

MANDATORY LABOR ARBITRATION  
OF STATUTORY CLAIMS, AND THE  
FUTURE OF FAIR EMPLOYMENT:  
*14 PENN PLAZA V. PYETT*

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*In its sharply divided 5 to 4 decision in 14 Penn Plaza v. Pyett, the United States Supreme Court endorsed mandatory labor arbitration, rather than external litigation, to resolve statutory claims of unlawful age-based employment discrimination brought by labor union-represented employees. The Court substantially clarified, and perhaps simplified, what had become an increasingly complex and potentially inconsistent panorama of decisions on whether labor union-represented employees can be mandated to arbitrate, and thus be foreclosed from litigating de novo, statutory claims, most frequently those alleging unlawful employment discrimination by the employer. This Article will critically assess the salient foreseeable consequences and likely ramifications of the Pyett decision.*

*On the eve of a half-century of Supreme Court enthusiasm for labor arbitration, grounded in the landmark Steelworkers Trilogy in 1960, the Pyett decision perhaps reached the correct result, favoring a single, globalized, omnibus arbitration rather than second bites at the apple in serial litigation. However, the Court engaged in deeply problematic and severely truncated reasoning to reach this result. Unfortunately, Pyett is not the rare exception. The phenomenon of the Court reaching the correct result through badly-fractured and spasmodic reasoning, while not the norm, occurs with some frequency. Pragmatically, a sound functional result from a problematic and jagged opinion is markedly superior to an elegant theory yielding an obsolete, wrong result.*

*The great practical utility of these principles is palpable in labor and employment law. Pyett is certainly not the first, nor will it be the last, decision of the Court that, while not elegantly grounded in sophisticated jurisprudential metaphysics, may nevertheless work well and yield*

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*just and fair results for employees, employers, and unions who favor a single, integrated arbitration forum for the resolution of all contractual and statutory claims. Meanwhile, those employees, employers, and unions wishing to retain independent judicial recourse for litigating statutory claims are not precluded from doing so and are left unaffected by the Pyett decision.*

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INTRODUCTION

In its sharply divided<sup>1</sup> 5-4 decision in *14 Penn Plaza v. Pyett*,<sup>2</sup> the United States Supreme Court dramatically endorsed mandatory labor arbitration, rather than external litigation, to resolve statutory claims of un-

<sup>1</sup> See *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1456 (2009). Justice Thomas wrote the majority opinion, joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito. Justice Souter wrote a dissenting opinion, which was joined by Justices Stevens, Breyer, and Ginsburg. Justice Stevens also authored a separate dissenting opinion.

<sup>2</sup> *Pyett*, 129 S. Ct. at 1456. *Pyett* has already been seized upon by the lower courts. See, e.g., *Matthews v. Denver Newspaper Agency*, No. 07-CV-02097-WDM-KLM, 2009 WL 1231776, at \*5 (D. Colo. May 4, 2009) (“Under the reasoning of the Supreme Court in *Pyett*, because the parties recognized that the CBA’s arbitration agreement covered Plaintiff’s statutory claims, I conclude that *Gardner-Denver* does not preclude me from finding that Plaintiff waived his right to seek a judicial remedy by voluntarily pursuing arbitration under the CBA and that his discrimination claims are now barred by the doctrine of res judicata.”). The original phrasing (“subsequent decisions”) indicated the case was cited by the Supreme Court subsequently.

lawful age-based employment discrimination brought by union-represented employees subject to such a provision in their labor contract.<sup>3</sup> The Court summarily isolated and trivialized as jurisprudentially obsolete, but did not deem it necessary to formally overrule, thirty-five years of well-established precedent<sup>4</sup> that had protected the employee's right to litigate *de novo* statutory claims of unlawful employment discrimination without suffering any *res judicata* or collateral estoppel effects from a prior adverse arbitration decision.<sup>5</sup> The Court substantially clarified, and perhaps simplified, what had become an increasingly complex and potentially inconsistent panorama of decisions as to whether union-represented employees can be mandated to arbitrate, and thus be foreclosed from litigating *de novo*, statutory claims.

With its controversial activist methodology, the political and ideological Court ran roughshod over *stare decisis* principles.<sup>6</sup> As a result, a host of questions, ramifications, and unintended consequences of the *Pyett* decision could transform the dynamics of arbitration well beyond the present contours of union-represented employment environments.

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<sup>3</sup> See *Pyett*, 129 S. Ct. at 1456.

<sup>4</sup> See discussion *infra* Part III.A; see also Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining Alexander v. Gardner-Denver in the Wake of Gilmer v. Interstate/Johnson Lane Corp.*, 1997 BYU L. REV. 591 (2007); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997); Julius Getman, *Was Harry Shulman Right?: The Development of Arbitration in Labor Disputes*, 81 ST. JOHN'S L. REV. 15 (2007); William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609 (2006).

<sup>5</sup> *Pyett*, 129 S. Ct. at 1456.

<sup>6</sup> Cf. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (Knopf 2005) (discussing the need to combine both the liberty of the ancients (active liberty) with the liberty of the moderns and arguing that the courts should interpret constitutional and statutory texts with the Constitution's democratic nature in mind); ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., Regnery Pub. 2007) (lobbying for originalism as the correct way to interpret the Constitution and discussing judges' opinions regarding the principle of *stare decisis*); RICHARD A. POSNER, *HOW JUDGES THINK* (Harvard University Press 2008) (discussing the various roles of judges, the judicial method, and the role of precedent as a superior force to which judges yield); JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (Doubleday 2007) (revealing the inner-workings of the Supreme Court and its Justices, including how some justices do not believe in *stare decisis*); Frank H. Easterbrook, *Pragmatism's Role in Interpretation*, 31 HARV. J.L. & PUB. POL'Y 901 (2008) (arguing that both originalism and pragmatism can play roles in constitutional interpretation); Stephen B. Presser, *Judicial Ideology and the Survival of the Rule of Law: A Field Guide to the Current Political War Over the Judiciary*, 39 LOY. U. CHI. L.J. 427 (2008) (exploring the idea that judges and courts are to follow the law, not make it); Clifford W. Taylor, *Merit Selection: Choosing Judges Based on Their Politics Under the Veil of a Disarming Name*, 32 HARV. J.L. & PUB. POL'Y 97 (2009) (describing the dispute between two potential roles of judges, that of judges functioning solely as interpreters versus judges acting as policy makers).

