Not What They Bargained For: Directing the Arbitration of Statutory Antidiscrimination Rights

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I. INTRODUCTION

> "Do I believe in arbitration? I do. But not in arbitration between the lion and the lamb, in which the lamb is in the morning found inside the lion."[1]

It has been more than three decades since the Supreme Court ruled that employees who had earlier submitted their statutory antidiscrimination claims in a collectively-bargained arbitral forum were not precluded from later bringing those same claims in a lawsuit.[2] This ruling was due in part to their understanding that "arbitral procedures [are] less protective of individual statutory rights than are judicial procedures."[3] However, the Supreme Court has been chiseling away at this proposition, beginning with its decision allowing the arbitration of statutory anti-trust claims.[4] Decisions allowing for the arbitration of RICO claims,[5] securities claims,[6] Age Discrimination in Employment Act claims,[7] and Carriage of Goods by Sea Act claims soon followed.[8] Still, the Court made it clear that the existence of a collective bargaining agreement could not waive a member employee's right to a judicial forum for statutory discrimination claims.[9] The Court reasoned that:

> [I]n enacting Title VII, Congress had granted individual employees a nonwaivable, public law right to equal employment

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1. Samuel Gompers, American labor union leader (1850 - 1924) quotes, THINKEXIST.COM, http://thinkexist.com/quotation/do-i-believe-in-arbitration-i-do-but-not-in/391533.html (quoting Samuel Gompers, American labor union leader).

2. *See* Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 745 (1981).

3. *Id.* at 744 (citation omitted).

4. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

5. *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 242 (1987).

6. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485 (1989).

7. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991). As will be explained *infra*, *Gilmer* was unique in that it involved a non-union arbitration, arising under the FAA and not a collective bargaining agreement, between an employer and employee.

8. *See* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 530 (1995).

9. Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974) (stating that an arbitrator "has no general authority to invoke public laws that conflict with the bargain between the parties").

> opportunities that was separate and distinct from the rights created through the "majoritarian processes" of collective bargaining. Moreover, because Congress had granted aggrieved employees access to the courts, and because contractual grievance and arbitration procedures provided an inadequate forum for enforcement of Title VII rights, the Court concluded that Title VII claims should be resolved by the courts *de novo*.[10]

Nevertheless, the Court recently held in *14 Penn Plaza LLC v. Pyett*[11] that a collective bargaining agreement that required arbitration as the exclusive remedy for an employee's statutory discrimination claim was enforceable,[12] despite the previous decisions that a union cannot waive an individual's right to bring a statutory claim in a federal forum, and despite the legal principle of *stare decisis*.[13] The Court accomplished this, not by referring to legal precedents – since none exist – but by simply explaining that there had been a "radical change, over two decades, in the Court's receptivity to arbitration."[14] Not surprisingly, this decision has split the district courts on how to proceed. While some follow *Pyett* and allow for the arbitration of statutory claims, others disregard *Pyett* and prohibit the arbitration of such claims. Still others direct arbitration but allow for the statutory claims to be brought in federal court should the union prevent them from being heard in the arbitration.[15] The uncertainty of the applicability of the holding in *Pyett* has led commentators to lament the Court's disregard of *stare decisis*, as legal practitioners now find themselves in the situation where each individual court may interpret the enforceability of a collective bargaining agreement's arbitration clause differently in regard to statutory rights.[16]

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10. *Barrentine*, 450 U.S. at 737-38 (citations omitted).

11. This case will be explained in further detail *infra* in Section IV.

12. *See* 556 U.S. 247, 273 (2009).

13. *Stare decisis* is defined as "the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY 1414 (7th ed. 1999).

14. 556 U.S. at 267.

15. These cases will be discussed *infra* in Section V.

16. *See, e.g.*, David L. Gregory & Edward McNamara, *Mandatory Labor Arbitration Of Statutory Claims, And The Future Of Fair Employment: 14 Penn Plaza v. Pyett*, 19 CORNELL J. L. & PUB. POL'Y 429, 431 (2010) ("With its controversial activist methodology, the political and ideological Court ran roughshod over *stare decisis* principles"); E.E. Keenan, *Collectively Bargained Employment Arbitration: 14 Penn Plaza LLC v. Pyett*, 15 HARV. NEGOT. L. REV. 261, 279 (2010) ("The Court should have acknowledged the binding precedent in *Gardner-Denver* and set it side-by-side with subsequent developments in the law of arbitration, considering the propriety of overruling and its attendant ramifications for the Court's strong tradition of statutory *stare decisis*."); Margaret L. Moses, *The Pretext Of Textualism: Disregarding Stare Decisis in 14 Penn Plaza v. Pyett*, 14 LEWIS & CLARK L. REV. 825, 844 (2010) ("[T]he

This article will examine how the Supreme Court, via its decision in *Pyett*, has abandoned its thirty-five year precedent against forcing employees to pursue their individual statutory claims in arbitration, how lower courts have interpreted that decision, and the ramifications of that decision on future employer/union negotiations. Section I will give a brief historical overview of the evolution of collectively bargained arbitration agreements in labor disputes. Section II will discuss the Court's decision in *Alexander v. Gardner-Denver* and its progeny, creating three decades of precedent prohibiting the use of a collective bargaining agreement to force the arbitration of statutory claims. Section III will explore the *Pyett* decision, its rejection of *stare decisis,* and its misapplication of the Federal Arbitration Act (FAA) to collective bargaining agreements that should instead be governed by the National Labor Relations Act (NLRA). Section IV will examine the judiciary's inconsistent reaction to *Pyett*, as it struggles to finesse the Court's holding in order to make the *Pyett* decision compatible with over thirty years of legal precedent. Section V will discuss the numerous deficiencies of arbitration, specifically in the context of statutory discrimination rulings and why the *Pyett* decision endangers the statutory rights of employees. This article concludes that despite the ruling in *Pyett*, lower courts will remain reluctant to direct the arbitration of statutory claims where the right to proceed to arbitration is controlled by the union rather than by the individual employee.

II. Collectively Bargained Arbitration in Labor Disputes: A Historical Overview

The industrial revolution of the late nineteenth century spawned a rapid growth of America's economy and a booming labor workforce.[17] However, with this growth came a harsh reality. Dismal working conditions, meager pay and rampant labor-management violence soon became commonplace.[18] Recognizing that this situation could not continue, Congress passed the Wagner Act of 1935, more popularly known as the NLRA,[19] which established a federal

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Court [in Pyett] was ignoring principles of *stare decisis* in favor of its current preference for arbitration.").

17. *See* Robert A. Gorman & Matthew W. Finkin, Basic Text on Labor Law Unionization and Collective Bargaining 1-8 (2d ed. 2004).

18. *See* Bernard D. Meltzer, *The Brandeis–Gompers Debate on "Incorporation" of Labor Unions*, 1 Green Bag 2d 299, 299 (1998).

19. *See* National Labor Relations Act, Pub. L. No. 198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 151 (1988)). The Wagner Act was a successor of § 7(a) of the National Industrial Recovery Act. *See* Pub. L. No. 67, 48 Stat. 195, 198-99

right to unionize.[20] In doing so, Congress declared that "[e]xperience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest . . ."[21] With the passage of the NLRA, collective bargaining became the law of the land.[22]

Courts soon recognized that the NLRA created substantive rights between employers and employees and a unique mechanism for adjudicating those rights.[23] The NLRA's preference for arbitration as the method to solve labor disputes stemmed from the understanding that, were all of these abundant disputes to be litigated, industry in this country would be unable to function.[24] Therefore, in order to promote industrial stability, arbitration was not only accepted but also favored in the collective bargaining context as a quick and efficient manner for resolving labor disputes.[25] The Supreme

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(1933). Several years later, Congress enacted the Labor Management Relations ("Taft-Hartley") Act of 1947 (LMRA), which dealt with claims involving the breach of a collective bargaining agreement. 29 U.S.C. § 185 (1947). Although the terminology of the two acts is different, "each statute is motivated by the same three goals: to preserve peace within the industry, to encourage arbitration between disputing parties through representatives of their own choosing, and to limit federal judicial review of disputes[.]" Ellen C. Nachtigall, *Federal Labor Law Preemption of State Claims for Tortious Interference with Contract Against Nonsignatories*, 65 S. CAL. L. REV. 1675, 1681 (1992).

20. Labor unions have been defined as a "voluntary organization of employees created to defend or improve the pay and conditions of their members through bargaining with their employers." J.C. DOCHERTY, HISTORICAL DICTIONARY OF ORGANIZED LABOR 1 (2d ed. 2004).

21. 29 U.S.C. § 151.

22. Collective bargaining agreements are the result of negotiations between employee and employer representatives in which both sides consent to apply "an agreed set of rules to govern the substantive and procedural terms of the employment relationship, as well as to define the relationship between the parties to the process." Roy J. Adams, *Regulating Unions and Collective Bargaining: A Global, Historical Analysis of Determinants and Consequences*, 14 COMP. LAB. L. & POL'Y J. 272, 272 (1993) (citations omitted).

23. *See* Int'l Plainfield Motor Co. v. Int'l Union, 123 F. Supp. 683, 691-92 (D.N.J. 1954) ("Section 301(a) [of the LMRA] is a grant of federal-question jurisdiction and thus creates a federal, substantive right."). *See also* Wilson & Co. v. United Packinghouse Workers, 83 F. Supp. 162, 165 (S.D.N.Y. 1949) ("The Labor Management Act creates important substantive rights between employers and employees engaged in interstate commerce . . . .").

24. *See* 29 U.S.C. § 151 (2012) (stating that collective bargaining reduces the likelihood of industrial strife because employees and employers have to work together).

25. United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 596 (1960) (referring to arbitrators as "indispensable agencies in a continuous collective bargaining process").

Court acknowledged the important role that arbitration clauses in collective bargaining agreements play in achieving industrial peace in three of its 1960 decisions, known as the "Steelworkers Trilogy."[26] In doing so, the Court stated that "it would enforce agreements to arbitrate employment disputes covered by collective bargaining agreements, that it would enforce the resultant awards, and give [those awards] great deference."[27]

One of the main reasons why such great deference is given to these awards is due to the fact that arbitrators, as experts in the industry, are able to apply the "law of the shop" – an industrial code that defines expectations and norms for employers and workers – to assist in settling the parties' disputes.[28] This allows the arbitrator to take into account such factors as the effect of a particular result upon productivity, its consequence to the morale of the shop, and his judgment as to whether tensions will be heightened or diminished by the award.[29]

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26. *See* Michael P. Wolf, *"Give 'Em Their Day In Court: The Argument Against Collective Bargaining Agreements Mandating Arbitration to Resolve Employee Statutory Claims,"* 56 J. Mo. B. 263, 264 (2000) (explaining that the judiciary's deference to arbitration clauses in collective bargaining agreements was established in the "Steelworkers Trilogy"). The "Steelworkers Trilogy" consists of: United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) (clarifying that, when in question, courts should aim to uphold arbitration agreements); United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960) (explaining that courts cannot review the merits of an arbitration award under the guise of examining arbitrability); and United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960) (holding that an arbitration award must be enforced if it draws from the essence of the contract).

27. Charles J. Coleman & Jose A. Vazquez, *Mandatory Arbitration of Statutory Issues Under Collective Bargaining: Austin and its Progeny*, 48 LAB. L.J. 703, 704 (1997).

28. *Warrior & Gulf Navigation Co.*, 363 U.S. at 579-80 (stating that arbitrators apply their knowledge of the industry when hearing the disputes, rather than relying solely on the collective bargaining agreement itself, since "[t]here are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties").

29. Chris Baker, *Sexual Harassment v. Labor Arbitration: Does Reinstating Sexual Harassers Violate Public Policy?*, 61 U. CIN. L. REV. 1361, 1364 n.24 (1993); *see also* Harry H. Wellington, *Judicial Review of the Promise to Arbitrate*, 37 N.Y.U. L. REV. 471, 480 (1962) ("For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs"); *Warrior & Gulf Navigation Co.*, 363 U.S. at 581 ("The parties expect that [the arbiters'] 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. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.").

Arbitration is not only the preferred method of solving labor disputes but is also considered the judiciary's favored form of alternative dispute resolution in all civil cases, because it helps to ease the burden of an ever-expanding docket.[30] This preference can be traced back to the passage of the FAA[31] in 1925, the purpose of which was to reverse the judiciary's longstanding hostility towards arbitration and place arbitration agreements on equal footing with other contracts.[32] Moreover, in the 1983 case *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[33] the Court began a new tract of decisions that essentially rewrote the FAA, declaring that the Act created the "liberal federal policy favoring arbitration . . ."[34] In fact, the Court, in an effort to expand the applicability of the FAA, stated that "as a

30. *See, e.g.*, Sec. Indus. Ass'n v. Connolly, 883 F.2d 1114, 1116 (1st Cir. 1989) (stating that the FAA was "therapy for the ailment of the crowded docket"); *Galt v. Libbey-Owens-Ford Glass Co.*, 376 F.2d 711, 714 (7th Cir. 1967) ("The policy of the [FAA] is to promote arbitration to accord with the intention of the parties and to ease court congestion.") (citation omitted); *Ruth R. Remmel Revocable Trust v. Regions Fin. Corp.*, 255 S.W.3d 453, 458 (Ark. 2007) ("Arbitration is looked upon with approval by courts as a less expensive and more expeditious means of settling litigation and relieving docket congestion.") (citation omitted); Buchholz v. W. Chester Dental Group, No. CA2007-11-292, 2008 Ohio LEXIS 4450, at *4 (Ohio Ct. App. Oct. 13, 2008) ("Arbitration provides the parties with an 'inexpensive method of conflict resolution and has the additional advantage of unburdening crowded court dockets.'") (quoting *Bd. of Educ. v. Findlay Educ. Ass'n*, 551 N.E.2d 186, 189 (Ohio 1990)).

31. 9 U.S.C. §§ 1-16 (1994).

32. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974). The FAA accomplishes this by providing that arbitration agreements "shall be 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 (2006). These grounds include the common law contract defenses of fraud, duress, and unconscionability. *See* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

33. The Supreme Court in *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.* was presented with the issue of determining what constitutes a final decision for purposes of an appeal and under what circumstances may a federal court decline to exercise its jurisdiction. *See* 460 U.S. 1, 8-9 (1983). While answering those questions, the Court, in dicta, addressed a separate issue: Whether a federal district court had properly stayed a suit seeking to compel arbitration pursuant to the FAA. *Id.* at 13. In doing so the Court stated that the FAA is a "congressional declaration of a liberal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Id.* at 24. The Court therefore explained the Act created federal substantive law that obligates state courts to grant stays in favor of arbitration. *Id.*

34. *Id.* at 24. There was no basis for the statement in *Moses H. Cone* that section 2 of the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Id.* In fact:

> [n]othing in the legislative history suggests that Congress favored arbitration. Rather, Congress agreed to adopt the FAA so that arbitration contracts could be enforced like other contracts. The FAA was designed to place arbitration agreements "upon the same footing as other contracts. H.R. Rep. No. 68-96 (1924). The policy the Supreme Court announced in *Moses H. Cone*

matter of federal law, *any* doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[35] Thus, the FAA, which was originally perceived as merely providing a procedure for the enforcement of arbitration agreements,[36] now created a federal substantive law to grant stays in favor of arbitration.[37] Nevertheless, the Court continued to refrain from the enforcement of arbitration clauses in situations involving statutory rights.[38]

Similarly, the Court's endorsement of arbitration in the context of collective bargaining agreements also did not initially extend to the use of arbitration in adjudicating statutory claims.[39] This was due to the proposition that the interests served by arbitrating disputes arising from collective bargaining agreements are distinct from those served by arbitrating rights granted by statute.[40] While collective bargaining agreements are the creation of two comparatively equal parties (*i.e.* the employer and the union), individual employees have far less bargaining power than their employer in protecting their

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was a policy that concerned labor arbitrations, but not commercial arbitrations. There are national policy justifications for favoring arbitration of a CBA—to promote industrial peace and prevent strikes and worker violence. But these policy reasons are not applicable to commercial arbitration, which is simply an alternative to litigation, and not one particularly favored by Congress, contrary to the Court's assertion. *See* Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 797 (1990) ("Arbitration in nonunion settings does not warrant an aggressive pro-arbitration policy akin to the *Steelworkers Trilogy*.").

Moses, *supra 16*, at 841 n.86.

35. *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-25 (emphasis added).

36. Southland Corp. v. Keating, 465 U.S. 1, 26 (1984) (O'Connor, J., dissenting) ("Congress *believed* that the FAA established nothing more than a rule of procedure . . . .").

37. *Id.* at 12 (finding "the Arbitration Act was an exercise of the Commerce Clause power clearly implied that the *substantive* rules of the Act were to apply in state as well as federal courts.") (emphasis added).

38. *See, e.g.*, McDonald v. City of W. Branch, Mich., 466 U.S. 284, 290 (1984) (holding that arbitration cannot provide an acceptable substitute for a judicial proceeding protecting federal statutory and constitutional rights, although it can resolve contractual disputes).

