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**ARBITRATORS SHOULD WRITE OPINIONS FOR PARTIES AND
FOR COURTS***

JOSEF ROHLIK**

The literature of the last decade on arbitration has been dominated by the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*¹ Strictly speaking, *Gilmer* is one in the long line of Court cases regulating arbitrability under law.² Under *Gilmer*, arbitration clauses involving claims under the Age Discrimination in Employment Act ("ADEA")³ are specifically enforceable under the Federal Arbitration Act ("FAA"),⁴ and, of course, the resulting arbitration award may be set aside on the FAA grounds,⁵ as well as for "manifest disregard of the law," a standard of review developed and accepted by most courts.⁶ In *Gilmer*, the Supreme Court appears to have retreated from a rationale postulated in the context of Title VII⁷ claims in unionized employment, in *Alexander v. Gardner-Denver Co.*,⁸ where the Court said:

Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. . . . [T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. . . . Parties

* Professor and Librarian Eileen Searls, in whose honor this collection of essays is published, has assembled a premier book collection in our library. I will always remember that when I joined this faculty in 1971, there was a magnificent library, and the most meager library budget. I concluded then, and still maintain today, that Eileen is a magician. My contribution to this collection is made with a hope that one day there will "arbitration reports" on the shelves of the law library next to the labor arbitration reports.

** Professor of Law, Saint Louis University School of Law. For the purposes of this essay, it should be mentioned that the author once worked for the Regional Office of the American Arbitration Association in New York City, and is an arbitrator, and a member of the National Academy of Arbitrators. Thanks to Ms. Deborah Hawkins, a third year law student, for her research assistance.

1. 500 U.S. 20 (1991).
2. As opposed to arbitrability under the contractual arbitration clause.
3. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994 & Supp. IV 1998).
4. Federal Arbitration Act, 9 U.S.C. §§ 1, 4 (1994).
5. 9 U.S.C. § 10 (1994).
6. See *Wilko v. Swan*, 346 U.S. 427, 436-37 & n.24 (1953); see also *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998).
7. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994).
8. 415 U.S. 36 (1974).

usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory and constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language can be given meaning only by reference to public law concepts.

Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. And as this Court has recognized, 'arbitrators have no obligation to the court to give their reasons for an award.' Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.⁹

Unlike *Alexander*, which was decided under Section 301 of the Labor Management Relations Act,¹⁰ *Gilmer* is a FAA commercial arbitration case. However, as none other than David Feller, who sat next to Arthur Goldberg when the "Steelworkers Trilogy"¹¹ was argued before the Supreme Court, observed, in law "[t]he difference between grievance arbitration and commercial arbitration . . . simply disappeared. The Court embarked on a new course designed . . . to avoid litigation."¹²

In terms of arbitration procedure and award, I find three differences between grievance and commercial arbitration. First, grievance proceedings prior to the actual arbitration hearing may be viewed as a limited species of discovery, while discovery in traditional commercial arbitration, apart from a possible subpoena, has not been favored.¹³ Second, labor arbitration awards contain an opinion, whereas in traditional commercial arbitration, outside specialized areas,¹⁴ such as international trade or admiralty, true opinions are a

9. See *id.* at 56-58 (citations and footnotes omitted).

10. See Labor-Management Relations Act, 29 U.S.C. §§ 141-187 (1994 & Supp. IV 1998).

11. *United Steelworkers of Am. v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960)

12. David E. Feller, *Fender Bender or Train Wreck?: The Collision Between Statutory Protection of Individual Employee Rights and the Judicial Revision of the Federal Arbitration Act*, 41 ST. LOUIS U. L.J. 561, 567 (1997).

13. See, e.g., AMERICAN ARBITRATION ASS'N, COMMERCIAL DISPUTE RESOLUTION PROC. (INCLUDING MEDIATION AND ARBITRATION RULES) Rule 23 & 34 (1999).

14. As in commercial arbitration in general, awards in these cases are not published. In making this statement, I rely on my experience. In a non-traditional area, such as health care

rarity. In her seminal article on commercial arbitration Soia Mentschikoff writes that “[the American Arbitration] Association puts enormous pressure on its arbitrators not to write opinions”¹⁵ It has been observed that the reason for this pressure is the avoidance of giving the courts an opportunity to attack the award,¹⁶ i.e., avoidance of the propensity of courts to say what the judges want to say, which my colleague, Susan FitzGibbon, called the “judicial itch,” borrowing from Judge Richard Arnold’s characterization.¹⁷ Finally, traditional commercial arbitrators arbitrate infrequently,¹⁸ whereas most labor arbitrators make a significant living out of that profession, i.e., they have a proven acceptability.¹⁹

