Courts Expanding Arbitration Role in Employment Claims

Recently, Courts throughout the country, including New Jersey, have issued a number of decisions which signal an expanding role for alternative dispute resolution of employment claims.

The first of those decisions, *Gilmer v. Interstate/Johnson Lane Corp.*, was handed down by the United States Supreme Court last May. In *Gilmer*, the court held that an employee's statutory age discrimination claim, cognizant under the Age Discrimination in Employment Act of 1967 (ADEA), was subject to mandatory arbitration pursuant to an arbitration clause set forth in the employee's stock exchange registration application with the New York Stock Exchange (NYSE).

*Gilmer Changed Alexander Rule*

For many, Gilmer represents a substantial change in the law. Indeed, only eighteen years earlier, the nation's highest court held in *Alexander v. Gardner Denver Co.* that an employee's statutory race discrimination claim under Title VII of the Civil Rights Act of 1964 was not subject to the mandatory arbitration procedures set forth in the collective bargaining agreement between the employer and the employee's collective bargaining representative. The court maintained the "rule" of *Alexander* in subsequent employment decisions until its decision in *Gilmer*.

What changed during the 18 years between *Alexander* and *Gilmer*?

Perhaps there had been a change in attitudes of both the judiciary and litigants regarding the burdens of litigation and the benefits of arbitration. For example, in his 1981 dissent in *Barrentine v. Arkansas-Best Freight System, Inc.*, then Chief Justice Warren E. Burger exhorted the virtues of arbitration and decried the costs, time consumption and inappropriateness of litigation for many "routine" employment claims. In a subsequent address to the American Bar Association in January of 1982, Burger reiterated his concerns over the litigations crisis and court backlogs and called upon the bar to endorse alternative dispute resolution procedures.
Employers' Attitudes

Undoubtedly, employer attitudes towards the resolution of employment claims have been affected by the escalating costs of litigation and the increasing size of jury verdicts handed down in discrimination and related employment cases during recent years.

See, e.g., *Cancellier v. Federated Dept. Stores*, 672 F.2d 1312 (9th Cir. 1982), cert. denied. 459 U.S. 859 (1982) ($2.3 million jury award on ADEA and pendent state law claims); *Wilson v. Monarch Paper Co.*, 939 F.2d 1138 (5th Cir. 1991) ($3.4 million jury award on ADEA and related emotional distress claim).

Most recently, jury awards in employment cases have soared to new heights. See e.g., *Martin v. Texaco Refining & Marketing, Inc.*, C 613044 (Cal. Super. Ct. 1991) ($17,657 million jury award on sex discrimination claim); *Banuaas v. Mitsubishi Bank Ltd.*, No. 89-12-07357 (Or. Cir. Ct. 1991) ($6.2 million jury verdict for wrongful termination claims).

Closer to home, late in 1990 a U.S. District Court jury sitting in Newark awarded $1.37 million to a plaintiff who was discharged in contravention of the New Jersey Conscience Employee Protection Act. It is no wonder that employers and the defense bar recently endorsed a model uniform termination act with provisions that transfer decision-making on such claims from juries to arbitrators or, alternatively, administrative agencies or judges.

While employers might have had good reasons to turn to alternative dispute resolution procedures, it is only with recent court opinions that legal bases for expanded use of the arbitration process have arisen. At first glance, *Gilmer* suggests only a limited expansion of the use of arbitration for resolving employment claims.

In *Gilmer*, the court enforced a NYSE arbitration clause pursuant to the Federal Arbitration Act (FAA). Because the arbitration clause was not contained in an "employment contract" between the employee and employer but, rather, was set forth in the employee's NYSE securities registration application, the court determined that it was not necessary for it to decide whether Section 1 of the FAA was applicable to the arbitration clause. Section 1 of the FAA excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the FAA's coverage. Holding that the NYSE securities registration application was not an "employment contract" within the meaning of the FAA, the *Gilmer* court applied the FAA to the NYSE arbitration clause.

Recent Court Opinions
Decisions handed down since *Gilmer* suggest that the lower courts may regard *Gilmer* as a general endorsement of arbitration processes for the resolution of employment claims, including statutory claims, and will even overcome the limiting "employment contract" exclusion of the FAA.

