PART II. ADJUSTING THE BALANCE BETWEEN PUBLIC RIGHTS AND PRIVATE PROCESS: *GILMER V. INTERSTATE/JOHNSON LANE CORPORATION*

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Introduction

On May 13, 1991, the Supreme Court decided *Gilmer v. Interstate/Johnson Lane Corporation*,[1] enforcing a predispute arbitration agreement and holding that it was not contrary to the purposes of the Age Discrimination in Employment Act of 1967 (ADEA).[2] *Gilmer* is the latest in a line of Supreme Court decisions[3] holding arbitration agreements enforceable to resolve claims arising under statutes such as the Sherman Act, Securities Act of 1933, Securities Exchange Act of 1934, and RICO.[4]

On the strength of the pro-arbitration policy contained in the Federal Arbitration Act (FAA),[5] the Court has held in all of these cases that predispute arbitration agreements are binding on the parties unless the opponent of arbitration proves that Congress intended to exempt the statutory claim from the FAA.[6] The text of the statute, its legislative history, or a showing that its purposes would be inconsistent with arbitration are ways of proving the impropriety of arbitrating rather than litigating statutory claims.

Gilmer is a particularly important case for labor arbitrators. Unlike earlier Sherman Act, securities acts, and RICO cases, the ADEA claim of Gilmer is an employment issue. In that sense it is like Title VII[7] and National Labor Relations Act (NLRA)[8]

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[1]111 S.Ct. 1647, 55 FEP Cases 1116 (1991).

[2]29 U.S.C. §§621–634.

[3]*Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989); *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987); *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

[4]Sherman Antitrust Act (1890), 15 U.S.C. §§1–7; the Securities Act of 1933, §12(2), 15 U.S.C. §77(1)(2); the Securities Exchange Act of 1934, §10(b), 15 U.S.C. §78(j)(b); and the Civil Provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO) (1970), 18 U.S.C. §1961 *et seq.*

[5]9 U.S.C. §1 *et seq.*

[6]This burden of proof allocation is set forth in *Shearson/American Express v. McMahon*, *supra* note 3, at 227.

[7]Civil Rights Act (1964), 41 U.S.C. §§20003–20003-17.

[8]29 U.S.C. §151 *et seq.*

claims, which may be decided by arbitrators under just cause and antidiscrimination provisions of collective bargaining agreements. Also, unlike the earlier cases,[9] in *Gilmer* the strong policy for arbitration announced in the FAA confronts substantial policy limitations announced in *Alexander v. Gardner-Denver Co.*,[10] *Barrentine v. Arkansas-Best Freight System, Inc.*,[11] and *McDonald v. City of West Branch.*[12] In those cases the Court refused to permit arbitration provisions contained in collective bargaining agreements to preclude litigation of statutory employment-related claims in federal court.

This paper will explore the *Gilmer* decision and its impact on labor arbitration, and will consider the relationship between the FAA and the *Steelworker's Trilogy*[13] in an effort to determine whether a single policy of American arbitration is emerging. Also, the paper will focus on specific challenges to arbitrators raised by the current trend toward greater judicial acceptance of private process and arbitral responsibility for public rights.

The Decision

In May 1981 Interstate/Johnson Lane Corporation (Interstate) hired Robert D. Gilmer (Gilmer) as a manager of financial services, a position that required his registration with the New York Stock Exchange (NYSE) as well as other exchanges. The registration application included an agreement to arbitrate any employment and termination dispute between Gilmer and Interstate.[14] Interstate terminated Gilmer in 1987, when he was 62 years old. Gilmer then filed a charge with the Equal Employment Opportunity Commission (EEOC) and later a complaint in federal district court, alleging age discrimination under the ADEA. In the court action Interstate moved to compel arbitration under the arbitration agreement and the FAA. The district

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[9]*See* Justice Stevens's dissent in *Mitsubishi Motors Corp. v. Soler Chrysler-Phymouth, supra* note 3, at 647, 650, using arguments drawing upon *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974); *Barrentine v. Arkansas-Best Freight*, 450 U.S. 725, 24 WH Cases 1284 (1981); *McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 115 LRRM 3646 (1984).

[10]*Supra* note 9.

[11]*Supra* note 9.

[12]*Supra* note 9.

[13]*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

[14]The registration application incorporated NYSE Rule 347.

court denied the motion, and the Fourth Circuit reversed.[15] The Supreme Court ultimately affirmed.[16]

There are three key parts to the *Gilmer* decision: (1) its holding that the section 1 exclusionary clause of the FAA did not apply to Gilmer's arbitration agreement; (2) its rejection of Gilmer's argument that arbitration is inconsistent with the ADEA, because of the inadequacy of arbitration procedures; and (3) its rejection of Gilmer's argument that *Alexander, Barrentine*, and *McDonald* preclude arbitration of employment discrimination claims. These pronouncements affirm the importance of arbitration and effectively increase the likelihood and prestige of arbitration.

The FAA and Employment Contracts

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the American Association of Retired Persons (AARP), and the Committee for Civil Rights Under Law in their amicus briefs argued in support of Gilmer that section 1 of the FAA specifically excludes employment contracts.[17] However, since Gilmer failed to raise this issue in the lower court or to include it in his petition for certiorari, the Court declined to address it.[18] The Supreme Court stated that, since Gilmer's agreement was not contained in an employment contract (i.e., the arbitration agreement was part of Gilmer's registration application with the stock exchanges rather than with his employer), addressing the scope-of-exclusion issue was inappropriate.

The question of whether collective bargaining agreements are excluded under FAA section 1, previously thought to be settled, appears to be an open question after *Gilmer*. If the exclusion does not apply to collective bargaining agreements, the strong pro-arbitration labor policy contained in the *Steelworkers Trilogy*[19] has now been strongly reinforced by the FAA. Even if the section 1

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[15]*Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 52 FEP Cases 26 (4th Cir. 1990).

[16]*Gilmer v. Interstate/Johnson Lane Corp., supra* note 1.

[17]*See, e.g.*, amicus brief for the AFL-CIO in support of petitioner, filed November 15, 1990.

[18]*Cf.* Justice Stevens's dissent, arguing that the waiver rule should be relaxed in this case since it was "antecedent . . . and ultimately dispositive" of the issue of whether the arbitration is enforceable under the FAA, since the issue was adequately briefed by the amici curiae, and since both parties had an opportunity to brief and argue the issue. *Gilmer v. Interstate/Johnson Lane Corp., supra* note 1, 55 FEP Cases at 1124.

[19]*Supra* note 13.

exclusion covers collective bargaining agreements, the universe of employment contracts not covered by the exclusion has been expanded by *Gilmer*.