On the eve of a half-century of Supreme Court enthusiasm for labor arbitration, grounded in the landmark *Steelworkers Trilogy*<sup>7</sup> in 1960, the *Pyett* decision perhaps reached the correct result—favoring a single, globalized, omnibus arbitration rather than second bites at the apple in serial litigation.<sup>8</sup> However, the Court engaged in deeply problematic and severely truncated reasoning. *Pyett* is not the rare exception. The phenomenon of the Court reaching the correct result, but through badly fractured and spasmodic reasoning, while not the norm, occurs with some frequency.<sup>9</sup> Pragmatically however, a sound functional result from a problematic and jagged opinion is markedly superior to an elegant theory yielding an obsolete and incorrect result.

The great practical utility of these principles is especially true in labor and employment law. *Pyett* is certainly not the first, nor will it be the last decision of the Court that, while not elegantly grounded in sophisticated jurisprudential metaphysics, may nevertheless work well and yield just and fair results<sup>10</sup> for employees, employers, and unions who favor a single, integrated arbitration forum for the resolution of all contractual and statutory claims. Meanwhile, those employees, employers, and unions wishing to retain independent judicial recourse for statutory claims are not precluded from doing so and are left unaffected by the *Pyett* decision. An omnibus mandatory labor arbitration mechanism to hear all issues, including all statutory claims, must be the deliberate, negotiated product of the parties, and be unequivocally set forth in the par-

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<sup>7</sup> See *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); see also Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 CHL.-KENT L. REV. 3 (1988); William B. Gould IV, *Judicial Review of Labor Arbitration Awards—Thirty Years of the Steelworkers Trilogy: The Aftermath of AT&T and Misco*, 64 NOTRE DAME L. REV. 464 (1984); Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, 75 MICH. L. REV. 1146 (1977).

<sup>8</sup> See *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1456 (2009).

<sup>9</sup> See, e.g., John Hart Ely, *Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920 (1973) (favoring the result of *Roe v. Wade*, but deploring its legal reasoning).

<sup>10</sup> A certain inelegance is the price readily paid for the democratic experience, and experimenting in democracy is very much part of the Brandeisian principle that the states are the “laboratories” of Jeffersonian democracy. See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring); see also *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575–76 (1988). So too, the workplace. See Thomas C. Kohler, *Labor Law: “Making Life More Human”—Work and the Social Question*, in *RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW* 163 (Michael A. Scaperlanda & Teresa Stanton Collett eds., The Catholic University of America Press 2007). Chicago labor lawyer Thomas Geoghegan contends that the decline of labor in the workplace has contributed to a rise in litigation, as most workers have no genuine familiarity with workplace ADR mechanisms, and increasingly see litigation as their sole recourse. See THOMAS GEOGHEGAN, *SEE YOU IN COURT: HOW THE RIGHT MADE AMERICA A LAWSUIT NATION* (The New Press 2007).

ties' collective bargaining agreement. As the Supreme Court ruled in *Wright v. Universal Maritime Service Corp.*,<sup>11</sup> the labor contract provision for mandatory arbitration of all statutory claims must be clear and unmistakable in order to constitute a waiver of the employees' *Gardner-Denver* right to pursue subsequent external litigation of statutory claims. A general fair employment practices declaration by the parties will be manifestly insufficient to be considered a *Pyett* waiver of the employees' right to litigate separately in court their statutory claims.

This Article will examine *Pyett*'s place among these considerations. Part I of the Article will present a synoptic chronology of the prior pertinent decisions of the Supreme Court. Part II will set forth the Second Circuit's experience setting the stage for *Pyett*, while Part III will focus on the Supreme Court's *Pyett* decision. Part IV will assess the likely ramifications of this important decision.

## I. FROM *GARDNER-DENVER* TO *CIRCUIT CITY*: A BRIEF SYNOPSIS

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

In a necessarily chronological, but decidedly less than linear fashion, the Supreme Court has articulated a series of benchmarks bearing on the "arbitration or litigation" dynamic, commencing with its landmark unanimous decision in *Alexander v. Gardner-Denver*<sup>12</sup> in 1974.<sup>13</sup> *Alexander* was a member of a labor union and was protected by a collective bargaining agreement (CBA).<sup>14</sup> Through the union, the grievance pro-

<sup>11</sup> 525 U.S. 70 (1998); see *infra* Part I.C.

<sup>12</sup> 415 U.S. 36 (1974). *Gardner-Denver* and its progeny have spawned significant law review commentaries. See, e.g., Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331 (2006); Richard A. Bales & Christopher J. Kippely, *Extending OWBPA Notice and Consent Protections to Arbitration Agreements Involving Employees and Consumers*, 8 NEV. L.J. 10 (2007); Harry T. Edwards, *Where are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293 (1999); Michael Z. Green, *Measures to Encourage and Reward Post-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 8 NEV. L.J. 58 (2007); Ann C. Hodges, *Arbitration of Statutory Claims in the Unionized Workplace: Is Bargaining with the Union Required?*, 16 OHIO ST. J. ON DISP. RESOL. 513 (2001); John Kagel, *Arbitration and Due Process: The Way We Were at the Time of Gilmer*, 11 EMP. RTS. & EMP. POL'Y J. 267 (2007); George Nicolau, *Gilmer v. Interstate/Johnson Lane Corp.: Its Ramifications and Implications for Employees, Employers and Practitioners*, 1 U. PA. J. LAB. & EMP. L. 177 (1998); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996); Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685 (2004).

<sup>13</sup> In the same Term, the Court held that a union could not waive the distribution rights of employees because they are National Labor Relations Act Section 7 statutory rights. See *NLRB v. Magnavox*, 415 U.S. 322, 325 (1974); see also Matthew W. Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183, 189 (1980).

