CHAPTER 2

ARBITRATION DECISIONS OF THE U.S. SUPREME COURT 2000–2001

I. REVIEW AND APPRAISAL

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The exceptional interest that the U.S. Supreme Court has taken in arbitration cases in recent years manifested itself eclectically this term in four cases, two in the area of labor arbitration, a third involving commercial arbitration, and the fourth with respect to arbitration under individual employment contracts. While the four are not of equal significance, taken collectively they reflect the Court's continuing enthusiasm for arbitration, even in contexts where one might think such enthusiasm is not entirely warranted.

Eastern Associated Coal Corp. v. United Mine Workers[1]

This case is the latest in the Supreme Court's several attempts to define the circumstances under which a labor arbitrator's award may be set aside on the ground that it conflicts with "public policy." The process began in *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers.*[2] An arbitrator ordered the employer to compensate male employees who had been laid off in violation of the seniority provisions of the collective bargaining agreement, and the employer sought to set aside the award on the ground that it was in conflict with a conciliation agreement it had entered into with the Equal Employment Opportunity Commission (EEOC). But the union was not a party to the conciliation

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[1]531 U.S. 57, 165 LRRM 2865 (2000).

[2]461 U.S. 757, 113 LRRM 2641 (1983).

agreement, the seniority provisions were valid, and the Court upheld the award, saying that the employer's problem was a dilemma of its own making. While observing that a contractual provision might be unenforceable on grounds of public policy, the Court gave little guidance to what that might mean, except to say that public policy must be "explicit," "well defined and dominant," and ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."[3]

In *United Paperworkers v. Misco, Inc.*,[4] an employer ordered reinstatement of an employee whose job it was to operate dangerous machinery, and whom the employer had fired for allegedly smoking marijuana in a car on company property. The employer argued, and the court of appeals found, that the award violated a "well defined and dominant" policy against the operation of dangerous machinery while under the influence of drugs. The Supreme Court initially took the case to decide whether a court may refuse to enforce an arbitration award on public policy grounds if the award neither violates positive law nor requires unlawful conduct by the employer, but it managed to finesse that issue. It observed, instead, that the court of appeals had "made no attempt to review existing laws and legal precedents" in order to demonstrate that such a policy exists, and that even if such a policy did exist it was not violated by the award because using drugs in a car on company property did not necessarily establish use on the job, and the factual linkage was a question for the arbitrator to decide.[5] Moreover, the Court noted, the award ordered that the employee be reinstated "in his old job or in an equivalent one," and it was not established in the record that the employee would have posed a serious threat to the asserted public policy in every job for which he was qualified.[6]

Eastern Associated Coal also involved reinstatement after marijuana use, but this time the role of public policy could not be so easily finessed. James Smith, a truck driver, was discharged after he had tested positive for marijuana in a random drug test pursuant

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[3] *Id.* at 766 (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

[4] 484 U.S. 29, 126 LRRM 3113 (1987).

[5] *Id.* at 31. Initially the employee was fired on the basis of evidence that he was in someone else's car where marijuana was found; subsequently, the employer discovered evidence that he was smoking in his own car. The arbitrator held that the employer could not rely on that evidence.

[6] *Id.*

to U.S. Department of Transportation (DOT) regulations requiring random drug testing for workers in "safety sensitive" tasks.[7] An arbitrator, finding no just cause for discharge, ordered Smith reinstated subject to 30 days of suspension without pay, participation in a substance abuse program, and periodic drug tests. A year later Smith tested positive again, was again discharged, and again a kindhearted arbitrator, taking into account Smith's length of service and family problems, found no just cause and ordered reinstatement, this time subject to suspension for 3 months, reimbursement to the employer and the union for the costs of both arbitration proceedings, continued participation in a substance abuse program with random drug tests, and a signed, undated letter of resignation to take effect if Smith tested positive within the next 5 years. The employer sought to have the award set aside on grounds of public policy, but the district court declined to do so, and its decision was affirmed by the Fourth Circuit.

