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"PAPER: CUTTING EDGE ISSUES IN ARBITRATION AND PRACTICAL TIPS©" (6/98)

By R. Rogge Dunn

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R. Rogge Dunn was born in Dallas, Texas on January 22, 1957. He was admitted to the Bar of the State of Texas in 1984 and was subsequently admitted to all Federal District Courts in Texas and the United States Court of Appeals for the Fifth Circuit.

Mr. Dunn served as a law clerk to the Hon. Reynaldo Garza, U.S. Fifth Circuit Court of Appeals from 1983-1984. Mr. Dunn became Board Certified in Labor and Employment law by the Texas Board of Legal Specialization in 1993.

Education

Mr. Dunn was educated at Southern Methodist University where he received a B.A., cum laude, with departmental distinction in English in 1980. He received a J.D., with honors, from the University of Texas in 1983. At the University of Texas Law School he served as a Note Editor of the *Texas Law Review* 1982-1983, was a member of the UT International Moot Court school team in 1982, and was a member of the Board of Advocates during 1981-1983.

Recent Presentations and Speeches

Speaker, "Electronic and Computer Records," University of Houston Law Foundation, Employment Law seminar (Houston and Dallas, 1998);

Speaker, "Employment Law Discovery: Cases, Techniques and Forms," Dallas Bar Association, Employment Law Section (Dallas, 1998);

Speaker, "Preventing Sexual Harassment in the Workplace," presented to employees of Adecco, Inc. (Irving, 1998);

Speaker, "The Americans with Disabilities Act: Disabilities, Accommodations and Access," National Association of Women in Construction seminar (Dallas, 1997);

Speaker, "Preventing Sexual Harassment in the Workplace," presented to employees at Boeing Defense & Space (Irving, 1997);

Speaker, "Workplace Privacy in the Electronic Age," University of Houston Law Foundation, Employment Law for Lawyers and Human Resource Professionals Seminar (Dallas and Houston, 1997);

Guest, Kelly Ford Show, "Family Issues in the Workplace," KTLK radio 860 AM (Denver, 1996);

Speaker, "Workplace Privacy: What Can an Employer Discover about its Employees?" University of Houston Law Foundation, "Employment Law for Lawyers and Human Resource Professionals, seminar (San Antonio and Dallas, 1996);

Speaker, "Employment Practices Liability -- the Solution," Marsh & McLennan seminar (Addison, 1996);

Panelist, "Staging Your Own Event -- the Winning Adversary in Mediation," Bench/Bar Conference, Dallas Bar Association (Del Lago, 1996);

Speaker, "Ethical Considerations Applicable to an Employment Law Practice Involving Both Plaintiffs and Defendants," Dallas Bar Association, Employment Law Section (Dallas, 1995);

Speaker, "Preventing Sexual Harassment in the Workplace," presented to employees of CB Commercial Real Estate (Arlington, 1995);

Speaker, "Preventing Sexual Harassment in the Workplace," presented to employees of TAD Technical (Dallas, 1995);

Recent Publications

"Should Employers Use Criminal Records to Evaluate Job Applicants and Employees?" Personnel Law Update (December 1997);

"Arbitration versus Litagation: It's No Contest," Texas Lawyer, In house supplement 22 (November 17, 1997);

"Obtaining More than 'Name, Rank and Serial Number' From and Job Applicant's Former Employer," Personnel Law Update (November 1997);

"U.S. Supreme Court Restrictions on Providing References," Personnel Law Update (April 1997);

"Employers Won't Be Smiling When Their Candid Camera Leads to an Employee Lawsuit," Personnel Law Update (March, 1997);

"Arbitration: The Cost Effective Solution to the Explosion of Employment Lawsuits", Personnel Law Update (August, 1996);

"Dress and Grooming Codes: Can Companies Require Their Employees to Dress for Success?", Personnel Law Update (June, 1996);

"Fifth Circuit Holds OWBPA Does Not Apply to Arbitration Agreements," Personnel Law Update (May, 1996);

Activities

Mr. Dunn has been an Adjunct Professor in the MBA Program at Southern Methodist University since 1986. Mr. Dunn serves on the Editorial Advisory Board for James Publishing, which is publishing Texas Employment Law, a multi-volume work covering all aspects of Texas employment law. Mr. Dunn also serves on the Board of Directors of the SMU Mustang Club and is a member of SMU's Hilltop 100.

CUTTING EDGE ISSUES
IN ARBITRATION AND PRACTICAL TIPS

I. FAA APPLIES TO EMPLOYEES AND EMPLOYERS

A. The Issue: § 1 of FAA

The language of Section 1 of the FAA states:

> But nothing herein contained shall apply to contracts of employment of seamen, railway employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 1 (emphasis added). Plaintiffs often contend that their work involves interstate commerce and therefore the § 1 exemption means the FAA does not apply. The legislative history of the Act does not support this reasoning.

B. Legislative History Proves § 1 Exemption Applies Only to Transportation Industry Workers

When the FAA bill was proposed, it did not include the § 1 exemption for "contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce." Tenney Engineering, Inc. v. United Elec. Radio & Machine Workers of America, 207 F.2d 450, 452 (3rd Cir. 1953). The seamen's union objected and asked that this specific exemption be added to the FAA. Id. The Tenney court noted that:

> It thus appears that the draftsmen of the Act were presented with the problem of exempting seamen's contracts. Seamen constitute a class of workers as to whom Congress had long provided machinery for arbitration. In exempting them the draftsmen excluded also railroad employees, another class of workers as to whom special procedures for the adjustment of disputes had previously been provided. Both these classes of workers were engaged directly in interstate or foreign commerce. To these the draftsmen of the Act added 'any other class

> of workers engaged in foreign or interstate commerce.' We think that the intent of the latter language was, under the rule of ejusdem generis, to include only those other classes of workers who are likewise engaged directly in commerce, that is, only those other classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it. The draftsmen had in mind the two groups of transportation workers as to which special arbitration legislation already existed and they rounded out the exclusionary clause by excluding all other similar classes of workers.

Tenney, 207 F.2d at 452-53 (emphasis added).

C. Caselaw Indicates § 1 Exemption Applies Only to Transportation Industry Workers

Although there is no United States Supreme Court case on point, long ago, numerous Circuit Court of Appeals -- including the Fifth Circuit -- recognized that the § 1 exemption upon which Plaintiff attempts to rely applies only to seamen, railroad employees or workers engaged in the transportation industries.

The Second Circuit recognized this was the clear intent of the FAA as early as 1956. Signal-Stat Corp. v. Local 475, United Electrical Radio & Machine Workers, 235 F.2d 298 (2nd Cir. 1956), cert. denied, 354 U.S. 911, 77 S. Ct. 1293, 1 L.Ed.2d 1428 (1957); accord Irving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2nd Cir. 1972); Weston v. ITT-CFC, 8 IER Cases 503, 505 (N.D. Tex. 1992) ("The court finds that the weight of persuasive authority favors a narrow interpretation limiting the exclusion to employment contracts governing workers involved in the transportation industries or the actual movement of goods in interstate commerce.")

The Fifth Circuit has recognized that the FAA applies to employment contracts like the one at issue. In Tullis v. Kohlmeyer & Company, 551 F.2d 632 (5th Cir. 1977), the court held that a lawsuit concerning an employment dispute between brokers and their employer was covered by the

FAA. The Fifth Circuit reaffirmed this ruling in another case involving an employment dispute. General Warehouse & Helpers v. Standard Brands, 579 F.2d 1282, 1295 (5th Cir. 1978), cert. dism'd, 439 U.S. 859 (1978).

The First Circuit has also adopted this interpretation, holding that:

> Courts have generally limited this exception to employees, unlike appellant, involved in, or closely related to the actual movement of goods in interstate commerce.