In a series of decisions handed down after *Gilmer*, all dealing with the mandatory arbitration clause in NYSE securities registration applications, several courts ordered the mandatory arbitration of statutory claims under the ADEA as well as Title VII of the Civil Rights Act of 1964. At least one court echoed the *Gilmer* court's commentary that the applicability of the FAA's exclusion of "employment contracts" must still be decided.

In December of 1991, two, federal courts moved beyond the FAA's exclusion on different theories. In the first of those cases, neither of which involved a NYSE securities registration application, a U.S. District Court in Pennsylvania ordered the mandatory arbitration of ADEA and common law wrongful discharge claims of an accounting firm partner under the FAA. In that decision, the court narrowly construed the FAA's exclusionary clause and held that it did not apply to the accounting firm partnership agreement. Similarly, in the second case, a U.S. District Court in Massachusetts granted an employee's application seeking the mandatory arbitration of a wrongful discharge claim pursuant to an "agreement" to arbitrate contained in an employment manual issued by the employer. In that case, the court held the exclusionary language of the FAA applied only to workers "actually in the transportation industry" and, therefore, it concluded that all other "employment contracts" were not covered by the FAA. Thus, the court granted the employee's application and directed the employer to arbitrate the employee's wrongful discharge claim.

In New Jersey, the Supreme Court and a U.S. District Court recently issued decisions on different theories endorsing the arbitration of employment claims. Neither of those cases involved the FAA.

In *Fregara v. Jet Avianon Business Jets*, U.S. District Judge Nicholas Politan dismissed a wrongful discharge claim based on an employee handbook under circumstances in which the employee failed to exhaust the handbook's grievance and arbitration procedures. The FAA was not at issue in *Fregara* instead. Politan based his decision on state common law principles of exhaustion of remedies, which the court expressly regarded as an affirmative obligation of an employee raising *Woolley V. Hoffmann-LaRoche, Inc.* employee handbook claims under circumstances in which the handbook also contained mandatory dispute resolution procedures.

Of note in *Fregara* is that the grievance and arbitration procedure in the employee handbook provided for "internal" arbitration before a "board of adjustment" composed entirely of company employees selected separately by company management and rank-file employees. Statutory claims were not subject to arbitration in *Fregara* - only claims based upon the handbook.
In Maher v. N.J. Transit Rail Operations, Inc., the Supreme Court of New Jersey recently held that an employee's handicap discrimination claim cognizable under the New Jersey Law Against Discrimination (NJLAD) was a "minor dispute" subject to compulsory arbitration under arbitration procedures contained in a collective bargaining agreement between the employer and the employee's collective bargaining representative. Again, Maher did not involve the FAA. Instead, the Railway Labor Act was at issue. The significance of Maher is that the Supreme Court ignored the critical distinction between the facts in Alexander and the facts in Gilmer, which permitted the U.S. Supreme Court in Gilmer to rule as it did.

In Gilmer, the court distinguished the facts in Alexander from the facts in Gilmer because Alexander had involved an arbitration clause in a collective bargaining agreement and the union's "waiver" of a member's statutory claim. Gilmer, on the contrary, involved the employee's intentional submission of his own statutory claims to procedures under the arbitration clause in his stock exchange registration applications. Notwithstanding that the facts in Maker were closer to the facts in Alexander than in Gilmer, the Maker court directed the compulsory arbitration of the employee's NJLAD claim.

Lessons for the Future

The lessons' to be learned from Gilmer and its progeny are that the arbitration of employment claims is quickly becoming the rule rather than the exception. Employers wishing to "contain" the costs, delays and their potential exposure on employment claims will be wise to explore the use of grievance and arbitration procedures in employee handbooks, company policies and employment agreements. Although uncertainty remains as to the enforceability and breadth of agreements to arbitrate, recent decisions suggest that courts are willing to entertain a variety of theories to enforce such agreements, including the FAA, common law contractual and exhaustion of remedies theories and state alternative dispute resolution statutes such as the New Jersey Arbitration Act or the New Jersey Alternative Procedure for Dispute Resolution Act.

It is apparent that compulsory arbitration of statutory and noncontractual claims is no longer in doubt. The significance of recent case law is that arbitration procedures may provide a broadbased mechanism for the controlled, expeditious, cost-conscious resolution of the majority of employee claims that might arise during employment. Although this is a developing area and further definition is required, those entering into agreements to arbitrate employment claims will be moving with rather than against a developing trend.

Practice:

Labor & Employment Law