Demise of the FAA's Contract of Employment Exception - Gilmer v. Interstate/Johnson Lane Corp., The

Michael G. Holcomb

Follow this and additional works at: https://scholarship.law.missouri.edu/jdr

Part of the Dispute Resolution and Arbitration Commons

Recommended Citation
Available at: https://scholarship.law.missouri.edu/jdr/vol1992/iss1/12
THE DEMISE OF THE FAA's "CONTRACT OF EMPLOYMENT" EXCEPTION?

*Gilmer v. Interstate/Johnson Lane Corp.*

I. INTRODUCTION

The recent trend in the federal courts is to expand the scope of the Federal Arbitration Act (FAA) to include statutory claims. *Gilmer v. Interstate/Johnson Lane Corp.* illustrates this trend by compelling claims under the Age Discrimination in Employment Act of 1967 (ADEA) to arbitration pursuant to an arbitration clause in an employment contract. But does this trend neglect the rights of the individual employee vis-a-vis his employer and does it undermine the purpose of the "contract of employment" exception in the FAA?

This Note will examine the *Gilmer* case and its adherence to the current trend of expanding the scope of the FAA in the area of statutory claims and also its refusal to address the issue of the "contract of employment" exception and to whom it should apply.

II. THE FACTS

Respondent Interstate/Johnson Lane Corporation (Interstate) hired appellant Robert Gilmer as a Manager of Financial Services in May, 1981. Gilmer’s employment agreement required him to register as a securities representative with several stock exchanges, one of which was the New York Stock Exchange (NYSE). The registration application contained, among other things, an arbitration clause which stated he agreed to arbitrate any disputes between him and Interstate.

3. *See infra* notes 57-69 and accompanying text.
8. *Id.*
9. *Id.* The arbitration agreement also stated that arbitration would be required only when the dispute is required to be arbitrated "under the rules, constitutions or by-laws of the organizations with which I register." *Id.* The relevant rule in this case was New York Stock Exchange (NYSE) Rule 347 which provides, in part, that arbitration is required of "any controversy between a registered
In 1987, Interstate terminated Gilmer's employment. He was 62 years old at the time. After filing a claim with the Equal Employment Opportunity Commission (EEOC), he brought suit in the United States District Court for the Western District of North Carolina. In his petition, Gilmer alleged that Interstate discharged him because of his age, thus violating ADEA provisions. Interstate then filed a motion to compel arbitration, pursuant to the arbitration agreement in the registration application as well as the FAA. In arguing against the motion, Gilmer alleged that compelling arbitration of ADEA claims would undermine the purposes and statutory framework of the ADEA. The district court, relying on Alexander v. Gardner-Denver Co., denied Interstate's motion to compel arbitration of the claim, stating that "Congress intended to protect ADEA claimants from the waiver of a judicial forum." The United States Court of Appeals for the Fourth Circuit reversed. The appellate court found "nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements." Appellant Gilmer, on writ of certiorari, sought a determination from the United States Supreme Court that a compulsory arbitration clause in a securities registration agreement was not enforceable when the claim was age discrimination against an employer. The United States Supreme Court affirmed the Fourth Circuit enforcing the arbitration agreement. In a seven to two decision, the court held that an age discrimination claim in a securities registration application was subject to compulsory arbitration under the arbitration agreement and the FAA.

---

representation and any member or member organization arising out of the employment or termination of employment of such registered representative." *Id.* at 1651 (quoting NYSE Rule 347).

10. *Id.* at 1651.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 1652.
18. *Id.*
19. *Id.* at 197.
20. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 41 (1990). The writ was granted to resolve a conflict among the courts of appeals regarding the arbitrability of ADEA claims. *Gilmer*, 111 S. Ct. at 1651. *Compare Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d at 197 (Fourth Circuit finding "nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements") with Nicholson v. CPC Int'l Inc., 877 F.2d 221, 222 (3d Cir. 1989) (Congress intended claims under ADEA to be heard in a judicial forum and to compel arbitration would undermine this intent).
22. *Id.* at 1650.
23. *Id.*
III. LEGAL HISTORY