Dickstein v. Dupont, 443 F.2d 783, 785 (1st Cir. 1971) (emphasis added). Likewise, the Seventh Circuit has held:

> The Act's exclusion of 'contracts of employment of . . . workers engaged in foreign or interstate commerce' . . . has been held to be limited to workers employed in the transportation industries.

Miller Brewing v. Brewery Workers Local U. No. 9, 739 F.2d 1159, 1162 (7th Cir. 1984), cert. denied, 469 U.S. 1160 (1985) (quoting FAA statute); accord Pietro Scalzitti Co. v. Int'l Union of Operating Engineers, Local 150, 351 F.2d 576, 580 (7th Cir. 1965).

Limiting the § 1 exemption clause to transportation and postal workers makes sense. Adopting Plaintiff's argument that the §1 exemption applies to every worker "involved in" interstate commerce would eliminate FAA coverage for almost all workers in America since most jobs involve some use of the instrumentalities of interstate commerce. Further, if the drafters had intended to so limit the FAA they would have used the phrase "involved in" instead of "engaged in." Following the principle of ejusdem generis, one court recently held:

> In purposefully following the specific exemption created for seamen and railway workers with the words 'any other class of workers engaged in foreign or interstate commerce,' the drafters intended to indicate that only classes of workers actively involved in the

> transportation industry, such as seamen and railway workers were to be exempt from the FAA. Id. at 452.
>
> If § 1 were intended to exempt all contracts of employment, the drafters easily and almost certainly would explicitly have so stated without qualification.

Dancu v. Coopers & Lybrand, 778 F. Supp. 832, 834 (E.D. Pa. 1991) (emphasis added), aff'd, 912 F.2d 1330 (3rd Cir. 1992); accord Mallison v. Prudential-Bache Securities, Inc., 654 F. Supp. 101, 104 (E. Mich. 1987). As another court has reasoned "if Congress had intended to exclude all employment contracts from the Act, it would have been unnecessary to identify specific categories of workers." Hydrick v. Management Recruiters, Int'l., 738 F. Supp. 1434, 1435 (N.D. Ga. 1990).

One case that typifies type of work needed to trigger for the section 2 exemption is, Bacashihua, 859 F.2d 402. Bacashihua, of course, is distinguishable from the typical employment case because it involved postal workers. The Court noted that those workers are responsible for numerous "items of mail moving in 'interstate commerce' on a daily basis. Indeed, without them, 'interstate commerce,' as we know it today, would scarcely be possible." Bacashihua, 859 F.2d at 405.

D. Cases Reading the § 1 Exemption Broadly

1. United Electrical Radio & Machine Workers of America v. Miller Metal Products, Inc., 215 F.2d 221, 224 (4th Cir. 1954).

2. Herring v. Delta Airlines, Inc., 894 F.2d 1020, 1023 (9th Cir.), cert. denied, 494 U.S. 1016 (1990).

II. FAA CLEARLY REQUIRES ARBITRATION OF EMPLOYMENT CLAIMS

A. FAA Applies to Statutory Employment Disputes

Numerous cases recognize that FAA applies to statutory employment disputes, e.g., Williams v. Cigna Financial Advisors, Inc., 56 F.3d 656, 659, (5th Cir. 1995) (ADEA and retaliation claims); Metz v. Merrill Lynch, Pearce Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994) (Title VII Claims) Kidd v. Equitable Life Assurance Society of United States, 32 F.3d 516, 519 (11th Cir. 1994)(Title VII Claims); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991); Tullis, 551 F.2d 632; General Warehouse & Helpers v. Standard Brands, 579 F.2d 1282, 1295 (5th Cir. 1978).

B. Recent U.S. Supreme Court and Fifth Circuit Cases Holding that Significant Statutory Claims Are Preempted By the FAA

In Gilmer v. Interstate/Johnson Lane Corp., an employee who had sued his employer under the ADEA argued that the FAA did not require arbitration of the Plaintiff's age claims. The Supreme Court held that:

> '[h]aving made the bargain to arbitrate, the parties should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'

Gilmer, 111 S. Ct. 1647, 1652 (1991) (quoting Mitsubishi, 473 U.S. at 628).

The Fifth Circuit has followed this ruling and held that all Title VII claims can be subjected to compulsory arbitration under the FAA. Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991). As one court has noted:

> The message of Gilmer and Alford is clear: 'disputes alleging a violation of a statutory prohibition against discrimination in employment, may despite important public policies involved, be

> subject to arbitration if the arbitration agreement in question is governed by the FAA.'

Sacks v. Richardson Green Shield Securities, Inc., 781 F. Supp. 1475, 1481 (E.D. Cal. 1991) (quoting Higgins v. Superior Court, 234 Cal. App.3d 1464 (1991)).

C. Drafting a Broad Arbitration Agreement

Before an employee's claim can be subject to arbitration, a court must decide that the arbitration agreement itself is broad enough to cover the dispute. Arbitration clauses that are ambiguous or limited, do not bind the parties to arbitration. Courts have rejected arbitration in these circumstances.

Accordingly, careful attention should be paid to the language used in an arbitration agreement. Those wishing to compel arbitration should use language such as the parties "agree to arbitrate any and all disputes that arise between them at any time." Samples of complete arbitration agreements are attached at the end of this paper.

The Fifth Circuit has recognized that the "any and all disputes" language is a "broad arbitration clause." Neal v. Hardee's Food Systems, Inc., 918 F.2d 34, 38 (5th Cir. 1990); see also Coors Brewing Co. v. Molson Breweries, 51 F.3d 1511, 1515 (10th Cir. 1995) (interpreting "any dispute arising in connection with the implementation, interpretation or enforcement of this Agreement" to compel arbitration); Snap-On Tools Corp. v. Mason, 18 F.3d 1261, 1263 (5th Cir. 1994) ("any controversy or dispute arising out of or relating to this Agreement" covered contract and tort causes of action between the parties).

This broad clause would encompass all of tye types of claims an employee could make against an employer, including an adhesion contract claim. Mar-Len of Louisiana, Inc., 773 F.2d 633 (5th

Cir. 1995) (claim that contract modifications were procured by economic duress was subject to arbitration clause covering "any dispute" regarding the contract).

1. Standard for Determining Whether Dispute Governed by An Arbitration Clause

Section 3 of the Arbitration Act requires a court to stay proceedings pending arbitration if the court is "satisfied that the issue involved . . . is referable to arbitration" under an arbitration agreement. See Bhatia v. Johnston, 818 F.2d 418, 421 (5th Cir. 1987). Indeed, the Fifth Circuit, following Supreme Court authority, has noted that:

> By its express terms, the Arbitration Act dispels any suggestion that the district courts are vested with discretion to order arbitration for it 'mandates that all district courts shall direct the parties to proceed to arbitration on the issues as to which an arbitration agreement has been signed.'

Bhatia, 818 F.2d at 421.

2. Burden of Proof

The Fifth Circuit has also held that "the party resisting arbitration . . . has the burden of showing he is entitled to a jury trial." Bhatia, 818 F.2d at 422 (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 637 F.2d 391, 398 n.12 (5th Cir. Unit B, 1981)).

III. ADHESION, FRAUDULENT INDUCEMENT, COERCION AND RESCISSION CAN DEFEAT AN ARBITRATION AGREEMENT

PRACTICE TIP: Unless a party challenges only the making of the arbitration provision itself, and does not challenge the entire contract, a court must refer adhesion and other similar issues to an arbitrator.

In the Prima Paint case, a party sought to rescind a contract containing an arbitration clause based on fraudulent inducement. The Court held that the FAA "does not permit the federal court to consider claims of fraud in the inducement of the contract generally." Prima Paint Corp. v. Flood &

Conklin Mfg. Co., 388 U.S. 403, 404 (1967). In this situation, the court must refer the matter to arbitration. Id.

