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Arbitration Agreements: When do Employees Waive Their *Wrights*?*

I. INTRODUCTION

Over the past several decades, many questions have arisen regarding employment agreements that contain clauses requiring the mandatory arbitration of employment disputes. These provisions are commonly found in employment contracts, free-standing arbitration agreements, employee handbooks, and other similar documents.[1] Until 1999 mandatory arbitration provisions were also included in securities exchange registration forms.[2] Such provisions in an employment contract require that employment dispute claims, such as discrimination and wrongful termination, be subject to arbitration rather than heard in a judicial forum. Arbitration clauses have become especially popular because arbitration is typically less expensive, faster, and less formal than court proceedings.[3] However, members of the legal and business communities have been perplexed by the legal issues surrounding the construction and enforcement of these mandatory arbitration clauses, specifically where alleged violations of statutory rights are at issue.

This confusion stems largely from two United States Supreme Court decisions, *Alexander v. Gardner-Denver*[4] and *Gilmer v. Interstate/Johnson Lane Corp.*[5] The Court in *Gardner-Denver* held that an employee's statutory right to a trial under Title VII, for his claim of

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1. See John P. Furfaro & Marury B. Josephson, *Employment Arbitration*, N.Y. L.J., Sept. 11, 1997 at 3.

2. After much pressure from plaintiffs, civil rights groups, and Congress, as of January 1, 1999, the National Association of Securities Dealers (NASD) no longer requires its securities industry employees to arbitrate statutory employment discrimination claims. Peter M. Pranken & Jeffrey D. Williams, *Alternative Dispute Resolution in the Courts and in the Real World,* A.L.I. ADV. EMP. L & LITIG., Dec. 3, 1998, at *18. Employment discrimination claims in violation of a statute will be eligible for arbitration only where the parties agree to arbitrate after the claim has arisen. *Id.* Brokerage houses are not required to follow suit. *Id.* The amendment does not apply to claims filed before 1999. *See* Koveleskie v. SBC Capital Mkts., 167 F.3d 361 (7th Cir. 1999).

3. Martin H. Malin & Robert F. Landenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187 (1993).

4. 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974).

5. 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991).

wrongful discharge as a result of a racially discriminatory employment practice, was not precluded by prior submission of his claim to final arbitration, as provided for by a nondiscrimination clause of a collective-bargaining agreement.[6] This decision has frequently been interpreted to mean that arbitration cannot be compelled in discrimination cases.[7] Several years later, the Supreme Court decided *Gilmer*, holding that an individual's termination-of-employment claim under the Age Discrimination in Employment Act (ADEA) could be subjected under the Federal Arbitration Act (FAA) to compulsory arbitration pursuant to the arbitration agreement in the securities registration Form U-4 the employee was required to sign as a condition of employment.[8] Several courts have interpreted this decision as overruling *Gardner-Denver* and requiring the arbitration of discrimination claims.[9]

The contradiction between the two cases is apparent. In *Gardner-Denver*, an alleged violation of an employee's rights under Title VII, which resulted in a discrimination claim, was not subject to a waiver; while in *Gilmer*, the right to a judicial forum for a discrimination claim arising under the ADEA could be waived by entering into an agreement requiring the mandatory arbitration of employment disputes.[10] In light of this conflict, the Supreme Court granted certiorari to *Wright v. Universal Maritime Services Corp.*[11] Many interested parties anxiously awaited the Court's decision in *Wright*, hoping for a resolution to the *Gilmer/Gardner-Denver* conflict. These parties anticipated receiving additional guidance from the Court on the use of arbitration agreements and the possible waiver of statutory rights.[12] However, the Supreme Court's decision in *Wright* did not provide a clear resolution to this conflict. The Court held that the collective bargaining agreement's (CBAs) general arbitration clause at issue did not require an employee to use the arbitration procedure for an alleged violation of the Americans with Disabilities Act (ADA) because the language of the

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6. *Gardner-Denver*, 415 U.S. at 36.

7. Nancy Erika Smith, *Is the Bell Tolling for Mandatory Arbitration?*, 196 N.J. LAWYER. 28 (April 1999).

8. *Gilmer*, 500 U.S. at 20.

9. Carol E. Neesemann, *Resistance to Arbitration is Evident in First Circuit's* 'Rosenberg' *Ruling*, N.Y.L.J., Mar. 11, 1999.

10. Wright v. Universal Maritime Servs. Corp., 525 U.S. 70, 119 S.Ct. 391, 142 L.Ed.2d 361 (1998).

11. 121 F.3d 702 (1997), *cert. granted*, 119 S.Ct. 391 (vacating and remanding the lower Court's decision).

12. *See* Jennifer Click, *Arbitration Agreements, Benefit Plan Changes are Among Issues on Supreme Court's Docket*, 17 HR NEWS (Oct. 1998) at 1,4.

contract was not specific enough for Mr. Wright to know that he had waived his statutory rights by agreeing to the employment contract.[13]

In its decision in *Wright*, the Court addressed a number of important issues regarding arbitration clauses, including the confusion involved in the *Gardner-Denver* and *Gilmer* decisions, the presumption of arbitrability, and the "clear and unmistakable" standard for waiving statutory rights. Additionally, the opinion addressed such issues as the distinction between individual and union-negotiated rights, and that between statutory and CBA rights.[14]

Unfortunately, *Wright* did not address a number of issues of concern to those who must work with or under arbitration clauses. The issues left unaddressed include the validity of a union-negotiated waiver, and thus the enforceability of such a waiver (as appear to be at issue in both *Gilmer* and *Gardner-Denver*), the applicability of the Federal Arbitration Agreement (FAA) to this case, and the validity of CBA pre-dispute agreements to arbitrate employment discrimination claims. Moreover, *Wright* does not enter into the realm where a CBA clearly encompasses employment discrimination claims, nor into the realm of areas outside collective bargaining.[15] The exclusion of these topics suggests that the scope of *Wright* is limited, and that while the holding has provided some guidance, it has also left several questions unanswered.

