Journal of Dispute Resolution

Volume 1991 | Issue 2 Article 9

1991

Right to Sue vs. the Agreement to Arbitrate: The Dilemma in Title VII Cases, The

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THE RIGHT TO SUE VS. THE AGREEMENT TO ARBITRATE: THE DILEMMA IN TITLE VII CASES

Alford v. Dean Witter Reynolds, Inc.[1]

I. INTRODUCTION

In enacting Title VII, Congress specifically gave employees who are victims of discrimination based on race, color, religion, sex, or national origin the opportunity for judicial redress through the federal courts.[2] In *Alexander v. Gardner-Denver Co.*,[3] the Supreme Court held that a Title VII suit could be maintained despite a clause in an employment contract providing for the arbitration of all employment disputes. After *Alexander*, two federal circuit courts followed the Supreme Court's ruling.[4] However, a recent trio of Supreme Court decisions favoring contractual agreements for the arbitration of several statutorily-founded claims[5] cast doubt upon the continued applicability of *Alexander* to employment discrimination suits. It is in this context that the question arises once again.

II. THE FACTS

Joan Chanson Alford was a stockbroker with Dean Witter Reynolds, Inc. (Dean Witter) until she was fired by the brokerage firm.[6] Alleging that her dismissal was the result of discrimination, Alford brought a Title VII suit for sex discrimination and sexual harassment against Dean Witter in the United States District Court for the Southern District of Texas.[7] Dean Witter filed a motion to dismiss the suit with prejudice and to compel arbitration, contending that Alford

1. 905 F.2d 104 (5th Cir. 1990).

2. Alexander v. Gardner-Denver Co., 415 U.S. 36, 56 (1974); Benestad v. Interstate/Johnson Lane Corp., 752 F. Supp. 1054, 1057 (S.D. Fla. 1990); 42 U.S.C. §§ 2000e-2(a)(1), 2000e-5(f), (g) (1988).

3. 415 U.S. 36.

4. Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304, 1305-09 (8th Cir. 1988), *reh'g denied*, 872 F.2d 264 (8th Cir. 1989); Utley v. Goldman Sachs & Co., 883 F.2d 184, 185-87 (1st Cir. 1989).

5. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 238 (1987); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 483-85 (1989).

6. *Alford*, 905 F.2d at 104-05.

7. *Id.*

needed to submit her claim to commercial arbitration as required by a clause in her employment contract.[8] The district court denied Dean Witter's motion, and Dean Witter appealed.[9]

Concluding that the 1974 Supreme Court decision of *Alexander v. Gardner-Denver Co.* governed this case, the United States Court of Appeals, Fifth Circuit, affirmed the district court's decision.[10] The court of appeals held that an employee may pursue a Title VII lawsuit for sex discrimination and sexual harassment rather than submit her claim to commercial arbitration as called for in her employment contract.[11]

III. LEGAL BACKGROUND

As the *Alford* court recognized, the instant decision forced the court to reconcile two equally important, but conflicting, national concerns: the strong policy favoring commercial arbitration over litigation, and weighty federal legislation designed to fight discrimination.[12] In recent decisions, the United States Supreme Court tended to favor contractual arbitration provisions over litigation, declaring that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[13] This preference for arbitration applied even to claims based on federal statutory grounds.[14] In fact, "permitting enforcement of statutory remedies by means of contractual arbitration has . . . become the norm. . . ."[15] For example, in three recent cases the Supreme Court held predispute agreements to arbitrate enforceable for the arbitration of antitrust claims brought under the Sherman Act,[16] claims brought under the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act,[17] and even claims brought under the Securities Act of 1933.[18]

A. Title VII Suits

While the recent trend enforces arbitration provisions, the Supreme Court's *Alexander* decision protects Title VII suits from the reach of such a trend.[19] In *Alexander*, the Supreme Court held that an employee's statutory right to a trial de

8. *Id.*
9. *Id.*
10. *Id.* at 105.
11. *Id.*
12. *Id.*
13. *Id.* (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 406 U.S. 1, 24-25 (1982)).
14. *See id.* at 106.
15. *Id.*
16. *Mitsubishi*, 473 U.S. at 636-37.
17. *McMahon*, 482 U.S. at 238, 242.
18. *Rodriguez de Quijas*, 490 U.S. at 485.
19. *Alexander*, 415 U.S. 36.

