and binding arbitration. Since it has been argued that the Federal Arbitration Act, the law governing the federal enforcement of arbitration agreements, specifically exempts from its coverage "contracts of employment" [2], "side" agreements to compel arbitration of all employment disputes have become a virtual tradition in private sector employment. Such agreements, surrendering an employee's basic right to have a jury decide issues of racial, gender, age, and disability discrimination, are required boilerplate, separate from the employment contract itself and thus totally enforceable. Job applicants are too thrilled with the offer of employment to question the conditions attached to that offer, or to anticipate future problems. Prospective employees, even those with college degrees, do not realize the full impact of accepting employment under the condition that *all* disputes be finally and completely settled through binding arbitration. Few understand the rubric and limitations of binding arbitration when compared to the day in court they are forfeiting.

HISTORY OF THE PROBLEM

In 1974, in *Alexander v. Gardner-Denver Co.*, the U.S. Supreme Court held that an employee who had been discharged and grieved his discharge pursuant to a clause in the collective bargaining agreement requiring arbitration did not, by complying with the contract, give up his right to bring a Title VII action in the courts arising from the same grieved conduct [3]. The Court distinguished an employee's rights under the collective bargaining agreement from statutory rights protected by Title VII. The *Gardner-Denver* decision stated that the role of the arbitrator was to effectuate the intent of the parties as expressed in the collective bargaining agreement [3, at 53]. The Court specifically said it was not the role of the arbitrator to enforce public laws [3, at 53]. Only federal courts have been assigned plenary powers to secure compliance with Title VII [3, at 47]. In an effort to clarify the interaction between the role of the arbitrator and that of the courts in resolving employment disputes based on Title VII, the Court emphasized that there is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of their jurisdiction [3, at 47].

Thus, initially, in the wake of *Gardner-Denver*, employees who signed contracts with compulsory arbitration clauses were not required to forego their day in court regarding a violation of a statutory right simply because a contractual agreement required the arbitration of all employment disputes. Arbitrators settled contractual disputes and the courts settled statutory disputes.

Seventeen years later, however, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court, perhaps influenced by the economic and political pressures of the times, reversed its position regarding the arbitration of statutory rights [4]. In

this case, the Court held that an Age Discrimination in Employment Act (ADEA) claim could be exclusively resolved by the compulsory binding arbitration process agreed to at the time of employment. The employee in *Gilmer* was required, in an agreement separate from his employment contract, to arbitrate any controversy giving rise to employment termination. The plaintiff employee in *Gilmer*, in an Equal Employment Opportunity Commission (EEOC) complaint and subsequent suit, charged the employer with age discrimination. In response, the employer compelled arbitration of the ADEA claim invoking both the requirements of the contract to arbitrate and the Federal Arbitration Act.

In its review of this case, the Supreme Court concluded that nothing in the text or legislative history of the ADEA prohibits the use of arbitration as a means of settling employment disputes arising from age discrimination [4, at 35]. The Court also noted that arbitration was not inherently inconsistent with the statutory scheme and purposes of the ADEA [4, at 21, 27-29].

The Gilmer Court distinguished the *Gardner-Denver* decision by noting that the primary focus of *Gardner-Denver* was contract, not statutory, claims, and that the plaintiffs in *Gardner-Denver* were represented in arbitration by a union [4, at 35]. The primary concern in *Gardner-Denver* was the tension between collective representation and individual statutory rights, a concern not applicable in *Gilmer* [4, at 35]. In *Gilmer*, the dispute centered on a separate procedural agreement signed by an individual employee. This agreement to arbitrate all employment disputes, separate from the plaintiff's contract, was not part of an "employment contract," and was therefore enforceable under the terms of the Federal Arbitration Act.

