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John A. Gray

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**COLE V. BURNS INTERNATIONAL SECURITY SERVICES¹:
MANDATORY ARBITRATION OF STATUTORY DISCRIMINATION CLAIM
by John A. Gray**

INTRODUCTION AND BACKGROUND

Clinton Cole ("Cole") worked for Burns International Security Services, Inc. ("Burns International") as a security guard assigned to Union Station in Washington, D.C. Burns International required its new and continuing employees to sign, as a condition of employment, an agreement under which (1) both the employer and the employee mutually waived the right to a trial by jury in the event that there was employment related litigation between them, and (2) the employer had the right to compel mandatory arbitration of any employment related issue within sixty days of a complaint filed by the employee.² The terms of this agreement in effect required an employee to initiate a lawsuit against the employer. The employer then had the option to litigate the dispute or to compel arbitration. If the employer chose to litigate, the employee could not request a jury trial.³

Burns International fired Cole. After filing charges with the Equal Employment Opportunity Commission ("EEOC"), Cole filed suit in federal

district court on the grounds of racial discrimination in violation of Title VII of the Civil Rights Act of 1964. Burns International moved for dismissal on grounds of lack of personal jurisdiction under the terms of the employment agreement with Cole. The United States Court of Appeals for the District of Columbia granted Burns International's motion to compel arbitration and rejected Cole's claims that the Federal Arbitration Act ("FAA"), 9 U.S.C. §1, excluded the agreement from coverage, and that the agreement was an unconscionable, unenforceable contract of adhesion.⁴

The United States Court of Appeals addressed the following four issues: (1) whether Section 1 of the FAA excluded this employment agreement;⁵ (2) whether the agreement was enforceable⁶ because it met the requirements of *Gilmer v. Interstate/Johnson Lane Corporation*;⁷ (3) whether a pre-dispute mandatory employment arbitration agreement is enforceable if it requires the employee to pay part or all of arbitrator-related expenses -- an issue raised *sua sponte*;⁸ and (4) whether it was unconscionable because the scope of judicial review of arbitral awards was adequate to assure an "effective vindication of statutory rights."⁹ The court did not address the terms of the agreement under which both the employer and the employee waived their right to a jury in the event of a trial because neither party raised this issue.¹⁰

Interesting aspects of this opinion are that it includes a lengthy discussion of the differences

¹ 105 F.3d 1465 (D.C. Cir. 1997). "This case raises important questions regarding whether and to what extent a person can be required, as a condition of employment [sic], to (1) waive all rights to a trial by jury in a court of competent jurisdiction with respect to any dispute relating to recruitment, employment, or termination, including claims involving laws against discrimination, and (2) sign an agreement that, at the employer's option, any such employment disputes must be arbitrated." *Id.* at 1467.

² See *id.* at 1469 for the exact language of the "Pre-dispute Resolution Agreement" signed by Cole.

³ The right to a jury trial in cases of intentional discrimination did not exist until granted by the Civil Rights Act of 1991 amending Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the American Disabilities Act of 1990.

⁴ See Cole, 105 F.3d at 1470.

⁵ See *id.* at 1470-72.

⁶ See *id.* at 1480-83.

⁷ 500 U.S. 20 (1991).

⁸ See Cole, 105 F.3d at 1483-86.

⁹ See *id.* at 1486-87.

¹⁰ See *id.* at 1473 n.4.

between arbitration in the collective bargaining context and the non-union context.¹¹ It also reviews the positions of the EEOC,¹² the National Labor Relations Board (“NLRB”),¹³ the Dunlop Commission,¹⁴ and a number of arbitral organizations¹⁵ on the issue of the legality and wisdom of pre-dispute employment agreements requiring arbitration of statutory employment claims.

FIRST ISSUE: FAA §1 Exclusion⁶

The issue was whether Congress, when it enacted the FAA in 1925, intended to exclude all employment contracts from its coverage (broad construction) or to exclude only certain employment contracts (narrow construction). The *Cole* court held¹⁷ that Section 1 of the FAA excluded from its coverage only employment contracts of workers actually engaged in the movement of goods in interstate commerce. Therefore, the federal policy in favor of arbitration¹⁸ applied to this employment agreement. The court adopted the narrow construction and articulated four reasons for its holding.

¹¹ See *id.* at 1473-79.

¹² See *id.* at 1479.

¹³ See *id.*

¹⁴ See *id.* at 1483 n.11 and 1488. The Department of Labor Commission on the Future of Worker-Management Relations (“Dunlop Commission”)(1944).

¹⁵ *Id.* For example, the American Arbitration Association, JAMS/Endispute, the Center for Alternative Dispute Resolution.

¹⁶ FAA §1 states that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. §1 (1994).

¹⁷ See *Cole*, 105 F.3d at 1472.