The Adequacy of Arbitration

Attempting to sustain his burden of proving that arbitration is inconsistent with the ADEA, Gilmer argued that arbitration panels are biased, discovery is limited, the absence of written opinions deprives the public of knowledge about the employer's discriminatory practices and appellate courts of effective review, and arbitration does not provide broad equitable and class relief. The Court rejected all of these arguments as "[resting] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law . . . [and] . . . far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."[20]

Specifically, the Court held that NYSE arbitration rules requiring information about arbitrators and allowing challenges to arbitrators, combined with the disclosure obligations of arbitrators, adequately protected the arbitration proceedings from bias. The Court also noted the FAA provision giving courts the authority to overturn arbitration decisions tainted by the "partiality or corruption" of arbitrators.[21] NYSE discovery provisions allowing "document production, information requests, depositions, and subpoenas" were deemed sufficient, with any deficiency in discovery being a trade-off for relaxing the rules of evidence in arbitration hearings. As to written awards, NYSE rules required the writing and publication of arbitration awards containing the names of the parties, a summary of the issues, and a description of the award. The Court observed that, even without the collective action provision of the NYSE rules, the availability of a collective remedy under the ADEA would not preclude the arbitration of Gilmer's claim.[22]

The Court's affirmation of the competency of arbitration to resolve statutory disputes renews the respect and importance given to arbitration, particularly in light of the Court's earlier

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[20]55 FEP Cases at 1121 (quoting *Rodriguez de Quijas v. Shearson/American Express, supra* note 3, at 481).

[21]*See* 9 U.S.C. §10(2).

[22]The Court noted that the EEOC retained the authority to bring class actions under its ruling in *Gilmer*.

pronouncements in *Alexander*,[23] *Barrentine*,[24] and *McDonald*.[25] Thus, *Gilmer* raises a question as to the impact of the Court's new respect for arbitration on cases involving other statutory claims, such as Title VII, the Fair Labor Standards Act (FLSA), and section 1983. In the absence of statutory provisions or legislative history evincing Congress's rejection of the arbitral forum, is the Court likely to find arbitration inconsistent with these statutes?

Alexander, Barrentine, and McDonald

Gilmer argued that *Alexander, Barrentine,* and *McDonald* precluded enforcement of his predispute arbitration agreement, but the Court distinguished these cases as follows:

First, they did not involve enforcement of an agreement to arbitrate statutory claims but rather the question of whether arbitration of a contractual claim involving statutory issues precludes a judicial action to resolve the statutory claims.[26] The Court was concerned about the arbitrator's limited authority to resolve contractual rather than statutory issues in the *Alexander* line of cases.

Second, those cases involved arbitration under a collective bargaining agreement, where the employee was represented by a union and subject to the tensions between collective representation and individual statutory rights. In *Alexander*, for instance, the Court was concerned that in collective bargaining "the interest of the individual employee may be subordinated to the collective interest of all employees in the bargaining unit."

Third, those cases were not decided under the FAA, a statute that *Gilmer* held to reflect a "liberal federal policy favoring arbitration agreements."

Fourth, the Court repudiated the *Alexander* view that "arbitration [is] inferior to the judicial process for resolving statutory claims."[27] Citing *McMahon*,[28] the Court said:

> . . . mistrust of the arbitration process, however, has been undermined by recent arbitration decisions. . . . [W]e are well past the time when judicial suspicion of the desirability of arbitration and of

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[23]*Alexander v. Gardner-Denver Co., supra* note 9.
[24]*Barrentine v. Arkansas-Best Freight, supra* note 9.
[25]*McDonald v. City of West Branch, Mich., supra* note 9.
[26]*Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647, 55 FEP Cases 1116 (1991).
[27]*Id.*, 55 FEP Cases 1123 n.5.
[28]*Id.* (quoting *Shearson/American Express v. McMahon, supra* note 3, at 231–32).

the competence of arbitration tribunals inhibited the development of arbitration as an alternative means of dispute resolution.

Issues

The FAA Exclusion of Employment Contracts

1. Collective Bargaining Agreements. Since *Gilmer's* strong pro-arbitration pronouncements received their vitality from the FAA, the implications for labor arbitrators are not clear and direct. The historical moment for interlocking the FAA and labor arbitration was passed in the *Textile Workers Union v. Lincoln Mills*[29] decision. In that case the Textile Workers Union, in accordance with their collective bargaining agreement, sued Lincoln Mills to compel arbitration under section 301 of the Labor Management Relations Act of 1947.[30]

Before *Lincoln Mills* some courts had held that section 301 supplied the federal jurisdiction, while the FAA supplied the substantive law.[31] Other courts had held that section 301 was more than jurisdictional and also contained the substantive law governing such disputes.[32] The Fifth Circuit in *Lincoln Mills* reflected this debate. The majority held that section 301 was only jurisdictional and that the FAA was unavailable because of the employment contract exclusion; the dissent argued that section 301 also contained the substantive law governing labor contractual disputes.[33]

The defining moment in the relationship between the FAA and labor arbitration agreements came when the Supreme Court in *Lincoln Mills* held (without mentioning the applicability of the FAA) that section 301 authorized federal courts to develop a common law of labor contractual disputes. Dissenting Justice Frankfurter regarded the majority's enforcement of the labor arbitration agreement as a finding that Congress in section 301 had repealed its exclusion of employment contracts

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[29]353 U.S. 448, 40 LRRM 2113 (1957).

[30]29 U.S.C. §185.

[31]*See, e.g., Electrical Workers (UE) Local 205 v. General Elec. Co.*, 233 F.2d 85, 38 LRRM 2019 (1st Cir. 1956), *aff'd on other grounds*, 353 U.S. 547, 40 LRRM 2119 (1957); *Hoover Motor Express Co. v. Teamsters Local 327*, 217 F.2d 49, 35 LRRM 2301 (6th Cir. 1954).

[32]*See, e.g., Textile Workers v. American Thread Co.*, 113 F. Supp. 137, 32 LRRM 2205 (D. Mass. 1953).

[33]*Lincoln Mills v. Textile Workers*, 230 F.2d 81, 37 LRRM 2462 (5th Cir. 1956) (circuit court ordered lower court to grant motion to dismiss for failure to state claim on which relief could be granted).

under the FAA.[34] Finally, in the *Steelworkers Trilogy*[35] the Court proclaimed arbitration as a central component in national labor policy.

Although the Court refused to explicitly address the applicability of the FAA to labor arbitration under collective bargaining agreements, it left open the door for judicial borrowings from the FAA and other statutes in fashioning the common law. Lower courts seized this opportunity. For example, in *Ludvig Honold Mfg. Co. v. Fletcher*[36] the Third Circuit borrowed from cases interpreting the FAA to determine the proper role of courts in reviewing arbitration awards, observing that judicial interpretations of the FAA should be treated not as controlling but as persuasive authority in labor arbitration cases. In *Pietro Scalzetti Co. v. Op. Eng. Local 150*[37] the Seventh Circuit went further, granting under FAA section 3 a motion to stay court action pending arbitration and holding that FAA section 1 was not intended to exclude workers not directly engaged in interstate or foreign commerce.

