EXTENDING THE USE OF ARBITRATION TO NONUNION ENVIRONMENTS: JUDICIAL REQUIREMENTS FOR DUE PROCESS

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I. INTRODUCTION

With the rise in the cost of litigation,[1] the lengthy litigation process,[2] and the significant cost of jury awards,[3] employers outside of the unionized environment are increasingly including arbitration provisions in non-union employment agreements.[4] Since the Supreme Court's decision in *United Steelworkers v. Warrior & Gulf Navigation Co.*[5], an evolution has taken place leading to the use of arbitration in both the union and nonunion environments. This article will examine this "evolution," will consider substantive and procedural issues that have arisen implementing arbitration in the nonunion environment, and will suggest a model to resolve some of those issues.

II. THE "EVOLUTION"

It is common for collective bargaining agreements to include grievance procedures that contain arbitration as its final step. In the words of the U. S. Supreme Court in *United Steelworkers v. Warrior & Gulf Navigation Co.*:[6]

> Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining

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[1] One estimate suggests that litigating a typical employment dispute costs at least $50,000 and takes two and one-half years to resolve. *See* Hooters of Am. v. Phillips, 173 F. 3d 933, 936 (4th Cir. 1999).

[2] In *EEOC v. Waffle House, Inc*., 2002 U.S. LEXIS 489, n. 12 (Jan. 15, 2002), the Supreme Court stated:

> In the vast majority of cases, an individual employee's arbitral proceeding will be resolved before a parallel court action brought by the EEOC. See Maltby, Private Justice: Employment Arbitration and Civil Rights, 30 Colum. Human Rights L. Rev. 29, 55 (1998)(reporting that in arbitration the average employment discrimination case is resolved in under nine months while the average employment discrimination case filed in federal district court is not resolved for almost two years).

[3] The national jury-award median for employment practice liability cases, which includes discrimination and retaliation claims, rose 44% in one year - from $151,000 in 1999 to $218,000. JURY VERDICT RESEARCH REPORT, EMPLOYMENT PRACTICE LIABILITY: JURY AWARD TRENDS AND STATISTICS (2001).

[4] In *Waffle House*, the Court, quoting from a June 20, 1997 article in the Wall Street Journal stated: "more than 3.5 million employees are covered" by arbitration agreements. 2002 U.S. LEXIS 489, at n. 11.

[5] 363 U.S. 574 (1960).

[6] *Id*.

> agreement. .... The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement.[7]

Although the Supreme Court endorsed the use of arbitration to resolve disputes arising under a collective bargaining agreement, the Court distinguished the role of arbitration in the labor-management setting from the use of arbitration in the "commercial setting." The Court stated: "In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife.... For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself."[8]

The Court also stated that:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law--the practices of the industry and the shop--is equally a part of the collective bargaining agreement although not expressed in it.... The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished.[9]

Although the Steelworkers Trilogy[10] may have set forth subtle distinctions between an arbitrators' role in the collective bargaining context, and arbitration in the commercial setting, in its 1974 decision in *Alexander v. Gardner-Denver Co.*,[11] the Supreme Court was less than enthusiastic about the notion of giving the "labor arbitrator" exclusive authority over statutory disputes. In *Gardner-Denver*, the Court considered whether to permit an employee to pursue his rights in federal court after completing the arbitration process provided for under his collective bargaining agreement.[12] In its decision, the Court concluded that enforcement of Title VII is vested in federal courts.[13] Additionally, the Court was critical of the arbitration process as a method for resolving such statutorily based claims arising in the collective bargaining context. In *Gardner-Denver*, a black employee of the Company filed a grievance under his collective-bargaining agreement claiming that he had been "unjustly discharged." Although the actual written grievance did not specifically raise the issue of race discrimination at the pre-arbitration step of the grievance procedure, the union raised the claim that the employee's discharge had been for racially motivated reasons. The matter went before an arbitrator who concluded that the discharge was for just cause.[14] In addition to filing the grievance, the employee filed a charge of racial discrimination with the Colorado Civil Rights Commission, which referred the complaint to the Equal Employment Opportunity Commission (EEOC). The EEOC determined that there was not reasonable cause to believe that a violation of Title VII had occurred. The employee

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[7] *Id.* at 578-79, 581.
[8] *Id.* at 577.
[9] *Id*. at 581.
[10] United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593,(1960).
[11] 415 U.S. 36 (1974).
[12] *Id*.at 47-48.
[13] *Id*. at 47.
[14] *Id*. at 39.

then filed an action in federal district court alleging that his discharge was based upon race discrimination. The employer argued that the employee was bound by the decision of the arbitrator and was therefore barred from seeking redress in federal court.

The Supreme Court in concluded that the employee was not foreclosed from bringing an action in federal court because he had previously submitted his claim to arbitration. In reaching its conclusion, the Court emphasized that: "Final responsibility for enforcement of Title VII is vested with federal courts. The Act authorized courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effects of unlawful employment practices."[15]

The Court conceded "Title VII does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements."[16] However, it took this silence as an indication that "[t]here is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction."[17]

Additionally, the Court concluded that the legislative history of Title VII demonstrated that Congress intended to "allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes."[18] In support of this critical conclusion, the Court noted that under Title VII, EEOC actions are not barred by order of state or local agencies, and an individual can bring an action in federal court even if the EEOC concludes that Title VII has not been violated.