A. The Federal Arbitration Act

Prior to 1925, courts routinely refused to enforce arbitration agreements because they "ousted jurisdiction" of the courts and violated public policy. The purpose behind passing the FAA was to reverse this hostility federal courts had towards arbitration and to "place arbitration agreements upon the same footing as other contracts." There are two primary sections in the Act. Section two is the substantive section and section one contains the exceptions to the Act. Section two states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or refusal to perform the whole or any part thereof, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

It appears that the only grounds to attack such a clause is on the same grounds that one attacks ordinary contracts, such as fraud, adhesion, and duress. Recognizing this, the Supreme Court ruled that it will not create special common law rules of unconscionability or adhesion to deal specifically with arbitration clauses. But the other primary section of the Act, section one, provides another method of avoiding compulsory arbitration, that is, by falling under one of its exceptions.

Section one states, among other things, that the Act does not apply to "contracts of employment of seamen, railroad employees, or any other class of


25. The FAA applies only to commercial arbitration agreements affecting interstate, foreign, or maritime commerce. Therefore, the act only applies to federal courts. 9 U.S.C. § 2. To enforce agreements affecting intrastate commerce all 50 states have adopted similar statutes permitting the enforcement of arbitration clauses. Shell, Res Judicata and Collateral Estoppel Effects of Commercial Arbitration, 35 UCLA L. REV. 623, 636 n.64 (1988).


28. Id. § 2.

29. See generally Shell, supra note 24, at 400.

30. Id. at n.11; see also Perry v. Thomas, 482 U.S. 483, 493 n.9 (1987) (a court may not construe an arbitration agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law).
workers engaged in foreign or interstate commerce." Since the Act’s adoption, courts struggled with the interpretation of section two as it applies to statutory claims and with both the interpretation and application of section one.

**B. Compulsory Arbitration of Statutory Claims**

The Supreme Court first addressed the issue of applying arbitration clauses to statutory claims in *Wilko v. Swan.* In *Wilko,* the court held that a claim under section 12(2) of the 1933 Securities Act was nonarbitrable because the court doubted the ability of an arbitrator to adequately enforce the special statutory rights of section 12(2) and because of certain interpretations of the 1933 Act. The holding in *Wilko* created a new defense for parties wanting to avoid enforcement of arbitration clauses when their claims were based on statutory rights. It became known as the "public policy" defense. This defense focused on the belief that: (1) arbitration would not be an adequate substitute of the courts in protecting a party’s statutory rights; (2) surrendering to arbitration would be a waiver of one’s statutory rights, which would be contrary to public policy; and (3) the procedural characteristics of arbitration make it unlikely that courts would be able to correct errors in interpretations of the statute.

After *Wilko,* lower courts began applying the "public policy" doctrine to various statutory claims until the doctrine reached its zenith in the late 1960s and early 1970’s. Beginning in 1974, the Supreme Court started expanding the scope of the FAA while simultaneously eroding the *Wilko* doctrine.

---

32. See infra notes 33-90 and accompanying text.
35. *Wilko,* 346 U.S. at 436. Under section 12(2) of the 1933 Securities Act, the defendant has the burden of proving that any misrepresentation or omission was innocent and could not have been corrected by the exercise of due care. 15 U.S.C. § 77l(2).
37. *Id.*
41. *Id.*
Scherk v. Alberto-Culver Co. was the first decision that questioned the Wilko reasoning. In Scherk, the court held that claims arising under section 10(b) of the 1934 Securities Act were arbitrable under the FAA notwithstanding the Wilko decision. The court based its decision more on the international context of the dispute rather than a general attack on Wilko, but the court’s analysis did question the reasoning in Wilko.

The Sherman Act was the next statutory claim to fall under the FAA. In Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, the Supreme Court overruled the line of cases holding that claims under the Sherman Act were nonarbitrable. The court emphasized the "liberal federal policy favoring arbitration agreements" when determining whether a statutory claim is subject to arbitration.

There is nothing in the FAA that establishes a presumption against arbitration of statutory claims, thus the court should enforce such clauses unless it is invalid under reasons recognized at common law. Therefore, the first task in determining the validity of an arbitration clause is to determine whether the parties agreed to arbitrate the dispute. The court is to make this determination "with a healthy regard for the federal policy favoring arbitration."