The Supreme Court reaffirmed the relevancy of the FAA in section 301 cases in *United Paperworkers International Union v. Misco, Inc.*[38] Noting that FAA section 1 excludes as employment contracts all collective bargaining agreements (presumably even those covering workers who are not directly engaged in interstate commerce), the Supreme Court endorsed the use of the FAA for guidance in section 301 cases. In *Misco* the company asked the Court to vacate an award that allegedly violated public policy, where the arbitrator refused to hear company evidence discovered after the employee's discharge. In applying a standard of review borrowed from the FAA, the Court held that the arbitrator's ruling was not improper.

After the *Steelworkers Trilogy* we would have thought that the policy endorsing labor arbitration was much stronger than its commercial counterpart. In *Warrior and Gulf* the Court recognized a superior role for labor arbitration and said that judicial hostility toward commercial arbitration was inappropriate in labor cases, because the former replaced litigation while the

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[34]*Supra* note 29, at 469.

[35]*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

[36]405 F.2d 1123, 70 LRRM 2368 (3d Cir. 1969).

[37]351 F.2d 576, 60 LRRM 2222 (7th Cir. 1965).

[38]484 U.S. 29, 126 LRRM 3113 (1987).

latter was a substitute for industrial strife.[39] Given the Court's distinction between *Gilmer* and *Alexander* based in part on the "liberal federal policy favoring arbitration agreements," it is not clear how the Court currently views the relative force of FAA and section 301 arbitration policies.

2. *Other Employment Agreements.* While *Misco* appears to reinforce exclusion of collective bargaining agreements under section 1 of the FAA,[40] the Court has yet to articulate the broader parameters of the exclusion. *Gilmer* specifically declined to do so. Courts have often been asked to apply the section 1 exclusion to arbitration agreements in other kinds of contracts.[41] Most of these cases have enforced the arbitration agreements, narrowly confining the exclusionary language of section 1 to the transportation industry.[42]

Bucking this trend is *Willis v. Dean Witter Reynolds,*[43] where the Circuit Court rejected the EEOC's claim that the arbitration agreement was excluded from coverage under the FAA as a contract of employment. The Sixth Circuit based its finding of coverage on *Gilmer's* conclusion that a similar arbitration agreement was not a contract of employment, siding with the Fourth Circuit in *United Electrical Workers v. Miller Metal Prods., Inc.,*[44] where the court adopted a broad construction of the exclusionary clause in order to avoid the inconsistency between sections 1 and 2 created by the narrow construction.

If the Supreme Court adheres to the position announced in *Misco,*[45] the conflict among the circuits over the meaning of interstate commerce in the exclusionary clause should be resolved in favor of a broad construction. There is no principled

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[39]*Steelworkers v. Warrior & Gulf Navigation Co., supra* note 35.

[40]*Paperworkers v. Misco, Inc., supra* note 38.

[41]*See Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 57 FEP Cases 386 (6th Cir. 1991) (NYSE registration agreement); *Erving v. VA Squires Basketball Club*, 468 F.2d 9 (1972) (individual employment contract); *Dickstein v. DuPont*, 443 F.2d 783 (1971) (NYSE registration agreement); *Hydrick v. Management Recruiters Int'l*, 738 F. Supp. 1434 (N.D. Ga. 1990) (individual employment contract); *Malison v. Prudential Bache Secs.*, 654 F. Supp. 101 (W.D.N.C. 1987) (NYSE registration agreement); *Wilder v. Whittaker Corp.*, 215 Cal. Rptr. 536 (Cal. App. 1985) (individual employment contract).

[42]Some courts have found that collective bargaining agreements are covered by FAA §2, not by the exclusion in FAA §1, and have interpreted the exclusion as narrowly applying to the transportation industries. *See, e.g., Miller Brewing v. Brewery Workers Local 9*, 739 F.2d 1159, 116 LRRM 3130 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160, 118 LRRM 2192 (1985).

[43]*Supra* note 41.

[44]215 F.2d 221, 34 LRRM 2731 (4th Cir. 1954).

[45]In *Paperworkers v. Misco, Inc., supra* note 38, the Court noted the nonapplicability of the FAA to the collective agreement, even though that case involved a nontransportation industry.

basis for distinguishing between collective bargaining agreements and individual employment agreements for purposes of defining interstate commerce in the section 1 exclusionary clause. If the former are subject to the exclusionary clause, even when they cover nontransportation workers, the latter should be as well. The Court's finding that both kinds of employment contracts are subject to the exclusionary clause would shift the debate from the nature of the industry to the nature of the contract.

Before *Gilmer* there may have been little doubt that an agreement to arbitrate employment disputes under NYSE 347 was an employment contract.[46] However, *Gilmer* holds that it is not a contract of employment under section 1 of the FAA. The question is when does an agreement related to employment become a "contract of employment" under section 1. It appears that the only third party agreements that bind employees are securities registration and collective bargaining agreements. In light of *Misco*, consistency predicts that all two-party employment agreements will be excluded from the FAA.[47]

Other Statutory Claims

Except for two-party contracts of employment, *Gilmer* is likely to open up arbitration to a much broader universe of statutory claims under the FAA. And *Gilmer*'s exacting analysis places a substantial burden on the judicial forum seeker. Such a claimant must show that Congress intended to preclude the judicial forum waiver by explicit language in the statute, references in the legislative history, or the purpose reflected in the statutory scheme. For EEOC claims this burden may be difficult to meet, given the absence of expressed constraints on forum waiver and the variety of dispute-settlement alternatives associated with such claims.

Claims involving unlawful employment discrimination based on race, color, religion, sex, national origin, age, and disability

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[46]*See Malison v. Prudential Bache Secs., supra* note 41 (the court assumed that registration agreement was contract of employment but held it enforceable under the FAA, because employee did not work in transportation industry).

[47]Collective bargaining agreements may be considered two-party agreements, since their terms are incorporated into individual employment contracts. Unlike third-party agreements like Gilmer's (enforced by the FAA) and collective bargaining agreements (enforced by §301), individual employment arbitration agreements are not as yet backed by federal legislation. Such agreements are covered by a variety of state rules, some perhaps unfriendly to arbitration.

are all enforced by the EEOC. None of the relevant statutes explicitly precludes forum waiver, and the EEOC's procedures call for alternative dispute resolution.[48] *Gilmer* points out that those procedures are consistent with the use of arbitration to settle EEOC-enforced statutory claims.[49]

A recent example is *Willis v. Dean Witter Reynolds*,[50] where the plaintiff brought suit against Dean Witter, alleging sexual harassment and discrimination. Willis had been an account executive with Dean Witter, a position that required her execution of Securities Registration Form U-4 with the American Stock Exchange, the National Association of Securities Dealers, and the NYSE. As in *Gilmer*, Form U-4 contained an agreement to arbitrate disputes, and NYSE Rule 347 required her to arbitrate employment disputes. Dean Witter's motion to compel arbitration was ultimately upheld by the Court of Appeals. The Court rejected the plaintiff's and the EEOC's arguments based on *Alexander*, public policy, the regulatory scheme of Title VII, and the FAA section 1 exclusion of employment contracts. Quoting extensively from the *Gilmer* decision, the Sixth Circuit found that there was "no relevant difference between the EEOC's role under the ADEA and under Title VII."[51] *Gilmer* should also be dispositive of other statutory claims.

