Mercer Law Review

Volume 49
Number 4 *Annual Eleventh Circuit Survey*

Article 12

7-1998

Brisentine v. Stone & Webster Engineering

William White

CASENOTES

Brisentine v. Stone & Webster Engineering

In *Brisentine v. Stone & Webster Engineering*,[1] the Eleventh Circuit Court of Appeals revisited the murky corner of employment law that deals with arbitration agreements. The case is noteworthy because the court, for the first time in the Eleventh Circuit, addressed the issue of whether a compulsory arbitration provision in a collective bargaining agreement precluded a separate action by the employee to protect his statutory rights.

I. FACTUAL BACKGROUND

The collective bargaining agreement in *Brisentine* was between Tennessee Valley Authority ("TVA") contractors and subcontractors and unions comprising the Tennessee Valley Trades and Labor Council. It provided for arbitration to resolve any grievances filed as a result of an alleged violation of the agreement.[2]

Article VII of the agreement contained the procedure for filing a grievance. According to that procedure, employees initiated any grievance by contacting their union representative. The union representative and the employee were involved in the intitial steps, but if a

1. 117 F.3d 519 (11th Cir. 1997).
2. *Id.* at 520.

settlement could not be reached within those first few steps, only the contractors and the council had the authority to appeal an unfavorable resolution to the arbitrator. In addition, if the dispute went to arbitration the contractors and the council, not the employee, had to split the costs. If the grievance reached the arbitrator, the agreement limited his jurisdiction to determining the "'meaning, application of, or compliance with the provisions of [the] Agreement.'"[3]

Clifford Brisentine worked as an electrician for several years before applying to Stone & Webster, during which time he fell off a scaffolding and injured his back. After undergoing surgery, Brisentine rehabilitated to the point of being able to return to work, although his doctor restricted him from lifting more than thirty to forty-five pounds and from repetitive bending and stooping.[4]

Upon his release from treatment, Brisentine sought employment with Stone & Webster. The detailed hiring process included a probationary period. While on probation he was informed that his application was rejected and that he was being terminated because of the restrictions on his ability to work. Brisentine immediately contacted his union, the I.B.E.W., about filing a grievance. The union representative told Brisentine that because his dispute with Stone & Webster centered on his disability, he would have a much better chance of success if he filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). Brisentine followed the representative's advice and filed a complaint with the EEOC. After receiving his right to sue letter from the commission, Brisentine filed a lawsuit alleging that Stone & Webster had violated the Americans with Disabilities Act ("ADA")[5] by terminating him. Stone & Webster moved for summary judgment, and the district court granted the motion on the grounds that Brisentine had failed to submit his agreement to binding arbitration.[6] The Eleventh Circuit reversed the district court and held that the statutory complaint was not subject to the compulsory arbitration provisions of the collective bargaining agreement.[7]

II. LEGAL BACKGROUND

Traditionally, American courts harbored a "suspicion of arbitration as a method of weakening the protections afforded in the substantive law

3. *Id.* at 521 (quoting the agreement).
4. *Id.*
5. 42 U.S.C. §§ 12101-12213 (1994).
6. 117 F.3d at 521.
7. *Id.* at 526-27.

to would-be complainants."[8] This "judicial hostility to arbitration"[9] was pervasive and prevented arbitration from being a viable alternative form of dispute resolution. As recent as the early 1950s, the Supreme Court refused to enforce arbitration agreements even in the face of federal legislation that was "not easily reconcilable."[10]

Since 1953, judicial attitude has changed drastically. Today, given the right factual scenario, courts will "rigorously enforce agreements to arbitrate."[11] Nonetheless, there has not been a total change. Instead of completely switching tracks from not enforcing any arbitration agreements to enforcing all of them, the courts have undergone a "metamorphosis," slowly accepting arbitration as an alternative form of dispute resolution. As a result, predicting whether an agreement will be enforceable has become a daunting task.[12] Not surprisingly, the gradual change of judicial attitude, the presence of cases in which courts have held agreements to arbitrate unenforceable, and the enactment of much federal legislation on the subject have caused a considerable amount of litigation, the result of which can easily become confusing.[13]

In the area of employment law, probably the best way to wade through the quagmire of case and statutory law is to start with the "easy" case and move to the exceptions. In recent years, the Supreme Court has had little trouble enforcing agreements to arbitrate when three factors are present: (1) the individual employee agrees with his employer, (2) the setting in which the agreement takes place is covered by the Federal Arbitration Act ("FAA"),[14] and (3) the agreement is to arbitrate disputes regarding the provisions of the employment contract itself.[15] When one of these factors is missing, the Court has struggled with whether or not to enforce the agreement, although the trend leans toward enforcement. When multiple factors are missing, however, no clear trend exists, and the lower courts differ on whether to enforce the agreement.

