J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 2(4) 283-291, 1993-94

GILMER v. INTERSTATE/JOHNSON LANE CORP.: OBSERVATIONS ON AN EXPANDED ROLE FOR THE LABOR ARBITRATOR

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ABSTRACT

The Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.* potentially signifies an expanded role for the labor arbitrator in the resolution of employment-related claims. Under the Steelworkers trilogy, labor arbitrators' expertise was perceived as being limited to matters of the shop, and so labor arbitrators' authority was limited by the Court to those areas. By compelling the arbitration of Gilmer's Age Discrimination in Employment (ADEA) claim, the Court firmly embraced an increased respect for the expertise of arbitrators, and signalled a willingness to depart from the limitations imposed by the Steelworkers trilogy on the role of labor arbitrators.

These comments address the implications of *Gilmer v. Interstate/Johnson Lane Corp.* [1] when applied to traditional agreement-based labor arbitration. Gilmer was required as a condition of his employment with Interstate to register as a securities representative with the New York Stock Exchange (NYSE). According to the Supreme Court, the registration application "provided, among other things, that Gilmer 'agree[d] to arbitrate any dispute, claim or controversy' arising between him and Interstate 'that is required to be arbitrated under the rules, constitutions or by-laws of the [NYSE]'" [1, at 1650]. One of the NYSE rules provided for the arbitration of "'[a]ny controversy'" between Gilmer and Interstate "'arising out of [Gilmer's] employment or termination of employment'" [1, at 1651]. The case involved Gilmer's efforts to bring a claim under the Age Discrimination in Employment Act (ADEA) in federal court, rather than submit it to compulsory arbitration pursuant to the terms of the arbitration agreement

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doi: 10.2190/TEVF-LP7M-T8RW-WA8D
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contained in his securities registration application. The Supreme Court held that the arbitration agreement was enforceable by Interstate under the terms of the Federal Arbitration Act (FAA), and required that Gilmer submit his ADEA claim to compulsory arbitration. Prior to *Gilmer,* the Court had held in *Alexander v. Gardner-Denver Co.* [2] that an employee's right to a trial *de novo* under Title VII is not foreclosed by the employee's prior submission of a claim to arbitration under the nondiscrimination clause of a collective bargaining agreement [3].

While *Gilmer* certainly appears to change the arbitration landscape, the decision should be kept in perspective—labor arbitrators have long heard and decided grievances based on perceived discrimination on the basis of, for example, race and gender. After *Gilmer,* a labor arbitrator may now expect to be confronted with a discrimination claim based not on a perceived violation of a collective bargaining agreement, but rather on a perceived violation of statutory law. Thus, the change wrought by Gilmer is not that labor arbitrators will now find themselves faced for the first time with deciding troublesome questions of discrimination; rather, whereas a labor arbitrator's resolution of a collective bargaining agreement-based discrimination claim must draw its essence from the agreement [4], it now appears that the labor arbitrator's resolution of a statutory-based discrimination claim should be drawn from the essence of the controlling statute. *Gilmer* thus raises the question that long has been the subject of much scholarly, good-faith dispute among labor arbitrators: the extent to which external law should inform, if at all, a labor arbitrator's resolution of a particular grievance [5].

From a labor arbitrator's perspective, the change in the Court's attitude toward arbitration from *Gardner-Denver* to *Gilmer* may represent a number of possibilities: either a fundamental departure from the Court's earlier pronouncement in *Gardner-Denver,* the death knell of *Gardner-Denver,* or no change at all. The answer, of course, depends on the ultimate resolution of a host of questions raised, but not answered, by *Gilmer.* For the purposes of this article, it is enough to note a few of these questions: whether a particular collective bargaining agreement containing a broad arbitration agreement will fall within the exemption clause of Section 1 of the Federal Arbitration Act (FAA), and therefore be unenforceable under the FAA [6]; whether a perceived conflict between collective interests and individual statutory rights will preclude a union prospectively from waiving in an arbitration agreement an individual member's statutory rights [7]; and, the general application of *Gilmer* to statues other than the ADEA [8].

