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# Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?

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**MANDATORY ARBITRATION OF EMPLOYEE  
DISCRIMINATION CLAIMS:  
UNMITIGATED EVIL OR BLESSING IN  
DISGUISE?**

THEODORE J. ST. ANTOINE\*

Things are seldom what they seem:  
Skim milk masquerades as cream;  
Highlows pass as patent leathers;  
Jackdaws strut in peacock's feathers . . . .

Black sheep dwell in every fold;  
All that glitters is not gold.

W.S. Gilbert  
H.M.S. Pinafore

One of the hottest current issues in employment law is the use of mandatory arbitration to resolve workplace disputes. Typically, an employer will make it a condition of employment that employees must agree to arbitrate any claims arising out of the job, including claims based on statutory rights against discrimination, instead of going to court. On the face of it, this is a brazen affront to public policy. Citizens are being deprived of the forum provided them by law. And indeed numerous scholars and public and private bodies have condemned the use of mandatory arbitration.<sup>1</sup> Yet the insight of that great Nineteenth Century English social philosopher, W.S. Gilbert's Little Buttercup, may apply here: "Things are seldom what they seem." Perhaps the validity of mandatory arbitration should depend more on a pragmatic assessment of what is likely to be best in practice for the great majority of workers, employers, and the

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\* James E. & Sarah A. Degan Professor of Law, University of Michigan. The text is a version of the Krinock Lecture delivered at the Thomas M. Cooley Law School in Lansing, Michigan, on October 7, 1997.

1. See, e.g., David E. Feller, *Fender Bender or Train Wreck?: The Collision Between Statutory Protection of Individual Employee Rights and the Judicial Revision of the Federal Arbitration Act*, 41 ST. LOUIS L.J. 561 (1997); Joseph R. Grondin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990's*, 73 DENV. U. L. REV. 1017 (1996). See also *infra* notes 17-20 and accompanying text.

public, rather than on abstract notions about the inviolability of statutory claims and the sanctity of the right to a jury trial. At least arguably, in light of an overworked, underfunded Equal Employment Opportunity Commission (EEOC) and backlogged federal court dockets, most employees might be better off with mandatory arbitration, even of statutory claims, *provided* there were due process guarantees and the arbitrator could furnish the full range of statutory remedies.

Before reaching the practical considerations, a brief look at the legal framework is in order. Almost a quarter century ago, the Supreme Court appeared to lay to rest any idea that private arbitration could displace an employee's ability to resort to statutory procedures. In *Alexander v. Gardner-Denver Co.*,<sup>2</sup> the Court held an arbitrator's adverse decision under a collective bargaining agreement did not prevent a black employee from pursuing in court a claim that his discharge was based on racial discrimination in violation of Title VII of the 1964 Civil Rights Act.<sup>3</sup> The Court reasoned that the arbitrator was only authorized to decide the contractual issue of discrimination, and not the statutory issue. Apparently the Court was untroubled that the National Labor Relations Board (NLRB) routinely "defers" to arbitrators' rulings regarding employees' rights under the National Labor Relations Act.<sup>4</sup> Maybe the real reason for the result in *Gardner-Denver* was skepticism about union zeal in pressing Title VII cases as distinguished from cases of anti-union discrimination.

Six years ago the Supreme Court seemed to take a sharp turn away from the *Gardner-Denver* approach. In *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>5</sup> the Court held that an individual stockbroker employee was bound by a contract with the New York Stock Exchange to arbitrate a claim of age discrimination against his employer. The Court distinguished *Gardner-Denver* on the grounds that in *Gilmer* the arbitrator was authorized to handle statutory as well

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2. 415 U.S. 36 (1974); *see also* *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728 (1981) (noting that employees are not barred by arbitration award on wage claim under union contract from suing under Fair Labor Standards Act). In *Gardner-Denver*, the Court noted that the arbitrator's award could be admitted into evidence in subsequent court proceedings, and, if certain procedural safeguards were observed, it could be accorded "great weight." *Gardner-Denver* 415 U.S. at 60 n.21.

