LAW REVIEW[1] 22048
August 2022

Forced Arbitration of USERRA Disputes

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
And Lieutenant Colonel Nicole Mitchell, ANG[3]

1.4—USERRA enforcement
1.5—USERRA arbitration
1.8—Relationship between USERRA and other laws/policies

---

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses' Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997, and we add new articles each month.

[2] BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. I have dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 40 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. §§ 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

[3] Nicole Mitchell, a life member of ROA, joined the Air National Guard in 1992, right out of high school. She was trained by the military first as a Weather Observer and later as a Weather Forecaster. She worked her way up to E-6 before she earned her commission in 2002. In 2003, she transferred from the Air National Guard to the Air Force Reserve. She served as a Weather Officer for the Hurricane Hunters, a unit that performs reconnaissance missions into hurricanes and other tropical weather systems to gather data which aids in forecasting. In 2019, Ms. Mitchell returned to the Air National Guard and was selected to be the Commander of the 126th Weather Flight. She currently holds the rank of Lieutenant Colonel (O-5). In addition to her degree in weather from the Air Force, Ms. Mitchell has a Bachelor of Arts in Speech Communications from the University of Minnesota and a Juris Doctor (law degree) from Georgia State University. She is a member of the Minnesota Bar Association. On the civilian side, she has worked as a broadcast meteorologist around the country, including for three national networks. She returned home to Minnesota in 2016 to raise her son and contributed as a meteorologist for Minnesota Public Radio and for KSTP-TV until January 2022, when she announced her candidacy for the Minnesota Senate. She is a candidate for that office in the November 2022 general election. She is also the proud mother of three sons as of July 2022, her biological son and two foster sons.

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

***Garrett v. Circuit City Stores, Inc.,* 449 F.3d 672 (5th Cir. 2006).[5]**

***Landis v. Pinnacle Eye Care, LLC,* 537 F.3d 559 (6th Cir. 2008).[6]**

***Ziober v. BLB Resources, Inc.,* 839 F.3d 814 (9th Cir. 2016), *cert. denied,* 137 S. Ct. 2274 (2017).[7]**

Nicole Mitchell's bad experience with forced arbitration of USERRA cases.

In 2008, I (Nicole Mitchell) had a bright career, on the civilian side and the military side, as a broadcast meteorologist and a flight meteorologist. I was a Captain in the Air Force Reserve, serving as a flight meteorologist with the elite Hurricane Hunters. On the civilian side, I was a broadcast meteorologist for The Weather Channel (TWC), where I had been working since 2004. Within months of my hiring, I was moved to the station's top-rated morning show. Management renewed my four-year contract two years early, anxious to retain my services. In 2006, I signed a new contract for a four-year term starting in 2007.

The new contract had a forced-arbitration clause, and I sought to get that provision removed from the contract before I signed it, but the company insisted that the arbitration clause was "mandatory." At the time, I had no problems with the company, other than a few scheduling issues about my Air Force Reserve duty, so I signed the contract.

In 2008, NBC Universal, Bain Capital, and the Blackstone Group jointly purchased The Weather Channel, with NBC managing the channel. Initially, I was a favorite with the

---

[4] This is a 7-2 decision by the United States Supreme Court, decided on 5/13/1991. Justice Byron White wrote the majority decision and was joined by six of his colleagues. The citation means that you can find the decision in Volume 500 of *United States Reports,* starting on page 20. This case arose under the Age Discrimination in Employment Act, not the federal reemployment statute. Nonetheless, the case is relevant to the adjudication of reemployment rights cases.

[5] This is a decision of the United States Court of Appeals for the Fifth Circuit, the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas. The citation means that you can find the decision in Volume 449 of *Federal Reporter Third Series,* starting on page 672. Wright discusses *Garrett* in detail in Law Review 11091 (October 2011).

[6] This is a decision of the United States Court of Appeals for the Sixth Circuit, the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

[7] This is a decision of the United States Court of Appeals for the Ninth Circuit, the federal appellate court that sits in San Francisco and hears appeals from district courts in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Marianas Islands, Oregon, and Washington. The "*cert. denied*" means that the United States Supreme Court denied certiorari (discretionary review). At least four of the nine justices must vote for certiorari, in a conference to consider certiorari petitions. Certiorari is denied in more than 99% of the cases where it is sought. The denial of certiorari does not necessarily mean that the Supreme Court agrees with the ruling of the Court of Appeals, but the denial of certiorari makes the Court of Appeals decision final. Wright discusses *Ziober* in detail in Law Review 16110 (October 2016).

new management, as I had been with the old management. I was promoted to be the main anchor on the top-rated morning show.

