# XV. LERA DISTINGUISHED PANEL

# Due Process in Employment Arbitration: Differential Coverage is Not Due Process

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The thesis of this paper is that the U.S. Supreme Court, however well meant its decision in *Gilmer v. Interstate/Johnson Lane Corp.*, erred in not realizing that the decision created an unfair two-tier system involving the arbitration of disputes containing a statutory discrimination claim.[1] The two tiers are employees involved in (1) proceedings under an employment arbitration agreement as in *Gilmer* and (2) statutory claims arising under a collective bargaining agreement as available under *Alexander v. Gardner-Denver.*[2] There are many aspects to due process, including knowledge of rules, timely handling of disciplinary and other matters, access to representation, and avoidance of differential treatment in similar situations. The lack of due process emphasized here is the different way the two tiers referred to above are handled in workplace disputes. I note that the two tiers reflect the two aspects of the new Labor and Employment Relations Association title for our organization.

Mr. Gilmer, a securities industry employee, signed a preemployment agreement to take employment claims to arbitration under an industry-sponsored plan. He claimed that his dismissal was based on age discrimination, and the U.S. Supreme Court held that the matter qualified for arbitration, as the employer argued. The U.S. Supreme Court pointed out that Mr. Gilmer was

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not being denied access to statutory rights, but was simply having them heard in an arbitration forum.

In the next section, I will examine due process and related problems that arise under *Gilmer* but are basically not present under *Gardner-Denver.* These include the following explicit or implicit assumptions by the Supreme Court:

1. Private employment plans and arbitrators would be fair.
2. Waiver of statutory rights was inherent in the signing of a private employment agreement.
3. The employee is a plaintiff with the burden of proof.
4. Costs of employment arbitration should be borne by the parties.
5. All issues, statutory and nonstatutory, should be covered in employment arbitration as a substitute for the courts.
6. Filing for statutory review of arbitration decisions available to grievants under a collective bargaining agreement was not appropriate for claimants under an employment agreement.

Following discussion of the these issues, I will consider the role of the Equal Employment Opportunities Commission (EEOC) as it has dealt with private employment plans calling for arbitration of claims. I will conclude by examining remedies that may be effective in dealing with the problems caused by the two-tier system.

Before proceeding, I wish to recommend an excellent new volume published by the W.E. Upjohn Institute for Employment Research, *Workplace Justice Without Unions,* by Hoyt Wheeler, Brian Klaas and Douglas Mahony, issued in 2004. It addresses employment arbitration both in the United States and abroad.

## Private Employee Arbitration Plans and Arbitrators Would be Fair

In the *Gilmer* decision, the U.S. Supreme Court indicated its comfort with the notion that private employment arbitration plans would be fair. They said, "Gilmer's challenge to the adequacy of arbitration procedures are insufficient to preclude arbitration. This Court declines to indulge his speculation that the parties and the arbitral body will not retain competent, conscientious, and impartial arbitrators, especially when the NYSE rules and the Federal Arbitration Act (FAA) protect against biased panels.[3]

I believe most observers would agree that the stock exchanges, however unilaterally, have made efforts to provide fair plans.[4] The same cannot be said of the early versions of such plans elsewhere, and the impact of the FAA

on fairness of existing plans appears to be limited.[5] The best evidence as to concerns about plan fairness is the list of organizations that convened to work on a *Due Process Protocol* designed to establish fairness standards in employment arbitration.[6] These groups included the American Arbitration Association (AAA), Federal Mediation and Conciliation Service (FMCS), National Academy of Arbitrators (NAA), Labor and Employment Law Section—American Bar Association, American Civil Liberties Union, Society of Professionals in Dispute Resolution (now Association for Conflict Resolution [ACR]), and the National Employment Lawyers Association. Both ACR and NAA took positions as organizations that mandatory arbitration of statutory rights should not be required.