The Collective Bargaining Waiver After Gilmer

A major question raised but not answered completely by *Gilmer* concerns the continuing vitality of *Alexander*,[52] *Barrentine*,[53] and *McDonald*.[54] These cases dealt with the preclusive effect of arbitration under collective bargaining agreements on federal suits under Title VII, the Fair Labor Standards Act (FLSA), and section 1983, respectively.

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[48]*See* 29 U.S.C. §626(b). In an explanatory statement of the ADR provision of the Americans With Disabilities Act, the House conferees make it clear that the procedures are intended to be voluntary and not preclusive of individual rights under the ADA. *See* H.R. Conf. Rep. No. 101-596, 101 Cong., 2d Sess., at 89 (1990). As with the comparable provision of the Civil Rights Act of 1991, there is some uncertainty about the effect of predispute forum waivers under the statute.

[49]Furthermore, even when statutory claims are arbitrated under collective bargaining agreements, *Gilmer* increases the likelihood that subsequent judicial resolution will be precluded. Given the Court's rejection of arbitral inadequacy, bargaining power inequality, and precedential arguments, judicial form waivers will undoubtedly be viewed in a more positive light.

[50]*Supra* note 41.

[51]*Id.*, 57 FEP Cases at 389.

[52]*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974).

[53]*Barrentine v. Arkansas-Best Freight*, 450 U.S. 725, 24 WH Cases 1284 (1981).

[54]*McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 115 LRRM 3646 (1984).

1. Alexander and Waiver. The principal case in this series, *Alexander*, defines the effect to be given arbitration awards in subsequent statutory court actions involving the same facts. In that case the employee, who had been discharged for sub-par performance, filed a grievance under the collective bargaining agreement. Later a charge of racial discrimination was alleged under Title VII and referred to the EEOC. The agreement contained an antidiscrimination clause.[55] While the charge before the EEOC was pending, the employee testified at the arbitration hearing that his discharge was racially motivated. Without referring to the employee's claim of racial discrimination, the arbitrator held that the discharge had been for just cause. The employee then sued the employer in federal district court under Title VII, and the district court granted the employer summary judgment on the grounds that the arbitration decision precluded the employee from suing under Title VII.

The Supreme Court rejected the lower courts' view that notions of election of remedies and waiver, as well as the federal policy favoring arbitration of labor disputes, dictated preclusion of the employee's federal court claim. The Court read the statute and legislative history as expanding rather than narrowing the forums available to employees for protection against unlawful discrimination and rejected the "election of remedies" and "waiver" rationales as inappropriate. Even though both causes of action arise from the same set of facts, the contractual grievance-arbitration procedure addresses the contractual violation and may award a contractual remedy while the federal court may order a statutory remedy for a statutory violation. In finding that Title VII rights may not be waived prospectively, the Court distinguished these rights from those under the NLRA by characterizing Title VII rights as absolute individual rights which cannot be collectivized or waived.[56] Nor could Title VII rights against discrimination displace contractual rights, since they have different sources and place different limitations on the enforcer.[57]

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[55]Like 42 U.S.C. §703(a)(1), §2000e-2(a)(1), the antidiscrimination clause in the agreement prohibited "discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry."

[56]The Court noted that an employee may waive the Title VII right individually as part of a settlement.

[57]Here the Court discusses the limited authority of arbitrators to interpret the contract rather than public law under *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

It is noteworthy that the Court in *Alexander* did not completely rule out the preclusion of Title VII suits by arbitration. The Court permitted the "arbitration decision to be admitted as evidence and accorded such weight as the court deems appropriate." In a footnote the Court made it clear that an arbitration award may be given "great weight," where the contract confers Title VII rights and the arbitration procedure deals fully and fairly with the Title VII claim.

2. Barrentine *and* McDonald. The Court deployed its *Alexander* arguments to reject the preclusion claims of employers in *Barrentine* and *McDonald*. In *Barrentine* the Court acknowledged the tension between two aspects of national labor policy—regulating relationships between unions and employers by encouraging collective negotiations and processes and regulating relationships between employers and employees by guaranteeing employees specific statutory rights. However, the Court saw no reason to distinguish the employee's FLSA claim involving wage and hour issues from a Title VII claim of discrimination. As a statutory claim involving minimum guarantees to individual employees, the FLSA claim, like a Title VII claim, was deemed not well suited for contractual grievance-arbitration procedures. As in *Alexander*, the Court in *Barrentine* feared that FLSA rights might be lost in grievance arbitration because of the union's potential sacrifice of individual FLSA rights for collective benefits, potential arbitral incompetence, and lack of remedial authority.

In *McDonald*, the Supreme Court gave the employee's section 1983 claim similar treatment. In that case the circuit court had reversed a district court judgment in favor of the employee on the grounds that the arbitration award barred district court action, basing its decision on notions of res judicata and collateral estoppel. The Supreme Court reversed, citing Congress's intent to make the statutory issues judicially enforceable and the inadequacy of arbitration as a substitute for judicial proceedings. Relying on *Alexander* and *Barrentine*, the Court concluded that giving preclusive effect to arbitration awards would undermine federal rights.

Lessons from *Gilmer*

Deferral and Its Implications for Arbitration

1. *Alexander and Deferral.* The Court in *Alexander* rejected the employer's argument that a deferral rule should be adopted if

the Court rejected a rule of preclusion. Under a deferral rule the Court would grant an employer's motion for summary judgment provided that the arbitration complied with minimum standards. For the Court, a deferral rule created two problems: (1) it would be inconsistent with Congress's intent to have federal courts ultimately responsible for the enforcement of Title VII, and (2) it would be premised on the false assumption that arbitral and judicial procedures are comparable.

The Court acknowledged that the limited contractual authority of arbitrators might extend to Title VII claims, where the parties have incorporated statutory rights into the agreement. However, this would not render arbitration comparable to judicial action, since "other facts may still render arbitral processes . . . inferior to judicial process in the protection of Title VII rights." Among these other facts the Court cited the arbitrator's specialized competence for private contractual law rather than public law (the primary domain of the judiciary) and the inferiority of arbitral factfinding caused by incomplete arbitral records, inapplicability of the rules of evidence, limited availability or unavailability of civil procedure, absence of arbitral obligation to give reasons for decisions, and the union's exclusive control over the grievance-arbitration procedure.[58] The Court stated that any arbitration procedure adequately protecting Title VII rights would be unduly complex, and a deferral rule would encourage employees to bypass the contractual grievance-arbitration procedure. The Court concluded that neither the deferral rule proposed by the employer nor a stricter deferral standard would correct the inherent inferiority of arbitration.[59]

Yet, in *Gilmer* the Court rejected the petitioner's challenges to the adequacy of arbitration procedures, citing *Rodriguez de Quijas*[60] and *Mitsubishi*.[61] To the charge of bias in arbitration panels, the Court expressed confidence in the parties' and the arbitrator's ability to conduct a competent and impartial proceeding, taking comfort in NYSE arbitration rules guarding

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[58]The Court noted that a union might subordinate an employee's individual rights to the interest of the unit as a whole.

