Case Note

Protecting Public Rights in Private Arbitration

Cole v. Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997).

Since the Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.*[1] that a claim under the Age Discrimination in Employment Act[2] can be subjected to compulsory arbitration, the use of mandatory arbitration clauses in individual employment contracts has been the subject of vigorous debate. Though mandatory arbitration clauses have been widely criticized in both the scholarly literature[3] and the popular press,[4] lower courts have generally upheld these agreements and extended *Gilmer*'s holding to a variety of statutory claims.[5] In *Cole v. Burns International Security*

1. 500 U.S. 20 (1991).

2. Age Discrimination in Employment Act of 1967 § 2, 29 U.S.C. § 621 (1994).

3. The inequality of bargaining power between employers and nonunion employees has raised concerns that these agreements are foisted upon workers without any real choice. *See, e.g.*, Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contracts of the 1990s*, 73 DENV. U. L. REV. 1017, 1018 (1996). One author has suggested that arbitration clauses may force "employees to take their complaints to tribunals that are no better than kangaroo courts." Lewis Maltby, *Paradise Lost—How the* Gilmer *Court Lost the Opportunity for Alternative Dispute Resolution To Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1, 3 (1994). Other scholars fear that an employer's unique status as an institutional repeat player may give it an unfair advantage in arbitrator selection. *See, e.g.*, Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. (forthcoming 1997) (providing empirical evidence of the repeat player effect). Finally, scholars warn that arbitrators may be incompetent and unrepresentative. *See* U.S. GEN. ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES 2 (1994) (reporting that 89% of the New York-based New York Stock Exchange arbitrators were white males with an average age of 60); Harry T. Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, 28 NAT'L ACAD. ARB. PROC. 59, 71-72 (1976) (reporting that 40% of arbitrators do not read advance sheets to keep abreast of developments under Title VII).

These concerns prompted the Dunlop Commission, the Equal Employment Opportunity Commission, and the National Labor Relations Board formally to oppose mandatory arbitration. *See* COMMISSION ON THE FUTURE OF WORKER-MGMT. RELATIONS, DEP'T OF LABOR, REPORT AND RECOMMENDATIONS 32-33 (1994); *ADR Services Say They Will Continue To Hear Compulsory Arbitration Cases*, 22 Pens. & Ben. Rep. (BNA) No. 45, at 2486, 2487 (Nov. 13, 1995).

4. *See, e.g.*, Roy Furchgott, *Workers Who Signed Away a Day in Court*, N.Y. TIMES, July 28, 1996, at C9; Margaret A. Jacobs, *Workers Call Some Private Justice Unjust*, WALL ST. J., Jan. 26, 1995, at B1.

5. *See, e.g.*, Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110 (3d Cir. 1993) (ERISA); Saari v. Smith Barney, Harris Upham & Co., 968 F.2d 877 (9th Cir. 1992) (Employee Polygraph Protection Act); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992) (Title VII).

Services,[6] Judge Edwards offered a reading of *Gilmer* that would allow courts to ensure that employer-imposed alternative dispute resolution programs meet minimum standards of fairness and due process.

This Case Note argues that, although the *Cole* decision introduces a promising framework for addressing potential inequities and inadequacies in mandatory arbitration of individual employment disputes, it does not go far enough. The court should have followed its own logic and required public disclosure of arbitration awards to protect the integrity of public law. The matter is one of great urgency because statutes protecting the rights of individual employees are being increasingly interpreted and applied in private judicial fora.

I

When Burns Security hired Clinton Cole, it required him to sign an agreement to submit at the employer's request any employment disputes, including statutory discrimination claims, to binding arbitration in accordance with the rules of the American Arbitration Association (AAA). Fired two years later, Cole filed a complaint with the Equal Employment Opportunity Commission (EEOC) and brought charges in federal district court alleging racial discrimination under Title VII.[7] The District Court dismissed Cole's complaint pursuant to the employer's motion to compel arbitration.

In affirming the validity of the disputed arbitration agreement on appeal, Judge Edwards (a well-known scholar of labor law)[8] provided a new and thoughtful approach to the enforceability of mandatory arbitration clauses in individual employment contracts. The court first held that the employment contract at issue was covered by the Federal Arbitration Act (FAA) and therefore enforceable by a federal court.[9] Mindful of the differences between labor and individual employment arbitration,[10] the court held that agreements to arbitrate statutory claims are enforceable only if they do not undermine the relevant statutory scheme by preventing prospective litigants from effectively vindicating their claims.[11]

Prudential Insurance Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994), is a rare example of judicial reluctance to enforce an arbitration clause.

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

7. 42 U.S.C. § 2000(e)(1) to (17) (1994).