<sup>14</sup> See *Gardner-Denver*, 415 U.S. at 39–40.

testing his discharge was taken to arbitration.<sup>15</sup> The grievance was denied and the discharge sustained.<sup>16</sup> Alexander then filed a lawsuit in federal district court, alleging that he had been unlawfully discriminated against on the basis of his race.<sup>17</sup> The employer, Gardner-Denver, unsuccessfully argued that the adverse arbitration award had res judicata effect and thus precluded his subsequent litigation.<sup>18</sup> The Supreme Court, however, found that Alexander had the right to a de novo trial in federal district court regarding his statutory claims of alleged unlawful employment discrimination on the basis of his race.<sup>19</sup> He was not foreclosed by the prior adverse arbitration decision, which did not have res judicata effect because “an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the non-discrimination clause of a collective-bargaining agreement.”<sup>20</sup>

Perhaps the most compelling rationale for preserving the subsequent external litigation avenue is grounded in the jurisprudential and practical reality that courts may sometimes be the best and only recourse for employees. This deep mistrust of “private justice”<sup>21</sup> is reflected in the populist, class-based ideology that states that employment relationships are essentially adhesion contracts, with the dominant, corporate employer dictating terms to the helpless, subordinated worker.<sup>22</sup> To entirely privatize the resolution of disputes through mandatory arbitration, and to foreclose external litigation, is to ignore Justice Douglas’ fundamental truth that “[t]he loss of the proper judicial forum carries with it the loss of substantial rights.”<sup>23</sup>

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<sup>15</sup> *Id.* at 36.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See *Alexander v. Gardner-Denver*, 415 U.S. 36, 36 (1974).

<sup>19</sup> *Id.* at 43–44.

<sup>20</sup> *Id.* at 49.

<sup>21</sup> There is a voluminous and rich literature deeply critical of the privatized justice of Alternative Dispute Resolution, especially when the courts are marginalized in the rush to ADR. See, e.g., Owen Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1085–87 (1984); Symposium, *Against Settlement Twenty-five Years Later*, 78 *FORDHAM L. REV.* 1117 (2009). Of course, ADR is here to stay. See David L. Gregory & Francis A. Cavanagh, *Transatlantic Perspectives on Alternative Dispute Resolution*, 81 *ST. JOHN’S L. REV.* 1, 2 (2007).

<sup>22</sup> This bleak, Great Depression-era scenario is encapsulated in the opening policy provision of the National Labor Relations Act, 29 U.S.C. § 151 (2006), enacted in 1935 to bring some rough equilibrium to this markedly skewed reality. Many contemporary critics of the Act, including many labor leaders, assert that the highly politicized NLRB has, since the end of the Carter administration, fundamentally failed. See, e.g., WILLIAM GOULD IV, *LABORED RELATIONS* (The MIT Press 2000) (providing scathing criticisms of Board politics and interne-cine warfare by the Clinton administration NLRB Chairman); David L. Gregory, 2 *EMPLOYMENT RIGHTS QUARTERLY* 74–75 (2001) (reviewing GOULD, *supra*); see also David L. Gregory, *The Long View of the NLRA at 70 . . . Or, the More Things Change??*, 56 *LAB. L. J.* 172 (2005).

<sup>23</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 532 (1974) (Douglas, J., dissenting).

The NLRB, however, has largely acquiesced to the consolidation of virtually all authority in the hands of private labor arbitrators, including resolution of Section 8 unfair labor practice claims.<sup>24</sup> Thus, the leap from *Gardner-Denver* to *Pyett* is not as dramatic or unprecedented as those championing *Gardner-Denver*'s retention would assert.

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

In 1991, the Supreme Court, in *Gilmer v. Interstate/Johnson Lane Corp.*, held that a nonunionized white-collar worker in the financial services sector was bound by the terms of the mandatory arbitration agreement he had executed at the commencement of employment.<sup>25</sup> Thus, he was precluded from subsequently litigating in court his allegation that his employment was terminated for, *inter alia*, unlawful age discrimination in violation of the federal Age Discrimination in Employment Act of 1967.<sup>26</sup> *Gilmer* quickly became the alternative to *Gardner-Denver*—the alternative endorsed in *Pyett*.

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

In 1998, in *Wright v. Universal Maritime Service Corp.*, the Supreme Court declined to break the one-to-one tie between *Gardner-Denver* and *Gilmer*.<sup>27</sup> Justice Scalia, castigating the indiscriminate boilerplate language of the arbitration provision in the CBA at issue, found that the absence of careful contouring obviously could not preclude the plaintiff, Mr. Wright, from pursuing in court his claims regarding his employer's bad-faith interference with his insurance and medical benefits for his bad back.<sup>28</sup>

Wright was injured while working as a longshoreman.<sup>29</sup> He sought workers' compensation for permanent disability, settled his claim, and received social security disability benefits.<sup>30</sup> A few years later, Wright again sought employment at the dock with various stevedoring compa-

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<sup>24</sup> See *United Tech. Corp.*, 268 NLRB 557, 559 (1984) ("Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the [National Labor Relations] Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery."). This reiterates the NLRB doctrines in *Spielberg Mfg. Co.* 112 N.L.R.B. 1080 (1955), and *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971), which essentially transfer the power to resolve NLRA Section 8 unfair labor practices claims from the NLRB to private labor arbitrators.

<sup>25</sup> See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 20 (1991)

<sup>26</sup> See *id.*

<sup>27</sup> See *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 77 (1998).

<sup>28</sup> See *id.* at 82.

<sup>29</sup> See *id.* at 74.

