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THE *WRIGHT* DECISION: THE RIGHT TIME TO IMPROVE THE STATURE OF THE ARBITRATION PROCESS

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I. INTRODUCTION

In its November 16, 1998 decision *Wright v. Universal Maritime Services Corp.*,[1] the U.S. Supreme Court addressed the question whether a general arbitration clause in a collective bargaining agreement (CBA or contract) requires an employee to use the arbitration procedures set forth in the contract to pursue a remedy for an alleged violation of the Americans with Disabilities Act?[2] The employer group in the *Wright* case believed that an arbitration provision in a CBA need not list every possible dispute between the parties to be binding,[3] and asserted that such a view is supported by the Supreme Court precedent *Gilmer v. Interstate/Johnson Lane Inc.*[4] and a strong federal policy favoring arbitration.[5] The plaintiff, Caesar Wright, disagreed, asserting that the controlling precedent is the Supreme Court's *Alexander v.*

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[1] 199 S.Ct. 391 (1998).

[2] *Id.* at 392-393. The Americans with Disabilities Act (ADA), 104 Stat. 327, 42 U.S.C. § 12101 *et. seq.*

[3] See Wright v. Universal Maritime Service Corp.,121 F.3d 702 (4th Cir. 1997).

[4] *Id.*, citing Gilmer v. Interstate/Johnson Lane Inc., 500 U.S. 20 (1991).

[5] *Id.*

Gardner-Denver[6] decision, which held that an employee covered by an arbitration agreement could nevertheless bring a lawsuit in federal court under Title VII of the Civil Rights Act of 1964. This paper will analyze the Court's decision which held that Wright is not required to arbitrate his ADA claim. It will also provide guidelines to employers and unions to aid them in drafting judicially acceptable arbitration clauses requiring all claims including statutory discrimination claims to be resolved in arbitration.

II. THE *WRIGHT* CASE

Caesar Wright worked as a longshoreman in Charleston, South Carolina from 1970 to 1992. On February 18, 1992, he injured his right heel and his back at work. Consequently Wright filed suit for benefits under the Longshore and Harbor Workers' Compensation Act,[7] and his employer, Stevens Shipping Company, settled the claim for $250,000 and $10,000 in attorney's fees. Wright also was awarded social security benefits.[8] During the course of this suit, Wright represented that he had been totally and permanently disabled.[9] On January 2, 1995, Wright

[6] 415 U.S. 147 (1974).

[7] 44 Stat. 1424, 33 U.S.C. § 901 *et seq.*

[8] Wright v. Universal Maritime Service Corp., 119 S.Ct. 391, 393 (1998).

[9] *Id.* Neither the U. S. District Court, the U. S. Court of Appeals, nor the U. S. Supreme Court explains in any meaningful way the contractual basis for the position taken by the employer association that Wright was not qualified to work due to his "total and permanent disability." An *estoppel* theory exists which arbitrators have accepted in the past as a basis to deny an individual the right to return to his job after that individual asserted in proceedings under the Longshore and Harbor Workers' Compensation Act or in the railroad industry under the Federal Employers' Liability Act that he or she was totally and permanently disabled. Basically, the employers argue that it is unfair for an individual to testify in court that he or she is totally and permanently disabled and will thus never be able to work again in the longshore or railroad industries and allow a jury to assess damages based on this assertion, and then days, weeks, or months later to allow that individual to return to his or her job when the individual shows up at the workplace asserting that he or she is fully able to perform all of the functions of the job. A judicial *estoppel* doctrine is currently being applied in the face of considerable scholarly criticism whereby an individual may have applied for disability benefits under the Social Security Administration SSI and SSDT programs, and in an eligibility statement under oath the individual states that he or she is completely disabled and unable to work, and thereafter the individual brings an Americans with Disabilities Act claim against an employer asserting that the individual could perform the essential functions of the job with or without reasonable accommodation. *See* Christine N. O'Brien, *To Tell The Truth: Should Judicial Estoppel Preclude Americans with Disabilities Act Complaints?* 31 BUS. LAW REV. 83 (Fall, 1998). See also Cleveland v. Policy Management Systems Corp., Daily Lab. Rpt. (BNA) No. 37, AA-1 (February 25, 1999) where the U. S. Supreme Court will decide whether an individual's sworn statements to the Social Security Administration that she was totally disabled estops her from asserting an ADA claim against her former employer that she was a qualified person with a disability able to perform the essential functions of her job if provided reasonable accommodation.