The Fifth and other Circuit courts have repeatedly followed Prima Paint and routinely referred such issues to arbitration. E.g., Snap-On Tools Corp. v. Mason, 18 F.3d 1261, 1268 (5th Cir. 1994) (fraudulent inducement question properly resolved by arbitration); R.M. Perez & Associates, Inc. v. Welch, 960 F.2d 534, 538-39 (5th Cir. 1992) (plaintiff claimed he never knew he was agreeing to arbitration clause, did not read or understand documents, company did not explain documents, fraudulent inducement); Bitkowski v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 866 F.2d 821, 823 (6th Cir. 1987) (fraudulent inducement); Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 285-86 (9th Cir. 1988) (adhesion, fraudulent inducement, not given copy of contract, unconscionability); Lorence v. Comprehensive Business Services, Co., 833 F.2d 1159, 1162 (5th Cir. 1987) (illegality); Villa Garcia v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 833 F.2d 545, 547 (5th Cir. 1987) (overreaching); Bhatia v. Johnston, 818 F.2d 418, 422 (5th Cir. 1987) (agreement not explained, no bargaining opportunity, adhesion); Mar-Len of Louisiana, Inc. v. Parsons-Gilbane, 773 F.2d 633, 636 (5th Cir. 1985) (economic duress); Schacht v. Beacon Ins. Co., 742 F.2d 386, 389 (7th Cir. 1984) (fraudulent inducement); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 637 F.2d 391, 398 (5th Cir. 1981) (duress, unconscionability); Weston v. ITT-CFC, 8 IER Cases 503, 505 (N.D. Tex. 1992).

If a Plaintiff complains about the contract as a whole and not solely about the arbitration provision contained within that contract, the entire contract is at issue and the adhesion claims must be decided by arbitration.

The Fifth Circuit has specifically addressed this issue. In Bhatia, the plaintiff made the same allegations as Plaintiff in the case at bar, namely that "the agreements were not explained to him and that he had no bargaining opportunity as to their contents." Bhatia v. Johnston, 818 F.2d 418, 421-22 (5th Cir. 1987). Further, the plaintiff argued that the arbitration clause "should be void because it was a contract of adhesion." Bhatia, 818 F.2d at 422. The Fifth Circuit held that:

> We are persuaded that Bhatia did not assert that the arbitration clause alone, as opposed to the customer agreement generally, was induced by the misrepresentations and actions of Johnston. Accordingly, the Supreme Court's holding in Prima Paint dictates Bhatia's claim that the contract is invalid must be referred to arbitration.

Bhatia, 818 F.2d at 422. See also Snap-On Tools, 18 F.3d at 1268.

In a case involving a customer/broker contract with an arbitration clause, the parties seeking to avoid arbitration on adhesion grounds alleged facts identical to those in this case. The court referred the matter to arbitration holding that:

> The Plaintiffs' allegations that they did not read or understand the documents and that Welsh did not explain the documents to them does not allege fraud in the making of the arbitration agreement, but goes to the formation of the entire contracts. Therefore, the allegations are arbitrable.

Perez, 960 F.2d at 539 (5th Cir. 1992) (emphasis added).

Other courts have recognized that when a party challenges the entire contract and does not solely challenge the arbitration clause, the matter must be referred to arbitration. The Seventh Circuit did so upon finding that the appellant "nowhere contends that the alleged fraud in the inducement applied solely to the arbitration clause." Schacht v. Beacon Ins. Co., 742 F.2d 386, 390 (7th Cir. 1984) (emphasis in original). As one court has put it:

> The Prima Paint holding can be reduced to the fairly simple proposition that a challenge based on fraud in the inducement of the whole contract (including the arbitration clause) is for the arbitrator to decide, while a challenge based on fraud in the inducement of the arbitration clause only is for the court to decide.

Rhoades v. Powell, 644 F.Supp. 645, 653 (E.D. Cal. 1986), aff'd, 921 F.2d 217 (9th Cir. 1992) (citing Schacht); accord Letizia v. Prudential Bache Securities, Inc., 802 F.2d 1185, 1188 (9th Cir. 1986) ("only a claim that the arbitration clause itself was independently induced by fraud can be brought before the court"); Matterhorn, Inc. v. NCR Corp., 763 F.2d 866, 868 (7th Cir. 1985) ("challenge based on fraud in the inducement of the whole contract (including the arbitration clause) is for the arbitrator.")

Several district courts that have faced this identical issue, have stayed lawsuits pending arbitration. See orders attached to the end of this paper.

IV. AN EMPLOYEE WHO PLEADS BREACH OF CONTRACT IS OFTEN ESTOPPED FROM SEEKING RESCISSION

Plaintiffs often pled a cause of action for breach of contract. Such pleadings can put a plaintiff in an inconsistent position. On the one hand, the plaintiff alleges that she had a contract of employment with the defendant, yet on the other hand, the plaintiff seeks rescission of that contract on grounds of unconscionability.

The legal remedies sought by a plaintiff in such a situation are clearly inconsistent. Applying Texas law, the Fifth Circuit has held that:

> the defrauded party cannot seek both to have the contract rescinded and at the same time sue on the contract for damages resulting from the fraudulent transaction.

Fredonia Broadcasting Corp., Inc. v. RCA Corp., 481 F.2d 781, 790 (5th Cir. 1973), cert. denied, 439 U.S. 859 (1978). We "sheppardized" this case on March 17, 1998 and found no more recent authority than Fredonia.

In Fredonia, the Plaintiff contended that a contractual limitation contained in a contract should not apply because the contract was induced by fraud. The Fifth Circuit held that the Plaintiff's argument had "no merit since, when Fredonia decided to affirm the contract and sue for its breach, it must be bound by the contract terms." Fredonia, 481 F.2d at 799.

Employers have a basis for defeating this agreement by noting that it is unfair to deny a defendant the benefit of his bargain. This is especially true when a plaintiff has accepted the benefits of the bargain by working for the employer for many years, obtaining raises, etc. without complaining until it suits the plaintiff's purposes.

If a court were to allow a plaintiff to ignore an arbitration provision of a contract while suing on the rest of the contract, it would delay the resolution of the dispute and destroy one of the primary benefits of arbitration. The ruling in Prima Paint underscores this important policy. The court based its decision to refer the adhesion issue to arbitration on "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." Prima Paint, 388 U.S. at 404.

V. THE TEXAS STANDARD FOR UNCONSCIONABILITY/ADHESION

Under Texas law, Plaintiff must prove both substantive and procedural unconscionability to prevail. Wade v. Austin, 524 S.W.2d 79, 86 (Tex. Civ. App. -- Texarkana 1975, no writ), cited with approval in, Southwestern Bell Telephone Co. v. DeLanney, 809 S.W.2d 493, 498 (Tex. 1991). A court may find procedural unconscionability if a plaintiff presents evidence showing the absence of

any meaningful choice in the bargain. Wade, 524 S.W.2d at 86. A court may find substantive unconscionability if the terms of the contract are so one-sided or oppressive as to be unreasonable. Id.

A. Did the Employee Have a Meaningful Choice?

In Allright, Inc. v. Elledge, 515 S.W.2d 266 (Tex. 1974), the Texas Supreme Court held that the plaintiff had failed to show any evidence of disparity of bargaining power in a month-to-month lease agreement which was entered into by Plaintiff and a parking garage owner, Allright. The Texas Supreme Court stated that one claiming disparity of bargaining power must present evidence to raise a fact issue concerning the claim, unless the very occupation of one of the parties is evidence of such a fact. Id. See also Federated Department Stores, Inc. v. Houston Lighting & Power Co., 646 S.W.2d 509 (Tex. App. -- Houston [1st Dist.] 1982, no writ).

A plaintiff needs to present evidence establishing that she could not have obtained employment elsewhere. A plaintiff must show that it is standard for all employers to include an arbitration clause in an employment contract. A plaintiff's efforts will be more difficult if at the time she signed the arbitration agreement, the plaintiff was employed elsewhere. A plaintiff should also be prepared to present any evidence regarding his net worth or financial condition at the time the arbitration agreement was signed.