<sup>30</sup> See *id.*

nies.<sup>31</sup> He was hired and worked until the companies found out about his workers' compensation claim.<sup>32</sup> The companies refused to allow him to work, claiming he was "unqualified" due to his disability, despite the fact that he had been performing his duties adequately.<sup>33</sup> Pursuant to his union's advice, Wright filed charges with the Equal Employment Opportunity Commission (EEOC), alleging violation of the Americans with Disabilities Act (ADA), ignoring an all-encompassing arbitration provision in the applicable CBA.<sup>34</sup>

Justice Scalia and the majority distinguished *Wright* from both *Gilmer* and *Gardner-Denver*. First, the Court noted that the presumption of arbitrability it had previously expressed in the *Steelworkers Trilogy* should "not extend beyond the reach of the principal rationale that justifies it, i.e., that arbitrators are in a better position than courts to interpret the terms of a CBA."<sup>35</sup> Here, however, the CBA only called for arbitration of all disputes in general, and the federal court system was deemed better suited for a claim under the ADA.<sup>36</sup>

Next, the Court found that "the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit *union* waiver in a CBA."<sup>37</sup> If such a waiver of rights is to be upheld, the waiver must be stated in "clear and unmistakable" language.<sup>38</sup> This stringent requirement necessary to find effective waiver of individual statutory claims was not met here.<sup>39</sup> Consequently, the Court had no need to discuss whether an explicit union waiver would have been upheld.<sup>40</sup> The decision in *Gilmer* was not affected because the employee there waived his own individual rights, negating the need for the standard to apply.<sup>41</sup> *Wright*, like *Gilmer*, quickly became a road map of opportunities and challenges for employers. Arbitration of statutory claims in one proceeding is possible, but it must be via a carefully crafted document of agreement, including "clear and unmistakable" waiver language. As the *Wright* decision demonstrated, this is easier said than done.

#### D. Circuit City Stores, Inc. v. Adams

In 2001, the Supreme Court, in *Circuit City Stores, Inc. v. Adams*, held in favor of mandatory arbitration of unlawful employment discrimi-

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<sup>31</sup> See *id.* at 74.

<sup>32</sup> See *id.*

<sup>33</sup> *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 74 (1998).

<sup>34</sup> *Id.* at 74–75.

<sup>35</sup> *Id.* at 77–78.

<sup>36</sup> See *id.* at 78–79.

<sup>37</sup> *Id.* at 80 (emphasis added).

<sup>38</sup> *Id.*

<sup>39</sup> See *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998).

<sup>40</sup> See *id.*

<sup>41</sup> See *id.* at 80–81.

nation claims brought by a nonunionized employee.<sup>42</sup> Upon being hired by Circuit City, Adams signed an employment contract that included a mandatory arbitration agreement.<sup>43</sup> Two years later, when Adams filed an employment discrimination suit in California, the United States Court of Appeals for the Ninth Circuit held that the Federal Arbitration Act (FAA) did not apply to employment contracts, and therefore Adams did not have to use arbitration to settle his claim.<sup>44</sup> The Supreme Court granted certiorari to clarify the extent of the FAA's exemption for certain contracts.<sup>45</sup>

The Court held that the exemption to the FAA concerned only employment contracts of seamen, railroad employees, and those "actually engaged in the movement of goods in interstate commerce."<sup>46</sup> The interpretation used by the Ninth Circuit and others made the exemption superfluous.<sup>47</sup> According to the Supreme Court, if the exemption was meant to apply to all contracts of employment, it would have said so.<sup>48</sup>

Perhaps the most significant aspect of the *Circuit City* decision for present purposes is that the Court did not regard the former employee as having irrevocably waived his statutory claims.<sup>49</sup> Rather, the Court deemed Adams to have agreed to the arbitral, rather than judicial, forum for the resolution of his statutory claims.<sup>50</sup> Thus, the Supreme Court set the stage for its decision in *Pyett* on the grounds of the adequate waiver of the right to bring statutory claims de novo—themes exhaustively treated in *Gilmer* and *Wright*, and in a panorama of lower court decisions.

## II. THE EVOLUTION TOWARD *14 PENN PLAZA V. PYETT* IN THE SECOND CIRCUIT

### A. *Rogers v. New York University*

In *Rogers v. New York University*,<sup>51</sup> the Second Circuit addressed whether a CBA could include a mandatory arbitration provision whereby

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<sup>42</sup> See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

<sup>43</sup> See *id.* at 110.

<sup>44</sup> See *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999).

<sup>45</sup> See *Circuit City*, 532 U.S. at 111.

<sup>46</sup> *Id.* at 112.

<sup>47</sup> See *id.* at 113.

<sup>48</sup> See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113–14 (2001).

<sup>49</sup> See *id.* at 123.

<sup>50</sup> See *id.*

<sup>51</sup> *Rogers v. N.Y. Univ.*, 220 F.3d 73 (2d Cir. 2000). Other pre-*Pyett* decisions by the Second Circuit were analogous to *Rogers*. See, e.g., *Guyden v. Aetna Inc.*, 544 F.3d 379 (2d Cir. 2008) (whistleblower claims under the Sarbanes-Oxley Act of 2002 are arbitrable); *Fayer v. Town of Middlebury*, 258 F.3d 117 (2d Cir. 2001) (town employee could bring constitutional claims in litigation subsequent to an adverse arbitration decision). New York state courts, however, have held that mandatory arbitration is binding, and that corresponding waiv-

employees waived their right to litigate statutory claims, including alleged unlawful employment discrimination, in federal court.<sup>52</sup> Susan Rogers was a clerical employee of New York University (NYU), and subject to the CBA between NYU and Local 3882, United Staff Association of NYU, NYSUT, AFT, AFL-CIO.<sup>53</sup> The CBA contained a no-discrimination provision, guaranteeing employees the protections of all federal and state discrimination laws, including the Family and Medical Leave Act of 1993 (FMLA).<sup>54</sup>

Rogers went on medical leave under the FMLA in August 1997.<sup>55</sup> NYU terminated Rogers three months later, purportedly because her leave time had expired.<sup>56</sup> She filed a claim of unlawful employment discrimination with the EEOC, which issued her a right-to-sue letter.<sup>57</sup> In March 1998, she filed a lawsuit against NYU in federal court in the Southern District of New York.<sup>58</sup> In her claim, Rogers alleged that NYU discriminated against her in violation of the FMLA, ADA, and the New York State and City human rights laws.<sup>59</sup>

