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GILMER: NO JUSTICE, NO INDUSTRIAL PEACE

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The question for civil rights claims after *Gilmer v. Interstate/Johnson Lane Corporation* [1], is whether an employer of fifteen or more people, may, prior to or contemporaneous with employing a person or groups of persons, present and exact an agreement to arbitrate all claims, including federally created civil rights or constitutional claims, involving race, color, sex, creed, religion, or national origin, on any terms or conditions of employment? The best answer to this question is no. The reason for this answer is that arbitration agreements should not render expressed national purposes against employment discrimination and, perhaps, other forms of unlawful activity (protected under the post-Reconstruction statutes) as nonreviewable.

Before there was a Civil Rights Act of 1964, an employer was free to discriminate against persons on the basis of race, sex, creed, national origin, and religion almost with impunity. Some states may have adopted fair employment practice laws to protect workers against discriminatory acts of their employers. However, these laws were not very effectively enforced and not very strong in the award of remedies.

The Civil Rights Act of 1964 was the nation's first comprehensive employment antidiscrimination law, which, as amended, has always faced opposition by some who believed the resolution of disputes between employer and employee should be left for resolution between the two. Because discrimination remains a dominant force in the workplace, jurisdictional claims of discrimination under Title VII of the Civil Rights Act of 1964 have continued to spiral. Rather than to treat the root causes of discrimination, some members of the commercial and political community have sought to accommodate and advocate for alternative means to deal with discrimination outside the courts, where, I believe, they predict that employers can save money (attorneys' fees, filing costs, etc.,) in the defense

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against such claims, and, perhaps, indirectly influence the outcome by the pre/post hiring terms set forth in the arbitration agreements.

Let's examine two hypothetical cases and see how they play in a post-Gilmer climate.

FIRST CASE

A, a black woman applies to B, an employer of 100 people, to work in a widget factory. The factory is located in a small county in Mississippi, where blacks historically have been unemployed and politically unrepresented, or marginally so. A is a member of the NAACP, the Mt. Nebo Baptist Church, whose minister is a leading civil rights advocate. For black people in the community, jobs are scarce, and black people are underemployed, not only in the city of B's manufacturing company, but the county as well. Assume further that A has three children, is a single parent, rents an apartment, or lives in substandard housing and is not well-educated. When A applies for the job, B informs A that she has the job, but that B wants A to sign an agreement that A will arbitrate all claims arising out of her employment. What do you think A is going to do? Let's assume the unlikely: that A refuses to sign the agreement and B finds some pretext not to hire A, but never says that the real reason A is not being hired is because she won't sign the arbitration agreement. Does anyone believe that the next applicant from Mt. Nebo Church, whose circumstances are similar to A's, is going to decline to sign the arbitration agreement? One can assume that when A is presented with the arbitration agreement, which can be defined as an offer to enter into a legally binding contract, A will not have an opportunity to or may not be able to afford to consult a lawyer. My guess is that if A asks to take the agreement to a lawyer, that B will not hire A. What rights does A have against B? What difference does it make? A is a poor black woman, in a community where her value can be substituted by someone else. B, the employer, already the dominant person as relates to A, is now further empowered by the Gilmer opinion to use "B's right" of conditioning employment on signing the arbitration agreement to discriminate without recourse in courts of law.

SECOND CASE

Assume that A, a white female high school graduate, works for B, who owns several clothing stores in New York City. Employer B has been known to harass women. Indeed, employee complaints have been filed, one successfully, against him before the Equal Employment Opportunity Commission (EEOC). Assume that A is being harassed by B, A will not give in, and B continues to persist. Assume that A threatens to file a complaint against B at EEOC, and in fact does. During the sixty days that EEOC has to determine cause, B presents an arbitration agreement signed by A that A routinely, but without full knowledge of the

consequences, signed while being processed through B's personnel office when she was hired four years earlier. What does EEOC do with this agreement? Assume that A's complaint and EEOC's investigation unearths several other victims of B's sexual harassment, who, unlike A, do not have the courage to file a claim for fear of losing their jobs. How does Gilmer potentially apply under these circumstances? Is EEOC precluded from taking a role in the claim brought by A? What if EEOC chooses not to exercise its enforcement powers? Independent of EEOC, will the federal courts grant B's motion to dismiss A's claim when the arbitration agreement is presented? Will the court hear testimony from A that she was unaware that she had signed a preclusion agreement? What is the burden of proof to demonstrate lack of knowledge or appreciation of the consequences of signing the agreement (particularly of the waiver of constitutional violations or the waiver of constitutional rights, e.g., the right to a jury trial). Will a lawyer even take A's case?

Before attempting to answer the questions posed by these two questions, let me say that I am not optimistic about the post-*Gilmer* era as it relates to the rights of employees. So let me get to the point. As relates to employees who are not members of unions, (and, maybe to "individuals," who are members of unions), the execution of arbitration agreements will substantially affect their rights available under federal and state law. For example, employees will be waiving the right to a jury trial by signing an arbitration agreement, and other substantive and procedural rights available in federal and state courts, such as procedural rights available under the Federal Rules of Civil Procedure. The question is whether employees have reached a point in American labor law where Congress or state legislatures must devise a nonwaiver statement to be provided by a company or employer for hire which states something like this:

"During the course of employment, I (do)/(not) waive any right to redress any claim or controversy arising out of my employment in a court of law."