A Plaintiff will often argue that she was forced to sign the contract "on the spot." Therefore, I recommend that an employer allow each applicant or employee to take the arbitration agreement home and carefully consider and review it. If the employer does allow a "waiting period" before requiring an agreement, the employer should document that the employee took time to consider the arbitration agreement before signing same.

If a plaintiff continues employment with an employer after signing an arbitration agreement, such action arguably defeats any contention that she was coerced into signing the contract. With the security of a job in hand, a plaintiff will certainly have the time and flexibility to find other work if the plaintiff truly believes she was coerced into the contract.

An employer should be prepared to present evidence, via affidavit or otherwise, that the plaintiff did not conduct any job search. Occasionally, a co-employee of the plaintiff who may be a confidant can provide information on this subject. Further, if the plaintiff is unable to present such evidence, an employer can use the lack of evidence regarding same as a basis for defeating an adhesion argument.

B. Proving that an Arbitration Agreement is Oppressive

The second prong necessary to prove unconscionability necessitates proof that the end result of the contract is oppressive or so one-sided that it is unreasonable.

An employer will have a number of strong arguments to counter the plaintiff's contention that arbitration agreements are inherently oppressive. Requiring arbitration of a dispute arising out of one's employment is arguably anything but oppressive. Arbitration provides all parties with a forum for prompt resolution of their dispute with a minimum of attorneys' fees and expenses. Given the backlog of criminal cases in federal court, if a federal court employment lawsuit is not arbitrated, it will likely not be resolved for many years.

In the interim, the disputants will agonize over the delays and uncertainties of litigation and incur dramatically increased attorneys' fees and expenses. Further, their ability to prove their case on the merits may be significantly decreased as witnesses move away or their memories become "sketchy."

As the Eighth Circuit has noted regarding customer/broker agreements, "[t]here is certainly nothing inherently unfair about the arbitration clauses, and they are therefore valid and enforceable." Surman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 733 F.2d 59, 61 n.2 (8th Cir. 1984). Finally, as the Supreme Court has recognized, proceeding to arbitration in no way prejudices a party's statutory rights. It only results in those rights being "resol[ved] in an arbitral rather than judicial forum." Gilmer, 111 S. Ct. at 1652.

Congress has evinced a strong public policy favoring arbitration. The Supreme Court has endorsed this policy and recognized arbitration as an important way of resolving disputes. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983).

Texas courts have also noted the importance of arbitration. One Texas court has held that:

> [t]here is a strong national policy favoring arbitration and doubts regarding the availability of arbitration are resolved in favor of arbitration.

Shearson Lehman Hutton, Inc. v. Tucker, 806 S.W.2d 914, 919 (Tex. App. -- Corpus Christi, 1991, writ dism'd. w.o.j.) (citing Life of Am. Ins. Co. v. Aetna Life Ins. Co., 744 F.2d 409, 413 (5th Cir. 1984)); accord Carpenter v. North River Ins. Co., 436 S.W.2d 549, 553 (Tex. Civ. App. -- Houston [14th Dist.] 1968, writ ref'd. n.r.e.).

Texas courts have specifically recognized that Texas' public policy also favors resolving disputes via arbitration. The Dallas Court of Appeals has noted that passage of the Alternative Dispute Resolution Procedures Act by the Texas legislature in 1987:

> set[s] forth the state's policy of encouraging peaceable resolution of disputes and the early settlement of pending litigation. The implementation of this policy has been placed in the hands of the judiciary.

Wylie Independent School District v. TMC Foundations, Inc., 770 S.W.2d 19, 23 (Tex. App. -- Dallas 1989, writ dism'd).

The Fifth Circuit has also recognized that the Texas courts have spoken forcefully on this issue. Life of America Ins. Co. v. Aetna Life Ins. Co., 744 F.2d 409, 413 (5th Cir. 1984). In Life of America, the Fifth Circuit held that "the settlement of disputes by arbitration is favored in the law of Texas". Id. at 413.

The public policy considerations supporting arbitration should not be ignored. The unconscionability defense is the child of equity and public policy. Arguments that a particular contract is void because of adhesion necessarily raise the countervailing considerations of state and federal public policy promoting resolution of disputes through arbitration.

Plaintiffs have typically complained about the arbitration procedure by arguing that: (1) the situs of the arbitration is unduly burdensome; (2) the cost of the arbitration is too high; (3) requiring an employee to pay some or all of the arbitrator's fees is unreasonable; and (4) the arbitration rules do not require a written decision.

VI. A PLAINTIFF HAS A BASIS FOR CHALLENGING ARBITRATION RULES IF THE RULES DO NOT FAIL TO REQUIRE A WRITTEN OPINION

In Gilmer the Supreme Court reviewed an arbitration agreement governed by the New York Stock Exchange Rules. Those rules require a full written opinion by the arbitrators.

The rules for other arbitration agreements, however, do not always require a written decision. A plaintiff may argue that some case law suggests the arbitration process must create a sufficient written record for adequate review by an appellate court where the arbitration requires statutory

discrimination rights. See Franks v. Bowman Transportation Co., 495 F.2d 398 (5th Cir. 1974); Rios v. Reynolds Metals Co., 467 F.2d 54 (5th Cir. 1972).

On the other hand, several cases suggest that an arbitration agreement is not void merely because it involves discrimination claims and the arbitration rules do not require any written reasoning, factual findings or legal conclusions. For example, it is well settled that arbitrators are not required to disclose or explain the reasons for an award. Antwine, 899 F.2d at 412 (citing United Steel Workers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960)). See also Robins, 954 F.2d at 684. As the Fifth Circuit reasoned:

> if arbitrators were required to issue an opinion or otherwise detail the reasons underlying an arbitration award, the very purpose of the arbitration -- the provision of a relatively quick, efficient and informal means of private dispute settlement -- would be markedly undermined.

Antwine, 899 F.2d at 412; See also Wall Street Assoc., L.P. v. Becker Paribas, Inc., 27 F.3d 845, 849 (2nd Cir. 1994).

Plaintiffs often attempt to distinguish these cases because they involved commercial disputes rather than discrimination claims. Such arguments ignore controlling Fifth Circuit precedent and the rulings of other circuits, which all compelled arbitration of discrimination claims under NASD rules -- rules that, at least at the time, did not require a written opinion detailing an arbitrator's findings and reasoning.[1] E.g., Williams v. CIGNA I, at 659 (ADEA claim subject to NASD arbitration); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994); (Title VII claims of former employee registered with NASD "are subject to compulsory arbitration"); Kidd v. Equitable Life Assurance Society of United States, 32 F.3d 516, 519 (11th Cir. 1994); (Title VII claims); Ass'n

[1]Note that the NASD has proposed a number of new rule changes that are being considered by the SEC for approval.

of Investment Brokers v. SEC, 676 F.2d 857, 861 (D.C. Cir. 1982); (NASD rules require arbitration of employer-employee disputes).

Even assuming that a court might be inclined to strike down an arbitration agreement whose rules do not require a written opinion from the arbitrator, the desire for a written opinion can be met through other means. If the arbitration rules require transcription of the proceedings, or if a party retains a court reporter to transcribe same, the public policy considerations for opinion are arguably met by such a transcript. If it is true that a written decision is important for a court to evaluate the arbitrators' actions on a Motion to Vacate the Arbitration Award, this need can be met by a transcript.

VII. REQUIRING AN EMPLOYEE TO PAY SOME OR ALL OF THE ARBITRATION FEES IS NOT UNREASONABLE

Arbitration fees are no more of a barrier than court filing fees. If a working class employee cannot afford arbitration fees, he can retain an attorney on a contingency fee who will advance those forum fees just as plaintiffs' employment lawyers do everyday when they file lawsuits on a contingency fee basis and advance filing fees and other litigation costs.