[59]The stricter standard addressed by the Court was handed down in *Rios v. Reynolds Metals Co.*, 467 F.2d 54, 5 FEP Cases 1 (5th Cir. 1972) (the court affirmed earlier decision holding that election of remedies and res judicata did not bar suit under Title VII following adverse arbitration award).

[60]*Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989).

[61]*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

against biased panels. To the challenge that discovery is too limited in arbitration, the Court noted that in earlier cases involving RICO and antitrust claims discovery was also limited, and Gilmer's ADEA claim did not require more discovery than those claims. After noting the NYSE discovery provisions, the Court argued that the arbitration agreement involved a trade-off of more extensive court procedures and opportunity for review for "the simplicity and informality, and expedition of arbitration,"[62] and that the relaxation of evidence rules in arbitration counterbalanced reduced discovery. The Court also pointed out that the NYSE rules require written awards and that arbitrators under those rules have broad remedial power.

This section of the *Gilmer* decision is potentially the most important for labor arbitration of statutory issues under collective bargaining agreements, because it removes an impediment to greater deference. *Gilmer* declared that there is greater comparability between arbitration and the judicial process than *Alexander* acknowledged. And an appropriate deferral rule would not deprive the courts of ultimate responsibility for statutory cases, as feared in *Alexander*, even though it may permit a greater number of summary dispositions. In its affirmation of the competency of arbitration and explicit reversal of *Alexander*'s rationale for rejecting a deferral rule, *Gilmer* has laid the foundation for a stronger rule of preclusion in collective bargaining arbitration cases—a rule that perhaps may remove a court's discretion to deny preclusion where the arbitration meets certain standards.

A deferral standard, such as that set forth in *Rios v. Reynolds Co.*[63] but rejected in *Alexander*, seems to accommodate both federal collective and individual concerns. In *Rios*, a Title VII case, the Fifth Circuit promulgated a deferral rule with eight parts:

(1) It assigned the burden of proof in establishing the conditions for deferral to the respondent, an important procedural decision since close cases would be resolved in favor of nondeferral;[64]
(2) The contract must incorporate Title VII rights;

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[62]*Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647, 55 FEP Cases 1116 (1991).
[63]*Supra* note 59.
[64]*See* Sharpe, *NLRB Deferral to Grievance Arbitration: A General Theory*, 48 Ohio St. L.J. 620 (1987).

(3) "The factual issues before [the Court] must be identical to those decided by the arbitrator";
(4) "The arbitrator [must have] had power under the collective agreement to decide the ultimate issue of discrimination";
(5) "The evidence presented at the arbitral hearing [must have] dealt adequately with all factual issues" ;
(6) "The arbitrator [must have] actually decided the factual issues presented to the Court";
(7) "The arbitration procedure [must have been] fair and regular and free of procedural infirmities"; and
(8) "It must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor the public policy which adheres in Title VII."

Criteria (2) through (6) assure that the arbitrator had the power and the record to decide the statutory issue that has been brought to the court.[65] Criteria (7) and (8) assure the court's review of the fairness of arbitral procedures as well as of the adequacy of the arbitration award in protecting TitleVII individual rights and public policy.

The *Rios* rule would not necessarily complicate arbitration or fail to substantially reduce judicial involvement, as feared in *Alexander.* Professional and agency rules governing arbitration mandate procedural fairness, and highly acceptable arbitrators would meet these requirements. Deferral criteria, assuring that the statutory claim was before the arbitrator and was decided on an adequate record, might at worst merely prolong the hearing,[66] which need not be synonymous with greater complexity.[67] Single-issue arbitrations involving contractual interpretation based on negotiating history, for example, can be far more complex than a dispute involving several issues of lesser complexity. If a judicial evaluation of the quality of an arbitration under *Rios*-type criteria enables a court to dispose of more suits

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[65]*See generally* Note, *Judicial Deference to Arbitrator's Decisions in Title VII Cases,* 26 Stan. L. Rev. 421, 431 (1974).

[66]*But see* Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study,* in Arbitration—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books, 1976), 59.

[67]*See* Hoyman & Stallworth, *The Arbitration of Discrimination Grievances: The Aftermath of* Gardner-Denver, 39 Arb. J. 49, 53 (1984) (overwhelming majority of discrimination claims in survey were factual rather than legal).

at the summary judgment stage rather than after trial, judicial involvement and resources can be substantially reduced.

The deferral rule can address *Alexander*'s concern about an employee's election to bypass arbitration. Under a deferral rule, such as that used by the NLRB or under section 3 of the FAA, a court could deny access before contractual procedures have been exhausted.[68] Where there is a potential or manifested conflict of interest, preclusion would be inappropriate.

Thus, *Gilmer* markedly increases the importance of arbitration under collective bargaining agreements which incorporate statutory protections. These cases remove *Gilmer*'s distinction from *Alexander* based on the absence of an agreement to arbitrate the statutory claim. Where the statutory claim is incorporated in the collective bargaining agreement, employees have agreed through their union agent to arbitrate such claims.[69] The second basis for distinguishing *Gilmer* from *Alexander*, a concern about the tension between collective representation and individual statutory rights, can be removed through an appropriate deferral standard. The third basis, "the liberal federal policy favoring arbitration agreements" under the FAA, is not very persuasive, since an equally strong policy exists under the *Steelworkers Trilogy* and the federal common law under section 301.

Because of continuing concern about the tension between individual rights and collective process under labor agreements, *Gilmer* is likely to lead to greater preclusion of statutory claims under more structured judicial discretion. Experience has already revealed judicial willingness to rely upon qualified arbitration awards, an attitude that *Gilmer* clearly fertilizes.

2. *Alexander and Footnote 21 Cases.* In footnote 21 of *Alexander*, the Court adopted a rule making arbitration awards admissible in statutory cases and giving the courts discretion to determine the weight to be given to an arbitration award. Noting that "great

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[68]*See United Technologies Corp.*, 268 NLRB 557, 115 LRRM 1049 (1984); *Collyer Insulated Wire*, 192 NLRB 837, 77 LRRM 1931 (1971). Since the Board focuses on the suitability of grievance arbitration to resolve the statutory dispute (including the presence of union hostility toward employee statutory rights) in its presettlement deferral analysis, an analogous deferral standard would address *Alexander*'s fears about the subordination of individual employee interest to collective interests. *See generally* Sharpe, *supra* note 64. *See also* FAA §3, which permits a stay of court proceedings until after an issue has been arbitrated.