The next step is to consider whether legal constraints external to the parties’ agreement prevents the arbitration of those claims. This is done by determining whether Congress considered the statutory rights at issue unsuitable for arbitration. Evidence of this can be found by looking at the statute itself or the legislative history. The court determined that the Sherman Act had no such intent and was therefore subject to arbitration.

Besides the effects of making claims under the Sherman Act arbitrable, the Mitsubishi decision also adopted a new trend in the federal courts of enforcing arbitration clauses in statutory claims unless there was a clear congressional intent.

43. 15 U.S.C. § 10(b) (1934).
44. Scherk, 417 U.S. at 515-20.
45. Id. at 513-14.
48. Id. at 640.
49. Id. at 625 (citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).
50. Id.
51. Id.
52. Id. (citing Moses H. Cone, 460 U.S. at 24-25).
53. Id. at 628.
54. Id.
55. Id.
56. Id. at 640.
against arbitration. This new policy rendered few statutes immune from arbitration.

In *Shearson/American Express, Inc. v. McMahon*, the Supreme Court applied this reasoning to claims under the Securities Act of 1934 holding that these claims are subject to arbitration. The court’s reasoning, similar to the reasoning in *Mitsubishi*, was a strong presumption in favor of arbitration which could be overcome only by showing a specific congressional intent against arbitration. The burden of showing this intent was on the party opposing arbitration by using the text, the legislative history, or evidence of "an inherent conflict between arbitration and the statute’s underlying purposes." The court held that there existed no such intent or evidence of a conflict in claims arising under the 1934 Act.

The court in *McMahon* also held that claims arising under the Racketeer Influenced and Corrupt Organizations Act (RICO) were subject to arbitration. The reasoning was the same as that used concerning the 1934 Act, that is there was no clear legislative intent against arbitration nor were the policies behind the RICO statute impeded by allowing arbitration.

The *Wilko* case finally met its demise in *Rodriguez de Quijas v. Shearson/American Express, Inc.* In *Rodriguez de Quijas*, the court held that claims under the Securities Act of 1933 were arbitrable thus overruling the *Wilko* decision. The court’s reasoning rejected the *Wilko* suspicions in the adequacy of arbitration in the enforcement of the 1933 Act by stating that this logic has "fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."

As the Supreme Court was expanding the FAA, it never directly confronted the issue of the enforceability of an arbitration clause in disputes between an employer and an individual employee, until the *Gilmer* decision. This failure

---

57. See Shell, supra note 24, at 406.
60. *McMahon*, 482 U.S. at 238.
61. Id. at 227.
62. Id. (citing Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 217 (1985)).
63. *McMahon*, 482 U.S. at 238.
66. Id.
68. Id. at 485.
69. Id.
raised the issue of how the courts are to interpret the "contract of employment" exception in section one and to whom it is to apply. The lower courts have struggled with this issue since the passage of the Act and there has been much confusion and disagreement among them as to its scope and Congress' underlying purpose behind it.\textsuperscript{71}

C. Interpreting Section One

Section one contains two requirements that must be satisfied before one can be exempted from the act.\textsuperscript{72} First it requires the contract in dispute to be a "contract of employment."\textsuperscript{73} Secondly, the employee must fall within a certain class of employee, such as "seamen, railroad employee, or any other class of workers engaged in foreign or interstate commerce."\textsuperscript{74} The disparity among the courts arises from interpreting the meaning of "contract of employment" and which employees are "engaged in foreign or interstate commerce."\textsuperscript{75}

The majority of case law concerning the "contract of employment" issue is in the area of collective bargaining agreements.\textsuperscript{76} In those cases, the courts treat these agreements as employment contracts within the exception and thus not subject to compulsory arbitration.\textsuperscript{77}

While the courts regularly deal with the exception in the context of collective bargaining, few decisions concern individual employment contracts and the application of section one to them. Cases confronting individual claims focus on the meaning of "engaged in interstate commerce" rather than the meaning of "contract of employment."\textsuperscript{78} These cases also emphasized the strong presumption in favor of arbitration rather than confronting the issues raised by section one.\textsuperscript{79}