A problem arose when management asked me to come in for an impromptu appointment during an Air Force Reserve drill weekend that I had already scheduled six months in advance. I held my ground and refused to interrupt my military duty for this impromptu appointment. In the following months, some additional conflicts arose between my obligations to the Air Force and the unreasonable demands of management. I was demoted to less-favorable anchoring slots, ultimately ending up in an unfavorable late-night slot.

In 2010, I returned from my two-week annual training tour in the Air Force, only to be told that The Weather Channel did not want to retain me and that I would be cut when my contract expired in early 2011. As predicted, management fired me as soon as my contract expired.

I retained private counsel and filed suit against The Weather Channel in the United States District Court, but management used the forced-arbitration clause to remove the dispute from federal court to a "neutral arbitrator." The arbitrator appeared to have a pro-employer bias, and he had no experience with USERRA cases. I requested that the case be reassigned to a more neutral arbitrator with experience in the relevant statute, but my request was denied.

In addition to our concern about the arbitrator, my legal team and I were also concerned about the adequacy of the limited discovery process available in arbitration. We had reason to believe that management was not turning over relevant e-mails, showing that their annoyance with me was related to my service in the Air Force Reserve. Electronic discovery, which could sift through such deception, is routinely available in federal court but not in arbitration.

The arbitrator's decision is not reviewable by any court, and the whole process is unfair and opaque. I am convinced that I would have had a much better shot with a federal district judge determining questions of law, reviewable by the Court of Appeals, and with questions of fact determined by a jury of my peers.

The Federal Arbitration Act

Congress enacted the Federal Arbitration Act (FAA) in 1925, and the Act is codified in title 9 of the United States Code. The FAA provides that "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and

enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[8] The FAA also provides the authority for a federal district court to compel arbitration of a dispute.[9] The Supreme Court has held that these provisions manifest a "liberal federal policy favoring arbitration agreements."[10]

Congress enacted USERRA 69 years after it enacted the FAA, but the provisions of the two laws must be reconciled, if possible, because "repeals by implication are disfavored—very much disfavored."[11] The Supreme Court has held: "The rarity with which [the Court has] discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue."[12]

The FAA means that if parties have agreed in advance, before any dispute has arisen, that any dispute will be adjudicated in arbitration, rather than state or federal court, they will be held to that agreement when a dispute arises. When Congress enacted the FAA, it apparently had in mind disputes between or among sophisticated business entities, like a dispute between the United States Steel Corporation and Ford Motor Company over a contract for the supply of steel for automobile manufacturing, and arbitration is entirely appropriate in cases of that nature. Unfortunately, the Supreme Court has held that the FAA also applies in the employment context and that if an employee has agreed in advance to submit employment-related disputes to arbitration, instead of litigating them in court, the employee will be held to that agreement.[13]

We think that arbitration is not an appropriate and just way to adjudicate employment and consumer disputes. For the employer or other company, these disputes are an everyday occurrence. For the individual employee or consumer, such a dispute is a once-in-a-lifetime occurrence. The arbitrator has an enormous financial incentive to rule against the individual and for the company, so that the company will select the same arbitrator again for the next dispute.

It is true that the arbitrator is supposedly required to apply the text and legislative history of the relevant statute (like USERRA) and the case law under that statute, just as a federal district court judge would. The problem is that there is no remedy if the arbitrator misapplies or even

---

[8] 9 U.S.C. § 2.

[9] 9 U.S.C. § 3.

[10] *Gilmer,* 500 U.S. at 25, citing *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 24 (1983).

[11] *Reading Law: The Interpretation of Legal Texts,* by Antonin Scalia and Bryan A. Garner, page 327, Thomson/West 2012. This is the definitive recent restatement of the principles of statutory construction, the rules developed over many centuries by courts in the United States, Great Britain, and other common law countries for the interpretation of constitutions, statutes, and other legal texts.

[12] *J.E.M. Agricultural Supply, Inc. v. Pioneer Hi-Bred International, Inc.,* 534 U.S. 124, 142 (2001).

[13] *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991).

flouts the substantive law that he or she is supposedly applying.[14] But what we think is not especially relevant—much more relevant is what the Supreme Court and the Courts of Appeals have held.

