US Supreme Court strips workers of right to sue for discrimination

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The same 5-4 Supreme Court majority that stopped the vote count in Florida in order to install George W. Bush as president ruled March 21 that workers have no right to sue for on-the-job discrimination and harassment if the employer includes a boilerplate arbitration provision in the employment application. Demonstrating once again that its decisions are determined by a right-wing political agenda rather than respect for legal precedent or accepted forms of logical argument, the majority opinion was based on reading a 76-year-old act of Congress to mean the opposite of what its authors clearly intended it to mean.

In *Circuit City Stores, Inc. v. Adams*, an employee of the national retail chain filed a discrimination lawsuit in state court under the California Fair Employment and Housing Act, one of the most comprehensive anti-discrimination statutes in the country. Rather than answer the complaint and litigate the case in state court, Circuit City sued the employee in federal court. The corporation obtained an injunction from the federal judge to stop the discrimination suit from going forward and force it into arbitration, a "private judge" process that dispenses with the right to jury trial and other procedural safeguards. The court based its ruling on the Federal Arbitration Act (FAA), a 1925 law that directs federal courts to enforce arbitration agreements in commercial contracts.

The employee appealed, and the Ninth Circuit Court of Appeals overturned the lower court ruling because the FAA specifically excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Since the FAA is a federal law, it can only deal with cases involving interstate commerce. Thus this provision expressly exempts all employment contracts within the FAA's reach from compulsory arbitration.

The Supreme Court reversed the Court of Appeals, thus reinstating the original ruling. In doing so, the majority ignored California's interest in enforcing its own, stringent anti-discrimination laws in its own courts. While the Supreme Court majority claims to champion "states' rights," it has no compunction contradicting the doctrine when it appears to stand in the way of the higher goal of upholding corporate interests at the expense of workers' rights.

Associate Justice Anthony Kennedy's decision, which was joined by Associate Justice Sandra Day O'Connor and the right-wing extremist triumvirate of Chief Justice William Rehnquist and Associate Justices Antonin Scalia and Clarence Thomas, is little more than empty pedantry. (The full text of the decision is available at http://supct.law.cornell.edu/supct/html/99-1379.ZO.html.)

First, Kennedy summarizes the employee's argument. Because the FAA covers commercial contracts "involving commerce," and the exception from compulsory arbitration is for employment contracts of workers "engaged in ... commerce," he concludes that "all employment contracts" fall "within that authority." But this interpretation, Kennedy continues, "runs into an immediate and, in our view, insurmountable textual obstacle."

He then seeks to explain why such an apparently simple and self-evident argument is false:

"Unlike the 'involving commerce' language" that defines the FAA's reach, "the words 'any other class of workers engaged in ... commerce' constitute a residual phrase, following, in the same sentence, explicit reference to 'seamen' and 'railroad employees.' Construing the residual phrase to exclude all employment contracts fails to give independent effect to the statute's enumeration of the specific categories of workers which precedes it; there would be no need for Congress to use the phrases 'seamen' and 'railroad employees' if those same classes of workers were subsumed within the meaning of the 'engaged in ... commerce' residual clause. The wording ...

calls for the application of the maxim *ejusdem generis*, the statutory canon that '[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'... Under this rule of construction the residual clause should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it."

On the basis of this sophistic argument, Kennedy concludes that the FAA's exemption applies only to "transportation workers."

Kennedy's exercise in phrase juggling is disconnected from any consideration of real world factors. There is no reason for Congress to have carved out an exception to mandatory arbitration that would apply only to transportation workers, and not to all other workers within the FAA's jurisdiction. The references to "seamen" and "railroad employees" are easily explained by the date of the FAA's enactment—1925. At that time, Congressional power under the Constitution's "commerce clause" was given a very narrow interpretation. Those classes of workers were identified to show that there were, in fact, employees within Congressional jurisdiction.

Over the past 60 years, however, the "commerce clause" power has been given a much broader application, to the extent that almost any economic activity affecting national commerce—including, as in this case, the employment contract between a worker and a national retail chain such as Circuit City—is within its reach.

Associate Justice John Paul Stevens, the appointee of Republican President Gerald Ford who has emerged recently as the Court minority's most cogent voice of dissent, shredded Kennedy's argument. (His opinion can be read by clicking http://supct.law.cornell.edu/supct/html/99-1379.ZD.html) Stevens explains that "the FAA was a response to the refusal of courts to enforce commercial arbitration agreements." The Act "was opposed by representatives of organized labor," however, "because of their concern that the legislation might authorize federal judicial enforcement of arbitration clauses in employment contracts and collective-bargaining agreements."

In response to this objection, Stevens continues, the Act's sponsors testified to Congress that the Act was not "referring to labor disputes at all." To underline this point, at the suggestion of then Secretary of Commerce Herbert Hoover, Congress added the provision excluding "contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce." Thus, "The legislation was reintroduced in the next session of Congress with Secretary Hoover's exclusionary language added ... and the amendment eliminated organized labor's opposition to the proposed law."

Kennedy and O'Connor do not always side with Rehnquist, Scalia and Thomas. A six-justice majority decided, also on March 21, that a South Carolina state hospital's practice of providing the police with the results of drug tests performed on expectant mothers violated the Fourth Amendment's prohibition against unreasonable searches. In his dissent, Scalia contended that there exists a "special needs" doctrine that trumps Fourth Amendment privacy rights. Joined by Rehnquist and Thomas, the "pro-life" Scalia voiced no concern at all over whether expectant mothers might forego important medical treatment to avoid involuntary drug tests and resulting legal prosecution.

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