The Supreme Court reiterated its stand allowing the arbitration of Title VII claims as well when it vacated and remanded *Dean Witter Reynolds Inc. v. Alford*, a Fifth Circuit decision that had relied on *Gardner-Denver* in refusing to dismiss the plaintiff's Title VII claim [5]. This case, but for its subject matter, was identical to *Gilmer*, and the Fifth Circuit was directed to reconsider its decision in light of *Gilmer*. As a result, the Fifth Circuit unanimously reversed its earlier position, concluding that *Gilmer* required it to order the trial court to dismiss the plaintiff's Title VII complaint and to order arbitration. In light of the similarities between Title VII and the ADEA, the appellate court had no difficulty in applying the Court's reasoning in *Gilmer* to conclude that Title VII claims could also be arbitrated.

In addition to this show of judicial support for the binding arbitration of statutory claims, Section 118 of the 1991 Civil Rights Act provides legislative endorsement for the use of arbitration in settling statutory claims. Section 118 states:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiation, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged

> to resolve disputes arising under the Acts or provisions of Federal law amended by this Act [6].

Thus, it is clear statutory claims are fully subject to binding arbitration, at least outside of the context of collective bargaining [4, at 26]. What has not been addressed is the fact that arbitration outside the context of collective bargaining may need to be adjusted before being applied to individual employment disputes.

HOW EMPLOYMENT DISPUTES DIFFER FROM LABOR DISPUTES

At first glance it may appear that the legal precepts governing the enforcement and review of arbitration in labor disputes should also be applicable to employment disputes. There are, however, significant differences between labor and employment disputes and the use of arbitration in each forum. These differences make any attempt to equate labor arbitration with employment arbitration tantamount to squeezing a square peg into a round hole.

Law vs. Contract

Employment disputes, unlike labor disputes, are often based on a violation of law rather than a violation of contract. Employment law and litigation exist to protect both the statutory and contractual rights of employees who are *not* protected by a collectively bargained agreement. Statutory rights, however, are not the same as collectively bargained contractual rights. At the very least, statutory rights include both a substantive protection and access to a neutral forum in which to enforce those protections [7]. Statutory rights are created, defined, and subject to modification *only* by Congress and the courts [7, at 1476]. In contrast, collectively bargained rights are created, defined, and subject to modification by the employer and the union, the same private parties participating in the arbitration process [7, at 1476]. There is an inherent public interest in ensuring that laws are correctly and consistently interpreted and applied, and that substantive policies reflected in the law are neither underenforced nor overenforced [7, at 1476]. There is rarely such a public interest in the interpretation and application of labor contracts. Contracts exclusively bind only the parties who create and knowingly sign them; laws bind citizens of whole nations, states, and communities who've had virtually no input into their creation, and who've entered into no explicit agreement to be bound by them. Laws bring substance and order to the way we live; contracts give substance and order to the way we conduct business.

Litigation vs. Arbitration

Just as law differs from contract, so litigation, the way in which laws are defined and enforced, differs from arbitration, the way in which contracts are defined and enforced. Arbitrators perform functions quite different from those of courts. Arbitration serves the direct interests of the parties to a contract. It is the means of solving the unforeseeable by molding a system of private law for all the problems that may arise, and providing for their solution in a way that will generally accord with the variant needs and desires of the parties [8]. The grievance process is actually a vehicle by which meaning and content are given to the collectively bargained agreement, and the question of interpreting the agreement is a question for the arbitrator [8, at 578]. It is the arbitrator's construction that was bargained for, and so far as the arbitrator's decision concerns construction of contract, the courts have no business overruling this decision because their interpretation of contract differs from that of the arbitrator [9]. In labor, arbitration is a way to avoid industrial strife.