Gilmer

In May 1981, Robert Gilmer was hired by Interstate/Johnson Lane Corporation as a Manager of Financial Services. As required by his employment, he registered with several stock exchanges, including the giant New York Stock Exchange. In the registration application form that he was required to complete and sign, Gilmer "agreed to arbitrate any dispute, claim, or controversy" that might thereafter arise between himself and his employer.

In 1987, when Gilmer was 62, Interstate fired him. Gilmer claimed that the firing violated the Age Discrimination in Employment Act (ADEA), which makes it unlawful for employers to discharge, refuse to hire, or otherwise discriminate against individuals above the age of 40 based on their age. Gilmer filed an ADEA complaint with the United States Equal Employment Opportunity Commission (EEOC). After the EEOC tried unsuccessfully to conciliate the dispute between Gilmer and Interstate, Gilmer sued the company in the United States District Court for the Western District of North Carolina.

Interstate filed a motion to compel arbitration, contending that Gilmer had agreed in 1981 that he would submit any future disputes with his employer to arbitration, instead of suing in state or federal court, and that the agreement was binding and enforceable. The district court denied the motion, holding that binding arbitration was contrary to the ADEA.[15] Interstate appealed to the United States Court of Appeals for the Fourth Circuit.[16] The appellate court reversed the district court, finding "nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements."[17] The Supreme Court granted certiorari (discretionary review) because there was a conflict among the federal appellate courts about the enforceability of agreements to submit future disputes to binding arbitration.

Writing for himself and six colleagues, Justice Byron White wrote:

---

[14] Please see Law Review 12033 (March 2012). I recently attended the 2019 Advanced Employment Law Symposium, sponsored by the State Bar of Texas. One part of the symposium was an exercise to evaluate the settlement value of cases. Where an enforceable arbitration agreement was in place, the settlement value was significantly reduced according to both employer side and employee side attorneys.

[15] The district court decision is unpublished.

[16] The 4th Circuit is the federal appellate court that sits in Richmond, Virginia and hears appeals from district courts in Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

[17] *Gilmer v. Interstate/Johnson Lane Corp.,* 895 F.2d 195, 196 (4th Cir. 1990).

> It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. Indeed, in recent years we [the Supreme Court] have held enforceable arbitration agreements relating to claims arising under the Sherman Act, 15 U.S.C. §§ 1-7; section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq.; and section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2). *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985); *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477 (1989). In these cases, we recognized that by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.
>
> Although all statutory claims may not be appropriate for arbitration, having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. *Ibid.* In this regard, we note that the burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims. *See McMahon,* 482 U.S. at 227. If such an intention exists, it will be discoverable in the text of the ADEA, its legislative history, or an "inherent conflict" between arbitration and the ADEA's underlying purposes. *See ibid.* Throughout such an inquiry, it should be kept in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone, supra,* at 24.[18]

Gilmer conceded that nothing in the text or legislative history of the ADEA explicitly excluded arbitration of ADEA claims. The Supreme Court majority carefully reviewed each of Gilmer's complaints about arbitration and found that none of them showed an "inherent conflict" between arbitration and the ADEA. Accordingly, the Supreme Court affirmed the decision of the 4th Circuit to compel arbitration of Gilmer's ADEA claim against Interstate/Johnson Lane Corporation.

***Alexander v. Gardner-Denver Co.* distinguished**

Seventeen years earlier, the Supreme Court had held that a plaintiff asserting Title VII discrimination[19] was not precluded by an adverse arbitration decision under a collective

[18] *Gilmer,* 500 U.S. at 26.

[19] Title VII of the Civil Rights Act of 1964 forbids employment discrimination on the basis of race, color, sex, religion, or national origin.

bargaining agreement.[20] Justice White's majority decision cited that case and discussed it in detail and then distinguished it rather than overruling it. Justice White wrote:

> Gilmer vigorously asserts that our decision in *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974) and its progeny *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728 (1981) and *McDonald v. West Branch,* 466 U.S. 284 (1984) preclude arbitration of employment discrimination claims. Gilmer's reliance on these cases, however, is misplaced.
>
> In *Gardner-Denver,* the issue was whether a discharged employee whose grievance had been arbitrated pursuant to a collective-bargaining agreement was precluded from subsequently bringing a Title VII action based upon the conduct that was the subject of the grievance. In holding that the employee was not foreclosed from bringing the Title VII claim, we stressed that an employee's contractual rights under a collective-bargaining agreement are distinct from the employee's statutory Title VII rights. …
>
> We also noted that a labor arbitrator has authority only to resolve questions of contractual rights. *Id.* at 54. We further expressed concern that in collective-bargaining arbitration "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Id.* at 58, note 19.[21]

The point is that *Alexander v. Gardner-Denver Co.* and its progeny are still good law in the context of arbitration under collective bargaining agreements but not in the context of forced arbitration under individual agreements signed by employees as a condition of being hired or of continued employment.