39. *Barrentine*, 450 U.S. at 744 (1981) (explaining that a statutory claim should not be arbitrable because the arbitrator's power is derived from the collective bargaining agreement, and in this matter, the arbitor's main objective will be to effectuate the intent of the parties, rather than enforcing the statues, and may therefore lead to rulings "inimical" to public policies) (citation omitted); *Gardner-Denver Co.*, 415 U.S. at 49 (a statutory private cause of action is not forfeited even if the grievance is first pursued to final arbitration under the collective bargaining agreement's nondiscrimination clause); Wilko v. Swan, 346 U.S. 427, 440 (1953) (refusing to hold valid an arbitration agreement where a statutory securities issue was involved).

40. Elizabeth A. Roma, *Mandatory Arbitration Clauses in Employment Contracts and the Need for Meaningful Judicial Review*, 12 AM. U. J. GENDER SOC. POL'Y & L. 519, 536 (2004).

statutory antidiscrimination rights.[41] Collective bargaining, protected by the LMRA, is the process in which rights set forth under the NLRA "may be exercised or relinquished by the union as a collective-bargaining agent to obtain economic benefits for union members."[42] Since the unions and employers have experience in negotiating collective bargaining agreements, their bargaining power in the process is fairly equal and neither side is able to impose a condition that the other finds to be undesirable.[43] However, as the Supreme Court explained, "Title VII . . . stands on plainly different ground" from "statutory rights related to collective activity [. . .] it concerns not majoritarian processes, but an individual's right to equal employment opportunities."[44] Those rights are "absolute" and "waiver of [them] would defeat the paramount congressional purpose behind Title VII."[45]

In granting federal courts the sole authority to decide Title VII claims, Congress gave private individuals a significant role in the enforcement of these rights.[46] Congress understood that in arbitration, as in the collective bargaining process, the interests of the individual employee may be subordinated to the collective interests of the employees in the union.[47] Thus, the "harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of [. . .] discrimination is made."[48] This is due in part to the fear that union representatives could refuse to pursue a discrimination claim in order to stay on good terms with the employer[49] as well as "the long history of union discrimination against

41. *Id.* at 539-40.

42. *Gardner-Denver*, 415 U.S. at 51.

43. Roma, *supra* note 40, at 539-40.

44. *Gardner-Denver*, 415 U.S. at 51.

45. *Id.* However, while there can be no prospective waiver of an employee's rights under Title VII, "a union may waive certain statutory rights related to collective activity, such as the right to strike." *Id.*

46. *See id.* at 45.

47. *Id.* at 58, n.19; *see also* Lynlee Wells Palmer, *Trying It Again for the First Time: Judicial Treatment of Arbitral Decisions in Subsequent Title VII Cases*, 52 ALA. L. REV. 1077, 1088 (2001) ("Although union representation is a factor in determining the fairness of the arbitral proceeding, the court remains mindful that the union essentially becomes a slave to two masters: the individual employee bringing the claim and the collective union [bargaining unit] itself.").

48. *Gardner-Denver*, 415 U.S. at 58, n.19; *see also* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 199 & 206 (1944) (noting that, in cases involving racial discrimination, union and employee views may not be compatible).

49. Albert Y. Kim, *Arbitrating Statutory Rights in the Union Setting: Breaking the Collective Interest Problem Without Damaging Labor Relations*, 65 U. CHI. L. REV. 225, 231 at n.41 (1998).

minorities and women."[50] Because of these potential conflicts of interests, Congress believed that it was essential that it afford individual employees the protections of Title VII against unions as well as employers.[51]

Moreover, even if the right to bring a statutory antidiscrimination claim in federal court were waivable, arbitration would be an inappropriate venue.[52] The Supreme Court has explained that "[w]hile courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers."[53] These considerations include the fact that: (i) arbitrators are more likely to apply the "law of the shop" as opposed to the "law of the land;" (ii) arbitrators do not have to put their decisions in writing; and (iii) the fact finding process in arbitration is significantly less involved than in the court system.[54] In fact, not only do the formal rules of evidence not apply to arbitration, but regular court procedures such as discovery, cross-examination, and testimony under oath may be limited or entirely unused in arbitrations.[55] This led the Court to declare that, despite the favored status of arbitration, an arbitrator has neither the authority nor the expertise to hear statutory claims because the "competence of arbitrators pertains primarily to the law of the shop, not the law of the land."[56]

III. The Barrier between Litigation and Arbitration of Individual Statutory Rights: *Gardner-Denver*, *Gilmer* and *Wright*

As discussed below, the Supreme Court's refusal to allow an individual's statutory antidiscrimination rights to be heard in arbitration

50. *Barrentine*, 450 U.S. at 749-50 (1981) (Burger, C.J., dissenting).

51. *See Gardner-Denver*, 415 U.S. at 58, n.19. *See also* Pryner v. Tractor Supply Co., 109 F.3d 354, 362 (7th Cir. 1997) ("[A] worker who asks the union to grieve a statutory violation cannot have great confidence either that it will do so or that if it does not the courts will intervene and force it to do so.").

52. *Gardner-Denver*, 415 U.S. at 56 ("Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII . . . .").

53. *Barrentine*, 450 U.S. at 737.

54. *Gardner-Denver*, 415 U.S. at 57-58.

55. *See id.*

56. *Id.* at 57.

was first set forth in its 1974 landmark decision *Alexander v. Gardner-Denver Co.*[57] While this same issue was again addressed by the Court in *Gilmer v. Interstate/Johnson Lane Corp.*, the Court there held that an individual non-union member *could* be required to arbitrate his antidiscrimination claims if his employment contract contained an arbitration clause.[58] The *Gilmer* ruling caused a rift in the judiciary, with some Circuits holding that *Gilmer* simply limited the Court's ruling in *Gardner-Denver* to instances involving collective bargaining agreements while at least one Circuit Court held that *Gilmer* overruled *Gardner-Denver* altogether.[59] When presented once again with the issue of mandatory arbitration of federal antidiscrimination claims due to a clause in a collective bargaining agreement, the Court in *Wright v. Universal Maritime Service Corp.* failed to address the applicability of a collective bargaining agreement's arbitration clause to statutory claims and instead ruled that the clause in the contract at issue was invalid due to it not being "clear and unmistakable."[60] This failure to resolve the *Gilmer*/*Gardner-Denver* conflict led to a divergence in the federal courts over the validity of *Gardner-Denver*'s prohibition against an employee being precluded from bringing an antidiscrimination claim in court after the same claim had already been addressed in a grievance proceeding as required by a collective bargaining agreement.[61]

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

In 1974, the Supreme Court was presented with a case involving the termination of the petitioner, an African-American male, who had filed a grievance under his union's collective bargaining agreement, claiming he was discharged due to racial discrimination.[62] Before the arbitration hearing occurred, the petitioner filed a charge of racial discrimination with the Colorado Civil Rights Commission, which referred it to the Equal Employment Opportunity Commission (EEOC).[63] The arbitrator ruled that the petitioner had been "discharged for just cause" but did not address the claim of racial discrimination.[64] A few months later, the EEOC stated that there was no reasonable cause to believe that a violation of Title VII of the Civil

57. *Gardner-Denver*, 415 U.S. at 38.
58. 500 U.S. 20, 33-34 (1991).
59. *See infra* note 135.
60. 525 U.S. 70, 82 (1998).
61. *See infra* section III subsection D.
62. *Gardner-Denver*, 415 U.S. at 38-42.
63. *Id.* at 42.
64. *Id.*

Rights Act of 1964[65] had occurred but notified the petitioner that he could still bring a civil action in federal court, which he then did.[66] The District Court of Colorado granted the respondent's motion for summary judgment, finding that the claim of racial discrimination had been submitted to the arbitrator and resolved adversely to the petitioner.[67] The Tenth Circuit affirmed and the petitioner appealed.[68]

In reversing the Tenth Circuit's decision, a unanimous Supreme Court held that "an employee's rights under Title VII are not susceptible of prospective waiver."[69] The Court reasoned that Title VII concerns "an individual's right to equal employment opportunities," which is distinct from the contractual rights under the collective bargaining agreement, even though both resulted from the same factual occurrence.[70] Whereas the contractual right is "conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members,"[71] the statutory right relates to the individual's right to equal employment opportunities.[72] Thus, the Court set forth a clear policy regarding the appropriateness of arbitration as a resolution of statutory rights, explaining that:

> [T]he factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery,

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65. Title VII generally forbids, in the context of employment, discrimination against any individual "because of such individual's race, color, religion, sex, or national origin." *See* 42 U.S.C.A. § 2000e-2. The Act's proscriptions are directed at employers, employment agencies, and labor organizations, each of which is forbidden to engage in certain defined "unlawful employment practices." *Id.*

66. *Gardner-Denver*, 415 U.S. at 43.

67. *Id.*

68. *Id.*

69. *Id.* at 51-52.

70. *Id.* The Court further explained that "[t]here is no suggestion in the statutory scheme [of Title VII] that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction." *Id.* at 47. This is because:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence.

Id. at 49-50.

71. *Id.* at 51.

72. *Id.*

> compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. And as this Court has recognized, "arbitrators have no obligation to the court to give their reasons for an award." Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.[73]

The Supreme Court reaffirmed the rule established in *Gardner-Denver*, that the arbitration of a statutory claim pursuant to a collective bargaining agreement did not bar the subsequent litigation of the claim in federal court, several times over the following decade. For example, seven years after its decision in *Gardner-Denver*, the Court ruled in *Barrentine v. Arkansas-Best Freight System, Inc.* that wage claims under the Fair Labor Standards Act could be pursued in federal court despite the prior submission of the claims to arbitration under a collective bargaining agreement.[74] Three years later, the Court held in *McDonald v. City of West Branch* that an employee's § 1983 action,[75] alleging that he had been discharged for exercising his First Amendment rights, was not barred, even though the claim

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73. *Id.* at 57-58 (citations omitted).

74. 450 U.S. 728 (1981). In that case, the petitioner and another employee of Arkansas-Best Freight Systems filed several grievances alleging that they were not compensated for time spent complying with company safety practices and federal regulations regarding inspection and safety of their vehicles. *Id.* at 730-31. The claims were submitted to arbitration, as per the collective bargaining agreement, and were rejected. *Id.* at 731. Although the Distinct Court and the Court of Appeals for the Eighth Circuit denied the petitioners' claims, the Supreme Court reversed, holding that the rights at issue were independent of the collective bargaining process by the union. *Id.* at 734-41 ("FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate.") (citations omitted). *Id.* at 740.

75. 42 U.S.C. § 1983 (2006) states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

had previously been submitted for arbitration, since arbitration proceedings are not adequate to protect federally created or constitutional rights.[76] The Court explained that § 1983 created a cause of action that Congress intended to be enforceable in a judicial forum.[77]

The Court was again asked to reconcile an issue of individual statutory rights and a collective bargaining agreement three years later in *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*.[78] This time the issue was whether an employee was required by the Railway Labor Act's mandatory arbitration provision relating to "minor disputes" to arbitrate his claim for damages resulting from a workplace injury under the Federal Employers' Liability Act.[79] The Court, citing *Gardner-Denver*, *Barrentine*, and *McDonald*, rejected the employer's argument and stated that it had "on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes."[80]

However, just when the holding of *Gardner-Denver* seemed concrete, the Supreme Court was asked to decide how far reaching that ruling truly was. In a decision that cast a shadow over the viability of *Gardner-Denver* as binding precedent, the Court was presented with a slightly different and more nuanced question: whether an employer could compel arbitration of a statutory rights claim, pursuant to an employee-employer agreement, when a collective bargaining agreement did not exist.[81]

B. *Gilmer v. Interstate/Johnson Lane Corp.*

At first glance, the Supreme Court's attitude seemed to change with its 1987 decision, *Gilmer v. Interstate/Johnson Lane Corp.*, when it upheld the compulsory arbitration of an Age Discrimination in Employment Act (ADEA) claim based on the arbitration clause in an employment contract.[82] However, a closer reading shows that the Court was not overruling *Gardner-Denver* but rather distinguishing

76. 466 U.S. 284, 288-92 (1984).

77. *Id.* at 288-90. The court stated that "[b]ecause § 1983 creates a cause of action, there is, of course, no question that Congress intended it to be judicially enforceable." *Id.* at 290 (citing Mitchum v. Foster, 407 U.S. 225, 242 (1972)).

78. 480 U.S. 557 (1987).

79. *Id.* at 564.

80. *Id.*

81. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23-24 (1991).

82. *See id.* at 35.

between collective bargaining arbitration clauses and arbitration clauses contained in individual employment contracts.[83]

The *Gilmer* case involved a suit brought by a 62 year-old stockbroker – a nonunion employee – alleging that his termination violated the ADEA.[84] Upon his employment with Interstate/Johnson Lane Corp., Gilmer submitted a registration application with the New York Stock Exchange (NYSE) which stated that he "agreed to arbitrate any dispute, claim or controversy" arising between him and Interstate "that is required to be arbitrated under the rules, constitutions or by-laws of the organization with which I register."[85] Rule 347 of the NYSE requires arbitration of "any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative."[86] Nevertheless, upon his termination by Interstate, Gilmer not only filed a charge with the EEOC but also brought an action in district court alleging that he was discharged because of his age in violation of the ADEA.[87] Interstate responded with a motion to compel arbitration, relying upon both the registration application's arbitration clause and on the FAA.[88] The district court denied the motion based on the holding in *Gardner-Denver,* but the Fourth Circuit reversed.[89]

In affirming the Fourth Circuit Court of Appeals, the Supreme Court explained that *Gardner-Denver*, *Barrentine*, and *McDonald* ("the GBM cases") were distinguishable from *Gilmer* on three issues. First, the GBM cases only involved the issue of whether the arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims.[90] They did *not* address the enforceability of an agreement to arbitrate statutory claims.[91] Second, the GBM cases

83. *See id.* at 33-34.

84. *See id.* at 23. Congress enacted the ADEA in 1967 "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (1967). In order to achieve those goals, the ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." § 623(a)(1).

85. *Gilmer*, 500 U.S. at 23 (quoting Gilmer v. Interstate/Johnson Lane Corp, 895 F.2d 195 (1991)).

86. *Id.*

87. *Id.* at 23-24.

88. *Id.* at 24.

89. *See id.*

90. *Id.* at 35.

91. *Id.*

concerned collective bargaining based arbitration in which the claimants were represented by unions in the arbitration proceeding.[92] In those situations, the Court was concerned with the tension between collective representation and individual statutory rights, a concern the Court felt was not applicable in *Gilmer*.[93] Third, the Court pointed out that the GBM cases did not involve the FAA and its "liberal federal policy favoring arbitration agreements."[94] Surprisingly, the Court found, in contrast to *Gardner-Denver*, that "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA . . . Although all statutory claims may not be appropriate for arbitration, 'having made the bargain to arbitrate, the party should be held to it . . .'"[95] However, the Court did not offer any examples of what it regarded as the basis for determining which statutory rights were appropriate to be arbitrated and instead announced that the burden to establish whether Congress intended to preclude arbitration of the statutory claim at issue was placed on the party objecting to the arbitration.[96] Therefore, the Court primarily distinguished the holding in *Gardner-Denver* by explaining that that case involved a labor arbitration dispute under a collective bargaining agreement, not a non-union arbitration arising out of the FAA.[97] In doing so, the Court created a dichotomy in which an arbitration clause in an individual employment contract is enforceable while the same clause in a labor agreement is not.[98]

Gilmer reflected the growing trend of the Court to resolve concerns regarding the scope of arbitral disputes in favor of arbitration.[99] Employers quickly seized upon the *Gilmer* decision, viewing it as giving them permission to mandate arbitration "as the mechanism

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92. *See id.*

93. *See id.* The Court had explained earlier in its decision that "[t]here is no indication in this case, however, that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application." *Id.* at 33.

94. *Id.* at 35 (citing *Mitsubishi*, 473 U.S. at 625).

95. *Id.* at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

96. *Id.* (citing *Mitsubishi*, 473 U.S. at 628) ("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.").

97. *See id.* at 33-35.

98. Wolf, *supra* note 26, 56 J. Mo. B. at 265. This split in its application of *Gardner-Denver* was rejected by Justice Stevens who argued that "arbitration clauses contained in employment agreements are specifically exempt from coverage of the FAA," and therefore the petitioner should not be compelled to submit his ADEA violation claims to arbitration. *Gilmer*, 500 U.S. at 36 (Stevens, J., dissenting).

99. Michael B. Kass, *Recent Development: Wright v. Universal Maritime Service Corp.*, 14 Ohio St. J. on Disp. Resol. 945, 945 (1999).

for dispute resolution in the employment context."[100] Many businesses began requiring employees "to sign documents in which they give up their rights to resolve disputes in courts . . . as a condition of their future employment."[101] Similarly, following the Supreme Court's decision in *Gilmer*, the lower courts began applying the FAA in requiring the arbitration of other statutory discrimination claims.[102] Although the tension between the impermissibility of mandatory arbitration clauses in collective bargaining agreements and their permitted use in employee contracts continued to grow,[103]

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100. Wolf, *supra* note 26, at 265 (quoting Mary E. Bruno & Lawrence J. Rosenfeld, *"Duffield" Puts Compulsory Arbitration in Doubt*, NAT'L LAW JOURNAL, Oct. 5, 1998 at B6).

101. *Id.* at 263 (quoting Jean R. Sternlight, *Steps Need to be Taken to Prevent Unfairness to Employees, Consumers*, 5 DISP. RESOL. MAG., Fall 1998, at 5, 7).