Why the Supreme Court thought it necessary to allocate scarce resources to consider review of the Fourth Circuit's opinion, which was per curiam and unpublished, is something of a mystery. There had been other lower court opinions in public policy cases, but the Court took no notice of them. In an opinion by Justice Breyer, with a separate concurrence by Justice Scalia joined by Justice Thomas, the Court unanimously affirmed.

The employer in *Eastern Associated Coal* sought to distinguish *Misco* by arguing that reinstatement of a driver who has twice failed random drug tests would undermine the public policy implicit in the Omnibus Transportation Employee Testing Act of 1991[8] and the DOT's implementing regulations,[9] but the Court disagreed.[10] The Court observed that, although the regulatory scheme certainly embodied a policy against drug use by employees in safety-sensitive transportation positions and in favor of drug testing, it also embodied policies in favor of rehabilitation of employees who use drugs, and it reflects recognition of background labor law policy that favors determination of disciplinary questions through negotiation.[11] The arbitrator's award dealt with Smith severely, and it violated no specific provision of any law or regulation. Conse-

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[7]531 U.S. at 60.
[8]Pub. L. No. 102-143, §2(3), 105 Stat. 953. *See* 49 U.S.C. §31306.
[9]49 C.F.R. §382.101 et seq.
[10]531 U.S. at 63–64 (discussing policy underlying statutory scheme).
[11]*Id.* at 65.

quently, the lower courts correctly rejected the employer's public policy claim.

To some extent *Eastern Associated Coal* is *Misco* warmed over, but the decision goes beyond *Misco* in two important respects. First, the decision makes clear in a way more direct than in previous decisions that the ultimate issue is not the validity of the arbitrator's award, but the validity of the collective bargaining agreement as interpreted by the arbitrator,[12] so that if the parties could have agreed to reinstate Smith without violating public policy, it cannot be against public policy for the arbitrator to order his reinstatement. Second, the opinion displays a lack of inclination on the part of the Court to divine public policy that goes beyond a statute and regulations in a detailed regulatory scheme.[13]

The Court does not rule out the possibility that some provision of a collective bargaining agreement, on its face or as interpreted by an arbitrator, might be found to violate public policy even though the relief ordered does not contravene any provision of positive law—indeed, the Court agrees "in principle, that courts' authority to invoke the public policy exception is not limited" to such cases,[14] and it is this agreement that invokes the Scalia concurrence insisting that there is no authority for such a proposition. But Scalia goes on to recognize what is surely the case—that it is "hard to imagine" how an arbitration award would ever violate a public policy as defined by the majority without actually conflicting with positive law.[15] "One can, of course, summon up a parade of horribles," he says, "such as an arbitration award ordering an airline to reinstate an alcoholic pilot who somehow escapes being grounded by force of law," but such problems could be corrected by Congress or the agency.[16]

Perhaps it is because of the possibility of such a case that the Court leaves the public policy door slightly ajar, but it is so very close to being closed that I doubt we will see any lower courts refusing to enforce arbitration awards on public policy grounds any time soon.

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[12]"Eastern does not claim here that the arbitrator acted outside the scope of his contractually delegated authority. Hence we must treat the arbitrator's award as if it represented an agreement between Eastern and the union as to the proper meaning of the contract's word 'just cause.' St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and its Progeny,* 75 Mich. L. Rev. 1137, 1155 (1977). For present purposes the award is not distinguishable from the contractual agreement." 531 U.S. at 57.

[13]*Id.* at 63.

[14]*Id.*

[15]*Id.* at 68.

[16]*Id.* at 69.

Major League Baseball Players Association v. Garvey[17]

This case, the Supreme Court's gift to the arbitral profession, came as a mid-May surprise, a per curiam opinion rendered, so confident was the Court, without benefit of either oral argument or briefing.