Among the issues with which the *Protocol* group dealt were recommendations that a claimant should have the right to participate in the selection of an arbitrator and choice of an advocate. Existing plans often placed limitations on these basic aspects of fairness. Appointing agencies such as the American Arbitration Association and JAMS adopted and have applied the *Due Process Protocol.* The makers of the *Protocol* were unable to agree on some aspects of fairness, and the NAA created *Guidelines* addressing certain of these employment arbitration issues. The goal was to help NAA members decide whether they should take a particular employment arbitration case.[7]

A matter not covered by the *Protocol* or *Guidelines* is that many employment arbitrators also serve as advocates. We do not have accurate employment arbitration statistics that would show what percentage of the work is done by full-time neutrals as is overwhelmingly true in labor-management arbitration, but my observation is that a majority of employment cases are arbitrated by advocates serving as neutrals. It is also my observation that these are honorable individuals who handle their arbitration assignments with a sense of responsibility, but the use of advocates as arbitrators does not provide the claimant with patently neutral arbitrators. Virtually every collective bargaining arbitration uses arbitrators who are neutral. The use of advocates as arbitrators was apparently initially predicated on the belief that advocates were the only sizeable group with the necessary background knowledge to handle these cases. Aside from the questionable accuracy of that proposition, there does not appear to be a lack of qualified neutrals to arbitrate these cases at this time. The parties are always free to select their arbitrator, but the arbitration process is enhanced when panels of neutrals are available from appointing agencies.

The grievant thus usually has an arbitrator with neutral auspices and operates under a plan negotiated by elected representatives. The employment-arbitration claimant does not have these advantages. Finally, *Gilmer*-type

agreements are contracts of adhesion (contracts attached to a separate matter and requiring the taking of an all or nothing position) and are inherently unfair.

## Waiver of Statutory Rights

The language of *Gilmer* quoted above makes it easy to see why employers claimed that signing a broad employment contract or accepting an employer handbook calling for arbitration of all employment claims, including statutory ones, constituted a waiver of the right of the employee to make use of statutory procedures. Various circuit courts, however, have taken positions on both sides of the argument.

Illustratively, the Fourth Circuit Court of Appeals stated in *Hooters of America v. Phillips,* that the agreement was so one-sided in favor of the employer that no knowing waiver could have been present.[8] The District of Columbia Circuit Court of Appeals took the opposite position in *Cole v. Burns International Security Services,* holding that employees who agree to submit employment claims to arbitration, have, in effect, waived any right they may have had to proceed statutorily.[9] As will be discussed in the EEOC section of this paper, although claimants are free to file their cases with EEOC while being required to go to arbitration, the number of such cases going forward are likely to be small.

The courts have split as to what constitutes a knowing waiver and range from signing of an employment contract as a waiver to the conclusion that an employee made no knowing waiver when the arrangement was patently unfair to the employee. A majority of the circuit courts require some evidence that goes beyond signing of an employment agreement or acceptance of an employee handbook that the individual was aware of and agreed to the terms of the company/employer association procedure; however, a minority of the circuit courts accept the rule, which they believe is required by *Gilmer,* that the arbitration agreement or handbook is binding.

This is as contradistinct to the situation applicable to grievants under a collective bargaining agreement. Here, the courts have held that a waiver must be express and knowing if the right to proceed statutorily is to be considered as having been given up.[10] Some companies, such as General Electric, require unionized employees to sign a *Gilmer*-style contract. If these employees file a grievance, *Gardner-Denver* applies, but it does not if the individual seeks redress under *Gilmer.*

The situation created by *Gilmer* thus provides the grievant under a collective bargaining agreement with the strong presumption that a statutory claim may see the light of day in the courts. The same assumption does not hold true for all claimants under a private-employment agreement. There, it

depends on the pertinent circuit court of appeals. Such an arrangement provides differential due process for some members of the two groups.

### The Employee as Plaintiff with the Burden of Proof

The U.S. Supreme Court was silent about the burden of proof in employment arbitration cases. It is not surprising that appointing agencies and employment arbitrators apply the court standard that an employee seeking redress is a plaintiff and has the burden of proof. The opposite is true in dismissal or other discipline cases arising in labor-management arbitration. The distinction places the claimant at a disadvantage compared to a grievant under a collective bargaining agreement.

The U.S. Supreme Court's statement that it was merely substituting arbitration for court activity did not address the differences in burden of proof between claimants and grievants. One approach to balancing the burden of proof difference would be if the United States had a statute providing for arbitration of alleged unfair dismissals. Such legislation has been proposed frequently by industrial relations scholars and legislators, but it has not as yet received serious consideration.

### Costs of Employment Arbitration

An implicit assumption in the *Gilmer* decision was that the parties would pay their own costs, including arbitrator fees, in employment cases. After all, this was the court standard before the *Gilmer* turn to arbitration in place of the courts. One exception involves claimants who have attorneys who take the case on speculation, that is, they expect one third to 40 percent of any award in the matter. The *Due Process Protocol* also took the position that costs were to be shared equally by the parties.