\textsuperscript{71} See sources cited infra note 76.
\textsuperscript{72} See 9 U.S.C. § 1; see also text accompanying note 31 supra.
\textsuperscript{73} See 9 U.S.C. § 1; see also text accompanying note 31 supra.
\textsuperscript{74} 9 U.S.C. § 1; see also text accompanying note 31 supra.
\textsuperscript{75} See sources cited infra note 76.
\textsuperscript{77} See cases cited supra note 76.
\textsuperscript{78} See, e.g., Shearson Hayden Stone, Inc. v. Liang, 493 F. Supp. 104, 106 (N.D. Ill. 1980) (contract between New York Stock Exchange brokerage firm and employees involving interstate commerce is to be governed by FAA. The court never addressed the issue of whether the contract falls within the exception); Dickstein v. du Pont, 320 F. Supp. 150, 152 (D.C. Mass. 1970) (an account executive is not a worker engaged in interstate commerce for purposes of the Section one exception).
\textsuperscript{79} See cases cited supra note 76.
Interpretation of the second requirement of section one, the class of employee, receives more judicial notice than does defining "contract of employment."80 The majority of courts adhere to a narrow definition of "other class of workers engaged in foreign or interstate commerce."81 In *Tenney Engineering v. United Electrical Radio & Machine Workers*,82 the court reasoned that since the specified class of workers under the exclusion, seamen and railroad employees, was engaged directly in interstate or foreign commerce, the "other class" of workers must also be engaged directly in interstate or foreign commerce.83 Therefore, workers engaged in the production of goods for subsequent sale in interstate commerce do not fall under the exclusion in section one.84

Overall, the courts give the exclusion a very narrow interpretation if they address the issue at all.85 Few courts even consider congressional intent for guidance in applying section one to employment contracts.86 In fact, section one was not even intended to apply to disputes between employer and employee as witnessed in a statement by the chairman of the ABA committee responsible for drafting the Act:

"[The bill] is not intended to be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is in this."87

Notwithstanding this, the courts readily use the FAA to enforce arbitration clauses in employment contracts, citing the trend of favoring alternative dispute resolutions as their reasoning while ignoring obvious congressional intent to limit the Act from contracts of employment.88 Finally, in *Gilmer*, the Supreme Court heard a dispute between an individual employee and his employer and whether the

---

80. *See* cases cited *supra* note 76 (none of which attempt to define "contract of employment").
81. *See*, e.g., *Bacashihua*, 859 F.2d at 405 (court held that postal employees were a class of workers engaged in interstate commerce for purposes of the FAA exclusion); *see also* cases cited *supra* note 76.
82. 207 F.2d 450.
83. *Id.* at 452.
84. *Id.* at 453. Several courts have followed this narrow definition. *See*, e.g., cases cited *supra* note 76.
85. *See supra* notes 75-84 and accompanying text.
86. *See supra* notes 75-84 and accompanying text.
88. *See*, e.g., cases cited *supra* note 76. The Supreme Court was guilty of doing this in *Gilmer*. 111 S. Ct. at 1651; *see infra* notes 95 & 96 and accompanying text.
FAA exclusion should apply to the case in light of congressional intent.\textsuperscript{89} Even so, the Court chose not to address the issue.\textsuperscript{90}

\textbf{IV. THE INSTANT DECISION}

\textit{A. The Majority Opinion}\textsuperscript{91}

The majority in \textit{Gilmer} held that a claim under the ADEA was subject to arbitration pursuant to an arbitration clause in an application to the NYSE and pursuant to the FAA.\textsuperscript{92} The Court addressed two basic arguments: whether compulsory arbitration would frustrate the purpose of the ADEA, and whether allowing such arbitration was inconsistent with two prior Supreme Court decisions between employer and employees.\textsuperscript{93} Since the issue of whether section one of the Act precluded arbitration of employment disputes was not raised on appeal, the Court reduced the issue to a footnote.\textsuperscript{94} The Court held that the arbitration clause was not in a "contract of employment," because it was in Gilmer's application to the NYSE and not in his contract with Interstate.\textsuperscript{95} Therefore, the contract did not implicate section one.\textsuperscript{96}