Steve Garvey, described by the Court as "a retired, highly regarded first baseman," claimed that his contract with the San Diego Padres was not extended because of collusion, and sought damages through a special arbitration procedure that had been established by labor and management to deal with collusion claims under their collective bargaining agreement.[18] The arbitrator denied the claim, finding that the nonrenewal of Garvey's contract was for reasons other than collusion. In the course of making that finding, the arbitrator rejected certain evidence that Garvey had offered, finding that it lacked credibility.

Garvey then sought to vacate the arbitrator's award. His efforts were rebuffed by the district court, but he succeeded in the Ninth Circuit. Finding that the arbitrator's rejection of the disputed evidence was "inexplicable" and "border[ed] on the irrational," the Ninth Circuit reversed and remanded with directions to vacate the award.[19]

Instead of vacating the award, the district court sent the case back to the arbitrator for further hearings, but Garvey appealed from that order, and the Ninth Circuit reversed, this time directing the lower court to remand to the arbitrator with instructions to enter an award for Garvey in the amount he claimed.

The Supreme Court's per curiam reversal was short but, for the Ninth Circuit panel that decided the case, was not so sweet. Finding the panel's decision "baffling" in light of principles declared in the *Steelworkers Trilogy*[20] and in *Misco*, the Court found that the Ninth Circuit had improperly substituted its judgment for that of the arbitrator with respect to findings of fact.[21] "The arbitrator's analysis may have been unpersuasive to the Court of Appeals, but his decision hardly qualifies as serious error, let alone irrational or

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[17]121 S.Ct. 1724, 167 LRRM 2134 (2001) (per curiam).
[18]121 S.Ct. at 1726.
[19]*Garvey v. Roberts*, 203 F.3d 580, 590, 163 LRRM 2449 (9th Cir. 2000).
[20]*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).
[21]121 S.Ct. at 1728–29.

inexplicable error,"[22] the Court stated, and in any event "even 'serious error' on the arbitrator's part does not justify overturning his decision where, as here, he is construing contract and acting within the scope of his authority."[23]

Moreover, the Court held, "[e]ven when the arbitrator's award may properly be vacated, the appropriate remedy is to remand the case for further proceedings,"[24] not to decide it. *Misco* had so held, and although that case involved procedural issues, its reasoning was not so limited: "If a remand is appropriate even when the arbitrator's award has been set aside for 'procedural aberrations' that constitute 'affirmative misconduct,' it follows that a remand ordinarily will be appropriate when the arbitrator simply made factual findings that the reviewing court perceives as 'irrational.'"[25] It follows that the Ninth Circuit should not have reversed the order of the district court denying the motion to vacate the arbitrator's award, much less directed that judgment be entered in Garvey's favor.

The opinion was 8–1, with Justice Ginsburg concurring on the narrower ground that the Ninth Circuit should not have disturbed the arbitrator's award in the first place. Justice Stevens dissented, objecting to the summary procedure. Further guidance was needed, he insisted, as to the standards that a federal court should use "in assessing whether an arbitrator's behavior is so untethered to either the agreement of the parties or the factual record so as to constitute an attempt 'to dispense his own brand of industrial justice,'" and he questioned whether remand for another arbitration should be the only course open to a reviewing court that believes that, as a result of such an assessment, "the correct disposition of the matter is perfectly clear."[26]

In a footnote, Justice Stevens observed that the Court's opinion is "somewhat ambiguous," it being "unclear whether the majority is saying that a court may never set aside an arbitration because of a factual error, no matter how perverse, or whether the Court merely holds that the error in this case was not sufficiently severe to allow a court to take that step."[27] There is merit in this observa-

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[22] *Id.* at 1729 n.2.
[23] *Id.* at 1729.
[24] *Id.*
[25] *Id.* (quoting *United Paperworkers v. Misco, Inc.*, 484 U.S. 29, 126 LRRM 3113 (1987)).
[26] *Id.* at 1730 (Stevens, J., dissenting).
[27] *Id.* at 1730 n.1.

tion, but perhaps, as I heard a colleague say on the court I was on, "it's close enough for government work."

