

Review of Selected Issues and Recent Cases Related to the Arbitration of Employment Disputes

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A. The Supreme Court Upholds Mandatory Pre-Dispute Arbitration of a Federal Age Discrimination in Employment Act Case.

In Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), the Supreme Court enforced an arbitration clause in a securities registration application, thus subjecting to arbitration a claim under the federal Age Discrimination in Employment Act. Rejecting a variety of challenges to the arbitration of statutory claims, and breaking with the hostility toward the arbitration of statutory disputes reflected in the Court's 1974 decision in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)², the Supreme Court reasoned that such forum selection agreements were enforceable:

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² In Gardner-Denver, the plaintiff pursued a claim under Title VII although a labor arbitrator had found his discharge proper under the CBA. The Supreme Court held that the prior submission of plaintiff's claim to arbitration did not preclude his Title VII claim in federal court. In an opinion evidencing substantial hostility to arbitration, the Court relied upon three additional points: First, the Court found a Congressional intent to "allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." 415 U.S. at 48. Second, the Court stressed that Title VII "concerns not majoritarian processes, but an individual's right to equal employment" and thus that the "rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat . . . the purpose behind Title VII." Id. at 51. Finally, the Court stated

“[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”

500 U.S. at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

The Court also reasoned:

Although all statutory claims may not be appropriate for arbitration, “[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an attention to preclude a waiver of judicial remedies for the statutory rights at issue.”

500 U.S. at 26 (quoting Mitsubishi, 473 U.S. at 628).

B. Since the Supreme Court's Landmark Decision in Gilmer, Post-Gilmer Decisions Have Generally Supported Mandatory Pre-dispute Arbitration of a Wide Variety of Statutory Claims, Including Title VII Claims.

In one of the most important decisions in this area, the District of Columbia Court of Appeals, in Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1977), exhaustively considered most of the arguments against the enforceability of pre-dispute arbitration agreements required as a condition of employment and concluded that plaintiff's Title VII claims were subject to arbitration. The case is particularly noteworthy because it was authored by Chief Judge Harry T. Edwards, a well-known labor and employment law expert.

that the “arbitrator has authority [only] to resolve questions of contractual rights” regardless of whether contractual rights are duplicative of substantive Title VII rights. Id. at 53.

Cole did not, however, consider Section 118 of the Civil Rights Act of 1991 or its legislative history.

C. The Ninth Circuit Rejects Mandatory Pre-Dispute Arbitration of Title VII (And Related State Law) Claims; the 3rd and 1st Circuits Subsequently Hold Otherwise as Do the Courts of Appeal in California and at Least One Federal District Court.

The Ninth Circuit's hostility to mandatory pre-dispute arbitration reached full voice in Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir.), cert. denied, 119 S. Ct. 445 and 119 S. Ct 465 (1998), where the Ninth Circuit interpreted Section 118 of the Civil Rights Act of 1991 to preclude arbitration of Title VII cases under agreements entered into as a condition of employment despite the fact that the language of Section 118 on its face appears to encourage arbitration: “Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes under the Acts or provisions of Federal law amended by this Title.” Id. at 1191 (citation omitted). Although Gilmer had been decided shortly before the Civil Rights Act of 1991 was enacted, the Ninth Circuit concluded that “to the extent authorized by law” referred to the law as it existed at the time the Civil Rights Act of 1991 was drafted, which, according to the Ninth Circuit, was the Gardner-Denver approach to compulsory pre-dispute arbitration. Despite its apparent hostility to mandatory pre-dispute arbitration, however, the Ninth Circuit in Duffield did explicitly acknowledge that its holding barred only mandatory pre-dispute agreements to submit Title VII claims (and analogous State Fair Employment

and Practice Act claims) to arbitration; thus, arbitration of common law claims and other statutory claims was not precluded. 144 F.3d at 1189

Shortly after Duffield, the Third Circuit, in Seus v. John Nuveen & Co., 146 F.3d 175 (3rd Cir. 1998), explicitly rejected the approach of the Ninth Circuit. The Third Circuit refused to find that Section 118's "straightforward declaration of the full Congress" could be interpreted to mean that the FAA had been impliedly repealed with respect to agreements to arbitrate Title VII claims. 146 F.3d at 183. The Court also rejected reading the language "where appropriate and to the extent required by law" as "freez[ing] any particular view of the case law," concluding that once Gilmer had been decided, it provided a basis for determining what was "authorized by law." Id.