GARDNER-DENVER AND THE LEGACY OF THE STEELWORKERS TRILOGY: COURT-IMPOSED LIMITATIONS ON THE AUTHORITY OF LABOR ARBITRATORS

The Supreme Court's well-known statement in *United Steelworkers of America v. Enterprise Wheel & Car Corp.* has, at least until *Gilmer,* defined the parameters of the federal courts' deference to labor arbitrators:

> "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award" [9].

This quotation is, perhaps, best understood when viewed in the context of the *Gardner-Denver* Court's understanding that, "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land" [10].

The legacy of the Steelworkers trilogy carried through to *Gardner-Denver,* where the Court continued to recognize the expertise of labor arbitrators in matters of the shop. The *Gardner-Denver* Court refused, however, to extend this deference to matters of statutory law. Indeed, the Court's holding emphatically limited an arbitrator's authority to interpreting the collective bargaining agreement, and went so far as to say that "Where the collective-bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement" [11]. Given that, as a general rule, parties cannot contract away federal mandates, *Gardner-Denver* suggests that the Court took very seriously its aversion to, or distrust of, an arbitrator's ability to interpret statutes. Or, perhaps, the Court simply was jealous of any further encroachment by arbitrators into the federal judiciary. To its credit, the *Gardner-Denver* Court did recognize that the decisions of at least some arbitrators merited some deference from federal courts [12]. But, of course, that deference did not reach the level of issue or claim preclusion.

HOW ARBITRATION WORKED AFTER GARDNER-DENVER

Against this backdrop labor arbitration took its present form. Generally speaking, a labor arbitrator is mutually chosen by the parties under the terms of a collective bargaining agreement, and charged with finally resolving a particular dispute arising under the terms of the parties' agreement. The arbitrator is not charged with creating a decision intended to create any nationwide, or, for that matter, industry-wide precedent. Rather, the arbitrator's job is, strictly speaking, to decide a particular dispute on the basis of a particular collective bargaining agreement. In reaching a decision, the arbitrator has resort to the evidence presented at the hearing and the common law of the shop, but the decision itself must "draw its essence" from the language of the collective bargaining agreement governing the grievance [13]. Unlike the federal courts, a labor arbitrator generally is not bound by precedent—not even if the asserted precedent is a prior arbitral ruling by the same arbitrator under the same collective bargaining agreement and involving similar or identical facts.

In the case of a charge that the employer discriminated against the employee in meting out discipline or discharge, oftentimes the employee will rely on a provision found in many collective bargaining agreements forbidding, for example, "discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry" [14]. As a matter of course, the labor agreement will also provide that an employee may only be disciplined or discharged for "good" or "proper" or "just" cause. Thus, the arbitrator will need to decide, solely on the basis of the parties' collective bargaining agreement, whether the discipline was in fact discriminatory, or was for just cause.

THE PROBLEM OF EXTERNAL LAW UNDER GARDNER-DENVER

Arbitrators have disagreed on the propriety of looking to "external law" in resolving collective bargaining agreement-based grievances such as the one at issue in *Gardner-Denver.* This disagreement was instigated, perhaps, by the Court's statement in *Enterprise Wheel & Car Corp.* that an arbitrator "may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement" [13]. That decision did not, however, provide any guidance on the issue. Where a particular grievance based on a perceived violation of a collective bargaining agreement involves an issue that has been treated by statutory law, such as the discrimination claim raised in *Gardner-Denver,* arbitrators have disagreed over the extent to which external law, such as Title VII and decisions thereunder, ought properly to inform the arbitrator's decision. The precedent in the area of employment discrimination under Title VII likely is measured in feet, if not in yards. Accordingly, the extent to which any of that precedent plays a role in the arbitrator's decision-making process potentially has a great impact—both on the parties' efforts to present for the arbitrator's benefit favorable precedent, and to the arbitrator's own outside research, if necessary, to study how courts have resolved similar disputes under similar rules. It is little help to the labor arbitrator to be told that his/her decision ultimately must rest squarely on the parties' agreement.

CHANGES WROUGHT BY GILMER

Expansion of the Steelworkers Trilogy: Expanded Role for Labor Arbitrators

From a labor arbitrator's perspective, *Gilmer's* greatest impact may well turn out to be the Court's departure from the principle underlying the Steelworkers trilogy and *Gardner-Denver* limiting the authority of labor arbitrators to matters of the shop. At least since *Gulf & Warrior Navigation,* the labor arbitrator's competence has been understood to lie in his/her expertise in matters of the shop.