Green Tree Financial Corp. v. Randolph[28]

When Larketta Randolph bought a mobile home from Better Cents Home Builders in Opelika, Alabama, and financed the purchase through Green Tree Financial Corporation, she discovered that the finance agreement required her to buy vendor's single interest insurance to protect the vendor or lienholder against the costs of repossession in the event of default. Alleging that Green Tree had violated the federal Truth in Lending Act by failing to disclose this requirement, Randolph brought what she and her lawyers hoped would be a class action against Green Tree in federal district court. But her agreement with the lender required her to arbitrate "any dispute, claim or controversy."

The arbitration provision called for Green Tree to select the arbitrator "with consent of Buyer," but otherwise had nothing to say about either arbitral selection or procedure. Randolph argued to the district court that requiring her to arbitrate under such circumstances would in two ways preclude her from vindicating her statutory rights: by denying her right to a class action and by threatening to subject her to costs that she would not be required to pay in litigation. The district court rejected both arguments and dismissed her complaint.

The Eleventh Circuit reversed. Without reaching the class action issue, it held that the arbitration agreement, by reason of its silence with respect to filing fees, arbitrator costs, and other arbitration expenses, failed to provide the minimum guarantees that Randolph could vindicate her statutory rights. The Supreme Court granted certiorari, and Chief Justice Rehnquist wrote the opinion for the court, with Justice Ginsburg, joined by Justices Stevens, Breyer, and Souter, dissenting in part.

For Randolph there was both good and bad news. The good news was that the court of appeals was right to hear her case. Section 16 of the Federal Arbitration Act (FAA) precludes appeals from interlocutory orders to arbitrate, but allows appeals from a "final decision with respect to an arbitration that is subject to this title."[29]

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[28]531 U.S. 79, 84 FEP Cases 769 (2000).
[29]9 U.S.C. §16(a)(3).

Some lower courts had held that an order compelling arbitration is not a "final decision" if it occurs in an "embedded" proceeding, that is, a proceeding involving both a request for arbitration and other claims for relief. This makes sense when the other claims for relief are still alive in the district court, but it makes no sense at all when the district court's order disposes of all the issues so that nothing remains to be decided, and the Supreme Court said so. This part of the decision ensures that persons in the position of Randolph will not have to await the outcome of arbitration in order to test the validity of an order requiring them to arbitrate, unless there are issues remaining for decision in the trial court.

The bad news for Randolph was that she lost on the merits. A majority of the Supreme Court found that the district court acted correctly in rejecting her motion for reconsideration. An agreement to arbitrate is not unenforceable, the Court held, merely because it says nothing about the costs of arbitration and thus fails to provide protection from potentially substantial costs of pursuing federal statutory claims in the arbitral forum. Justice Rehnquist's opinion conceded "that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum," but the record did not show that Randolph would bear such costs if she went to arbitration.[30] The risk that Randolph would be saddled with prohibitive costs was therefore "too speculative" to justify the invalidation of an arbitration agreement in light of federal policy supportive of arbitration.[31] Just as the Court had insisted that a party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration, so a party seeking to invalidate an arbitration agreement on the ground that it would be "prohibitively expensive" bears the burden of showing the likelihood of incurring such costs.

In her dissenting opinion, Justice Ginsburg did not directly challenge the implication of the majority's decision that a successful defense to the enforcement of an agreement to arbitrate statutory claims depends on a showing that the costs of arbitration would be "prohibitive," or at least large enough to preclude a litigant from effectively vindicating her statutory rights; instead, she and her dissenting colleagues focused on the procedure for