102. *See, e.g.*, Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991) (compelling a female stockbroker to arbitrate her Title VII claims); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991) (holding that a female broker's Title VII sex discrimination claim was arbitrable due to an arbitration agreement contained in her securities registration application); Bird v. Shearson Lehman/Am. Express, Inc., 926 F.2d 116 (2d Cir. 1991) (ERISA claims held to be arbitrable); Haviland v. Goldman Sachs & Co., 947 F.2d 601 (2d Cir. 1991) (holding RICO claims are arbitrable); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992) (claims of sexual harassment and gender discrimination are subject to securities arbitration under the arbitration clause of an employment application); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992) (holding that Title VII and state law tort claims are arbitrable under an agreement in the registration statement); Saari v. Smith Barney, Harris Upham & Co., 968 F.2d 877 (9th Cir. 1992) (finding claims under the Federal Employee Polygraph Protection Act are subject to compulsory arbitration even though the Act precludes "waive[r] by contract or otherwise" of "rights and procedures" provided under the Act); Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, 7 F.3d 1110 (3d Cir. 1993) (compelling arbitration of an ERISA claim); Nghiem v. NEC Elec., Inc., 25 F.3d 1437 (9th Cir. 1994) (finding the employee's wrongful termination, race discrimination and antitrust claim was arbitrable where he submitted to the authority of the arbitrator and pursued arbitration, only to later change his mind and assert lack of authority); Metz v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994) (finding that the plaintiff stockbroker's registration application provided for the arbitration of her allegations of unlawful termination under the Pregnancy Discrimination Act of 1978); Williams v. CIGNA Fin. Advisors, Inc., 56 F.3d 656 (5th Cir. 1995) (holding that Older Workers Benefit Protection Act's anti-waiver provision only barred waiver of a claim and not a waiver of judicial forum). *But cf.* Graham Oil Co. v. ARCO Products Co., 43 F.3d 1244, 1247 (9th Cir. 1994) (finding that since the federal Petroleum Marketing Practices Act was intended to protect franchisees from surrendering important statutory rights because of the "gross disparity of bargaining power" that Congress found to exist, the arbitration clause was unenforceable and the plaintiff's complaint was reinstated).

103. The majority of circuit courts understood *Gilmer* as still prohibiting the application of mandatory arbitration agreements found in collective bargaining agreements to statutory claims. *See, e.g.*, Tho Dinh Tran v. Dinh Truong Tran, 54 F.3d 115 (2d Cir. 1995); Varner v. Nat'l Super Mkts., Inc., 94 F.3d 1209 (8th Cir. 1996); Penny v. United Parcel Serv., 128 F.3d 408 (6th Cir. 1997); Pryner v. Tractor Supply Co., 109

it would take another seven years before the Court would have an opportunity to finally explain whether *Gilmer* had overruled, or at the very least, undermined its decision in *Gardner-Denver*.

C. *Wright v. Universal Maritime Services Corp.*

An opportunity for the Supreme Court to pacify the *Gardner-Denver / Gilmer* conflict once and for all arose in the 1998 case, *Wright v. Universal Maritime Service Corp.*[104] Ceasar Wright, a longshoreman and a union member, was injured on the job where he had worked for 22 years.[105] He brought a worker's compensation claim for permanent disability against his employer, Universal Maritime Services Corp., which was settled for a substantial sum, including social security disability benefits.[106] Although Wright attempted to return to work on the docks three years later, companies refused to employ him, believing that his settled claim for permanent disability rendered him unqualified to perform longshore work under the collective bargaining agreement of the International Longshoremen's Association, AFL-CIO.[107]

Wright contacted the union and inquired as to how he could return to work.[108] Rather than suggest that he file a grievance, as provided for in the collective bargaining agreement, the union instructed him to obtain counsel and file a claim under the Americans with Disabilities Act of 1990 (ADA).[109] Wright did so and filed charges with the EEOC, which issued him a right-to-sue letter.[110] Soon thereafter, Wright filed a complaint in federal district court against the South Carolina Stevedoring Association and six of its member-companies.[111]

A Magistrate Judge recommended the case be dismissed due to the fact that Wright had not followed the grievance procedure set forth in the collective bargaining agreement, and the district court

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F.3d 354 (7th Cir. 1997); Brisentine v. Stone & Webster Eng'g Corp., 117 F.3d 519 (11th Cir. 1997); Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997) *cert. granted and judgment vacated*, 524 U.S. 947 (1998). However, the Fourth Circuit held that, under *Gilmer*, a collective bargaining agreement's arbitration clause can bar an individual worker's Title VII claim. *See* Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996).

104. 525 U.S. 70, 72 (1998).
105. *See id.* at 74.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 74-75.
111. *Id.* at 75.

agreed.[112] The Fourth Circuit affirmed, holding that the general arbitration provision in the collective bargaining agreement was broad enough to cover a statutory claim arising under the ADA.[113]

The Supreme Court began its opinion by addressing the *Gardner-Denver/Gilmer* tension.[114] Wright argued that under *Gilmer*, even though federal forum rights can be waived in individually executed contracts, they cannot be waived in union-negotiated collective bargaining agreements.[115] The respondents countered that the real difference between *Gardner-Denver* and *Gilmer* was the "radical change, over two decades, in the Court's receptivity to arbitration" and that the *Gilmer* Court intentionally undermined *Gardner-Denver* so that a union could now waive an employee's right to have these claims brought in court.[116] Although presented with this opportunity to set the record straight once and for all, the Court deferred and instead stated that "we find it unnecessary to resolve the question of the validity of a union-negotiated waiver, since it is apparent to us, on the facts and arguments presented here, that no such waiver has occurred."[117]

The Court explained that, under the LMRA, arbitration procedures should be followed in labor disputes, since arbitrators are in a better position to interpret the terms of a collective bargaining agreement than judges, unless the nature of the claim is not subject to their interpretation under the arbitration's terms.[118] The collective bargaining agreement at issue in *Wright* dealt with questions pertaining to whether an employee was qualified for the job, whereas the ADA dealt with questions of whether the refusal to hire an employee was a statutory violation.[119] Wright's cause of action arose from a statutory, and not a contractual, right.[120] The Court therefore denied the respondents the benefit of the presumption of arbitrability.[121]

The Court then considered whether a union could waive an employee's right to a judicial forum in a statutory cause of action.[122]

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112. *Id.*
113. *Id.*
114. *See id.* at 75-77.
115. *Id.* at 77.
116. *Id.*
117. *Id.*
118. *Id.* at 78 (citing AT&T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643, 650 (1986)).
119. *See id.* at 78-79.
120. *Id.* at 79.
121. *Id.*
122. *See id.* at 79-80.

The Court explained that, while it is unclear if *Gardner-Denver*'s prohibition of a union waiver of employees' federal forum rights survived *Gilmer*, *Gardner-Denver* "at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA."[123] Under the Court's reasoning, for a collective bargaining agreement's requirement of arbitration of statutory claims to be enforceable, it must be stated in "clear and unmistakable" language.[124] The Court explained that the collective bargaining agreement at issue in *Wright* was very general, requiring for the arbitration of "matters under dispute," which could be understood to include solely matters in dispute under the contract.[125] Furthermore, the contact did not contain an explicit incorporation of any statutory antidiscrimination requirements.[126] Therefore, because the collective bargaining agreement before it did not meet the standard of a clear and unmistakable waiver of an employee's statutory rights, the Court ruled that the employee was not required to arbitrate his ADA claims, while making it clear that "[w]e take no position [on the effect of *Gilmer*] in cases where a CBA clearly encompasses employment discrimination claims, or in areas outside collective bargaining."[127]

Although the *Wright* Court failed to address the current validity of *Gardner-Denver*, the fact that it refrained from explicitly overruling that decision was viewed by the judiciary as tacit acceptance of the post-*Gilmer* rule: unless Congress has precluded him from doing so, an individual may waive his own statutory right to a judicial forum, but his union may not waive that right for him.[128] The *Wright*

123. *Id.* at 80.
124. *Id.* at 80-81.
125. *Id.*
126. *Id.* at 81.
127. *Id.* at 82 n.2.
128. *See* Air Line Pilots Ass'n, Intern'l v. Nw. Airlines, Inc., 199 F.3d 477, 484 (D.C. Cir. 1999) ("Thus, even after *Gilmer*, *Gardner-Denver* stands as a firewall between individual statutory rights the Congress intended to be bargained away by the union, and those that remain exclusively within the individual's control.") (citations omitted). *See also* Granados v. Harvard Maintenance, Inc., No. 05 Civ. 5489(NRB) 2006 U.S. Dist. LEXIS 6918, at *13-14 (S.D.N.Y. Feb. 22, 2006) ("Absent more explicit guidance from the Supreme Court, lower courts, including the Second Circuit, have distinguished these two lines of cases by asserting that the second line of cases 'deals not with arbitration clauses in collective bargaining agreements but with employees' own agreements to arbitrate specified disputes.'") (citations omitted). With regard to the Court's failure to resolve the *Gardner-Denver/Gilmer* tension, the D.C. Circuit stated:

> Whatever the Supreme Court said – or, more precisely, refrained from saying – in *Wright*, we do not understand the Court in *Gilmer* to have overruled *Gardner-Denver*. Rather, the Court expressly distinguished that case, which

decision did suggest that a union-negotiated waiver of an employee's statutory right to a judicial forum might be enforceable if such a clause was "clear and unmistakable."[129] For a waiver to be considered "clear and unmistakable," one of two conditions must be met: either (1) the arbitration clause contains a provision whereby employees specifically agree to submit all federal causes of action arising out of their employment to arbitration;[130] or (2) the collective bargaining agreement contains an explicit incorporation of the statutory antidiscrimination requirements in addition to a broad and general arbitration clause.[131] This holding led to the fear, among some, that a "reasonably competent employer-counsel would simply advise her client to obtain explicit waivers as part of the collective-bargaining agreement."[132] However, this fear may have been premature, as courts continued to find union-negotiated waivers of employees' statutory right to a judicial forum unenforceable.

D. *The Post-Wright World*

The Fourth Circuit was the first post-*Wright* court to be presented with the issue of whether an arbitration clause in a collective bargaining agreement could preclude a union employee from bringing his statutory claim in court.[133] The plaintiffs in *Carson v. Giant Food, Inc.* brought an action for race, age and disability discrimination against their employer.[134] Prior to the *Wright* decision, the Fourth Circuit had been the lone Circuit Court to hold that *Gilmer* had overruled *Gardner-Denver* and therefore a union-negotiated collective bargaining agreement that required arbitration of statutory claims was valid and binding on unionized employees.[135] Now, after *Wright*, the court found itself in a situation where it believed "the normal interpretative rule applicable to collective bargaining agreements – one which presumes a dispute is arbitrable – [no longer applies] to statutory discrimination claims" and instead "collective

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> strongly implies that it remains the law within its field of application. We therefore leave to the Court itself the prerogative of overruling its own precedent (if it will); we apply the law as it stands.

Air Line Pilots Ass'n, Intern'l, 199 F.3d at 484.

129. *Wright*, 525 U.S. at 81-82.

130. Rogers v. New York University, 220 F.3d 73, 76 (2d Cir. 2000).

131. *Id.* (explaining that "Courts agree that specific incorporation requires identifying the antidiscrimination statutes by name or citation.").

132. Kass, *supra* note 99, at 954-55.

133. Carson v. Giant Food, Inc., 175 F.3d 325 (4th Cir. 1999).

134. *Id.* at 327.

135. *Austin*, 78 F.3d at 885 (Agreements to arbitrate statutory claims are "valid because they rest on the premise of fair representation.") (citation omitted).

bargaining agreements to arbitrate these claims, unlike contracts executed by individuals, must be 'clear and unmistakable.'"[136] The court held that the collective bargaining agreement at issue failed to meet either of the two standards set forth in *Wright* for an arbitration clause to be clear and unmistakable.[137] Although the arbitration clause broadly stated that the parties agreed to arbitrate all disputes over the meaning of the agreement, it did not express that it also included disputes arising under federal law and therefore did "not satisfy the demand of particular clarity."[138] Similarly, while the agreement contained antidiscrimination provisions, it lacked any provision incorporating by reference specific federal antidiscrimination statutory law.[139] Thus, the court held that the collective bargaining agreement did not mandate the arbitration of the employees' federal statutory discrimination claims.[140]

In fact, even when an agreement contains an antidiscrimination provision and references a specific federal statute, courts have still found it not sufficiently clear or unmistakable, as required by *Wright*,

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136. *Carson*, 175 F.3d at 331 (quoting *Wright*, 525 U.S. at 396).

137. *Id.* at 331-32.

138. *Id.*

139. *Id.* at 332. This realignment of the Fourth Circuit with the rest of the Circuit Courts appears to have been short lived, as seen *infra* note 140.

140. *Id.* Other courts have similarly declined to enforce arbitration clauses due to their failure to meet *Wright*'s clear and unmistakable requirement. *See, e.g.*, Fayer v. Town of Middlebury, 258 F.3d 117, 122-23 (2d Cir. 2001) (applying *Rogers* and holding that an arbitration clause in a union collective bargaining agreement was not enforceable against an individual employee's ADA and FMLA claims since it was not clear and unmistakable); Joseph v. Hess Oil Virgin Islands Corp., No. 11-8026 2001 U.S. Dist. LEXIS 3539, at *5 (D.V.I. Feb. 26, 2001) ("the particular non-discrimination clause and grievance procedures . . . do not operate to effectively waive Plaintiff's statutory [Title VII] rights."); Mitchell v. Chapman, 343 F.3d 811, 824 (6th Cir. 2003) ("Assuming arguendo, that the CBA mandates binding arbitration, it is well-established that the CBA must contain a 'clear and unmistakable waiver' of Mitchell's [Family and Medical Leave Act] rights to foreclose his entitlement to a judicial forum."); *Granados*, 2006 U.S. Dis. LEXIS 6918, at *15 ("Applying the two rationales of *Rogers*, we find that the arbitration provision at issue here is not enforceable as to any of plaintiff's statutory claims."). In fact, the only exception seems to be – once again – the Fourth Circuit which, despite its holding in *Carson*, held that a collective bargaining agreement that stated "[a]ny and all claims regarding equal employment opportunity or provided for under this Article of the Agreement or under any federal or state employment law shall be exclusively addressed by an individual employee or the Union under the grievance and arbitrations provisions of this Agreement" constituted clear and unmistakable language indicating a waiver of a statutory right to a judicial forum of a claim. Singletary v. Enersys, Inc., 57 Fed. Appx. 161 (4th Cir. 2003). *See also* Safrit v. Cone Mills Corp., 248 F.3d 306, 308-09 (4th Cir. 2001) ("[A]n agreement to arbitrate statutory claims is part of the natural tradeoff that a union must make in exchange for other benefits . . . . To redact one clause from a CBA would in effect alter the agreement reached during the often-difficult collective bargaining process.").

to waive statutorily conferred rights.[141] For instance, in *Rogers v. New York University*, an agreement presented to the Second Circuit contained a provision stating "there shall be no discrimination as defined by applicable Federal, New York State, and New York City laws, against any present or future employee by reason of . . . physical or mental disability . . . "[142] The agreement also referred to a specific antidiscrimination statute, stating that "employees are entitled to all provisions of the Family Medical Leave Act of 1993 (FMLA) that are not specifically provided for in this agreement."[143] While these provisions would appear to satisfy the second condition set forth in *Wright*, the court held that, although the agreement contained both a general arbitration clause and a nondiscrimination provision naming a federal statute, "neither incorporates anything explicitly."[144] Moreover, while the agreement created contractual rights coextensive with the FMLA, the agreement did "not specifically make compliance with the FMLA a contractual commitment that is subject to the arbitration clause."[145] The Second Circuit therefore affirmed the lower court's ruling, denying the defendant-appellant's attempt to compel arbitration.[146]

IV. *PYETT* AND THE DIMINISHMENT OF *STARE DECISIS*

With the above in mind, it should come as no surprise that the Second Circuit in *Pyett v. Penn. Building Co.* likewise refused to compel arbitration of age discrimination claims based on an arbitration clause in the collective bargaining agreement between the plaintiffs' union and their employer.[147] As the court explained, "there is nothing that has changed in the nine years since *Wright* or the seven years since *Rogers* that compels us to reverse our ruling in *Rogers* that arbitration provisions contained in a CBA, which purport to waive employees' rights to a federal forum with respect to statutory claims, are unenforceable."[148]

The Supreme Court disagreed.

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141. *See, e.g.*, *Rogers*, 220 F.3d at 76.
142. *Id.* at 74.
143. *Id.*
144. *Id.* at 76.
145. *Id.* (stating that the Court in *Wright* explained that "creating coextensive rights 'is not the same as making compliance with the [federal statute] a contractual commitment that would be subject to the arbitration clause'") (quoting *Wright*, 525 U.S. at 81)).
146. *Id.* at 77.
147. 498 F.3d 88 (2d Cir. 2007).
148. *Id.* at 93-94.