---

8. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989).

9. Kulukandis Shopping Co. v. Armstrong Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942).

10. Wilko v. Swan, 346 U.S. 427, 438 (1953). By the time this opinion was issued, the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1994), which clearly established a federal policy favoring arbitration, had been in force for twenty-seven years. Despite this, the Court still refused to enforce the arbitration agreement. 346 U.S. at 438.

11. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985).

12. Jondavid S. DeLong, Annotation, *Enforceability of Predispute Agreements to Arbitrate Claims Arising Under Employee Retirement Income Security Act of 1994 (ERISA)*, 116 A.L.R. FED. 525, 541 § 2[a].

13. *Id.*

14. 9 U.S.C. §§ 1-14 (1994).

15. *See, e.g.*, Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987).

For example, when a court finds that the FAA does not apply, it must then struggle to enforce the arbitration agreement. The issue that causes the struggle is often whether the FAA applies to employment contracts at all. Passed by Congress in 1925, the FAA created a federal policy favoring arbitration to help promote judicial acceptance. Because of political pressure, coming mainly from maritime unions,[16] section one of the Act excluded from coverage seamen, railroad employees, and any other worker "engaged in foreign or interstate commerce."[17] That exception has caused much confusion over what is covered by the FAA. Many courts have held that Congress intended all employment contracts to be excluded from the Act.[18] Others have held that only collective bargaining agreements are excluded,[19] while the Seventh Circuit has held that the FAA is generally applicable to all employment contracts.[20] Another small group of courts has held that section 301 of the Taft-Hartley Act[21] supersedes the FAA, rendering the question moot.[22] The Supreme Court has not yet directly addressed the issue, and as a result, other courts avoid the issue whenever possible.[23]

When the FAA is found not to apply, or the court addressing the agreement avoids the issue, the arbitration clause may still be enforced. In three cases that have collectively become known as *The Steelworkers Trilogy*, the Supreme Court announced that a presumption of arbitrability may be present even where the FAA cannot be applied.[24] This presumption is based on the "notion that arbitration is a preferable means of dispute resolution where there is a need to promote labor peace, given that the parties to a labor dispute possess potent economic weapons, including the strike and the lockout."[25] Thus, even though

---

16. Pryner v. Tractor Supply Co., 109 F.3d 354, 358 (7th Cir. 1997) (citing history).

17. 9 U.S.C. § 1.

18. *See* Pritzer v. Merrill Lynch, 7 F.3d 1110, 1120 (3d Cir. 1993); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 310-12 (6th Cir. 1991); Herring v. Delta Airlines, Inc., 894 F.2d 1020, 1023 (9th Cir. 1989); United Food & Commercial Workers v. Safeway Stores, Inc., 889 F.2d 940, 943-44 (10th Cir. 1989).

19. *See, e.g.*, United Elec., Radio & Mach. Workers v. Miller Metal Prods., Inc., 215 F.2d 221, 224 (4th Cir. 1954).

20. *Pryner*, 109 F.3d at 357.

21. 29 U.S.C. § 185 (1994).

22. *See, e.g.*, Martin v. Youngstown Sheet & Tube Co., 911 F.2d 1239, 1244 (7th Cir. 1990); *see also* DeLong, *supra* note 12, at 540 § 2[a] n.10.

23. *Pryner*, 109 F.3d at 357 (citing Matthew W. Finkin, *Worker's Contracts Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKLEY J. EMPL. & LAB. L. 282, 290 (1996)).

24. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

25. DeLong, *supra* note 12, at 541 § 2[a].

the addressing court may struggle with the issue, the absence of the FAA factor, alone, will generally not keep the agreement from being enforced.