Despite that compliment to labor arbitrators' expertise, the decision can also be seen as a limited compliment—since labor arbitrators were viewed as readers of contracts and knowledgeable in matters of the shop, their authority expressly has been limited by the Court to those areas. This explains, perhaps, the Court's decision in *Gardner-Denver*—the arbitrator's resolution of the discrimination claim could not foreclose the employee's later right to file a Title VII claim in federal court based on the same set of facts because of perceived shortcomings in the arbitral process in matters of statutory law. Assuming that a statutory claim properly is presented to a labor arbitrator for decision, the Court's holdings in *Gilmer* may well signify a significant change in the arbitrator's traditional role.

Although relegated to a footnote late in the opinion, the *Gilmer* Court's arguable expansion of the limiting principles of the Steelworkers trilogy and *Gardner-Denver* was signalled by the Court's statement that "'mistrust of the arbitral process,' however, has been undermined by our recent arbitration decisions. '[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution'" [15]. When this statement is contrasted with the concerns of the *Gardner-Denver* Court regarding the perceived deficiencies of the arbitral process [16], a standard for the arbitral determination of statutory claims arguably emerges.

The Problem of External Law in the Labor Arbitration Context: The Essence of an Arbitral Decision

Setting aside the threshold questions alluded to earlier, labor arbitrators may now find themselves faced with claims based not only on collective bargaining agreements, but also on statutes. The effect is of potentially great significance to both the parties and the arbitrator. Labor arbitrators may now find themselves on less-familiar ground. A labor arbitrator's decision on statutory-based claims must, presumably, draw its essence not from the collective bargaining agreement, but from the applicable statute. This means, of course, that the Court's historical understanding of the limits of the expertise of labor arbitrators, as gleaned from the Steelworkers trilogy, is expanding. The labor arbitrator must now understand and examine relevant statutes and precedent.

The question raised by *Gilmer,* then, is: What standards govern the resolution of the statutory claim? *Gilmer* itself gives short shrift to this problem, stating only in a footnote that the concerns over the perceived limitations of arbitration that drove *Gardner-Denver* no longer will bar an arbitrator from resolving statutory claims [1, at 1656 n. 5]. It should be understood that with the move from *Gardner-Denver* to *Gilmer,* both the substantive and procedural rules governing arbitration may have to change, and both the arbitrator and the parties should be aware of the possible implications of those changes.

Arbitral Decisions on Statutory Claims: Must they Draw their Essence From the Controlling Statute?

Although *Gilmer* itself did not so state, it seems clear that statutory law, and not the collective bargaining agreement, must govern the resolution of a statutory claim raised in an arbitral forum. In *Gilmer,* in rejecting the grievant's argument that judicial review of arbitral awards is too limited, the Court noted that, "We have stated, however, 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" [17]. A possible interpretation of this language is that whereas arbitral awards based on contract claims must draw their essence from the collective bargaining agreement, arbitral awards based on statutes must draw their essence from the governing statutes. This would, of course, represent a major departure from *Enterprise Wheel & Car Corp.* Now, a new standard for review of arbitral awards may well emerge: the decision must draw its essence from the statute. Parties and arbitrators alike should take note of this potential change, because, after *Gilmer,* an arbitrator's resolution of a statutory grievance that, at a minimum, permits the grievant to vindicate his/her statutory rights likely will stand. "'[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function" [18].

The scenario becomes more complex when, for example, a grievant seeks relief under both the nondiscrimination provisions of a collective bargaining agreement and an applicable statute. While arbitrators routinely resolve such questions under a collective bargaining agreement on a just-cause standard, arbitrators may find themselves in less familiar territory when attempting to resolve the statutory claim—deluged with arguments by counsel based on statutory law and up to their elbows in the federal reporters. While one set of facts may constitute a clear violation of the collective bargaining agreement under the common law of the shop, the arbitrator may find no statutory violation, or vice versa. And, of course, if both claims are sustained, the arbitrator is faced with fashioning an appropriate remedy that sufficiently vindicates the grievant's rights under both the contract and the statute, without awarding duplicative relief.