Both addressed and unaddressed issues in *Wright* are significant in that they seem to send a message that *Gilmer* did not overrule *Gardner-Denver*. The Court's opinion and the tense judicial climate in which the decision was made reveal the difficulty courts are having in balancing the protection of statutory rights and the enforcement of employment contract provisions. This note looks at the questions *Wright* answered and discusses the guidance *Wright* provides on certain issues regarding arbitration agreements. The analysis also discusses the decision's limitations and other concerns the legal and business communities continue to face where arbitration agreements are concerned. Part II of this note outlines the background and development of the law regarding mandatory arbitration clauses. It also provides examples of different circuits' interpretations of the conflict between *Gardner-Denver* and *Gilmer*.

Part III gives the facts of *Wright* and discusses the analysis used by the Supreme Court in deciding the matter. Part IV suggests that the

13. *Wright*, 119 S.Ct. at 393.
14. *Id.*
15. *Id.*

Court narrowly defined the issue[16] and thereby avoided addressing certain issues relating to the enforceability of arbitration agreements, but that even within this narrow construction, the Supreme Court has sent the message that *Gilmer* did not overrule *Gardner-Denver*. Rather, the Court's decision seems to limit *Gilmer's* application. The analysis further suggests that there is still some confusion surrounding both the construction and the enforceability of arbitration agreements that employers, employees, and lawyers should recognize. Part V concludes that while arbitration is often a preferred method of dispute resolution, it can result in the loss of certain rights and privileges, and therefore, should only be used when it is appropriate for the particular matter at hand and when the arbitration procedure is knowingly and voluntarily entered into by the employee.

II. BACKGROUND

As suggested previously, the *Wright* decision comes in the midst of a variety of legal precedents regarding mandatory arbitration clauses in employment contracts. Specifically, the conflict between *Gardner-Denver* and *Gilmer* is of extreme importance. *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*[17] illustrates this conflict and provides an example of the belief that *Gilmer* overruled *Gardner-Denver*. *Cremin*, addressed the conflict between *Gilmer* and *Prudential Insurance Co. v. Lai*,[18] which largely the *Cremin* court considered to be in line with the holding in *Gardner-Denver*.[19] The *Cremin* court said:

> Regardless of any personal views this Court may have regarding *Gilmer*, we are obligated, as a district court, to give it full force. Although this Court is sympathetic to the *Lai* approach, we find the substantial authority refusing to follow *Lai* is more in keeping with the principles *Gilmer* espoused.[20]

16. The Court made its decision on the basis of the arbitration agreement's construction, particularly the Collective Bargaining Agreement's (CBA) general terms. The contract provision's general terms were not sufficiently clear as to indicate to the Court or to Wright that he would waive statutory rights by entering into the contract.

17. 957 F. Supp 1460 (N.D. Ill. 1997).

18. Prudential Ins. Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994). In *Lai* the Ninth Circuit held that two employees, who signed U-4 forms containing arbitration agreements, could not be compelled to arbitrate their sexual discrimination and abuse claims under Title VII, because they did not "knowingly enter into any agreement to arbitrate employment disputes." *Id.* at 1301.

19. The Court looked at Congressional intent for Title VII claims. The House Report used was based on *Gardner-Denver*. The Court notes that *Gardner-Denver* was distinguished in *Gilmer*. *See Cremin*, 957 F. Supp. at 1460.

20. *Cremin*, 957 F. Supp. at 1475.

This language demonstrates the tension between *Gardner-Denver* and *Gilmer* and indicates a commonly held notion that *Gilmer* is the current controlling law.

The Fourth Circuit has also adopted this belief, as illustrated by its decision in *Austin v. Owens-Brockway Glass Container, Inc.*[21] In *Austin* the Fourth Circuit followed *Gilmer*, holding that a collective bargaining agreement that explicitly called for the arbitration of gender and disability discrimination subjected Austin's Title VII and ADA claims to mandatory arbitration.[22] Furthermore, using *Gilmer* as its guide, the Fourth Circuit said that because Austin did not first submit her claim to arbitration under the collective bargaining agreement, she could not bring the lawsuit.[23] The *Austin* court specifically noted that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded it by statute; it only submits to their resolution in an arbitral, rather than judicial forum."[24] Holding fast to *Gilmer*, the *Austin* decision follows *Gilmer*. It rejects the principal concern in *Gardner-Denver*, that arbitration is an "inappropriate forum for the resolution of Title VII statutory rights."[25] *Austin*, therefore, suggests that *Gilmer* overruled *Gardner-Denver*, even though the Court's opinion in *Gilmer* explicitly distinguishes the two cases.[26] Specifically, the Court in *Gilmer* indicates that *Gilmer* is different from *Gardner-Denver*, because the latter involved the issue of whether arbitration of contract-based claims precluded the judicial resolution of statutory claims where the contract was in the form of a CBA, and was

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21. 78 F.3d 875 (1996), *cert. denied*, 519 U.S. 980 (1996).

22. *Id.* at 877-78.