Further, minimally, it seems to me that employers by law should be required to advise employees or prospective employees that they are not required to sign an arbitration agreement, and that if they do not sign one they will not incur any penalty for not doing so. If Congress or state legislatures do not enact such protection, I foresee, and encourage, the rise of a new industry of independent employment counselors to help citizens negotiate jobs in nonunionized workplaces, and the formation of more watchdog groups to assure that collective bargaining agreements do not unfairly undermine federally created rights of employees to have their claims determined by the courts.

Legal arguments that may counter an extension of Gilmer to civil-rights-type claims are:

1. Congress could not have intended to include the subject matter of civil-right-type claims under the Federal Arbitration Act (FAA) in 1925 because neither the common law nor the federal law had dealt with arbitral disputes regarding the category of claims arising under Title VII.

2. Congress, by its enactment of the FAA in 1925 could not have legislated *in futuro* to preclude federal jurisdiction over the subject matter of federal or local civil rights claims, given the history of race relations in the country in 1925. The resolution of race, sex, color, national origin, and religious claims arising out of employment was not contemplated by Congress in 1925. And, for point of argument, assuming that *Gilmer* stands and that the FAA applies to Age Discrimination in Employment Act claims, it is submitted that such claims do not have the same history as race, sex, color, national origin, or religious discrimination claims in this country to foreclose federal courts from hearing the merits of such claims [1, at 1652].

3. Does an individual arbitral contract of employment that precludes an action under judicial authority actually constitute a transaction affecting commerce? Isn't it the discriminatory acts of the employer that affects commerce, and doesn't the judicial forum made available by Congress under Title VII offer, by public policy, an overriding, indeed, superior command to have such claims resolved in a judicial forum? [2, at 1651, n. 2].

4. If the FAA is intended to liberally favor arbitral agreements [2, at 1651], its reach appears to be limited to contracts solely of a commercial nature. Hence, *Gilmer* may be appropriately distinguished by the nature of the unique regulatory scheme of the Security Exchange Commission (and the antitrust laws, etc.) under which the *Gilmer* case arose (which is quite different from that of workers in an unregulated commercial widget factory) [1, at 1652].

5. The Court in *Gilmer* stated that "[a]lthough all statutory claims may not be appropriate for arbitration, '[h]aving made a bargain to arbitrate, the parties should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies. . . .'" [1, at 1652] I submit that the question is: Is the "bargain" a fair one? There can be no bargain if the condition for it is not legitimate. The very act of arbitration may limit the reach of federal law on a class basis. [1, at 1652]

6. The burden of proof assigned in Gilmer would not, in my view, be the same if the subject matter of the claim were race, color, sex, creed, national origin, or religion. The deep-rooted history of these categories, and their impact on the marketplace as demonstrated by the Civil Rights Act of 1964, logically places the burden of proof on the employer to demonstrate that Congress intended to preclude judicial authority to hear Title VII claims as a matter of overriding public policy. [1, at 1652]

7. In *Gilmer,* themes of efficiency, not justice, dominate, and judicially permit, if not encourage, adhesive contracts as relates to employment. Even though *Gilmer* states that "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract'" [1, at 1656], well-supported claims cannot logically or reasonably be expected to be established by the working poor of America against employers who have the

power to deny employment to minorities that continue to be historically in poverty [2].

8. As related to the regulatory powers of the EEOC, *Gilmer* states: "Finally, it should be remembered that arbitration agreements will not preclude the EEOC from bringing actions seeking classwide and equitable relief" [2, 1 at 1655]. This statement misreads (or perhaps, properly reads) the history of the EEOC and the executive branch of government for the past decade, which so underfunded EEOC and other civil rights agencies, so as possibly to make the Court's statement in *Gilmer* meaningless [3]. The resources of EEOC and the unwillingness of presidents and Congress to provide adequate funding to enforce civil rights claims and policy, or refusal of jurisdictional agencies to enforce the law, make the above quote hollow, a statement devoid of justice. Arbitration agreements in the labor and civil rights areas may encourage federal agencies not to enforce the laws, leaving the same for private resolution and out of the reach of the courts.

I predict that when the American people—the poor and the middle class—discover that even the EEOC is without adequate power to eradicate discrimination or unable to provide corrective relief in the courts because of underfunding, we will see the most dramatic demonstrations ever witnessed in this country. I submit that politicians (not institutional bodies that have an economic interest in arbitration) are going to have to persuade the public that arbitration is preferable to Article III adjudication of civil rights claims. This is going to pose a serious problem for politicians. (The implications of arbitration under state civil rights law must also be considered, particularly for the millions of employees not covered by Title VII, i.e., employers with fewer than fifteen employees.).

Given the discourse of this presentation, I leave it to you as to whether the problems posed in cases One and Two above would be resolved in favor of A. However, I leave you with two of many nagging questions to ponder: Could *Gilmer* apply to a constitutional protection that is violated by a government employer during the course of an employment covered by an arbitration agreement, or apply to a federal statutory prohibition or civil rights of a citizen that is violated by a private employer covered by an arbitration agreement?

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ENDNOTES

1. 111 S.Ct. 1647 (1991).
2. *See e.g.,* Paulette Thomas, *Poverty Spread in 1922 to Total of 36.9 Million,* Wall St. J., Oct. 5, 1993, at A2.
3. *See e.g., Civil Rights Commission to Look at Agencies,* Nat'l. Law J., Oct. 18, 1993.

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