novo under Title VII could not be foreclosed by the prior submission of his claim to arbitration pursuant to a collective bargaining agreement.[20] The *Alexander* court felt that "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective bargaining agreement *and* his cause of action under Title VII."[21] *Alexander* makes it clear that "[t]here is no suggestion in the statutory scheme [of Title VII] that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction."[22] This is because "[t]he purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal."[23] In a final footnote the Court instructs that "[other] courts should be ever mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum."[24]

Two circuit courts extended *Alexander*'s rationale to arbitration of Title VII claims under commercial arbitration agreements.[25] In *Swenson v. Management Recruiters International, Inc.*,[26] the Eighth Circuit noted that:

> [A]lthough *Alexander* involves a collective bargaining agreement, and not a commercial arbitration agreement under the [Federal Arbitration Act], this fact should not change the court's analysis. The *Alexander* Court was well aware that federal policy favors arbitration. That decision turned not on the fact that a collective bargaining arbitration was involved, but instead on the unique nature of Title VII.[27]

In *Utley v. Goldman Sachs & Co.*,[28] the United States Court of Appeals, First Circuit, found the *Swenson* court's analysis "compelling," quoting from *Swenson*:

20. *Id.* at 60.
21. *Id.* at 59-60 (emphasis added).
22. *Id.* at 47.
23. *Id.* at 56.
24. *Id.* at 60 n.21.
25. *Swenson*, 858 F.2d at 1305-09; *Utley*, 883 F.2d at 185-87.
26. 858 F.2d 1304.
27. *Id.* at 1306.
28. 883 F.2d 184.

> [I]n the passage of Title VII it was the congressional intent that arbitration is unable to pay sufficient attention to the transcendent public interest in the enforcement of Title VII. Title VII mandates the promotion of public interest by assisting victims of discrimination. The arbitration process may hinder efforts to carry out this mandate.[29]

Although at least one district court has held that Title VII claims must be arbitrated where provided for in employment contracts,[30] no circuit court has so held,[31] and the Supreme Court has done nothing to disturb its ruling in *Alexander*.[32]

B. ADEA Suits

While the circuit courts unite in their approach to the enforceability of predispute contractual agreements to arbitrate Title VII suits, they differ as to whether litigation should prevail over arbitration agreements found in claims based on another anti-employment discrimination statute, the Age Discrimination in Employment Act of 1967 (ADEA).[33] Congress enacted the ADEA to "promote employment of older persons based on their ability rather than age; *to prohibit arbitrary age discrimination in employment* . . . to help employers and workers find ways of meeting problems arising from the impact of age on employment."[34] Often, the ADEA is considered to be comparable to Title VII,[35] yet, two circuit courts reached opposite results in recent cases addressing the arbitrability of ADEA claims.[36]

In *Nicholson v. CPC International Inc.*,[37] a majority of the United States Court of Appeals, Third Circuit, held that an employer could not compel arbitration as called for in an employment contract of a former employee's claim that his termination violated the ADEA.[38] The majority found the *Mitsubishi*

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29. *Id.* at 187 (quoting *Swenson*, 858 F.2d at 1307).

30. Roe v. Kidder Peabody & Co., No. 88 Civ. 8507, slip op. at 7 (S.D.N.Y. Apr. 18, 1990) (WESTLAW, DCT database). The *Roe* court concluded that the three recent Supreme Court cases enforcing contractual agreements to arbitrate statutory claims (*Mitsubishi*, *McMahon*, and *Rodriguez de Quijas*) and the Supreme Court's remand of a decision declining to enforce a predispute agreement to arbitrate an ERISA claim, Bird v. Shearson/Lehman-American Express, Inc., 110 S. Ct. 225 (1989), entitled Kidder to arbitration of Roe's Title VII discrimination claim. *Roe*, No. 88 Civ. 8507, slip op. at 7.

31. *Alford*, 905 F.2d at 106.

32. *See Utley*, 883 F.2d at 186; *Alford*, 905 F.2d at 105.

33. 29 U.S.C.A. §§ 621 -34 (1985 & Supp. 1990).

34. *Id.* § 621 (b) (emphasis added).

35. *See* Nicholson v. CPC Int'l Inc., 877 F.2d 221, 227 (3d Cir. 1989); *Alford*, 905 F.2d at 106 n.3.