Garrett

Michael T. Garrett was a Lieutenant Colonel in the Marine Corps Reserve.[22] On the civilian side, he worked for Circuit City Stores, Inc. (CCSI) from 1994 (when he was hired) until March 2003 (when he was fired). In 1995, CCSI sent to each "associate" (employee) a letter and package of

---

[20] *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974).

[21] *Gilmer,* 500 U.S. at 33-34. In USERRA cases, the conflict between the individual rights of those who serve or have served our country and the rights of most employees who have not served is particularly intense. USERRA protects the interests of the relative handful of employees who volunteer to serve, and those interests often conflict with the interests of the great majority who remain at home and in the civilian job, enjoying the protection of the minority. For example, under USERRA's escalator principle the returning veteran is entitled to be placed on the seniority roster at the point he or she would have attained if continuously employed, ahead of all employees that he or she was ahead of at the time of commencement of the period of service. The returning veteran is entitled to reemployment even if that means that another employee must be displaced.

[22] He was later promoted to Colonel and is now retired.

materials about the company's newly established "Associate Issue Resolution Program." The letter explained that each employee had 30 days to object in writing to this new program of binding arbitration of any disputes that might thereafter arise involving employees and the company. Like the great majority of CCSI employees, Garrett did not respond within the 30-day window. The company asserted that failing to respond amounted to an "agreement" to submit all future employment-related disputes to binding arbitration.

Garrett alleged that between December 2002 and March 2003, just as the United States military was preparing for combat in Iraq, his CCSI supervisors subjected him to unjustified criticism and discipline at work. In March 2003, when the United States invaded Iraq, CCSI fired Garrett. He alleged that the firing violated section 4311 of USERRA,[23] which makes it unlawful for an employer (federal, state, local, or private sector) to deny a person "retention in employment" on the basis of the person's performance of uniformed service or obligation to perform service.[24]

Garrett retained an attorney (Robert Goodman of Dallas) and sued CCSI in the United States District Court for the Northern District of Texas. The company responded by filing a motion to compel arbitration under the FAA. Goodman contacted me (Wright) for assistance.[25] I contacted my friend Colonel John S. Odom, Jr., USAFR (now retired), and together we drafted and filed an amicus curiae (friend of the court) brief on behalf of the Reserve Officers Association (ROA)[26] in the District Court, urging that court to deny the motion to compel arbitration. Colonel Odom drove from his home in Shreveport to the court in Dallas and participated in oral argument as amicus.

The district judge agreed with our argument that section 4302(b) of USERRA[27] overrode the FAA and denied CCSI's motion to compel arbitration.[28] CCSI appealed to the 5th Circuit, where the case was assigned to a panel of three appellate judges.[29] The 5th Circuit panel reversed the district court and ordered Garrett to submit his USERRA claim to binding arbitration. In her scholarly decision,[30] Judge Jones wrote:

---

[23] 38 U.S.C. § 4311.

[24] Section 4311 also makes it unlawful for an employer to deny a person initial employment, promotion, or a benefit of employment on this basis.

[25] At the time, I worked as an attorney for the Department of Defense organization called "Employer Support of the Guard and Reserve" (ESGR).

[26] ROA is now doing business as the Reserve Organization of America.

[27] 38 U.S.C. § 4302(b). That subsection provides: "This chapter [USERRA] supersedes any State law (including any local law or ordinance), contract, *agreement,* policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, *including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit."* (Emphasis supplied.)

[28] *Garrett v. Circuit City Stores, Inc.,* 338 F. Supp. 2d 717 (N.D. Tex. 2004).

[29] The three judges were Edith Jones (then the Chief Judge of the 5th Circuit), Carol Dineen King, and James L. Dennis. Judge Jones wrote the decision and was joined by the other two judges in a unanimous panel decision.

[30] By calling her decision scholarly, I do not mean to imply that I agree with it, either as a matter of law or policy.