More recently, the First Circuit in Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 98-1246, 1998 WL 880910 (1st Cir. Dec. 22, 1998), even more thoroughly rejected each of the arguments advanced by Duffield, concluding that "neither the language of the statute nor the legislative history demonstrates an intent in the 1991 CRA to preclude pre-dispute arbitration agreements." Id. at *8. In reaching this conclusion, the First Circuit relied upon its earlier decision in an ADA case, Bercovitch v. Baldwin Sch. Inc., 133 F.3d 141 (1st Cir. 1998), pointing out that the legislative history relied upon by plaintiff Rosenberg (and the Ninth Circuit) to defeat arbitration was identical "to language in the Committee Report accompanying the ADA" which the First Circuit had already held "not [to] 'rebut the presumption in favor of arbitration.'" Id. at *6 (quoting Bercovitch, 133 F.3d at 150). In addition, the First Circuit found the CRA's legislative history regarding mandatory arbitration of statutory claims conflicting and concluded that it was "insufficient

to overcome the presumption in favor of arbitration which Gilmer establishes.” Id. at *7.

With regard to this issue, the First Circuit also observed that “[n]umerous circuit courts have held that the Supreme Court’s reasoning in Gilmer applies to Title VII claims and that pre-dispute agreements to arbitrate Title VII claims are permissible. . . . Only the Ninth Circuit has disagreed.” Id.

The First Circuit also rejected challenges to pre-dispute arbitration based upon the Older Workers Benefit Protection Act, upon the structure of the NYSE arbitration procedures, and upon the agreement to arbitrate’s being an unconscionable contract of adhesion. Nevertheless, the District Court’s decision refusing to compel arbitration in this case was affirmed by a 2 to 1 vote because the U-4 Form involved was interpreted by the majority to require that employees be given a copy of the NYSE rules or information to the same effect and Merrill Lynch was found not to have provided Rosenberg with a copy of the rules:

It was part of Merrill Lynch’s side of the bargain with Rosenberg that it inform her of the content of the NYSE rules. Merrill Lynch did not keep its side of the bargain.

Id. at *20. Under the circumstances, the First Circuit’s majority found that compelling arbitration would not be “appropriate” under the 1991 CRA.

Judge Wellford dissented from this portion of the First Circuit’s decision:

Unlike Judge Lynch, I would hold that Rosenberg was presumed to understand, and to be bound by, the plain terms of her U-4 agreement even if she were not furnished copies of the exchange rules at the time of signing. I believe the agreement was broad and plain and that it put Rosenberg on notice that she agreed to arbitrate at the outset “any dispute, claim or controversy” with Merrill Lynch under exchange rules.

Id. at *23.

Duffield was also recently rejected in Rand v. J.C. Bradford & Co., No. 98 Civ. 4906, 1998 WL 872421 (S.D.N.Y. Dec. 15, 1998), where the court compelled arbitration of the plaintiff's Title VII claims. Rand had agreed to arbitration pursuant to the NYSE rules which provided for arbitration of "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment." Id. at *3. The court found the agreement "[o]n its face" to "require[] Rand to arbitrate all of her employment claims." Id. at *4. The court rejected plaintiff's arguments based upon Congressional intent, finding: "Duffield does not bind this Court, and, in any event, is countered by authority in other circuits." Id.

Another aspect of Duffield was considered, and rejected, in 24 Hour Fitness, Inc. v. Munshaw, 66 Cal. App. 4th 1199 (1998), which involved mandatory arbitration of a discrimination claim under the California's Fair Employment and Housing Act. The California Court of Appeal declined to follow Duffield which had held, without analysis, that a plaintiff could not be required to arbitrate such claims:

Because "[p]arallel state anti-discrimination laws are explicitly made part of Title VII's enforcement scheme," FEHA claims are arbitrable [only] to the same extent as Title VII claims.

Duffield, 144 F.3d at 1187 n.3 (citation omitted). Addressing this issue in a footnote, the Court of Appeal found:

Duffield is not binding on this court, and its validity is undermined by contrary decisions in Brockwood v. Bank of Am., 45 Cal. App. 4th 1667, 53 Cal. Rptr. 2d 515 (1996) and

Spellman v. Securities, Annuities & Ins. Servs., Inc., 8 Cal. App. 4th 452, 10 Cal. Rptr. 2d 427 (1992), both of which hold that statutory discrimination claims under FEHA are arbitrable.