8. *See, e.g.*, HARRY T. EDWARDS ET AL., LABOR RELATIONS LAW IN THE PUBLIC SECTOR: CASES AND MATERIALS (Michie 4th ed. 1991) (1974); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986).

9. *See Cole*, 105 F.3d at 1470-72.

10. The court carefully distinguished between labor arbitration in the context of a private collective bargaining agreement, where arbitration is "'part and parcel of the collective bargaining process itself'" and serves as the "'substitute for industrial strife,'" *id.* at 1473 (quoting United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960)), and in the individual employment context, where it serves merely as a quick and inexpensive private substitute for litigation of statutory rights, *see id.* at 1473-79.

11. *See id.* at 1468. Courts have occasionally invalidated arbitration clauses that forfeit statutory rights. *See, e.g.*, Graham Oil Co. v. ARCO Prod., 43 F.3d 1244 (9th Cir. 1994) (invalidating an arbitration clause

The *Cole* decision is the first time a court has interpreted *Gilmer*, traditionally cited for the proposition that civil rights claims can be subjected to compulsory arbitration, to *limit* the enforcement of arbitration clauses.[12] It did so by requiring, at a minimum, the due process standards provided for by the New York Stock Exchange (NYSE) arbitration rules. While the agreement between Burns Security and Clinton Cole was deemed valid, the court held that agreements requiring the employee to pay the arbitrators' fees are not enforceable[13] and that arbitrators' rulings on individual employees' statutory discrimination claims would be subject to meaningful judicial review.[14]

II

Cole is a distinguished opinion amid a multitude of post-*Gilmer* decisions that have mechanically enforced mandatory arbitration clauses without considering the fairness of the arbitration system at issue.[15] While respecting Congress's and the Supreme Court's recent strong endorsements of alternative dispute resolution (ADR),[16] the *Cole* framework protects against the most insidious dangers of compulsory arbitration of discrimination claims by requiring that private resolution programs provide for neutral arbitrators, more than minimal discovery, a written award, and full legal relief.[17] Although the

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because it forced petroleum franchisees to forgo the right to recover exemplary damages and attorneys' fees as provided by statute). Courts have thus far not been nearly as receptive to claims that arbitration agreements in employment contracts are inconsistent with the relevant statutory scheme *See, e.g.*, Nghiem v. NEC Elecs., Inc., 25 F.3d 1437 (9th Cir. 1994) (rejecting the argument that agreements to arbitrate Title VII claims are inconsistent with Congress's desire to provide for jury trials under the 1991 amendments); DeGaetano v. Smith Barney, Inc., No. 95 Civ. 1613 (DLC), 1996 WL 44226 (S.D.N.Y. Feb. 5, 1996) (enforcing an arbitration clause that required the employee to waive rights to attorneys' fees, punitive damages, and injunctive relief in a sexual harassment case).

12. The *Cole* court's reading of *Gilmer* was first suggested by Robert Gorman. *See* Robert A. Gorman, *The* Gilmer *Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635, 644 ("The Supreme Court in the *Gilmer* case did not hold that *any* sort of arbitration procedure before *any* manner of arbitrator would be satisfactory in the adjudication of public rights."), *see also* Stone, *supra* note 3, at 1044 (praising Gorman's analysis of *Gilmer*).

13. *See Cole*, 105 F.3d at 1483-86.

14. *See id.* at 1486-87. The court argued that the nearly unlimited deference paid to arbitration awards in the collective bargaining context is inappropriate for individual employment arbitrations. *See id.* Thus far, lower courts have not heeded Judge Edwards's call for substantial judicial review. *See, e.g.*, Chisolm v. Kidder Asset Mgmt., Inc., 966 F. Supp. 218, 226-27 (S.D.N.Y. 1997).

15. *See, e.g.*, Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994); Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110 (3d Cir. 1993).

16. Both the Civil Rights Act of 1991 and the Americans with Disabilities Act specifically encourage ADR. *See* Civil Rights Act of 1991, Pub. L. No. 102-66, § 118, 105 Stat. 1071, 1081 (codified in scattered sections of 42 U.S.C.); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 513, 104 Stat. 327, 377 (codified at 42 U.S.C. § 12212 (1994)). In *Gilmer*, the Court noted that "generalized attacks on arbitration . . . are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'" Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991) (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989)).