NYU moved to stay the lawsuit under § 3 of the FAA.<sup>60</sup> The district court set forth two separate reasons for denying NYU's motion. First, the court relied on the Supreme Court's holding in *Gardner-Denver* for the principle that employees cannot waive their right, via a CBA, to bring federal statutory actions in federal court.<sup>61</sup> Second, the district court held that while *Gardner-Denver* is sufficient to resolve the issue, the same conclusion could be reached by applying a different line of

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ers of employee rights to bring lawsuits regarding statutory claims are legitimate and effective. *See, e.g.*, *Sum v. Tishman Prop. Corp.*, 37 A.D.3d 284 (N.Y. App. Div. 2007) (upholding mandatory arbitration because the waiver of the right to litigate met the *Circuit City* test of being "clear and unmistakable"); *Garcia v. Bellmarc Prop. Mgmt. Corp.*, 295 A.D.2d 233 (N.Y. App. Div. 2002) ("[B]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.") (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001)).

<sup>52</sup> *See Rogers*, 220 F.3d at 75.

<sup>53</sup> *Id.* at 74.

<sup>54</sup> *See id.* Pertinent sections of the CBA stated: (1) "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"; and (2) "Employees are entitled to all provisions of the Family and Medical Leave Act of 1993 ['FMLA'] that are not specifically provided for in this agreement." *Id.* Another section of the agreement contained an arbitration clause that stated that challenges arising under the agreement would be arbitrated. *See id.*

<sup>55</sup> *See id.*

<sup>56</sup> *See id.*

<sup>57</sup> *See Rogers v. N.Y. Univ.*, 220 F.3d 73, 74 (2d Cir. 2000).

<sup>58</sup> *See id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *See Rogers v. N.Y. Univ.*, No. 98 Civ. 2089, 1999 WL 710777, at \*\*2-3 (S.D.N.Y. Sept. 10, 1999).

reasoning articulated by the Supreme Court in *Wright*.<sup>62</sup> In *Wright*, the Supreme Court suggested that a provision waiving an employee's right to bring federal statutory actions in federal court may be enforceable under certain circumstances; however, it held that a condition precedent to the enforceability of such a provision is that the language of the waiver be clear and unmistakable.<sup>63</sup> The district court held that the waiver in the NYU CBA did not meet this important threshold of being a "clear and unmistakable" waiver of Rogers' right to bring external litigation.<sup>64</sup> Consequently, even if such a waiver were not barred by *Gardner-Denver*, it failed to meet the "clear and unmistakable" standard set forth in *Wright*.<sup>65</sup>

The Second Circuit affirmed the district court's holding, maintaining that both lines of reasoning were correct.<sup>66</sup> It refused to enforce a CBA's mandatory arbitration provision that would have resulted in a waiver of an employee's right to litigate a statutory claim in federal court.<sup>67</sup> The Second Circuit explained that while *Wright* questioned *Gardner-Denver*, the latter was not overruled and was still good law.<sup>68</sup> The Supreme Court denied NYU's petition for a writ of certiorari,<sup>69</sup> setting the stage for *Pyett*.

#### B. *Pyett v. Pennsylvania Building Co.*

With its August 2007 decision in *Pyett v. Pennsylvania Building Co.*,<sup>70</sup> the Second Circuit reaffirmed its holding in *Rogers*.<sup>71</sup> It held that a CBA's purported mandatory arbitration provision was inoperative inso-

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<sup>62</sup> See *id.* at \*4.

<sup>63</sup> See *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998).

<sup>64</sup> See *Rogers*, 1999 WL 710777, at \*4.

<sup>65</sup> See *id.*

<sup>66</sup> See *Rogers v. N.Y. Univ.*, 220 F.3d 73, 74–77 (2d Cir. 2000).

<sup>67</sup> See *id.* at 75.

<sup>68</sup> See *id.*

<sup>69</sup> See *N.Y. Univ. v. Rogers*, 531 U.S. 1036 (2000).

<sup>70</sup> See *Pyett v. Pa. Bldg. Co.*, 498 F.3d 88, 90 (2d Cir. 2007). Other federal courts of appeals were in accord with the Second Circuit in refusing to enforce mandatory arbitration of statutory claims. See, e.g., *Airline Pilots Ass'n Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477 (D.C. Cir. 1999); *Bratten v. SSI Services, Inc.*, 185 F.3d 625 (6th Cir. 1999); *Albertson's, Inc. v. United Food and Commercial Workers Union, AFL-CIO & CLC*, 157 F.3d 758 (9th Cir. 1998); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997) (individual worker must agree to waiver of right to litigate statutory claims, and a union cannot waive such rights on the employee's behalf). But see *Aleman v. Chugach Support Serv. Inc.*, 485 F.3d 206 (4th Cir. 2007) (effectively ignoring the Supreme Court's decisions, and upholding mandatory arbitration even though many employees did not have English language proficiency); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519 (11th Cir. 1997); *Martin v. Dana Corp.*, 114 F.3d 421 (3rd Cir. 1997) (holding that *Gilmer*, not *Gardner-Denver*, controlled).

<sup>71</sup> See *Pyett*, 498 F.3d at 91–93.

far as it waived the worker's right to litigate federal statutory causes of action in a judicial forum.<sup>72</sup>

In *Pyett*, the plaintiffs, all over the age of fifty, were longtime employees of Temco Services Industries.<sup>73</sup> They were originally employed as night watchmen in a commercial office building.<sup>74</sup> The plaintiffs were also members of Local 32BJ of the Service Employees International Union (SEIU), and were subject to a CBA between the Union and the Realty Advisory Board (RAB) on Labor Relations, Inc., the bargaining association for the real estate industry in New York City.<sup>75</sup> The 2002 "Contractors Agreement," governing the period from January 1, 2002 through September 30, 2004, covered the events giving rise to this matter.<sup>76</sup>

SEIU and the RAB have had a labor management relationship, reflected in a CBA, since the 1930s.<sup>77</sup> Since 1999, the CBA has expressly provided that employment discrimination claims are subject to mandatory arbitration:

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 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, New Jersey Law Against Discrimination, New Jersey Conscientious Employee Protection Act, Connecticut Fair Employer Practices Act, or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI [of the CBA]) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.<sup>78</sup>

Plaintiffs filed a grievance with SEIU in August 2003, protesting their reassignment from night watchmen positions to less desirable posi-

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<sup>72</sup> See *id.* at 90.