appeared at the hiring hall of Local 1422 of the International Longshoremen's Association (ILA), stating that he was ready and able to return to work. Wright presented a note from his physician, which stated he could return to full duty. From January 2 through January 11, 1995, the union referred Wright to four different stevedoring contractors. When the companies discovered that Wright had earlier received a settlement for a total and permanent disability, they, both individually and acting through their multi-employer collective bargaining representative, the South Carolina Stevedoers Association (SCSA), advised the union that Wright would no longer be accepted for employment referral. The SCSA maintained that under the parties' collective bargaining agreement (CBA), Wright was not qualified to work due to his being certified as permanently disabled. The union responded with a letter disputing the SCSA's interpretation of the CBA. However, neither Wright nor the union ever filed a formal grievance under the CBA's arbitration procedure, and the union advised Wright to pursue a statutory claim under the Americans with Disabilities Act.[10] Wright then filed this suit against the SCSA and six of its individual members.

The case was referred to a magistrate judge who citing the Fourth Circuit's *Austin v. Owens-Brockway Glass Container Inc.*[11] decision, recommended the case be dismissed because Wright had failed to submit his claim to arbitration as required by the CBA. The district court adopted this position and the Fourth Circuit Court of Appeals affirmed the judgment of the district court.[12] The arbitration clause at issue stated in part: "The union agrees that this Agreement is intended to cover all matters affecting wages, hours, and other terms and conditions of employment..."[13]

Wright contended before the Court of Appeals that such language did not address statutory rights granted him under the ADA, and the clause therefore was not binding on him in regards to his ADA lawsuit. The court of appeals, however, determined that the "all matters" regarding "terms and conditions of employment" language in the arbitration clause "easily encompasses Wright's ADA claim." [14] The Court stated that a narrower interpretation would fly in the face of both the ADA's statutory preference for arbitration, and the federal policy favoring alternative dispute resolution.[15]

[10] *Wright* at 394.
[11] 78 F.3d 875 (4th Cir. 1996), *cert. denied* 519 U. S. 980 (1996).
[12] *Wright*, at 394.
[13] *Id.* at 393.
[14] *Wright*, 121 F.3d at 703.
[15] *Id.*

III. INTERPRETING THE ARBITRATION CLAUSE

The arbitration clause was interpreted by the court of appeals to "easily" encompass Wright's ADA claim. The Supreme Court focused on the arbitration clause to determine if in fact the clause encompassed Mr. Wright's ADA claim. Litigation involving the courts and arbitration is commonly resolved by reference to the doctrines found in the U. S. Supreme Court's landmark *Steelworkers Trilogy*, decided in 1960,[16] and reaffirmed by the Supreme Court in the Court's *AT&T Technologies Inc. v. Communication Workers of America* decision in 1986.[17] The *Steelworkers v. Warrior & Gulf Navigation* decision sets forth the basic precept that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit."[18] This decision recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.[19] Questions of arbitrability—whether a collective bargaining agreement creates a duty for the parties to arbitrate the particular grievance—are issues for judicial determination. And, in *Warrior & Gulf* the court announced a strong presumption of arbitrability, as follows:

> To be consistent with the congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration...(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. Doubts should be resolved in favor of coverage.[20]

Should the *Trilogy* presumption of arbitrability be applied in the present case where an employer contends that its collective bargaining agreement with the union requires the union to arbitrate the dispute

[16] United Steelworkers v. American Mfg. Co., 363 U.S. 561 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[17] 475 U.S. 643 (1986).