¹⁸ FAA §2 provides that arbitration agreements “shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. §2 (1994).

First, the court relied on two “well-established canons of statutory construction.”¹⁹ One is that courts should avoid a reading that renders some words altogether redundant. “Here if the final phrase of the exclusionary clause . . . extended to all workers whose jobs have any effect on commerce, the specific inclusion of seamen and railroad workers would have been unnecessary.”²⁰ The second canon, the rule of *ejusdem generis*, limits general terms that follow specific ones to matters similar to those specified. Thus, in applying the canon to this case, the interpretation would be limited only to those workers likewise actually engaged in the movement of interstate or foreign commerce.²¹ Second, every circuit to consider this issue has adopted the narrow construction of the exclusion.²² Third, while the Supreme Court has not addressed this issue, the *Cole* court reasoned that the decisions in *Allied Bruce Terminex Cos. v. Dobson*²³ and *Gilmer v. Interstate Johnson/Lane*²⁴ suggest that the Supreme Court also would adopt the narrow construction.²⁵ Finally, the court recognized that the legislative history could be read to support a broad construction, but took the position that “in a case such as this, where the statutory text does not admit of serious ambiguity, and where firmly established case law is absolutely clear on the meaning of the statute, legislative history is, at best, secondary, and, at worst, irrelevant.”²⁶

The court also noted that even if it was incorrect in adopting the narrow construction, the agreement was still a contract and probably enforceable under the common law of contract and state arbitration

¹⁹ *Cole*, 150 F.3d at 1470.

²⁰ *Id.*

²¹ See *id.* at 1471.

²² See *id.* The Court cited the 1st, 2nd, 4th, and 7th circuits.

²³ 513 U.S. 265 (1995).

²⁴ 500 U.S. 20 (1991).

²⁵ See *Cole*, 105 F.3d at 1472.

²⁶ *Id.*

statutes.²⁷ The court, however, did not resolve this issue in light of its FAA §1 holding.

SECOND ISSUE: Enforceability under *Gilmer*²⁸

As a preamble to its searching examination of the details of the agreement in light of its understanding of *Gilmer*, the court developed at length its view on the differences between arbitration in the collective bargaining context and arbitration in the non-union context. It concluded that courts do not owe the same degree of judicial deference to arbitration agreements and awards in the non-union context as they do to those in the union, collective bargaining context.²⁹

To this court, *Gilmer* stands for the proposition that a pre-dispute employment agreement requiring binding arbitration of statutory discrimination claims as a condition of employment is as enforceable as any other contract provision, so long as the specific arbitration process under the agreement provides to the employee a forum “to effectively vindicate statutory rights.”³⁰ The Supreme Court in *Gilmer* upheld the New York Stock Exchange arbitration procedure as sufficient to provide such a forum.³¹

In *Cole*, the parties agreed to the following five propositions:³²

- (1) the agreement allows the employer the option of forcing statutory claims into arbitration for the resolution of public law issues;

- (2) the agreement’s waiver of a jury trial is absolute, i.e., it operates even if the employer does not seek arbitration;
- (3) the agreement does not affect an employee’s ability to seek relief from the EEOC;³³
- (4) the arbitrator is fully bound to apply Title VII and other applicable public law, both as to substance and remedy, in accordance with statutory requirements and prevailing judicial interpretation;³⁴ and
- (5) the agreement provides for appointment of a neutral arbitrator through the American Arbitration Association (“AAA”) and for the conduct of the arbitration proceeding in accordance with AAA rules.³⁵

Since the agreement incorporated the AAA *National Rules for the Resolution of Employment Disputes*, the court undertook a close examination of each and concluded:

We believe that all of the factors addressed in *Gilmer* are satisfied here. In particular we note that the arbitration arrangement (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable cost or any arbitrator’s fees or expenses as a condition of access to the arbitration forum. Thus, an

²⁷ See *id.* For example, the Maryland Arbitration Statute applies to employment agreements. See also MD. CODE ANN., CTS. & JUD. PROC., §3-206(a); *Wilson v. McGrow, Pridgeon & Co.*, 298 Md. 66, 467 A.2d 1025 (1983).

²⁸ “We turn now to the heart of the problem in this case, i.e., the enforceability of conditions of employment requiring individual employees to use arbitration in place of judicial fora for the resolution of statutory claims.” *Id.*

²⁹ See *id.* at 1473-78.

³⁰ *Id.* at 1481.

³¹ See *id.* at 1481-82 (citing *Gilmer*, 500 U.S. 20 (1991)).

³² See *Cole*, 105 F.3d at 1480.

³³ In *Gilmer* the court recognized the right of the plaintiff to file a complaint with the EEOC to seek an administrative action against the employer but not the right to have the EEOC seek compensatory relief for the plaintiff because that was available under the arbitration agreement.