The FAA was enacted "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 24 (1991). The FAA states that written arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Court has reinforced the strong federal policy favoring arbitration. *Mitsubishi Motors Corp.,* 473 U.S. 614, 626-27. Accordingly, once a party makes an agreement to arbitrate, that party is held to arbitration "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp., Inc. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626-27 (1985). Garrett bears the burden to prove that Congress intended to preclude a waiver of a judicial forum for USERRA claims. *See Gilmer,* 500 U.S. at 26.

In *Gilmer*, the Supreme Court considered the favored status of arbitration in the employment context when an individual subject to an arbitration agreement alleged a violation of federal discrimination statutes. *Gilmer,* 500 U.S. at 23. The Court held that statutory discrimination claims under the Age Discrimination in Employment Act were subject to mandatory arbitration under the FAA. *Id.,* at 35. In so holding, the Court clarified several issues concerning the FAA's application: (1) "It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to FAA," (2) although arbitration involves submission to an alternate nonjudicial forum *id.,* at 26, it does not require a party to forego substantive rights afforded by the particular statute, *id.*; (3) arbitration is not inconsistent with the important social policies being addressed by federal statutes, *id.,* at 28; and (4) limited discovery provisions are nevertheless sufficient to allow a fair opportunity to present discrimination claims, *id.,* at 31.

The Court also distinguished between an employer/employee agreement enforceable pursuant to the FAA and union collective bargaining agreements. *Id.,* at 34. Although both agreements may include arbitration provisions, they may require different treatment under federal law. *Id.,* at 34-35. When all employees in a unit are represented by a union, the collective interest of the bargaining unit may impinge upon individual substantive rights. *Id.* To that end, pre-*Gilmer* decisions reflected a concern for "the tension between collective representation and individual statutory rights." *Id.,* at 35. The Court stated, however, that such tension is not present in the enforcement of individual agreements between an employee and the employer. *See id.*

Finally, *Gilmer* elaborated on the difference between substantive rights conferred by Congress, such as the prohibition of age discrimination, which must be preserved, even in the arbitral forum, and procedural rights, which include choice of forum and may be waived without running afoul of the substantive intent of Congress. *Id.,* at 26.

Because the parties agreed to arbitrate the dispute at issue, the agreement is enforceable unless Garrett can demonstrate that Congress intended to preclude arbitration. *See* ***Mitsubishi,*** 473 U.S. at 626-27. Congressional intent "will be discoverable in the text of [USERRA], its legislative history, or an 'inherent conflict' between arbitration and [USERRA]'s underlying purposes." *Gilmer,* 500 U.S. at 26.

USERRA's antidiscrimination provision prohibits an employer from denying initial employment, reemployment, or any other benefit of employment to a person on the basis of membership in a uniformed service, application for membership, performance of service, application for service, or obligation of service. 38 U.S.C. § 4311(a). . Garrett contends, and the district court agreed, that section 4302(b) of USERRA precludes binding arbitration in stating:

> This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.
>
> According to Garrett, a "right or benefit provided by" USERRA is a plaintiff's right to bring suit in federal court. Indeed, USERRA provides two methods for a protected person to enforce substantive rights against a private employer. A person may file a complaint with the Secretary of Labor (who will investigate and attempt to resolve the complaint) and request that the Secretary refer the matter to the Attorney General for further prosecution. 38 U.S.C. § 4323(a)(1). Alternatively, a person may pursue a civil action in federal court, forgoing all agency participation. . 38 U.S.C. § 4323(a)(2). In this case, Garrett chose the second method.
>
> It is not evident from the statutory language that Congress intended to preclude arbitration by simply granting the possibility of a federal judicial forum. As noted above, the Supreme Court has held that "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." *Mitsubishi,* 473 U.S. at 626-27. In cases involving the Sherman Act, the Securities Exchange Act of 1934, the civil protections of the Racketeer Influenced and Corrupt Organizations Act (RICO), and the Securities Act of 1933, the Court has held substantive statutory rights enforceable through arbitration. With this in mind, it is significant that Section 4302(b) does not mention mandatory arbitration

or the FAA, notwithstanding that the *Gilmer* decision, issued only three years before enactment of section 4302(b), extended mandatory arbitration to employment agreements. When Congress enacts laws, it is presumed to be aware of all pertinent judgments and opinions of the judicial branch. *United States v. Barlow,* 41 F.3d 935, 943 (5th Cir. 1994). Congress was on notice of *Gilmer* in 1994 but did not speak to the issue in the text of section 4302(b). The text of section 4302(b) is not a clear expression of Congressional intent concerning the arbitration of servicemembers' employment disputes.

