Part II: Trends In Alternative Dispute Resolution: Employer Promulgated Arbitration Systems To Resolve Employment Disputes

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Introduction

The U.S. Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991), held that an employee may be compelled to arbitrate an Age Discrimination in Employment Act claim based upon the employee's agreement with the employer to arbitrate any employment controversy. Since *Gilmer*, an increasing number of employers in various industries require as a condition of employment that job applicants and employees agree to resolve all employment disputes through mediation and binding arbitration. These agreements may be presented in the form of an employment contract or may be included in an employee handbook or even in an employment application. Part I of this article reviews two recent U.S. Supreme Court decisions which firmly establish the appropriateness and reach of employer promulgated arbitration systems as a method to resolve statutory employment discrimination claims. Part II of this article discusses due process safeguards that should be included in employer promulgated arbitration systems so that the fairness of the system itself will withstand judicial scrutiny.

Part I: *Circuit City* And *Waffle House*

Last year, in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the Supreme Court reaffirmed arbitration as an appropriate method to resolve statutory employment discrimination claims. When the employee in *Circuit City* was hired by a California store of a national retailer of consumer electronics, the individual signed a job application which included a broadly worded agreement to settle all future employment disputes exclusively through binding arbitration before a neutral arbitrator. After two years of employment, the employee filed an employment discrimination suit against the employer in state court alleging various state statutory discrimination claims and other claims based on general tort theories. The employer brought an action in federal district court to enjoin the state court action and to compel the employee to arbitrate the claims pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (the "FAA").

The FAA generally empowers a U.S. District Court to enforce a wide variety of written arbitration agreements by compelling arbitration and enjoining legal proceedings involving claims the parties agreed to arbitrate. The District Court enjoined the state court action and compelled the employee to arbitrate her claims. The employee appealed. The U.S. Court of Appeals for the Ninth Circuit reversed the judgment of the District Court. In doing so, the Ninth Circuit held that the employee's arbitration agreement was contained in a "contract of employment" and therefore was not subject to FAA coverage. The Ninth Circuit case law holding that all employment contracts are excluded from FAA squarely conflicted with every other Court of Appeals to have addressed the question and, accordingly, the U.S. Supreme Court granted *certiorari* to resolve the issue.

In a 5 to 4 decision, the U.S. Supreme Court in *Circuit City* reversed the Ninth Circuit and compelled arbitration of the employee's legal claims. Based on a review of the legislative history, the Court in *Circuit City* concluded that the FAA covers all employment contracts containing an agreement to arbitrate disputes with an employer, except for agreements covering maritime and transportation workers (*i.e.*., those workers actually engaged in the movement of goods in interstate commerce), which the FAA specifically excludes from coverage. Thus, the Court in *Circuit City* has again broadly endorsed the use of arbitration to resolve statutory discrimination claims asserted by an employee.

However, as illustrated by the Court's decision this year in *EEOC v. Waffle House, Inc*., 534 U.S. 279 (2002), the public policy favoring arbitration established by *Gilmer* and *Circuit City* does not limit or change in any way the statutory enforcement functions of the U.S. Equal Employment Opportunity Commission (the "EEOC") or the remedies otherwise available to the EEOC when bringing an action on behalf of an individual. The employee in *Waffle House* signed an agreement to settle any dispute or claim concerning his employment through binding arbitration. After 16 days of employment, the employee suffered a seizure at work and soon thereafter was terminated.

The employee filed a discrimination charge with the EEOC alleging that the discharge violated the Americans with Disabilities Act (the "ADA"). After an investigation and an unsuccessful attempt to settle the charge, the EEOC filed a lawsuit against the employer on behalf of the employee (*i.e.,* the employee was not a party to the lawsuit) in federal court alleging violations of the ADA and the Civil Rights Act. The employer, in turn, filed a motion in U.S. District Court pursuant to the FAA to stay the EEOC's action and to compel mandatory arbitration of the former employee's claims based on the arbitration agreement. The District Circuit denied the employer's motion based on a factual determination that the employee's actual employment contract had not included an arbitration provision.

On appeal, the U.S. Court of Appeals for the Fourth Circuit reversed the District Court and then considered the effect the arbitration agreement had on the EEOC's action. The Fourth Circuit balanced the competing public policies favoring arbitration established by the FAA and having the EEOC vindicate statutory discrimination rights through enforcement actions. The Fourth Circuit reasoned that where the EEOC action seeks victim-specific relief (*e.g*., back pay and compensatory damages) the federal policy favoring enforcement of private arbitration agreements outweighs the EEOC's enforcement action because the EEOC seeks primarily to vindicate public, rather than private, interests. However, when the EEOC pursues injunctive relief, the Fourth Circuit concluded the balance tips in favor of EEOC enforcement efforts because the public interest dominates the EEOC action. Thus, the Fourth Circuit in *Waffle House* held that when an employee has signed a mandatory arbitration agreement, the EEOC's remedies in an enforcement action are limited to injunctive relief. In doing so, the Fourth Circuit declared that permitting the EEOC to prosecute the claim of an employee who agreed to arbitrate such a claim "would significantly trample" the strong federal policy favoring arbitration.