I find no difference in arbitration proceedings and awards between 1974 when *Alexander* was decided, and 1991, when *Gilmer* was decided. *Gilmer*, of course, is an employment case, and arguably as so, it would appear to be more similar, in its setting to a labor arbitration case than to a “buyer-seller” dispute. It does appear, however, that having concluded in *Gilmer* that the statutory rights disputes are arbitrable, the Court is looking for the dominant intention to arbitrate.²⁰ In *Wright v. Universal Maritime Service Corp.*,²¹ involving an Americans with Disabilities Act (“ADA”) claim, while the Court reaffirmed *Alexander*, it did not detract from *Gilmer* either, with the ambivalent holding that the waiver of judicial forum must be “clear and unmistakable.”²²

In lower court decisions following *Gilmer*, the Ninth Circuit Court of Appeals stands out. In *Prudential Insurance Co. of America v. Lai*²³ the Ninth Circuit required a “knowing” agreement to arbitrate Title VII claims,²⁴ which, at least for me, can be reduced to the inquiry whether there is a valid contract (“arbitration clause”) that evidences the parties’ intent to arbitrate. Even in *Duffield v. Robertson Stephens & Co.*,²⁵ the issue is reduced to the validity of

arbitration, AAA rules require an opinion. See AMERICAN ARBITRATION ASS’N, HEALTH CARE CLAIM SETTLEMENT PROCEDURES (1992).

15. Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 857 (1961).

16. Cf. G. Richard Snell, *Arbitration and Corporate Governance*, 67 N.C. L. REV. 517, 523 n.39 (1989), cited in Feller, *supra* note 12, at n.77.

17. Susan A. FitzGibbon, *The Judicial Itch*, 34 ST. LOUIS U. L.J. 485, 491 & n.31 (1990).

18. See generally Mentschikoff, *supra* note 15 (extensively examining the role of traditional commercial arbitrators).

19. Acceptability is a criterion for the membership in the National Academy of Arbitrators.

20. Cf. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

21. 525 U.S. 70 (1998).

22. *Id.* at 80.

23. 42 F.3d 1299 (9th Cir. 1994).

24. *Id.* at 1305. See also *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1440 (9th Cir. 1994) (affirming the district court’s confirmation of the award, in part, because the plaintiff “clearly submitted his claim to binding arbitration.”).

25. 144 F.3d 1182 (9th Cir. 1998).

the “compulsory arbitration clauses” as a condition of Title VII as amended. Said the court:

In holding that Form U-4 is unenforceable as applied to Title VII claims, we do not, of course, mean to suggest that Congress sought in the 1991 Act to preclude employees from agreeing after a claim has arisen to submit the dispute to arbitration. Indeed, employees in many instances may believe that arbitration is preferable to protracted and expensive litigation and will willingly make that choice. Because of the legal community’s recently increased faith in arbitration, those plaintiffs are now “encouraged” to resolve their employment disputes in that manner, and if they choose to do so, they are bound by the arbitrator’s decision. The contract before us, however, requires compulsory arbitration in every sense of the word, and it is contracts of that nature we are compelled to hold unenforceable under the Civil Rights Act of 1991.²⁶

In my judgment, one should be careful of reading *Duffield* as conditioning arbitrability of Title VII claims on a *submission* to arbitration (of an existing dispute) to the exclusion of arbitrability under an *arbitration clause* (a promise to arbitrate future disputes). Particularly in view of *Wright*, one should not prejudge a case—in the land of the Ninth Circuit—when, for example, a top executive freely negotiates an individual employment contract that includes an arbitration clause. I confess that I find that the consent to arbitrate, or the dominant intention to arbitrate, in the security industry’s Form U-4 could be problematic even under contract law, related to unconscionability, small print clauses, and other defenses.²⁷ Of course, it should be noted that the Supreme Court has rejected the unequal bargaining power claim in *Gilmer*.²⁸

The “practical” policy issue involved in *Gilmer* and its progeny may indeed be the balancing of the value of avoidance of litigation before overburdened courts, and the value of the policing and prompting societal changes by courts, along the lines of Owen Fiss’s well known statement of “bring[ing] a recalcitrant reality closer to our chosen ideals.”²⁹ As I will

26. *Id.* at 1199 (internal citations omitted).

27. *See, e.g.,* *Hooters of Am., Inc. v. Phillips*, 39 F. Supp.2d 582 (D. S.C. 1998) (discussing contract principles and unconscionability and finding an arbitration clause “unconscionable and unenforceable”). *Phillips*, however, was a Title VII case, and the decision is heavily dependent on the peculiar facts of the case. *Id.* at 605-15. The decision was affirmed by the Fourth Circuit. *See Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

28. *See Gilmer*, 500 U.S. at 32.

29. Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1089 (1984). Utilitarian considerations in enforcement of an arbitration clause have not been limited to the avoidance of litigation, even in a situation when the enforcement of the arbitration clause was likely to result in a displacement of mandatory rules of U.S. law by an arbitration forum abroad. For example, in case involving an alleged violation of Rule 10b-5 of 10(b) of Securities Exchange Act of 1934, the Supreme Court enforced the arbitration clause. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). The Court additionally distinguished *Scherk* from *Wilko* because,

attempt to demonstrate, there are some decisions, which only courts can make, in exercising their law-making function.

There is, of course, the third value, that of an accessibility, and a claimant's relatively quick accessibility to a decision making forum.³⁰ Abstracting from arbitration, the access to courts in civil matters has been chiefly regulated by costs which, in employment discrimination matters, include the EEOC budget. I asked myself what would happen if various American philanthropists decided to shun education, medical research, and other charities, and instead poured all their money into a civil litigation fund disbursed on a "first come first served" basis. Query, whether the intricate and interwoven system of administration of justice in the United States, which has allowed for orderly, evolutionary progress of American society, would collapse.

The purpose of this essay is not to add anything to the debate of whether courts, rather than arbitrators, should decide statutory rights claims.³¹ Rather,

among other reasons, *Scherk* involved an "international agreement," *see id.* at 515, and further noted that:

The invalidation of such an agreement . . . would . . . reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.'

Id. at 519 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (involving a prorogation clause)).

30. *See generally* Susan FitzGibbon, *Reflections on Gilmer and Cole*, 1 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 221, 260-61 n.234 (1997); Clyde Summers, *Effective Remedies for Employee Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 456, 477 (1992).

31. Others have done it exhaustively. *See, e.g.*, Reginald Alleyne, *Arbitrating Sexual Harassment Grievances: A Representation Dilemma for Unions*, 2 U. PA. J. LAB. & EMPLOYMENT L. 1 (1999); Mark L. Adams, *Compulsory Arbitration of Discrimination Claims and the Civil Rights Act of 1991: Encouraged or Proscribed?*, 44 WAYNE L. REV. 1619 (1999); Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1 (1998); Stuart L. Bass, *What the Courts Say about Mandatory Arbitration*, 54 DISP. RESOL. J. 24 (Nov. 1999); Harvey R. Boller & Donald J. Peterson, *Mandatory Arbitration Clauses*, 54 DISP. RESOL. J. 56 (Feb. 1999); William H. Daughtrey, Jr. & Donnie L. Kidd, Jr., *Modifications Necessary for Commercial Arbitration Law to Protect Statutory Rights Against Discrimination in Employment: A Discussion and Proposals for Change*, 14 OHIO ST. J. ON DISP. RESOL. 29 (1998); Harry T. Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 OHIO ST. L. J. 23 (1985); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 CHI.-KENT L. REV. 3 (1988); David E. Feller, *End of the Trilogy: The Declining State of Labor Arbitration*, 48 ARB. J. 18 (Sept. 1993); Feller, *supra* note 12, at 567; David M. Kinnecome, *Where Procedure Meets Substance: Are Arbitral Procedures a Method of Weakening the Substantive Protections Afforded by Employment Rights Statutes?*, 79 B.U. L. REV. 745 (1999); Geraldine Szott Moohr, *Arbitration and the Goals of Employment*

the purpose of this essay is to suggest that the proliferation of the statutory rights may be permeating arbitration cases far beyond individual employment cases, and that the arbitrators should write opinions that specifically isolate and resolve the statutory issues, or otherwise expressly state that any such specific issue is left for the courts or administrative agencies to decide, and leave it to the parties to the dispute to whether or not to resort to courts.³²

This proposition raises the old debate of whether arbitrators should follow the contract or the law. To be sure, any arbitrator is the creation of a contract. Today, governmental regulatory schemes are so pervasive that an effort to try to divorce them from contracts is an exercise in futility. Besides, it is rare to encounter a contract which would so squarely conflict with mandatory rules of law that the only possible interpretation of that contract would be that there is such an unavoidable conflict. For instance, a run of the mill “seller-buyer” contract must be read against the background of a mandatory rule of law imposing the obligation of good faith in its performance and enforcement, a contract involving exclusive distributorship must be reviewed under anti-trust law, and a contract involving securities may involve securities law. A conclusion that a commercial contract mandates a violation of mandatory rules of law will be fairly rare, and a decision which would consciously sanction such a violation should not be upheld.