17. *See Cole*, 105 F.3d at 1482.

rules of the major employment arbitration providers would survive the *Cole* analysis, those of most private arbitration systems would not.[18]

Regrettably, however, the *Cole* court ignored an element crucial to a fair arbitration process: public access to arbitration awards. In determining the appropriate minimum due process protections, the *Cole* court relied on dicta in *Gilmer* praising the arbitration rules used by the NYSE,[19] but ignored *Gilmer*'s explicit praise of public arbitration decisions. The Supreme Court had rejected Gilmer's challenge to the arbitration clause in part because the NYSE rules did not undermine the statutory scheme,[20] providing as they did for fair arbitrator selection procedures, limited discovery, broad equitable relief, *and written and publicly available opinions*.[21]

In *Cole*, the court argued that "*Gilmer* cannot be read as holding that an arbitration agreement is enforceable no matter what rights it waives or what burdens it imposes"[22] and adopted the procedural protections of the NYSE rules as minimum preconditions for enforcing private arbitration clauses.[23] The logic of the *Cole* framework thus clearly demands that public access to arbitration awards be included among the minimum protections required for the enforcement of arbitration agreements. In finding that the agreement between Burns Security and Clinton Cole satisfied the due process factors addressed in *Gilmer*, however, the court overlooked a key difference between the NYSE rules at issue in *Gilmer* and the AAA rules in the instant case: NYSE arbitration decisions are made available to the public while AAA awards are confidential.[24] In accord with its own reasoning, the *Cole* court should have refused to enforce an agreement that does not provide for public decisions.

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18. *See* U.S. GEN. ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: MOST PRIVATE-SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION (1995) (reporting that most private arbitration systems do not conform to the procedures recommended by the Dunlop Commission: a neutral arbitrator, limited discovery, a fair method of cost sharing, the right to independent representation, full legal remedies, a written opinion, and sufficient judicial review to ensure that the result is not inconsistent with the governing laws). Both the AAA and JAMS/Endispute, two large providers of arbitration services, require that employment arbitrations meet these standards. *See Cole*, 105 F.3d at 1483 n.11 (discussing JAMS/Endispute); Arnold M. Zack, *The Evolution of the Employment Protocol*, DISP. RESOL. J., Oct.-Dec. 1995, at 36, 36 (discussing the AAA).

19. *See Cole*, 105 F.3d at 1481-82 (citing *Gilmer*, 500 U.S. at 1654-55).

20. As the Court emphasized, "'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.'" *Gilmer*, 500 U.S. at 26 (quoting Mitsubishi Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

21. *See id.* at 31-32. The Court in *Gilmer* did not make clear whether these procedural protections were necessary or merely sufficient to satisfy the statutory scheme. *See* Gorman, *supra* note 12, at 646.

22. *Cole*, 105 F.3d at 1482.

23. *See id.* at 1482-83. The court also indicated that where an arbitration system presents a due process issue not raised by the agreement in *Gilmer*—such as a requirement that the employee pay the arbitrators' fees—courts must not enforce such agreements without first determining that the arbitration procedure is a reasonable substitute for a judicial forum and that it allows the employee to vindicate effectively his statutory cause of action. *See id.* at 1483-84.

24. The court substituted *Gilmer*'s reference to NYSE Rules 627(a), (e), and (f), which require "that all arbitration awards be in writing . . . [and] made available to the public," *Gilmer*, 500 U.S. at 31-32, with the bare requirement that there be a "written award," *Cole*, 105 F.3d at 1482.

Confidential, private arbitration of public law issues like employment discrimination presents significant dangers.[25] Public awards and the publicity surrounding these awards are necessary to deter employers[26] and to warn potential employees. Private decisions do not generate uniform standards to shape employers' policies[27] and, denied access to arbitral awards, plaintiffs may find it difficult or impossible to establish an employer's pattern or practice of discrimination.[28] Confidential decisions may also hinder the creation of precedent and the development of the law.[29] Legislatures must be able to monitor the enforcement of public law and to amend legislation when judicial decisions go awry.[30]

The *Cole* court evidently assumed that written arbitration awards, combined with the continued presence of court decisions and agency regulations, would adequately respond to these concerns.[31] In this, the decision follows the analysis of Robert Gorman, who defends unpublished public law awards on the ground that they are unproblematic so long as published court decisions and agency regulations continue to comprise the majority of adversary dispositions of such issues.[32]

Given the surge in employment arbitration in recent years, however, this assumption is questionable. A 1995 survey conducted by the General Accounting Office, for example, found that 10% of companies with more than 100 employees used private arbitration systems, while an additional 8% were

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25. Though private resolution of legal claims is generally controversial, private arbitration of employment discrimination claims is particularly problematic. These types of cases display two of the four characteristics cited by Owen Fiss as inappropriate for private resolution: "significant distributional inequalities" between the parties and "a genuine social need for an authoritative interpretation of law." Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1087 (1984) (citing, as the other two characteristics, the "difficult[y] . . . [of] generat[ing] authoritative consent because organizations or social groups are parties or because the power to settle is vested in autonomous agents" and the necessity of a court's continual "supervis[ion of] the parties after judgment").