The Court also articulated its concern that arbitration procedures, and the role of arbitrators generally, make the arbitration process inappropriate to consider statutory issues. The Court noted that an "arbitrator's task is to effectuate the intent of the parties" and to interpret the collective bargaining agreement, not the interpretation of legislation.[19] While acknowledging that collective-bargaining agreements generally, and the agreement in *Gardner-Denver* specifically, may contain "nondiscrimination clauses similar to Title VII," the Court viewed the inclusion of such a clause not as a means of authorizing an arbitrator to consider the statutory issue, but simply as providing an incentive for a possible pre-litigation or pre-trial settlement.[20]

Despite the "chilly" reception the *Gardner-Denver* Court gave to the notion of arbitrating statutory disputes, the issue reappeared in the early 1990's outside of the collective bargaining setting.

In *Gilmer v. Interstate/Johnson Corp*,[21] the Supreme Court indicated a change in attitude by concluding that a claim under the Age Discrimination in Employment Act (ADEA) can be subject to compulsory arbitration under the Federal Arbitration Act. (FAA). In *Gilmer*, Interstate/Johnson Lane Corporation hired Robert Gilmer as a manager of financial services. Gilmer registered as a securities representative with several stock exchanges as required by the terms of his employment.[22] The registration application filed by Gilmer provided, in part, that he "agreed to arbitrate any dispute, claim or controversy" arising between him and his employer Interstate.[23]

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[15] *Id*. at 56.
[16] *Id*. at 45.
[17] *Id*. at 47.
[18] *Id*.
[19] *Id*. at 53.
[20] *Id*. at 55.
[21] 500 U.S. 20 (1991)
[22] *Id*. at 23.
[23] *Id*.

In 1987 Gilmer was terminated at the age of 62. Gilmer filed an age discrimination charge with the EEOC and subsequently brought suit under the ADEA in federal district court alleging age discrimination. Interstate filed a motion to compel arbitration citing the arbitration provision in the registration agreement and the Federal Arbitration Act. Gilmer wanted to assert his statutory rights and opposed the motion. The Supreme Court concluded that Gilmer's ADEA claim was subject to compulsory arbitration.

In reaching its conclusion, the Court considered several issues including: 1) the adequacy of arbitration procedures;[24] 2) the unequal bargaining power between employers and employees;[25] 3) whether the language of the ADEA or its legislative history specifically precludes arbitration;[26] 4) the effect of the Court's prior decision in *Alexander v. Gardner-Denver Co.*;[27] and 5) whether the Federal Arbitration Act excludes coverage of contracts of employment.[28]

In *Gilmer*, the Court clearly endorsed arbitration as a method for resolving disputes and endorsed the procedures utilized in establishing the arbitration process. The Court rejected Gilmer's claim that arbitrators are biased.[29] It pointed out that under New York Stock Exchange rules, the parties are informed of arbitrators' backgrounds, parties are permitted one preemptory challenge and unlimited challenges for cause, and arbitrators are required to disclose any conflicts that might preclude them from rendering an objective and fair decision.[30] Additionally, the Court rejected Gilmer's contention that the limited discovery permitted under the arbitration process in question made it difficult to prove discrimination.[31]

Although conceding that the discovery process under the arbitration procedure was not as extensive as that provided for in federal court, the Court quoted from its decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*,[32] and stated that a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."[33] Additionally, the Court pointed out that even the limited discovery in arbitration allowed for document production, information requests, depositions, and subpoenas.[34]

Moreover, the Court rejected Gilmer's argument that arbitration cannot adequately further the purposes of the ADEA because it does not provide for "broad equitable relief and class actions."[35] The Court noted that under the Stock Exchange rules, an arbitrator is not restricted in the types of relief that may be awarded. The Court majority was clearly not concerned with the fact that arbitration may not permit a class action or class relief. The Court noted that even if class actions could not be brought through the arbitral forum, the EEOC would not be precluded from bringing such a class action.[36]

Finally, the Court was not persuaded by Gilmer's argument that the use of arbitration would somehow stifle the development of the law.[37] While noting that it was unlikely that ADEA

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[24] *Id*. at 30.
[25] *Id*. at 33.
[26] *Id*. at 24.
[27] *Id*. at 33.
[28] *Id*. at 40.
[29] *Id*. at 29.
[30] *Id*. at 30.
[31] *Id*. at 31.
[32] 473 U.S. 614 (1985)
[33] 500 U.S. 20, 31 (1991).
[34] *Id*. at 40.
[35] *Id*. at 32.
[36] *Id*.
[37] *Id*. at 31

claims would vanish from the courts, the Court pointed out that under New York Stock Exchange rules all arbitration awards are in writing, include the names of the parties, a summary of the issues and a description of the award decided upon by the arbitrator.[38] Moreover, the Court noted that the decisions were available to the public. While conceding that judicial review of arbitration decisions was limited, the Court reaffirmed its view that such review is "sufficient to assure that arbitrators comply with the requirements of the statute at issue."[39]

The majority rejected Gilmer's claim that the Court's 1974 decision in *Alexander v. Gardner-Denver Co.*, precluded arbitration of the underlying claim.[40] The *Gilmer* Court was clearly not prepared to reconsider its holding in *Gardner-Denver*.[41] The Court distinguished its holding in *Gardner-Denver*, in part, on the grounds that "an employee's contractual rights under a collective-bargaining agreement are distinct from the employee's statutory Title VII rights...."[42] The Court also noted, as it has in *Gardner-Denver*, that a "labor arbitrator has authority only to resolve questions of contractual rights" and not to raise issues concerning public law that clash with collective bargaining rights.[43] The Court went on to state, "[s]ince the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions."[44] Moreover, the Court in *Gilmer* noted its "concern" that in labor arbitration individual rights may be secondary to the collective interests of the bargaining unit as a whole. The Court appeared to be concerned that individual statutory rights will lose out to collective rights in the collective bargaining context because the alleged victim of discrimination is represented by his or her union rather than by a private attorney hired and owing complete loyalty to the employee.