[18] 363 U.S. at 582, 583. It should also be made clear that the courts have no business weighing the merits of a grievance or considering whether there is equity to a particular claim as set forth in Steelworkers v. American Manufacturing Co., 363 U.S. 561, at 568 (1960). In the *Wright* case, Section 15 (B) of the parties' collective bargaining agreement requires that a grievance must be filed within 48 hours after discussions with management. Possibly in anticipation that these "time limits" would be raised by the employer and applied by an arbitrator, Wright asked the Court of Appeals to monitor the arbitration process, and the Court declined to do so, 121 F.3d at 703. It seems clear that relegating the claim to arbitration will result in the claim being dismissed for violation of the time limits, precluding Wright from ever having his case heard on the merits.

[19] *Id.*

[20] *Id.*

over whether or not the employer association violated the Americans with Disabilities Act, a public law, when the employer refused to allow Mr. Wright to return to work after being released by his doctor for duty, and bars the employee whom the employer disqualified from work from seeking relief on his own under a public law forbidding disability discrimination? Substantive provisions of collective bargaining agreements deal with wages, hours, benefits, leaves of absence, subcontracting, and discipline, among many other "working conditions." In *Warrior & Gulf,* the Supreme Court set forth in part the rationale for the presumption of arbitrability, stating:

> ...the labor arbitrator performs functions which are not normal to the courts, the considerations which help him fashion judgments may indeed be foreign to the competence of the court.[21]

Arbitrators are experts in interpreting contractual disputes involving wages, hours, and working conditions. Unlike federal judges, their practices do not ordinarily deal with public laws and remedies.

The Supreme Court resolved the dispute before it by refusing to apply the presumption of arbitrability to the *Wright* case. It stated that the presumption of arbitrability does not extend beyond the reach of the principle rationale that justifies it, which is that arbitrators are in a better position than the courts to interpret the terms of a CBA.[22] And the Court points out that the dispute in the present case ultimately concerns not the application or interpretation of a CBA but the meaning of a federal statute, the ADA.[23]

[21] *Id.* at 581.

[22] *Wright,* 198 S.Ct. 391, at 395.

[23] *Id.* The Court handled the Fourth Circuit's erroneous interpretation of the arbitration clause with judicial tact by simply refusing to apply a presumption of arbitrability to the case before it. The arbitration clause in question stated: "Union agrees that this Agreement is intended to cover all matters affecting wages, hours and other terms and conditions of employment...." The plain language of this clause does not purport to vest an arbitrator with authority to decide whether or not the employer violated the Americans with Disabilities Act or discrimination laws in general. It is utterly amazing that the Court of Appeals believed that the "all matters" regarding the "terms and conditions of employment" language "easily encompasses" Wright's ADA claim. Based on this reasoning the "all matters..." language would give a labor arbitrator, a limited expert on interpreting collective bargaining contracts, authority to resolve all public law "matters" such as the Americans with Disabilities Act, workers' compensation and unemployment law issues, Fair Labor Standards Act issues, Family and Medical Leave Act matters, and all other antidiscrimination law issues. The language used by the parties and the total lack of bargaining history supportive of such a broad interpretation make the interpretation set forth in the Court of Appeals' decision untenable.

IV. THE TENSION BETWEEN THE *GILMER AND GARDNER DENVER* LINES OF CASES.

The Court of Appeals relied on the *Gilmer v. Interstate/Johnson Lane Corporation* [24] decision as support for its "broad" interpretation of the arbitration clause in this case.[25] Robert Gilmer's age discrimination lawsuit was stayed under Section 3 of the Federal Arbitration Act (FAA), and Gilmer was compelled to arbitrate his claim under Section 4 based on the language of his securities registration application and a New York Stock Exchange rule which provided for arbitration of any dispute, claim or controversy arising out of a representative's termination of employment.[26]

In *Alexander v. Gardner-Denver Co.*, the Supreme Court held that Harrell Alexander was not precluded from bringing a Title VII claim by the prior unsuccessful submission of a discrimination claim to arbitration.[27] The employer group in *Wright* argued before the Supreme Court that over the two decades separating *Gardner-Denver* from *Gilmer* and the "healthy regard for the federal policy favoring arbitration" *Gilmer* has sufficiently undermined *Gardner-Denver* that a union can waive employees' rights to a judicial forum.[28]

The Supreme Court did not take up the daunting task of deciding whether or not *Gilmer* has in fact undermined or overruled *Gardner-Denver* as asserted. The Court following its tradition of judicial restraint, resolved the controversy before it on the narrow basis that the arbitration clause in the parties' collective bargaining agreement did not require the worker to arbitrate his ADA claim. Importantly, the Court set forth the clarifying language in its *Wright* decision that:

> ...whether or not *Gardner-Denver's* seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer*,

[24] 400 U.S. 20 (1991).