3. 42 U.S.C.A. § 2000e (West 1994).

4. *See, e.g.,* *Olin Corp.*, 268 N.L.R.B. 573 (1984); *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

5. 500 U.S. 20 (1991).

as contractual disputes. Furthermore, the Court stressed that no loss of statutory rights occurred in *Gilmer*; it was only a change of forum. *Gilmer* could easily have been decided on such old-fashioned grounds as the failure of the plaintiff to exhaust internal remedies. There, unlike *Gardner-Denver*, no arbitration proceedings had been conducted. That makes all the more significant the Court's readiness to go out of its way to endorse arbitration as a final dispute-resolution mechanism, even when made a condition of employment. Even so, the Court commented that the stockbroker was not precluded from filing a charge with EEOC; it was only his court action that was barred.

*Gardner-Denver* and *Gilmer* can be distinguished in several ways, some more plausible than others. The Court's own emphasis on the authority of the arbitrator will make little difference, if unions and employers can simply empower arbitrators in the labor contract to deal with statutory issues. More persuasive on the existence of a real distinction is the view of Judge Harry Edwards in *Cole v. Burns International Security Services*.<sup>6</sup> Speaking for the District of Columbia Circuit, he emphasized that in individual contracts of employment, the employee maintains control over the arbitration presentation while the union is in control in the collective bargaining setting. On the other hand, in terms of bargaining power, one might argue that a union's agreement to arbitrate and waive the judicial forum should be *more* acceptable—less of a “contract of adhesion”—than an isolated individual employee's agreement.

The legislative history of the 1991 Civil Rights Act contains some strong language indicating that arbitration should not displace Title VII processes, the subject of *Gardner-Denver*.<sup>7</sup> The Age Discrimination in Employment Act (ADEA), involved in *Gilmer*, expressly permits waivers under certain prescribed conditions.<sup>8</sup> It has also been suggested that Title VII's protections against discrimination because of race, sex, religion, and natural origin implicate more

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6. 105 F.3d 1465 (D.C. Cir. 1997).

7. Although section 118 of the 1991 Civil Rights Act, Pub. L. No. 102-66, 105 Stat. 1081 (1991), encouraged the use of alternative means of dispute resolution “[w]here appropriate,” the House Report emphasized that ADR procedures were only intended to “supplement” and not “supplant” Title VII rights and remedies. H.R. REP. NO. 102-40(1), at 1 (1991). Two leading legislators disavowed *Gilmer*. See 137 CONG. REC. S15473 (1991) (Rep. Edwards). Cf. *Martin v. Dana Corp.*, 114 F.3d 428 (3d Cir. 1997) (en banc) (ordering rehearing).

8. See 29 U.S.C.A. § 626(f) (1994) (waiver must be “knowing and voluntary”).

sensitive rights than the right against discrimination because of age, which was at issue in *Gilmer*.<sup>9</sup> That particular distinction might have had a greater appeal for some of us a few years earlier in our life spans. Finally, it can be argued that job applicants like *Gilmer* have less of an equity in their jobs than an incumbent employee such as *Alexander* may have had.

The distinction which has stood up in the eyes of most courts is that between a collective bargaining agreement and an individual contract of employment. The courts of appeals have generally sustained individual agreements to arbitrate as barring court suits,<sup>10</sup> but have rejected employers' objections to court actions because of an arbitration clause in a union contract.<sup>11</sup> Only the Fourth Circuit, in a 2-1 decision, concluded that *Gilmer* had superseded *Gardner-Denver* even as to collective bargaining agreements.<sup>12</sup> And the Fourth Circuit holding could also be explained on an exhaustion-of-remedies theory; there had been no recourse to the arbitration procedure provided by the union contract prior to the court suit. Perhaps a crucial question in the collective bargaining context should be whether the union has actually agreed to *waive* employees' rights to a statutory forum or merely *added* a contractual claim. In none of these cases have the courts drawn distinctions because the rights arose under Title VII rather than ADEA.