Arbitration evolved as an expedited *quasijudicial* process. As such, factfinding in arbitration is not equivalent to factfinding in litigation. The record of the arbitration proceeding is also not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath are often severely limited or unavailable [9, at 598]. In an early decision regarding application of the Federal Arbitration Act, Justice Douglas flatly rejected the conclusion that arbitration is merely a form of trial and found that the choice of arbitration rather than litigation could make a radical difference in the ultimate outcome of an action [10]. In arbitration there would be no jury trial, no instruction of arbitrators as to law, no statement of reasons nor record to support an appeal, and no requirement that arbitrators follow the rules of evidence [10, at 202-03]. These perceived weaknesses in the arbitration process have had no serious negative impact on the equity in labor relations because there is a balance of power in labor that overcomes Justice Douglas' concerns. In the context of collective bargaining, there are unique protections for both parties built into the arbitration process that minimize the risk of unfairness or error by the arbitrator [11]. Both unions and employers are repeat customers of arbitration and both have an equal say in selecting the arbitrator to hear their disputes. Thus, an arbitrator who regularly favors one side or the other will not be hired again [12]. This creates a demand for fair judgments and equitable treatment. In addition, parties to a collectively bargained contract maintain an ongoing relationship and are free to rewrite their contract and correct what they perceive to be errors on the part of the arbitrator [13].

Inequities in Employment Arbitration

There is no balance of power when prescribed arbitration is used to settle employment disputes. Individual employees have none of the bargaining strength

that comes with union numbers. There can be no realistic threat of strike or work action. Arbitration of employment claims simply pits the lone employee against the corporate Goliath. Starting about three years ago, employers trying to avoid big, expensive lawsuits began forcing their employees to agree to binding arbitration to keep their jobs or get new ones, and many employers adopted stiff, self-serving arbitration rules that, for example, prohibit punitive damages or put severe limits on evidence gathering by employees [14]. Unfortunately, employees faced with loss or denial of work too readily agree to sign away their legislated rights to punitive damages and adequate due process. With virtually no bargaining power at the time such take-it-or-leave-it contracts are offered, what other choice do they have?

Yet in spite of repeated claims of unequal bargaining power, the Supreme Court has not actually voided any arbitration agreement based on such a defense [15]. While the Court, in theory, continues to allow use of claims of inequity to support a show of fraud or coercion, it no longer rules out whole categories on this assumption [4, at 32-33]. Inequity in bargaining power has not been a bar to the Court's overall support of agreements to arbitrate all employment disputes. The Supreme Court has made it clear that, as a general rule, statutory claims are fully subject to binding arbitration, at least outside the context of collective bargaining [4, at 26, 34-35]. Thus, it becomes the responsibility of present and prospective employees to read, question, and understand the full implication of an agreement to arbitrate all employment disputes and to then knowingly choose to sign or not sign such an agreement. To this end, the Court has overturned state laws designed to protect unwitting employees. The Court reviewed and held that any state law targeted specifically to void arbitration agreements and not contracts in general was preempted by the Federal Arbitration Act, even if the purpose of the state law may have been to promote the knowing choice of arbitration [16].

There are other ways as well in which the individual employee is placed at a disadvantage by the present use of arbitration to settle all employment disputes. Inevitably the employer participates in the arbitration process as an informed consumer. In employment cases, only the employer is a repeat player, and the employer's repeat use of arbitration gives the employer superior knowledge with respect to selection of arbitrators [17]. One-shot players such as employees are less able to make informed decisions regarding the selection of arbitrators [18]. And the fact that employers are repeat players in the arbitration process has other repercussions as well. Since employers, rather than the individual employees, are more likely to have repeat participation in the employment dispute arbitration process, arbitrators are more likely to rule in their favor to increase their chances of being selected to arbitrate future claims [19]. This element of control tends to tilt the scales of justice despite ethical standards to the contrary. Employment arbitrators, unlike labor arbitrators, need not concern themselves with an image of unbiased fairness. The process is private, there is no appeal from the decision, and

they are unlikely to ever see the employee again. There is, in fact, an obvious and immediate advantage to their currying the favor of the repeat participant in arbitration. There is a temptation for arbitrators to favor the interests of the institutional employer [20]. A recent study actually shows that repeat-player employers win in employment arbitration twice as often as nonrepeat players [21].

Individual employees are also disadvantaged by the privacy accorded the process of arbitration. Arbitration awards, unlike court decisions, are not automatically published. In fact, they cannot be published if either party objects. As a result, employment arbitration has a very limited public record, and this lack of public disclosure may systematically favor companies over the individual [7, at 1477]. The unavailability of published arbitration decisions may prevent potential plaintiffs from locating information necessary to build a case of intentional misconduct or to establish a pattern or practice of discrimination by an employer [18, p. 686].