³⁴ The agreement requires the arbitrator to apply substantive law, unlike those discussed in Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 AM. BUS. L.J. 105 (Fall 1997). The arbitration process required by the *Cole* agreement seems to be more like “private judging” on the spectrum of dispute resolution techniques than traditional arbitration as analyzed by Professor Levin.

³⁵ See *Cole*, 105 F.3d at 1480.

employee who is made to use arbitration as a condition of employment “effectively may vindicate [his or her] statutory cause of action in the arbitral forum.”³⁶

THIRD ISSUE: Arbitrator Fees³⁷

The third issue addressed in *Cole* was raised by the court *sua sponte*. The court found the AAA rules to be ambiguous on the point of which party is responsible for paying arbitrator fees and, using the *contra proferentum* rule of contracts, held that the AAA rule was to be interpreted to require only the employer to pay arbitrator expenses.³⁸ The court reasoned that when arbitration occurs only at the option of the employer, and that option has been imposed as a condition of employment by the employer, the employer alone should bear the cost of the arbitrator’s expenses.³⁹ Moreover, because a plaintiff does not have to pay the salary of a judge to pursue statutory claims in court, the employee likewise should not be required to pay any or all of the arbitrator’s fees and expenses. However, the agreement may require the employee to pay other reasonable administrative fees incurred by the arbitration.⁴⁰ The court held

that Cole could not be required to agree to arbitrate his public law claims as a condition of employment if the arbitration agreement required him to pay all or part of the arbitrator’s fees and expenses. In light of this holding, we find that the arbitration agreement in this case is valid and enforceable.⁴¹

FOURTH ISSUE: Scope of Judicial Review⁴²

Cole argued that the arbitration agreement was unconscionable because arbitrator’s rulings were not subject to judicial review. The court recognized three distinct bases for judicial review: (1) the FAA §10 (a) states four grounds for vacating an arbitral award;⁴³ (2) awards may be set aside when they are found to be contrary to “some explicit public policy”;⁴⁴ and (3) awards can be vacated when they are found to be in “manifest disregard of the law.”⁴⁵ The court was of the opinion that

in the vast majority of cases, judicial review of legal determinations to ensure compliance with public law should have no adverse impact on the arbitration process. Nonetheless, there will be some cases in which novel or difficult legal issues are presented demanding judicial judgment. In such cases, the courts are empowered to review an arbitrator’s award to ensure that its resolution of public law issues is correct.⁴⁶

CONCLUDING COMMENT

Whom does this decision benefit? Although waiver of the right to a jury trial was not addressed, this waiver probably benefits an employer-

⁴² See *id.* at 1486-87.

⁴³ (1) Where the award was procured by corruption, fraud, or undue means. (2) Where there was evident partiality or corruption in the arbitrators, or either of them. (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of the parties have been prejudiced. (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made. See *Cole*, 105 F.3d at 1486 (citing 9 U.S.C. §10 (a)).

⁴⁴ *Id.* at 1486.

⁴⁵ *Id.*

⁴⁶ See *id.* at 1487.

³⁶ *Id.* at 1482.

³⁷ “We use the term ‘arbitrator’s fees’ to include not only the arbitrator’s honorarium, but also the arbitrator’s expenses and any other costs associated with the arbitrator’s services.” *Id.* at 1484 n.15.

³⁸ See *id.* at 1485-86.

³⁹ See *id.* at 1485.

⁴⁰ See *id.* at 1484.

⁴¹ *Id.*

option of the employer clearly benefits the employer since the employer is able to choose which disputes it prefers to litigate and which to arbitrate. However, because arbitration is selection of a forum and not a surrender of rights or remedies, an early arbitral award in favor of an employee may be preferable to an award at the conclusion of administrative and judicial proceedings. One may also wonder whether this court's understanding of the scope of judicial review of pre-dispute employment agreements mandating arbitration of statutory discrimination claims does not, in effect, eliminate the characteristic trait of the finality of arbitral awards.

Those who think that *Gilmer* and its progeny are unwise should (a) encourage Cole and similar losing plaintiffs to appeal to the United States Supreme Court and submit *amicus curiae* briefs in support of reversal and/or (b) form a coalition of employee interest groups to lobby Congress to amend the FAA to exclude all employment contracts from its coverage and to state that all such conditions of employment are unenforceable as a matter of public policy.

About the Author: John A. Gray is currently a professor of Law and Social Responsibility at Loyola College of Maryland, and is a member of the Maryland and federal bars. Mr. Gray also serves as an arbitrator with the American Arbitrator Association and the National Association of Securities Dealers. Additionally, he volunteers for the Maryland Human Relations Commission and the Baltimore District Office of the EEOC as a mediator. His writings have been published in several journals, including *The American Business Law Journal*, *The Villanova Law Journal*, and *The Labor Law Journal*.

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