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[30] 531 U.S. at 90.
[31] *Id.*

resolving the question of "who pays." Observing that Green Tree, as a "repeat player" in the arbitration system it had created, was in a better position than Randolph to know about the procedures and costs entailed, Justice Ginsburg questioned the propriety of placing the burden of showing what the costs would be on Randolph and disagreed with the Court's conclusion that Randolph would have to proceed to arbitration before the issue would be confronted. Ginsburg referred to Chief Judge Harry Edwards's decision in *Cole v. Burns International Security Services*,[32] which held that an agreement in the employment context to arbitrate statutory claims that is silent as to costs should be interpreted as requiring the employer to pay the fees of the arbitrator, but stops short of endorsing that view. Justice Ginsburg concluded that, "[b]efore writing a term into the form contract, as the District of Columbia Circuit did . . . or leaving cost allocation initially to each arbitrator, as the Court does, I would remand for clarification of Green Tree's practice."[33]

The effect of the majority's decision was to require Randolph to go through the time and expense of arbitration before she could raise the question of arbitration costs as a bar to vindication of her statutory claims. More significantly, the decision puts future litigants on notice that if they want to raise that question in such a way as to avoid arbitrating, they will have to conduct whatever discovery might be necessary to obtain the necessary information and bear the burden of showing that the procedure would entail costs so large that they would defeat effective vindication of statutory rights. Whether this determination is to be made on a case-by-case basis, taking into account the financial resources of the particular litigant, or on a more generalized basis, considering the impact of the procedure on the average litigant, is unclear, as is the allocation of authority between the arbitrator and a court with respect to the issue. However these questions are ultimately answered, the Court's opinion creates a formidable obstacle course for plaintiffs seeking to bypass the arbitral forum on the basis of costs.

The Court declined to consider Randolph's class action argument because it had not been considered by the court below, but the four dissenters make clear their view that Randolph remained entitled to raise the question in the Eleventh Circuit.[34] It is an

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[32]105 F.3d 1465, 72 FEP Cases 1775 (D.C. Cir. 1997).
[33]531 U.S. at 96 (Ginsburg, J., dissenting in part).
[34]*Id.* at 97 n.4.

important question, not only for Randolph, but for all plaintiffs who seek to sue under statutes that allow class actions and where individual proceedings would be uneconomical. One answer would be to allow litigation to occur notwithstanding the arbitration clause,[35] while another would be to allow arbitration to proceed on a classwide basis, either under the direction of the arbitration or under supervision by a court.[36] Absent one of these alternatives, a plaintiff in the position of Randolph might well be unable to vindicate his or her statutory rights effectively.

Circuit City Stores, Inc. v. Adams[37]

So now we know: the Supreme Court has bought the "shlepper rule." While the coverage of the FAA under section 2 ("involving commerce")[38] had been interpreted to extend to the outer reaches of congressional power under the modern view of the Commerce Clause,[39] it turns out that it is only "transportation workers" whose employment contracts are excluded under the last part of the section 1 exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Never mind that the legislative history points to a broader reading of the exemption,[40] and never mind that it is difficult to imagine a rational legislator voting to exclude only those employment relationships most clearly within the reach of congressional power;[41] Justice Kennedy's opinion for the 5-justice majority pushes such considerations aside in favor of the "ejusdem generis" principle of statutory interpretation and what the majority otherwise viewed as the "meaning" of the text.

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[35]Justice Ginsburg's opinion refers to the contrary view in *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 121 S.Ct. 1081 (2001).

[36]*See* the author's opinion for the California Supreme Court in *Keating v. Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982), *rev'd on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984) (courts have authority to order arbitration proceedings on a classwide basis and to supervise the proceedings to safeguard the rights of absent class members). *Compare* Kupperman & Freeman, *Selected Topics in Securities Regulation*, 65 Tulane L. Rev. 1547, 1577–93 (1991) (arguing that courts should refrain from imposing class actions on the arbitral process).

[37]121 S.Ct. 1302, 85 FEP Cases 266 (2001).

[38]9 U.S.C. §2.

[39]*Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

[40]*See* Finkin, *Workers Contracts Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. & Lab. L. 282 (1996).

[41]The majority suggests it "would be rational for Congress to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation." *Circuit City*, 121 S.Ct. at 1312.