Clearly, the *Gardner-Denver* Court's "suspicion" of the arbitration process to resolve statutory claims was substantially, if not totally, rejected by the Court in *Gilmer*. Quoting from its decision in *Mitsubishi Motors Corp*., the *Gilmer* Court stated, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[45] The Court specifically rejected the idea that arbitration panels will be biased, or lack sufficient discovery or court like procedures with regard to evidence or remedies to be a legitimate

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[38] *Id*.
[39] *Id*. at 32, n. 4.
[40] *Id*. at 33.
[41] In *Cole v. Burns Int'l Sec. Serv.*, 105 F. 3d 1465, 1483 (D.C. Cir. 1997), the Court of Appeals offered its view on the issue stating:

> It is plain that the Supreme Court saw a critical distinction in the situations raised by *Gardner-Denver and Gilmer*. *Gardner-Denver* involved arbitration in the context of collective bargaining, which almost invariably means that the union controls the presentation of the statutory issue to the arbitrator. Thus, the *Gardner-Denver* Court knew that arbitration might not be fair to the individual employee, because an arbitrator would of necessity be required to deal with the union's interests vis-a-vis the employer, and the union's interests are not necessarily the same as the employee's interests, especially with respect to a claim of employment discrimination. *Gilmer*, on the other hand, raised an individual employee claim outside the collective bargaining context, so the pitfalls seen in *Gardner-Denver* did not present themselves in *Gilmer*.

[42] 500 U.S. at 34.
[43] *Id*. at 34. The *Gilmer* Court also distinguished *Gardner-Denver* by pointing out that *Gilmer* is decided under the Federal Arbitration Act whereas *Gardner-Denver* was not. Although the Court did not discuss the federal policy underlying labor arbitration, it did state that the FAA "reflects" a liberal policy favoring arbitration agreements.
[44] *Id*. at 35.
[45] *Id*. at 34.

substitute for the court process.[46] Moreover, the *Gardner-Denver* view that "…the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land" appeared not to concern the *Gilmer* Court.[47]

The trend supporting arbitration that started in *Gilmer* continued in *Circuit City Stores, Inc. v. Adams.*[48] In a 5 to 4 decision, the Supreme Court held that the Federal Arbitration Act applied to the employment contract at issue. Significantly, the Court's narrow majority rejected the view that the FAA exempted all contracts of employment. In *Circuit City*, Saint Clair Adams applied for a position with Circuit City Stores, Inc. Adams signed an employment application that stated in part:

> I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, exclusively by final and binding arbitration before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Right Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the laws of contract and the law of tort.[49]

Two years later, Adams filed an employment discrimination suit against his employer asserting claims under California law. Circuit City in turn filed suit in federal district court seeking to enjoin the state court action and asking the court to compel arbitration under the language of the employment application. The District Court compelled arbitration. However, the Ninth Circuit held that since the arbitration agreement in *Circuit City* was contained in a "contract of employment" it was not subject to the FAA and therefore arbitration could not be compelled. Clearly, the Supreme Court's broad view of the exemption under the FAA firmly opened the door to the use of arbitration provisions in employment contracts.

In addition to the importance of its interpretation of the FAA, the Court's majority reiterated its firm belief in the benefits of arbitration as a method of dispute resolution. The Court stated:

> We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts. These litigation costs to parties (and the accompanying burden to the Courts) would be compounded by the difficult choice-of-law questions that are often presented in disputes arising from the employment relationship . . . .[50]

The Court went on to reaffirm the view it had expressed in the *Gilmer* case that "arbitration

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[46] *Id*. at 30, 31, 39.
[47] 415 US at 53.
[48] 532 U.S. 105 (2001).
[49] *Id*. at 109.
[50] *Id*. at 123.

agreements can be enforced under the FAA without contravening the policies of congressional enactment's giving employees specific protection against discrimination prohibited by federal law . . . ."[51]

Just as it appeared that the Supreme Court was unequivocal in its endorsement of arbitration, it issued its decision in *EEOC v. Waffle House Inc.*.[52] In a 6 to 3 decision the Court held that the EEOC had the right to pursue a claim on behalf of an employee even if the employee has signed an arbitration agreement. The plaintiff in *Waffle House* filed a charge with the EEOC claiming that his termination had violated the ADA. The EEOC found probable cause after its investigation and filed suit in federal court.