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> See *id.*

<sup>76</sup> See *Pyett v. Pa. Bldg. Co.*, 498 F.3d 88, 90 (2d Cir. 2007).

<sup>77</sup> See *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1461 (2009).

<sup>78</sup> *Pyett*, 498 F.3d at 90 (quoting the CBA).

tions as porters and cleaners.<sup>79</sup> They alleged the unwelcome reassignment was made because they were the only building employees over the age of fifty.<sup>80</sup> The plaintiffs also alleged violations of seniority rules and failure of the employer to equitably rotate and allocate overtime opportunities.<sup>81</sup> They alleged that the transfer was in violation of the CBA's provisions prohibiting, *inter alia*, unlawful age discrimination.<sup>82</sup>

After the first day of the arbitration hearing, SEIU declined to pursue the age discrimination claims, addressing only those elements of the grievance based on denials of overtime and promotions.<sup>83</sup> SEIU had consented to the Penn Plaza management bringing in Spartan Security to provide security services previously performed by Temco.<sup>84</sup> SEIU believed that this did not constitute unlawful age discrimination.<sup>85</sup> On February 23, 2004, they sent a letter to the Contract Arbitrator, Earl Pfeffer, formally withdrawing the age discrimination claims from arbitration.<sup>86</sup> Between August 2004 and August 2005, there were several hearings in the arbitration of the remaining overtime and promotion claims.<sup>87</sup> On August 10, 2005, the arbitrator issued a written decision denying the grievances.<sup>88</sup>

In May 2004, while the arbitration was still ongoing, the plaintiffs also filed charges of age discrimination with the EEOC.<sup>89</sup> The EEOC subsequently notified the plaintiffs of their right to sue the employer in federal district court for unlawful age discrimination.<sup>90</sup> On September 23, 2004, the employees commenced an action in federal district court in the Southern District of New York against both Temco and the owners of the building in which they were employed.<sup>91</sup> The employees alleged violations of the Age Discrimination in Employment Act, the New York State Administrative Code, and the New York State Human Rights

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<sup>79</sup> *See id.*

<sup>80</sup> *See id.*

<sup>81</sup> *Pyett*, 129 S. Ct. at 1462.

<sup>82</sup> *Pyett v. Pa. Bldg. Co.*, 498 F.3d 88, 90 (2d Cir. 2007).

<sup>83</sup> *See* Transcript of Oral Argument at 55, 14 Penn Plaza LLC, v. *Pyett* 129 S. Ct. 1456 (No. 07-581). The Industry (the Real Estate owners and operators collectively) has approximately 700 grievances annually going to arbitration. *See id.* The parties therefore created their own office of the contract arbitrator, rather than work through an impartial non-profit ADR provider, such as the American Arbitration Association. *See id.*

<sup>84</sup> *See Pyett*, 498 F.3d at 91.

<sup>85</sup> *See id.*

<sup>86</sup> *See* Brief for the Service Employees International Union, Local 32BJ as *Amici Curiae* Supporting Respondents at 16, 14 Penn Plaza LLC v. *Pyett*, 129 S. Ct. 1456 (2009) (No. 07-581).

<sup>87</sup> *See Pyett*, 498 F.3d at 90–91.

<sup>88</sup> *See Pyett v. Pa. Bldg. Co.*, 498 F.3d 88, 91 (2d Cir. 2007).

<sup>89</sup> *See id.*

<sup>90</sup> *See id.*

<sup>91</sup> *Id.*

Law.<sup>92</sup> Further, the employees claimed that the SEIU violated its duty of fair representation by its failure to pursue the age discrimination claims during the arbitration.<sup>93</sup> The defendants moved for dismissal, arguing that the plaintiffs failed to state a claim for which relief could be granted and, in the alternative, to compel arbitration.<sup>94</sup>

The district court denied both motions.<sup>95</sup> The court relied on its decision in *Granados v. Harvard Maintenance*<sup>96</sup> to conclude that a “union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable.”<sup>97</sup> The defendants appealed, claiming that the Supreme Court’s decision regarding arbitration provisions in *Gilmer* permitted the enforcement of the mandatory arbitration provision.<sup>98</sup> However, the Second Circuit agreed with the district court’s reasoning that *Gilmer* applied to arbitration clauses solely in individual contracts, and not to CBAs,<sup>99</sup> and upheld the district court’s conclusion that *Gilmer* did not apply here because the plaintiffs were subject to a CBA and did not have *Gilmer*-like individual employment contracts.<sup>100</sup> The Second Circuit relied on its ruling in *Rogers* to hold that *Gardner-Denver* controlled the case at issue.<sup>101</sup>

The Second Circuit further held that the Supreme Court’s decision in *Wright*, which contained dicta strongly suggesting that in some circumstances a union-negotiated waiver of a worker’s right to litigate statutory claims in federal court could be enforceable, did not itself overrule *Gardner-Denver*.<sup>102</sup> The Second Circuit affirmed the district court’s refusal to enforce the labor contract’s mandatory arbitration provision.<sup>103</sup> It held that *Rogers* governed, as *Rogers* was not overruled by *Gilmer* or *Wright*.<sup>104</sup> Thus, the Second Circuit’s holding in *Pyett* established that a CBA cannot waive a worker’s right to litigate statutory claims in federal court.<sup>105</sup>

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<sup>92</sup> *Id.*

<sup>93</sup> See 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1462 n.2 (2009).

<sup>94</sup> See Pyett v. Pa. Bldg. Co., 498 F.3d 88, 91 (2d Cir. 2007).

<sup>95</sup> See Pyett v. Pa. Bldg. Co., No. 04 Civ. 7536, 2006 WL 1520517 (S.D.N.Y. June 1, 2006).