The Cole court did not demonstrate how an individual is prejudiced by arbitration rules that allow the Arbitrators to "tax" forum fees against one or more of the participants. Plaintiffs who lose employment cases usually have court costs taxed against them. These court costs are usually much higher than arbitration fees. In addition, on occasion, a Defendant is awarded its attorneys' fees as a "prevailing party" under the anti-discrimination statutes. Since a plaintiff's exposure for payment these court costs is equally the same as paying for arbitration forum fees under an arbitration system, there is no basis for reforming the award on these grounds.

Even assuming that an employee must pay an arbitration fee of several thousand dollars, how could this be oppressive when compared to the litigation alternative? If this matter is tried rather than arbitrated, a plaintiff's out-of-pocket payments to court reporters alone would exceed this figure. When expert witness fees, travel costs, photocopying, postage charges and other litigation costs are added in, the costs to Plaintiff to pursue litigation will be four to five times the arbitration fee.

A plaintiff will be hard pressed to prove how a dispute resolution mechanism that provides a prompt answer to the claim at a fraction of the cost is oppressive. Indeed, a proponent of arbitration can argue that the plaintiff does not oppose arbitration because it is oppressive. In reality, Plaintiff is attempting to gain a strategic advantage by pursuing protracted litigation in hopes that the potential costs of defense to be incurred by Defendants will prompt them to pay a settlement to which Plaintiff is not undeserving.

VIII. EEOC BRIEFING CONCERNING MANDATORY ARBITRATION OF EMPLOYMENT AGREEMENTS

The EEOC recently filed an amicus brief on behalf of an appellant employee. I have reproduced portions of the brief here, which provides the EEOC's position regarding mandatory arbitration agreements covering employment discrimination claims.

The EEOC (hereafter "the Commission") has taken the position that federal law prohibits the enforcement of arbitration agreements that require an individual, in this statutory context, to agree in advance to submit any future claim to arbitration as a condition of initial or continued employment. See EEOC: Mandatory Arbitration of Employment Discrimination Disputes as a Condition of Employment, 8 FEP Manual 405:7511 (BNA 1997). The Commission has advanced this position in a number of amicus briefs. The Commission has also argued, among other things, that if arbitration

agreements are to be enforced, the Gilmer decision supports the arbitration of an ADEA claim only where there are adequate protections in place to ensure that, "[b]y agreeing to arbitrate [the] statutory claim, a party does not forgo the substantive rights afforded by the statute." Gilmer, 500 U.S. at 26.

The Commission's position is supported by a growing consensus among those in the arbitration community that the use of mandatory arbitration in this context is inappropriate. Most notably, the NASD itself has recently voted to eliminate the mandatory arbitration of employment discrimination claims. See Daily Labor Report (BNA) at AA-1 (August 8, 1997). In reaching that determination, the NASD bowed to criticism that securities industry arbitration panels "are uniquely unqualified to handle the arbitration of employment discrimination claims." Daily Labor Report at AA-1 (quoting SEC Commissioner Isaac C. Hunt). The action of the NASD is not yet final (the proposed rule is to be implemented one year after approval by the SEC) and, thus, technically does not apply to this case. Nonetheless, the recent action of the NASD provides strong support for the view that arbitration under the rules of the NASD is an inadequate substitute for the judicial right of action established under the ADEA (and the other anti-discrimination statutes). See also Reginald Alleyne, Statutory Discrimination Claims: Rights 'Waived' and Lost in the Arbitration Forum, 13 Hofstra Labor L.J. 381, 428 (Spring 1996) (stating that "statutory discrimination grievances relegated to ... arbitration forums are virtually assured employer-favored outcomes," given "the manner of selecting, controlling, and compensating arbitrators, the privacy of the process and how it catalytically arouses an arbitrator's desire to be acceptable to one side"); Stuart H. Bompey & Andrea H. Stempel, Four Years Later: A Look at Compulsory Arbitration of Employment Discrimination Claims after Gilmer v. Interstate/Johnson Lane Corp., 21 Empl. Rel. L.J. 21, 43 (Autumn 1995) (encouraging

employers to use arbitration in light of evidence that "employers stand a greater chance of success in arbitration" and are subjected to "smaller" damage awards).

IX. ARBITRATION ORGANIZATIONS

American Arbitration Association
140 West 51st Street
New York, New York 10020-1203
(212) 484-4000

Arbitration Forums, Inc. (for Dallas, TX)
P.O. Box 173893
Denver, Colorado 80217
(888) 272-8096
(972) 488-3251

Arbitration Forums, Inc. (National Office)
P.O. Box 271500
Tampa, Florida 33688-1500
(800) 353-1200

CPR Institute for Dispute Resolution
366 Madison Avenue
New York, New York 10017-3122
(212) 949-9490

J•A•M•S/Endispute (Judicial Arbitration & Mediation Service)
2323 Bryan, Suite 2100
Dallas, Texas 75201
(214) 744-5267

J•A•M•S/Endispute
700 11th Street N.W., Suite 450
Washington, D.C. 20001
(800) 448-1660

National Arbitration Forum
Box 50191
Minneapolis, Minnesota 55405
(612) 782-2534
(800) 474-ADR1

National Association of Securities Dealers
Arbitration and Mediation Service
10 S. LaSalle Street, 20th Floor
Chicago, Illinois 60603-1002
(312) 899-4440

Upchurch, Watson, White & Fraxedas
150 Magnolia Avenue
Daytona Beach, Florida 32114
(904) 253-1560

X. VACATUR ISSUES

A. Plaintiffs Will Argue that a Court Reviewing an Arbitration Award Resolving Statutory Claims Should Apply A Standard Of Review That is Sufficiently Rigorous to Ensure that the Arbitrators Have Properly Interpreted and Applied Statutory Law

The following are excerpts from a Fifth Circuit brief filed on behalf of an appellant/employee which argues for more rigorous standard of review when a court has deciding whether or not to vacate an arbitration award.

Although it has long been understood that Congress intended for the "federal courts to exercise final responsibility for enforcement" of the federal anti-discrimination statutes, see Alexander v. Gardner-Denver Co., 415 U.S. 36, 56 (1974), the Supreme Court has indicated that arbitration is a viable and valid alternative means for resolving employment discrimination claims under those statutes. See Gilmer, 500 U.S. at 35 (ADEA claims may be submitted to arbitration). Specifically, in Gilmer, the Supreme Court rejected the notion that an individual could never be required to arbitrate an ADEA claim pursuant to a pre-existing arbitration agreement. Id. At 30-32. The Court

did not, however, adopt a "grand presumption in favor of arbitration." Farand v. Lutheran Brotherhood, 993 F.2d 1253, 1255 (7th Cir. 1993).

More importantly for this case, the Court in Gilmer in no way suggested that the decisions of arbitration panels are immune from judicial review, or that arbitration panel decisions are entitled to the level of deference applied by the district court below. Instead, the Supreme Court invited fact-based challenges to the inadequacies of arbitration procedures on a case-by-case basis, and reaffirmed the following two fundamental principles: (1) that by "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," and (2) that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue." Gilmer, 500 U.S. at 26, 32 n.4 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) and Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987), respectively) (internal quotations omitted).

It is significant that the Supreme Court, in Gilmer, relied heavily on its prior decision in Mitsubishi. See id. In Mitsubishi, the Court ruled that for a court to order arbitration of a federal claim, arbitration must be compatible with the remedial scheme of the federal statute at issue. The Court decided to enforce the arbitration agreement at issue but only with assurance that, at the review stage, a court could carefully scrutinize the arbitration record to ensure that the claimant had been able to vindicate fully its statutory rights in the arbitral forum. Mitsubishi, 473 U.S. at 635-38. The Court made clear that if the agreement operated "as a prospective waiver of a party's right to pursue statutory remedies for [federal] violations, we would have little hesitation in condemning the agreement as against public policy." Id. At 637 n.19. By invoking the Mitsubishi standard in Gilmer,

the Court ratified this view of a court's role at the review stage in ensuring compliance with the dictates of public law.