A. *14 Penn Plaza LLC v. Pyett – The Decision*

Associate Justice Robert H. Jackson once suggested that Supreme Court rulings have "a mortality rate as high as their authors."[149] That statement appears to have been wishful thinking as the Court further decreased the precedential lifespan of its holdings with its decision in *14 Penn Plaza, LLC v. Pyett*.[150]

In *Pyett*, the Supreme Court once again found itself presented with the familiar question of whether a provision in a collective bargaining agreement that required union members to arbitrate claims arising under the ADEA was enforceable.[151] The plaintiffs/respondents in *Pyett* worked as unionized night lobby watchmen at the 14 Penn Plaza office building in New York City.[152] In August of 2003, the Union filed grievances challenging the petitioner's/defendant's hiring of a separate unionized security service and the reassignment of the plaintiffs/respondents to work as night porters and light dry cleaners throughout the building.[153] The Union alleged, among other claims, that the petitioners violated the agreement's ban on workplace discrimination by reassigning the respondents due to their age.[154] However, after requesting arbitration, pursuant to the

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149. Robert H. Jackson, *The Task of Maintaining Our Liberties: The Role of the Judiciary*, 39 A.B.A. J. 961, 962 (1953).

150. 556 U.S. 247 (2009).

151. *Id.* at 251.

152. *Id.* at 252.

153. *Id.* at 253.

154. *Id.* at 252. The collective bargaining agreement's grievance and dispute resolution procedure required:

> § 30 NO DISCRIMINATION.
>
> There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to *Title VII of the Civil Rights Act*, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, . . . or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedures (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

Id. The Union alleged that the defendants/petitioners: (1) violated the collective bargaining agreement's ban on workplace discrimination by reassigning respondents on account of their age; (2) violated seniority rules by failing to promote one of the respondents to a handyman position; and (3) failed to equitably rotate overtime. *Id.* at 253.

collective bargaining agreement, the Union withdrew its age discrimination claim altogether.[155] Soon thereafter, the respondents filed their own complaint with the EEOC.[156] Although the EEOC failed to find that a violation had occurred, it notified the respondents of their right to sue.[157] The respondents filed suit in the Southern District of New York, and the petitioners responded by filing a motion to compel arbitration pursuant to the FAA.[158] The Second Circuit affirmed the district court's denial of the petitioner's motion, stating that, under the holdings of *Gardner-Denver* and *Gilmer*, collective bargaining agreements "which purport to waive employees' rights to a federal forum with respect to statutory claims, are unenforceable."[159]

Justice Thomas, writing for a sharply divided Supreme Court, reversed, stating that a collective bargaining agreement's arbitration clause must be upheld unless the ADEA itself removed the particular class of grievances from the NLRA's broad sweep – which the Court held it did not.[160] The Court first distinguished *Gardner-Denver*, *Barrentine* and *McDonald*, explaining that those cases involved the specific issue of whether the arbitration of contract-based claims precluded the subsequent judicial resolution of statutory claims where the employees had not agreed to arbitrate those statutory claims.[161] The Court explained that while it was understandable that in those circumstances, arbitration was held not to preclude subsequent statutory actions, "*Gardner-Denver* and its progeny . . . do not control the

155. *Id.* The Union believed that, since it had consented to the contract for the new security personnel, it could not now claim that respondents' reassignment was discriminatory. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 255 (quoting Pyett v. Penn. Building Co., 498 F.3d 88, 93-94 (2d. Cir. 2007)).

160. *Id.* at 258 (quoting *Gilmer's* pronouncement that "nothing in the text of the ADEA or its legislative history explicitly precludes arbitration." *Gilmer*, 500 U.S. at 26-27). Additionally, the requirement set forth in *Wright* that an agreement to arbitrate statutory antidiscrimination claims be "explicitly stated" in the collective bargaining agreement was met by the agreement at issue in *Pyett*. *Wright*, 525 U.S. at 80. The respondents had only raised the issue in their Supreme Court brief, having failed to raise it before in either the district court or court of appeals. *Id.* at 272-73. Therefore, the Court held that this argument had been forfeited and the arbitration clause would be considered clear and unmistakable. *Id.*

161. *Id.* at 263. The respondents had argued that, under *Gardner-Denver*, a union cannot waive an employee's right to a judicial forum for federal antidiscrimination claims since "allowing the union to waive this right would substitute the union's interests for the employee's antidiscrimination rights." *Id.* at 260.

outcome where, as is the case here, the collective-bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimination claims."[162]

The Court then addressed the argument that arbitration itself was not a proper forum for the resolution of statutory antidiscrimination claims, and therefore an agreement to submit those claims to arbitration was "tantamount to a waiver of those rights."[163] The Court explained that *Gardner-Denver*'s view was based on its prior holding in *Wilko v. Swan,*[164] a holding which had been overruled in *Rodriguez de Quijas v. Shearson/Am. Express, Inc.,* nearly two decades prior to the *Pyett* decision.[165] It was in *Rodriguez de Quijas* that the Court had explained that *Wilko*'s suspicion of arbitration had fallen out of step with the Court's "current strong endorsement of the federal statutes favoring this method of resolving disputes."[166]

Justice Thomas further explained that the Court's statement in *Gardner-Denver* that certain features of arbitration made it an inappropriate forum for the resolution of Title VII rights was based on a misconception of the competence of arbitrators with regard to statutory antidiscrimination claims.[167] Just as the Court had recognized that arbitral tribunals are capable of handling statutory claims such as antitrust matters, RICO claims, and securities claims, so too "[a]n arbitrator's capacity to resolve complex questions of fact and law extends with equal force to discrimination claims brought under the ADEA."[168]

The Court next rejected the argument, presented in *Gardner-Denver*, that in arbitration, just as in the negotiation of a collective bargaining agreement, "a union may subordinate the interests of an individual employee to the collective interests of all employees in the bargaining unit."[169] The Court stated that had Congress intended this conflict-of-interest concern between a union and its members to be addressed, it should have done so in the ADEA, rather than expect

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162. *Id.* at 264.

163. *Id.* at 265 (citing *Gardner-Denver*, 415 U.S. at 51).

164. The Court in *Wilko* had held that an agreement to arbitrate claims under the Securities Act of 1933 was unenforceable. *Wilko*, 346 U.S. at 438.

165. *Rodriguez de Quijas*, 490 U.S. at 477.

166. *Id.* at 481.

167. *Pyett*, 556 U.S. at 268 (quoting *Gardner-Denver*, 415 U.S. at 56).

168. *Id.* at 269.

169. *Id.*

it to be resolved by the Judiciary.[170] Moreover, the conflict-of-interest argument, in the eyes of Justice Thomas, is simply a negative spin on the "principle of majority rule" which "is in fact the central premise of the NLRA."[171] The Court further explained that since a union is subject to liability if it illegally discriminates against workers based on their age, Congress had provided remedies for situations in which a labor union is "less than vigorous in defense of its members' claims of discrimination[.]"[172]

The four-Justice minority,[173] led by Justice Souter, strongly dissented to what it viewed as the Court's "subversion of precedent[.]"[174] Arguing that the majority "evades the precedent . . . simply by ignoring it," Justice Souter explained that as recently as the *Wright* decision, the Court recognized a prohibition of union waiver of employees' federal forum rights based on the two separate categories of rights set forth in *Gardner-Denver*, with one being the "statutory rights related to collective activity" and the other being Title VII rights which "concern not the majoritarian process, but an individual's right to equal employment activities."[175] Moreover, the Court's attempt to limit *Gardner-Denver*, stating that it only pertained to situations where the collective bargaining agreement did not specifically cover statutory claims, ignored the fact that that was "merely one of several reasons given in support of the decision."[176]

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170. *Id.* at 270 (explaining that the Court "cannot rely on this judicial policy concern as a source of authority for introducing a qualification into the ADEA that is not found in its text").

171. *Id.* at 271 ("It was Congress' verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands. Respondents' argument that they were deprived of the right to pursue their ADEA claims in federal court by a labor union with a conflict of interest is therefore unsustainable; it amounts to a collateral attack on the NLRA.").

172. *Id.*

173. Justice Souter's minority opinion was joined by John Paul Stevens, Ruth Bader Ginsburg and Stephen Breyer.

174. *Id.* at 274 (Souter, J., dissenting).

175. *Id.* at 278-79. As one commentator noted, "[t]he Court has now equated the two rights without explaining by what alchemy individual rights under federal law transform into a union claim against an employer under a collective bargaining agreement." Alan Hyde, *Labor Arbitration of Discrimination Claims After 14 Penn Plaza v. Pyett: Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them*, 25 OHIO ST. J. ON DISP. RESOL. 975, 976 (2010).

176. *Id.* at 282. This led Justice Souter to opine that "if the Court can read *Gardner-Denver* as resting on nothing more than a contractual failure to reach as far as statutory claims, it must think the Court has been wreaking havoc on the truth for years, since (as noted) we have unanimously described the case as raising a 'seemingly absolute prohibition of union waiver of employees' federal forum rights.'" *Id.* at 283 (quoting *Wright*, 525 U.S. at 80).

Additionally, the minority explained that the Court's disregard of *Gardner-Denver*'s fear that a union may subordinate the interest of the individual employee for the interests of the bargaining unit as being merely a "judicial policy concern" that the Court "cannot rely on . . . as a source of authority for introducing a qualification into the ADEA that is not found in the text," blatantly dismisses decades of statutory interpretation precedent.[177] As Justice Souter lamented, "[w]hen the Court construes statutes to allow a union to eliminate a statutory right to sue in favor of arbitration in which the union cannot represent the employee because it agreed to the employer's challenged action, it is not very consoling to add that the employee can sue the union for being unfair."[178]

But what would the practical ramifications of this holding be? In his dissent, Justice Souter cautiously stated that the majority's ruling "explicitly reserves the question whether a [collective bargaining agreement's] waiver of a judicial forum is enforceable when the union controls access to and presentation of employees' claims in arbitration."[179] However, while the majority stated that "a substantive waiver of federally protected civil rights will not be upheld,"[180] that appears to have been exactly what occurred in *Pyett* when the union withdrew their discrimination claims from the arbitration proceeding[181] and the respondents were still denied the right to bring those claims in court.[182] Justice Thomas disagreed that this was the case, explaining that the union had allowed the respondents to continue with the arbitration of those claims even though the union itself had declined to participate.[183]

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177. *Id.* at 284. In fact, Congress itself had stated that "consistent with the Supreme Court's interpretation of Title VII in [*Gardner-Denver*]," "any agreement to submit disputed issues to arbitration . . . in the context of a collective bargaining agreement . . . does not preclude the affected person from seeking relief under the enforcement provisions of Title VII." *Id.* at 285 (citing H. R. Rep. No. 102-40, pt. 1, p. 97 (1991)).

178. *Id.* at n.4. In his separate dissent, Justice Stevens reiterated that "[i]t is for Congress, rather than this Court, to reassess the policy arguments favoring arbitration and revise the relevant provisions to reflect its views." *Id.* at 277.

179. *Id.* at 285.

180. *Id.* at 249.

181. *Id.* at 253.

182. *Id.* at 274.

183. *Id.* at 273. Justice Scalia similarly stated during oral arguments that "if the union chooses not to arbitrate [the grievance regarding statutory claims] the individual must have the right to arbitrate it on his own[.]" *See* Transcript of Oral Argument, 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (No. 07-581) at 5.

B. *14 Penn Plaza LLC v. Pyett – Its Reasoning Questioned*

The *Pyett* decision created more questions than it answered. For instance, if the union is no longer representing the employee, why should the employee be bound by the collective bargaining agreement – an agreement between the employer and the union (and not the employee) – to bring his claim in arbitration? Alternatively, if the union chooses to pursue the discrimination claims, the adequacy of such a pursuit will likely be determined by other factors, including the union's need to conserve resources.[184] While an employee can bring suit directly against his employer when the union breaches its duty of fair representation,[185] demonstrating such a breach is difficult.[186] In fact, as long as the union has not acted arbitrarily or sought to discriminate against the individual employee, the lack of allocation of adequate resources will not violate the union's duty of fair representation.[187] Not only would the employee, in effect, be bound by an adverse ruling caused by a lackluster effort put forth by the union, he would be bound even if the union was negligent in its presentation of the employee's discrimination claims.[188] It is apparent that the *Pyett* majority's opinion that the "misconceptions" about arbitrators lacking sufficient expertise with Title VII and other statutory rights-based antidiscrimination laws "have been corrected"[189] neglected to consider whether the union itself is competent to bring such claims.

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184. *See* Mary K. O'Melveny, *One Bite of the Apple and One of the Orange: Interpreting Claims That Collective Bargaining Agreements Should Waive the Individual Employee's Statutory Rights*, 19 LAB. LAW. 185, 212 (2003) ("A union's decision not to pursue arbitration remedies may be made for a variety of good faith reasons, not the least of which could be the lack of staff and financial resources.").

185. Vaca v. Sipes, 386 U.S. 171, 186-87 (1967).

186. Henry H. Perritt, Jr., *Employee Dismissal Law and Practice* (5th ed. 2008) §5.12 ("To prove a breach of a union's duty of fair representation, the record must show by substantial evidence that the union was motivated in its actions by hostility, malice or bad faith.").

187. Mark Berger, *A Step Too Far: Pyett and the Compelled Arbitration of Statutory Claims Under Union-Controlled Labor Contract Procedures*, 60 SYRACUSE L. REV. 55, 83-84 (2009).

188. *See, e.g.*, Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985) (affirming judgment n.o.v. overturning the jury's finding that a union had breached its duty of fair representation; the union's conduct amounted to no more than negligence, and negligent conduct on part of the union is legally insufficient to sustain a claim for breach of duty of fair representation); Dober v. Roadway Express, Inc., 707 F.2d 292 (7th Cir. 1983) (duty of fair representation is not violated by lackluster, inept, careless or negligent union actions); Hoffman v. Lonza Inc., 658 F.2d 519 (7th Cir. 1981) (negligence in failing to give timely notice of intent to bring grievance to arbitration does not violate the duty of fair representation).

189. *Pyett*, 556 U.S. at 268.

Moreover, while the Court explained that its dramatic shift in the acceptance of mandatory arbitration to resolve statutory claims of employment discrimination was based on the importance of enforcing collective bargaining agreements, commentators have viewed it as just another example of a politicized Supreme Court allowing ideology to interfere with the preservation of precedent.[190] As one author noted:

> The jurisprudential realpolitik of the *Pyett* decision is dramatically obvious. Stark ideological and political warfare continues between the Court's core conservative majority and the liberal minority. This is thoroughly transparent and yields no surprises. The conservatives favor major institutional interests of employers and of unions, at workers' expense. Concomitantly, the liberal minority is relatively more solicitous of workers, especially individuals who are sometimes shabbily treated by unions and employers or, at the very least, are generally more vulnerable and have fewer resources than these institutional counterparts.[191]

Lastly, ignored by the Court is the fact that the private nature of arbitration as well as the inability to invoke public scrutiny of employers, will have little impact in addressing workplace discrimination because by its very nature only a few arbitration decisions result in any public scrutiny.[192]

C. *Stare Decisis – The Precedential Value of Precedent*

Justice Cardozo once implored that "adherence to precedent should be the rule and not the exception."[193] Of course, there are many exceptions to that rule. In *Burnet v. Coronado Oil & Gas Co.*, Justice Brandies explained that there exists a well-accepted two-tier

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190. *See, e.g.*, Jess Bravin, *Justices Back Arbitration, Not Suits, Over Job Bias*, WALL STREET JOURNAL, April 2, 2009, at A3 ("[Pyett] followed the court's conservative-liberal split, with conservatives in the majority, showing how the presumptions judges bring to the bench affect their reading of laws as different as the Age Discrimination in Employment Act . . . ."); Erwin Chemerinsky, *The Conservative Assault on the Constitution* 231 (1st ed. 2010) ("It is not coincidental that most of the decisions pushing matters to arbitration and away from courts and juries are split exactly along ideological lines."); Sarah Rudolph Cole, *Let the Grand Experiment Begin: Pyett Authorizes Arbitration of Unionized Employees' Statutory Discrimination Claims*, 14 LEWIS & CLARK L. REV. 861, 862 (2010) ("This 5-4 decision, which split along traditional liberal and conservative lines, reaches a result that will likely raise the ire of legal academics.").

191. Gregory & McNamara, *supra* note 16, at 450.

192. Stephen Plass, *Private Dispute Resolution and the Future of Institutional Workplace Discrimination*, 54 How. L.J. 45, 80–81 (2010).

193. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921).

system of *stare decisis* depending on the type of case that is before the Court.[194] Whereas the Court ought to have more freedom to reverse itself in cases relating to the judicial construction of the Constitution, in cases involving statutory interpretation, the Court should display greater hesitation in overturning prior law.[195] This is because, while it is difficult for Congress to pass legislation to correct poorly reasoned constitutional decisions, with respect to statutory issues, such as those presented in *Pyett*, Congress is given greater latitude to fix its own erroneous choices.[196] This understanding led Justice Souter to dissent in *Pyett*, explaining that:

> [C]onsiderations of *stare decisis* have special force over an issue of statutory interpretation, which is unlike constitutional interpretation owing to the capacity of Congress to alter any reading we adopt simply by amending the statute. Once we have construed a statute, stability is the rule, and we will not depart from it without some compelling justification.[197]

The unanimity of a decision also greatly increases its ability to withstand being overturned in the future.[198] The more unified the Supreme Court Justices are on a particular decision, the more solid the reasoning is viewed by the legal community.[199] Likewise, a Supreme Court dissenting opinion "is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court has been betrayed."[200] Lacking a unanimous opinion, "adherence to the law is difficult because the first essential of a lasting precedent is that the court or the majority that promulgates it be fully committed to its principle."[201] Therefore, unanimous decisions, such

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194. 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting).