When properly interpreted, section 4302(b) can be harmonized with the FAA and mandatory arbitration. Its operation and meaning turn, in part, on the terms "right or benefit provided by this chapter." The purpose of section 4302(b) is the protection of "any right or benefit provided by [Chapter 43 of USERRA]."38 U.S.C. § 4302(b) . Chapter 43 codifies the rights of soldiers and reservists to reemployment, to leaves of absence, to protection against discrimination and to health and pension plan benefits, among others. *See generally* 38 U.S.C. §§ 4301-4304, 4311-4319. .These are substantive rights. Additionally, section 4303(2) defines rights for the purposes of the chapter:

> The term "benefit", "benefit of employment", or "rights and benefits" means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

38 U.S.C. § 4302(2).

Again, the defined substantive rights relate to compensation and working conditions, not to affording a particular forum for dispute resolution. An exclusive judicial forum is not a right protected by Chapter 43 of USERRA, nor is it within the scope of section 4302(b).

An agreement to arbitrate under the FAA is effectively a forum selection clause, *see Equal Employment Opportunity Commission v. Waffle House,* 534 U.S. 279, 295 (2002), not a waiver of substantive statutory protections and benefits. Thus,

section 4302(b)does not conflict with the FAA's policy to encourage the procedural remedy of arbitration. As recognized by the United States Supreme Court:

> [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 a judicial, forum. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention would be deducible from text or legislative history. *Mitsubishi,* 473 U.S. at 628.

Congress took no specific steps in USERRA, beyond creating and protecting substantive rights, that could preclude arbitration.

The district court overlooked this important distinction between procedural and substantive rights. *Compare Williams v. Cigna Financial Advisors, Inc.,* 56 F.3d 656, 660 (5th Cir. 1995) (holding, with regard to the Older Workers Benefit Protection Act, that there is "no indication that Congress intended the OWBPA to affect agreements to arbitrate employment disputes" and that "the OWBPA protects against the waiver of a right or claim, not against the waiver of a judicial forum.")

Garrett also contends that having to arbitrate his claims results in a reduction in the total package of rights and benefits afforded by USERRA. The right or benefit that arbitration allegedly infringes upon is found in USERRA section 4323(b)(3), which the district court interpreted as a "guarantee of a federal forum for aggrieved employees." *Garrett,* 338 F. Supp. 2d at 720. Section 4323(b)(3) provides that "the district courts of the United States shall have jurisdiction of the action" against a private employer. This language, however, neither guarantees a right to a federal court trial nor forbids arbitration as an alternate forum. On the contrary, USERRA provides several means for the resolution of disputes, and there is no guarantee of a federal forum for aggrieved employees.

In *Yellow Freight Systems, Inc. v. Donnelly,* 494 U.S. 820 (1990) , the Court construed similar language in Title VII to confer concurrent jurisdiction on federal and state courts rather than exclusive federal jurisdiction. *Id.* at 823-26. Concurrent jurisdiction suggests a broad right of the parties to select a forum, including the arbitral forum. *Gilmer,* 500 U.S. at 29. Because section 4323(b) of USERRRA, like the language in *Donnelly*, confers concurrent jurisdiction, arbitration is a permissible forum choice. *See Bird,* 926 F.2d at 119-20 (broad and

in some instances exclusive access to federal forum for ERISA claims is not evidence of congressional intent to preclude arbitration).

Next, while section 4323 outlines USERRA enforcement provisions for private or state employees, section 4324 affords different procedures for federal government employees, which include adjudicating claims in an administrative tribunal, the Merit Systems Protection Board ("MSPB"). This is significant, because in *Gilmer*, the Court phrased the relevant inquiry as whether Congress had precluded "arbitration or other nonjudicial resolution" of claims. *Gilmer,* 500 U.S. at 28. The MSPB option evidences an intent to allow alternative means of dispute resolution for employees protected by USERRA. Thus, a federal judicial forum is not guaranteed to all employees under USERRA; rather, a federal judicial forum is available to some employees and can be claimed or waived, just as in other antidiscrimination statutes.