Strictly speaking, the same reasoning should apply to collective bargaining agreements. However, under collective bargaining agreements, the issue has been often framed as whether the agreement incorporates the law in question.³³ I am not convinced about the continuing viability of that proposition. In an overwhelming majority of cases the employer and the union are keenly aware of mandatory rules governing employment issues and employee rights. A lack of specific reference to such statutes governing the employment area, for

Discrimination Law, 56 WASH. & LEE L. REV. 395 (1999); Leonard D. Polletta, *What's Left After Wright? Do Employees Still Have Two Bites of the Apple?*, 54 DISP. RESOL. J. 48 (Nov. 1999); Margo E. K. Reder, *Arbitrating Securities Industry Employment Discrimination Claims: Restructuring a System to Ensure Fairness*, 2 U. PA. J. LAB. & EMPLOYMENT L. 19 (1999); Daniel Roy, *Mandatory Arbitration of Statutory Claims in the Union Workplace After Wright v. Universal Maritime Service Corp.*, 74 IND. L. J. 1347 (1999); David Sherwyn, et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMPLOYMENT L. 73 (1999); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999). For an evenhanded discussion of various issues, written before *Gilmer*, see Samuel Estreicher, *Arbitration of Employment Issues Without Unions*, 66 CHI.-KENT L. REV. 753 (1990).

32. Compare Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77, 100-05 (1996) (advocating de novo judicial review).

33. See, e.g., David Feller, *Compulsory Arbitration of Statutory Discrimination Claims Under a Collective Bargaining Agreement: The Odd Case of Caesar Wright*, 16 HOFSTRA LAB. & EMPLOYMENT L.J. 53 (1998).

example, Title VII, ADEA, ADA, and FMLA, particularly in the presence of non-discrimination clauses which today appear in most agreements, can hardly be interpreted as limiting the arbitrator's authority. I would borrow from a different area of decision-making, and suggest that if there appears to be a conflict between the collective bargaining agreement and mandatory rules of law, the arbitrator should reconsider whether the conflict is "real."³⁴ If an interpretation would avoid a conflict, it should be adopted.

In non-union employment cases it is easy to conclude that *Gilmer's* holding that choice of arbitration is a choice of the forum, by which "a party does not forgo the substantive rights afforded by the statute,"³⁵ extends to all mandatory rules of law (i.e., to "statutory rights"). Apart from top executives, the only contract may be the arbitration clause. In a unionized context, arbitrators are deemed to be experts in the "common law of a particular industry or of a particular plant[.]"³⁶ for "[t]he collective agreement covers the whole employment relationship."³⁷ In 1960, the Supreme Court distinguished labor arbitration from commercial arbitration by stating that "[commercial arbitration is, simply] the substitute for litigation."³⁸ The Court's statement reflects the continuous and all-embracing relationship of the parties to a collective bargaining agreement as opposed to an occasional dispute in the commercial context. However, as Mentschikoff points out, there is often a commonality between parties to a traditional commercial arbitration, e.g., when they are members of a trade association.³⁹ She also writes: "Fact-finding norms of an informed nature in commercial matters are more likely to reside in arbitrators than in a jury or even in a judge."⁴⁰ Accordingly, it is assumed that the arbitrator is an expert in the industry or the human endeavor in which he or she arbitrates, which, today, must include at least some cursory knowledge of some basic legal concepts.⁴¹

While it may be said that expertise in employment statutory rights cases is, by definition, limited to the expertise in law, the familiarity with a particular employment field should not be underestimated. More often than not, in situations involving an adverse action by the employer, the arbitrator must also

34. The distinction between "real" and "apparent" conflicts and the reconsideration in the field of conflict of laws is the brainchild of Brainard Currie, and gained wide acceptance as a refinement of Currie's original "interest analysis." See Brainard Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1242-43 (1963).

35. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

36. *Warrior and Gulf Navigation Co.*, 363 U.S. at 579.

37. *Id.*

38. *Id.* at 578. See U.C.C. § 1-203 (1994).

39. Mentschikoff, *supra* note 15, at 850.

40. *Id.* at 868.

41. See generally Feller, *supra* note 12.

evaluate the employer's stated reason for the action. In addition, there must be some reason why parties to a dispute agreed on a particular arbitrator. Of course, if one party is deprived of a meaningful participation in the arbitrator selection process, and/or in the arbitration process in general, the arbitration process and the award become highly questionable.⁴² Most importantly, arbitrators may decide only upon the issues submitted to them, whether by stipulations, or by claims, counterclaims, defenses, etc., and the parties should, or perhaps must, brief them on pertinent law. The Second Circuit Court of Appeals stated in *Halligan v. Piper Jaffray, Inc.*, an ADEA case:

Indeed, we have cautioned that manifest disregard "clearly means more than error or misunderstanding with respect to the law." We have further noted that to modify or vacate an award on this ground, a court must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.⁴³

The arbitrators in *Halligan* did not explain the award.