Following the principles outlined by the Supreme Court in Gilmer and Mitsubishi, the D.C. Circuit recently explained the more rigorous standard of review that should apply when courts are asked to review arbitration awards resolving statutory claims like the one in this case. See Cole v. Burns Int'l Security Services, 105 F.3d 1465 (D.C. Cir. 1997). In Cole, the plaintiff signed an arbitration agreement as a condition of employment, as the plaintiff did in this case. The defendant invoked that agreement when the plaintiff claimed his discharge was the product of race discrimination in violation of Title VII. The D.C. Circuit agreed with the defendant that the arbitration agreement was enforceable, but did so only because the agreement met the minimum requirements articulated in Gilmer. Specifically, the agreement was deemed enforceable because it "(1) provide[d] for neutral arbitrators, (2) provide[d] for more than minimal discovery, (3) require[d] a written award, (4) provide[d] for all of the types of relief that would otherwise be available in court, and (5) [did] not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum." Id. At 1482 (emphasis in original).[2]

The court in Cole also addressed "the scope of judicial review of arbitral awards in cases of this sort, where an employee is compelled as a condition of employment to arbitrate statutory claims." Id. At 1486. The court recognized that the FAA provides "a number of grounds on which arbitration awards may be vacated," but believed that the "manifest disregard of law" standard (identified by the

[2]The case at bar fails to meet even these basic requirements, because the panel improperly required Plaintiff to pay half of the forum fees associated with the arbitration. This Court should, at minimum, modify the award to avoid requiring the plaintiff to bear more expenses than if this dispute had been resolved in a judicial forum. See Cole, 105 F.3d at 1483-86.

Supreme Court in First Options of Chicago, Inc., 514 U.S. at 942) also supplied a basis for judicial review, and needed to be defined in light of the principles underlying the Supreme Court's analysis in Gilmer. Focusing on the Supreme Court's indications that parties do not forgo the substantive rights provided by the statute when they agree to arbitrate a claim, and that judicial review of arbitration awards needs to be "sufficient to ensure that arbitrators comply with the requirements of the statute at issue," the court in Cole ruled that the arbitration of statutory claims is 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." Cole, 105 F.3d at 1487 (citing Gilmer, 500 U.S. at 26, 32 n.4).[3]

B. Review and Vacatur of Arbitration Awards

1. Standard of Review

Pursuant to First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995), appellate review of district court decisions regarding arbitration awards is de novo for questions of law, clear error for questions of fact. First Options, 514 U.S. at 947-49 (1995); F.C. Schaffer & Assocs., Inc. v. Demech Contractors, Ltd., 101 F. 3d 40, 43 (5th Cir. 1996). The Court particularly rejected a more deferential standard of appellate review previously adopted by the Eleventh Circuit. First Options, 514 U.S. at 948 (1995).

[3] We note that the author of the Cole decision, Judge Harry Edwards, is one of this Nation's foremost authorities on arbitration and is a strong advocate of its use in appropriate circumstances. See Harry Edwards, Alternative Dispute Resolution: Panacea or Anathema, 99 Harv. L. Rev. 668 (1986). The Cole decision is therefore persuasive authority not only because it represents the position of a sister circuit, but also because of Judge Edwards' status as an expert on arbitration.

2. Plaintiffs Will Argue That Courts Should Recognize Non-Statutory (§10) Grounds for Vacatur of Arbitrators' Awards

What follows is an amicus brief from the American Association of Retired Persons ("AARP") filed on behalf of an employee/appellant. The AARP, the National Employment Lawyers Association and other similar groups are currently fighting hard to defeat mandatory arbitration agreements and reduce the standards for reviewing arbitration decisions upon a motion to vacate same.

The Federal Arbitration Act, 9 U.S.C. § 1, et seq. (FAA), under which this appeal proceeds, provides only four grounds for review of an arbitrator's award, including fraud, corruption, misconduct, and failure to execute a final decision. 9 U.S.C. § 10(a). In McIlroy v. PaineWebber, Inc., 989 F.2d 817 (5th Cir. 1993) and R.M. Perez & Assoc., Inc. v. Welch, 960 F.2d 31 (5th Cir. 1992), this Court held that it recognizes no other grounds beyond these four to vacate an arbitrator's award under the FAA. However, at least ten other circuits have found additional, non-statutory grounds for vacatur, including manifest disregard of the law.[4] And as discussed further in the next section, most courts (including the Fifth Circuit) recognize a public policy exception to enforcement of arbitrator's awards.

While no panel of this Court may overrule another panel's prior ruling, a new Supreme Court decision can change the legal landscape and compel reconsideration. United States v. Pettigrew, 77 F.3d 1500, 1511 n.1 (5th Cir. 1996) (panel may reject circuit precedent in light of intervening Supeme Court decision). First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995), is such a new

[4] See, e.g., Cole v. Burns Int'l Sec. Servs, 105 F.3d 1465, 1487 (D.C. Cir. 1996); Prudential-Bache Secs., Inc. v. Tanner, 72 F.3d 234, 239 (1st Cir. 1995); DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 821 (2d Cir. 1997); Remmey v. PaineWebber, Inc., 32 F.3d 143, 149 (4th Cir. 1994); Glennon v. Dean Witter Reynolds, Inc., 83 F.3d 132, 136 (6th Cir. 1996); Flexible Mfg. Sys. Pty. Ltd. v. Super Products Corp., 86 F.3d 96, 100 (7th Cir. 1996); PaineWebber, Inc. v. Agron, 49 F.3d 347, 352 (8th Cir. 1995); Barnes v. Logan, 122 F.3d 820, 821-22 (9th Cir. 1997); Jenkins v. Prudential-Bache Secs., Inc., 847 F.2d 631, 634-35 (10th Cir. 1988); Montes v. Shearson Lehman Brothers, Inc., 128 F.3d 1456 (11th Cir. 1997).

decision. There, the Supreme Court considered what standard of judicial scrutiny to apply under the FAA to review an arbitrator's decision that a particular claim is arbitrable under a contract. In the course of its decision, the Court stated that in addition to the grounds provided by the FAA, a party may also seek review of an award for manifest disregard of the law. Id. At 942 (citing Wilko v. Swan, 346 U.S. 427, 436-37 (1953), overruled on other grounds), Rodriguez de Ouijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989). In light of this explicit reference in First Options, this Court should consider anew its prior rejection of this ground for vacatur.

Indeed, this identical course was recently taken by the Eleventh Circuit in Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456 (11th Cir. 1997). Like this Court, the Eleventh Circuit had previously rejected a manifest disregard of the law standard of review of arbitrator's awards under the FAA. Robbins v. Day, 954 F.2d 679, 684 (11th Cir.) ("we decline to adopt the manifest disregard of the law standard"), cert denied, 506 U.S. 870 (1992).[5] Yet in light of the 1995 First Options decision, the Eleventh Circuit did not about-face and held that manifest disregard of the law could properly serve as a ground to attack an arbitrator's award where the employer's attorney exhorted the arbitrators to ignore the applicable law.

[5] Robbins, in turn, has been cited by this Court in support of its own refusal to consider bases for challenging an arbitrator's decision other than those provided by the FAA. McIlroy, 989 F.2d at 820; Perez, 960 F.2d at 539. n.1.

3. Fifth Circuit Precedent Holds That Review of an Arbitration Award is Deferential and Should Be Vacated Only Upon Grounds Set Forth in § 10 of the FAA

What follows is briefing filed on behalf of an employer/appellee, which supports the proposition that the Fifth Circuit has followed the majority position that review of an arbitration award is differential and limited.