[69]There is a potential issue about whether access to a judicial forum is a right that is waivable by the union. See *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974). *See generally*, Harper, *Union Waiver of Employee Rights Under the NLRA: Part I*, 4 Indus. Rel. L.J. 335 (1981).

weight" might be given to an arbitration award where employee statutory rights have been fully considered, the Court set forth the following controlling factors: (1) contractual provisions that conform to the statute, (2) procedural fairness, (3) adequacy of the record, and (4) special competence of the arbitrator. This formulation created the possibility that qualified awards may receive the preclusive effect sought by the employer in *Alexander* despite the Court's holding in that case.

A review of the cases decided under footnote 21 following *Alexander* shows that only eleven have involved the proper deference to be given arbitration awards under collective bargaining agreements. In three cases the courts gave full weight to the arbitration award, upholding grants of summary judgment and directing a verdict based on the award.[70] In the remaining eight cases the courts gave varying degrees of deference, based on whether the arbitration met the footnote 21 standards.[71]

Two of these cases are worth noting, since they suggest an approach courts will take to deference. The strongest cases for deference to arbitration awards would seem to be those where the arbitrator's interpretation of the contract is important to the

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[70]*Owens v. Texaco, Inc.*, 857 F.2d 262, 129 LRRM 2925 (5th Cir. 1988) (circuit court reversed lower court's findings in favor of employee, saying that lower court erred in ignoring arbitrator's award to the contrary); *Darden v. Illinois Bell Tel. Co.*, 797 F.2d 497, 41 FEP Cases 731 (7th Cir. 1986) (circuit court affirmed lower court's granting of summary judgment based on great weight given arbitrator's award); *Guy v. Swift & Co.*, 612 F.2d 383, 25 FEP Cases 801 (8th Cir. 1980) (circuit court granted summary judgment based on finding "no hint" of material fact, citing arbitrator's award as evidence of this finding).

[71]*Perugini v. Safeway Stores*, 935 F.2d 1083, 137 LRRM 2660 (9th Cir. 1991) (circuit court held that the lower court erred in granting summary judgment based on arbitration award alone); Jalil v. Avdel Corp., 873 F.2d 701, 49 FEP Cases 1210 (3d Cir. 1989) (circuit court reversed lower court's summary judgment based on arbitrator's award, since arbitrator did not adequately consider employee's Title VII claims); *Criswell v. Western Airlines*, 709 F.2d 544, 32 FEP Cases 1204 (9th Cir. 1983) (circuit court cited inadequate evidentiary record and failure to consider employee's ADEA rights as reasons for not giving arbitration award greater weight); *Beckton v. Detroit Terminal of Consol. Freightways*, 687 F.2d 140, 29 FEP Cases 1078 (6th Cir. 1982) (court held it excessively narrow to interpret *Alexander* as preventing court review of evidence at arbitration of contractual claim, where such evidence might assist employee in establishing element of statutory claim); *Graham v. American Airlines*, 731 F. Supp. 1494, 53 FEP Cases 1390 (N.D. Okla. 1989) (court gave little weight to arbitration award because arbitrator did not fully consider all of plaintiff's Title VII claims); *Green v. U.S. Steel Corp.*, 481 F. Supp. 295 (E.D. Penn. 1979) (court found antidiscrimination provision insufficiently broad to cover plaintiff's claim that arbitrator had not done complete analysis of Title VII issues, and there were issues of material fact preventing granting summary judgment); *Liotta v. National Forge Co.*, 473 F. Supp. 1139, 23 FEP Cases 1580 (W.D. Pa. 1979) (court agreed with arbitrator's award but did not accord it any express weight—simply found independently no violation); *Burroughs v. Marathon Oil Co.*, 446 F. Supp. 633, 17 FEP Cases 612 (E.D. Mich. 1978) (court noted that arbitration award met requirements of *Alexander* footnote 21 but constituted only one of the factors leading to judgment for defendant after bench trial).

employee's statutory claim.[72] These two cases show that, even when contract interpretation is important, deference will depend on the court's review of the merits of the award.

In *Owens v. Texaco*[73] the plaintiff, a laid-off employee, filed a claim of racial discrimination based on denial of retroactive seniority for 30 months spent in a craft training program. In the arbitration preceding the suit, the arbitrator had considered past practice and ruled that the employee was not entitled to seniority under the contract and there was no evidence of discrimination. The district court ignored the arbitrator's award and found the denial of seniority discriminatory because of evidence that in some cases (where there was a special contract) seniority had been given for training time. The Fifth Circuit reversed the district court, finding that under the *Trilogy* the arbitrator's interpretation of the contract was binding. The court held that the arbitrator's finding of no discrimination, while not binding, should have been considered in conjunction with the employer's reasons for not awarding seniority and concluded that the district court committed error by ignoring the arbitrator's award.

In *Criswell v. Western Airlines*,[74] DC 10 captains nearing age 60 filed suit under the ADEA alleging age discrimination when the airline refused their downbid to flight engineer positions. The pilots had earlier grieved the issue, and the arbitration panel held that even though "the language of the agreement would have permitted their bids, such bids were never contemplated or intended by the parties." The Ninth Circuit affirmed the jury verdict for the plaintiffs, saying that the arbitration award, which had been admitted into evidence with an instruction to the jury that it was a "reasonable factor other than age," had received sufficient deference. The court noted that the arbitration panel had not considered the ADEA rights of the pilots and that the evidence on the downbidding practice was minuscule. Importantly, the court explained at length *Alexander*'s rationale for giving this reduced deference to the award.

The cases decided under footnote 21 show a trend toward crediting arbitration. With *Gilmer*'s undermining of *Alexander*'s

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[72]Deferral in this sense is analogous to NLRB cases where deferral to arbitral interpretation of a contract has long been uncontroversial. *See Collyer Insulated Wire, supra* note 68.

[73]*Supra* note 70.

[74]*Supra* note 71.

foundation for rejecting a more structured discretion (deferral), this trend may be expected to accelerate. Indeed, the ADR provision of the Civil Rights Act of 1991 may make deferral rather than waiver appropriate in many statutory arbitration cases.

3. Solicitude and Finality. Gilmer suggests somewhat paradoxical trends—concurrently greater deference to arbitration and greater scrutiny of arbitration awards. These trends will carry dual implications for labor arbitrators.

First, greater deference will make arbitrators rather than judges primary protectors of important employee statutory rights, continuing the debate about the ability of arbitrators to assume this role.[75] At the threshold, this heightens the importance of the Code of Professional Responsibility for Arbitrators of Labor–Management Disputes (Code) Rule 1B, which acknowledges that arbitrators may be competent generally but not for specialized assignments. It requires an arbitrator to withdraw or request special assistance, if the case is beyond the arbitrator's competence. This rule may be enforced by the courts under section 10(a)(3) of the FAA.