The case began when Saint Clair Adams, an employee of Circuit City Stores in Santa Rosa, California, brought suit in state court complaining of harassment and retaliation based on his sexual orientation, in violation of California's Fair Employment and Housing Act, combined with state common law claims of constructive discharge and intentional infliction of emotional distress. There were no federal claims, but Circuit City responded with a petition in the U.S. District Court, based on diversity and the FAA, to enjoin Adams's state court action and to compel arbitration of all his claims pursuant to an arbitration provision that he was required to sign as a condition of employment.

Adams resisted arbitration in the district court on the ground that the arbitration agreement was "unconscionable": it placed a cap on the amount of front pay or punitive damages an arbitrator could award; it imposed a 1-year statute of limitations on all claims, including claims with longer limitation periods under California law; it obligated employees to pay half the cost of arbitration, including arbitrator fees and expenses, subject to cost-shifting only at the arbitrator's discretion; it vested complete discretion in the arbitrator to decide whether to award attorney's fees to a prevailing employee, even on statutory discrimination claims; and it did not require the arbitrator to provide findings or reasoning to support the arbitration award. But the district court concluded that these features of the arbitration scheme did not amount to the "extreme one-sidedness that's required for a finding of unconscionability"; accordingly, it granted Circuit City's petition to enjoin the state court proceeding and ordered arbitration.[42]

The Ninth Circuit reversed on the basis of its view that the agreement was not within the FAA and that the district court was therefore without jurisdiction. It did not reach Adams's unconscionability claims, and they presumably remain viable under the Supreme Court's order of remand for further proceedings consistent with its opinion.

Justices Souter and Stevens each filed dissenting opinions, joined by Justices Ginsburg and Breyer and by each other as well, except as to a portion of Stevens's dissent, which Justice Souter did not join. Justice Stevens's dissent is the most pointedly critical: it is apparent, he insisted, that it was "the potential disparity in bargain-

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[42]This description of the trial record is taken from the respondent's brief to the Supreme Court, 2000 WL 1369473, at 2–3.

ing power between individual employees and large employers" that was the basis for organized labor's opposition to the FAA, and it was this concern that led to the section 1 exemption. By ignoring the interests of unrepresented workers, the majority "skews its interpretation with its own policy preferences . . . . A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court's own views of how things should be, but it may also defeat the very purpose for which a provision was enacted. That is the sad result in this case."[43]

Sad or not, the Court has spoken, and for commentary to be useful it must focus on the future and on the questions yet to be answered.

One task the Court has obviously cut out for itself is defining the limits of the category it calls "transportation workers." The Court suggested a partial definition, borrowed from the District of Columbia Circuit's opinion in *Cole:* "those workers 'actually engaged in the movement of goods in interstate commerce.'"[44] But does that mean just people who drive the vehicle that contains the goods, or does it also embrace the people who load the vehicle or otherwise assist in the movement? And what about workers engaged in the movement of people rather than goods? Because the Court has cut the scope of the exemption loose from any realistic policy considerations and thereby has minimized the possibility of a functional approach, we seem to be left with a formalistic approach that harks back to earlier days of constitutional Commerce Clause jurisprudence.[45]

Beyond the scope of the exemption, however, remain challenging questions that would have appeared in different forms if the case had been decided the other way. There is, for example, the question posed by the Ninth Circuit's decision in *Duffield v. Robertson–Stephens & Co.*,[46] holding (contrary to all other courts that have considered the question) that Title VII precludes enforcement of an agreement to arbitrate statutory claims if the

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[43]121 S.Ct. at 1318 (Stevens, J., dissenting).

[44]*Id.* at 1307 (quoting *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1471, 72 FEP Cases 1775 (D.C. Cir. 1997)).

[45]Whether a collective bargaining agreement is a "contract of employment" and is therefore excluded from coverage under the FAA with respect to "transportation workers" also remains an open question.