Ultimately, the employee bound by an agreement to arbitrate is also financially disadvantaged. The employer and its lawyers have a comparatively free hand in drafting the details of the arbitration clause. While a recent decision held that an employer requiring an employee to arbitrate all disputes cannot also require the employee to pay all or even part of the arbitrator's fees [7], the cost of research and case presentation remain an impediment to the individual employee's success in arbitration. It takes time and legal insight to knowledgeably prepare and present a case to an arbitrator.

In addition to these problems, the courts have acknowledged the ongoing concerns of arbitrators, legal commentators, the Equal Employment Opportunity Commission, and the National Labor Relations Board regarding the competence of arbitrators and the arbitral forum to effectively enforce the myriad of public laws protecting workers and regulating the workplace [7, at 1465]. The competence of arbitrators to analyze and decide purely legal issues in connection with statutory claims has been questioned, sine many arbitrators are not lawyers, and they have not traditionally engaged in the same kind of legal analysis performed by judges [7, at 1477]. An arbitrator's decision may be based on broad-stroke principles to the exclusion of cases more analogous to the claim being arbitrated [7, at 1477]. The EEOC has objected to the use of arbitration to settle employment disputes because arbitration is conducted by arbitrators given no training and possessing no expertise in employment law and because arbitration is not governed by the statutory requirements and standards of Title VII [22]. Even the Supreme Court itself questioned arbitrators' understanding of legal concepts and worried that the lack of a complete record of the proceedings and explanation of awards would prevent adequate judicial review [23].

One report noted that 16 percent of arbitrators have never read any judicial opinions involving Title VII; 40 percent 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 percent nonetheless felt professionally competent to decide legal issues in cases involving employment discrimination [24]. In essence, arbitrators who have only a layman's understanding of Title VII and other pivotal employment legislation, and who are neither publicly elected nor publicly accountable, interpret the laws designed to safeguard employee rights.

The Supreme Court has said that arbitrated awards can be vacated if they are in "manifest disregard of the law" [23, at 436-37], that is, when 1) the applicable legal principle is clearly defined and not subject to reasoned debate; and 2) the arbitrator refused to heed the legal principle" [25]. The question, however, becomes how can an arbitrator without legal training recognize and correctly heed the applicable legal principle?

CORRECTING THE INEQUITIES IN EMPLOYMENT ARBITRATION

Arbitration *is* a potentially vital tool for settling employment disputes, and there are ways of making it a more equitable process. First and foremost, there is a need to make sure that nonunionized employees really understand what agreement to arbitrate all employment disputes means. Preceding the agreement to arbitrate, there should be a clear written warning that the employee, in signing this agreement, gives up the right to pursue statutory claims in a court of law, and there should be a list of the statutes affected by the agreement. Prospective signers should also be advised that the right to a trial and to a trial by jury is of value, and that they may wish to consult with an attorney before signing an agreement to forfeit these rights. While this explanation and warning will not affect the employer's right to deny employment to anyone who refuses to sign the agreement, employees who choose to accept these conditions as a prerequisite for employment will at least do so knowingly.

Secondly, the fiscal problems surrounding the use of arbitration to settle employment disputes must be resolved. The courts have already ruled that because public law confers both substantive rights and a reasonable right of access to a neutral forum in which those rights can be vindicated, employees cannot be required to pay for the services of an arbitrator to pursue their statutory rights [7, at 1468]. The mere possibility that an employee might be required to pay all or part of the arbitrator's fees would have an immediate impact on the employee's willingness to pursue a statutory claim in arbitration [7, at 1468]. Arbitration is not an inexpensive process. Under the American Arbitration Association (AAA) plan, for example, an employee could be required to pay a filing fee of $500 (as compared to a $120 filing fee to pursue a claim in district court), administrative fees of $150/day, room rental fees, court reporter fees and, of course, attorney fees, if the employee decides to use an attorney [7, at 1484, n12]. The AAA cites $700 per day as the average arbitrator's fee [26], and the AAA's

Rule 44 notes these expenses "shall be borne equally by the parties, unless they agree otherwise"[27].