Further, if the collective bargaining agreement appears to conflict with the statute, the arbitrator is faced with determining how to resolve that conflict. While *Gardner-Denver* suggested that the conflict for the arbitrator must be resolved in favor of the agreement, *Gilmer* implicitly undermines that suggestion by holding that arbitrators are competent to resolve not only contract claims, but also statutory claims. Since the Court presumably now trusts an arbitrator's competence to resolve statutory claims, it may well be that the Court now also trusts and expects a labor arbitrator to resolve conflicts between collective bargaining agreements and statutory law. This, of course, would be a major change in the

understanding of the Court-imposed limitations on an arbitrator's authority as those limitations were proscribed by *Gardner-Denver.*

Resolution of Statutory Claims in an Arbitral Forum May Require Enhanced Procedural Safeguards

Another significant change may well be the procedures governing the arbitration of a statutory claim. Collective bargaining agreements provide specifically for procedures governing the arbitration of grievances arising under the collective bargaining agreement. The *Gilmer* Court strongly suggested that one of the reasons for the Court's willingness to leave statutory claims to arbitrators is that the Court will not presume that the arbitrator cannot safeguard the grievant's statutory rights—that is, so long as the grievant can vindicate his/her statutory rights, arbitration of those claims will not undermine the purposes of the statute [1, at 1653]. The *Gilmer* Court rejected Gilmer's argument that discovery limitations in arbitration would thwart his ability to prove discrimination on the grounds that any trade-off between judicial processes and arbitral processes are counterweighed by relaxed rules of evidence. The Court also noted, however, that the arbitral award must "'comply with the requirements of the statute' at issue" [1, at 1655 n. 4]. This footnote strongly suggests that labor arbitrators and the parties had better pay careful attention to the safeguards built into the judicial forum. As any lawyer can and will tell you, procedural safeguards may be considered fundamental to a fair trial. Accordingly, such safeguards are built into resolution of discrimination claims in judicial forums.

Generally, many of these safeguards are less pronounced in, or may be altogether absent from, the arbitral forum. It is, probably, immaterial why the safeguards are not found in the arbitral forum [19]; the important point is that the arbitral forum may well have to incorporate many safeguards heretofore found only in the judicial forum into the arbitral forum. This raises at least two issues. First, the parties and the arbitrator will have to take a long look at which safeguards must be added to the typical labor arbitration proceeding to ensure that the grievant's statutory rights are vindicated. Second, the more the arbitral forum begins to look like a judicial forum, one may, as the Supreme Court has, question whether the purposes and benefits of arbitration are undermined [20]. With the introduction of many judicial characteristics into the arbitral forum, it may well be critical for the parties, and, indeed, the arbitrator, to take a good, long look at the way in which the typical arbitration hearing is conducted when a statutory claim is presented.

CONCLUSION

From a labor arbitrator's perspective, *Gilmer* potentially represents a major change in the way in which discrimination claims are handled in the traditional

labor arbitration context—the trust of federal courts in labor arbitrators' expertise in matters of the shop has been transformed into trust in labor arbitrators to resolve federal statutory claims. This is a far cry from *Gardner-Denver* and the Steelworkers trilogy. It must be remembered that the foregoing observations depend on the resolution of a host of potentially insurmountable threshold questions relating to the applicability of *Gilmer* to the labor arbitration context. But, assuming those problems can be overcome, when called upon to decide statutory issues an arbitrator may no longer rely solely on the collective bargaining agreement and his/her expertise in matters of the shop while ignoring external law.