195. *Id.* at 405-06. Similarly, Justice Breyer explained that the "Court applies *stare decisis* more 'rigidly' in statutory than constitutional cases." Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 923 (2007) (Breyer, J. dissenting).

196. *Burnet*, 285 U.S. at 406-07.

197. *Pyett*, 556 U.S. at 280 (Souter, J., dissenting) (internal quotations omitted).

198. *See* Christopher P. Banks, *Reversal of Precedent and Judicial Policy-Making: How Judicial Conceptions of Stare Decisis in the U.S. Supreme Court Influence Social Change*, 32 AKRON L. REV. 233, 240-41 (1999).

199. Jessica Reese, *The Lone Second Amendment Interpretation: Has It Reached The Status of "Superprecedent"?* 32 S. ILL. U. L.J. 211, 223 (2007) ("If all nine Justices agree with the holding, for the same reasons, the decision appears more resolute, giving the decision itself a stronger force of authority.").

200. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928).

201. Banks, *supra* note 198, at 240-41 (quoting Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 335 (1944)).

as *Gardner-Denver*, should be, and in nearly all instances are, followed by the Court.[202] It is likely that, in understanding the precedential strength of unanimous decisions, Justice Thomas was forced to uphold *Gardner-Denver,* all the while doing his best to undermine it by limiting it to its facts and then stating that "[b]ecause today's decision [in *Pyett*] does not contradict the holding of *Gardner-Denver*, we need not resolve the *stare decisis* concerns raised by the dissenting opinions."[203]

Yet another factor affecting a law's stability is the age of the decision under review.[204] The more recent a decision is, the greater risk it has of reversal compared to long-settled precedent, which is more likely to be preserved.[205] This factor can be best understood in the context of reliance – the fewer years a decision is on the books, the less society will come to rely on that decision.[206] As Justice Brandies explained, "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."[207] Thus, it is no surprise that, in a study of 154 overturned former Supreme Court precedents, 50 percent were less than twenty-one years old when they were overturned; while only 6.4 percent of the overturned decisions were ninety years old or more.[208]

While each of these factors on their own may not be enough to prevent a decision's eventual overruling, when taken together they provide a strong deterrent to reversing precedent. In fact, the Court has explicitly stated that "[c]onsiderations of *stare decisis* are particularly forceful in the area of statutory construction, especially when a unanimous interpretation of a statute has been accepted as settled

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202. Banks, *supra* note 198, at 240-41.

203. *Pyett*, 556 U.S. at n.8. *See also,* Moses, *supra* note 16, 841 ("Its purpose in the second part of the *Pyett* decision is to narrow and discredit *Gardner-Denver*, in order to overcome its *stare decisis* effect.").

204. Banks, *supra* note 198, 241.

205. *Id.*

206. Reese, *supra* note 199, 223.

207. *Burnet*, *supra* note 194, at 406. *But see* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").

208. Banks, *supra* note 198, at 241 (citing SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946-1992 29 (1995)). *See also* James F. Spriggs, II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POL. 1091, 1105, n.16 (2001) ("[T]he average baseline hazard for cases during their first ten years of existence is .000932. This number decreases to .000466 for cases between 31 and 40 years old.").

law for several decades."[209] Given that *Pyett* involved statutory interpretation based on the unanimous decision in *Gardner-Denver* which had been followed as established precedent for over thirty years, it would appear that the *Gardner-Denver* decision had hit the *stare decisis* trifecta which the *Pyett* Court would be hard pressed to ignore. Perhaps that is why the Court found itself unable to overrule *Gardner-Denver* even while stating that it could not rely on that decision due to the "radical change, over two decades, in the Court's receptivity to arbitration."[210]

Moreover, the *Pyett* Court's treatment of *Gardner-Denver*'s "several [. . .] lines of complementary reasoning"[211] as "broad dicta"[212] failed to recognize the authoritative value of the equally valid alternative holdings enumerated in that case, such as (1) a Congressional preference for "parallel or overlapping remedies against discrimination;" (2) a sense that arbitration did not offer a good forum for the resolution of Title VII claims; and (3) a concern that collective bargaining representatives might not adequately represent employees' individual interests.[213] Simply limiting *Gardner-Denver*, as well as the decisions that followed, to apply merely to instances where the arbitration clause explicitly covered only breaches of the collective bargaining agreement's privately-negotiated discrimination protections, and not Title VII itself, ignores *Wright*'s statement that *Gardner-Denver* imposed a "seemingly absolute prohibition" on the enforcement of collective bargaining clauses with regard to statutory antidiscrimination claims.[214] Moreover, the motive behind the Court's acrobatic attempt to avoid the precedent set forth in *Gardner-Denver* and its progeny without overruling them outright is unclear, especially considering that "[w]hen the Supreme Court limits a case to its facts, it is on the way to overruling it, by nullifying the principle that decided the case."[215] This disregard of *stare decisis* led Justice

209. IBP, Inc. v. Alvarez, 546 U.S. 21, 32 (2005).

210. *Pyett*, 556 U.S. at 267 (quoting *Wright*, 525 U.S. at 77).

211. *Pyett*, 556 U.S. at 279 (Souter, J., dissenting) (quoting *Gardner-Denver*, 415 U.S. at 47).

212. *Id.* at 265.

213. Keenan, *supra* note 16, 268.

214. *Pyett*, 556 U.S. at 279 (Souter, J., dissenting) (quoting *Wright*, 525 U.S. at 80).

215. Chad Flanders, *Please Don't Cite This Case! The Precedential Value of Bush v. Gore*, 116 YALE L.J. POCKET PART 141, 142 (2006). *See also* Moses, *supra* note 16, 844 ("Although the Court claimed it distinguished rather than overruled *Gardner-Denver*, in effect, virtually nothing remains of the decision."). *See generally* Parisis G. Filippatos, *The Doctrine of Stare Decisis and the Protection of Civil Rights and Liberties in the Rehnquist Court*, 11 B.C. THIRD WORLD L. J. 335, 374 (1991) ("A precedent

Stevens to lament that "the majority's preference for arbitration again leads it to disregard our precedent."[216]

V. THE POST-*PYETT* TRIANGULATION: CONFUSION IN THE COURTROOM

In his dissent, Justice Souter stated that "the majority opinion may have little effect, for it explicitly reserves the question whether a CBA's waiver of a judicial forum is enforceable when the union controls access to and presentation of employees' claims in arbitration[.]"[217] Similarly, Paul Salvatore, the attorney who argued before the Supreme Court for the employer in *Pyett*, stated that Justice Scalia dismissed these concerns about the uncertain rights a union-represented employee may possess when the union refuses to seek arbitration, explaining that the matter could be dealt with in the lower courts.[218] It is therefore not surprising that the lower courts were presented with this very issue within a month of the Court's decision.[219] However, instead of clarifying the *Pyett* holding, the lower courts added to the confusion, creating three distinct branches of post-*Pyett* reasoning.

A. *Waiver of the Right to Bring a Claim in Court*

The first of these three tracts of cases follows a straightforward reading of Justice Thomas' decision – a collective bargaining agreement that contains an arbitration clause waives an individual employee's right to bring a statutory discrimination claim in federal court.

The District of Colorado was the first post-*Pyett* court to tackle this issue.[220] *Mathews v. Denver Newspaper Agency* involved a Title VII claim by an employee of the Denver Newspaper Agency who claimed he was demoted based on discriminatory reasons.[221] The

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is effectively extinguished when it no longer contains normative substance. To proclaim a hollowed-out precedent as an example of *stare decisis* is to present a fossil of a dinosaur as evidence that such a creature still roams the earth.").

216. *Pyett*, 556 U.S. at 275 (Stevens, J., dissenting).

217. *Id.* at 285. (Souter, J., dissenting).

218. Lawrence E. Dubé, *ABA Discussion of Impact of Pyett on Union-Management Relations*, ADR PROF BLOG (Nov. 11, 2009), *http://www.indisputably.org/?p=689*.

219. As will be explained *infra*, while both the District of Colorado and the Southern District of New York addressed this issue one month after the Supreme Court's decision in *Pyett*, the two courts reached very different conclusions.

220. Mathews v. Denver Newspaper Agency LLP, No. 07-cv-02097-WDM-KLM 2009 U.S. Dist. LEXIS 37697 (D. Colo. May 4, 2009).

221. *Id.* at *1.

matter had been submitted to arbitration, pursuant to the collective bargaining agreement, which ruled that there had been no violation of Title VII.[222] The plaintiff then brought a Title VII action in district court, and the defendants moved for summary judgment, arguing that the plaintiff's participation in the arbitration amounted to a waiver of the plaintiff's right to seek judicial remedy.[223]

The district court explained that under the collective bargaining agreement, union members were not required to arbitrate their statutory discrimination claims and may directly pursue their administrative and judicial remedies, as the plaintiff had previously done with another discrimination claim in federal court.[224] Moreover, the plaintiff had declined to use the union-appointed representative and had instead hired his own counsel who worked independently from the union in preparing and presenting his case.[225] The court therefore held that, under the Supreme Court's holding in *Pyett*, since the parties had agreed that the collective bargaining agreement covered the plaintiff's statutory claims, the plaintiff waived his right to seek a judicial remedy by voluntarily pursuing his claim in arbitration.[226] Furthermore, since the plaintiff had voluntarily decided to submit his discrimination claims to binding arbitration where both he and the defendant were parties and there was a final judgment on the merits, the action was also barred by the doctrine of *res judicata*.[227]

A week later, the Southern District of New York ruled on the ramifications of the *Pyett* decision on pre-existing litigation.[228] The court was asked in *Beljakovic v. Melohn Properties, Inc.* to compel arbitration of a Title VII Age Discrimination claim after it had already rejected such a motion previously, and litigation had been

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222. *Id.* at *1-2.

223. *Id.* at *7.

224. *Id.* at *8.

225. *Id.*

226. *Id.* at *13. The Tenth Circuit recently revisited this holding in Mathews v. Denver Newspaper Agency LLP, 649 F.3d 1199 (10th Cir. 2011) in which it held that no waiver of judicial forum had occurred "[b]ecause the arbitration agreement empowered the arbitrator to resolve only the dispute submitted, and because the dispute submitted made no mention of statutory claims, the arbitral decision could in no way determine the question of Mathews's statutory rights." *Id.* at 1207. The Tenth Circuit therefore held that, since the submission of the plaintiff's contractual claims to binding arbitration resulted in no waiver or preclusion of his statutory claims, summary judgment on such grounds was inappropriate. *Id.* at 1208. This line of reasoning will be further discussed in section IV subsection B.

227. *Mathews*, 2009 U.S. Dist. LEXIS 37697 *13-16.

228. Beljakovic v. Melohn Properties, Inc., No. 2:04-cv-03694-RJH-GWG, 2009 U.S. Dist. LEXIS 83600 (S.D.N.Y. May 11, 2009).

ongoing over the course of five years.[229] The court had based its prior ruling – that claims for employment discrimination under Title VII that were expressly covered by the collective bargaining agreement's arbitration clause could not be subject to mandatory arbitration – on then-applicable Second Circuit precedent.[230] However, after the Supreme Court's decision in *Pyett*, the district court changed direction, ruling that the collective bargaining agreement's arbitration clause was enforceable and thus compelled arbitration.[231] Moreover, it ruled that the defendant did not waive its right to arbitration by litigating the matter, noting that it had moved to compel arbitration early on and only defended itself in the litigation after its request had been denied.[232]

This pro-arbitration line of decisions continued when two weeks later the Southern District of New York was presented with the question of whether a union member can be compelled to seek relief via arbitration when the union itself refuses to pursue its member's discrimination claim. The plaintiffs in *Duraku v. Tishman Speyer Properties, Inc.*, were union members who worked as cleaners in a commercial office building managed by the defendants.[233] The union's collective bargaining agreement contained a mandatory arbitration provision as well as a nondiscrimination policy that referenced Title VII along with New York antidiscrimination laws.[234] The plaintiffs notified the union of their complaints but the union declined to bring their claims to arbitration.[235] The plaintiffs then initiated a suit on their own against their employer alleging employment discrimination based on nationality and gender in violation of Title VII and several New York laws.[236] In response, the defendants moved to compel arbitration.[237] The plaintiffs argued that, under the collective bargaining agreement, the union had sole responsibility to bring a claim in arbitration and once the union refused, the plaintiffs were permitted to bring their claims in court.[238] The defendants disagreed, citing the collective bargaining agreement's arbitration

229. *Id.* at *1.
230. *See id.* (citing Beljakovic v. Melohn Properties, Inc., 542 F. Supp. 2d 238 (S.D.N.Y. 2005)).
231. *See id.* at *3-4.
232. *See id.* at *3.
233. 714 F. Supp. 2d 470, 471 (S.D.N.Y. 2010).
234. *Id.* at 472.
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*

clause as well as a supplemental agreement between the union and defendants which stated that arbitration is mandated in the event that "the Union has declined to take an individual employee's employment discrimination claim under the no discrimination clause of the CBA (including statutory claims) to arbitration and the employee is desirous of litigating the claim."[239]

The court turned to *Pyett* and explained that "[a] collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate statutory employment discrimination claims is enforceable as a matter of federal law unless Congress precluded waiver of judicial remedies for the statutory rights at issue."[240] Therefore, relying on the language in the supplemental agreement, the court granted the defendant's motion to compel arbitration.[241]

Similarly, in *Pontier v. U.H.O. Management Corp.*, although the plaintiff's union initiated an arbitration proceeding against his former employer alleging that he was unjustly discharged, it did not raise his claim of discrimination.[242] The arbitrator issued an award in favor of the defendants and the plaintiff subsequently filed suit in federal court alleging Title VII violations.[243] The defendants moved to compel arbitration or, alternatively, to dismiss the complaint altogether, arguing that the plaintiff was subject to a mandatory arbitration clause in the collective bargaining agreement and that the plaintiff had had an opportunity to argue his discrimination claim in the earlier arbitration proceeding.[244] The collective bargaining agreement's supplemental agreement stated "[w]henever it is claimed that an employer has violated [Title VII] . . ., the matter shall be submitted to mediation," and that "arbitration appl[ies] to those circumstances in which the [union] has declined to take an individual

239. *Id.* at 473.

240. *Id.*

241. *Id.* at 474-75. *But see* Cardine v. Holten Meat, Inc., No. 10-cv-309-MJR-DGW, 2010 U.S. Dist. LEXIS 127889 at *8 (S.D. Ill. Dec. 3, 2010) (requiring the plaintiff to arbitrate his statutory discrimination claims due to a clear and unmistakable arbitration provision in the collective barraging agreement, but warning that "if Holten fails to engage in arbitration in good faith, pursuant to the terms of the CBA, or if for some reason the door to arbitrate Cardine's claims is already closed, Cardine may attempt to refile any remaining viable claims as a new civil action in this Court."). Instances where a union refuses to pursue an employee's discrimination claim, and neither the collective bargaining agreement nor any supplemental agreement contains language similar to that found in *Duraku*'s supplemental agreement, will be discussed *infra* in section IV subsection C.

242. No. 10 Civ. 8828(RMB), 2011 U.S. Dist. LEXIS 37208 at *3 (S.D.N.Y. April 1, 2011).

243. *Id.* at *1.

244. *Id.* at *4.

employee's discrimination claim . . . to arbitration and the employee is desirous of litigating the claim."[245] The Southern District of New York therefore found the requirement to arbitrate Title VII claims to be clear and unmistakable and granted the defendants' motion to compel arbitration, explaining that the defendant's claim of *res judicata* was to be resolved by the arbitrator.[246]

Hence, under the first line of post-Pyett reasoning, an individual would be held to have waived his ability to bring a statutory antidiscrimination claim in court not only if the collective bargaining agreement contained an arbitration clause, but also even if the union had refused to arbitrate on the employee's behalf as long as the agreement stated that all disputes would be submitted to arbitration whether or not the union decides to bring the action.

B. *No Waiver of the Right to Bring a Claim in Court*

While the lower courts found themselves bound by the *Pyett* ruling that a collective bargaining agreement's arbitration provision is enforceable with regard to statutory discrimination claims, the "clear and unmistakable" requirement established in *Wright* still governed, giving judges an effective means to circumvent the Court's decision. In fact, as discussed below, a mere two months after *Pyett* was decided, the Eastern District of New York refused to mandate the arbitration of a statutory discrimination claim even though the collective bargaining agreement contained both an arbitration clause and an antidiscrimination provision.[247]

The plaintiff in *Shipkevich v. Staten Island University Hospital* brought suit against his employer, claiming to have been discriminated against in violation of Title VII and the New York Human Rights Law.[248] The defendants moved to dismiss, arguing that the collective bargaining agreement required the plaintiff to arbitrate his claims, including those for discrimination.[249]

The court began its decision by noting that, based on the Supreme Court's discussion in *Pyett*, it was clear that the content of the

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245. *Id.* at *5.