It has been proposed that employers be required to pay arbitration costs because by mandating arbitration the employer is avoiding the risks of a jury trial [28]. However, if the employer assumes the total cost of arbitration, the temptation for arbitrator bias favoring the paying employer remains a real danger to the integrity of the process. Perhaps one way to fund compulsory employment arbitration while preserving the integrity of the process is by creating a funding program modeled on Workers' Compensation. That is, employers who wish to avoid jury trials by mandating agreements to arbitrate would be required to contribute in advance to a central insurance fund earmarked to finance employment arbitration under a set schedule of fees. Like Workers' Compensation, the employer's premium would be based on the company's record and degree of use, but actual payment would no longer be made directly by the employer, thus removing the potential for arbitrator indebtedness. In addition, the threat of a rising premium would be an incentive to avoiding the need for arbitration of employment disputes.

To further equalize the power of the parties in arbitration, it is suggested that neither party have a choice in selecting the arbitrator. Instead, a random selection would be made by AAA or another certifying agency based on the arbitrator's record of experience and expertise in dealing with the particular statutory issue in dispute. In this way employees pressed for time and money would have the *best* choice made for them by the agency responsible for certifying arbitrator expertise.

To effectively make this judgment call, however, it would be necessary that all arbitrated awards be recorded, categorized, and kept on file by subject, employer, and arbitrator, with the appointing agency. This file would serve the additional purpose of supporting discovery in pattern and practice cases. Since privacy has always been one of the touted advantages of arbitration, awards need not be published or released to the public at large, nor serve as binding precedent, but a specific employer's arbitration history should be available to future litigants hoping to make a pattern and practice of discriminatory behavior a part of their claim. To do otherwise is to thwart the discovery necessary for ultimate justice.

Concern for the calibre of arbitrators hearing employment disputes can also be addressed by the appointing agency. The AAA, for example, could insist that as a prerequisite for appointment as an employment arbitrator, prospective arbitrators who are not attorneys must participate in workshops dealing with statutes central to employment disputes. Greater reliance on private process to protect public rights imposes a professional obligation on arbitrators to handle statutory issues only if they are prepared to fully protect the rights of statutory grievants [29]. Arbitrators who accept appointments in cases involving claimed violations of Title VII, the ADA, and other statutes must demonstrate a working knowledge of the basic protections and proscriptions of those statutes as well as the case law

underlying them [30]. Perhaps arbitrators who are not attorneys should actually be licensed as arbitrators based on their participation in a program of continuing arbitrator legal education. Not all employment arbitrators need be attorneys, but all employment arbitrators do need to know and understand the legal principles defining and affecting employment discrimination, and they need to know how to apply these principles to the cases they will hear. Familiarity with a business or an industry is helpful, but an understanding of statutory law is an absolute necessity if arbitration is to be an equitable alternative for solving *all* employment disputes.

Even the federal courts' endorsement of employment arbitration is premised on the arbitrator's application of clearly defined legal principles, not subject to reasoned debate [25, at 421]. Therefore, a continuing education and licensing program designed to keep arbitrators abreast of evolving statutory principles would help curb the need for the courts to review and vacate inept awards. Such a program would keep employment arbitration alive as a viable and equitable alternative to litigation.

SUMMARY

Labor arbitration has a long history of success because it is perceived as an equitable process by those who use it. Employment arbitration has no such history, and individuals now forced to use it do not perceive it as an equitable process. Case after case has challenged the equity of the process as it presently exists. Individual employees have the right to have their statutory claims heard in an equitable forum, and arbitration could well be this forum if the legislature and the courts would recognize the problems of the existing system and adjust it in ways that will resolve those problems. The baby need not be thrown out with the bath water, but the water does cry out for changing if it is to do what it was intended to do.

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