23. *Id.*

24. *Id.* at 880 (quoting *Gilmer*, 500 U.S. at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)).

25. *Austin*, 78 F.3d at 875 (quoting *Gardner-Denver*, 415 U.S. at 56).

26. The Court in *Gilmer* states:

> There are several important distinctions between the Gardner-Denver line of cases and the case before us. First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. . . . Second, because arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA, which, as discussed above reflects "a liberal federal policy favoring arbitration agreements." (quoting *Mitsubishi Motors*, 473 U.S. at 625).

Gilmer, 500 U.S. at 35; *See also* Pryner v. Tractor Supply 109 F.3d 354, 364 (7th Cir. 1997), *cert. denied*, 118 S.Ct. 294 (1997), (reiterating this distinction). In light of the distinction, the Fourth Circuit's decision in *Austin* seems to directly contradict the intent of the *Gilmer* decision as illustrated by the Court's distinguishing the *Gardner-Denver* line of cases from *Gilmer*.

not decided under the FAA.[27] Thus, it is interesting and somewhat confusing that the Supreme Court refused to grant certiorari to *Austin*.[28]

The Supreme Court also refused to grant certiorari to *Duffield v. Robertson-Stevens & Co.*[29] in which the Ninth Circuit Court of Appeals issued an opinion rejecting the Fourth Circuit's holding in *Austin*, calling the *Austin* decision "troubling."[30] The Ninth Circuit held that employees who sign arbitration agreements as a condition of employment cannot be compelled to arbitrate Title VII discrimination claims.[31] In *Duffield*, new employees were required to sign employment agreements that provided for the mandatory arbitration of employment disputes, including Title VII claims.[32] On appeal, the Ninth Circuit overturned the lower court's decision that the claims were arbitrable. The *Duffield* court found that one of Congress' primary goals in enacting the Civil Rights Act of 1991 (CRA) was to "strengthen" Title VII, by making it easier to bring and prove lawsuits; by increasing the judicial remedies available to compensate victims of discrimination; and by providing a right to damages and trial by jury.[33] The Ninth Circuit also concluded that the new provisions in the 1991 Act suggested that it was not Congress' intent to have Title VII claims arbitrated. Thus, the Ninth Circuit followed the holding in *Gardner-Denver*, that an employee could not be barred from bringing Title VII claims into a judicial forum by an arbitration clause in a collective bargaining agreement.[34] The Ninth Circuit stated, "Congress in no way intended to incorporate *Gilmer*'s holding into Title VII, or to authorize compulsory arbitration of Title VII claims."[35] Thus, according to the Ninth Circuit, Congress' clearly expressed intent regarding compulsory arbitration was in direct opposition to *Gilmer*.

Additionally, the Ninth Circuit's decision in *Duffield* directly contradicts the Fourth Circuit's decision in *Austin*; yet, the Supreme

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27. *Id.*

28. The court in *Wright* notes that in contrast to *Wright* the CBA in *Austin* containted its own specific antidiscrimination provision. *Wright*, 119 S.Ct at 396-97. This specific provision may help account for the Courts denial of certitorari in light of the "clear and unmistakable" standard discussed herein.

29. 144 F.3d 1182 (9th Cir. 1998).

30. *Id.* at 1192.

31. *Id.* The employees had to sign U-4 Forms as conditions of employment in the securities industry. Certain provisions in the form contained mandatory arbitration clauses for employment disputes. The signing of these agreements are no longer required. *See* discussion *supra* note 2.

32. *Id.*

33. *Id.* at 1193 (referring to H.R. REP. No. 40(I), at 30 (1991); H.R.REP. No. 40(II), at 1-4, (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694-96).

34. *Id.*

35. *Id.* at 1195 (noting that the CRA of 1991 was passed almost simultaneously with the issuance of the Gilmer decision).

Court denied certiorari in both cases. It is also significant that the Fourth Circuit decided *Wright* according to the precedent it set forth in *Austin* and the Supreme Court agreed to hear *Wright*. Perhaps the Supreme Court recognized the need to address the conflict between the *Austin* and *Duffield* lines of decisions and chose to do so by granting certiorari to *Wright*. By granting cert, the Supreme Court seems to be sending a message that *Gilmer* is limited in its facts and that the Fourth Circuit should move away from a *per se* enforcement of arbitration agreements, especially where collective bargaining agreements are concerned.

III. WRIGHT DID NOT WAIVE HIS STATUTORY RIGHTS

Wright v. Universal Maritime Services Corp. involved Wright, a longshoreman and member of the International Longshoremen's Association, AFL-CIO (Union), who was subject to a collective-bargaining agreement (CBA) and a Longshore Seniority Plan, both of which contained arbitration clauses. When Wright injured his right heel and his back while working, he sought compensation from his employer for the permanent disability and in a settlement received $250,000 plus $10,000 for attorney's fees. He later returned to the Union hiring hall, asked to be referred to work, and worked for four stevedoring companies. When the companies found out that he had previously settled a claim for permanent disability, they informed the Union that they would not accept Wright for employment, because a person certified as permanently disabled was not qualified to perform longshore work under the CBA. Although Wright failed to file a timely grievance, as was the expected procedure under the CBA, the Union advised Wright to file a claim in federal court under the ADA. He filed a claim in district court, alleging that the stevedoring companies and the SCSA violated the ADA by denying him work.[36]

The district court dismissed the case without prejudice because Wright failed to pursue the arbitration procedure provided by the CBA.[37] On appeal, the Fourth Circuit followed its previous decision in *Austin v. Owens-Brockway*[38] and upheld the lower court's decision. The Fourth Circuit in *Austin* held:

> Whether the dispute arises under a contract of employment growing out of securities registration application, a simple employment contract, or a collective bargaining agreement, an agreement has yet

36. *Wright*, 119 S.Ct. at 394.