In reaching the conclusion that arbitration did not frustrate the purposes behind the ADEA, the Court reasoned that while it is true arbitration focuses on specific disputes between the parties, so does judicial resolution of claims.\textsuperscript{97} Both of these methods can further the social purposes behind the statute.\textsuperscript{98}

The Court found the argument that arbitration would undermine the role of the EEOC in enforcing the ADEA\textsuperscript{99} unpersuasive because a claim subject to arbitration can still be filed with the EEOC, and indeed Gilmer did so.\textsuperscript{100} Also, the EEOC's goal in eliminating discrimination is not dependent upon the filing of a charge against an employer because the agency receives information on alleged

\textsuperscript{89} \textit{Gilmer}, 111 S. Ct. at 1652 n.2.
\textsuperscript{90} \textit{See id.}
\textsuperscript{91} Justice White delivered the opinion, joined by the Chief Justice, Kennedy, O'Connor, Scalia, Souter, and Blackmun. \textit{Id.} at 1650.
\textsuperscript{92} \textit{Id.} at 1657.
\textsuperscript{93} \textit{Id.} at 1652 & 1656.
\textsuperscript{94} \textit{Id.} at 1651 n.2.
\textsuperscript{95} \textit{Id.} In its analysis, the Court expressed no concerns that Interstate required Gilmer to apply with the NYSE as part of his employment. \textit{Id.} at 1650. The Court concluded that it would leave the issue of whether all contracts of employment fall under the exceptions of Section one for another day. \textit{Id.} at 1652 n.2.
\textsuperscript{96} \textit{Id.} at 1652 n.2.
\textsuperscript{97} \textit{Id.} at 1653.
\textsuperscript{98} \textit{Id.}
\textsuperscript{99} \textit{Id.} Under section 626(d) of the ADEA an individual must file a charge with the EEOC before he can file a civil suit. 29 U.S.C. § 626(d). The civil suit is extinguished, however, if the EEOC files a suit against the employer. \textit{Id.} § 626(c)(1). Before the EEOC can bring an action, it must attempt to eliminate the discriminatory practice through informal methods. \textit{Id.} § 626(b).
\textsuperscript{100} \textit{Gilmer}, 111 S. Ct. at 1653.
violations from several "sources."\textsuperscript{101} Gilmer also argued that the forced arbitration deprived him of a judicial forum provided for by the ADEA.\textsuperscript{102} The Court rejected this by stating there was no explicit intent in the text nor in the legislative history to preclude arbitration of ADEA claims.\textsuperscript{103}

Arguing that arbitration would frustrate the purpose of the ADEA, Gilmer contended that arbitration procedures were inadequate to handle ADEA claims.\textsuperscript{104} The Court rejected this argument based on several reasons.\textsuperscript{105} In addressing the bias claim, the Court stated that it was unwilling to "indulge in the presumption" that the arbitral body will be biased.\textsuperscript{106} Concerning the limited discovery claim, the Court stated that it is doubtful that ADEA claims require more extensive discovery than other statutory claims where arbitration has been allowed, such as RICO and antitrust claims.\textsuperscript{107} The appellate review argument was dismissed because the NYSE rules require the findings of the arbitrator to be in writing.\textsuperscript{108} The equitable relief argument was likewise rejected because the NYSE rules do not restrict the types of relief an arbitrator may award.\textsuperscript{109}

Gilmer also claimed that due to the unequal bargaining power between employer and employee, compelling arbitration frustrates the purpose of the ADEA.\textsuperscript{110} The Court held that mere inequality in bargaining power is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.\textsuperscript{111} A court will invalidate an arbitration clause if the agreement to arbitrate "resulted from the sort of fraud or overwhelming economic power that would provide grounds for the 'revocation of any contract.'"\textsuperscript{112} In this case, there was no evidence of such fraud or coercion.\textsuperscript{113}

