Alternative Dispute Resolution

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In March, in *Circuit City Stores v. Adams*, 121 S.Ct. 1302 (2001), the U.S. Supreme Court held that the Federal Arbitration Act ("FAA") allows enforcement of arbitration agreements contained in employment contracts. Because *Circuit City* removed one significant obstacle to enforcement, many more employers are considering implementation of arbitration programs even though some of the law still remains unsettled.

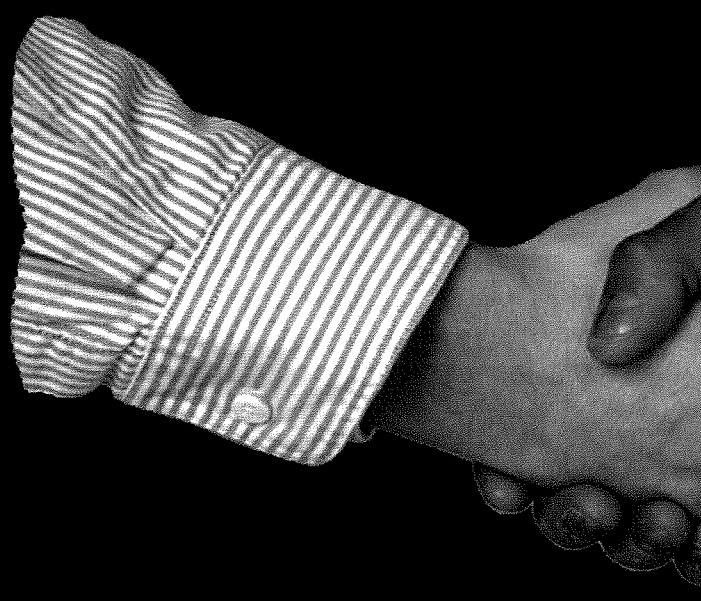
While arbitration of employment disputes has distinct benefits, for both sides, there also can be significant detriments. Some are common to both employees and their employers; some are unique to one party. All should be considered before any employer adopts a program or any party seeks enforcement of an arbitration agreement.

The *Circuit City v. Adams* Holding and Its Place in The Jurisprudence of Compelling Parties to Arbitrate Discrimination Claims

Circuit City was not the first Supreme Court case involving the FAA and arbitration of employment discrimination claims. Ten years earlier, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court compelled an employee, under the FAA, to arbitrate his claim under the Age Discrimination in Employment Act (ADEA). Shortly after *Gilmer*, Congress amended Title VII of the Civil Rights Act to provide a right to jury trial and recovery of capped compensatory and punitive damages. Congress also endorsed alternative methods of dispute resolution. Pub.L. 102-166, § 188. Use of arbitration programs continued to increase.

The Ninth Circuit Court of Appeals, however, has limited arbitration, differing from other circuits. In 1998, in *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998), the Court refused to enforce agreements to arbitrate Title VII claims, relying upon a unique interpretation of the 1991 amendments that differs from all of the other circuits that have considered the issue, and allowed it to distinguish *Gilmer*. In the Ninth Circuit, ADEA claims can be arbitrated, but not Title VII claims.

Not only do other circuits disagree with the Ninth, the Nevada Supreme Court also declined to follow *Duffield*. *Kindred v. Second Judicial District Court*, 996 P.2d 903 (Nev. 2000) (employee may be compelled, under NRS 38.015-38.205, to arbitrate Title VII, state law discrimination, and Family and Medical Leave Act (FMLA) claims). Even the California Supreme Court has refused to follow *Duffield*, with a lower appellate court holding that public policy is not violated by requiring arbitration as a condition of employment. *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 6 P.2d 669, 99 Cal.Rptr.3d (2000); *Lagatree v. Luce Forward*, 74 Cal.App.4th 1105, 88 Cal.Rptr.2d 664 (2000).



Enter the *Circuit City* case. Circuit City required all applicants to execute an employment application containing an agreement that any future claims would be settled "*exclusively* by final and binding *arbitration* before a neutral Arbitrator. " When Adams later filed suit in state court, asserting employment discrimination claims under California law, Circuit City obtained a federal court order under the FAA compelling arbitration. The Ninth Circuit Court reversed, holding that because the arbitration agreement

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was contained in a "contract of employment," it therefore fell within a specific exemption to the FAA. 194 F.3d 1070. The Supreme Court, however, limited the FAA's exemption for "contracts of employment" to transportation workers' contracts. 121 S. Ct. 1311.

The new spur to arbitration comes from the renewed expression in the *Circuit City* opinion of support for arbitration to resolve employment discrimination claims. Justice O'Connor's concurrence noted that, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum." 121 S.Ct. at 1312.

Circuit City, however, did not either mention *Duffield* or try to construe Title VII. Still, because of this language, *Duffield* is generally believed to be under pressure. The issue is currently before the Ninth Circuit, and a similar issue is before the Supreme Court this fall term. In April, a district court in the Central District of California compelled arbitration of a Title VII case in an unpublished order, noting that *Duffield* had "declined to follow the general federal policy in favor of arbitration." *Olivares v. Hispanic Broadcasting Corporation*, No. CV-00-00534 (C.D.Cal. April 27, 2001). A federal district court in Oregon, however, recently felt constrained to follow *Duffield*.

The Pro's of Arbitration

1. Quicker Resolution. Arbitration often is faster, given the crowded federal dockets, for both parties. Usually, getting to hearing is quicker than getting to trial in either state or federal court, given the size of the dockets. This may change as use of arbitration increases.