Significant points made by various courts of appeal include the notion that at least an employee's waiver of Title VII rights, remedies, and procedures must be "knowing,"<sup>13</sup> although another court declined to pass on whether a waiver had to be knowing and

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9. Age is not a "suspect" classification. See generally *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976).

10. See generally *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465 (D.C. Cir. 1997) (holding that due process standards would have to be observed and that (2-1) the employer would have to pay all the arbitrator's fees); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997); *Rojas v. TK Communications*, 87 F.3d 745 (5th Cir. 1996). But see *Duffield v. Robertson Stephens & Co.* No. 97-15698, 1998 WL 227469 (9th Cir. May 8, 1998) (distinguishing *Gilmer* and rejecting mandatory arbitration in a Title VII case).

11. See generally *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519 (11th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997); *Vamer v. National Super Markets*, 94 F.3d 1209 (8th Cir. 1996).

12. See *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996), cert. denied, 117 S.Ct. 432 (1996). The Supreme Court will have the opportunity to revisit the issue in *Wright v. Universal Maritime Serv. Corp.*, 118 S. Ct. 1162 (1998).

13. See generally *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1995), cert. denied, 516 U.S. 812 (1995).

voluntary.<sup>14</sup> Still another court opined that a mere disparity in bargaining power doesn't mean a lack of voluntariness.<sup>15</sup> Finally, in a decision of considerable potential importance if extended beyond its particular facts, the Seventh Circuit held that there must be extra consideration besides providing employment in order to make binding an employee's promise to arbitrate a statutory claim.<sup>16</sup>

Two federal agencies and a couple of private bodies have weighed in against mandatory arbitration of statutory employment claims. In a July 1995 policy statement, the EEOC declared: "[P]arties must knowingly, willingly, and voluntarily enter into an ADR proceeding."<sup>17</sup> According to the EEOC, an employee should be able to withdraw from a proceeding any time before a decision is rendered. *Gilmer* can be regarded as involving at best a "knowing" agreement on the employee's part. It was hardly "voluntary" in the EEOC sense of the word. The General Counsel of the NLRB seemed ready at one point to issue unfair labor practice complaints against any effort to impose mandatory arbitration agreements, but later that was apparently limited to attempts to prevent the filing of charges with the NLRB.<sup>18</sup>

The December 1994 Report of the Dunlop Commission on the Future of Worker-Management Relations stated: "[A]ny choice between available methods for enforcing statutory employment rights should be left to the individual who feels wronged rather than dictated by his or her employment contract."<sup>19</sup> But the Commission hinted at the possibility of more flexibility by suggesting that the issue be revisited after there was more experience with the arbitration of statutory claims. Finally, the National Academy of Arbitrators at its May 1997 meeting expressed its opposition to "mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights."<sup>20</sup> But the Academy added that, given the

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14. See generally *Gibson v. Neighborhood Health Clinic*, 121 F.3d 1126 (7th Cir. 1997).

15. See generally *Great W. Mortgage Corp.*, 110 F.3d at 222.

16. See generally *Gibson*, 121 F.3d at 1126.

17. 8 LAB. REL. REP. (BNA) 405:7302 (1997).

18. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1479 (D.C. Cir. 1997).

19. COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP'TS OF COMMERCE AND LABOR, REPORT AND RECOMMENDATIONS 33 (Dec. 1994) [hereinafter COMMISSION].