In the 1997 wrongful termination case, *Neary v. Prudential Insurance Co. of America*,⁴⁴ a Connecticut district court granted Prudential's motion to compel arbitration. Thereafter, the arbitration panel granted summary judgment in favor of Prudential. The case came back to the district court in 1999, which held that "based on the arbitration proceedings there [was] no doubt that the panel's decision [had to] be vacated on . . . [the] ground" that the "panel's decision to grant summary judgment was in manifest disregard of the law."⁴⁵ Similar to the arbitrators' award in *Halligan*, there was no explanation of the panel's ruling in *Neary*. Said the court with reference to *Halligan*: "The failure of the arbitration panel to explain its decision in this case also buttresses this Court's determination."⁴⁶

There is no question that arbitrators must resolve all issues submitted to them or raised before them, and should persuade the parties that they have done so. In *Halligan* and *Neary* the courts re-examined the arbitration records. I find it obvious that the lack of an arbitration opinion can no longer be viewed as insulating the award from the court review.

Even in a labor arbitration case, the Court of Appeals for the Eighth Circuit vacated a reasoned award in a labor arbitration case that did not involve any mandatory rules of law, because it disagreed with the arbitrator's interpretation

42. See *Hooters*, 39 F. Supp.2d 582 (D. S.C. 1998); *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903 (Cal. 1997). As a result of the *Engalla* decision, Kaiser's arbitrations are now administered by the American Arbitration Association.

43. *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (1998) (internal citations omitted).

44. 1997 WL 114789 (D. Conn. Feb. 24, 1997).

45. 63 F. Supp.2d 208, 209 (D. Conn. 1999).

46. *Id.* at 210.

of the contract, and because the arbitrator's opinion failed to reference contractual provisions that the court considered important.⁴⁷ Judge Wollman, dissenting, captured the essence of the decision:

I respectfully dissent. I would affirm the order confirming the arbitration award. To hold that the arbitrator ignored the plain language of the contract by not specifically referring to the second sentence of Article XV, section 15.2, seems to me to be an overly restrictive view of the arbitrator's role. This is all the more true in light of the fact that section 15.2 does not compel the interpretation Hormel places on it.⁴⁸

For me, it does not matter whether the case before the reviewing court is a commercial case, i.e., an FAA case or a case under a state arbitration statute, or a labor case, i.e., a Section 301 LMRA case. When it comes to statutory rights involved in *Gilmer* and its progeny, it is apparent that the case may end up in the courts, even if it is arbitrable. When it comes to labor cases involving statutory rights claims under *Alexander*, it is clear that such claims are in fact arbitrated, and may be arbitrated even though the claimant has access to courts. Of course, if the claimant resorts to courts before arbitration, then there would be no arbitration. With respect to the isolation of the statutory rights claims and their resolution in the arbitration opinion, there should be no difference. After all, the *Alexander* Court kept the door open for courts to defer to the arbitration award.⁴⁹

I again wish to stress, that I do not address the question whether statutory claims under *Alexander* or *Gilmer* and its progeny, should or should not be arbitrated. I also do not address the question of the text or reach of particular arbitration clauses, or of their legal effects as between *Gilmer* and *Alexander*.⁵⁰ I am simply saying that statutory rights have been arbitrated in commercial and labor settings, and I am addressing the opinion of arbitrators in such cases.

It should be noted that I previously referenced mandatory rules of law as being synonymous with statutory rights. One may object that *Alexander* and *Gilmer* and its progeny involve, conceptually, discrimination claims. On the one hand, it is evident that rules of law relating to discrimination have had a special significance in "remaking" of the American society, even though such statutory rules have equal normative value as other mandatory rules of law. On the other hand, there are other laws that grant important rights to employees, for instance, the Family and Medical Leave Act of 1993 ("FMLA").⁵¹ Although containing blanket references to discrimination,⁵²

47. *George A. Hormel & Co. v. UFCW Local 9*, 879 F.2d 347, 351-52 (8th Cir. 1988)

48. *Id.* at 352.

49. *Alexander*, 415 U.S. at 60 n.21.

50. *See generally* Feller, *supra* note 33.

51. The Family Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 5 U.S.C. §§ 6381-6387; 29 U.S.C. §§ 2601-2654 (1994 & Supp. IV 1998)).

FMLA confers important entitlement on employees, as do many other laws protecting employees. One can even imagine, in this time of increasing propensity of many employers to invade more and more of their employees' privacy,⁵³ that there could appear some new statutory employee safeguards in this area.