[46]144 F.3d 1182, 76 FEP Cases 1450 (9th Cir. 1998).

agreement is "mandatory" as a condition of employment. If the Court had decided that all employment contracts were exempt from the FAA, then the merits of the *Duffield* position would have been determined without regard to the policies of that statute. As it is, however, the Court relied on those policies in reaching its conclusion, insisting that the contrary interpretation, by injecting state law into the arena, would introduce "complexity and uncertainty into the enforceability of arbitration agreements in employment contracts" and would thereby "call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers, in the process undermining the FAA's pro-arbitration purposes, and 'breeding litigation from a statute that seeks to avoid it.'"[47]

The opinion ends by reaffirming the Court's conviction that "[a]rbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law"[48] and by quoting from *Gilmer v. Interstate/Johnson Lane Corp.*,[49] that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[50] Recognizing that the statutory claim before the Court in *Circuit City* was based on state rather than federal law, the Court went on to make clear that, under its previous preemption decision in *Southland Corp. v. Keating*,[51] that made no difference. It would seem, based on all of this gratuitous language, which was entirely unnecessary to the result in *Circuit City*, that *Duffield*'s days are numbered.

Indeed, the general validity of an arbitration agreement under Title VII is subsumed within the issue now before the Court in *EEOC v. Waffle House*,[52] which involves the effect of a presumably valid arbitration clause in an employment agreement on the

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[47]121 S.Ct. at 1313 (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995)).

[48]*Id.*

[49]500 U.S. 20, 26, 55 FEP Cases 1116 (1991).

[50]121 S.Ct. at 1313 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 55 FEP Cases 1116 (1991)).

[51]465 U.S. 1 (1984) (holding that Congress intended the FAA to apply in state courts and to preempt conflicting state laws). Justices Scalia, Thomas, and O'Connor have expressed disagreement with *Southland*, but only Scalia and Thomas would vote to overturn it, and its holding was reconfirmed in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

[52]193 F.3d 805, 9 AD Cases 1313 (4th Cir. 1999), *cert. granted*, 121 S.Ct. 1401 (2001).

jurisdiction of the Equal Employment Opportunity Commission (EEOC). In *Gilmer* the Supreme Court assured us that an individual claimant "will still be free to file a charge with the EEOC" and that, in any event, the EEOC has "independent authority to investigate . . . discrimination."[53] But the Court said nothing about whether the EEOC would retain authority to file suit in its own name or what relief it could seek under circumstances in which the employee or employees involved had signed *Gilmer* agreements. The lower courts are divided over that question, and in *Waffle House* the Fourth Circuit divided the answer, holding that the EEOC could still seek injunctive but not monetary relief on behalf of the individual employees.

If the EEOC is deprived of jurisdiction to seek monetary relief, employees will be deprived of a significant benefit provided by the statute—the ability to litigate without cost. But an even more serious question lurks behind *Waffle House*: What of the 20 or so states that provide employees with the option of having their claim considered and decided by an administrative agency with power to order back pay, front pay, and (as in some states, such as California) even emotional distress damages and administrative fines? Will the Supreme Court say agency jurisdiction is precluded by an arbitration agreement, thereby depriving employees of an entire system of administrative enforcement that these states have thought beneficial? One hopes not, but I have given up on predictions.

Finally, there remains a host of questions concerning the enforceability of particular agreements—some of them posed by the facts in *Circuit City* itself. Some of these questions would have existed even if *Circuit City* had been decided the other way, but again the pro-arbitration policies of the FAA would not have informed the answers.[54]

It seems a fair implication from what the Court has already said that an employer cannot use an arbitration provision to limit the remedies available under the applicable statute, or to shorten the statute of limitations,[55] but what of those other features of arbitration that Chief Judge Harry Edwards, in *Cole v. Burns* (and this

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[53]500 U.S. at 28.

[54]*See generally* Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 Hofstra Lab. L.J. 1 (1996).