<sup>96</sup> *Granados v. Harv. Maint.*, No. 05 Civ. 5489, 2006 WL 435731 (S.D.N.Y. Feb 22, 2006).

<sup>97</sup> *Pyett*, 2006 WL 1520517, at \*3.

<sup>98</sup> See *Pyett*, 498 F.3d at 91.

<sup>99</sup> See *id.*

<sup>100</sup> See Pyett v. Pa. Bldg. Co., 498 F.3d 88, 91–92 (2d Cir. 2007).

<sup>101</sup> See *id.* at 91 n.3.

<sup>102</sup> See *id.* at 92–93.

<sup>103</sup> See *id.* at 93–94.

<sup>104</sup> See *id.*

<sup>105</sup> See *id.* at 93–95. This is quite analogous to the principle set forth in 1999 by the United States Court of Appeals for the District of Columbia in *Airline Pilots Ass’n, Int’l v. Northwest Airlines, Inc.*, 199 F.3d 477 (D.C. Cir. 1999): “Unless the Congress has precluded

The Second Circuit reiterated that *Gardner-Denver* “remains good law,” and held in *Pyett* “that a collective agreement could not waive covered workers’ rights to a judicial forum for causes of action created by Congress.”<sup>106</sup> The Second Circuit thus endeavored to meld the principles of *Gardner-Denver* and *Gilmer*, holding that, while a non-unionized individual could elect arbitration of statutory claims, no labor union could institutionally bind its individual constituent members and fellow employees via such a waiver mechanism in a labor contract.<sup>107</sup> This manifest incongruity, as well as the unresolved issues left in the wake of the *Wright* decision, militated strongly in favor of the grant of certiorari by the Supreme Court.<sup>108</sup>

Unsurprisingly, most of the courts of appeals that examined whether a union and employer could require unionized employees to bring all of their statutory employment discrimination claims to arbitration, and thus be foreclosed from external litigation of those claims, had consistently maintained that only the Supreme Court could clarify and prioritize the constellation of pertinent decisions flowing from *Gardner-Denver*.<sup>109</sup>

### III. THE SUPREME COURT’S DECISION IN *14 PENN PLAZA V. PYETT*

On April 1, 2009, a sharply divided Supreme Court overturned the Second Circuit’s decision in *Pyett*, holding that “a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as matter of federal law.”<sup>110</sup>

#### A. *The Majority Opinion*

Justice Thomas, writing for the majority, disagreed with the Second Circuit’s unduly broad understanding of the Supreme Court’s 1974 decision in *Gardner-Denver*.<sup>111</sup> Specifically, Justice Thomas did not believe

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his doing so, an individual may prospectively waive his own statutory right to a judicial forum, but his union may not prospectively waive that right for him.”

<sup>106</sup> *Pyett v. Pa. Bldg. Co.*, 498 F.3d 88, 91 n.3 (2d Cir. 2007).

<sup>107</sup> See *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1463 (2009).

<sup>108</sup> See *id.* at 1463; see also *id.* at 1463 n.4 (identifying conflicting decisions among the circuits, including *Rogers v. N.Y. Univ.*, 220 F.3d 73 (2d Cir. 2000); *O’Brien v. Town of Agawam*, 350 F.3d 279 (1st Cir. 2003); *Mitchell v. Chapman*, 343 F.3d 811 (6th Cir. 2003); *Tice v. Am. Airlines, Inc.*, 288 F.3d 313 (7th Cir. 2002); *E. Associated Coal Corp. v. Massey*, 373 F.3d 530 (4th Cir. 2004)).

<sup>109</sup> See, e.g., *Brisentine v. Stone and Webster Eng’g Corp.*, 117 F.3d 519, 525 (11th Cir. 1997) (“It may be that the Supreme Court has cut *Alexander* [*v. Gardner-Denver*] back so far that it will not survive. Perhaps, but we are not convinced we are authorized to sing the dirge of *Alexander* [*v. Gardner-Denver*]. We will leave that to the Supreme Court.”); *Pryner v. Tractor Supply Co. Inc.* 109 F.3d 354, 364 (7th Cir. 1997) (noting that any lower court’s interpretation of the *Gardner-Denver* and *Gilmer* continuum could be inherently problematic and that it was up to the Supreme Court to clarify matters)

<sup>110</sup> *Pyett*, 129 S. Ct. at 1474.

<sup>111</sup> See *id.* at 1461.

that the decision in *Gardner-Denver* somehow forbade the arbitration of the statutory ADEA claim in the case at issue.<sup>112</sup> According to the *Pyett* majority, *Gardner-Denver* did not deal with the *Pyett* issue of enforcing an agreement to arbitrate statutory claims.<sup>113</sup> Rather, *Gardner* focused on a separate and distinct issue: whether “arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims.”<sup>114</sup> Justice Thomas explained that the Second Circuit faced a dissimilar situation in *Pyett*—a CBA containing an arbitration provision that included both contractual and statutory discrimination claims—thus, reliance on *Gardner-Denver* was inappropriate.<sup>115</sup>

Justice Thomas noted that, from the outset, the labor contract’s very broad arbitration provision was the product of good faith negotiations.<sup>116</sup> The parties expressly decided that statutory claims “would be resolved in arbitration.”<sup>117</sup> The majority opinion noted that “this freely negotiated term between the Union and the RAB easily qualifies as a ‘condition of employment’ that is subject to mandatory bargaining.”<sup>118</sup> Justice Thomas concluded:

Examination of the two federal statutes at issue in this case, therefore, yields a straightforward answer to the question presented: the NLRA provided the union and the RAB with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to federal age-discrimination claims in the ADEA. Accordingly, there is no legal basis for the Court to strike down an arbitration clause in this CBA, which was freely negotiated by the Union and the RAB, which clearly and unmistakably requires respondents to arbitrate the age-discrimination claims at issue in this appeal. Congress has chosen to allow arbitration of ADEA claims. The Judiciary must respect that choice.<sup>119</sup>

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<sup>112</sup> *See id.*

<sup>113</sup> *See* 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1466 (2009).