Gilmer also argued that to compel arbitration in this case would contradict the holdings in \textit{Alexander v. Gardner-Denver Co.}, and \textit{Barrentine v. Arkansas-Best Freight System, Inc.}\textsuperscript{114} In those cases, the Supreme Court held that claims under \textit{Title VII}\textsuperscript{115} and claims under the \textit{Fair Labor Standards Act}\textsuperscript{116} were not

\begin{itemize}
    \item \textsuperscript{101} Id.
    \item \textsuperscript{102} Id.
    \item \textsuperscript{103} Id. at 1654.
    \item \textsuperscript{104} Id. Gilmer claimed that (1) arbitration panels would be biased, (2) the discovery allowed in arbitration is more limited than in judicial proceedings such that it is difficult to prove discrimination, (3) arbitrators do not issue written opinions therefore preventing effective appellate review and finally, (4) the procedures do not provide for broad equitable relief and class actions. Id. at 1654-55.
    \item \textsuperscript{105} Id. at 1654-55.
    \item \textsuperscript{106} Id. 1654 (citing \textit{Mitsubishi}, 473 U.S. at 634).
    \item \textsuperscript{107} Id.
    \item \textsuperscript{108} Id. at 1655.
    \item \textsuperscript{109} Id.
    \item \textsuperscript{110} Id.
    \item \textsuperscript{111} Id.
    \item \textsuperscript{112} Id. at 1656 (citing \textit{Mitsubishi}, 473 U.S. at 627).
    \item \textsuperscript{113} Id.
    \item \textsuperscript{114} 450 U.S. 728 (1981).
    \item \textsuperscript{116} 29 U.S.C. §§ 201 - 219 (1938).
\end{itemize}
arbitrable because arbitration would frustrate the purpose of those acts. In Alexander, the Court held that Congress intended federal courts to exercise final enforcement of Title VII and deferral to arbitral decisions would be incompatible with that intent. In Barrentine, the Court held that congressional intent in the FLSA was to give employees a right to bring their minimum-wage claim in a judicial forum. To compel arbitration in such claims would frustrate that intent. The Court in Gilmer distinguished those cases thus avoiding the undesirable job of overruling them. Because of these reasons, the Court held that Gilmer had failed to meet his burden of showing that Congress intended to preclude arbitration of claims under the ADEA and therefore the claims were subject to arbitration.

B. The Dissent

The dissent listed three reasons why ADEA claims cannot be compelled to arbitration: (1) the majority avoided the primary issue, (2) compulsory arbitration would frustrate Congressional intent of the ADEA, and (3) Congress did not intend for the FAA to apply to parties of unequal bargaining power.

The dissent believed that the majority avoided the main issue in the case. Justice Stevens stated, "[t]he Court today . . . [in its holding], skirts the antecedent question of whether the coverage of the Act even extends to arbitration clauses contained in employment contracts, regardless of the subject matter of the claim at issue." The dissent was referring to section one of the FAA and the apparent intent of Congress in adding that section. Stevens disagreed with the

117. Barrentine, 450 U.S. at 742; Alexander, 415 U.S. at 56.
118. Alexander, 415 U.S. at 56.
119. Barrentine, 450 U.S. at 745.
120. Id.
121. Gilmer, 111 S. Ct. at 1657. The Court found three reasons to distinguish. First, Gardner-Denver and Barrentine "did not involve the issue of the enforceability of an agreement to arbitrate statutory claims." Id. Rather, they involved the issue of "whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims." Id. Secondly, the arbitration clauses in Gilmer and Barrentine occurred in the context of collective-bargaining agreements and these courts were concerned about the tensions between collective representation and individual statutory rights. Id. Finally, those cases were not decided under the FAA because they involved intrastate commerce and therefore were not decided under the "liberal federal policy favoring arbitration agreements." Id. (citing Mitsubishi, 473 U.S. at 625).
122. Id.
123. Justice Stevens wrote the dissent, joined by Justice Marshall. Id.
124. Id.
125. Id.
126. Id. (emphasis added).
127. See supra text accompanying note 31.
128. See Gilmer, 111 S. Ct. at 1657.
majority's narrow interpretation of that section stating that Congress' intent when passing the Act was for it not to be applied to employment disputes.129

His second argument was that compelling arbitration of ADEA claims would frustrate the congressional purpose behind the ADEA.130 Broad injunctive relief is the "cornerstone to eliminating discrimination in society" and because arbitration does not have this characteristic much of the purpose behind ADEA would not be realized.131