[55]*See Graham Oil Co. v. Arco Prods. Co.*, 43 F.3d 1244 (9th Cir. 1994) (franchisee under distributorship agreement covered by Petroleum Marketing Practices Act could sue under that statute notwithstanding arbitration provisions that purported to establish a shorter period of limitations than the statute and to preclude exemplary damages and attorneys' fees that the statute authorized), *cert. denied*, 516 U.S. 907 (1995).

Academy), have found to be essential to the vindication of statutory rights—a neutral arbitrator, more than minimal discovery, a written award, and no requirement for payment of either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitrator forum? *Green Tree* may already have thrown cold water on *Cole* with respect to costs and fees, but perhaps has not extinguished its reasoning entirely; the other issues remain in doubt. And if *Cole* is right on any of these issues as a matter of federal statutory policy, does the same reasoning hold true when it is a *state* antidiscrimination statute that is involved, on the theory that state statutes are part of the machinery for vindicating national policy? And if federal statutes immunize the provisions of state antidiscrimination laws that parallel and supplement federal protection, what about provisions, such as the prohibition against sexual orientation discrimination at issue in *Circuit City*, that have no federal counterpart?

And what about the scope of judicial review? The U.S. Supreme Court keeps assuring us 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."[56] It is unclear whether the Court means to say that the limited scope of review generally applicable to arbitration awards is adequate, which is almost certainly not the case, or that special rules will be developed for cases involving statutory claims, which the Court has yet to do.

Finally, there are a set of questions in the wake of *Circuit City* that would have been answered as a matter of state law had the case been decided the other way: What circumstances render an arbitration agreement unenforceable on common law grounds? The FAA provides for enforcement of arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract," and the Supreme Court has indicated that this provision means that "generally applicable contract defenses, such as fraud, duress, or unconscionability may be applied to invalidate arbitration agreements,"[57] but unconscionability principles are by their nature context-specific and must of necessity take into account the arbitral context in their application. The California Supreme Court, for example, has invoked unconscionability principles to

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[56]*E.g., Shearson/American Express v. McMahon*, 482 U.S. 220 (1987).
[57]*Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

support two limitations on the enforcement of arbitration agreements contained in contracts of adhesion: there must be a truly neutral arbitrator[58] and a "modicum of mutuality."[59] Will these limitations be acceptable to the Supreme Court? The answer may depend on the approach that the Court takes toward state law in these matters. In the case of labor arbitration under section 301 of the Labor Management Relations Act,[60] the Court has insisted on absorbing state common law into a uniform body of federal common law principles to which states must conform,[61] and it seems likely that the Court will move in that direction under the FAA as well. For a Court that is concerned with federalism, *Circuit City* represents a somewhat incongruous push in the direction of national control.

II. MANAGEMENT PERSPECTIVE

JAMES WALTERS*

One area that is different in perspective from the Supreme Court cases reviewed by Justice Grodin is that of the lower court judges who get inundated with employment cases. I have heard any number of federal judges say they don't like employment cases. They say their dockets on the criminal side are loaded with drug cases, and on the civil side with employment cases. If there were some way to clean up the civil side, that would ease a lot of the workload. I think our federal judges are by and large overworked. We keep adding new laws and not enough new judges.

I have some statistics I would like to share with you, one of which is anecdotal in nature. I subscribe to an electronic service called CaseStream. When I log on to my computer in the morning, I get an icon that says there has been activity in my preselected dockets.

Because I am a labor-employment specialist, I get only federal filings, usually from the day before, in labor and employment cases. Maybe twice a week there is a Railway Labor Act[1] case. Maybe 10

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[58] *Graham v. Scissor-Tail*, 28 Cal. 3d 807, 106 LRRM 2914 (1981).
[59] *Armendariz v. Foundation Health*, 24 Cal. 4th 83, 83 FEP Cases 1172 (2000).
[60] 29 U.S.C. §141 et seq.
[61] *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957).
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[1] 45 U.S.C. §151 et seq.