Like the applicability of the FAA, when it is not clear that the individual employee has agreed to arbitration with the employer, courts will struggle to determine whether the agreement is enforceable. This problem most often arises under collective bargaining agreements where the decision to send disputes to arbitration is made for the individual employees by the union representing them in the collective bargaining. In these cases the Supreme Court has been most concerned about possible tension between collective representation and individual rights.[26] It is much harder to find that the parties intended to be bound by the agreement when both parties did not individually sign the agreement.[27] Still, when the other two factors are present, another piece of federal legislation, section 301 of the Labor Management Relations Act, also requires that these types of agreements to arbitrate be enforced.[28]

The Supreme Court has similarly struggled with cases where the agreement exceeds the parameters of the employment contract itself. However, when this is the only factor missing, the Court generally will enforce the agreement anyway. This problem has recently arisen when the agreement to arbitrate covers individual statutory rights.[29] In holding that such agreements are still enforceable when only the FAA applies and the individual employee agreed, the Supreme Court stated, "by 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 a judicial, forum."[30]

Thus, even when one of the three factors (the applicability of the FAA, the assent of the individual employee, and the limitation of arbitration to disputes about the contents of the employment contract) is missing, the clear judicial pattern is to enforce the agreement to arbitrate, as long

---

26. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 36 (1991) (Steven, J., dissenting).

27. *See Pryner*, 109 F.3d at 363.

28. 29 U.S.C. § 185 (1994). This statute requires that the employer deal directly with the union in bargaining, making the factor of individual employee assent almost impossible to satisfy.

29. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614 (1985); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1990); Shearson Lehman/American Express, Inc. v. Bird, 493 U.S. 884 (1989).

30. *Mitsubishi*, 473 U.S. at 628.

as the other two factors are present.[31] As a result, it may be unclear why a factors test is more favorable in predicting whether an agreement will be enforceable than a general presumption that all agreements to arbitrate will be enforced. The answer is simple. When two or more of the factors discussed above are missing, the Supreme Court has broken from the clear judicial pattern. *Alexander v. Gardner-Denver Co.*[32] illustrates such a break. Alexander filed an action in the district court alleging that his company discharged him for racially discriminatory reasons in violation of Title VII of the Civil Rights Act of 1964. The Gardner-Denver Company responded to the action with a motion for summary judgment, claiming that Alexander had already submitted his claim to arbitration as provided for under a collective bargaining agreement, and it had been decided against him. The district court dismissed the action and the Court of Appeals for the Tenth Circuit affirmed.[33] In reversing the district court and the court of appeals, the Supreme Court held that the agreement was unenforceable because the arbitration agreement, reached through collective bargaining, did not encompass the statutory violations that Alexander claimed.[34]

The Court's ruling in *Alexander* was followed by *Barrentine v. Arkansas-Best Freight System, Inc.*[35] and *McDonald v. West Branch*,[36] both involving situations where collective bargaining agreements existed instead of individual employee agreements, statutory claims instead of disputes about the provisions of the employment contract, and at least questionable applicability of the FAA.[37] The court declined to enforce the arbitration resulting from the agreements in both cases.[38] Thus, it was established that when two or more of the factors included in a readily enforceable arbitration agreement are missing, the Supreme Court is far less likely to enforce the agreement than when all of the factors are present, or only one factor is missing.

It should be noted that some courts[39] have not followed a factors-type test, and as a result have ruled that *Alexander* and its progeny were overruled by later Supreme Court cases such as *Gilmer v. Inter-*

---

31. *See generally*, DeLong, *supra* note 12, at 538-45 § 2[a].
32. 415 U.S. 36 (1974).
33. *Id.* at 40-44.
34. *Id.* at 49-50.
35. 450 U.S. 728 (1981).
36. 466 U.S. 284 (1984).
37. *Barrentine*, 450 U.S. at 730, 732-33; *McDonald*, 466 U.S. at 286.
38. *Barrentine*, 450 U.S. at 745; *McDonald*, 466 U.S. at 292.
39. Martin v. Dana Corp., 114 F.3d 421 (3d Cir. 1997) (*vacated*, July 1, 1997) (limited agreements which allow the employee to pursue arbitration without the approval of the union); Austin v. Owens-Brockway Glass Containers, Inc., 78 F.3d 875 (4th Cir. 1996).