The *Cole* case raised the financial role of a claimant in a statutory discrimination case in arbitration to a new level. The court reasoned that claimants do not pay for judges in a court case and decided that it was unfair for claimants to pay arbitrator fees and expenses.[11] The decision is particularly noteworthy because it was authored by Judge Harry Edwards, who is a labor relations and arbitration expert. It should also be noted that neither plaintiffs nor defendants pay for the services of judges, but that *Cole* placed the burden for arbitrator fees and costs on the employer in federal discrimination cases.

There has been some backing and filling in terms of who pays arbitrator fees and expenses in employment cases involving charges of discrimination, but the clear direction is to have the employer pay the fees. Some of this has come about voluntarily by the willingness of employers to pay these fees, perhaps as a quid pro quo for employees required to sign an arbitration

agreement as a condition of employment. Also, the AAA in 2002 announced that it was requiring employers to pay arbitrator fees for claimants in employment arbitration. The arrangement applies to mandatory predispute agreements, but it does not apply to individually negotiated executive agreements that provide for joint payment of arbitrator fees.

Certainly, the rights of claimants in employment arbitration have been enhanced by arrangements that remove any requirement for payment of arbitrator fees by claimants. These arrangements have come about post-Gilmer and are not universal. This is as compared to grievants whose arbitration costs are usually covered by the union.

The desirability of providing access to an arbitration determination for individuals lacking funds must be balanced against the sense of process fairness when arbitrator fees are paid by both parties. If your priority is an opportunity to go to arbitration for an individual who might otherwise be unable to do so, the payment of arbitrator fees by the employer can be seen as a plus. If your primary concern is the image of fairness, your preference may be for equal sharing of arbitration costs, which avoids the repeat- payer problem. In any event, the grievant typically does not have any of the financial concerns that may be faced by a claimant in employment arbitration.

### *All Employment Arbitration Cases Qualify for Court Procedures*

The U.S. Supreme Court was apparently concerned about discrimination cases. It was well known that EEOC had a backlog in excess of about 90,000 cases in the early 1990s. Coupled with the encouragement by Congress of the greater use of Alternative Dispute Resolution (ADR) tools, it was not surprising to find the Court turn to arbitration of discrimination cases. One problem is that all employment complaints are typically covered by employment agreements, and the cases involving allegations of discrimination arise in a minority of cases. An active player in administering employment arbitration cases is the AAA, and it reported that approximately 20 percent of the cases involved a discrimination charge in cases originating in portions of 2001 through 2003.[12] Many of the cases deal with conditions of employment, and an additional large number are negotiated agreements between an executive and an organization over terms of employment.

Individuals under an employment arbitration agreement who take nondiscrimination cases to arbitration are thus visited with the full panoply of courtroom activity rather than the more limited range—read less costly—of functions associated with make-whole arbitration. Again, the grievant under a collective bargaining agreement whose union elects to pursue a grievance to arbitration provides the individual involved with full financial coverage. The claimant under an employment agreement may be responsible for substantial charges personally even though the matter has nothing to

do with a discrimination claim. Overall, in this category, a grievant has an advantage over a claimant.

## Differential Appeal Rights

Basically, a claimant wishing to take an employment arbitration decision up on appeal is limited to the charge that the decision was obtained by fraud or corruption, was in manifest disregard of the law or a violation of public policy. The same standards are also applicable to grievance arbitration. The big difference between the two areas, however, is that a claimant often must go to arbitration while a discrimination grievant may generally take a case to arbitration, administrative agencies and the courts, simultaneously or sequentially. The argument by some observers that this constituted two bites of the same apple was countered by noted labor-law analyst David Feller, who pointed out that two different apples were involved.[13] One apple provided for make-whole remedies under a collective bargaining agreement, and the other gave access to statutory procedures and remedies.

The approach of the U.S. Supreme Court as it applies to *Gardner-Denver* and *Gilmer* raises some additional questions regarding U.S. Supreme Court assumptions. In *Gardner-Denver,* the U.S. Supreme Court apparently perceived that there may be differences between a union and an individual bringing a discrimination claim, and the individual was to be protected in that circumstance. Such a situation may well exist from time to time, but the more appropriate assumption, in my opinion, is that most unions are there to advance the legitimate claims of its constituents. Also, the labor-law requirement of a duty of fair representation applies to a union.

The employment arbitration claimant generally has a weaker statutory right to judicial review of the arbitration case. The collective bargaining grievant continues, except for an unmistakable waiver, to have the routine right to proceed with a statutory appeal following arbitration.[14] The two-tier system continues to apply.