[25] *Wright*, at 294.

[26] NYSE Rule 347.

[27] 415 U.S. 36 (1974). In *Gardner-Denver*, the Supreme Court touched on many relevant themes. It held that because of the unique nature of the statutory claims at issue, as compared with contractual claims, the doctrine of "election of remedies" would not apply to preclude a Title VII action following arbitration. *Gardner-Denver*, 415 U.S. at 50. It also referred to the special significance of the procedures of Title VII, and its purposes—to afford Congress's "highest priority" to the policy against discrimination. *Id.* at 49. Moreover, the Court addressed the issue of whether or not the arbitral process was suited to the effective enforcement of Title VII, for a number of reasons including its informality, the fact that there was limited discovery, that the arbitrator was obliged to effectuate the intent of the parties, and had "no general authority to invoke public laws that conflict with the bargain between the parties." *Id.* at 53. And, the Court was concerned with the voluntariness of an individual's prospective waiver of a statutory civil right, especially in the context of a collective bargaining agreement.

[28] *Wright* at 395.

> *Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA. The CBA in this case does not meet that standard.[29]

The Court demands that a union's waiver of the rights of represented employees to a federal judicial forum in a collective bargaining agreement must be by "clear and unmistakable" language.[30]

Ultimately *Gilmer* is inapposite to the *Wright* case, because *Gilmer* did not involve an arbitration clause contained in a collective bargaining agreement as does *Wright*. *Gilmer* involved an individual's waiver of his own rights, as opposed to a union's waiver of the rights of employees covered by the CBA.[31]

V. CONCLUSION: IMPROVING THE STATUS OF THE ARBITRATION PROCESS BY FOLLOWING THE GUIDANCE OF *WRIGHT* AND IMPROVING DUE PROCESS.

The Fourth Circuit Court of Appeals in *Wright* relied in part on "the strong federal policy favoring alternative dispute resolution." In 1991, certain provisions were added to Title VII, the ADA and the Age Discrimination in Employment Act, such that "where appropriate and to the extent authorized by law...arbitration...is encouraged to resolve disputes arising under" these laws.[32] Referring to the "where appropriate" provision, the Seventh Circuit, in *Pryner v. Tractor Supply Co.,* [33] denied mandatory arbitration of race and age discrimination claims in a collective bargaining setting, stating:

[29] *Id.* at 396.

[30] *Id.* at 397.

[31] *Id.*

[32] See notes following 42 U.S.C.§1981, §118; Section 118 is labeled ALTERNATIVE MEANS OF DISPUTE RESOLUTION, and states in its entirety: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title."

[33] 109 F.3d 354 (7th Cir. 1997). In a study conducted by the ABA's Commission on Mental and Physical Disability Law, where virtually every reported and unreported court decision was reviewed, the employer prevailed in 92 percent of the court rulings regarding cases brought under Title I of the ADA where a final decision was reached by the courts. Daily Lab. Rpt. (BNA) No. 119, E-1 (June 22, 1998). Was a hint of judicial cynicism in effect in the Fourth Circuit when *Wright* was decided, because of a pattern of lack of success for ADA cases, the expanding workload of federal judges and the opportunity to "subcontract" out some of this workload to arbitrators? The *Pryner* decision and numerous other decisions would indicate that such cynicism had no part in the appeals court's decision.