246. *Id.* at *7-9. *See also*, Anglin v. Ceres Gulf, Inc., No. H-10-2082, 2012 WL 1123606 at *6 (S.D. Tex. March 16, 2012) (mandating the arbitration of Title VII claims due to the clear and unmistakable language in the collective bargaining agreement).

247. Shipkevich v. Staten Island University Hosp., No. 08-CV-1008(FB)(JMA), 2009 U.S. Dist. LEXIS 51011 at *7 (E.D.N.Y. June 16, 2009).

248. *Id.* at *1.

249. *Id.* at *1-2.

collective bargaining agreement was determinative as to whether arbitration was required.[250] In order for "an agreement to arbitrate statutory antidiscrimination" claims to be enforceable, it must "be explicitly stated in the collective bargaining agreement."[251] The antidiscrimination provision at issue in *Pyett* specifically listed several antidiscrimination statutes, including the ADEA and Title VII.[252] Moreover, the Court in differentiating *Gardner-Denver*, *Barrentine* and *McDonald*, made it clear that "those prior cases 'did not expressly reference the statutory claim at issue,' unlike the CBA at issue in [*Pyett*]."[253] Similarly, the agreement at issue in *Shipkevich* contained only a "broad definition of the events that could trigger the grievance procedure" rather than citing actual antidiscrimination statutes themselves.[254] Thus, since *Pyett* explained that the agreement in *Gardner-Denver* contained broad language and therefore did not mandate the arbitration of statutory discrimination claims, the court held that it "require[d] the same result in the present case: the CBA does not require arbitration of Shipkevich's discrimination claims."[255]

The holding in *Shipkevich* demonstrates that the *Pyett* Court, by limiting *Gardner-Denver*, *Barrentine*, and *McDonald* to their facts rather than overruling them outright, gave lower courts a means to avoid enforcing arbitration clauses when the collective bargaining agreement does not explicitly mention the federal statute the grievant claims was violated. For example, the plaintiff in *Barnes v. Hartshorn*, brought suit alleging violation of the ADEA by the county's sheriff's department in its failure to promote him.[256] The defendants countered by arguing that the plaintiff had a legally enforceable contractual obligation under the collective bargaining agreement to submit the age discrimination claim to arbitration.[257] The court, quoting *Pyett*, explained that, for a plaintiff's claim to be

250. *Id.* at *5.

251. *Id.* at *4 (quoting *Pyett*, 556 U.S. at 258).

252. *Id.*

253. *Id.* at *5 (quoting *Pyett*, 556 U.S. at 264) ("*Gardner-Denver* and its progeny thus do not control the outcome where, as is the case here, the collective-bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimination claims.").

254. *Id.* at *6-7. The agreement stated that "[n]either the Employer nor the Union shall discriminate against or in favor of any Employee on account of race, color, creed, national origin, political belief, sex, sexual orientation, citizenship status, marital status, disability or age." *Id.* at *3.

255. *Id.* at *6-7.

256. No. 09-2299, 2010 U.S. Dist. LEXIS 92078, at *2 (C.D. Ill. July 15, 2010).

257. *Id.* at *4.

covered by an arbitration provision in a collective bargaining agreement, the agreement "must 'explicitly state' that the employee agrees to arbitrate statutory antidiscrimination claims."[258] The court reasoned that the language in the agreement's antidiscrimination clause was similar to that of the agreement in *Wright* in that while it prohibits the discrimination of the employee, it does not specifically reference the ADEA or even mention "federal statutory rights."[259] The court therefore denied the defendant's motion, holding that the plaintiff's ADEA claim was not covered by the agreement's arbitration provision.[260]

Similarly, in *Edwards v. Cascade County Sheriff's Dept.*, the Montana Supreme Court held that the plaintiffs, who were county employees alleging violations of state law prohibiting discrimination on the basis of political belief and state wage and hour violations, were not required to arbitrate their claims even though the collective bargaining agreement contained both a nondiscrimination clause and an arbitration provision.[261] Explaining that "[f]ederal law, rather than state law, governs the interpretation of the scope of a collective bargaining agreement,"[262] the court turned to *Pyett* and its "clearly and unmistakably" requirement.[263] Applying that case, the court explained that nowhere in the language of the collective bargaining agreement was there a "clear and unmistakable . . . requirement to arbitrate statutory discrimination or wage claim" issues.[264] Instead, the agreement simply sets forth the county's nondiscrimination policy.[265] The court therefore concluded that the collective bargaining agreement's arbitration clause did not cover the plaintiff's statutory discrimination and wage claims.[266]

Likewise, in *Quintanilla v. Suffolk Paving Corp.*, the plaintiffs had brought suit against their former employer alleging violations of the FLSA and New York Labor Laws.[267] The defendants moved to compel arbitration based on several collective bargaining agreements

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258. *Id.* at *6 (quoting *Pyett*, 556 U.S. at 258).

259. *Id.* at *6-7 & 11-12. The court noted that while the provision did refer to the Americans with Disabilities Act, "that does not help [the] Defendants." *Id.* at *12.

260. *Id.* at *12.

261. 223 P.3d 893, 906-07 (Mont. 2009).

262. *Id.* at 901.

263. *Id.* at 903-04 (quoting *Pyett*, 556 U.S. at 274).

264. *Id.* at 904.

265. *Id.*

266. *Id.*

267. No. CV 09-5331(SJF)(AKT), 2011 U.S. Dist. LEXIS 34193 at *2 (E.D.N.Y. Feb. 10, 2011).

between themselves and the plaintiffs' union.[268] The Eastern District of New York cited *Wright's* "clear and unmistakable" requirement before turning to the agreements' language, each of which stated that "any" disputes between the parties would be referred to arbitration.[269] The district court explained that arbitration clauses that cover "any dispute concerning the interpretation, application or claimed violation of a specific term or provision" of the collective bargaining agreement have been found to lack the necessary "clear and unmistakable" waiver because "the degree of generality [in the arbitration provision] falls far short of a specific agreement to submit all federal claims to arbitration."[270] Since the arbitration clauses at issue did not explicitly state that all disputes, including both federal and state law claims, were to be arbitrated, nor did they reference the FLSA, the provisions "are too broad and general to demonstrate the 'clear and unmistakable' intent to submit all federal statutory claims to arbitration."[271] Therefore, the magistrate judge recommended that the motion to compel arbitration be denied.[272]

But what are the limits of the "clear and unmistakable" requirement? Does a collective bargaining agreement that does not mention any of the statutes at issue constitute a "clear and unmistakable" waiver of an employee's right to sue in a judicial forum if the agreement "mirrors" the relevant statutes? This question was presented to the District Court for the Central District of California in the case *Martinez v. J. Fletcher Creamer & Son, Inc.*.[273] The plaintiff in *Martinez* brought an action claiming violations of the Fair Labor Standards Act and California Labor Code.[274] The defendants moved to dismiss, arguing that each of the claims were barred by the collective bargaining agreement's mandatory arbitration provision.[275] The court, citing *Wright*, explained that a collective bargaining agreement

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268. *Id.* at *3.

269. *Id.* at *9-13.

270. *Id.* at *10-11 (citation omitted).

271. *Id.* at *12 (citation omitted).

272. *Id.* at *12-13. *See also* Combs v. Highlands Hospital Corp., 2012 WL 1902170 at *4 (E.D. Ky. May 25, 2012) ("None of the language [in the collective bargaining agreement] demonstrates that the parties intended to subject employment-discrimination claims to binding arbitration."); Buckles v. City of Hope National Medical Center, 2012 WL 273760 at *7 (C.D. Cal. Jan. 31, 2012) (holding that the collective bargaining agreement's arbitration clause only relates to disputes involving the application and interpretation of the agreement and not to claims of statutory violations).

273. No. CV 10-0968 PSG (GMOx), 2010 U.S. Dist. LEXIS 93448, at *13 (C.D. Cal. August 13, 2010).

274. *Id.* at *5-6.

275. *Id.* at *6.

must expressly reference the statutory provisions at issue in order to be considered a clear and unmistakable waiver of the plaintiff's statutory claims.[276] "[M]ere parallelism with the statutes does not constitute an express waiver of Plaintiff's statutory rights."[277] Therefore the court denied the defendant's motion, holding that the agreement "did not directly reference the statutes at issue and, thus, does not 'clearly and unmistakably' waive Plaintiff's rights under those statues."[278]

Another question that has arisen in situations where the "clear and unmistakable" requirement is not met is the issue of claim preclusion in instances where arbitration has already occurred. This matter was first addressed in *St. Aubin v. Unilever HPC NA,* in which a union employee, who had already arbitrated and lost his FMLA claim, subsequently brought an action against his employer in federal court alleging those same violations.[279] The plaintiff had grieved his discharge, alleging that he was terminated due to his exercising his FMLA rights.[280] The arbitrator rejected this claim, stating that the plaintiff had been terminated for just cause.[281] The plaintiff then brought an action in the Northern District of Illinois, alleging the same FMLA violations.[282] The defendant argued that the action was barred by claim preclusion since the arbitrator had upheld the plaintiff's discharge and rejected his FMLA claim.[283] The plaintiff responded that, under *Gardner-Denver*, an arbitration decision cannot bar an employment discrimination lawsuit.[284] The court explained that the holding of *Gardner-Denver* was no longer so broad and that the Supreme Court in *Pyett* had limited the *Gardner-Denver* holding to instances where the parties had not agreed to arbitrate the specific statutory claims at issue.[285] However, that appeared to have been exactly what occurred in the instant case, where the preamble to the collective bargaining agreement stated that the parties agreed

276. *Id.* at *12.

277. *Id.* at *13 (citing Cicairos v. Summit Logistics, Inc., 133 Cal. App. 4th 949, 960 (2006) ("Arbitration is also not required simply because the provisions relating to meal periods and rest breaks in the collective bargaining agreement are almost identical or even more generous than under state law.")).

278. *Id.* at *15.

279. No. 09 C 1874, 2009 U.S. Dist. LEXIS 55626, at *1 (N.D. Ill. June 26, 2009).

280. *Id.* at *5.

281. *Id.* at *5-6.

282. *Id.*

283. *Id.*

284. *Id.* at *6.

285. *Id.* at *8.

to comply with all employment laws, including the FMLA, and a separate provision in the agreement required the arbitration "only of disputes about the interpretation or application" of the agreement's provisions and violations of the agreement.[286] Since the agreement "only" required the arbitration of disputes about the interpretation or application of the agreement's provisions and violations of the agreement, but did not refer to the antidiscrimination provision, the defendant did not meet the burden of establishing that the arbitration award precluded the plaintiff's FMLA claim.[287] Interestingly, unlike *Gardner-Denver,* where the plaintiff did not agree to arbitrate his statutory discrimination claim,[288] the plaintiff in *St. Aubin* did voluntary submit his claim to arbitration.[289] It would appear that in such a situation, the plaintiff would waive his right to later bring an action in federal court. However, since the defendant failed to raise this issue, the court did not address it.[290] Therefore, for now, the "clear and unmistakable" requirement continues to be used by courts as a means to circumvent the *Pyett* decision's limiting effect on the holding of *Gardner-Denver*.[291]

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286. *Id.* at *9.

287. *Id.* at *10.

288. The grievance filed by the petitioner in *Gardner-Denver* stated "I feel I have been unjustly discharged and ask that I be reinstated with full seniority and pay." *Gardner-Denver*, 415 U.S. at 39. As the Court noted, "[n]o explicit claim of racial discrimination was made." *Id.* In fact, it was only immediately prior to the arbitration hearing that the petitioner filed a charge of racial discrimination with the Colorado Civil Rights Commission, which referred the complaint to the EEOC. *Id.* at 42. At the arbitration hearing, the petitioner testified that, although his discharge was the result of racial discrimination, he filed a charge with the Colorado Commission because he "could not rely on the union." *Id.* Therefore, when the arbitrator ruled that the petitioner had been "discharged for just cause," he made no reference to the petitioner's claim of racial discrimination. *Id.*

289. *St. Aubin*, 2009 U.S. Dist. LEXIS 55626 at *5 (The plaintiff's arbitration claim stated that "the real reason for his termination [was] the exercise of FMLA rights.").

290. *Id.* at *11 ("Unilever does not address *Pyett's* impact on the viability of its argument that St. Aubin arbitration submissions constitute agreement to arbitrate the FMLA retaliation claim.").

291. *See, e.g.*, Kayser v. Southwestern Bell Telephone Co., 2010 U.S. Dist. LEXIS 130788, at *8 (E.D.Mo. Dec. 10, 2010) (holding that the collective bargaining agreement did not contain a "clear and unmistakable waiver of plaintiffs' right to assert their FLSA claims in a judicial forum."); Smith v. Board of Trustees Lakeland Community College, 2010 U.S. Dist. LEXIS 102187, at *45 (N.D. Ohio Sept. 28, 2010) (finding that the plaintiff did not have to seek redress in arbitration when "the CBA contains a generic nondiscrimination clause[.]"); Alderman v. 21 Club, 2010 U.S. Dist. LEXIS 86090 at *22 (S.D.N.Y. Aug. 20, 2010) ("The provisions in the CBA do not expressly specify that all disputes, including those arising under federal law, are subject to arbitration. Moreover, the CBA does not name or incorporate the FLSA into the arbitration clause. As such, the provisions of the CBA are too broad and general

C. *Waiver of the Waiver of the Right to Bring a Claim in Court*

Under the third line of reasoning arising form the *Pyett* decision, just as an employee may find that he has waived his right to bring an antidiscrimination claim in court due to an arbitration provision in his collective bargaining agreement, that waiver may itself end up being waived, and the employee would be permitted to pursue his claims in court, due to the actions (or more likely, inactions) of his union. In fact, less than a week after the District of Colorado issued the first post-*Pyett* ruling, holding that a union member's Title VII claim had to be arbitrated due to a provision in the collective bargaining agreement,[292] the Southern District of New York was faced with a similar situation but with one slight twist: the union refused to pursue the employee's claims.[293]

The plaintiff in *Kravar v. Triangle Services, Inc.* brought an action against her former employer alleging that she was discriminated against on the basis of her national origin and that her former employer failed to reasonably accommodate her disability.[294] The defendant moved to compel arbitration based on the collective bargaining agreement, which contained an antidiscrimination clause, as well as a requirement that all claims of discrimination be submitted to binding arbitration.[295] The agreement's antidiscrimination provision specifically listed several federal and state statutes, including Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and others.[296] While the issue of "clear and unmistakable" language was evidently satisfied, the plaintiff argued that the agreement's arbitration provision should not be enforced against her,

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to demonstrate the requisite 'clear and unmistakable' intent to submit all federal statutory claims to arbitration.").

292. *See Mathews*, 2009 U.S. Dist. LEXIS 37697 at *13.

293. Shortly after the Supreme Court issued its ruling in *Pyett*, commentators began wondering what the result would be if a union refused to pursue a member's statutory discrimination claim. As one author wrote, "Many of the open questions in this post-*Pyett* litany implicitly assume that if an institutional union decides not to pursue a grievant's statutory claim to arbitration, the union nevertheless will necessarily allow the grievant to hire private counsel to represent the grievant at a unionless arbitration with the employer, with the union absorbing the private counsel legal fees." Gregory & McNamara, *supra* note 16, at 454. This, as will be discussed, was not the case.

294. No. 1:06-cv-07858-RJH, 2009 U.S. Dist. LEXIS 42944 at *2 (S.D.N.Y. May 12, 2009).

295. *Id.* at *3-5.