26. *See* Stone, *supra* note 3, at 1047.

27. *See id.* at 1043.

28. *See* Jean R. Sternlight, *Panacea or Corporate Tool: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 686 (1996).

29. *See, e.g.*, Christine Godsil Cooper, *Where Are We Going with* Gilmer*?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 214-15 (1992). Some argue that settlement creates the same difficulties. *See, e.g.*, *Gilmer*, 500 U.S. at 32. *See generally* Fiss, *supra* note 25. Cooper argues that settlement and predispute arbitration agreements are very different, however, because "settlement is based on a prediction of the outcome of litigation; arbitration is based on an avoidance of the outcome of litigation." Cooper, *supra*, at 222.

30. The 1991 Civil Rights Act, for example, was in part a response to recent Supreme Court decisions making it more difficult for plaintiffs to prevail in employment discrimination claims. *See* Civil Rights Act of 1991, Pub. L. No. 102-66, § 3, 105 Stat. 1071, 1074-75 (clarifying that the Act intended to "respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes"). For discussion of this point, see Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworker's Trilogy to* Gilmer, 44 HASTINGS L.J. 1187, 1237-38 (1993).

31. *See Cole*, 105 F.3d at 1482. Both the *Gilmer* and *Cole* courts were aware of the criticisms of confidential arbitration decisions. *See Gilmer*, 500 U.S. at 31-32; *Cole*, 105 F.3d at 1476-78.

32. *See* Gorman, *supra* note 12, at 668-69; *cf. Gilmer*, 500 U.S. at 32 ("[J]udicial decisions addressing ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements.").

actively considering doing so.[33] More striking, a recent survey of employers using external dispute resolution systems found that 85% of the procedures were implemented since the *Gilmer* decision, including 20% in the last two years.[34] As confidence in the enforceability of mandatory arbitration clauses grows, employers fearful of large jury verdicts and high legal costs will increasingly include these clauses in employment contracts. It is not alarmist, therefore, to predict that the trend toward alternative dispute resolution will be powerful enough to hinder the development of public law in this area.[35]

Beyond the difficulties posed to the development of employment discrimination law, confidential procedures make it difficult to assess arbitration outcomes. The few studies that report plaintiff success rates in AAA arbitrations do not separate discrimination claims from breach-of-contract or wrongful discharge claims.[36] Given criticism that arbitrators are unrepresentative and uninformed about developments in discrimination law,[37] general studies of plaintiffs' ability to vindicate their claims in all employment arbitrations may overstate the fairness of outcomes in discrimination arbitrations. The ability of potential litigants to vindicate their claims effectively is the touchstone established by the decisions concerning mandatory arbitration clauses.[38] Denied information on arbitration outcomes, scholars and legislators cannot evaluate the fairness of ADR, and prospective employees cannot evaluate the contracts put before them.

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33. *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 18, at 7.

34. *See* Mei Bickner et al., *Developments in Employment Arbitration*, DISP. RESOL. J., Jan. 1997, at 8, 78.

35. Agency regulations and litigation alone cannot fulfill the public law functions of traditional employment discrimination litigation. The EEOC currently litigates fewer than 1% of the charges it investigates. *See* Cooper, *supra* note 29, at 219-20. Under a policy instituted in 1995, the EEOC now offers confidential voluntary ADR, *see EEOC Votes To Offer Voluntary Mediation as Option in Job Discrimination Claims*, 1995 Daily Lab. Rep. (BNA) No. 80, at D-3 (Apr. 26, 1995), uses a charge-priority system in an effort to decrease its backlog of cases, *see EEOC Adopts Charge-Priority System; Gives General Counsel More Authority*, 1995 Daily Lab. Rep. (BNA) No. 76, at D-3 (Apr. 20, 1995), and having rescinded its earlier policy of not settling for less than full relief when there was reasonable cause to believe a violation occurred, actively encourages settlements at all stages in the administrative process, *see id.*

36. *See* Lisa B. Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L.J. 108, 115 (1996) (reporting that only 2% of the commercial arbitrations studied involved discrimination claims but failing to provide separate outcome statistics for discrimination claims); *see also* Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 INT'L J. OF CONFLICT MGMT. 369 (1995) (analyzing a data set that included breach-of-contract and wrongful discharge as well as discrimination claims); William M. Howard, *Arbitrating Claims of Employment Discrimination: What* Really *Does Happen? What* Really *Should Happen?*, DISP. RES. J., Oct.-Dec. 1995, at 40, 41 (failing to distinguish arbitration outcomes in cases of discrimination from those in other types of employment claims).

37. *See supra* note 3.

38. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33-35 (1991).