66 Cal. App. 4th at 1210 n.9 (1998).

In a more recent decision, Armendariz v. Foundation Health Psychcare Servs., Inc., 68 Cal. App. 4th 374, 80 Cal. Rptr. 2d 255 (1998), a California Court of Appeal again rejected Duffield's reasoning with respect to FEHA claims, finding that previous decisions of the Court of Appeal had found that "the Gilmer analysis . . . applied to parallel provisions of the FEHA." Id. at 386. More importantly, however, the Court of Appeal also rejected, in dicta, the Ninth Circuit's reasoning with regard to Title VII. Thus, although the particular action before it did not involve an alleged violation of Title VII, the Court of Appeal left no doubt about its views, concluding both that Ninth Circuit authority is no more binding upon a California court than the decisions of other circuits and that there is a "near uniform line of post-Gilmer decisions ordering arbitration of statutory claims." Id. at 387.

D. Even Courts Willing to Enforce Mandatory Pre-Dispute Arbitration Agreements, However, Require Fairness, Consideration and Compliance by the Employer with its Obligations.

1. Where Employers Have Imposed a Scheme Which Lacks Fairness or Deprives Employees of the Full Panoply of Remedial Rights, Enforcement of Their Pre-Dispute Arbitration Agreements Has Generally Been Denied.

It is important to recognize that the Supreme Court in Gilmer upheld pre-dispute arbitration agreements as a valid choice of forum. Where, however, the employer has attempted to use pre-dispute arbitration agreements to secure an unfair advantage, courts have not hesitated to deny enforcement. Two of the most recent cases in this area are discussed below.

In Hooters of Am. v. Phillips, No. 4:96-3360-22, 1998 WL 558736 (D.S.C. March 12, 1998), appeal pending, a mandatory pre-dispute arbitration agreement was denied enforcement because of the parties' inequalities under the arbitration agreement. For example, the selection of arbitrators was entirely controlled by Hooters, employees were permitted only one deposition and the employees were required to "divulge the identity, address and summary of the testimony of all of their witnesses as a prerequisite to filing such a claim, but no burden is imposed on Hooters." Id. at *14, *34. Hooter's scheme was also found to abridge employees' "rights to full damages" because the agreement did not provide the full relief available under Title VII. Id. at *31. For example, the agreement required any back-pay relief to be offset from funds received from other sources, such as unemployment compensation, which the court found not to be required under Title VII. Id. at *11. Also, the agreement limited punitive damages to an amount equal to the employee's annual gross cash compensation. Id. And, unlike Title VII, the agreement placed limitations on when attorney's fees may be awarded to successful plaintiffs. Id. Finally, the court concluded that "by reserving the authority to modify the Rules, or terminate the agreement, at its choice, while denying the same to Phillips," the agreement and rules were "illusory". Id. at *33.

A limitation on damages was also found by the Eleventh Circuit to be a barrier to enforcing an agreement to arbitrate in Paladino v. Avnet Computer Techs., 134 F.3d 1054, 1060 (11th Cir. 1998). The arbitration agreement there, which limited remedies to contract damages, was found to be “fundamentally at odds with the purposes of Title VII because it completely proscribes an arbitral award of Title VII damages.” Paladino, 134 F.3d at 1060.

2. Enforcement Has Also Been Denied for Lack of Consideration When Employers Have Attempted to Bind Only the Employee, But Not Themselves, to Arbitrate.

Although mutual promises to arbitrate may themselves be sufficient consideration for an agreement to arbitrate, Johnson v. Circuit City Stores, 148 F.3d 373 (4th Cir. 1998), courts will find arbitration agreements to be illusory where the employer reserves to itself an unlimited right to make changes or makes no binding commitment to arbitrate. One of the earliest cases to so hold was Heurtebise v. Reliable Bus. Computers, Inc., 452 Mich. 405 (1996), cert. denied, 520 U.S. 1142 (1997), where the employer’s reservation of the right to make changes unilaterally was found to preclude enforcement of a handbook’s arbitration procedures.

More recently, the Seventh Circuit reached a similar result in Gibson v. Neighborhood Health Clinics, 121 F.3d 1126 (7th Cir. 1997). Reasoning that “in order for a promise to be enforceable against the promisor, the promisee must have given some consideration for the promise,” the court found that the agreement at issue there contained “no promise [on the employer’s part] to submit claims to arbitration. It [was] worded

entirely in terms of [the employee's] obligation to submit her claims to arbitration.” Gibson, 121 F.3d at 1130, 1131.