Finally, Stevens argued that it is doubtful Congress intended the FAA to apply to statutory claims arising from contracts between parties of unequal bargaining power, such as employer and employee.132 The Court, in its holding, has "put to one side any concern about the inequality of bargaining power between an entire industry, on the one hand, and an individual customer or employee, on the other."133

V. COMMENT

The Gilmer decision illustrates the trend of expanding the FAA to include more and more statutory claims.134 But in its attempt to continue the trend, the Supreme Court expanded the FAA into individual employment disputes without considering the underlying purpose of section one. The majority addressed the issue in a footnote by giving a pure textual reading of the phrase—"contracts of employment."135 No arguments were made as to the congressional intent behind section one of the Act and thus it seems the Court gave no consideration of it. But as the dissent points out, there is evidence that Congress intended the Act to be limited to commercial disputes.136 An important reason behind this intent is Congress' awareness of the unequal bargaining power between employer and employee.137 Senator Walsh succinctly stated this awareness in the hearings before the Judicial Committee considering passage of the FAA:

It is the same with a good many contracts of employment. A man says, "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.138

129. Id. at 1659.
130. Id. at 1660.
131. Id.
132. Id. at 1661.
133. Id.
134. See supra notes 42-69 and accompanying text.
135. Gilmer, 111 S. Ct. at 1651 n.2.
136. Id. at 1658-60.
137. Id. at 1661.
138. Id. at 1659 (citing Hearing, supra note 87, at 9) (Senator Walsh's testimony before the Senate Committee on the Judiciary).
The majority in *Gilmer* does address the issue of unequal bargaining power, but addresses the issue in the context of common law defenses to enforcement of a contract. Since unequal bargaining power existed between parties in some of the Court's prior decisions which upheld the arbitration clause, the majority held that disparity in bargaining power would not be enough to invalidate an arbitration agreement. What the Court failed to consider was whether section one expressed the intent by Congress to preclude the Act from applying to employment disputes because of the inherent inequality in bargaining power between employer and employee.

Footnote two could be foreshadowing any interpretations the Supreme Court will give section one, but the footnote itself gives little guidance to the lower courts. What is the meaning of "any other class of employees?" It is apparent that Congress did recognize the unequal bargaining power between employer and employee and thus attempted to protect employees. Notwithstanding this intent, lower courts have continuously interpreted the exclusion narrowly. The *Gilmer* case gave the Supreme Court a chance to take that congressional intent and put it into a working definition of section one. Instead the Court disposed of the issue in a footnote.

As for the "public policy" defense first espoused in *Wilko*, the Court's decision in *Gilmer* seems consistent with the recent trend of expanding the FAA to include statutory claims unless there is a clear intent in the text or the legislative history of the statute precluding arbitration. The Court has increasingly rejected the idea that arbitration is an inadequate forum to hear statutory claims and the *Gilmer* case follows this trend. In fact, it seems that the *Gilmer* case is demonstrative of the eventual demise of the "public policy" defense by an increasingly expansive interpretation of the FAA.

---

139. *Id.* at 1655.
140. *Id.*
141. It could be argued that by reducing the question to a footnote and narrowly defining "contracts of employment" the Court did in fact address the issue and found no such intent from Congress to prevent employment disputes from the scope of the FAA. *See supra* notes 94-95 and accompanying text.
143. *See supra* text accompanying note 31.
144. *See supra* notes 87 & 138 and accompanying text.
145. *See supra* notes 72-88 and accompanying text.
146. *Gilmer*, 111 S. Ct. at 1652-53 n.2; *see supra* text accompanying note 94.
147. *See supra* notes 42-69 and accompanying text.
148. *See supra* notes 42-69 and accompanying text.
VI. CONCLUSION

The results of the *Gilmer* decision will undoubtedly be an expansion of the FAA into employment disputes. By focusing on the trend favoring arbitration rather than Congress' intent to exclude employment contracts from the Act, the Court has left in doubt the future effect section one will have on employment disputes. Since it is clear that the recent trend is to favor arbitration in suits involving statutory claims, the Court must eventually decide on the apparent conflict between this trend and section one of the Act. Until that time the lower courts will be left to decide whether section one has any life remaining.

MICHAEL G. HOLCOMB