Garrett emphasizes, as did the district court, that a portion of the 1994 legislative history of section 4302 confirms Congressional intent to forbid resort to binding arbitration. The House Committee Report states:

> Section 4302(b) would reaffirm a general preemption as to State and local laws and ordinances, as well as to employer practices and agreements, which provide fewer rights or otherwise limit rights provided under amended chapter 43 or put additional conditions on those rights. *See* *Peel v. Florida Department of Transportation,* 600 F.2d 1070 (5th Cir. 1979); *Cronin v. Police Department,* 675 F. Supp. 847 (S.D.N.Y. 1987); and *Fishgold, supra,* 328 U.S. 275, 285 (1946) , which provide that no employer practice or agreement can reduce, limit or eliminate any right under chapter 43. Moreover, this section would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required. *See* *McKinney v. Missouri-K-T R. Co.,* 357 U.S. 265, 270 (1958). It is the Committee's intent that, even if a person protected under the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law. *See* .*Kidder v. Eastern Air Lines, Inc.,* 469 F. Supp. 1060, 1064-65 (S.D. Fla. 1978).

H.R. REP. NO. 103-65, 1994, *as reprinted in* 1994 U.S.C.C.A.N. 2453.

We disagree that this snippet of legislative history should affect our interpretation of section 4302(b). First, a powerful line of Supreme Court authority suggests that legislative history should rarely be used in statutory interpretation, because only the text of the law has been passed by Congress,

> not the often-contrived history. *See, e.g.*, ***Exxon Mobil Corp. v. Allapattah Services, Inc.,*** 545 U.S. 546 (2005). Even if legislative history may be consulted to resolve statutory ambiguity, *id.*, we have found no ambiguity in this provision. Second, laying aside these controlling preliminary objections, the House Committee Report appears to be the only pertinent legislative history concerning section 4302(b); no comparable Senate Report has been identified. Such a scant record, unless explicit and on point, hardly proves Congress's intention toward all cases involving arbitration. Moreover, what was left out of the legislative history is noteworthy. There is no recognition in the report of *Gilmer*'s then-recent endorsement of individual agreements to arbitrate. In any event, the totality of the quoted language, along with its imbedded citations, strongly suggests that Congress intended section 4302(b) only to prohibit the limiting of USERRA's substantive rights by union contracts and collective bargaining agreements, and that Congress did not refer to arbitration agreements between an employer and individual employee.
>
> Finally, this court has rejected reliance on cases involving collective bargaining arbitration as a basis for avoiding arbitration of statutory claims under the FAA. *Carter v. Countrywide Credit Indus., Inc.,* 362 F.3d 294, 298 (5th Cir. 2004). This is because, as noted *supra*, the Supreme Court explicitly distinguished between cases involving collective bargaining arbitration agreements and individually executed pre-dispute arbitration agreements. .*Gilmer,* 500 U.S. at 33-34. The Supreme Court "ultimately conclud[ed] that the former may not be subject to arbitration while the latter are." *Carter,* 362 F.3d at 298. While earlier arbitration cases arose during a time of judicial skepticism regarding arbitration, *Gilmer,* 500 U.S. at 34, the "mistrust of the arbitral process" expressed in such cases had been "undermined by [the Supreme Court's] recent arbitration decisions." *Id.* at 34, n. 5 ; *see also* *Mitsubishi,* 473 U.S. at 626-27.

Accordingly, we do not conclude from this one piece of legislative history concerning section 4302(b) that Congress intended to exclude all arbitration under USERRA.[31]

Landis* and *Ziober

In 2008, the 6th Circuit followed the 5th Circuit's *Garrett* decision (*Landis)*, and in 2016 the 9th Circuit followed suit (*Ziober).* The other circuits have not addressed the specific question of the enforceability of predispute binding arbitration agreements with respect to USERRA claims. When the other circuits are called upon to address this question, they will likely follow the path that the 5th, 6th, and 9th Circuits have already trod.

---

[31] *Garrett,* 449 F.3d at 674-80.

It is unlikely that the Supreme Court will grant certiorari on this question[32] because there is no conflict among circuits. If this problem is to be solved, it will probably have to be solved by Congress, not the Supreme Court.

Potential legislative solutions

> **Amend USERRA to add an explicit statement that section 4302(b) makes pre-dispute binding arbitration agreements unenforceable.**

On June 29, 2017, Major General Jeffrey Phillips, USA (Ret.), the Executive Director of the Reserve Organization of America (ROA), testified before the Veterans' Affairs Committee of the United States House of Representatives, in favor of H.R. 2631, a bill that would protect the employment and reemployment rights of Reserve Component service members by precluding the enforcement of unfair binding arbitration agreements extracted from such service members as a condition of hiring. You can see video and hear audio of the hearing at https://veterans.house.gov/calendar/eventsingle.aspx?EventID=1797. The ROA testimony starts at 1:19:33.