Michalski v. Circuit City Stores, 6 F. Supp. 2d 1002 (E.D. Wis. 1998), is another interesting case where an absence of consideration was found. At issue there was a signed opt-out provision, stating: “I understand that if I do not mail the Form [opting out of the arbitration program] within calendar 30 days, I will be required to arbitrate all employment-related legal disputes.” 6 F. Supp. 2d at 1003. The court found that because the employer had offered nothing in return for the employee's agreement to arbitrate, the opt-out provision did not bind the employee. Id.

See also Hooters, supra.

3. Where an Employer Does Not Comply With its Obligations, Enforcement of Pre-Dispute Arbitration May Be Denied.

The First Circuit in Rosenberg denied enforcement based on ordinary contract principles where Merrill Lynch did not comply with its obligations. Although the agreement Rosenberg signed “required Rosenberg to arbitrate any dispute that the NYSE's rules . . . required to be arbitrated,” Merrill Lynch conceded “those rules were not given to Rosenberg or described to her” as required by the U-4 agreement proffered to, and signed by, Rosenberg. 1998 WL 880910 at *17-*19. Because Merrill Lynch had failed to provide Rosenberg with a copy of the rules, the court's majority found Merrill Lynch to have “failed to define the range of claims subject to arbitration” and to “bear the risk of such

incompleteness.” Thus, under “principles of contract law,” the majority found no “agreement to arbitrate” and therefore no “enforceable contract.” *Id.* at *19.

E. The Standard of Review With Regard to the Arbitration of Statutory Disputes.

In *Cole*, Chief Judge Edwards suggests that “the strict deference accorded to arbitration decisions in the collective bargaining arena may not be appropriate in statutory cases in which an employee has been forced to resort to arbitration as a condition of employment.” 105 F.3d at 1487. Indeed, the Chief Judge reasoned that the “assumptions regarding the arbitration of statutory claims are valid only if judicial review under the ‘manifest disregard of the law’ standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law.” *Id.* Without necessarily citing *Cole*, most other courts appear to be applying a somewhat enhanced standard of review for statutory cases.

In *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456 (11th Cir. 1997), for example, the court had before it a claim for overtime which had been denied by the arbitrators, without opinion, after the attorneys for Shearson had argued to the arbitrators: “[Y]ou have to decide whether you’re going to follow the statutes that have been presented to you, or whether you will do or want to do or should do what is right and just and equitable in this case. . . . [I]n this case this law is not right.” 128 F.3d at 1459. The Eleventh Circuit reversed:

[W]e are able to clearly discern from the record that this is one of those cases where manifest disregard of the law is

applicable, as the arbitrators recognized that they were told to disregard the law . . . in a case in which the evidence to support the award was marginal.

Id. at 1462. Although, the court stated that the failure to state reasons for its decisions was not the basis for vacation, the court treated the absence of an opinion as a failure to “refute” inferences the court found appropriate from the evidence:

[T]he evidence did not show that Montes’s primary duties consisted of work directly related to management policies or general business operations. . . . At most, the evidence only showed that Montes performed some of this kind of work.

Id. at 1464. The court remanded the matter for a new arbitration before “a new arbitration panel.” Id. In a concurring opinion, Judge Carnes pointed out a limit inherent in the manifest disregard theory: “[T]he fact that an attorney misstated the law . . . will not justify a conclusion that the award resulted from a manifest disregard of the law.” Id.

The scope of review for arbitrators’ decisions of statutory claims has also recently been addressed in three Second Circuit cases. In DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818 (2nd Cir. 1997), cert. den. 118 S. Ct. 695, the Second Circuit limited the scope of review for “manifest disregard of the law” to cases where the arbitrator had been properly informed of the law. Plaintiff sought vacation of the arbitrator’s award because attorney’s fees were not awarded despite the fact that the ADEA states that “the court . . . shall, in addition to any judgment awarded to the plaintiff, . . . allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.” Id. at 822 (citation omitted). However, because plaintiff had failed to inform “the arbitrators of the relevant legal standard,” the

court found no manifest disregard for the law. Id. at 823. The “reach of the manifest disregard doctrine,” the court observed, “is severely limited.” Id. at 821 (citation omitted).

[T]o modify or vacate an award on this ground, a court must find both that (1) the “arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether,” and (2) the “law ignored by the arbitrators . . . [was] ‘well defined, explicit, and clearly applicable’” to the case.