20. NATIONAL ACADEMY OF ARBITRATORS, STATEMENT ON CONDITION OF EMPLOYMENT AGREEMENTS (May 1997).

present state of the law, its members could serve as arbitrators in such cases. Members nonetheless were advised to observe certain guidelines as to the fairness of these procedures. A broadly constituted Task Force sponsored by the American Bar Association (ABA) took no position in a May 1995 "Protocol" concerning the timing (pre-dispute or post-dispute) of arbitration agreements—and thus effectively their "voluntariness"—but it did agree they should be "knowingly made."<sup>21</sup>

There has been a reasonable degree of consensus on the procedural requirements for a fair arbitration, whether voluntary or mandatory. Thus, both the Dunlop Commission Report and the Protocol of the ABA Task Force came up with very similar sets of due process guarantees. They include:<sup>22</sup>

1. a jointly selected neutral arbitrator who knows the law;
2. simple, adequate discovery;
3. cost-sharing to ensure arbitrator neutrality;<sup>23</sup>
4. representation by a person of the employee's choice;

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21. *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, DISP. RESOL. J. 37 (Oct.-Dec. 1995) [hereinafter *Protocol*]. The Task Force consisted of management, union, and plaintiffs' attorneys from the ABA and the National Employment Lawyers Association and representatives of the American Arbitration Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, and the Society of Professionals in Dispute Resolution.

22. See COMMISSION, *supra* note 19, at 30-32; *Protocol*, *supra* note 21, at 38-39.

23. In *Cole*, 105 F.3d at 1465, the court (2-1) required the employer to pay all the arbitrator's fees as a condition for enforcing the employee's waiver of a judicial forum. Surely Judge Edwards, speaking for the majority, was right that the source of *payment* is not the key to arbitrator neutrality. Arbitrators are naturally concerned about getting their fee, but ordinarily not about where it comes from. The more delicate problem, at least as a matter of appearances, is who chooses the arbitrator. Employers are far more likely to be "repeat players" in arbitration than employees. Thus, an arbitrator's continuing acceptability probably turns more on employer than employee attitudes. This is not a matter on which the source of payment is going to have much effect. One has to count primarily on the inherent integrity of the great body of arbitrators—and on their knowledge that recognition of that integrity in the labor-management community is indispensable for their capacity to practice.

*Cole* may have gone too far in insisting that an employer pay all the arbitrator's fee. Access to a court, at least initially, would ordinarily not be cost-free. Some modest but reasonable sharing of the arbitrator's charges may serve as a realistic deterrent to an employee's filing of frivolous claims. If the employee ultimately prevails, then the arbitrator, like a court, could apportion fees and costs accordingly.

5. remedies equal to those provided by the law;
6. a written opinion and award, with reasons; and
7. limited judicial review, concentrating on the law.

At least three distinguished federal appellate judges have publicly extolled the advantages of arbitration over litigation in vindicating statutory rights against discrimination. These were Judges Harry Edwards of the District of Columbia Circuit, Betty Fletcher of the Ninth Circuit, and Alvin Rubin of the Fifth Circuit.<sup>24</sup> They stressed arbitration's merits of speed, cost savings, and relative informality. None of these endorsements dealt with mandatory arbitration. But at least they should dispose of concerns about the competency of trained arbitrators to handle the usual statutory interpretive problems in a discrimination case.

The case for allowing mandatory arbitration—permitting employers to condition employment upon an employee's agreement to arbitrate rather than litigate workplace claims, including statutory rights against discrimination—is counter-intuitive and highly practical. It reflects a willingness to take the professional or mid-level management employee's opportunity to get before a jury with a rare seven or high-six-figure claim, and trade it for the only realistic opportunity that most lower-level workers will have to recover a job and a modest financial award. Experienced litigators across the country tell me that the good plaintiffs' attorneys will accept on the average only about one in a hundred of the discrimination claimants who seek their help. One of the Detroit area's top employment specialists was more precise. His secretary kept an actual count; he took on one out of eighty-seven persons who contacted him for possible representation. Now, of course, some of those who are rejected will be individuals without meritorious claims. But others will be workers whose