END NOTES

1. 111 S.Ct. 1647 (1991).
2. 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974).
3. The *Gilmer* Court distinguished the *Gardner-Denver* decision on the grounds that the arbitration agreement at issue in *Gardner-Denver* did not include an agreement to arbitrate statutory claims, so the arbitrator was not authorized to resolve the statutory claims. Further, the *Gilmer* Court explained that *Gardner-Denver* arose in the collective bargaining context, which raised "the tension between collective representation and individual statutory rights, a concern not applicable to the present case" [1, at 1657]. Finally, the *Gilmer* Court noted that *Gardner-Denver* was "not decided under the FAA, which . . . reflects a 'liberal federal policy favoring arbitration agreements'" [1, at 1657].
4. *See* United Steelworkers of *America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597, 80 S.Ct., 1358, 1361, 4 L.Ed.2d 1424 (1960).
5. This debate was, perhaps, inspired by the Court's statement in *United States Steelworkers of America v. Enterprise Wheel & Car Corp.* that an arbitrator "may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." 363 U.S. at 597, 80 S.Ct. at 1361.
6. Section 1 of the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. At least one federal district court has avoided this question, enforcing an arbitration agreement in a collective bargaining agreement pursuant to the Railway Labor Act as opposed to the FAA. *See Daily Labor Report (BNA),* No. 169, A-1, September 2, 1993 (reporting on the recent decision in *Felt v. Atchison, Topeka & Santa Fe Railway Co.,* DC CCalif, No. CV 92-4217, 8/18/93).
7. The *Gilmer* Court asserted the "tension between collective representation and individual statutory rights" as one of the reasons distinguishing *Gardner-Denver* from *Gilmer.* 111 S.Ct. at 1657.
8. Although the *Gilmer* Court made it clear that certain statutory claims could be resolved by an arbitrator, the *Gardner-Denver* Court expressly stated that "federal courts have been assigned plenary powers to secure compliance with Title VII." *Gardner-Denver,* 415 U.S. at 45, 94 S.Ct. at 1018. The Bureau of National Affairs (BNA) has reported

that Judge Baird of the federal district court in Los Angeles, relying on *Gilmer,* dismissed for lack of subject matter jurisdiction an employee's religious discrimination claim brought under Title VII. *Daily Labor Report (BNA),* No. 169, A-1, September 2, 1993 (reporting on the recent decision in *Felt v. Atchison, Topeka & Santa Fe Railway, Co.,* DC CCalif. No. CV 92-4217, 8/18/93). According to BNA, the court held that the employee's claim: would necessarily involve reference to and an interpretation of the collective bargaining agreement. It also observed that the union contract contained a provision barring discrimination on the basis of religion. Baird concluded that the dispute is subject to compulsory, binding arbitration under the Railway Labor Act before the National Railroad Adjustment Board.

9. [4] at 597, 80 S.Ct. at 1361 (1960).
10. *Gardner-Denver,* 415 U.S. at 57, 94 S.Ct. at 1024 (citing *Gulf & Warrior Navigation Co.,* 363 U.S. 574, 581-583, 80 S.Ct. 1347, 1352-1353, 4 L.Ed.2d 1409 (1960)).
11. *Gardner-Denver,* 415 U.S. at 57, 94 S.Ct. at 1024.
12. The final sentence of *Gardner-Denver* noted that, "The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate." 415 U.S. at 60, 94 S.C. at 1025. The Court refused, however, to adopt any standards governing "the weight to be accorded an arbitral decision," leaving that issue to the "court's discretion with regard to the facts and circumstances of each case." 415 U.S. at 60 n. 21, 94 S.Ct. at 1025 n. 21.
13. *See Enterprise Wheel & Car Corp.,* 363 U.S. at 597, 80 S.Ct. at 1361.
14. *See, e.g., Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 39 (1974).
15. S.Ct. [1] at 1656 n. 5 (citations omitted).
16. *See Gardner-Denver,* 415 U.S. at 56-60, 94 S.Ct. at 1024-1025.
17. [1], at 1655 n. 4 (quoting *Shearson/American Express Inc. v. McMahon,* 482 U.S. 220, 232, 107 S.Ct. 2332, 2340, 96 L.Ed.2d 185 (1987)).
18. [1], at 1653 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 637, 105 S.Ct. 3346, 3359 (1985)).
19. Generally, as the Court itself noted, there is a trade-off to economize in terms of dollars and days expended prior to final resolution of a claim [1, at 1655].
20. *See, e.g., Gardner-Denver,* 415 U.S. at 56-60, 94 S.Ct. at 1024-1025. The Court stated that: [A] standard that adequately insured effectuation of Title VII rights in the arbitral forum would tend to make arbitration a procedurally complex, expensive, and time-consuming process. And judicial enforcement of such a standard would almost require courts to make *de novo* determinations of the employees' claims. It is uncertain whether any minimal savings in judicial time and expense would justify the risk to vindication of Title VII rights. [*Gardner-Denver,* 415 U.S. at 59, 94 S.Ct. at 1025].

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