Id. (citing Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 112 (2nd Cir. 1993)).

In Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2nd Cir. 1998), plaintiff was found to have introduced “strong evidence” of age-based discrimination, and his employer conceded he was “basically qualified,” 143 F.3d at 198. The arbitrators, however, without an opinion, denied relief to Halligan. On appeal, the court stressed that Halligan had presented overwhelming evidence. He had contemporaneous notes of discriminatory statements, he presented numerous witnesses who acknowledged the discrimination, and he demonstrated his strong qualification. In light of this overwhelming evidence and the fact that the arbitrators were “correctly advised of the applicable legal principles,” the court concluded that the arbitrators had “ignored the law or the evidence or both.” Id. at 204. The court also appeared to rely upon the arbitrators’ failure to state any reasons for denying relief:

[W]hen a reviewing court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account. Having done so, we are left with the firm belief that the arbitrators here manifestly disregarded the law or the evidence or both.

Id. DiRussa was distinguished solely on the basis of the parties’ “not sufficiently [bringing] the governing law to the attention of the arbitrators.” Id., at 203-04.

In a case preceding the Halligan decision, but affirmed after it, a district court in New York declined to “create a second standard for manifest disregard when statutory claims are made,” Chisolm v. Kidder, Peabody Asset Management Inc., 966 F. Supp. 218 (S.D.N.Y. 1998) aff’d, Chisolm v. Kidder Peabody Asset Management, Inc., No. 97-7828, 1998 WL 695041 (2nd Cir. July 28, 1998), although appearing somewhat critical of pre-dispute arbitration agreements: “[E]mployees are essentially forced to arbitrate statutory claims against their employer” which can, the district court concluded, “act as a significant barrier to the ability of litigants to vindicate their statutory rights.” Id. at 224-25. The court further observed that arbitration “is a dispute resolution process which is generally more favorable to employers than it is to employees,” and that “commentators have raised serious questions regarding the competence of arbitrators to decide discrimination claims.” Id. Despite these criticisms, however, the district court chose not to follow Cole’s suggestion with regard to the scope of review, finding no support from the Supreme Court or the Second Circuit “indicat[ing] that the scope of review for statutory claims is any different from any other arbitrated claims.” Id. at 227. On appeal, the Second Circuit affirmed, applying the standard of arbitral review described in Halligan and DiRussa and implicitly rejecting a different standard for statutory claims. “Unlike Halligan, where there was ‘strong evidence that Halligan was fired because of his age’ . . . there was ‘ample basis [in the instant case to support the arbitrator’s decision].’” 1998 WL 69504 at *2.

F. Courts Are Reluctant to Enforce Arbitration Agreements Requiring Employees to Pay Even Part of the Arbitration Costs.

In his treatise-like decision in Cole v. Burns Int'l Security Serv., 105 F.3d 1465 (D.C. Cir. 1997), Chief Judge Harry T. Edwards upheld pre-dispute arbitration agreements, even for statutory disputes. The Cole decision, however, is explicit in holding:

Cole could not be required to agree to arbitrate his public law claims as a condition of employment if the arbitration agreement required him to pay all or part of the arbitrator's fees and expenses.

105 F.3d at 1485. Since this decision, a number of courts have likewise held that an employee required to arbitrate claims as a condition of employment could not be required to pay all or part of the arbitrator's expenses. Somewhat surprisingly, courts that have addressed this issue have not generally reformed the agreement or severed the offending clauses. Whether this is because the underlying agreements did not have an adequate severability or reformation clauses is not generally apparent.

In Davis v. LPK Corp., 78 Fair Empl. Prac. Cas. (BNA) 32 (N.D. Cal. 1998), for example, plaintiff, resisting an order to compel arbitration, sought to invalidate the arbitration agreement in part because it "required [her] to bear half of the fees and costs of the arbitrator in order to pursue her statutory rights under Title VII and FEHA." Id. at 34. The court agreed with plaintiff, quoting Cole: "'Because public law confers both substantive rights and a reasonable right of access to a neutral forum in which those rights can be vindicated we find that employees cannot be required to pay for the services of a "judge" in order to pursue their statutory rights.'" Id. Interestingly, the court rebuffed

defendants' offer to advance the arbitrator's fees in order to "save the Arbitration Agreement from unenforceability" on the grounds that "no existing rule of contract law permits a party to resuscitate a legally defective contract merely by offering to change it." Id. at 36-37 (citing Stirlen v. Supercuts, Inc., 51 Cal.App.4th 1519, 1536 (1997)).