The U.S. Supreme Court granted *certiorari* to resolve a conflict among the Courts of Appeal on the issue of the effect an arbitration agreement has on the types of remedies the EEOC may seek in court on behalf of individuals. The Supreme Court in *Waffle House*, in reversing the Ninth Circuit, held that the EEOC has the authority to pursue any relief provided by statute, including victim-specific relief, regardless of the forum that the employer and employee have chosen to resolve their disputes, including arbitration. The Court stated that, prior to looking to general public policy goals, it should first look to whether the EEOC and the employer agreed to arbitrate the claims asserted in the enforcement action. Since the EEOC clearly was not a party to the employee's arbitration agreement, the Court concluded the EEOC could not be bound by such an agreement. Accordingly, the Court reasoned that the public policy favoring arbitration established by the FAA does not require the EEOC to relinquish its statutory authority if it has not agreed to do so. Thus, while an arbitration agreement can serve to avoid litigation and is enforceable against a party-signatory, it cannot prevent an EEOC lawsuit on behalf of an employee who had agreed to arbitrate statutory employment discrimination claims.[1]

Part II: Judicial Scrutiny And Due Process

The Court's decision in *Circuit City* firmly establishes arbitration as an appropriate method to resolve statutory employment discrimination claims. However, the restriction to arbitration can be denied when a court refuses to enforce an agreement to arbitrate because the terms of the arbitration agreement are one-sided to such an extent as to render the agreement "unconscionable." Therefore, it is prudent to consider whether an employer promulgated arbitration system has sound procedural safeguards to withstand judicial scrutiny and to foster a continued confidence in alternative dispute resolution by the judiciary. A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship ("Due Process Protocol" or the "Protocol") offers a model of procedural safeguards for parties who consider resolving statutory employment discrimination claims by binding arbitration. *See* 50 Disp. Resol. J. 37 (October - Dec. 1995). The Due Process Protocol has been either endorsed or supported by the following organizations: The National Academy of Arbitrators, American Bar Association, New York State Bar Association, Society of Professionals in Dispute Resolution, Federal Mediation and Conciliation Service, American Arbitration Association, National Employment Lawyers Association, and the American Civil Liberties Unions. Some of the procedural safeguards set forth in the Due Process Protocol are summarized below.

A. Right Of Representation

• *Representatives*. Employees should be notified that they have the right to choose their own spokesperson and should be provided with the names of institutions which might offer assistance, such as a local bar association.

• *Fees*. The amount and method of representation fees should be determined by the employee and the representative. The Due Process Protocol, however, recommends a variety of existing arbitration procedures in which the employer reimburses a portion of the employee's representative fees (especially for lower wage workers). In any event, the arbitrator should have the authority to provide for fee reimbursement as part of the remedy in accordance with applicable law.

• *Access to Information*. While recognizing that one of the advantages of arbitration is that less time and money is spent on pre-trial discovery, the Due Process Protocol encourages adequate but limited pre-arbitration discovery, including permitting employees access to all information reasonably relevant to arbitrate their claims. Included in the access to information is a recommendation that prior to the selection of an arbitrator, each side should be provided with the names, addresses and phone numbers of the representatives of the parties in the selected arbitrator's six most recent cases to aid the parties in selection.

B. Arbitrator Qualifications

• *Roster Membership*. A roster of arbitrators possessing the skill to conduct hearings, knowledge of the statutory issues at stake and familiarity with the workplace and employment environment should be established on a non-discriminatory basis, diverse by gender, ethnicity, background and experience to satisfy the parties that their interests and objectives will be respected and fully considered.

• *Conflicts of Interest*. The arbitrator for a case has a duty to disclose any relationship which might reasonably constitute or be perceived as a conflict of interest and should sign an oath affirming the absence of such a conflict.

• *Authority of the Arbitrator*. The arbitrator should be bound by the applicable agreements, statutes, regulations and rules of procedure of the designated arbitration provider, including the authority to determine the time and the place of the hearing, permit reasonable discovery, issue subpoenas, decide arbitrability issues, preserve order and privacy in the hearings, rule on evidentiary matters, determine the close of the hearing and procedures for post-hearing submissions, and issue an award resolving the submitted dispute. The arbitrator should be empowered to award whatever relief and remedy a court could grant. The arbitrator should issue an opinion and award setting forth a summary of the issues, including the type(s) of disputes(s), the damages and/or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim(s).

• *Compensation of the Arbitrator*. Impartiality is best assured by the parties sharing the fees and expenses of the mediator and arbitrator. In cases, however, where the economic condition of a party does not permit equal sharing, the parties should make mutually acceptable arrangements to achieve that goal if at all possible. In the absence of such an agreement, the arbitrator should determine allocation of fees. The arbitration provider, by negotiating the parties share of costs and collecting such fees, may be able to reduce the bias potential of disparate contributions by forwarding payment to the arbitrator without disclosing the parties share therein.

C. Scope of Review

• The arbitrator's award should be final and binding and the scope of a review by a court should be limited in accordance with appropriate federal or state law.

Conclusion

In summary, it is a settled legal question that an employer promulgated arbitration system is an appropriate forum to resolve statutory employment discrimination claims. To avoid a possible erosion of confidence by the courts in employer promulgated arbitration systems, due process safeguards should be implemented. The Due Process Protocol offers guidance and a model for an employer to consult when establishing an arbitration system to resolve employment disputes.

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[1] *In fact, after* Gilmer, *the EEOC publicly opposed mandatory arbitration of employment discrimination claims as a condition of employment. Indeed, the EEOC stated that an arbitration system, regardless of how fair it may be, is an inadequate forum to resolve statutory employment discrimination claims because the claims are, among other things, not decided by a jury, discovery is limited and there exists "structural biases" (i.e. the employer is likely a repeat source of business of an arbitrator whereas an individual is not.)* See *EEOC Notice No. 915.002 (July 10, 1997).*

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