> These provisions, a polite bow to the popularity of 'alternative dispute resolution' and perhaps a mild sop to the judiciary, which has expressed alarm at Congress's relentless expansion of the jurisdiction of the federal courts, encourage arbitration 'where appropriate' and if we are right it is not appropriate when it is not agreed to by the worker but instead is merely imposed by a collective bargaining agreement that he may have opposed.[34]

In lawsuits similar to *Gilmer*, where employers, under the authority of the Federal Arbitration Act, seek to compel individuals in the securities industry bringing statutory discrimination claims in the federal courts to instead arbitrate their claims based on agreements to arbitrate signed by the individuals when they were first hired by their employers, most appeals courts have decided in favor of arbitration.[35] However, the Ninth Circuit and First Circuit have declined to do so.[36]

It may well be that there no longer is a judicial suspicion of the competence of labor arbitration tribunals in general, but regarding arbitrators in the securities industry, a 1994 report by the United States General Accounting Office found that the discrimination claims handled by arbitrators differed from the usual types of employment disputes arbitrated before them because these claims (1) involved federal civil rights laws, not securities laws, (2) these arbitrators were not required to have training and knowledge of employment law, and (3) the majority of the arbitrators were white males over the age of 60.[37] Clearly such findings do not enhance the reputation of the arbitration process.[38]

[34] *Id.*

[35] *See* e.g., Seus v. John Nuveen & Co., 146 F.3d 175 (3rd Cir. 1998).

[36] Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998); and Rosenberg v. Merrill Lynch, 78 FEP Cases 1037 (1st Cir. 1998).

[37] U. S. General Accounting Office, Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes (1994).

[38] Articles listing the shortcomings of mandatory arbitration of discrimination disputes are Alleyene, *Statutory and Discrimination Claims: Rights Waived and Lost in the Arbitration Forum*, 1 HOFSTRA LAB. L.J. 381-384 (1996). M. Bickner, *et al.: Developments in Employment Arbitration*, 52 DISP. RESOL. J. 8 (1997); J. Garrison, *The Employee's Perspective; Mandatory Binding Arbitration Constitutes Little More Than A Waiver of a Worker's Rights*, 52 DISP. RESOL J. 15 (1997). Professor Samuel Estreicher has written an article entitled *Predispute Agreements To Arbitrate Statutory Employment Claims*, 72 N.Y.U.L. REV. 1344, (1997), in which he supports the position that a well-designed private arbitration alternative for statutory employment claims is in the public interest and is achievable. He asserts that the law should encourage, rather than hinder, arbitration of these disputes; and he defends the fitness of arbitrators for such responsibilities. Judge Nancy Gertner, in Rosenberg v. Merrill Lynch, 965 F.Supp. 190 (1997), a case dealing with issues of age and sex discrimination, addresses the following question relating to arbitration in securities industry, "Can The Plaintiff Demonstrate Systemic Arbitral Bias" at pages 200 and 201.

For employers and unions negotiating arbitration clauses in their collective bargaining agreements intended to require that all discrimination claims be resolved through arbitration, these parties should not only comply with the dictates of the *Wright* decision, but also take heed of the public discourse questioning the basic fairness of the arbitration process. It is suggested that arbitration clauses in the CBAs requiring mandatory arbitration of federal and state statutory discrimination claims should conform to the requirements of *Wright* that the waiver language in the collective bargaining agreement be set forth in "clear and unmistakable" language.[39] Bargaining unit members have a right to know that their union and their company have agreed to require all employment claims, including statutory discrimination claims be resolved through arbitration. Not all employees take it upon themselves to be informed about the content of the arbitration clause in CBAs, so it is a good practice for both unions and employers to feature news articles in company and union newsletters or newspapers informing employees of the scope of the arbitration clause along with the advantages of arbitration, including expediency, economy, and final and binding justice. Since arbitrators' authority is contractual in nature, the parties should make certain that the collective bargaining contract itself contains specific language making it a violation of the CBA to discriminate based on race, color, creed, national origin, gender, age, disability, or discrimination for taking a family or medical leave. Basic fairness requires that the arbitration clause also makes certain that arbitrators are granted authority in the CBA to provide remedies comparable to remedies available in the courts for violation of discrimination laws. To insure the fairness of the arbitration proceedings, the parties may choose to simply reference in their CBA adoption of the American Arbitration Association's National Rules for the Resolution of Employment Disputes, which set forth rules regarding representation, burdens of proof, discovery, remedies, and the award itself.[40] The effect of implementing these recommendations will enhance the overall stature and acceptability of the arbitration process.

[39] *Wright,* at 397.

[40] National Rules for the Resolution of Employment Disputes, American Arbitration Association.