There are other illustrations of the basic theme of this article, but the above examples serve to make the point that, overall, grievants under collective bargaining do better in terms of due-process rights than claimants in employment arbitration. I turn now to the role of EEOC in seeking to deal with its cases following *Gilmer.*

## EEOC and Employment Arbitration

After *Gilmer,* the EEOC took the position that a private arbitration system was not meant to be substitute for a matter involving public law. The EEOC joined the NAA and ACR in taking a stand against mandatory arbitration of statutory claims under an employment arbitration agreement. In 1997, the EEOC issued a formal policy statement against any limitation of its

rights by agreements that required discrimination claims to go to arbitration under a mandatory employment arbitration agreement. It maintained that the agency has an independent right to bring suit under its own aegis. Although there was a split in two circuit courts on the subject, EEOC's right to take action in its own name was confirmed by the U.S. Supreme Court in *EEOC v. Waffle House.*[15] The U.S. Supreme Court found that an arbitration agreement did not preclude the EEOC from bringing suit on its own in a meritorious discrimination case. Thus, an individual who is required to take a case to arbitration under a pre-dispute agreement is not precluded from filing with EEOC. One problem for such a claimant is that EEOC is limited by budget as to the number of cases in which it may institute a suit.

Although the EEOC does not bring many suits, its role is quite important because the Civil Rights Act of 1991 and other acts have given it the authority to seek compensatory and punitive damages as well as more limited make-whole remedies.

The EEOC has been active in seeking to prevent signers of employment arbitration agreements from losing an independent right to pursue a statutory resolution of their claims. Implicit in EEOC's pursuit of its role in discrimination claims is the belief that mandatory employment arbitration should not be considered an adequate substitute for agency and court action. Recently, however, the EEOC has indicated that it might consider some deference to employment arbitration provided it can be satisfied that claimants will be served properly if employment arbitration plans meet a due process standard. EEOC's concern is the theme of this paper and, as will be seen below, I believe there is an effective way to accomplish this end by extending *Gardner-Denver* to employment arbitration.

## Summary and Remedies

The examples given involving U.S. Supreme Court assumptions regarding the likely fairness of employment arbitration, inherent waiver of statutory rights in the plans, propriety of equality of cost sharing by the parties, inclusion of many nonstatutory cases in a courtroom-like procedure, role of claimant as plaintiff, and differential appeal rights all support the contention that, however unwittingly, the U.S. Supreme Court has participated in the creation of a two-tier system of justice involving claimants in employment arbitration cases and grievants under collective bargaining agreements. The advantage is consistently in favor of grievants. It does not seem appropriate to this observer that we maintain a system that has operated to provide lesser and greater due process to two groups of workers.

Attempts have been made to overturn *Gilmer* legislatively. A leader in this fight is Senator Edward Kennedy of Massachusetts. A more limited leg-

islative approach has been suggested by Clyde Summers.[16] He recommends that the FAA be amended to make clear that it does not apply to employment arbitration and that adhesion contracts be outlawed. Lewis Maltby, president of the National Workrights Institute, proposes that predispute agreements be voluntary. Alternatively, he notes that employers could adopt a policy of arbitrating disputes but that employees could opt out.[17] These are worthwhile suggestions and address some of the problems discussed here.

Most observers, however, see the dramatic growth in employment arbitration as having produced a powerful interest group that will seek to maintain the status quo. I am inclined to agree and recognize that any change in the employment arbitration system will be difficult. An alternative approach brings the U.S. Supreme Court back into the picture to help remedy the problems chronicled above by making the *Gardner-Denver* approach applicable to predispute employment arbitration agreements.

Had the U.S. Supreme Court elected to do so in the *Gilmer* decision, I believe we would have avoided much of the differential treatment described in this paper as well as provided a rational system for the handling of employment disputes. The U.S. Supreme Court in *Gilmer* rejected the *Gardner-Denver* approach, saying, "Gilmer's reliance on *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 is also misplaced. Those cases involved the issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims, not the enforceability of an agreement to arbitrate statutory claims. The arbitration in those cases occurred in the context of a collective bargaining agreement, and thus there was concern about the tension between collective representation and individual statutory rights that is not applicable in this case."[18]

I have earlier indicated that the U.S. Supreme Court's assumptions about workers being treated fairly under employment agreements were often not accurate at the time of Gilmer. Although employee treatment under predispute employment agreements has clearly improved, the thrust of this paper is that there remains a two-tier system that results in denial of due process to claimants in employment arbitration as compared to grievants in a collective bargaining arbitration case. If the U.S. Supreme Court recognizes that a two-tier system exists, I suggest that it is reasonable for it to consider treating employment arbitration the same way as grievance arbitration with regard to access to the courts in discrimination cases. The U.S. Supreme Court could simply take another look at its position re *Alexander v. Gardner-Denver* in a forthcoming case on the basis that a waiver of statutory employment rights should not take place, except perhaps on a postdispute agreement basis.