What follows are three examples of what I consider to be cases involving statutory rights in arbitration, in which the arbitrator isolated the statutory issue in the opinion.⁵⁴

Case Number 1

The first case arose under a collective bargaining agreement. A supervisor found folding chairs and a table in a building housing electrical equipment. The building had a flat roof, and, occasionally, an employee was dispatched to sweep the roof. There was a no entry sign on the building. As a result of the supervisor's discovery, the employer placed a hidden camera on the roof without bargaining with the Union about the placement of the camera. The tape showed several employees smoking what the employer determined was marijuana. The employees were confronted with the tape, confessed to smoking marijuana, and were discharged.

The Union raised the NLRB decision in *Colgate-Palmolive Company and Local 15, International Chemical Workers Union*.⁵⁵ Colgate-Palmolive installed surveillance camera in a restroom and a fitness center. The Board held that the installation of surveillance cameras was a mandatory bargaining subject, and that the Colgate-Palmolive failure and refusal to bargain at the request of its union violated Section 8(a)(1) and (5) of NLRA.

The arbitrator denied the grievance with a specific statement that the roof of the building in question was very different from a frequently visited restroom and a fitness center. The arbitrator also pointed out that reinstatement of discharged employees is not mandatory, even if a violation of the duty to bargain is found. On the question of the violation of the duty to bargain the arbitrator referred the parties to the NLRB.

52. 29 U.S.C. §§ 2601 (a)(6), (b)(4)-(5). See Malin, *supra* note 32, at n.4.

53. See, e.g., Barbara Ehrenreich, *Warning: This Is a Rights-Free Workplace*, N.Y. TIMES MAG., Mar. 5, 2000, at 88.

54. The cases were selected because of the disposition of the statutory issue, and the facts were patterned on real cases. Parties did not authorize the disclosure of their identity.

55. Case No. 9-CA-32158, 1997 NLRB LEXIS 309 (Apr. 23, 1997).

Case Number 2

A highly skilled engineer, a college graduate, was dismissed from a demanding job after coming to work four hours late. He said that he had "car trouble." He was told that he had arrived late some twenty-five times during the two years preceding his dismissal.

The engineer testified without contradiction that his children had asthma, and that he had to bring them to a physician when they had an acute asthmatic attack. He introduced into evidence physician's certificates covering twelve of the prior twenty-five late arrivals to work. He also testified without contradiction that on the other occasions either his son or daughter had an attack which did not require a visit to a physician, but which prevented them from going to school. It was stipulated that the engineer once told his supervisor about his children's condition. The engineer claimed that under the statute, the employer had an obligation to investigate whether he was entitled to FMLA leave which would have covered his late arrivals to work. He claimed that the employer furnished employees only with general statements about FMLA, and did not specifically advise him that he would be entitled to an intermittent leave on account of his children's condition, even though the employer knew of that condition.

It was stipulated that asthma was a qualifying condition under the Department of Labor Regulations.⁵⁶ It was further stipulated that the engineer never requested leave, and that the employer heard about his reasons for being late for the first time after his dismissal.

The arbitrator held that the statute and the regulations were not sufficiently clear on the issue of the employer's responsibility to investigate under the circumstances of this case, and that there was a paucity of court decisions on this subject. The arbitrator interpreted the statute as requiring the employee at the very least to advise the employer of the reasons for his late arrivals when they occurred, so that the employer could request appropriate medical documentation.

This case could have occurred either in non-union employment or under a collective bargaining agreement. Under a collective bargaining agreement there would have been a further issue of the engineer's failure to grieve progressive discipline.

Case Number 3

An African-American employee became disgruntled after a dismissal of a close friend. He was seen carrying a gun. He had several altercations with co-employees. After an irrational altercation with a guard over a locked door into a building, he was told to stay at home pending investigation. During the

56. 29 C.F.R. § 825.114(a)(2)(iii)(C) (1999).

investigation the employer discovered that the employee made several serious threats against the employer and some co-employees, in front of several co-employees and strangers, all of whom testified. The threats involved references to the Oklahoma federal building bombing, to the employee's prowess with his gun, etc. The employee was dismissed.

The employee did not dispute the testimony about the threats he made. He testified that he behaved as he behaved because of the pervasive racism in the workplace. It was admitted that one of the witnesses had routinely called him "nigger." He testified without contradiction that the previously dismissed employee was his only friend at work, and that the guard with whom he had the last altercation had always been hostile to him.

At the time of the arbitration hearing the employee has already filed a complaint with the EEOC, but stated on the record that he willingly participated in the arbitration.