Although the *Waffle House* decision may be viewed as a "blow" to the Court's endorsement of arbitration, it is likely to be a very "limited blow," and may well help to add credibility to the arbitration process. Prior to *Waffle House*, a plaintiff might well have believed that important issues deserving the attention of a court would never see the light of day because they would only be heard in the arbitration forum. With the Court's decision in *Waffle House* that concern should be significantly diminished. In short, issues of first impression or matters that the EEOC considers significant can be pursued through the courts and the potential for the growth of the law can be pursued.[53] However, it is unlikely that the relatively small number of cases pursued by the EEOC will nullify or significantly diminish the use of arbitration in the non-union setting.[54] The *Waffle House* decision is likely to lead to a "deferral" policy similar to that established by the National Labor Relations Board in *Collyer Insulated Wire*,[55] which established a standard by which unfair labor practice charges would be deferred to arbitration. Thus, although the Court's decision in *Waffle House* placed a new limitation upon the use of arbitration, it may well foster the use of arbitration and add a new credibility to the process.

III. IMPLEMENTING AN ARBITRATION PROCEDURE IN A NONUNION ENVIRONMENT

Thus, for more than a decade the Supreme Court has supported and encouraged the use of arbitration to resolve employment disputes in the non-union environment. Although the gate clearly has been opening wider and wider during this past decade, employers do not have *carte blanche* to create arbitration procedures that do not provide certain basic procedural safeguards for employees.[56] As the Court of Appeals in *Cole v. Burns Int'l Security Services*,[57] stated:

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[51] *Id*. Although *Gilmer* involved federal law, the *Circuit City* Court made it clear that was equally applicable to the State law claims. The Supreme Court stated: "*Gilmer*, of course, involved a federal statute, while the argument here is that a state statute ought not be denied state judicial enforcement while awaiting the outcome of arbitration. That matter, though, was addressed in *Southland and Allied-Bruce*, and we do not revisit the question here. " *Id.*

[52] 2002 U.S. LEXIS 489 (2001).

[53] *Id.* This will also address the issue raised by the plaintiff's in the *Gilmer* case that the use of arbitration would stifle the development of the law.

[54] *Id*. at 20, n. 7.

[55] 192 N.L.R.B. 837 (1971).

[56] This is clearly demonstrated by the decision of the Ninth Circuit in its consideration on remand of the Supreme Court's *Circuit City* decision. On remand, the Ninth Circuit refused to enforce the arbitration agreement concluding that the agreement was unconscionable. Circuit City Stores Inc. v. Adams, 279 F. 3d. 889 (9th Cir. 2002).

[57] 105 F.3d 1465,1483 (D.C. Cir. 1997).

> Obviously, *Gilmer* cannot be read as holding that an arbitration agreement is enforceable no matter what rights it waives or what burdens it imposes. [citation omitted]. Such a holding would be fundamentally at odds with our understanding of the rights accorded to persons protected by public statutes like the ADEA and Title VII. The beneficiaries of public statutes are entitled to the rights and protections provided by the law.[58]

Such procedural issues concern the selection process for arbitrators, the cost of the arbitration fees, the knowing waiver by employees of their right to court, and issues related to the lack of discovery in the process.

A. PROCEDURAL ISSUES

In *Hooters of America v. Phillips*,[59] the Court of Appeals considered the procedural aspects of an employer initiated arbitration procedure. Annette Phillips, a Hooters restaurant employee, threatened to sue Hooters for sexual harassment.[60] Hooters filed suit to compel arbitration under its 1994 dispute resolution process. The company "conditioned eligibility for raises, transfers, and promotions upon an employee signing an 'Agreement to arbitrate employment-related disputes."[61] The agreement provided that Hooters was responsible for setting up the arbitration rules and procedures.[62] Employees were not given a copy of the Hooters arbitration rules and procedures,[63] but were given five days to review the dispute resolution program and decide whether to accept or reject the offer made by the Company.[64] Philip's attorney was only provided a copy of the rules after Phillips quit her job.[65] The district court denied Hooters motion to compel arbitration.

On appeal, the Fourth Circuit Court of Appeals, while recognizing the benefits of arbitration and its role in providing "streamlined proceedings" and "expeditious results," affirmed the District Court's decision and refused to compel arbitration. However, the court, citing *Gilmer*, made it clear that agreements to arbitrate statutory discrimination claims had "judicial protection.'[66] The court noted that while arbitration was a proper vehicle to resolve such disputes, it was proper for the court to consider the arbitration rules promulgated by Hooters.[67]

Upon review of those rules, the court concluded that the rules were "so one-sided that their only possible purpose is to undermine the neutrality of the proceeding.'[68] It noted that while "the rules require the employee to provide the company notice of her claim," Hooters "is not required to file any responsive pleadings or to notice its defenses." Similarly, it noted that although the employee was required to provide a witness list and "brief summary of the facts known to each witness," Hooters had no similar obligation. The court also considered the arbitrator selection

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[58] *Id.* at 1482.
[59] 173 F. 3d 933 (4th Cir. 1999).
[60] *Id*. at 935.
[61] *Id*. at 935-36.
[62] *Id*. at 938.
[63] *Id*. 935-36.
[64] *Id*. at 936.
[65] *Id*.
[66] *Id*..
[67] *Id*. at 938.
[68] *Id*.

process provided for by Hooters. In this regard, it noted that although the court did not have any objection to a "tripartite panel," where each side picks one arbitrator and the two arbitrators pick the third arbitrator, it did object to the fact that the list of arbitrators was "created exclusively by Hooters."[69] The court stated:

> This gives Hooters control over the entire panel and places no limits whatsoever on whom Hooters can put on the list. Under the rules, Hooters is free to devise lists of partial arbitrators who have existing relationships, financial or familial, with Hooters and its management. In fact, the rules do not even prohibit Hooters from placing its managers themselves on the list. Further, nothing in the rules restricts Hooters from punishing arbitrators who rule against the company by removing them from the list. Given the unrestricted control that one party (Hooters) has over the panel, the selection of an impartial decision-maker would be a surprising result. [70]

The court also took issue with the process established by Hooters once the hearing commenced. The court noted that although Hooters had the right to "expand the scope of arbitration to any matter" even if unrelated to the employee's claim, the employee was restricted to matters included in his "notice of claim." Additionally, it pointed out that while Hooters could move for dismissal prior to the start of the hearing, the employee was not permitted to seek summary judgment.[71] The court also noted other biased provisions including Hooters exclusive right to audio or video the proceeding, or its right to move to vacate or modify an arbitral award.[72] The court concluded:

> We hold that the promulgation of so many biased rules -- especially the scheme whereby one party to the proceeding so controls the arbitral panel -- breaches the contract entered into by the parties. The parties agreed to submit their claims to arbitration -- a system where by disputes are fairly resolved by an impartial third party. Hooters by contract took on the obligation of establishing such a system. By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty.[73]

However, in reaching its conclusion the court made it clear that, "[w]e are not holding that the agreement before us is unenforceable because the arbitral proceedings are too abbreviated. An arbitral forum need not replicate the judicial forum."[74] Significantly, the court also noted that its decision should not "be misunderstood as permitting a full-scale assault on the fairness of proceedings before the matter is submitted to arbitration."

In *Floss v. Ryan's Family Steak House, and Daniels v. Ryan's Family Steak House*,[75] the Sixth Circuit was confronted with the validity of arbitration procedures in a nonunion environment. In a consolidated appeal involving two different employees and Ryan's Family Steak House, the court reviewed whether an employee waived rights to bring actions under the

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[69] *Id*. at 938-39.
[70] *Id* .at 939.
[71] Id..
[72] *Id*.
[73] *Id*.
[74] *Id*. at 940.
[75] 211 F. 3d 306 (6th Cir. 2000).

Americans with Disabilities Act (ADA), and in the other case whether the employee waived rights under the Fair Labor Standards Act (FLSA).[76] In both cases the plaintiffs had signed a form indicating they would arbitrate all employment-related disputes.

Ryan's required employees to sign an agreement entitled "Job Applicant Agreement to Arbitration of Employment-Related Disputes" in order to be considered for employment.[77] Interestingly, the employee's agreement was not with Ryan's but with a "third-party arbitration services provider."[78] Under the agreement the third party provider agreed to provide an arbitration forum in exchange for the employee's agreement to submit any dispute to arbitration with the provider. The agreement further stated that the "employee's potential employer is a third-party beneficiary of the employee's agreement to waive a judicial forum and arbitrate all employment-related disputes."[79] Under the agreement, the arbitration provider had "complete discretion" over the arbitration rules and procedures and had the right to modify those rules without the employee's consent.[80] The arbitration provider furnished the parties with a list of potential arbitrators,[81] and a biographical sketch of potential arbitrators.[82] Initially, each party could "strike" any name "for cause," and thereafter alternatively strike names until only one name remains from each selection pool.[83]

Interestingly, the district courts had arrived at different conclusions in the two cases. In the *Daniels* case, the district court concluded that the arbitration agreement was not enforceable because it did not provide the employee with any consideration for his promise to arbitrate his dispute.[84] The district court noted that only the arbitration provider and Ryan's benefited from the agreement.[85] Additionally, it held that the agreement was not sufficiently clear to constitute a "knowing and intelligent waiver" of the employee's disability claim.[86] In contrast, the district court in the *Floss* case enforced the agreement and rejected the argument that claims under the FLSA are not subject to mandatory arbitration.[87]

Although concluding that the underlying statutory claims of the employees were suitable for arbitration,[88] the Sixth Circuit Court of Appeals noted "the specific arbitral forum provided under an arbitration agreement must nevertheless allow for the effective vindication of that

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[76] *Id*. at 309.
[77] *Id*.
[78] *Id*.
[79] *Id*. at 310.
[80] *Id*. Under the provider's current procedures:

> A panel of three "adjudicators" preside over every arbitration proceeding. Each adjudicator is selected from one of three "selection pools." One pool consists of supervisors or managers of an employer who has entered into an arbitration agreement with EDSI. A second pool consists of nonsupervisory employees of an employer who is a signatory to an EDSI arbitration agreement. A third pool consists of attorneys, retired judges, and "other competent professional persons" not associated with either party. IF the dispute involves more than $20,000, only licensed attorneys are included in this third pool.