The District Court correctly held that this court has consistently ruled that "judicial review of an arbitration award is extraordinarily narrow." Gulf Coast v. Exxon Company, 70 F.3d 847, 850 (5th Cir. 1995) (quoting Antwine v. Prudential Bache Securities, Inc., 899 F.2d 410, 413 (5th Cir. 1990)). Indeed, in this Circuit, Section 10 of the FAA contains the exclusive grounds upon which a reviewing court may vacate an arbitration award. McIlroy v. Paine-Webber Inc., 989 F.2d 817, 820 (5th Cir. 1993) (quoting R.M. Perez &Associates, Inc. v. Welch, 960 F.2d 534 (5th Cir. 1992)); see also Gulf Coast, 70 F.3d at 850 ("we can only disturb an arbitration award on grounds set out in that Act"). The FAA provides that a district court may vacate an award:

> (1) Where the award was procured by corruption, fraud or undue means
>
> (2) Where there was evident partiality or corruption in Arbitrators . . .
>
> (3) Where the Arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the Arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made.

9 U.S.C. §10(a). Interpreting the FAA, the Supreme Court recently noted that when reviewing an arbitration award, "the court should give considerable leeway to the arbitrator, setting aside his or

her decision only in certain narrow circumstances." First Options of Chicago, Inc., 115 S. Ct. at 1923 (citing 9 U.S.C. §10).

The Supreme Court has stated "the Court made clear almost 30 years ago that the courts play only a limited role when asked to review the decision of an arbitrator." United Paperworkers Int'l Union, AFL-CIO, et al. v. Misco, Inc., 484 U.S. 29, 36 (1987). "The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact . . . ." Id. "Accordingly, the Federal Arbitration Act presumed that reviewing courts will confirm arbitration awards and that the courts' review of the arbitration process will be severely limited." Robins v. Day, 954 F.2d 679, 682 (11th Cir.), cert. denied, 506 U.S. 870 (1992). As the Eleventh Circuit noted:

> [the FAA] does not allow an arbitration award to be vacated solely on the basis of error of law or interpretation but requires something more, such as misconduct pertaining to the proceedings on the part of the arbitrators or the parties.

Robins, 954 F.2d at 683 (citing O.R. Sec., Inc. v. Professional Planning Assoc., Inc., 857 F.2d 742, 746 (11th Cir. 1988)). Interpretation of the statutory language has been supported by the FAA's strong presumption in favor of enforcing arbitration awards. Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). Limited review of arbitration awards is necessary "to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." Willemijn Houdstermaatschappij, B.V. v Standard Micro Systems Corp., 103 F.3d 9, 12 (2nd Cir. 1997).

Unhappy with the Arbitrators' interpretation of the evidence presented at the hearing, Plaintiff wants this Court to ignore the clearly erroneous standard for reviewing factual findings and substitute

its analysis of the evidence for that made by the Arbitrators and reviewed by the District Court. This type of second guessing is not permitted. As the other Courts of Appeal have noted:

> [a]rbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party.

Remmey v. Paine Weber, Inc., 32 F.3d 143, 146 (4th Cir. 1994) (quoting National Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731, 990 F.2d 957, 960 (7th Cir. 1993), cert. denied, 513 U.S. 1112 (1995)). Recognizing that the facts of this case do not justify vacatur under this standard, Plaintiff and the amici curiae attempt to distinguish these cases or urge adoption of a new standard solely because the arbitration in the case at bar involved discrimination claims.

Neither the Supreme Court nor the Fifth Circuit has ever held that the review of an arbitration award involving discrimination claims should be different from the review of any other claim. To the contrary, the Court in Gilmer anticipated that discrimination claims would be subject to the existing arbitration standards of review when it noted that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that Arbitrators comply with the requirements of the statute at issue." Gilmer v. Interstate-Johnson Lane Corp., 111 S. Ct. 1647, 1654 n.4 (1991) (emphasis added). The Gilmer court thus recognized that in order to effectuate the policies behind the FAA a limited standard of review is required regardless of the nature of the claim.

This standard of limited review has been applied to arbitration awards involving statutory discrimination claims. As a court recently held:

> Despite the fact that Plaintiff raises some important concerns regarding the adequacy of arbitration in this [ADEA] area, relevant Second Circuit precedent compels the conclusion that the standard of judicial review of arbitral decisions in cases involving statutory rights

> is no different from the extremely limited review used in arbitration generally.

Chisolm v. Kidder Peabody Asset Mgmt., 966 F. Supp. 218, 229 (S.D. N.Y. 1997); see also DiRussa v. Dean Witter Reynolds, 121 F.3d 818, 821-22 (2nd Cir. 1997) (ADEA claim), cert. denied, 66 U.S. L.W. 3449 (1998); Papapetrapoulous v. Milwaukee Transport Svcs., 795 F.2d 591 (7th Cir., 1986) (review of arbitration involving sexual assault at work pursuant to a §1983 lawsuit); Owens v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 907 F. Supp. 134, 137 (D. Md. 1995) (Title VII claim), aff'd, 103 F.3d 119 (4th Cir. 1996). The Fifth Circuit has applied this narrow standard in the context of other important statutory matters. E.g., R.M. Perez & Assoc. v. Welch, 960 F.2d 534 (5th Cir. 1992) (involving RICO claim). Thus, the District Court did not err in applying a deferential review.

Plaintiff tries to distinguish this Court's decisions in R.M. Perez and McIlroy on the ground that they did not involve statutory discrimination claims. This court refused to apply a "manifest disregard of law" standard in those cases because the Court found that Section 10 provided the exclusive means through which an arbitration award could be vacated. McIlroy, 989 F.2d at 820 n. 2; R.M. Perez, 960 F.2d 534 at 540. These decisions were based upon the construction of 9 U.S.C. §10 and did not hinge upon the nature of the claim that was arbitrated. The court in McIlroy noted "we declined to adopt 'manifest disregard', or any other standard, as an addendum to Section 10." McIlroy, 989 F.2d at 820 n.2 (citing R.M. Perez v. Welch, 960 F.2d 534 (5th Cir. 1992)). This Court has refused to be a superlegislature by setting forth different standards of review depending upon the nature of the claim, and should reject Plaintiff's invitation to do so now. Long ago, the Supreme Court and this Court expressly acknowledged the public policy supporting the §10 standard

for reviewing arbitration awards. According different standards of review depending on the claim would, of course, contravene those well established public policy goals.

In support of Plaintiff's plea for a different standard of review, he relies on Cole v. Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997). Cole held that the district court properly found that statutory discrimination claims were subject to arbitration. Plaintiff in the instant case relies on dicta from Cole in addressing an argument that the statutory discrimination claim in Cole was not subject to arbitration. In refuting that argument the Court wrote, in passing, that the D.C. Circuit's manifest disregard of the law standard "is sufficiently rigorous to ensure that Arbitrators have properly interpreted and applied [the] statutory law." Id. at 1487.

Plaintiff places great reliance on the Cole dicta to support his arguments. However, Cole is not controlling precedent and does not even reflect a majority view among the federal courts. Richard C. Reuben, Public Justice: Toward a State Action Theory of Alternative Dispute Resolution, 85 Cal. L. Rev. 577, 580 n. 3 (Cole is "clearly a minority position, selectively embraced in individual cases"). As noted, the Fifth Circuit has already expressly rejected a request to extend Section 10 to include the manifest disregard of the law standard, let alone the new standard Plaintiff requests based on Cole.

Further, those jurisdictions adopting the manifest disregard standard take a much more limited approach than the Cole court. The Second Circuit has held "[j]udicial inquiry under the 'manifest disregard' standard is therefore extremely limited." Merrill Lynch Pierce Fenner & Smith v. Bobker, 808 F.2d 930, 933-34 (2nd Cir. 1986).[6]

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[6] Accord Advest, Inc. v. McCarthy, 914 F.2d 6, 8-9 (1st Cir. 1990) (to set aside award for manifest disregard of the law, party resisting enforcement of award must demonstrate that the award is: "(1) unfounded in reason and fact, (continued...)