36. *Nicholson*, 877 F.2d at 231; Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 203 (4th Cir. 1990).

37. 877 F.2d 221.

38. *Id.* at 230.

Motors Corp. v. Soler Chrysler-Plymouth, Inc.,[39] *Shearson/American Express, Inc. v. McMahon*,[40] and *Rodriguez de Quijas v. Shearson/American Express*[41] holdings limited to claims involving business transactions.[42] In support of this conclusion, the majority stated that "[n]othing in *Mitsubishi* or *Shearson* suggests that the Court was overruling its prior holdings that arbitration agreements do not preclude access to a judicial forum for resolution of claims arising under the Fair Labor Standards Act" under 42 section 1983 and under Title VII of the Civil Rights Act of 1964.[43] After examining the text, legislative history, and objectives of the ADEA, the circuit court concluded that the right to a judicial forum under the ADEA, like that under Title VII, could not be displaced by a pre-conflict agreement in employment contracts to arbitrate disputes.[44]

The United States Court of Appeals, Fourth Circuit, found the reasoning of the majority in *Nicholson* "unpersuasive"[45] and so chose not to follow it in *Gilmer v. Interstate/Johnson Lane Corp.*[46] In *Gilmer*, the Fourth Circuit enforced an arbitration agreement in an employment contract when the employee's claim against the employer was brought under the ADEA.[47] The *Gilmer* majority found the Supreme Court's approval of arbitration agreements in *Mitsubishi*, *McMahon*, and *Rodriguez de Quijas* controlling,[48] and stated that the ADEA "is devoid of any congressional statement of intent to preclude waiver of the judicial forum."[49] Furthermore, the majority found the *Alexander* Title VII decision to be inapposite because it did not mention the Federal Arbitration Act (FAA)[50] and because it involved arbitration under a collective bargaining agreement.[51] The majority seemed to imply that *Alexander* would no longer apply where compelled arbitration is pursuant to an individual's employment contract, even in the context of a Title VII suit.[52]

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39. 473 U.S. 614.
40. 482 U.S. 220.
41. 490 U.S. 477.
42. *Nicholson*, 877 F.2d at 224.
43. *Id.*
44. *Id.* at 230.
45. *Gilmer*, 895 F.2d at 202.
46. *Id.*
47. *Id.* at 203.
48. *Id.* at 200.
49. *Id.* at 203.
50. *Id.* at 201; 9 U.S.C.A. §§ 1-16 (1970 & Supp. 1991). Note that this argument is dismissed by the *Alford* court. *Alford*, 905 F.2d at 107.
51. *Gilmer*, 895 F.2d at 202. Note that this argument is also rejected by the *Alford* court. *Alford*, 905 F.2d at 107.
52. *Gilmer*, 895 F.2d at 202.

IV. THE INSTANT DECISION

A. *The Alford Decision*

In *Alford*, Dean Witter argued that *Alexander* did not control this case for three reasons, none of which the court of appeals found convincing.[53] First, Dean Witter asserted that since *Alexander* specifically held that an employee could pursue both arbitration and Title VII remedies at the same time, the Supreme Court implied that Alford was required to arbitrate first and sue under Title VII later.[54] The court of appeals dismissed this argument, stating that to conclude that an employee had the opportunity to pursue her claim in both forums was not the same as concluding that the employee was required to "exhaust" all contractual arbitration remedies before she could file a Title VII suit.[55] In fact, the court noted that if the employee only asserted claims founded on discrimination prohibited by Title VII, she may find no reason to pursue arbitration.[56]

Dean Witter's second argument explained that *Alexander* did not apply here since it was based on labor arbitration, while the instant case addressed arbitration under the Federal Arbitration Act.[57] The court of appeals agreed that the *Alexander* court emphasized arbitration under a collective bargaining agreement, but noted that this was the only kind of arbitration prevalent in employment relations at the time of the *Alexander* decision.[58] Just because the Supreme Court did not consider the FAA in *Alexander* did not mean that *Alexander* did not apply.[59] Rather, the court of appeals found that *Alexander* rested primarily on a construction of Title VII and that while there are significant differences between labor arbitration and commercial arbitration, there is a strong federal policy favoring both types of arbitration.[60] Since the Supreme Court was willing to subordinate labor arbitration to Title VII, the court of appeals refused to automatically infer that commercial arbitration would not be subordinated.[61]

Dean Witter's final contention was that *Alexander* has been undercut by recent Supreme Court decisions favoring commercial arbitration.[62] The appellate court's response was simply that it had no authority to overrule an apparently controlling Supreme Court decision: "We are bound by the broad wording of *Alexander*."[63]

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53. *Alford*, 905 F.2d at 106-07.
54. *Id.*
55. *Id.* at 107.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 108.