[81] *Id*. at 314.
[82] *Id*.
[83] *Id*.
[84] *Id*. at 310.
[85] *Id*. at 311.
[86] *Id*.
[87] *Id*.
[88] The Court of Appeals initially considered whether the FLSA claim was subject to mandatory arbitration. The Court, citing the Supreme Court's decision in *Gilmer*, and other cases, stated, "[t]hough a claim under the FLSA certainly serves a purpose beyond providing relief to an individual claimant, we fail to see how the broader policies furthered by such a claim are hindered when that claim is resolved through arbitration." Id. at 313.

claim.'[89] In light of this view, the court considered the procedure established under the Ryan's dispute program. At the outset, the court questioned the "neutrality" of the forum "in light of the uncertain relationship between Ryan's and EDSI [the provider].'[90] The court noted that unlike the American Arbitration Association, the "potential exists" for bias when a private arbitration provider has a financial interest in maintaining arbitration contracts with employers. The court noted "any such bias would render the arbitral forum fundamentally unfair.'[91] Although the court also indicated its "concerns" with the "fee structure and potential bias of EDSI's arbitral forum," it did not have to reach the issue of whether such "deficits" would prevent the arbitration of the statutory claims at issue.[92]

In *Geiger and Sadler v. Ryan's Family Steak Houses, Inc.*,[93] the arbitration procedure in Ryan's received additional scrutiny. The District Court agreed with the 6th Circuit that "there is a strong potential for bias in the selection of the arbitration panel.'[94] The court indicated that it was "suspicious" of EDSI's claim that it was going to be "fair, impartial, and neutral" "for marketing reasons." This court also noted that EDSI had an incentive to maintain its contractual relationship with Ryan's, while employees had no similar leverage.[95] The court noted that, "[t]he imbalance is made even more painfully obvious by the fact that EDSI relies entirely on representatives of the employer to explain the Agreement's provisions to would be employees and to secure their signatures; Ryan's is EDSI's agent at this point and both are fully invested in the activities.'[96] Similarly, the court also noted its concern for bias in light of EDSI's authority to select "both the rules for arbitration as well as the pools of potential arbitrators.'[97]

B. THE COST OF ARBITRATION AS A BARRIER TO ENTRY

Subsequent to the issuance of its decision in *Circuit City*, the U.S. Supreme Court issued its decision in *Green Tree Financial Corp,-Alabama and Green Tree Financial Corporation v. Randolph*.[98] Although *Green Tree* involved an agreement to arbitrate a financing agreement for the purchase of a mobile home and not an employment contract, it provides insight into the question of whether arbitration fees can render an agreement to arbitrate unenforceable. In *Green Tree*, the agreement did not mention arbitration costs and fees.[99] In its decision, the Supreme Court acknowledged that the cost of arbitration could

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[89] *Id*.
[90] *Id*.
[91] *Id*. at 314.
[92] *Id*. at 313. Although not reaching the issue, the court referenced the D.C. Circuit's decision in *Cole v. Burns Int'l Sec. Serv.*, 105 F.3d 1465 (D.C. Cir. 1997) in which the court refused to compel arbitration where the employer did not bear the full costs of the arbitrator. *See also supra* note 41 and accompanying text.
[93] 134 F. Supp. 2d 985 (2001).
[94] *Id*. at 995.
[95] *Id*.
[96] *Id*.
[97] *Id*. In addition to the issues covered by the Sixth Circuit, the Court in *Sadler* also considered the discovery procedures included in the Ryan's arbitration process, as well as the question of whether the "fee" structure included in the process tainted the entire process. As for the discovery process, the court, although concerned with the discovery process provided for in the procedure, made clear that, "[t]he discovery procedures alone do not necessarily make the forum unsuitable; rather, it is the limited discovery, controlled by a potentially biased arbitration panel, which creates the unfairness to claimants." In short, the court did not specifically indicate that a discovery process was even required in an arbitration procedure, only that the process used under the circumstances of this case did not meet judicial scrutiny.
[98] 531 U.S. 79 (2000).
[99] *Id*. at 82.

preclude a litigant from "effectively vindicating [his] rights," however, concluded that the record did not demonstrate that the costs in the *Green Tree* case would cause such prejudice to the individual involved.[100] The Court noted that the burden is on the party attempting to invalidate the arbitration agreement to demonstrate that the costs are "prohibitively expensive."[101] Unfortunately, the Court did not provide guidance on how to determine if the costs are prohibitive noting that in the *Green Tree* case "no timely showing" was made on the issue.[102] The Court stated, "[t]he 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement."[103]

In *Geiger and Sadler v. Ryan's Family Steak Houses, Inc.*,[104] the court, in addition to considering the procedural issues previously discussed, also considered the issue of whether the payment of fees by an employer taints the arbitration process. The Court noted that agreements requiring the employer to pay the fees have been upheld, whereas those requiring payment by the employee have not been upheld on the grounds that the high costs of arbitration may nullify the agreement.[105] Under the EDSI Rules an employee could be required "to pay one-half of the arbitration panel's fees or more" and could be required to pay a retainer fee of up to $2,000 up front.[106] Based upon this fee structure, the Court stated, "[t]his alone permits us to conclude that the arbitration forum provided by EDSI is inadequate as an alternative to the federal courts."[107]

In *Giordano v. Pep Boys-Manny, Moe & Jack, Inc*,[108] an employee of Pep Boys claimed that the employer violated the Fair Labor Standards Act, and related state laws. As part of his employment agreement, the plaintiff signed an agreement agreeing to arbitrate potential claims. In contrast to the *Hooters*, and *Ryan's* cases, the agreement provided that any arbitration would be subject to the Model Employment Arbitration Procedures of the American Arbitration Association (AAA).[109] The arbitration agreement also provided that the company and employee would "equally share" the cost of the arbitrator "in the amount and manner determined by the arbitrator, ten days before the first day of the hearing."[110] The agreement also provided that

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[100] *Id*. at 90.
[101] *Id*.at 92.
[102] *Id*.
[103] *Id*. at 91. Justice Ruth Bader Ginsburg in dissent quoting from the Court of Appeals for the District of Columbia in *Cole*, stated in part:

> In *Gilmer* the Supreme Court endorsed a system of arbitration in which employees are not required to pay for the arbitrator assigned to hear their statutory claims. There is no reason to think that the Court would have approved arbitration in the absence of this arrangement. Indeed, we are unaware of any situation in American jurisprudence in which a beneficiary of a federal statue has been required to pay for the services of the judge assigned to hear her or his case.