37. *Id.*

38. 78 F.3d 875 (4th Cir. 1996), *cert. denied*, 519 U.S. 980 (1996).

> been made to arbitrate the dispute[;] [s]o long as the agreement is voluntary, it is valid, and . . . it should be enforced.[39]

This language suggests that *Austin* rejects the *Gardner-Denver* decision in favor of *Gilmer*, resulting in a *per se* rule requiring individuals to waive their federal statutory rights if they enter into an arbitration agreement voluntarily. Based upon this rule, Wright was required to arbitrate his claim.[40]

In a unanimous decision, the Supreme Court vacated and remanded the Fourth Circuit's decision.[41] The Court reasoned that Wright's claim was a statutory claim under the ADA, not a CBA or a contractual right (as in *Gardner-Denver*) and that the statutory claim was not subject to a presumption of arbitrability.[42] The Court further stated that any CBA requirement to arbitrate must be "clear and unmistakable."[43] Because the arbitration requirement did not meet this standard, Wright did not waive his right to have his claim heard in a judicial forum. In so limiting the scope of the issue at hand, the Supreme Court avoided ruling on the issue of the enforceability of such a waiver.

IV. THE WAIVER OF FEDERAL STATUTORY RIGHTS IN ARBITRATION AGREEMENTS

In *Wright*, the Supreme Court addressed several important issues regarding arbitration agreements. Overall, these issues should have a significant effect on case law regarding arbitration. However, since the scope of the decision is narrow, the *Wright* decision is limited in its application and implications.

A. The Conflict Between Gardner-Denver and Gilmer

The Court acknowledged in *Wright* the "tension" between its decision in *Gardner-Denver* and that in *Gilmer*.[44] At issue in *Gardner-Denver* and *Gilmer*, and the essence of the conflict between the two, is the enforceability of an arbitration agreement where violations of federal statutory rights are alleged. *Gardner-Denver* held that an employee's rights under Title VII are not subject to waiver, while *Gilmer* held that the right to present an ADEA claim in a judicial forum

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39. *Id.* at 885.

40. *See Wright*, 119 S.Ct at 394.

41. *Id.* at 397.

42. *Id.* at 395-96. "Presumption of arbitrability" means that if there is a possibility that an arbitration clause may cover an asserted claim, then the claim is presumed to be arbitrable, or subject to arbitration. *Id.*

43. *Id.* at 396.

44. *Id.* at 395.

could be waived.[45] Respondent's argument and the Fourth Circuit decision suggest that *Gilmer* had overruled G*ardner-Denver*.[46] Specifically, the stevedoring companies argued that *Gilmer* had "sufficiently undermined *Gardner-Denver* that a union can waive employees' rights to a judicial forum."[47]

However, the Supreme Court in issuing *Gilmer* did not indicate that it overruled *Gardner-Denver*, and as such, no express declaration was made in *Wright* either. Nor did the Court indicate that *Wright* overruled either of these two precedents. In fact, the Court did not reach the issue of the enforceability of a waiver of the right to a judicial forum for hearing civil rights claims. The Court explained:

> Petitioner and the United States amicus would have us reconcile the lines of authority by maintaining that federal forum rights cannot be waived in union-negotiated CBAs even if they can be waived in individually executed contracts—a distinction that assuredly finds support in the text of Gilmer.[48]

But the Court continued to explain that the Justices "find it unnecessary to resolve the question of the validity of a union-negotiated waiver, *since it is apparent . . . that no such waiver has occurred.*"[49]

Thus, from this ruling in *Wright* we find that prior to discussing the enforceability of a waiver, courts must look at whether a waiver has actually occurred. The Court's decision provides a "clear and unmistakable" standard for deciding whether a waiver has occurred.[50]

Even though the Court found that Wright had not waived his statutory rights and did not address the issue of enforcing such waivers, the Supreme Court's decision in *Wright* sends the message that *Gilmer* did not overrule *Gardner-Denver*. In fact, *Wright* reiterates the distinction between the two cases. *Wright* follows *Gardner-Denver* by allowing Wright to have his statutory claim heard in a judicial forum. The decision limits *Gilmer* by suggesting that individual statutory rights should be considered separate from CBA-conferred rights. The decision

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45. *See Gardner-Denver*, 415 U.S. at 51; *Gilmer*, 500 U.S. at 35.

46. *Wright*, 119 S.Ct. at 394.

47. *Id.* at 395.

48. *Id.* The agreement in question in *Gardner-Denver* was a collective bargaining agreement, while the agreement in *Gilmer* was not.

49. *Id.* (emphasis added).