Two of the three judges in Paladino were similarly concerned with requiring employees to cover a part of the arbitrators' fees, resting part of their decision to affirm the district court's refusal to compel arbitration on the fact that under the arbitration procedures at issue "employees may be liable for at least half the hefty cost of an arbitration." Paladino, 134 F.3d at 1062. Observing that "[o]ne circuit has in dicta stated that such 'fee-shifting' is a per se basis for nonenforcement," this two judge concurrence considered "costs of this magnitude a legitimate basis for a conclusion that the clause does not comport with statutory policy." Id.

Also, in Shankle v. B-G Maintenance Management of Colorado, Inc., 74 Fair Empl. Prac. Cas. (BNA) 94 (D.Colo. 1997), aff'd, 78 Fair Empl. Prac. Cas. (BNA) 1057 (10th Cir. 1999), defendant moved to compel arbitration of plaintiff's statutory claims requiring Shankle to "assume responsibility for one half of the arbitrator's fees" which "would be \$250 per hour for the arbitrator's time, \$125 per hour for travel time, and \$45 per hour for paralegal support time." Id. at 96. Again relying upon Cole, the court held "the premise of Gilmer is that the agreement at issue provided for arbitration which was a reasonable substitute for a judicial forum" and "the arbitration agreement in this case does not provide for such a substitute." Id. Arbitration under the circumstances here was neither adequate

nor enforceable because Shankle could not effectively “vindicat[e] his rights under title VII, the ADA, and the ADEA.” Id.

Although reformation was explicitly rejected in Davis, there are courts which have reformed the arbitration agreement, enforcing it as reformed. In Armendariz, for example, the court, “in view of the strong public policy in favor of arbitration,” severed “the remedies’ restriction which [it had] found to be unconscionable” and enforced the remainder of the arbitration agreement. Armendariz, 68 Cal. App. 4th 374 (1998). In doing so, the court cited an earlier California Supreme Court decision, Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 826-28 (1981), which had severed an unconscionable “provision designating a non-neutral arbitrator” and “approved the arbitration upon selection of a neutral arbitrator.” 68 Cal. App. 4th at 394. In Graham, the California Supreme Court relied upon “the strong public policy of this state in favor of resolving disputes by arbitration” and concluded the parties should not “be precluded from availing themselves of nonjudicial means of settling their differences.” 28 Cal. 3d at 831.

Hooters is another case which addresses the issue of reforming an arbitration agreement. There, the court refused Hooters’ request to reform the employment contract, finding reformation available under South Carolina law only for “mistake”: “Because this court may not blue pencil the parties’ arbitration agreement, the fact that another arbitration agreement with less onerous Rules might have been enforceable is irrelevant.” Hooters, 1998 WL 558736 at *40. Despite a severance provision, the court also declined to sever the agreement’s numerous improper provisions, finding that the agreement’s provisions were “highly interdependent” and that their severance would require the court “to fashion an

alternative to each [thus] necessitating a major rewrite based on the extensive number of defective provisions.” Id. at *42.

G. Breaking From Other Circuits, The Ninth Circuit Has Held the Federal Arbitration Act Does Not Apply to Employment Contracts.

In Gilmer, the Supreme Court explicitly left open the question of whether the Federal Arbitration Act applied to arbitration agreements set forth in contracts of employment, 500 U.S. 25 n. 2, leaving at issue the scope of the exclusion contained in Section 1 of the FAA: “[N]othing herein contained shall apply to contracts of employees of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1.

Although almost all states have enacted statutes encouraging arbitration, federal courts have often relied upon the Federal Arbitration Act in enforcing arbitration agreements requiring employees to arbitrate statutory claims involving the employee’s employer. Thus, the scope of Section 1 of the FAA could have considerable significance in this area. There has, moreover, been virtual unanimity among the Courts of Appeals, holding that Section 1 was intended to exclude from arbitration only those disputes involving seamen, railroad workers, or other employees who were directly involved in the movement of persons or goods in commerce. In December of 1998, however, the Ninth Circuit ruled otherwise, rekindling this controversy.