state/Johnson Lane Corp.,[40] *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*,[41] and *Rodriguez de Quijas v. Shearson/American Express, Inc.*[42] Each of these cases expressly held that a statutory claim could be arbitrable. However, these cases are distinguishable from *Alexander* in that there were also individual agreements between the parties, and agreements which covered statutory violations. The Third and Fourth Circuits have held that *Alexander* was overruled by these cases. The courts clearly put more importance on the fact that in these later cases the statutory claims were held arbitrable, and in *Alexander* the statutory claim was not. The courts concentrated on that holding rather than on a factors-type analysis, whereby *Alexander* would be clearly distinguishable.

The majority of courts that have addressed the issue recently have held that the two lines of cases are distinguishable.[43] In *Gilmer* the Supreme Court found a distinction between *Alexander* and the later cases.[44] *Gilmer* is the most recent decision enforcing an individual's agreement to arbitrate statutory claims. In that case, Gilmer argued that the holding in *Alexander* mandated a finding that his statutory violation claim was not arbitrable.[45] The Supreme Court disagreed.[46] In *Alexander* (1) the FAA did not apply, (2) a collective bargaining agreement was involved, and (3) the agreement to arbitrate did not encompass statutory violations.[47] Conversely, in *Gilmer* (1) the FAA did apply, (2) the agreement was made individually, and (3) the agreement did encompass statutory violations.[48] Therefore, Gilmer could not use *Alexander* to support his argument.[49]

The Supreme Court's holding in *Gilmer* has at least two implications. First, because the Court went to such great lengths to distinguish *Alexander*, it seems that *Alexander* remains good law. Second, although never expressly stated, the manner in which the Court went about distinguishing *Alexander* strongly suggests that a factors test should be

---

40. 500 U.S. 20 (1991).
41. 473 U.S. 614 (1985).
42. 490 U.S. 477 (1990).
43. *See, e.g.*, Harrison v. Eddie Potash, Inc., 112 F.3d 1437 (10th Cir. 1997); Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997); Varner v. National Supermarkets, Inc., 94 F.3d 1209 (8th Cir. 1996).
44. 500 U.S. at 35.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*

used instead of any hard rule or presumption when deciding whether an agreement to arbitrate should be enforced.

III. RATIONALE OF THE ELEVENTH CIRCUIT COURT OF APPEALS

In *Brisentine v. Stone & Webster Engineering*, the Eleventh Circuit employed the type of factors test described above and ultimately decided that it was faced with a situation in which all three of the factors were missing.[50] Stone & Webster argued (1) that the case before the court was more like *Gilmer* than *Alexander* and (2) that *Gilmer* overruled *Alexander*.[51] Brisentine argued that *Alexander* controlled.[52] After recognizing the two lines of cases in the area and deciding that neither was exactly on point, the court set out to find which case was more analogous.[53] In doing so, Judge Carnes and the rest of the majority relied heavily on the distinctions the Supreme Court made in *Gilmer* between the two lines of cases.[54]

The first distinction discussed was that the agreement in *Gilmer* contained provisions for arbitration of statutory claims whereas the agreement in *Alexander* did not.[55] Because neither the arbitrator in *Alexander* nor the arbitrator in *Brisentine* had the authority to do anything other than interpret the provisions of the collective bargaining agreement, the court found that the facts before them were more like *Alexander* on the first distinction.[56]

The second distinction was the collective nature of the agreement and how that might affect the individual employee's rights.[57] In *Gilmer* the Supreme Court recognized that in collective bargaining agreements, the rights of the individual sometimes are compromised by the unions which represent them.[58] This fact seemed to greatly concern the Eleventh Circuit, and the court pointed to the advice of the I.B.E.W. that Brisentine file his complaint with the EEOC instead of filing a grievance, as evidence of a possible disparity between the union's interests and the employee's individual rights.[59] Thus, the court held that this factor, or the lack thereof, set *Brisentine* closer to *Alexander*.[60]

---

50. 117 F.3d at 525.
51. *Id.* at 523.
52. *Id.* at 522.
53. *Id.* at 522-23.
54. *Id.*
55. 117 F.3d at 523.
56. *Id.* at 524.
57. *Id.*
58. 500 U.S. at 35.
59. 117 F.3d at 525.
60. *Id.*