296. *Id.* at *3-4.

since the union had refused to pursue her claims of disability discrimination.[297]

The court turned to the *Pyett* decision, in which Justice Thomas explained that the Court had declined to consider whether "the CBA operates as a substantive waiver of [plaintiff-respondents'] ADEA rights because it not only precludes a federal lawsuit, but also allows the Union to block arbitration," since the plaintiff-respondents had failed to brief the issue.[298] The district court, after reviewing the record, concluded that the union had prevented the plaintiff from raising her disability claim in *any* forum and, as such, the collective bargaining agreement operated as a waiver over the plaintiff's substantive rights.[299] The defendant employer countered that the union's actions were beside the point because the defendant was willing to arbitrate the plaintiff's discrimination claims.[300] The court disagreed, explaining that the agreement required the union's consent, and not that of the employer, to bring the claim in arbitration.[301] Since the union had refused to pursue the plaintiff's discrimination claim, the court denied the defendant's motion to compel arbitration.[302]

Similarly, in *Borrero v. Ruppert Housing Co., Inc.* the plaintiff brought an action against his former employer alleging Title VII violations.[303] The defendant moved to dismiss the action, having already engaged in an arbitration proceeding pursuant to the collective bargaining agreement which concluded that the plaintiff had been discharged for just cause.[304] The Southern District of New York, citing *Pyett*, explained that the agreement was clear and unmistakable and therefore granted the motion.[305] However, in doing so the court stated that "[s]hould [plaintiff's] attempts to arbitrate his claims be thwarted by the Union, the CBA will have operated as a 'substantive

297. *See id.* at *7-8.
298. *Id.* at *6-7 (quoting *Pyett*, 556 U.S. at 273).
299. *Id.* at *9.
300. *Id.* at *10.
301. *Id.* at *10-11.
302. *See id.*
303. No. 08 CV 5869(GB), 2009 U.S. Dist. LEXIS 52174 at *1 (S.D.N.Y. June 19, 2009).
304. *Id.* at *5.
305. *Id.* at *7-8.

waiver' of his statutorily created rights and he will have the right to re-file his claims in federal court."[306]

Likewise, the plaintiff in *Morris v. Temco Service Industries, Inc.* brought an action against her former employer claiming violations of Title VII and several New York State antidiscrimination laws.[307] The collective bargaining agreement in that case contained an arbitration clause and an antidiscrimination provision that specifically referenced the statutes in the plaintiff's complaint.[308] In addition, the agreement provided that "[a]ll Union claims are brought by the Union alone, and no individual shall have the right to compromise or settle any claims without the written permission of the Union."[309] The plaintiff had originally filed a grievance with her union but was told that since it appeared that the work "conditions [had] improved" she "no longer had an issue that she wanted to pursue."[310] The plaintiff then brought an action in the Southern District of New York and the defendant moved to compel arbitration pursuant to the collective bargaining agreement.[311] The court, citing *Pyett*, explained that the Supreme Court had declined to resolve whether a collective bargaining agreement "operates as a substantive waiver" of a union member's statutory rights where "it not only precludes a federal lawsuit, but also allows the Union to block arbitration of these claims."[312] However, Justice Thomas had acknowledged that "a substantive waiver of federally protected civil rights will not be upheld."[313] Turning to the case before it, the district court explained that "where a collective bargaining agreement functions to prevent an aggrieved member from vindicating her statutory civil rights claims in any forum, it strips the statute of 'its remedial and deterrent function' and operates as a substantive waiver of federally protected civil rights."[314] Therefore, since the Union prevented the plaintiff from arbitrating her discrimination claims, the motion to compel arbitration was denied.[315]

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306. *Id.* at *9-10. *See also* Johnson v. Tishman Speyer Properties, L.P., No. 09 Civ.1959(WHP), 2009 U.S. Dist. LEXIS 96464 at *9 (S.D.N.Y. Oct. 16, 2009) ("an exception to the enforceability of a union-negotiated arbitration provision may exist where a union prevents a member from arbitrating discrimination claims.").

307. No. 09 Civ. 6194, 2010 U.S. Dist. LEXIS 84885 at *1 (S.D.N.Y. Aug. 12, 2010).

308. *Id.* at *2-3.

309. *Id.* at *3 (citation omitted).

310. *Id.* at *5-6.

311. *Id.* at *1.

312. *Id.* at *11 (quoting *Pyett*, 556 U.S. at 273).

313. *Id.*

314. *Id.* at *12.

315. *Id.* at *12-15.

Lastly, in *Silva v. Pioneer Janitorial Services, Inc.*, the plaintiff filed a sexual harassment grievance with her union pursuant to the collective bargaining agreement between the union and her employer.[316] The union did not pursue the discrimination charge and the plaintiff therefore filed an action in state court.[317] The defendant removed the case to the District Court of Massachusetts before moving to have the claim dismissed, arguing that the plaintiff had waived her right to litigate by filing the grievance with her union and thereby elected to proceed under the collective bargaining agreement rather than by litigation.[318] The court turned to the *Pyett* decision and explained that the Supreme Court had left open the issue of whether a collective bargaining agreement that allows a union to block the arbitration of an employee's anti-discrimination rights impermissibly "operates as a substantive waiver of their . . . rights."[319] The district court concluded that, where "the union is the sole entity with authority to proceed to arbitration and it elect[s] not to do so, the [collective bargaining agreement's] provision constitutes an impermissible waiver of the employee's statutory anti-discrimination rights."[320] Thus, the collective bargaining agreement's arbitration provision "constitutes an impermissible waiver of the" plaintiff's rights."[321] Therefore, the court denied the employer's motion to dismiss.[322]

D. *Intersection of the Three Lines of Reasoning*

While the above explains the three lines of cases emanating from the *Pyett* ruling and how a practitioner can determine whether his client can bring a federal action or if he is bound by the arbitration clause in the collective barraging agreement, uncertainties still remain. As discussed earlier, the importance of precedent is to establish binding authority to instruct future litigants on how to

316. No. 10-11264-JGD, 2011 U.S. Dist. LEXIS 21143, at *3 (D. Mass. March 3, 2011).
317. *Id.* at *9.
318. *Id.* at *9-10.
319. *Id.* at *11 (quoting *Pyett*, 556 U.S. at 273).
320. *Id.* at *12.
321. *Id.* at *23.
322. *Id.*

proceed.[323] In this vein, the Supreme Court has found unconstitutional laws that would enable two individuals to interpret its meaning differently.[324] While *Gardner-Denver* had set forth a hard and fast rule that antidiscrimination rights were not subject to the arbitration clauses of collective bargaining agreements, the Court in *Pyett* created uncertainty as to what the rule currently is. And while these three distinct lines of cases appear to explain the different situations in which such an arbitration clause may or may not be enforced, the fact that the *Pyett* decision itself did not establish a clear-cut rule created an environment where it was only a matter of time before one of these lines of cases was misapplied or ignored. This is exactly what occurred in the District Court for the Western District of Pennsylvania's May, 2012 decision, *Babcock v. Butler County*.[325]

Babcock involved a lawsuit brought by employees of the Butler County prison claiming that their Fair Labor Standards Act rights had been violated.[326] The defendants moved to compel arbitration pursuant to a clause in the collective bargaining agreement.[327] The plaintiffs countered that the collective bargaining agreement was "not a clear and unmistakable waiver of their right to sue in federal court" since it did not explicitly state that it covered FLSA disputes.[328] The court disagreed and mandated arbitration, explaining that "[a]lthough the provision [in the collective bargaining agreement] does not mention the FLSA, it does specifically state that any dispute concerning wages and hours is subject to" arbitration.[329] This of course ignores the post-*Pyett* case law set forth above that unless the arbitration clause specifically mentions the federal statute at issue, the employee will be permitted to bring an action in federal court.[330]

Similarly, when the Eighth Circuit was presented with an employer attempting to force its employee to arbitrate his statutory nondiscrimination rights under FMLA, the court affirmed the district court's decision to mandate arbitration, even though the arbitration

323. Section III, subsection C.

324. *See e.g.*, Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (holding unconstitutional a law so vague that people "of common intelligence must necessarily guess at its meaning and differ as to its application").

325. No. 12cv394, 2012 U.S. Dist. LEXIS 65874 at *4 (W.D.Pa. May 10, 2012).

326. *Id.* at *2.

327. *Id.*

328. *Id.* at *4.

329. *Id.*

330. *Supra* section V subsection B.

clause did not mention the FMLA.[331] The plaintiff in *Thompson v. Air Transport International Limited Liability Co.* was hospitalized as a result of an illness and underwent surgery causing him to miss eight weeks of work.[332] The plaintiff alleged that he was terminated, in violation of the FMLA, for taking sick leave.[333] The defendant moved to dismiss, arguing that the plaintiff's claims were subject to a mandatory arbitration provision contained in the collective bargaining agreement between the defendant and the plaintiff's union.[334] The plaintiff countered that the language of the mandatory arbitration clause was an unconscionable and non-severable waiver of his FMLA claims.[335] The court disagreed. The arbitration clause stated that "claims of discrimination arising within the employment relationship between the Company and the Crewmembers . . . [that] alleged to be violations of state or federal law . . . are to be addressed [in arbitration and] each Crewmember waives each and every cause of action and remedies provided under these statutes and common law frameworks."[336] The court explained that the last sentence of the arbitration clause did not purport to waive the plaintiff's FMLA claims, since a separate section of the agreement expressly retained the FMLA rights of employees.[337] The waiver at the end of the arbitration clause was only a waiver of a judicial forum, which is permissible under the *Pyett* decision.[338] Therefore, ignoring *Pyett*'s acceptance of *Wright*'s "clear and unmistakable" requirement, the court affirmed the district court's decision mandating arbitration even though the FMLA claims were not mentioned in the arbitration clause.[339]

But while these two cases demonstrate a divergence from the three tracts of reasoning emanating from the *Pyett* decision, two other recent decisions express an attempt by some courts to maintain the delicate post-*Pyett* balancing act. The plaintiff in *Ibarra v. United Parcel Serv.*, brought an action against her former employer for Title

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331. Thompson v. Air Transp. Int'l L.L.C., 664 F.3d 723 (8th Cir. 2011).

332. *Id.* at 725.

333. *Id.*

334. *Id.* In fact, not only was the defendant a member of the union, he was the lead negotiator during the negotiations that resulted in the creation of the collective bargaining agreement. *Id.* at 726 n.2.

335. *Id.* at 726.

336. *Id.*

337. *Id.*

338. *Id.* at 727.

339. *See id.*

VII discrimination after she was terminated for "recklessness resulting in a serious accident."[340] The defendant moved for summary judgment, claiming that collective bargaining agreement's grievance procedure was the plaintiff's sole remedy for Title VII claims.[341] The Court began its holding by stating that although *Pyett* allowed the mandatory arbitration of statutory antidiscrimination claims based on a clause in a collective bargaining agreement, references to those claims in the arbitration clause must be clear and unmistakable.[342] The agreement at issue stated that any "misunderstanding or dispute arising as to interpretation, application or observance of any of the provisions of this Agreement" must be submitted to arbitration.[343] A separate nondiscrimination provision failed to mention any specific federal or state statutes and made no reference to the grievance procedures in the agreement.[344] The court therefore held that the district court was incorrect in concluding that the agreement required the plaintiff to bring her Title VII claim in arbitration given that the agreement did not clearly and unmistakably waive a union member's right to bring such a claim in federal court.[345]

Likewise, in *Bartoni v. American Medical Response West*, a California court rejected an attempt to compel the plaintiffs to submit their wage and hour claims to arbitration rather than proceed in court.[346] The clause in that case stated that "[i]n the event any grievance arises concerning the interpretation or application of any of the terms of this Agreement, and/or any dispute concerning wages, benefits and working conditions," such claims must be brought to arbitration.[347] In agreeing with the lower court, the Court of Appeals cited *Pyett*'s holding that a collective bargaining agreement must clearly and unmistakably require union members to arbitrate statutory claims.[348] Since the arbitration clause lacked explicit language referencing the specific statute at issue, the court affirmed the lower court's ruling in denying defendant's motion to compel arbitration.[349]

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340. 695 F.3d 354, 354-55 (5th Cir. 2012).

341. *Id.*

342. *Id.* at 359.

343. *Id.* at 356-57.

344. *Id.* at 357.

345. *Id.*

346. *See* No. A130333, 2012 Cal. App. Unpub. Lexis 6237 at *37 (Cal. Ct. App. 1st Dist, Div 2, 2012).

347. *Id.* at *4.

348. *Id.* at *9.

349. *See id.* at *21-22.

While it is unknown if *Babcock* and *Thompson* are aberrations or a troublesome bellwether of judicial chaos, one thing is clear: the Court in *Pyett*, rather than settling legal precedent, has created a situation of greater uncertainty.

VI. Courts Are Less Likely to Question Title VII Arbitration Decisions Than Those of Commercial Arbitrations

As discussed previously,[350] Congress passed the FAA in order to provide "that where there are commercial contracts and there is disagreement under the contract, the court can enforce an arbitration agreement in the same way as other portions of the contract."[351] However, without the option to go to court, the FAA could lead to the inequitable application of substantive law.[352] The Supreme Court has warned that:

> The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury that is guaranteed . . . by the Seventh Amendment . . . *Arbitrators do not have the benefit of judicial instruction on the law*; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial . . .[353]

In addition to the potential misapplication of substantive law, the procedural aspects of arbitration may also disadvantage the party bringing a grievance.[354] For example, under the FAA there is no formal discovery process similar to the court-supervised method in litigation, which is often necessary to establish facts and obtain crucial documents.[355] This lack of structured discovery typically favors the employers at the expense of the claimants who bear the burden of proof and are typically the party with less information.[356] Likewise,

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350. *See supra* notes 33, 34.

351. Russell D. Feingold, *Mandatory Arbitration: What Process Is Due*, 39 Harv. J. on Legis. 281, 286 (Summer, 2002) (quoting 65 Cong. Rec. 11080 (1924) (remarks of Rep. Mills)).

352. *See id.* at 288.

353. Bernhardt v. Polygraphic Company of America, Inc., 350 U.S. 198, 203 (1956) (*emphasis added*).

354. Feingold, *supra* note 351, at 289.

355. *Id. See also* McDonald v. City of West Branch, Michigan, 466 U.S. 284, 291 (1984) ("[A]rbitral factfinding is generally not equivalent to judicial factfinding.").

356. Eric A. Hernandez, *Mandatory Arbitration and Employment Discrimination: The Unfair Law*, 2 Cardozo Online J. Confl. Resol. 96, 101 (2001).

parties in arbitration cannot seek injunctive relief nor must the proceedings be held in public.[357] Arbitrators are not bound by the judicial rules of evidence[358] and only an extremely narrow form of judicial review is allowed.[359] As Judge Rakoff of the Southern District of New York cynically stated:

> Although arbitration is touted as a quick and cheap alternative to litigation, experience suggests that it can be slow and expensive. But it does have these "advantages": unlike courts, arbitrators do not have to give reasons for their decisions, and their decisions are essentially unappealable. Here, petitioner . . . having voluntarily chosen to avail itself of this wondrous alternative to the rule of reason, must suffer the consequences.[360]

The very structure of the arbitration system "lends itself to bias."[361] This is even more so in the employment context. Since employers can potentially appear before the same arbitrators numerous times, whereas the employee may only be involved in one arbitration in his/her lifetime, it would not be surprising if the arbitrators favored the employers, given that they are "likely to [be viewed] as a source of future business."[362] These "arbitrators are usually selected from a homogenous pool of white males associated with the employer's industry[, which] raises serious questions [of fairness] given that they most often arbitrate the claims of sexual and racial discrimination claimants."[363] Moreover, courts have recognized that the enormous price of arbitration places such a demand on employees

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357. Feingold, *supra* note 351, at 289.

358. *Id.* (citing Pompano-Windy City Partners, Ltd. v. Bear Stearns & Co., 794 F. Supp. 1265 (S.D.N.Y. 1992) (stating that in handling evidence an arbitrator need not follow all the niceties observed by the federal courts and must only grant the parties a fundamentally fair hearing)).

359. *Id.* An arbitration award can only be vacated on account of the arbitrator committing fraud or having been partial, corrupt, guilty of misconduct, or having exceeding his powers. 9 U.S.C. § 10(a) (2012). In fact, "[e]ven if an arbitrator misapplies a well defined and unambiguous law, the reviewing court will not overturn the award if it is not clearly shown that the arbitrator was plainly aware of the applicable law and proven that he or she then knowingly refused to apply the law." Roma, *supra* note 40, at 534.

360. Goldman Sachs Execution & Clearing, L.P. v. The Official Unsecured Creditors' Comm. of Bayou Group, L.L.C., 758 F. Supp. 2d 222, 229 (S.D.N.Y. 2010) (ruling that Goldman had failed to show that the arbitration decision "manifestly disregarded the law" in issuing the largest arbitration award ever levied against a securities firm).

361. Roma, *supra* note 40, at 530.

362. *Id. See also* Hernandez, *supra* note 356, at 100-101 ("The process, insofar as its ability to maintain an income stream, is dependent upon the receipt of favorable reviews from repeat user corporations.").

363. Hernandez, *supra* note 356, at 100.

(which they otherwise would not have in federal court), that the employees may be discouraged from defending their rights altogether.[364] It was these concerns, among others, that caused the Supreme Court's initial hesitation to endorse the arbitration of statutory claims.[365] Perhaps for these reasons the EEOC objected to the use of arbitration for statutory discrimination claims, explaining that arbitration:

> (1) is not governed by the statutory requirements and standards of Title VII; (2) is conducted by arbitrators given no training and possessing no expertise in employment law; (3) routinely does not permit plaintiffs to receive punitive damages and attorneys' fees to which they would otherwise be entitled under the statute; and (4) forces them to pay exorbitant "forum fees" in the tens of thousands of dollars, greatly discouraging aggrieved employees from seeking relief.[366]

The EEOC was not alone in its objections. In 1998, the SEC approved the NASD's proposed rule change, "which exempted discrimination and sexual harassment complaints from the mandatory arbitration requirement found in the NASD's U-4 Dealer Registration Form" and allowed such suits to be brought in a judicial forum.[367] Nevertheless, over the objection of these federal administrative agencies, the Supreme Court in *Pyett* held that a collective bargaining agreement that clearly and unmistakably required union members to bring statutory discrimination claims in arbitration was enforceable.[368] This is even more surprising when considering the deferential treatment that the judiciary gives statutory discrimination arbitration decisions compared to those of commercial arbitration.

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364. Janice Goodman & Justin M. Swartz, *Mandatory Arbitration of Statutory Employment Claims*, ABA Section on Labor and Employment Law Equal Employment Opportunity Committee 2003 Midwinter Meeting March 19-21, 2003 at 3. *See also* Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUDIES 1, 9 (2011) (citing that the average arbitrator's fee in an employment dispute is $6,340 per case).

365. *Gardner-Denver*, 415 U.S. at 57 ("the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.").