B. Alford Overruled

On May 20, 1991, the Supreme Court granted a petition for certiorari in connection with the *Alford* decision.[64] The Supreme Court vacated the judgment and remanded the case to the Fifth Circuit to reconsider in light of the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*[65] In *Gilmer*, decided May 13, 1991, the Court affirmed a Fourth Circuit decision enforcing an employment contract arbitration agreement when the employee's claim was brought under the ADEA.[66]

On remand, the Fifth Circuit reversed the district court and held that Title VII claims can be subjected to compulsory arbitration.[67] The court of appeals stated that *Gilmer* required it to reach such a decision.[68] Noting that both the ADEA and Title VII are civil rights statutes enforced by the Equal Employment Opportunity Commission, the court had "little trouble" deciding that with Title VII claims, arbitration agreements prevailed over the Title VII right to a lawsuit in the federal courts.[69]

In reaching its decision, the court of appeals stated that any broad public policy arguments against requiring compulsory arbitration of Title VII claims were necessarily rejected by *Gilmer*.[70] Furthermore, the court of appeals found that its reliance on *Alexander* in its prior decision was erroneous in light of *Gilmer*.[71] The court of appeals accepted Dean Witter's arguments that *Alexander* was not controlling because, as *Gilmer* stated, *Alexander* addressed labor arbitration rather than arbitration under the FAA, and because the Supreme Court since deciding *Alexander* had approved the use of commercial arbitration with other statutorily founded claims.[72]

V. COMMENT

Title VII of the Civil Rights Act of 1964, provides "it shall be . . . unlawful . . . for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."[73] As the *Alexander* court and later lower courts have found, Title VII was designed to

64. Dean Witter Reynolds, Inc. v. Alford, 111 S. Ct. 2050 (1991).
65. *Id.*; Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991).
66. *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. at 1650.
67. Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991).
68. *Id.* at 230.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. 42 U.S.C. § 2000e-2(a)(1).

allow victims of sex discrimination and sexual harassment an opportunity for judicial redress, specifically through the federal courts.[74]

Since the *Alexander* decision, arbitration advocates argue that arbitration is superior to litigation as a remedy for employment discrimination.[75] Proponents of arbitration contend (1) that arbitration is less formal and less costly than a judicial proceeding, (2) that arbitration is less complex and therefore leads to a more speedy resolution, (3) that arbitration of discrimination cases would help reduce the backlog of Title VII suits, and (4) that arbitration would reduce the disruption and adverse publicity resulting from a Title VII suit.[76] They urge that arbitrators have a greater amount of practical knowledge concerning labor disputes and can be more flexible than judges to better serve the interests of both parties to the dispute.[77]

Despite the glowing praise recited by arbitration supporters, arbitration is clearly not appropriate as the sole remedy for a Title VII discrimination suit. The arbitration proceeding itself is inadequate, for it was not designed to handle "multiple claims from a large number of similarly-situated claimants [the kind appropriate for class action treatment in courts]."[78] The arbitration process with its informality lacks the procedural protections of litigation, such as the opportunity for discovery and detailed findings of fact and conclusions of law.[79] Furthermore, private arbitration occurs outside the view of those governmental entities (the courts and administrative agencies) charged with enforcing "public" Title VII rights.[80] In such arbitration, "the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices."[81] Arbitrators, especially if they are lay persons, may lack the legal background necessary to adequately address the issues; and even if they are lawyers, they still may be unaware of Title VII's complexities.[82]

Unlike the other statutory schemes where arbitration agreements are enforced,[83] Title VII is a civil rights statute and therefore not commercial in nature. As the circuit court in the *Nicholson* ADEA case noted, "different considerations apply where the employee's claim is based on rights arising out of

74. *Alexander*, 415 U.S. at 56; *Benestad*, 752 F. Supp. at 1057; *see* 42 U.S.C. § 2000e-5(f),(g).