Justice Ginsburg also noted that, "[a]s a repeat player in the arbitration required by its form contract, *Green Tree* has superior information about the cost to consumers of pursing arbitration. Id. at 96. Justice Ginsburg observed, "[i]f Green Tree's practice under the form contract with installment sales purchasers resembles that of the employer in Gilmer, Randolph would be insulated from prohibitive costs." *Id* at 96.
[104] 134 F. Supp. 2d 985.
[105] *Id*. at 996.
[106] *Id*. at 997.
[107] *Id*. at 997. The Court acknowledged the Supreme Court's decision in *Green Tree*, but distinguished it on the grounds that the arbitration agreement in *Green Tree* was silent on the question of arbitration costs, and it was that silence which precluded the Court from invalidating the arbitration agreement. In contrast, the Court noted that the EDSI rules laid out a proposed fee structure that placed a heavy burden on the employee. *Id*. at 996, n. 5.
[108] 2001 U.S. Dist. LEXIS 5433 (2001)
[109] *Id*. at 5.
[110] *Id*. at 6.

each party would pay for its own costs and attorneys' fees, but that, "if any party prevails on a statutory claim which affords the prevailing party attorney's fees, or if there is a written agreement providing for fees, the Arbitrator may award reasonable fees to the prevailing party."[111]

With regard to the fee issue, the court noted that the plaintiff was a "fairly low-level employee" earning $400 per week.[112] Additionally, the court noted that the arbitration agreement at issue was "quite explicit both as to the percentage of responsibility born by each party and as to the fact that the costs are to be paid up-front."[113] Based upon the explicit clause, the court noted, "[the plaintiff] has submitted a fee schedule from the AAA that established that the initial filing fee would likely amount to $2000. While he has not established the arbitrator's likely charges with exacting precision, it is clear that an up-front responsibility for one half of daily fees anywhere near the range of $600 to $900, in conjunction with responsibility for the filing fee, would function as a barrier to plaintiff's pursuit of arbitration of his claims."[114]

In concluding that the "cost-sharing provision" was unenforceable, the court stated that, "nothing in *Green Tree* requires courts to undertake detailed analyses of the household budgets of low-level employees to conclude that arbitration costs in the thousands of dollars deter the vindication of employees' claim in arbitral forum."[115]

In a post *Green Tree* case, *Livingston v. Associates Finance, Inc.,*[116] the plaintiff challenged an arbitration provision included in a finance agreement on several grounds including that the "cost of arbitrating is prohibitively high." The agreement at issue incorporated the Commercial Rules of the AAA under which the arbitrator at the conclusion of arbitration allocates costs. The court stated "it cannot be said with confidence that Plaintiffs will not be saddled with prohibitive costs."[117]

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[111] *Id*. at 6.
[112] *Id*. at 23.
[113] *Id*. at 23.
[114] *Id*. at 23-24.
[115] *Id*. at 24. Interestingly, because the agreement contained language that stated provisions found to be unenforceable "shall not affect the validity of the remainder of the Agreement," and because the plaintiff was willing to go to arbitration, the Court enforced the agreement without enforcing the "fee" provision. As a result, Pep Boys was directed to "bear the costs of arbitration and the filing fees over and above the applicable filing fees for which plaintiff would be responsible were he filing his claim in federal court." It is also worth noting that the Court refused to oversee the discovery process, concluding that the *Gilmer* Court sanctioned discovery under arbitration provisions that are more limited than discovery under the Federal Rules of Civil Procedure. In addition, it noted that, "plaintiff has not made a showing that either the agreement's discovery provision or the AAA's discovery procedures will prove insufficient." *Id*. at 25.
[116] 2001 U.S. Dist. LEXIS 8678 (N. D. Ill. 2001).
[117] *Id*. at 8. The court noted in a footnote that the arbitration provision included in the plaintiff's agreement stated in part:

> If you start arbitration, you agree to pay the initial filing fee and required deposit required by the American Arbitration Association ...If you believe you are financially unable to pay such fees, you may ask the American Arbitration Association to defer or if the American Arbitration Association does not defer or reduce such fees so that you are able to afford them, we will, upon your written request, pay the fees, subject to later allocation of the fees and expenses between you and us by the arbitrator. There may be other costs during the arbitration, such as attorney's fees, expenses of travel to the arbitration, and the costs of the arbitration hearings. The Commercial Arbitration Rules determine who will pay the fees.