The arbitrator concluded that the threats were serious, and given the employee's behavior, that the employer had to take the threats seriously, as the employer claimed. The arbitrator also concluded that the employee worked in a hostile environment. Faced with the conflicting policy issues, the arbitrator held that given the contemporary environment of workplace violence, a policy decision to grant the relief the employee asked for, which included reinstatement to the only job he has ever had, had to be left to the courts.

Again, this case could have arisen in both, non-union employment or under a collective bargaining agreement.

Several comments should be made about these three cases. First, as the critics of *Gilmer* fear, each claimant lost. In addition, while the statutory issues were isolated and addressed, the facts controlled each of the three decisions. As the D.C. Circuit Court of Appeals observed in *Cole v. Burns International Security Services*⁵⁷ "[m]ost employment discrimination claims are entirely factual in nature . . ."⁵⁸

Second, all three cases could end before public bodies even after the arbitration award was rendered. In the first case, NLRB has original jurisdiction over unfair labor practice claims but can, of course, defer to the arbitration award. I am not sure whether *Alexander* would extend to the second case, but if the third case arose under a collective bargaining agreement, federal courts could ignore the award and conduct a trial, under *Alexander*. However, the awards in the second and third cases could end up in

57. 105 F.3d 1465 (D.C. Cir. 1997).

58. *Id.* at 1487. See also Judge Edward's comments on *Cole* in Harry T. Edwards, *Where Are We Heading With Mandatory Arbitration of Statutory Claims in Employment?* (paper presented at an "Alternative Dispute Resolution" conference at Georgia State University's W.J. Usery, Jr. Center for the Workplace (Nov. 2, 1999)).

the courts pursuant to a motion to vacate. Courts would review such awards under the manifest disregard of law, or violation of public policy standards.⁵⁹ As noted by the *Cole* court:

[I]n 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.^[FN] 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. Indeed, at oral argument, Burns conceded the courts' authority to engage in such review. Because meaningful judicial review of public law issues is available, Cole's agreement to arbitrate is not unconscionable or otherwise unenforceable.⁶⁰

[FN] The Hoyman/Stallworth study of arbitral awards in discrimination cases found that, even in cases where de novo review was available under *Alexander*, only 1.2% of all discrimination cases were reversed by the courts. See [Michele] Hoyman & [Lamont E.] Stallworth, [*Grievances in the Aftermath of Gardner-Denver*,] 39 ARB. J. [49,] at 55 (Sept. 1984).

Third, the arbitration clauses involved in all three cases pre-dated the dispute. All the cases involved attorneys on both sides, who filed adequate post-hearing briefs dealing with the relevant statutory issues. In the first case, a court reporter was present when the arbitrator walked into the room. In the second case, there was no transcript. In the third case, a court reporter was called at the arbitrator's request. No issue of discovery was brought to the arbitrators' attention nor were any pre-hearing conferences held in either case. In the third case the arbitrator signed several subpoenas prepared by each party.

Fourth, in each case the arbitrator was a lawyer, appointed directly by the parties. The arbitrator's knowledge of law was not discussed. In all three cases the arbitrator was neither on a roster of employment arbitrators of any agency, nor underwent any training in employment arbitration. In addition, none of the parties submitted any agency rules, such as American Arbitration Association Rules,⁶¹ nor did the arbitrator discuss the Due Process Protocol.⁶²

Fifth, in the first case, as is customary, each party equally paid the arbitrator's fees. For the purpose of this essay it is assumed that the arbitrators in the second and third cases were paid from an escrow account.

59. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987).

60. *Cole*, 105 F.3d at 1487. See also *Gilmer*, 500 U.S. at 32.

61. *Arbitration: AAA Issues Revised Rules; Officials Discuss Training Program*, DAILY LABOR REP., May 28, 1997

62. *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, DAILY LABOR REP., May 11, 1995.

In the first case, NLRB could very possibly hold that *Colgate-Palmolive* applies to placement of hidden cameras anywhere on an employer's property and could further hold that the policy of deterrence requires reinstatement of all discharged employees.

If the second and third cases arose under collective bargaining agreements, then under *Alexander*, as previously noted, a de novo trial could be conducted in the third case. However, even if the two cases reached a court on motions to vacate, the courts would essentially be faced with answering clearly stated questions. A court deciding the second case could resort to law-making and hold that when an employer is faced with an employee's unexplained absences but has notice that FMLA might cover the employee's situation, the spirit of FMLA mandates that the employer further investigate the situation, to provide the employee with an individualized notification of his or her rights under the Act. A court deciding the third case could conclude that as a policy matter, the policy underlying Title VII must prevail over any consideration of workplace violence. It appears to me that these two hypothetical conclusions may be made only by courts.