The advantages of such a relatively easily available resolution are many. It would turn arbitration under employment contracts into more of a make-

whole procedure as opposed to a courtroom substitute. Cost savings to the parties could be substantial. The majority of cases that do not have discrimination claims do not need a courtroom. A subtle advantage is that discrimination is sometimes alleged as part of a buckshot approach in an arbitration case, and the makeweight can be discarded when the case is properly decided on other issues. Under *Gilmer,* any allegation of discrimination places the cases into the courtroom type of setting. Most important, the change would preserve the statutory rights of the individual. The likelihood is also high that the courts would be affected positively in terms of workload because an arbitration outcome could well put many cases to rest.

Many writers—Jay Siegel, for example—have written about the promising future for arbitration and mediation in government.[19] I concur, but note that we must remember that misuse of ADR processes in any forum is likely to damage the use of ADR in other fora. Fortunately, the problems with involuntary predispute agreements in employment arbitration are remediable.

## Notes

This presentation is dedicated to the memory of Rose deWolf, outstanding reporter, columnist, and long-time friend of IRRA/LERA. I also wish to acknowledge the excellent input on aspects of employment arbitration provided by Arnold Zack.

1. *Gilmer,* 500 U.S., FEP Cases 1116 (1991).

2. *Gardner-Denver,* 415 U.S. 36, 7 FEP 81 (1974).

3. *Gilmer,* op. cit., p. 8

4. Greenbaum, Marc D. and Linda D. McGill, *The Arbitration of Individual Employment Disputes,* Matthew Bender & Co, pp. 45-30. In 1999, the National Association of Securities Dealers no longer required that signatories of pre-employment agreements were required to submit improper discharge claims to arbitration.

5. In *Circuit Cities Stores, Inc. v. Adams,* 121 S. Ct. 1302 (2001). the U.S. Supreme Court found that the exception to employment contracts covered by the statute applied solely to employees directly engaged in transportation. After this finding, it reaffirmed its *Gilmer* position.

6. "A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship," in *Dispute Resolution Journal,* October–November 1995. An excellent summary of the creation of the Due Process Protocol can be found in John T. Dunlop and Arnold M. Zack, *Mediation and Arbitration of Employment Disputes,* Jossey-Bass, San Francisco, 1999.

7. *Guidelines on Arbitration of Statutory Claims under Employer-Promulgated Systems.* Proceedings of the Fiftieth Annual Meeting, National Academy of Arbitrators, ed. Najita, BNABooks, 1998, p.313.

8. *Hooters,* 173 F.3d 933, 79 FEP 629 (4$^{th}$ Cir. 1999).

9. *Cole,* 105 F.3d 1465, 72 FEP 1775 (D.C. Cir. 1997).

10. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), 519 U.S. 980 (1996).

11. *Cole,* op. cit., 1484.

12. Information provided by Robert Meade, AAA Vice President, to Walter Gershenfeld, September 16, 2003.

13. David E. Feller, *Compulsory Arbitration of Statutory Discrimination Claims under a Collective Bargaining Agreement* in 16 Hofstra Labor Law Review 53, 1998.

14. *Wright v. Universal Maritime Services,* 525 U.S. 70, 119 S. Ct. 391 (1998).

15. *EEOC v. Waffle House, Inc.,* 193 F.3d 805 (4th Cir. 1999).

16. Clyde Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate,* in University of Pennsylvania Journal of Labor and Employment Law, Spring 2004.

17. Lewis Maltby, "Out of the Frying Pan into the Fire: The Feasibility of Post-Dispute Arbitration," National Workrights Institute, Testimony before the Commission on the Future of Worker-Management Relations, April 6, 1994.

18. *Gilmer,* op.cit, pp. 11-14.

19. Jay S. Siegel, *Changing Public Policy: Private Arbitration to Resolve Statutory Employment Disputes,* 13 The Local Lawyer 87, 1997.