50. Since *Wright* does not address the issue of enforceability, the decision is limited in that it does not resolve some important issues that frequently arise in the courts today. For example, it is unclear whether ADEA and ADA claims differ from Title VII claims regarding the enforceability of a waiver of the right to take civil rights matters into a judicial forum. In *Gardner-Denver* the Court held that Title VII rights could not be waived, while in *Gilmer* the Court held that ADEA rights could be waived. However, both are considered statutory rights, so perhaps no distinction need be made.

in *Wright* also rejects the *per se* standard and replaces it with the "clear and unmistakable" standard.[51]

Although the court found it unnecessary to enter into the realm of the enforcement of an arbitration agreement, the *Wright* opinion distinguishes the *Gilmer* and *Gardner-Denver* decisions in light of one contract being individually negotiated and the other being the result of a CBA. This distinction is helpful in reconciling the conflict between the two cases. The different kinds of employment contracts account at least partially for the different holdings. However, one can only speculate as to the Court's intention, since the *Wright* Court declined to address the issue of waiver enforceability.[52]

The Supreme Court may also be sending this message by denying certiori to *Duffield v. Robertson Stephens & Co.*[53] In *Duffield*, the Ninth Circuit held that employees who sign arbitration agreements as a condition of employment cannot be compelled to arbitrate Title VII discrimination claims. This refusal suggests that the Supreme Court may not always uphold mandatory arbitration of statutory claims as provided in certain employment agreements. Employers, employees, and legal practitioners should be mindful of decisions as such.[54]

B. "Presumption of Arbitrability"

The Court's reasoning behind its decision in *Wright* addresses the issue of a "presumption of arbitrability." The Supreme Court had previously found a presumption of arbitrability in section 301 of the Labor Management Relations Act (LMRA).[55] The *Wright* Court, quoting from a previous decision, stated that for collective-bargaining agreements "there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'"[56]

If a possibility exists that the arbitration clause may cover the asserted claim, then it is presumed to be subject to arbitration. The

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51. *Wright*, 119 S.Ct. at 396.

52. *Id.* at 395.

53. 144 F.3d 1182 (9th Cir. 1998), *cert. denied*, 119 S.Ct 445 (1998).

54. This trend may upset some employers because in the past few years arbitration agreements have become popular in employment contracts as a means ensuring a less expensive and more efficient forum for resolving employment disputes.

55. 29 U.S.C. § 185 (1994).

56. *Wright*, 119 S.Ct. at 395 (citing AT&T Technologies, Inc. v. Communications Workers 475 U.S. 643, 650 (1986) (quoting Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582-3 (1960))).

Court, however, went on to state that the principle rationale behind the presumption of arbitrability was that arbitrators are in a better position than courts to interpret the terms of a CBA, but that the presumption does not reach beyond this rationale.[57] This statement suggests that the converse is true; when the claim does not fall under the terms of a CBA, an arbitrator is not necessarily in the better position to decide the claim.

In *Wright* the claim arises out of the ADA, not out of an employment contract containing a CBA. As stated by the Court, the issue at hand in *Wright* "ultimately concerns not the application or interpretation of any CBA, but the meaning of a federal statute."[58] Simply stated, in *Wright* there is not a question of whether an arbitrator is in a better position to address CBA claims. The judicial courts are those who are most familiar with the adjudication of statutory claims because there has not been an alleged violation of a CBA right. Thus, the Court suggests that the statutory right asserted under the ADA is distinguished from a right conferred by the CBA, and therefore, is not subject to the presumption of arbitrability as the CBA-conferred right would.

C. A Statutory Right

The Court's indication that the claim in *Wright* is a statutory claim arising under the ADA and not a claim arising from an alleged violation of a CBA-conferred right is significant. When this distinction is applied to *Wright*, the Court concludes that Wright may not be qualified for his position as the CBA requires, but he may prevail if the refusal to hire him violated the ADA.[59] Additionally, even if the CBA created a right parallel to the statutory right, the question for the arbitrator would be "not what the parties have agreed to, but what federal law requires; and that is not a question which should be presumed to be included within the arbitration agreement."[60] Thus, the Court suggests that statutorily conferred rights and the applicable federal law within a CBA should be and are best heard in a judicial forum.

This issue is a primary distinction between *Gilmer* and *Gardner-Denver*, as the Court in *Gilmer* pointed out.[61] This distinction suggests that *Gilmer* is limited and further suggests that where collective

57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Gilmer*, 500 U.S. at 35.

bargaining agreements are concerned, a *Gardner-Denver* based approach may be more appropriate.

Justice Hall's dissenting opinion in *Austin* distinguishes between collective bargaining agreement rights and individual statutory rights as well. Justice Hall suggests that the context of the case, specifically whether there is a collective bargaining agreement, is the key factor in deciding which precedent to use, *Gilmer* or *Gardner-Denver*.[62] He suggests that the contractual rights under a collective bargaining agreement are different from independent statutory rights and that independent statutory rights cannot be waived like the right to strike, which is a collective activity. Therefore, he disagreed with the Fourth Circuit's decision in *Austin* and probably would have agreed with the Supreme Court in *Wright*.

D. The Federal Arbitration Act

In deciding arbitration agreement matters, courts often look to the Federal Arbitration Act's (FAA) presumption of arbitrability,[63] especially after the presumption's enforcement in *Gilmer*. In fact, the Supreme Court in *Wright* said that its ruling in *Gilmer* gave heavy consideration to the federal policy favoring arbitration in the FAA.[64] The Court also stated that "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."[65] The FFA was first passed in 1925 and then reenacted in 1947 to reverse the "longstanding judicial hostility" to arbitration that the American judicial system had carried over from English common law.[66] In essence, the FAA gives arbitration agreements the same legal standing as other contracts, so that contract law governs whether an agreement to arbitrate has been made and whether it is enforceable.[67]

The Court in *Wright* declined to address the issue of whether the FAA applied, but the decision seems to reject the arbitrability presumption. The Court did not address this issue because the presumption of arbitrability in the Labor Management Relations Act, which the Court did address, is the same as that of the FAA.[68] Also, the Fourth Circuit held elsewhere that the FAA did not apply to CBAs.[69]