If the second and third cases were arbitrated under collective bargaining agreements, the arbitrator would not be covered by the Due Process Protocol or by the AAA Rules cited with approval by the *Cole* court.⁶³ Yet, if these cases were arbitrated in a non-union setting, then, arguably, the failure to precisely satisfy the Due Process Protocol or AAA Rules could possibly be considered an independent reason for the vacation of the award. That result appears to me to be nonsensical, even if explainable by the de novo trial under *Alexander*, as opposed to judicial review of the commercial arbitration award only under the FAA and the manifest disregard of the law standard. As David Feller wrote, "[t]he standard for review of an arbitrator's decision in a non-union situation is presently uncertain. But that standard, whatever it may ultimately turn out to be, should apply whether the arbitration is pursuant to a unilaterally imposed requirement or by virtue of a collective bargaining agreement."⁶⁴ Various standards of review or reasons for vacation are normative terms which American courts interpret in their pursuit of justice-making. American courts, first of all, decide individual cases. They may do so by strictly following precedents, by lawmaking, or by molding the law or facts to reach the result they wish to reach. A well-reasoned arbitration opinion that isolates the statutory issues and explains their resolution should be the only requirement in any arbitration case involving statutory rights. It would certainly allow for "focused review" suggested in *Cole*.⁶⁵

63. *Cole*, 105 F.3d at 1480.

64. See Feller, *supra* note 33, at 81.

65. *Cole*, 105 F.3d at 1487.

There are no statistics regarding the number of statutory rights cases arbitrated in non-union setting⁶⁶ or the number of labor cases that involve statutory rights.⁶⁷ However, I will assert, based on discussions with fellow arbitrators and on my own practice that, for instance, FMLA is finding its way into a substantial number of common absenteeism cases under collective bargaining agreements.

I do not believe it possible that the standard of review of any and all arbitration awards involving at least statutory rights of employees will not be unified.⁶⁸ After all, as far as the substantive statutory rights are concerned, there is no notable difference between unionized and non-unionized employees. Additionally, the application of the scheme tends to spread to similar cases when the courts start the process of development of a regulatory scheme.

It would be most unfortunate if courts vacated arbitration awards for failure to adhere to private standards such as the AAA Rules, even if sanctioned by courts, and irrespective whether they are called procedural guarantees or anything else,⁶⁹ unless the court would find the lack of basic fairness prejudicial to either party. Arbitration would lose its identity, and “arbitrators” would become “mini-judges” administering a second tier of justice under centralized rules.⁷⁰ Of course, the obvious retort is that the current arbitration is a second tier of justice. In general, it certainly has not been justice imposed on the parties, but rather traditionally has been a dispute resolution process desired by the parties. That should be viewed as a value in a democratic society. Labor arbitration has been “an instrument of industrial self-governance”⁷¹ which has served this country well. An ability to destroy it

66. It even cannot be assumed that post-*Gilmer* arbitration schemes of employers will be utilized in cases of statutory rights only. I know of two large employers who promulgated arbitration schemes in reaction to *Gilmer*. However, to date, each employer has had only one arbitration, each involving a dismissal for specific substandard performance rather than involving any statutory rights.

67. Survey of reported cases is beyond the scope of this essay. However, it is very unlikely that most labor awards are reported.

68. Judge Edwards, a former arbitrator and law professor, highlights the differences between labor and commercial arbitration in his majority opinion in *Cole* and relies on that difference throughout the opinion, citing several well-known authors. Of course, *Cole* involved enforcement of an arbitration award. See also FitzGibbon, *supra* note 29, at 258-60.

69. For the proposition that the court should vacate the award if “not satisfied with procedural guarantees” see for example, Monica Washington, *Compulsory Arbitration of Statutory Employment Disputes: Judicial Review Without Judicial Reformation*, 74 N.Y.U. L. REV. 844, 882, 883 (1999).

70. Edward Brunet uses the term “Judicialized Arbitration” to describe the current “Contract Model of Arbitration.” See Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 45 (1999).

71. Estreicher, *supra* note 33, at 757.

by making a statutory rights claim in any given arbitration proceedings is hardly desirable. Commercial arbitration is an ancient and traditional method of dispute resolution throughout the world.⁷²

In conclusion, I believe that reasoned arbitration opinions isolating and resolving statutory rights issues are desirable for the parties who would know why their dispute was decided as it was decided, and also would simplify the task of courts in reviewing arbitration awards. In addition, such awards would permit the resolution of the question whether arbitration is a suitable forum for disputes involving statutory rights on an empirical basis, without theoretical “second-guessing.”

72. Mentschikoff, *supra* note 15, at 850.