75. *See, e.g.*, Nelson, *Sexual Harassment, Title VII, and Labor Arbitration*, ARB. J., Dec. 1985, at 56 (1985).

76. Clark & Bush, *Arbitration of Employment Discrimination Claims: A Need for Statutory Reform?*, 11 T. MARSHALL L.J. 47, 48 (1985); Oka, *Disarray in the Circuit Courts After Alexander v. Gardner-Denver Co.*, 9 U. HAW. L. REV. 605, 607-08 (1987).

77. Clark & Bush, *supra* note 76, at 48; Oka, *supra* note 76, at 607.

78. Clark & Bush, *supra* note 76, at 48.

79. *Id.*; Oka, *supra* note 76, at 609.

80. Clark & Bush, *supra* note 76, at 49.

81. *Alexander*, 415 U.S. at 45.

82. Clark & Bush, *supra* note 76, at 49; Oka, *supra* note 76, at 609.

83. *See, e.g., Mitsubishi*, 473 U.S. 614; *McMahon*, 482 U.S. 220; *Rodriguez de Quijas*, 490 U.S. 477.

a statute designed to provide minimum substantive guarantees to individual workers."[84]

The biggest strike against the arbitration of Title VII discrimination cases lies in the inherently unequal bargaining positions of the parties. Arbitration is inappropriate for parties with grossly disparate powers.[85] Added to the already unequal employer-employee relationship (where the employee who had to sign a contract with a boilerplate arbitration provision to get the job, now faces the loss or potential loss of her job),[86] is the further degradation of discrimination present in a Title VII action. Upon leaving an offensive, if not outright hostile, work environment, advocates of arbitration would require the employee to submit to employer-ordered arbitration without the protection provided by Title VII-the right to a lawsuit.

The Supreme Court in *Gilmer* rejected these arguments against compulsory arbitration in the context of an ADEA claim.[87] On remand, the court of appeals in *Alford* hurriedly concluded that the rationale behind *Gilmer* applied equally to Title VII claims and therefore Title VII claims could be subjected to compulsory arbitration.[88] But does *Gilmer* so conclusively answer the question presented in *Alford*?

The Supreme Court's decision in *Gilmer* premised its finding on Congress' intent to preclude a waiver of the right to a judicial forum for ADEA claims.[89] Yet in *Alexander*, the Supreme Court found "there can be no prospective waiver of an employee's rights under Title VII . . . since waiver of these rights would defeat the paramount congressional purpose behind Title VII."[90] Addressing Title VII specifically, the Court in *Alexander* concluded that "Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of the courts to assure the full availability of this forum."[91]

While the Supreme Court failed to find a congressional intent to preclude waiver of the right to a judicial forum under the ADEA, it did find such an intent in the context of Title VII claims.[92] On remand, the court of appeals in *Alford* failed to consider the differing congressional intent behind Title VII.

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84. *Nicholson*, 877 F.2d at 225 (quoting Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 737 (1981) (holding the provisions of the Fair Labor Standards Act prevented the predispute waiver, pursuant to employment contract arbitration agreements, of the right to judicial redress)).

85. *See Id.* at 229.

86. "Although this may not constitute the type of duress which renders a contract voidable, we cannot close our eyes to the realities of the workplace." *Id.* at 229.

87. *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. at 1653-55.

88. *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d at 230.

89. *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. at 1653-54.

90. *Alexander*, 415 U.S. at 51.

91. *Id.* at 60 n.21.

92. *Id.* at 48-49.

VI. CONCLUSION

While the Supreme Court refuses to affirmatively change its ruling in *Alexander*, confusion has crept into this area of the law with the recent Supreme Court cases of *Mitsubishi*, *McMahon*, *Rodriguez de Quijas*, and now *Gilmer* favoring arbitration over litigation. The court of appeals in *Alford* seemed to think that *Gilmer* resolved the issue in the context of Title VII claims. While *Gilmer* may have ended the confusion surrounding ADEA claims, it has added even greater confusion to Title VII claims. The *Alford* court stated in its prior decision "[w]e are bound by the broad wording of *Alexander*."[93] Until the Supreme Court affirmatively overrules *Alexander*, the court of appeals is still bound.

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93. *Alford*, 905 F.2d at 108.