Like the first two factors, the court found that the third factor, which was whether or not the claim arose under the FAA, was more analogous to *Alexander* than to *Gilmer*.[61] Although the court did not explain its reasoning on this issue in detail, it is apparent that the court relied on the fact that both *Alexander* and *Brisentine* involved collective bargaining agreements. As such, even though it is not clear that the FAA did not apply, it is clear that *Brisentine* is a case where the applicability of the FAA is at least questionable, and if the other two factors were present, the Eleventh Circuit would have had to struggle to enforce the agreement.[62]

After ruling that each of the distinctions mentioned in *Gilmer* made this case more analogous to *Alexander*, the court made explicit its view that *Alexander* was still good law.[63] While recognizing that it was reasonable to read *Gilmer* as severely undermining, if not overruling *Alexander*, the court reasoned that it was not a lower court's job to sound the death knell of a Supreme Court decision, and it expressly rejected the decisions of other circuits that have done so.[64] Thus, the Eleventh Circuit held that because the case before it was more analogous to *Alexander* than to *Gilmer* and that *Alexander* was still good law, the arbitration agreement was not enforceable as to the statutory violation claims.[65]

IV. IMPLICATIONS

At first glance, *Brisentine v. Stone & Webster Engineering* appears to be an important judicial decision because it is a step away from the growing trend towards enforcing arbitration agreements. However, upon closer examination, it becomes clear that the Eleventh Circuit's decision is in line with the Supreme Court's most recent cases involving the same issues. Although it has never expressly acknowledged it, the Court has employed the same type of factors test the Eleventh Circuit used in *Brisentine*: rigorously enforcing agreements when all of the factors are present, struggling to enforce when one factor is missing, and refusing to enforce when none of the factors are present.[66] In *Brisentine* the Eleventh Circuit found that none of the factors were present, and as a result, refused to enforce the arbitration agreement.[67] As such,

61. *Id.*
62. *See* Part II, *supra*.
63. 117 F.3d at 525-26.
64. *Id.* at 526.
65. *Id.* at 526-27.
66. *See* Part II, *supra*.
67. *See* Part III, *supra*.

Brisentine is difficult, but consistent with existing Supreme Court authority.

Still, the Eleventh Circuit's decision in *Brisentine* is noteworthy because it illustrates the practical difficulties that the judiciary's gradual change in attitude towards arbitration has brought. From an employer's standpoint, the difficulties are twofold. First, it is very hard to predict exactly what an agreement to arbitrate, adopted through collective bargaining, will cover. No doubt, Stone & Webster considered a situation like Brisentine's when bargaining with the union council and thought that the agreement covered such a situation.

Second, under the present state of the law, it is almost impossible for an employer to get an enforceable agreement with a union employee to arbitrate a statutory violation. As discussed earlier, the Labor Management Relations Act requires that employers deal directly, and solely with the union in collective bargaining.[68] To satisfy the individual agreement factor, however, the employer must deal directly with the individual employee.[69] Thus, under the present state of the law, the employer has two options: violate federal legislation or try to enforce an arbitration agreement with more than one factor missing.

There are practical difficulties when the employee is concerned as well. One of the main reasons that employers turn to arbitration instead of traditional litigation is expense—it is cheaper to arbitrate. If an employer has to spend money on both arbitration and litigation it may have less money to spend on employees. This may mean jobs are lost. Therefore, the present state of the law may affect employee job security.

Of course, a bright line rule that enforces all reasonable arbitration agreements would serve to resolve some of the difficulties that result from uncertainty. That appears to be exactly the type of rule the Fourth Circuit adopted,[70] and the type the Eleventh Circuit rejected in *Brisentine*.[71] It will be interesting to see if the Supreme Court addresses these difficulties in future cases. If so, it will be even more interesting to see if it follows the Fourth Circuit and adopts a more generally applicable rule or if it continues to use the factors test as employed by the Eleventh Circuit in *Brisentine*.

WILLIAM WHITE

---

68. 29 U.S.C. § 185.
69. *Id.*
70. *See* Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (1996).
71. 117 F.3d at 526-27.