In Craft v. Campbell Soup Co., 161 F.3d 1199 (9th Cir. 1998), a panel of the Ninth Circuit examined whether the FAA encompassed employment agreements at all. Choosing

to interpret the FAA by “understand[ing] Congress’ intent in enacting the FAA and the employment exclusion clause,” the court’s majority observed that the FAA was originally enacted in 1925, at a time when the Commerce Clause was “clearly limited to the actual interstate movement of goods.” *Id.* at 1202. Therefore, the “act . . . which excluded workers ‘engaged in interstate commerce,’ extended its reach to the outer limit of Congress’ power under the Commerce Clause, because all classes of employees who were not actually working in interstate commerce were already outside the reach of the FAA.” *Id.* In short: “From a historical context, then, § 1 was clearly intended to exempt all employment contracts over which Congress had interstate commerce power.” *Id.* at 1203. The court also cited the Act’s legislative history as demonstrating a purpose to “give the merchants the right or privilege of sitting down and agreeing with each other as to what their damages are” and not to “be an act referring to labor disputes at all.” *Id.* (Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 before a Subcomm. Of the Senate Comm. On the Judiciary, 67th Cong. 8 (1923)). In light of its conclusions concerning the original intent of the FAA, the court’s majority concluded that the “FAA is inapplicable to the CBA that governs Craft’s employment.” The majority’s reasoning, moreover, would clearly require a similar result with regard to an individual employee’s agreement to arbitrate disputes with the employee’s employer. *Id.* at 1206.

The majority’s reasoning, however, was soundly criticized in a dissent which reasons that the court’s decision reads “seamen” and “railroad employees” as having no purpose, violating the “cardinal principle of statutory construction” which is “to give effect . . . to every clause and word of a statute.” *Id.* at 1206 (quoting *Bennett v. Spear*, 520 U.S. 154

(1997)). As for Congressional intent, the dissent pointed out that the FAA had been reenacted in 1947 at which time “it was settled law that the phrase ‘engaged in commerce’ was not coextensive with the limits of the power of Congress over interstate commerce.” *Id.* at 1207. The dissent also points out, as the majority conceded: “[A]lmost every circuit to have considered this question directly has held that the employment exclusion clause of § 1 should be interpreted narrowly [i.e., limited to those workers engaged in the actual movement of persons or goods in interstate commerce].” *Id.* at 1206 n. 1. *See, e.g.* McWilliams v. Logicon, Inc., 143 F.3d 573, 575 (10th Cir. 1998); Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465, 1470-71 (D.C.Cir. 1997); Rojas v. TK Communications, Inc., 87 F.3d 745 (5th Cir. 1996); Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 596-601 (6th Cir. 1996); Miller Brewing Co. v. Brewery Workers Local Union No. 9 AFL-CIO, 739 F.2d 1159, 1162 (7th Cir. 1984), cert. denied, 489 U.S. 1160 (1985).

H. Collective Bargaining Agreements and the Arbitration of Statutory Rights.

When the Supreme Court granted certiorari in Wright v. Universal Maritime Serv. Corp., 119 S. Ct. 391 (1998), many thought the Court would use the occasion to reconsider its earlier decision in Gardner-Denver and to resolve the obvious “tension between [the Gilmer and Gardner-Denver] lines of case.” *Id.* at 395. In fact, however, the Court quickly rendered a unanimous decision in which it found it “unnecessary to resolve the question of the validity of a union-negotiated waiver [of employees’ statutory rights to a judicial forum], since it is apparent to us, on the facts and arguments presented here, that no such waiver has occurred.” *Id.* at 395. The Court found that the “clear and unmistakable” standard which

had been applied previously to the waiver of rights under the National Labor Relations Act was equally “applicable to a union-negotiated waiver of employees’ statutory right to a judicial forum for claims of employment discrimination.” Id. at 396. Although conceding that the right to a judicial forum is “not a substantive right,” the Supreme Court, nevertheless, found that Gardner-Denver “at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA.” Id. at 396. In holding that “the collective-bargaining agreement in this case does not contain a clear and unmistakable waiver of the covered employees’ rights to a judicial forum for federal claims of employment discrimination,” the Court explicitly acknowledged that it did not “reach the question of whether such a waiver would be enforceable.” Id. at 397. That question will need to await another day.

Another interesting case involving arbitration with regard to a union-represented employee is Doyle v. Raley’s Incorporated, 158 F.3d 1012 (9th Cir. 1998), decided shortly before Wright. This case involved a clerk, Connie Doyle, who signed an employment application including an “Acknowledgment of Working Conditions” which provided:

I further acknowledge and agree that any claim concerning, or arising out of, my employment or its termination shall be subject to final and binding arbitration if arbitration is provided for in any collective bargaining agreement or employee handbook covering my employment. I voluntarily and knowingly waive any right I may have to pursue such claims in court where an arbitral remedy is provided.