In his testimony, General Phillips said:

> This bill [H.R. 2631] amends the Uniformed Services Employment and Reemployment Rights Act of 1994 [USERRA] to (1) consider procedural protections or provisions under such Act concerning employment and reemployment rights of members of the uniformed services to be a right or benefit subject to the protection of such Act, and (2) make any agreement to arbitrate a claim under such provisions unenforceable unless all parties knowingly and voluntarily consent to arbitration after a complaint on the specific claim has been filed in court or with the Merit Systems Protection Board [which adjudicates claims that federal executive agencies have violated USERRA] and all parties knowingly and voluntarily consent to have that particular claim subjected to arbitration.
>
> Currently, the courts have interpreted that employed uniformed members are not afforded procedural right protections under USERRA with respect to binding arbitration clauses. Specifically, the courts' decisions in separate federal circuits indicate that legislative intent as determined from the committee reports cannot establish procedural right protections in the area of employment and reemployment under USERRA. The courts' past decisions demonstrate that only substantive right protections can be interpreted through the language of the Act.

[32] The final step in the federal appellate process is to apply to the Supreme Court for a writ of certiorari. At least four of the nine justices must vote for certiorari at a conference to consider certiorari petitions, or certiorari is denied, and the decision of the Court of Appeals is final. Certiorari is denied in more than 99% of the cases where it is sought.

> However, the original intent of Congress was to provide both substantive and procedural right protections under USERRA. Vague language contained in the Act caused courts to deprive uniformed members of the procedural right protections that Congress intended to grant. Section 4302 [of USERRA] makes it clear that USERRA is a floor and not a ceiling on the rights of service members as persons who are serving or have served.
>
> It is hard to accept that consent is voluntary when a person agrees to binding arbitration upon employment. Most people take jobs because they need to pay the rent and put food on the table. It is perhaps unsurprising that they may overlook the "future risk" of arbitration for the "present need" of income. Binding arbitration holds hostage the ability to provide food and housing for individuals and their families.

We strongly endorse General Phillips' testimony. Unfortunately, this bill was not enacted during the 115th Congress (2017-18). The effort continues in the 116th Congress and the 117th Congress.

> **Amend the FAA to make clear that the federal policy favoring arbitration only applies to business to business disputes, not disputes between businesses and employees or customers.**

Congress can solve this problem not just for USERRA but for employment laws generally by amending the FAA to make clear that the federal policy favoring arbitration and making pre-dispute arbitration "agreements" irrevocable and judicially enforceable only applies to commercial disputes among commercial enterprises, not disputes involving employees and customers. As I have explained, I think that arbitration is fair and appropriate for commercial disputes, and I believe that the original intent of Congress in 1925 (when it enacted the FAA) applied to disputes of that nature. I think that the Supreme Court erred when, in *Gilmer* and other cases, it expanded the FAA far beyond the scope that Congress intended. This problem can be fixed legislatively, by amending the FAA.

Conclusion

In Law Review 15089 (October 2015) I (Wright) made 16 proposals for amendments to improve USERRA. I listed a proposal to address the forced-arbitration problem first because that was the most important proposal.

Q: I thought that, earlier this year (2022), Congress enacted and President Biden signed new legislation that outlaws forced arbitration in employment cases. What gives?

A: On 3/3/2022, President Biden signed the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021."[33] That new law only applies to sexual assault and sexual harassment cases. Forced arbitration in other kinds of cases, including USERRA cases, is still permissible.

This brand-new law amends the Federal Arbitration Act (FAA) by adding a new chapter, Chapter 4, including section 402, which provides as follows:

> **§ 402. No validity or enforceability**
>
> - **(a) IN GENERAL.—**Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.
> - **(b) DETERMINATION OF APPLICABILITY.—**An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.[34]

The option of the complainant or plaintiff to opt out of a predispute arbitration agreement and proceed in court, rather than before an arbitrator, applies only to disputes about alleged sexual assault or sexual harassment.

Please join or support ROA

This article is one of 2,000-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established on 10/1/1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

---

[33] Public Law 117-234, 136 Stat. 27.

[34] 9 U.S.C. § 402, as amended March 3, 2022.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's eight[35] uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20 or $450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002[36]

[35] Congress recently established the United States Space Force as the 8th uniformed service.
[36] You can also donate on-line at www.roa.org.