IV. A MODEL TO IMPLEMENT ARBITRATION IN A NONUNION ENVIRONMENT

Typically, the grievance procedure included in a collective bargaining agreement provides for the mutual selection of an arbitrator through the auspices of the American Arbitration Association or the Federal Mediation and Conciliation Service. The American Arbitration Association and the Federal Mediation and Conciliation Service have an application process for those individuals interested in serving as arbitrators on their "labor panels."[118] Those individuals meeting the standards of the respective organization become eligible for selection. Each organization has rules concerning the arbitration process generally and rules covering arbitrator conflicts of interest.[119] Often, grievance procedures provided for in collective bargaining agreements specify that a request for a list of arbitrators be directed to either the American Arbitration Association or the Federal Mediation and Conciliation Service. After receiving such a request, the respective organization provides the parties with a list of arbitrators from which the parties may mutually agree upon an arbitrator.[120] Under a typical collective bargaining agreement, the parties generally split the fee charged by the arbitrator.

A. THE SELECTION PROCESS

The decisions that have considered the procedural validity of arbitration procedures established in nonunion settings have focused upon the flaws in the selection of the arbitrators, and the method for assessing the costs of the arbitration.[121] The longstanding model used in the collective bargaining setting can be adopted with modification to the nonunion environment. In the traditional labor setting a demand for arbitration is sent to the American Arbitration Association (or some equivalent impartial organization) and a list of arbitrators is sent to the parties from which to select an arbitrator. This list contains the names and biographical information for arbitrators meeting an established standard of competency. Based upon the list and biographical data, the company and union select an arbitrator. There is no reason that a similar process could not be used in the nonunion environment.

Although an experienced attorney or representative would have an advantage over an individual employee in selecting from the list based upon prior experience with arbitrators or the ability of an attorney or professional representative to research prior decisions of a particular arbitrator, it would seem that any employee considering a lawsuit would also be represented by counsel. Additionally, any employee prepared to pursue his or her case without a representative should be prepared to deal with issues far more sophisticated than the selection process.

One potential criticism of such a selection process is that arbitrators may favor the employer because it is the employer that is the more constant client. In short, individual employees "come and go" whereas the employer may be the party to multiple cases annually. Clearly, in the collective bargaining setting the union is an equal client and therefore an arbitrator

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[118] AMERICAN ARBITRATION ASSOCIATION, QUALIFICATION CRITERIA FOR ADMITTANCE TO THE AAA NATIONAL ROSTER OF ARBITRATORS AND MEDIATORS.

[119] AMERICAN ARBITRATION ASSOCIATION RULES (Feb. 1, 2002).

[120] *Id*.

[121] In addition, some attention has also been placed upon the discovery process. However, since the *Gilmer* Court's endorsement of limited discovery in arbitration, the issue has not sparked the concern of the courts. *See Gilmer*, 500 U.S. 20 and *supra notes* 21-47 and accompanying text.

is less likely to consider the implications of favoring one side or the other. Such a cynical view of arbitrators is without basis.

However, to safeguard against even the appearance the AAA could simply be the master of the process and the arbitrator list by randomly assigning a qualified and neutral arbitrator to a case. In short, the AAA would become the equivalent of the clerk of courts and would handle not only the docket, but also the assignment of the arbitrator. While this approach might seem somewhat foreign to the arbitration process, in litigation plaintiffs and defendants have no practical input into judicial selection. Although such a departure from the traditional arbitration process may not be necessary, the AAA acting as the "clerk of arbitration" would not prejudice either the company or the employee and would add an additional level of neutrality to the process.

B. Assessing the Cost of Arbitration

The courts have also been clear that assessing an individual with the cost of arbitration is likely to create a fatal flaw in the arbitration process. The concern appears to focus upon the cost of the arbitrator. The cost of the arbitrator's fees in the collective bargaining setting are generally split between the employer and the union. The obvious missing player in the nonunion environment is the union. Although the courts do not appear to have a problem with the nonunion employer paying the arbitrator's fees directly, such an approach does not leave the appearance of impartiality that one would think courts would want to encourage. In fact, it appears inconsistent with judicial concern that an employer should not control the selection process.

As an alternative, a system could be established through the AAA (or another similar organization) to establish an of arbitration trust fund. This fund would pool the funds of all interested nonunion employers whose employees are subject to arbitration procedures to resolve employment disputes. The AAA would establish a monthly or yearly fee for an employer to become part of this fund. Fees paid by an employer might depend on the number of employees at a company subject to the arbitration process, past number of cases arbitrated, and other similar factors. With the establishment of such a fund, the concern about employee expenses would be addressed, and the neutrality of the arbitration process would be preserved. Under such a procedure, an employee or employer who requests the appointment of an arbitrator would set into motion an entire administrative process handled by the AAA or its equivalent. In short, the competency of arbitrators would be overseen by a neutral nonprofit organization, the selection would be handled in a neutral manner, and the payment of arbitration fees would come from a central fund which would significantly eliminate even the appearance that the employer is "paying for the arbitrator," and his or her decision.

V. Conclusion

There is a clear trend toward including arbitration procedures in nonunion employment agreements. Although the Supreme Court has evolved in its early view that arbitration should be limited to nonstatutory disputes arising under collective bargaining agreements, it has articulated concerns about the procedural integrity of the arbitration procedures implemented in nonunion employment agreements. With the use of a credible non-governmental administrative organization to create and oversee unbiased procedures; oversee a competent and credible roster of arbitrators; and create and administer an arbitration fund, the use of arbitration in the nonunion environment can gain the same longstanding credibility that has been attached to arbitration in the collective bargaining setting.