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24. See generally Harry T. Edwards, *Advantages of Arbitration over Litigation: Reflections of a Judge*, ARBITRATION 1982: CONDUCT OF THE HEARING, PROCEEDINGS OF THE 35TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 16, 27, 28 (James L. Stern & Barbara D. Dennis eds., 1983); Betty Binns Fletcher, *Arbitration of Title VII Claims: Some Judicial Perceptions*, ARBITRATION ISSUES FOR THE 1980S, PROCEEDINGS OF THE 34TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 218-28 (James L. Stern & Barbara D. Dennis eds., 1982); Alvin B. Rubin, *Arbitration: Toward a Rebirth*, TRUTH, LIE DETECTORS, AND OTHER PROBLEMS IN LABOR ARBITRATION, PROCEEDINGS OF THE 31ST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 30, 36 (James L. Stern & Barbara D. Dennis eds., 1979).



potential dollar recovery will simply not justify the investment of the time and money of a first-rate lawyer in preparing a court action. For those individuals, the cheaper, simpler process of arbitration is the most feasible recourse.

Ideally, an employee would be offered the choice of arbitration *after* a dispute has arisen, not at some previous point in the employment relationship. If an employee has been discharged, for example, there is nothing much to lose by refusing to arbitrate, and thus any agreement is much likelier to be voluntary in the fullest sense. But there was credible testimony by management representatives before the Dunlop Commission that employers would generally not be willing to enter into post-dispute agreements to arbitrate.<sup>25</sup> For most run-of-the-mill claims, employers will be inclined to wait them out, assuming that the great bulk will go nowhere. Workers will not have the gumption to pursue lesser claims, and they probably will not find lawyers to take their cases if they try.

For employers, the desired trade-off is the one *big* case against the many smaller ones. Even if successful, a defense before a jury will cost \$100,000 to \$200,000 or more. And a professional arbitrator will be less disposed than an emotionally aroused jury to hand out seven-figure awards. But, conversely, a few employees and their lawyers will be willing to arbitrate the big case rather than take it to a jury. So for management, the sensible strategy is to agree to arbitrate only if everything can be included, and that almost necessarily means an agreement before any dispute arises. If employers are not bluffing, therefore, the only choice for the ordinary worker with an ordinary claim may be a *pre*-dispute agreement to arbitrate—or nothing.

The EEOC will not be the salvation of the employee with a minimal case. Before a severely overburdened Commission resorted to its “triage” procedure two years ago, classifying cases as “A,” “B,” or “C” priorities depending on merit and importance, and tossing out many charges after the briefest of investigations, its backlog had soared past 100,000 and it was receiving almost 100,000 new charges a year.<sup>26</sup> The situation is so bleak that Professor Maurice Munroe of

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25. See generally COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEPT'S OF COMMERCE AND LABOR, FACT FINDING REPORT 118 (May 1994). See also *Protocol*, supra note 21, at 37.

26. See generally 149 LAB. REL. REP. (BNA) 13, 14 (May 1, 1995); 151 LAB. REL. REP. (BNA) 143, 156 (Feb. 5, 1996).

the Thomas M. Cooley Law School has recommended, quite understandably, that the EEOC get out of the business of handling individual charges and husband its limited resources for routing out systemic unlawful practices.<sup>27</sup>

Finally, even if individual claimants can get to court, there is no guarantee they will fare any better there than they would before an arbitrator. A considerably more conservative judiciary than existed in earlier years may be all too willing to grant summary judgment against those civil rights plaintiffs who do manage to file suit. Without more empirical evidence about the actual experience of discrimination victims, we could be mistaken in condemning mandatory arbitration out of hand. It may well be the most realistic hope of the ordinary claimant.<sup>28</sup>

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27. See generally Maurice E.R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219 (1995).

28. For more recent and more sympathetic academic treatments of mandatory arbitration, see Richard A. Bales, *Creating and Challenging Compulsory Arbitration Agreements*, 13 LAB. LAW 511 (1998); Susan A. FitzGibbon, *Reflections on Gilmer and Cole*, 1 EMPLOYEE RTS. & EMPLOYEE POL'Y J. 221 (1997).