2. Costs Savings. Arbitration invariably costs less, for both parties, than litigation, much of this savings resulting from the quicker resolution and the typical streamlining of the discovery process that is more closely controlled by an arbitrator as compared to the courts. For plaintiffs, this has considerable advantages, since their resources likely to be fewer than their former employers'.

3. Greater Accessibility. Arbitration, particularly when part of an overall employer-provided dispute resolution program that includes grievances or mediation, is generally easier to access since a letter demand suffices. This is likely to be the case as employers try to bolster enforceability of their programs as a result of recent case law relieving employees from paying more than a small part of the arbitrator's relatively high fees. This greater accessibility may likewise result in employees' enhanced ability to address *during* employment various types of claimed discrimination, such as a lost promotion, changes in job duties of a significant nature, or disciplinary action.

4. Confidentiality. Arbitration proceedings typically take place without publicity; they are not publicly filed as are lawsuits and arbitration hearings typically take place in a private setting. Arbitration awards typically are not published without the consent of the parties.

5. Reduced potential for plaintiffs' verdicts and high jury awards. For employers, it has been anticipated by some that this cost savings will also include a reduced likelihood

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of high or "runaway" jury verdicts, particularly for serious cases. However, this anticipated savings is highly speculative and is premised upon a historical perspective of labor and employment arbitration that did not include a statutory remedial scheme expressly providing for compensatory and punitive damages. Nevertheless, since arbitrators are attorneys, there is a greater likelihood that the intricacies of the law will be applied, much as was the case before 1991 when federal judges acted as the triers of fact in Title VII cases.

The Con's of Arbitration

1. Loss, to employees, of the right to jury trial of their claims. For plaintiffs, this is the unkindest cut of all.

2. Potential limitations upon discovery. In arbitration, there is no right to discovery in any particular form, unlike in federal court, where both sides have the right to ten (10) depositions and to undertake a variety of written discovery. Arbitration discovery is in the hands of the arbitrator if the parties cannot agree to a plan, although various administration companies, from JAMS to the American Arbitration Association, provide for certain forms of discovery and allow considerable discretion with fairness as the guide.

3. Issues posed by the experience and qualifications of available arbitrators. As concerned as employees may be regarding loss of their right to jury trial or the possibility of a "pro-company" arbitrator, employers should also be concerned because many of the currently-available arbitrators are traditional labor arbitrators, who consider cases arising under collective bargaining agreements ("CBA"). These are very different proceedings from a discrimination lawsuit. Most traditional labor arbitrators are not accustomed to applying the sometimes complex legal standards applicable to discrimination cases or even to the standard of proof utilized in a civil lawsuits. In discipline cases, the company bears the burden to prove it acted in accordance with the CBA, whereas in discrimination lawsuits the employee bears the burden of proof except for a few affirmative defenses. Moreover, counsel experienced in arbitrating CBA grievances have increasingly raised concerns regarding potential biases of arbitrators. Employers who consider adopting an arbitration program must pay particular attention to the sources and experience of arbitrators; JAMS, for instance, taps former judges, and AAA is recruiting employment lawyers to sit as arbitrators in these cases.

4. Limited appellate review. This is, perhaps, one of the largest drawbacks for both sides. Even jury verdicts can and have been overturned by appellate courts under the "no reasonable jury" standard. However, arbitrators are entitled to considerably more deference, as courts cannot review an award on its merits even in the face of allegations the decision rests upon factual errors or misinterprets the parties' agreement. If the arbitrator "is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision." *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 52 (2000). Once the arbitrator decides, that usually ends the matter.

5. Increased costs to employers as arbitration programs develop to mimic litigation. Lower federal courts have increasingly declined to enforce arbitration programs that do not provide the employee opportunities to develop his/her claims through discovery that are substantially comparable to those available in a lawsuit in court. Employment arbitration proceedings likely will begin to take on more characteristics of lawsuits. Employers will still have incentives to conduct discovery to develop their defenses, particularly given the fact that arbitration cannot limit available remedies, and adverse Title VII awards can be quite sizeable — while compensatory and punitive damages are "capped," 42 U.S.C. § 1981a, back pay and front pay are not capped, and successful employees are entitled to recover their costs and attorney's fees. 42 U.S.C. § 2000e-5(k).

6. Reduced potential for summary judgment. Many cases, now, are disposed of via summary judgment. Although some arbitration schemes provide for summary disposition, such as JAMS arbitrations, the general view now is that arbitrators will be more likely to decide to hear cases on the merits.

7. Lack of protection from Equal Employment Opportunity Commission actions for class and/or injunctive relief or class actions. Those Circuits disagreeing with *Duffield* still recognize the right of the EEOC to seek injunctive relief, such as reinstatement or promotions, or class actions. The issue as to whether EEOC can still seek back pay, front pay or damages on behalf of employees subject to arbitration agreements, will likely be decided this term by the Supreme Court in *EEOC v. Waffle House*, 193 F.3d 805 (4th Cir. 1999), *cert. granted*, 121 S.Ct. 1401 (2001).

8. Potential difficulty for some plaintiffs to secure legal representation on a purely contingent fee basis. Some of the literature from the plaintiffs' bar indicates that because of a perception that there is a lesser likelihood to prevail before an arbitrator, some plaintiffs may have a more difficult time securing legal representation on the basis of a pure contingent fee agreement.

9. Increased costs through increased access. If an employer is successful in publicizing its arbitration program and lowers the start-up costs to the employee, the company may actually experience increased claims as more disputes go to arbitration than to lawsuits. **C**

Conclusion

Any decision to subject all future disputes with employees to arbitration should be considered carefully, and only after reviewing the potential down-sides in the context of the applicable company culture.

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