Recent evidence suggests that parties are generally satisfied with the performance of arbitrators, but that among the arbitral characteristics causing great dissatisfaction is the failure of arbitrators to write clear, well-reasoned, and thorough decisions.[76] While a desire for greater acceptability should counsel correcting this problem, the arbitrator's expanded responsibility in statutory cases mandates such action. Assuring due process at the hearing, carefully considering the evidence and addressing all relevant issues, and thoroughly researching the law are all matters within the arbitrator's control, even if the parties must be largely relied upon to produce the evidence. Greater reliance on private process to protect public rights imposes a professional obligation on arbitrators to handle statutory issues only if they are prepared to fully protect the rights of statutory grievants.

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[75]*See* Willig, *Arbitration of Discrimination Grievances: Arbitral and Judicial Competence Compared*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books, 1987), 101.

[76]*See* Watkins, *Assessing Arbitrator Competence: A Preliminary Regional Survey*, 47 Arb. J. 43, 44–46 (1992). This survey, though limited, confirms suspicions about how the parties view arbitrators. It isolates characteristics that best differentiate more acceptable from less acceptable arbitrators. Among these is the quality of reasoning and writing.

Second, greater deference means greater scrutiny of arbitration awards. While *Alexander*'s discretionary rule permitted review of arbitration awards to determine whether some degree of deference should be given, it also allowed the court to ignore the award. An award ignored because of its poor quality might still be enforced on the contractual issue, even though it had no bearing on the statutory claim. *Gilmer* may result in a deferral rule requiring courts to scrutinize an arbitration to determine whether it should preclude a trial de novo. This scrutiny may require courts to separate their narrow function on the contractual issue from the broader judicial function on the statutory issue—a task that may prove too difficult. Thus, the ethical and legal dimensions of arbitral responsibility in statutory cases provide strong incentives for improving the process in the interest of finality and protecting traditional arbitral prerogatives.

Taking the FAA Seriously

Some Supreme Court Justices continue to raise, and the Court majority repeatedly declines to rule on, the applicability of the FAA to collective bargaining agreements. Where the Court has acknowledged the FAA's nonapplicability, it has tied the statement to an affirmation of the FAA's relevance to labor arbitration. However, the principles of labor arbitration have developed in the federal common law of labor agreements under section 301 of the Labor Management Relations Act. The survival of this kinship between the principles of labor arbitration under section 301 and of commercial arbitration under the FAA results from the commonality of the arbitration process. In both spheres arbitration is a system of private adjudication, controlled by the parties and characterized by an adversary process that is somewhat less formal than federal court proceedings.

Gilmer premised the distinction of its case (commercial arbitration) from the *Alexander* line of cases (labor arbitration) in part on the differences in the contractual provisions and the kind of representation in the two cases rather than on any difference in the arbitration systems. In *Gilmer* the Court implicitly compared the governing statutes (section 301 in *Alexander* and the FAA in *Gilmer*) only to suggest that the pro-arbitration policy under the

FAA is stronger. Thus, *Gilmer* seems to address a unitary system of arbitration, which facilitates the integration of section 301 and FAA principles.

Indeed, courts have decided garden-variety actions enforcing collective bargaining arbitration agreements under the FAA,[77] and have used labor arbitration principles in deciding commercial cases under the FAA.[78] Although some of these decisions are self-conscious rejections of a broad reading of the section 1 exemption of contracts of employment,[79] many reflect a belief in the interchangeability of FAA and section 301 principles and a virtual identity of enforcement rules. This historical symbiosis has been blessed, even if only implicitly, by the Court's decision in *Gilmer*. Thus, it behooves arbitrators to pay more attention to the FAA.[80]

Section 10 of the FAA, dealing with the grounds for vacating arbitration awards, should arouse interest among arbitrators. *Misco* cited section 10(a)(3) in denying the employer's request to set aside the award.[81] And the cases decided under section 10(a) contain important guidelines for arbitral practice.

For example, in *Commonwealth Coatings Corp. v. Continental Casualty Co.*,[82] a commercial arbitration case, the Supreme Court set aside an arbitration award based on "evident partiality" under FAA section 10(a)(2). In that case the neutral arbitrator, an engineering consultant, had provided services to one of the

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[77]*See Paperworkers v. Misco, Inc.*, 484 U.S. 29, 40, 126 LRRM 3113 (1987); *Morelite Constr. Corp. v. Carpenters Benefit Fund (New York City Dist. Council)*, 748 F.2d 79, 117 LRRM 3009 (2d Cir. 1984) (applying "evident partiality" standard of FAA §10(b)); *Dogherra v. Safeway Stores*, 679 F.2d 1293, 110 LRRM 2790 (9th Cir. 1982) (court acknowledged that neither Supreme Court nor Ninth Circuit had ever held FAA applicable to labor arbitration, but cited FAA §10(b), finding fraud as a basis for vacating arbitration award under that Section or federal common law of §301); *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 70 LRRM 2368 (3d Cir. 1969) (noting persuasive value of FAA principles); *Electrical Workers (IBEW) Local 1466 v. Columbus & S. Ohio Elec. Co.*, 455 F. Supp. 471 (S.D. Ohio 1978) (citing FAA and §301 common law as source of standards for review of arbitration awards).

[78]*See Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (11th Cir. 1988) (court applied three-prong test for fraud established in *Dogherra v. Safeway Stores, supra* note 77, a §301 case); *Totem Marine Tug & Barge v. North Am. Towing*, 607 F.2d 649 (5th Cir. 1979) (court applied *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960), holding that arbitration panel exceeded powers).

[79]*See, e.g., Typographical Union No. 23 (Milwaukee) v. Newspapers, Inc.*, 639 F.2d 386, 106 LRRM 2317 (7th Cir. 1981); *Pietro Scalzitti Co. v. Operating Eng'rs Local 150*, 351 F.2d 576, 60 LRRM 2222 (7th Cir. 1965).

[80]St. Antoine, in his article on judicial review of arbitration awards, noted that FAA §10 "can be looked to for guidance in actions under section 301 of the Taft-Hartley Act to review arbitration awards. *See* St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny*, 75 Mich L. Rev. 1137, 1146 (1977).

[81]*Paperworkers v. Misco, Inc., supra* note 77, at 40.

[82]393 U.S. 145 (1968).

parties, collecting fees of $12,000 in a four- or five-year period. The arbitrator had not performed any services for the party in more than a year before the arbitration but did not disclose this business relationship to the other party. While the parties agreed and the trial court found that the arbitrator conducted a fair and impartial hearing and did not conceal the relationship, the Supreme Court held that the arbitrator had a duty to disclose "any dealings that might create an impression of possible bias."[83] Emphasizing the reality of arbitrators' business relationships, Justice White noted in a concurring opinion that "arbitrators are not automatically disqualified by a business relationship with the parties before them, if both parties are informed of the relationship in advance or if they are unaware of the facts but the relationship is trivial."[84] Rule 17 of the American Arbitration Association (AAA) *Labor Arbitration Rules* and Article 2B of the Code impose similar disclosure requirements, but section 10(a)(2) of the FAA adds considerable force to these rules.