In 1995, Doyle notified Raley’s that a skin condition prevented her from working in her current position. Effective September 25, 1996, Raley’s terminated her employment. Doyle did not file a grievance or pursue arbitration at any time during her medical leave of

absence or after her termination. Instead, in November 1996, she filed suit alleging wrongful termination because of her age and disability. The district court dismissed the suit finding that Doyle had signed a private agreement requiring her to follow the arbitration procedures contained in the collective bargaining agreement applicable to her employment.

The Ninth Circuit reversed, finding that “the arbitration clause in the collective bargaining agreement implicated only contractual rights and not the ‘independent statutory rights accorded by Congress.’” 158 F.2d at 1015, quoting from Alexander v. Gardner-Denver Co., 415 U.S. 36, 49-50 (1974). In this regard, of course, the Ninth Circuit was anticipating the result reached only weeks later by the Supreme Court in Wright v. Universal Maritime. Having found that the collective bargaining agreement at issue did not obligate the employee to arbitrate statutory disputes, the Ninth Circuit next looked to the company’s handbook to determine whether the handbook provided for final and binding arbitration of statutory disputes. Upon examining the handbook, however, the court determined that the “handbook does not contain an arbitration clause nor does it contain any reference of an agreement to arbitrate certain claims. Rather, it merely reiterates Raley’s policy of non-discrimination.” 158 F.3d at 1015, n. 6.

I. The Impact of an Agreement to Arbitrate Upon Actions by the EEOC.

In EEOC v. World Savings and Loan Assoc., Inc., 1999 WL 14255 (D. Md. Jan. 12, 1999), the EEOC brought suit for “general injunctive relief for alleged violations of Title VII” and also “for the benefit of two former WSLA employees . . . on whose behalf EEOC seeks equitable relief and compensatory and punitive damages.” Id. at *1. Because each of the two named individuals had signed a pre-dispute employment agreement agreeing to

arbitrate virtually all claims arising out of the employment relationship, including the specific claims asserted by the EEOC in this case, the defendant moved to stay the proceedings and compel arbitration.

Both parties agreed that the EEOC was not foreclosed from prosecuting an enforcement action in its own name for class-based equitable relief. In light of the arbitration agreements which had been executed by the employees, however, WSLA argued that any claims beneficially “owned” by the two employees could not be asserted in a judicial forum, whether such claims were asserted directly by themselves or derivatively by the EEOC.

The EEOC responded with three arguments, each of which was countered by WSLA and implicitly rejected by the court. First, the EEOC relied upon Cole to argue that the instant arbitration agreement was unenforceable because by its terms it required the employees to share in the costs of the arbitration. WSLA responded that Cole is not binding in the Fourth Circuit and that, in any event, under Maryland law, the instant arbitration agreement is severable. Second, the EEOC sought to distinguish cases in which individual monetary relief is unavailable at the behest of the EEOC because the individual previously had settled his claim from the circumstances here in which an alleged victim of discrimination had agreed to seek individual monetary relief only in an arbitral forum. WSLA, however, contended that there was no principled distinction between the two kinds of cases and that the EEOC is foreclosed from seeking individual relief in both circumstances. Finally, the EEOC contended that the enthusiasm demonstrated for arbitration by the Fourth Circuit is unwarranted as a matter of policy. The court observed,

however: “[U]nlike the EEOC, I am not free to indulge the extravagance of calling in to question the correctness of the Fourth Circuit’s interpretation of the law; its interpretation is binding on this court.” Id. at *3.

The district court appears to have accepted generally the arguments advanced by WSLA, although arbitration could not be compelled because the two individuals were not before the court. Instead, based on the court’s belief that the EEOC would not wish to proceed with this action solely for class-based equitable relief, the court, on its own motion, dismissed the EEOC’s action with prejudice, concluding:

If, contrary to my present understanding, the EEOC wishes to pursue this action as one for class-based equitable relief only, reserving until final judgment appellate review of the issue of whether it may seek individual monetary relief on behalf of former employees who . . . voluntarily became parties to a mandatory pre-dispute arbitration agreement, then I shall, on motion, vacate the within Order and issue a scheduling order allowing discovery to go forward.

Id. at *3.