366. Cole v. Burns Int'l Security Servs., 105 F.3d 1465, 1479 (D.C. Cir. 1997) (quoting Pierre Levy, *Gilmer Revisited: The Judicial Erosion of Employee Statutory Rights*, 26 N.M. L. REV. 455, 478 n.193 (1996)).

367. Hernandez, *supra* note 356, at 101.

368. *Pyett*, 556 U.S. at 274.

In his article, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*,[369] Professor Michael H. LeRoy analyzed cases involving instances where an employer or employee challenged an arbitrator's ruling during the 1975 through February of 2008 time frame.[370] Professor LeRoy reviewed a total of 483[371] state and federal court rulings that discussed disputed arbitration awards and compared his data with that of the Administrative Office of the U.S. Courts, which detailed how often federal appellate courts reversed lower court rulings made in civil cases in 2006.[372] His findings, detailed *infra* in Appendix A, conclude that the vacatur rate for arbitration awards is exactly one-third the rate for all court judgments reversed by appellate courts in 2006.[373] While the apparent deference towards an arbitrator's ruling is clear, it is even starker when the arbitration involves statutory discrimination claims.

In a demonstration of the virtual rubber-stamping of arbitrators' Title VII statutory discrimination rulings, Professor LeRoy conducted an additional test, reviewing 65 federal court rulings on Title VII arbitration awards and comparing them to 115 state court rulings on breach of contract arbitration awards.[374] In the state law contract cases, first-level courts enforced 73.0 percent of the awards, vacated 23.8 percent and partially confirmed 3.2 percent.[375] However, when it came to the Title VII arbitration rulings, federal district courts confirmed 95.5 percent of the decisions while vacating only 4.5 percent, as detailed *infra* in Appendix B.[376] While an optimist might argue that "based on these statistics [. . .] arbitrators are right more often than courts,"[377] the fact remains that "arbitrator rulings on Title VII statutory discrimination claims are more insulated from court review than comparable rulings by federal judges."[378]

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369. 2009 J. DISP. RESOL. 1.

370. *Id.* at 32.

371. Professor LeRoy's database consisted of 291 challenged arbitration awards, with 170 being federal court rulings and 121 being state court decisions. Ninety of the federal cases and 102 of the state cases were appealed, leading to a total of 483 rulings on disputed employment arbitration awards. *Id.* at 33.

372. *Id.* at 33-34.

373. *Id.* at 34. Professor LeRoy's research demonstrates that federal courts vacated only 4.3 percent of 162 arbitration awards. *Id.* A sub-sample of 44 employment discrimination arbitration awards under Title VII produced similar results. *Id.* at 35. By comparison, Federal Courts of Appeals in 2006 alone reversed 12.9 percent of 5,917 rulings made by civil court judges on the merits of legal claims. *Id.*

374. *See id.* at 40.

375. *Id.*

376. *Id.* (referring to Table 4).

377. Cole, *supra* note 190, at 879, n.96.

378. LeRoy, *supra* note 369, at 40.

Similarly, a 1984 study published in *The Arbitration Journal* noted that only a fraction of Title VII arbitral awards are overturned.[379] The article summarized a study in which surveys were sent to practicing labor law attorneys.[380] The attorneys who responded to the questionnaires reported a total of 1,761 discrimination arbitrations of which 307 (17 percent) were relitigated by the courts and only 21 (6.8 percent) were reversed.[381] This led the authors to conclude that "the effect of *Gardner-Denver* has been primarily in the form of review and relitigation, rather than in reversals."[382] In other words, once an arbiter renders a statutory discrimination ruling, that decision is almost certain to be upheld.[383] With the lack of protection of rights in arbitration combined with the deferential treatment given to arbitration decisions involving statutory discrimination claims, it is no wonder why the Supreme Court once warned that "[a]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII."[384]

VII. Conclusion

Over the last fifty years, arbitration has become the prevalent form of dispute resolution in the United States.[385] This is, in part, due to the attractiveness arbitration has to parties who realize that they can obtain a quick resolution without incurring the costs, delays, and publicity that are intrinsic to litigation.[386] This advantage is even more apparent in the context of collective bargaining, where arbitration is viewed as a swift and effective manner for resolving labor disputes without causing strife in the workplace.[387] However, this

379. Michele Hoyman & Lamont E. Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of Gardner-Denver*, Arb. J., Sept. 1984, Vol. 39, No. 3 at 55.

380. *Id.* at 51-52. Of the 659 responses the authors received, 67.5 percent were from attorneys who represented management while only 15.3 percent represented unions. *Id.* at 52.

381. *Id.* at 55.

382. *Id.* The Hoyman/Stallworth study of arbitral awards in discrimination cases found that, even in cases where de novo review was available under *Gardner-Denver*, only 1.2% of all discrimination cases were reversed by the courts. *See id.*

383. Henry H. Perritt, Jr., *Employee Dismissal Law and Practice*, § 5.15 n.404 (5th ed. 2008) ("few arbitration awards involving statutory issues are overturned").

384. *Gardner-Denver*, 415 U.S. at 56.

385. Bradley T. King, *"Through Fault of Their Own" - Applying Bonner Mall's Extraordinary Circumstances Test to Heightened Standard of Review Clauses*, 45 B.C. L. Rev. 943, 944-45 (2004).

386. *Id.* at 945.

387. *See United Steelworkers*, 363 U.S. at 596 (1960).

convenience comes at a price: not only do arbitrants sacrifice their statutory, common law procedural and evidentiary rights, but courts will also treat arbitral awards as final judgments.[388] The *Gardner-Denver* Court held that the arbitration of a statutory discrimination claim pursuant to a collective bargaining agreement did not bar the subsequent litigation of that claim in federal court due to this procedural laxity, as well as the finality of an arbiter's holding.[389] However, the Supreme Court later explained in *Gilmer* that an employee could be compelled to arbitrate his statutory discrimination claims based on an arbitration clause in his individual (*i.e.* not collectively bargained) employment contract.[390] When faced with these apparently contradicting holdings, the Court in *Wright* stated that a collective bargaining agreement's requirement to arbitrate a statutory claim might be enforceable if it contained clear and unmistakable language.[391] This decision was followed by a decade of holdings in which district and appellate courts refrained from enforcing arbitration provisions in collective bargaining agreements when the claimant brought an action for the violation of antidiscrimination statues.[392] Nevertheless, this decade of strained judicial stability came to an end when the Supreme Court in *Pyett* held that a provision in a collective bargaining agreement mandating the arbitration of employment-related discrimination claims was enforceable and required the employee to submit his statutory discrimination claims to binding arbitration.[393]

The reaction to the *Pyett* decision was mixed, with three distinct lines of cases arising in the year following the issuance of the holding.[394] One line of decisions holds that under *Pyett*, when parties had agreed to a collective bargaining agreement that covered the plaintiff's statutory claims, the plaintiff waived his right to seek a judicial remedy by voluntarily pursuing his claim in arbitration.[395] A second line of reasoning follows *Wright*'s holding that an arbitration clause is

388. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995).

389. *Gardner-Denver*, 415 U.S. at 57-58.

390. *Gilmer*, 500 U.S. at 33-34.

391. *Wright*, 525 U.S. at 81-82.

392. *See supra* section III subsection D.

393. *Pyett*, 556 U.S. at 264-65.

394. A diagram reflecting the evolution of case law from *Gardner-Denver* through the three lines of decisions emanating from *Pyett* is detailed *infra* in Appendix C.

395. *See Mathews*, 2009 U.S. Dist. LEXIS 37697 at *13; *Beljakovic*, 2009 U.S. Dist. LEXIS 83600 at *2-3; *Duraku*, 714 F. Supp. at 473-74; *Pontier*, 2011 U.S. Dist. LEXIS 37208 at *7-9.

unenforceable when the collective bargaining agreement did not explicitly mention the federal antidiscrimination statute that the grievant claimed was violated.[396] The third line of cases holds that, even when the agreement contains clear and unmistakable language, the arbitration provision is not enforceable if the union has refused to pursue the grievant's statutory antidiscrimination claims.[397] Not only has the Supreme Court's holding in *Pyett* failed to resolve the confusion that arose from the *Gardner-Denver*, *Gilmer* and *Wright* decisions, it has also created a new, chaotic system where parties to a collective bargaining agreement do not know if their discrimination claims are covered by the agreement's arbitration clause until a court is asked to decide.

But is arbitration even the proper venue for the resolution of statutory discrimination claims? Unlike litigation, arbitration lacks a formal, court-supervised discovery process, the rules of evidence do not apply, and only very limited judicial review is permitted.[398] This lack of judicial oversight and potential misapplication of governing statutes is quite worrisome when considering that courts only vacate 4.5 percent of Title VII arbitration rulings.[399] It is with these failings in mind that courts will likely continue to strictly apply *Wright*'s clear and unmistakable language requirement in order to limit the *Pyett* holding and deny enforcement to general arbitration clauses in collective bargaining agreements with respect to statutory discrimination claims.

396. *See Shipkevich*, 2009 U.S. Dist. LEXIS 51011 at *5-7; *Barnes*, 2010 U.S. Dist. LEXIS 92078, at *6-9; *Edwards*, 354 Mont. at 323; *Martinez*, 2010 U.S. Dist. LEXIS 93448, at *16; *Unilever*, 2009 U.S. Dist. LEXIS 55626, at *9-10; *Quintanilla*, 2011 U.S. Dist. LEXIS 34193 at *12-13.

397. *See Kravar*, 2009 U.S. Dist. LEXIS 42944 at *10-11; *Borrero*, 2009 U.S. Dist. LEXIS 52174 at *9-10; *Morris*, 2010 U.S. Dist. LEXIS 84885 at *12-15; *De Souza Silva*, 2011 U.S. Dist. LEXIS 21143, at *23.

398. Feingold, *supra* note 351, at 289.

399. LeRoy, *supra* note 369, at 40.

APPENDIX A[400]

Federal Courts Judicial Review of Arbitration Awards and Analogous Civil Court Rulings				
	Confirm Arbitrator Award or Affirm Court Judgment	**Partly Confirm Award or Dismiss, Remand, Other Judgment**	**Vacate Arbitrator Award or Reverse Court Judgment**	**Total**
District Courts				
Row 1 Review All Awards	152 Arbitrator Awards (93.8%)	3 Arbitrator Awards (1.9%)	7 Arbitrator Awards ⇒ (4.3%)	162 Arbitrator Awards
Row 2 Review Subset of	42 Arbitrator Awards (95.5%)	0	2 Arbitrator Awards ⇒ (4.5%)	44 Arbitrator Awards
Appellate Courts				
Row 3 Review Award	73 Arbitrator Awards (86.9%)	2 Arbitrator Awards (2.4%)	9 Arbitrator Awards ⇒ (10.7%)	84 Arbitrator Awards
Row 4 Review Subset of Title VII Awards	20 Arbitrator Awards (95.2%)	0	1 Arbitrator Awards ⇒ (4.8%)	21 Arbitrator Awards
Row 5 Review Civil Court Ruling	4,679 Trial Court Judgments (79.0%)	474 Trial Court Judgments (8.1%)	764 Trial Court Judgments (12.9%)	5,917 Trial Court Judgments

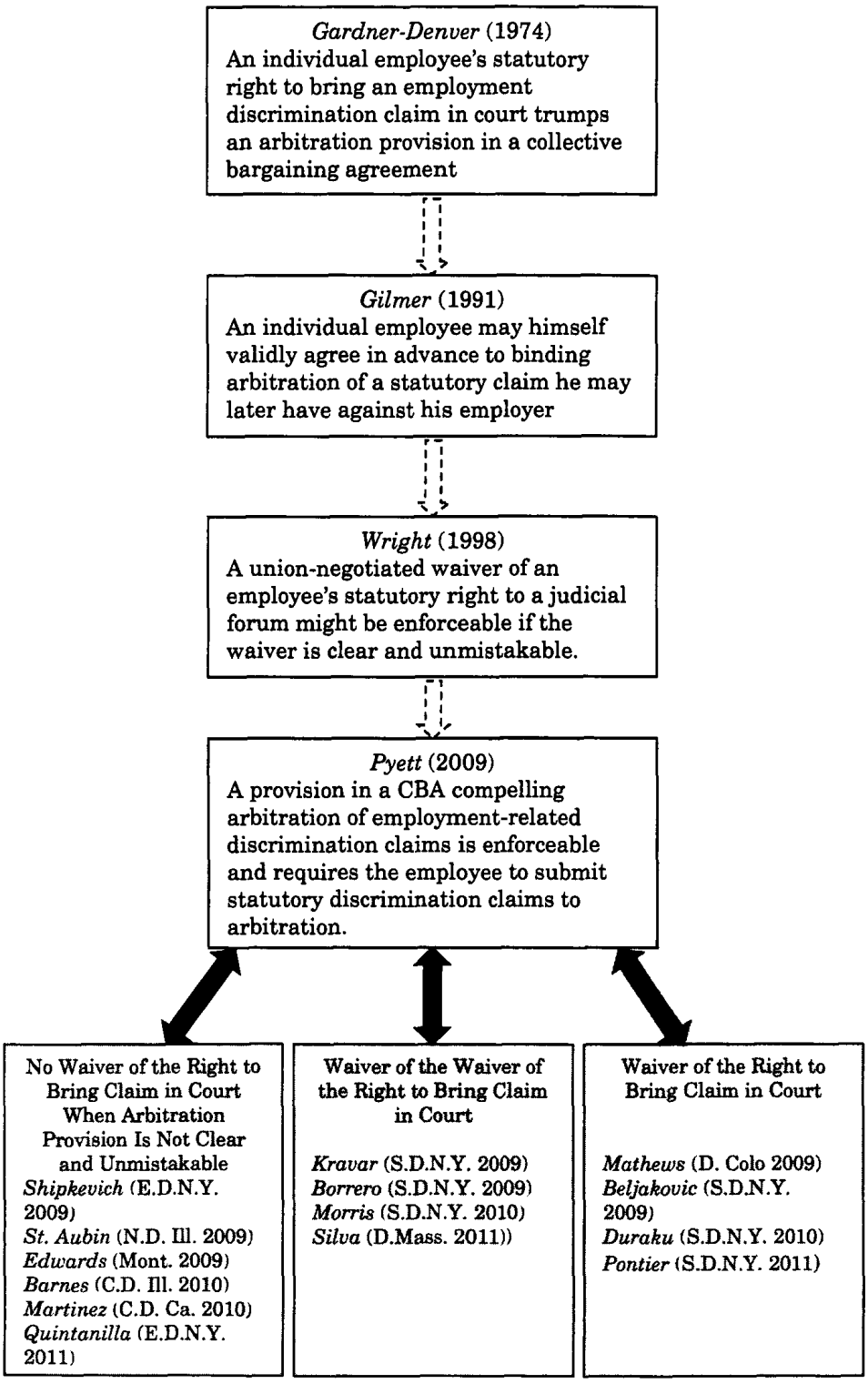
400. *Id.* at 35. Table 1 located at http://works.bepress.com/cgi/viewcontent.cgi?article=1005&context=michael_leroy, p.43.

APPENDIX B[401]

Comparing Federal Court Review of Arbitration Awards with Title VII Claims and State Court Review of Breach of Contract Awards				
	Confirm Award	**Partly Confirm Award**	**Vacate Award**	**Total**
FEDERAL COURT				
Federal District Court Rulings on Title VII Awards	42 95.5%	0	2 4.5%	44
Federal Appellate Court Rulings on Title VII Awards	20 95.5%	0	1 4.8%	21
STATE COURT				
State First-Level Court Rulings on Breach of Contract Awards	46 73.0%	2 3.2%	15 23.8%	63
State Appellate Court Review on Breach of Contract Awards	35 67.3%	6 11.5%	11 21.2%	52

401. *Id.* Table 4 located at http://works.bepress.com/cgi/viewcontent.cgi?article=1005&context=michael_leroy, p.49.

APPENDIX C


Gardner-Denver (1974)
An individual employee's statutory right to bring an employment discrimination claim in court trumps an arbitration provision in a collective bargaining agreement
Gilmer (1991)
An individual employee may himself validly agree in advance to binding arbitration of a statutory claim he may later have against his employer
Wright (1998)
A union-negotiated waiver of an employee's statutory right to a judicial forum might be enforceable if the waiver is clear and unmistakable.
Pyett (2009)
A provision in a CBA compelling arbitration of employment-related discrimination claims is enforceable and requires the employee to submit statutory discrimination claims to arbitration.
No Waiver of the Right to Bring Claim in Court When Arbitration Provision Is Not Clear and Unmistakable
Shipkevich (E.D.N.Y. 2009)
St. Aubin (N.D. Ill. 2009)
Edwards (Mont. 2009)
Barnes (C.D. Ill. 2010)
Martinez (C.D. Ca. 2010)
Quintanilla (E.D.N.Y. 2011)
Waiver of the Waiver of the Right to Bring Claim in Court
Kravar (S.D.N.Y. 2009)
Borrero (S.D.N.Y. 2009)
Morris (S.D.N.Y. 2010)
Silva (D.Mass. 2011))
Waiver of the Right to Bring Claim in Court
Mathews (D. Colo 2009)
Beljakovic (S.D.N.Y. 2009)
Duraku (S.D.N.Y. 2010)
Pontier (S.D.N.Y. 2011)