In support of his argument that this Court should depart from its previous application of the FAA when addressing statutory discrimination claims, Plaintiff cites Franks v. Bowman Transportation Co., 495 F.2d 398 (5th Cir.), rev'd on other grounds, 424 U.S. 747 (1976) and Rios v. Reynolds Metals Co., 467 F.2d 54 (5th Cir. 1972). Plaintiff claims that under these cases the District Court had a duty to review the arbitration decision to ensure: (1) that "the Arbitrator's decision is in no way violative of the private rights guaranteed by [the discrimination statute], nor of the public policy which inheres in [it]" (2) that "the-evidence presented at the arbitral hearing dealt adequately with all factual issues," (3) that "the Arbitrator actually decided the factual issues presented to the court" in the discrimination claims, and finally, (4) that "the arbitration proceeding was fair and regular and free of procedural infirmities." (Plaintiff's brief at pp. 20-21).

The issues before the courts in Franks and Rios were not the same as those before this Court, that is, whether Plaintiff has satisfied any of the grounds enumerated in Section 10 of the FAA justifying vacatur of an arbitration award involving a statutory discrimination claim. Rather, the courts in those cases were faced with the issue of whether, under the state of the law **before** Gilmer, an arbitration award for a Title VII claim should be accorded res judicata or collateral estoppel effect in a subsequent court suit brought by an employee alleging the same claim that was arbitrated. See Rios, 467 F.2d at 57; Franks, 459 F.2d at 408.

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[6] (...continued)
(2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling, or (3) mistakenly based on a crucial assumption that is concededly a non-fact"); Merrill Lynch v. Jaros, 70 F.3d 418, 421 (6th Cir. 1995) (holding that the two elements needed to establish manifest disregard are: "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle."); Remmey 32 F.3d at 149 (manifest disregard is shown when "arbitrators understand and correctly state the law, but proceed to disregard the same") (quoting San Martine Compania De Navegacion, S.A. v. Saguenay Terminals Ltd., 293 F.2d 796, 801 (9th Cir. 1961)); Health Services Management Corp. v. Hughes, 975 F.2d 796, 801 (7th Cir. 1992) (award is in manifest disregard of the law if the arbitrator deliberately disregards what he or she knows to be the law); O.R. Sec. Inc. v. Prof. Planning Assoc. Inc., 857 F.2d 742, 747 (11th Cir. 1988).

Plaintiff then argues that there ought to be two additional factors for consideration, the adequacy of the record with respect to the issue of discrimination and the competence of the arbitrators. (citing Alexander v. Gardner Denver, 415 U.S. at 60 n. 1). Again, these factors are not included in Section 10 of the FAA and Alexander v. Gardner Denver never considered the issue of whether Section 10 factors ought to be expanded for a statutory discrimination claim arbitrated pursuant to an agreement enforceable under Gilmer. Plaintiff suggests standards of review tantamount to a de novo review of all aspects of an arbitration. Superimposing rigorous procedural limitations on the process -- which is designed to avoid those limitations -- would lead to endless appeals and challenges to every arbitration, thereby destroying the objective of "a relatively quick, efficient and informal means of private dispute settlement." Antwine, 899 F.2d at 412 (5th Cir. 1990).

XI. CASES TO ANALYZE AND/OR WATCH

1. Sterling Supercuts, Inc., 12 IER Cases 684, 12 IER Cases 1127, 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138 (Cal. App. 1997).

2. Sportelli v. Circuit City Stores, Inc., 1998 W.L. 54335 (E.D. Pa. 1998).

3. Paladino v. Abnet Computer Technologies, Inc., 134 F.3d 1054 (11th Cir. 1998).

4. Wright v. Universal Maritime Service Corp., 121 F.3d 702 (4th Cir. 1997), cert. granted, 1998 W.L. 83613 (March. 2, 1998).

XII. OBTAINING PRIOR ARBITRATION DECISIONS OF POTENTIAL ARBITRATORS

LRP Publications
Dept. 420, 747 Dresher Rd.
Box 980
Horsham, PA 19044-0980
(800) 341-7874 ext. 274

R.C. Simpson
5950 Fair View Road
Suite 604
Charlotte, NC 28210
(704) 553-0716

XII. ARBITRATION AGREEMENTS OPTIONS

1. Aggressive versus Nonagressive Approach

    a. ITT-CFC/J.C. Penney's approach
    b. Brown and Root approach

2. Choice of Forum

    a. Where the alleged wrongful activity occurred.
    b. Home of the arbitration proponent.
    c. Home of the respondent.

3. Consideration for the arbitration agreement.

    a. Employment.
    b. Continued employment.
    c. Raises and/or promotions.
    d. Tee-shirt (the modern-day peppercorn)

4. Costs of the arbitration.

5. Payment of the arbitration.

    a. Payment by the claimants.
    b. Costs equally split by the participants.
    c. Costs (tax) by the arbitration panel.
    d. Employer/opponent of arbitration pays all costs.

e. ADR/mediation component.
f. "Workers' counsels."
g. In house mediation.
h. Outside mediation.
i. Outside services/turn-key operations (JAMS, AAA).

XIV. THE FUTURE OF ARBITRATION

Given the strong endorsement of arbitration by the Federal and State Legislatures and the courts, the courts overwhelming case law and the reluctance of legislatures to appropriate funds to create more courts, arbitration will grow in the near future. More companies are pushing the envelope with regard to arbitration issues.

It was only seven years ago that judges and legal scholars were debating whether or not a mandatory arbitration agreement was enforceable in disputes involving statutory discrimination claims. Now courts are enforcing arbitration agreements that are merely listed in an employee handbook or on company procedures -- enforcing these even though an employee has signed an agreement to be governed by arbitration.

Many exciting opportunities exist for expanding arbitration. I can foresee companies adding arbitration clauses to the terms and conditions of their contracts, on the backs of bills of lading and even posted in their reception areas, on restaurant menus, etc.

Is posting a statement that all disputes be resolved by arbitration any different than posting a disclaimer in a garage parking lot or on the back of a garage parking lot ticket? Since courts have upheld arbitration limits that are merely placed in an employee handbook or are part of an employer's policy and procedures, they may well apply those rulings to similar postings or notification between a company and its customers.

The rationale for applying arbitration in the "posting" context is similar. The courts argue that an employee who continues to work in the face of knowledge of a mandatory arbitration agreement ratifies that agreement. Similarly, a customer who knows that the entity with which he is dealing requires arbitration of all disputes has the option of shopping elsewhere. If he does not, arguably, he has agreed to this condition of doing business.

Of course, if arbitration agreements are unfair or limit substantive rights courts may strike them down. This is especially true when civil rights or important remedial statutes are involved.

XV. CONCLUSION

Arbitration is a cost-effective way to resolve disputes. It has been used successfully for years in the construction and securities industries. More and more employers are now using it to resolve disputes between themselves and employees.

While arbitration is not perfect, it is certainly no worse at dispensing justice than the jury system, a trial before a judge or any other dispute resolution used in history. Further, it is generally much quicker and less expensive than resorting to litigation.

The scope and limits of arbitration have not crystallized. There are vigorous debates among scholars, splits between the circuits and vigorous public policy debates among policy makers in Congress and the EEOC.

It is truly an exciting time, like it must have been at the time of McPherson v. Buick or when class action lawsuits were in their infancy. As practitioners and commentators on the law, we are truly blessed to be participating in the development of the law.

I enjoy analyzing arbitration issues and if you ever have any questions, read an interesting case or article, I would enjoy receiving a copy or visiting with you. Please don't hesitate to call me at (972) 234-3400 extension 301.