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62. *Austin*, 78 F.3d at 885-86 (Hall, J. dissenting).
63. *See Gilmer* 500 U.S. at 24.
64. *See Wright*, 119 S.Ct. at 394-95.
65. *Id.* at 395
66. *Gilmer*, 500 U.S. at 24.
67. *Id.*
68. *Wright*, 119 S.Ct. at 395 n.1.
69. *See Austin*, 78 F.3d at 879 (referring to Domino Sugar Corp. v. Sugar Workers Local

The Court noted further that respondents did not argue the issue of FAA applicability before the Court.[70] For these reasons, the Court in *Wright* did not spend much time discussing FAA applicability. Although the issue was not discussed in *Wright*, it is still a significant issue in deciding whether arbitration agreements are valid and enforceable.

While federal policy under the FAA may favor arbitration, *Wright* makes an effort to protect individual statutory rights, especially the individual rights of those whose employment contracts are negotiated collectively rather than individually. The following paragraphs demonstrate the standard the Court used to protect individual statutory rights.

E. The "Clear and Unmistakable" Standard

In order to protect individual statutory rights, the Court in *Wright* provides the standard for mandatory arbitration provisions in collective bargaining agreements. Specifically, the Court maintains that "*any* CBA requirement to arbitrate [a statutory claim] must be particularly clear."[71] The Court stood by its previous assertion that, in order for courts to infer that the parties intend to waive a statutorily protected right, the waiver must be "explicitly stated" or "clear and unmistakable."[72] The Court indicated that this standard should be applied to union-negotiated waivers of employees' statutory rights to a judicial forum for claims of employment discrimination.[73] The Court found that the CBA in *Wright* did not meet the "clear and unmistakable" standard because it was "very general" in that the arbitration clause only provided for the arbitration of "[m]atters under dispute" and did not include a statutory anti-discrimination requirement.[74] The Longshoresman Seniority Plan was also very general and thus failed to meet the "clear and unmistakable" standard as well.[75] Therefore, the Court determined that Wright had not waived his rights to adjudicate his ADA claim in federal court.

The Court's "clear and unmistakable" standard is similar to other courts' standards. The Supreme Court seems to be concerned that employees will waive their individual statutory rights without knowing

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Union, 392 F.3d 1064, 1067 (4th Cir. 1993)).

70. *Wright*, 119 S.Ct. at 395 n.1.

71. *Id.* at 396 (emphasis added).

72. *Id.* (quoting Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708).

73. *Id.*

74. *Id.*

75. *Id.* at 397.

what they are forbearing. For this reason, standards such as the "knowing and voluntary" and "clear and unmistakable" exist. After a knowing waiver has occurred, the courts may then move on to resolve the enforceability issue of such waivers.

F. Union-negotiated Waivers

With regard to the issue of union-negotiated rights, the Court does not explicitly state whether *Gardner-Denver's* prohibition of a union waiver of employees' federal forum rights survives *Gilmer*. Instead, the Court indicates that "*Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against a less-than-explicit union waiver in a CBA."[76] Thus, the focus of the Court's decision is on whether the arbitration clause was sufficiently clear to indicate to Wright that his statutory discrimination claims would be subject to arbitration, rather than heard in a judicial forum. The Court limits the "clear and unmistakable" standard, however, to CBA requirements to arbitrate and union-negotiated waivers of statutory rights by distinguishing its decision in *Wright* from that in *Gilmer*. "*Gilmer* involved an individual's waiver of his own rights, rather than a union's waiver of the rights of represented employees—and hence the clear and unmistakable standard was not applicable."[77]

By limiting the "clear and unmistakable" standard to collectively-negotiated agreements, the Court intends to provide protection for individuals who do not negotiate their own employment contracts and therefore are not in a position to protect their individual rights.[78] The standard is intended to ensure that union-negotiated agreements containing a waiver of statutory rights make clear by the contract language that such a right is being waived. The Court did not specify which standard would apply to individually negotiated contracts, but suggested that it would not be the same.[79] In fact, the Court's statement distinguishing *Wright* from *Gilmer* suggests that individually negotiated contracts probably would not be held to as high of a standard.[80] This

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76. *Id.* at 397.

77. *Id.* at 396.

78. *See generally* Almonte v. Coca-Cola Bottling Co., 959 F.Supp 569, 574 (D. Conn. 1997). This case indicates one court's concern for protecting the individual.

79. 42 F.3d 1299, 1305 (1994). *Cf. Gardner,* 425 U.S. at 51-52; (quoting Senator Dole). If the only issue is whether the arbitration agreement is collectively or individually negotiated then it would appear that the latter standard may not be upheld by the Supreme Court.

80. Perhaps this distinction is because individuals are in a better position to protect their own rights when they negotiate a contract than individuals are when the contracts are negotiated collectively, specifically by a union.

distinction is significant in the wake of the Ninth Circuit's decisions, particularly those in which the Ninth Circuit has extended the "knowingly" standard to individually-negotiated employment contracts, as is the case in *Prudential v. Lai.*[81]

In *Lai* the court found that employees did not have to arbitrate sexual harassment and discrimination claims as provided for in the Standard Applications for Securities Industry Registration, or U-4 forms they were required to sign for employment with Prudential Insurance Co., because the individuals did not "knowingly" enter into any agreement to arbitrate their disputes.[82] The Ninth Circuit concluded that "a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration."[83] This decision was based largely on the court's finding that Congress intended arbitration to be used by those employees who "knowingly" and "voluntarily" gave up their rights to bring their claims to a judicial forum.[84] Similarly, the Ninth Circuit, in *Renteria v. Prudential Insurance Co. of America*[85] refused to enforce the mandatory arbitration of a sexual harassment claim where the employee did not "knowingly" waive her right to sue when she signed the U-4 as a condition of her employment.