Other subsections of FAA section 10 are worth noting. Section 10(a)(1) makes vacating an award appropriate, when it is procured through "corruption, fraud, or undue means," which the courts have interpreted to include perjured testimony.[85] Under section 10(a)(3) an arbitrator's prejudicial misbehavior, including unjustified refusals to postpone hearing or to hear relevant evidence, will support an order to vacate the award. Arbitral misbehavior may also involve ex parte communications or other breach of professional rules.[86] Needless to say, the AAA

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[83]*Id.* at 149. The Court analogized the §10(b) standard to that imposed on judges, saying "we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review." *Id.* at 145.

[84]*Id.* at 150. The Court had acknowledged that arbitrators could not be expected to sever all business ties.

[85]*See Dogherra v. Safeway Stores, supra* note 77 (involved a finding of nonarbitrability based on perjured testimony, where Ninth Circuit attempted to protect finality of award by setting following conditions for vacating award based on fraud: "The fraud must not have been discoverable upon the exercise of due diligence prior to the arbitration. . . . must materially relate to an issue in the arbitration. . . . must be established by clear and convincing evidence." *Id.* at 1297). The Eleventh Circuit, citing *Dogherra,* applied the three-part test in *Bonar v. Dean Witter Reynolds, Inc., supra* note 78, where the court vacated a commercial arbitration award based on perjured testimony of an expert witness's credentials.

[86]*See Totem Marine Tug & Barge v. North Am. Towing, supra* note 78 (Fifth Circuit relied on AAA rules barring ex parte communications to find that FAA §10(a)(3) had been violated. *See also Allendale Nursing Home v. Local 115 Joint Board,* 377 F. Supp. 1208, 87 LRRM 2498. (S.D.N.Y. 1974) (court vacated award under §10(a)(3), based on arbitrator's refusal to postpone hearing when employer's key witness had to leave because of illness and enter hospital); *Teamsters Local 506 v. E.D. Clapp Corp.,* 551 F. Supp. 570 (N.D.N.Y. 1982) (court found violation of §10(c) because arbitrator refused to hear evidence relevant to arbitrability of dispute).

and the Code are rich sources of these rules. The fact that courts may consider them under FAA section 10(a)(3) adds incentive for extra care in compliance. Section 10(a)(4) proscribes exceeding or so imperfectly executing arbitral powers "that a mutual, final, and definite award . . . was not made." Many cases under this subsection involve collective bargaining agreements.[87] In some labor cases arbitrators have clearly exceeded their authority under the agreement;[88] in others the courts make judgment calls about the ambiguity of contractual terms (amenable to arbitral interpretation) and of arbitration awards (susceptible to vacating and remanding).[89] While courts say that FAA section 10(a)(4) like *Enterprise Wheel* constrains judicial review,[90] these cases require review of the merits of the award with all of the attendant temptations.

The ever-expanding importance of the FAA in labor cases should motivate arbitrators to become familiar with the terms of that statute.[91] Of immediate relevance to arbitrators are the section 10 standards for vacating arbitration awards. The cases interpreting these standards, particularly in one's jurisdiction, should be studied and heeded in arbitral practice.

Conclusion

In his dissenting opinion in *Barrentine*, Chief Justice Burger complained that the majority ignored a demonstrated congressional interest in easing the burden of the courts by promoting alternative dispute resolution, particularly for "routine and relatively modest-sized claims," such as the FLSA claim before the Court.[92] While the majority opinion held that the claimant's right to a judicial forum was nonwaivable, it recognized the tension between congressional policies encouraging private pro-

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[87]*See, e.g., Typographical Union No. 23 (Milwaukee) v. Newspapers, Inc., supra* note 79; *Storer Broadcasting Co. v. Television & Radio Artists*, 600 F.2d 45, 101 LRRM 2497 (6th Cir. 1979); *Bell Aerospace Co. Div. v. Auto Workers Local 516*, 500 F.2d 921, 86 LRRM 3240 (2d Cir. 1974); *Zeigler Coal Co. v. Mine Workers Dist. 12*, 484 F. Supp. 445, 109 LRRM 2044 (C.D. Ill. 1980); *Graphic Arts Local 97-B v. Haddon Craftsmen, Inc.*, 489 F. Supp. 1088 (N.D. Pa. 1979).

[88]*See Zeigler Coal Co. v. Mine Workers Dist. 12, supra* note 87 (arbitrator's award was contrary to explicit contractual terms) and cases cited therein at 447.

[89]*See Bell Aerospace Co. Div. v. Auto Workers Local 516, supra* note 87.

[90]*See Zeigler Coal Co. v. Mine Workers Dist. 12, supra* note 87.

[91]Though FAA §11, permitting courts to modify or correct arbitration awards, has not been used significantly in labor cases, it would not be surprising to see parties apply for such relief, thus expanding judicial review of arbitration awards.

[92]*Barrentine v. Arkansas-Best Freight*, 450 U.S. 725, 727, 24 WH Cases 1284 (1981).

cess in resolving employee disputes and policies creating independent substantive employee rights. The Court struck a balance that preserved complete access to the courts in statutory cases.

The *Gilmer* Court has redressed that balance. Judicial access in some cases may be completely denied. But, in other cases similar to *Alexander, Barrentine,* and *McDonald,* it may be substantially diminished. Through this diversion of cases from the courts to arbitration, arbitrators will replace courts as the primary protectors of important statutory rights. This enhanced prestige of arbitration will bring with it an increased professional responsibility and a heightened judicial scrutiny of the arbitration process. It behooves the community of arbitrators to observe the Scout's motto: "Be prepared."

PART III. NLRB DEFERRAL TO ARBITRATION

ABNER J. MIKVA*

Let me start off by saying how pleased I am that you invited me to address your Annual Education Conference. As a former labor lawyer, I was one of your satisfied customers who thought that the arbitration process worked wondrously well to promote justice in the workplace and to promote collective bargaining, the touchstone of our national labor policy. I am also flattered to be allowed to poach on the private preserve of my colleague, Judge Harry Edwards. Every time I look around, he seems to be addressing a group of arbitrators about the general climate of labor arbitration in this country. Indeed, I intend to quote from some of his previous efforts in this regard.

But I have a more compelling reason to be grateful for this invitation, because it allows me to expiate a great frustration that I have harbored about a case arising out of my court. Those of you who have practiced appellate law know the frustration of not being able to persuade an appellate tribunal of the correctness and importance of your cause and running out of higher tribunals to appeal to. I have not usually felt that way about cases where I end up in the minority as a judge. Perhaps my 20 years

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