Gilmer set forth a significant distinction between standards required for individually, as opposed to collectively-negotiated contracts. Indeed, the "knowingly" and "voluntarily" standard certainly applies to collectively negotiated agreements, yet the standard may be too high for an individually-negotiated employment contract. Thus, there is an argument that the Ninth Circuit may have applied too lenient a standard where indiviudal employment contracts were concerned.[86] However, there is perhaps a stronger argument that the U-4 forms should be subject to the same standard as collectively negotiated contracts since the employees are required as a condition of employment to sign these agreements and essentially may not negotiate their individual rights.

Essentially both the "knowingly" standard applied in *Lai* and *Renteria* and the "clear and unmistakable" standard applied in *Wright* are significant in their efforts to protect individual rights. Employees and employers operating under contracts where the prospective

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81. 42 F.3d 1299 (9th Cir. 1994).

82. *Lai*, 42 F.3d at 1305.

83. *Id. Cf.* Gardner, 425 U.S. at 51-52. (quoting Senator Dole).

84. *Lai*, 42 F.3d at 1305.

85. 113 F.3d 1104 (9th Cir. 1997).

86. See *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997), *cert denied*, 522 U.S. 915 (1997) for an example of a stricter standard applied to an individually-negotiated contract.

employee was not in a position to protect his or her rights prior to entering into an arbitration agreement must be cautious of the arbitration clauses embodied in the employment agreements. The provisions must be clear enough that the Court does not have to infer that a waiver was intended at the time the contract was negotiated and signed. Further, it should be "clear and unmistakable" from the wording of the employment agreement that the employees intended to waive the right to have their employment discrimination claims heard in a judicial forum.[87]

G. Courts Look for a Balance

In addition to the limitations mentioned above, the *Wright* decision is limited because it does not address instances where a CBA clearly encompasses employment discrimination claims.[88] Nor does the decision address areas outside collective bargaining or the enforceability of a pre-dispute agreement to arbitrate employment discrimination claims in a CBA. Furthermore, *Wright* does not solve the conflict between *Gardner-Denver* and *Gilmer*.

The on-going tension between the two decisions suggests a struggle to find a balance between enforcing arbitration agreements and protecting individual rights. *Almonte v. Coca-Cola Bottling Co.*[89] provides an example of a court's trying to reach this balance. The circuit court's desire for balance is revealed in the following discussion:

> The concerns expressed in *Gardner-Denver* and *Barrantine* strongly suggest that a collective-bargaining agreement can never require employees to submit individual statutory claims to grievance procedures. It is possible, however, to adopt a more limited view of the Court's holdings in those cases. Under this view, the exclusion of individual statutory claims from the collective-bargaining process would take the form of a rebuttable presumption rather than an absolute requirement: that is, the courts would assume that individual statutory claims were excluded from grievance procedures unless the collective bargaining agreement expressly provided otherwise. This view has the virtue of providing substantial protection for individual employees while recognizing that there may be circumstances in

87. *Wright*, 119 S.Ct. at 396.

88. *Austin* and *Gardner-Denver* involved arbitration agreements that contained their own anti-discrimination provisions. In Gardner-Denver, the waiver of Title VII rights was invalid. 415 U.S. at 51. In *Austin* the plaintiff was required to arbitrate her statutory claim. 78 F.3d at 877.

89. 959 F. Supp. 569 (1997).

> which the concerns expressed in Gardner-Denver and Barrantine are irrelevant or inapplicable.[90]

Thus, the *Almonte* court rejected the *per se* rule in *Austin*[91] on its way to find the middle ground. Moreover, the Supreme Court may be trying to move toward this middle ground by distinguishing *Gardner-Denver* and *Gilmer* and limiting the *Gilmer* decision. It is as if the Supreme Court wants the two decisions, and now three with *Wright*, to stand side-by-side as legal precedent in order to enforce valid arbitration agreements, yet, at the same time, protect individual rights.

H. Courts' Concerns Regarding Arbitration Agreements

The use of the "clear and unmistakable" standard reflects another concern courts have when deciding the validity of an arbitration agreement. The Ninth Circuit has indicated its intent to protect employees from compulsory arbitration, defining compulsory arbitration as occurring "when individuals must sign an agreement waiving their rights to litigate future claims in a judicial forum in order to obtain employment with, or continue to work for the employer."[92] Many securities forms have traditionally fallen into this category, however, after much pressure from plaintiffs, civil rights groups, and Congress, the National Association of Securities Dealers (NASD) will no longer require its securities industry employees to arbitrate statutory employment discrimination claims.[93] Employment discrimination claims in violation of the statute will be eligible for arbitration only where the parties agree to arbitration after the claim has arisen.[94]

While the Court in *Wright* did not address additional arbitration requirements, some courts have placed other restrictions on arbitration agreements. This should come as a word of caution to employers and employees. For example, to maintain the validity of arbitration clauses, employers are sometimes required to ensure that arbitration agreements do not reflect an unfair slant in favor of the employer's interests.[95] In *Stirlen* v. *Supercuts Inc.*,[96] California's Court of Appeals held that an

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90. *Id.* at 574 (quoting Claps v. Moliterno Stone Sales, Inc., 819 F. Supp. 141, 147 n.6 (D. Conn. 1993)).

91. *Almonte*, 959 F. Supp. At 569.

92. Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998). *See also* Stephen T. Davenport, Jr., *Are Employment Dispute Arbitration Agreements Valid?*, (visited Dec. 1, 1999) <*http://www.laborcounsel.com*>.

93. *See supra* discussion note 2.

94. *Id.*

95. Stirlen v. Supercuts Inc., 50 Cal. App. 1519 (4th Dist. 1997). *See also* Davenport, *supra* note 92.

96. 50 Cal. App. 1519 (4th Dist. 1997).

arbitration agreement was unconscionable because it favored the employer's rights over those of the employee and limited several of the employee's rights, as well. The agreement provided for the employee to resolve all employment-related disputes by means of arbitration, while the employer could use a judicial forum to enforce issues of confidentiality, trade secrets, and patent rights.[97] The *Stirlen* decision, in holding that such an employer-employee relationship was unconscionable, cited the United States Department of Labor's Commission on the Future Worker-Management Relations which set out guidelines for employee arbitration agreements. These guidelines include providing for:

> (1) a neutral arbitrator;
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> (2) a fair and simple method of securing information necessary for the employee to present his or her claim;
>
> (3) a fair cost-sharing system;
>
> (4) the right to independent representation;
>
> (5) a range of remedies equal to those available through litigation;
>
> (6) a written opinion of the arbitrator with the rationale used to obtain the result; and
>
> (7) sufficient judicial review to ensure that the result is consistent with governing laws.[98]

All of these guidelines reflect concerns some courts have with the arbitration process and indicate an effort to protect individual rights where arbitration is enforced.

Courts also use these factors to decide that arbitration provided a sufficient means of addressing statutory claims. Specifically, the District of Columbia Circuit Court in *Cole v. Burns International Security Services*[99] found that an arbitration agreement providing for neutral arbitrators, more than minimal discovery, a written reward, all types of relief that would be available in court, and protection against unreasonable arbitrators fees or related expenses.

By setting guidelines such as those mentioned above, in addition to requiring background disclosures for arbitrators prior to their being

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97. *Id.*

98. *Id.*

99. 105 F.3d 1465 (D.C. Cir. 1997). These guidelines are also of concern to the Supreme Court as suggested by their use in *Gilmer*. *See also* John P. Furfaro & Maury B. Josephson, *Employment Arbitration*, N.Y.L.J., Sept. 11, 1997 at 3.

selected, the courts can help protect against incompetent arbitrators making important decisions regarding individual statutory rights. For this reason, it has been suggested, by some observers, that there be judicial review for arbitration decisions.[100] Perhaps *de novo* review would not be appropriate, but proponents suggest that some kind of judicial review is necessary.

These guidelines raise additional concerns regarding arbitration agreements. In short, some courts are concerned with the quality and neutrality of arbitrators, the insufficient discovery that often takes place, whether the arbitrator's decision is put in writing, whether sufficient remedies are available, and that employees often have to pay excessive arbitrators fees and expenses. Finally, as previously stated, some courts and parties are concerned about the lack of judicial review that arbitration decisions can draw on.[101] In light of these concerns, it is not surprising that the Supreme Court in *Wright* held that a general arbitration clause did not require an employee to arbitrate alleged ADA violations because from the contract's language, it was not "clear and unmistakable" that Wright would waive his statutory right to a judicial forum by signing the contract.[102]

V. CONCLUSION

Although *Wright* did shed additional light on arbitration agreements, questions remain unanswered and it would be foolish to rely entirely on this decision in creating, signing, or arguing a claim for or against a mandatory arbitration agreement. Instead, factors such as whether the contract was a CBA, the specificity of the contract language used, whether uneven bargaining power existed in the creation of the contract, and similar issues should be considered. The Court's narrow construction of the issue specifically addressed whether the signing of a general arbitration agreement embodied within a collectively-negotiated employment contract constituted a waiver of the right to take a claim of an alleged ADA violation to a judicial forum. Simply put, the Court decided that generally worded arbitration provisions are not enough to constitute a "clear and unmistakable" waiver of the right to resolve a statutory claim in a judicial forum.

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100. *See* Robert J. Fitzpatrick, Wright v. Universal Maritime Service Corp., *the Death Knell for* Alexander v. Gardner-Denver*?*, A.L.I.,*110 (July 23, 1998).

101. *See* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997) (regarding arbitrators' fees concerns);. *See* Chisolm v. Kidder, Peabody Asset Management Inc., 966 F. Supp 218 (S.D.N.Y. 1997) (regarding judicial review concerns). *See also* John P. Furfaro & Maury B. Josephson, *Employment Arbitration,* N.Y.L.J., Sept. 11, 1997 at 3.

102. *See Wright*, 119 S.Ct. at 396.

Thus, under the narrow construction of the issue, the general language in arbitration agreements is not sufficient to constitute a waiver, and that the "clear and unmistakable" standard should apply to collective-bargaining agreements and union-negotiated rights, but not necessarily to individually-negotiated rights, as was the case in *Gilmer*. Moreover, there are a number of issues that the Court did not consider in *Wright*, but that employers, employees, and courts must often wrestle with where arbitration agreements are concerned. In answering these difficult questions, the parties involved, and particularly the courts, should remember that *Gilmer* did not overrule *Gardner-Denver* and that both decisions have their place within employment and labor law.

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