<sup>114</sup> *Id.* at 1459 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991)).

<sup>115</sup> *See id.* at 1459.

<sup>116</sup> *Id.* at 1464. The NLRB has held that the labor contract’s grievance arbitration mechanism is a mandatory subject of bargaining. It cannot be unilaterally imposed by the employer. *See Util. Vault Co.*, 345 N.L.R.B. No. 4 (2005). If the grievance arbitration mechanism is so broad as to seem to preclude anyone from filing charges with the NLRB, such an over-broad provision would be unlawful. *See U Haul Company of Cal.*, 347 N.L.R.B. No. 34 (2006).

<sup>117</sup> *Pyett*, 129 S. Ct. at 1464.

<sup>118</sup> *Id.* (citing *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 199 (1991)).

<sup>119</sup> 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1466 (2009).

To the majority, it is Congress, not the Court, that establishes federal labor policy, and the broad arbitration provision clearly and unmistakably negotiated by the parties is fully congruent with the congressional policy choice favoring arbitration over litigation as the preferred means of settling labor disputes.<sup>120</sup> *Pyett* broadened this policy choice to include mandatory labor arbitration of employment discrimination claims if such arbitration is required by a CBA.<sup>121</sup>

The majority acknowledged that *Gardner-Denver* and its progeny contained extensive dicta that criticized arbitration as an inappropriate forum for the resolution of statutory employment discrimination claims.<sup>122</sup> Justice Thomas opined that this critical, problematic dicta was a result of a negative, parochial, and hostile view of arbitration that had “fallen far out of step with our current strong endorsement of the federal statutes favoring this method [labor arbitration] of resolving [employment discrimination] disputes.”<sup>123</sup> The “misconceptions” about arbitrators lacking sufficient expertise with Title VII and other statutory rights-based antidiscrimination law “have been corrected.”<sup>124</sup> Justice Thomas summarized for the majority: “We recognize that . . . the *Gardner-Denver* line of cases included broad dicta that was highly critical of the use of arbitration for the vindication of statutory antidiscrimination rights. That skepticism, however, rested on a misconceived view of arbitration that this Court has since abandoned.”<sup>125</sup>

Justice Thomas explained that the majority was not overruling *Gardner-Denver*; rather, *Gardner-Denver* was simply inapplicable with respect to *Pyett*: “*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.”<sup>126</sup> Justice Thomas stated in a footnote that if *Gardner-Denver* had applied, the Court would likely have overruled it due to the Court’s current pro-arbitration jurisprudence.<sup>127</sup>

By avoiding a direct confrontation with *Gardner-Denver* via summary judicial fiat, the majority also conveniently dodged what the *Wright* Court identified as the ‘tension’ between the two lines of cases

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<sup>120</sup> *See id.*

<sup>121</sup> *See id.*

<sup>122</sup> *See id.* at 1470.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1471.

<sup>125</sup> 14 Penn Plaza LLC v. *Pyett*, 129 S. Ct. 1456, 1469 (2009).

<sup>126</sup> *Id.*

<sup>127</sup> *See id.* at 1469 n.8. Justice Thomas relied on *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989), which stated that “it is appropriate to overrule a decision where there ‘has been [an] intervening development of the law’ such that the earlier ‘decision [is] irreconcilable with competing legal doctrines and policies.’”

represented by *Gardner-Denver* and *Gilmer*.<sup>128</sup> In a preemptive repudiation of Justice Souter's dissent, the *Pyett* majority accused him of "wrench[ing] . . . out of context" what he portrayed as "*Wright*'s characterization of *Gardner-Denver* as raising a seemingly absolute prohibition of union waiver of employees' federal forum rights," and concluded that "*Wright* therefore neither endorsed *Gardner-Denver*'s broad language nor suggested a particular result in this case."<sup>129</sup>

Summarizing *Gardner-Denver*, *Barrentine*, and *McDonald*, Justice Thomas characterized the underlying facts in those three earlier cases favoring litigation over arbitration of statutory claims as "reveal[ing] the narrow scope of the legal rule arising from that trilogy of decisions."<sup>130</sup> The majority concluded that the *Denver* trilogy of cases

made clear that the *Gardner-Denver* line of cases 'did not involve the issue of the enforceability of an agreement to arbitrate statutory claims.' Those decisions instead 'involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions.'<sup>131</sup>

The Court, reiterating that "federal antidiscrimination rights may not be prospectively waived,"<sup>132</sup> found no such waiver in *Pyett*. "The decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance."<sup>133</sup> Further, "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."<sup>134</sup> The arbitration decision remains subject to judicial review.<sup>135</sup>

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<sup>128</sup> Cf. *Pyett*, 129 S. Ct. at 1469 n.8 (citing *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 76 (1998)).

<sup>129</sup> *Id.* at 1469 n.7 (internal quotations omitted).

<sup>130</sup> *Id.* at 1468.

<sup>131</sup> 14 Penn Plaza LLC v. *Pyett*, 129 S. Ct. 1456, 1468 (2009) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991)).

<sup>132</sup> *Id.* at 1469 (citing 29 U.S.C. § 626(f)(1)(C) (2006)).

<sup>133</sup> *Id.* (citing *Gilmer*, 500 U.S. at 26).

<sup>134</sup> *Id.* (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

<sup>135</sup> See *id.* at 1471 n.10.

Justice Thomas stated that to read *Gardner-Denver* as somehow prohibiting all waivers of all statutory rights “reveals a distorted understanding of the compromise made when an employee agrees to compulsory arbitration.”<sup>136</sup> Therefore, the majority ultimately concluded that “because today’s decision does not contradict the holding of *Gardner-Denver*, we need not resolve the stare decisis concerns raised by the dissenting opinions.”<sup>137</sup> Nevertheless, in a possible preview of coming attractions, the majority all but sounded the death knell for the *Gardner-Denver* line of cases, concluding that “given the development of this Court’s arbitration jurisprudence in the intervening years . . . *Gardner-Denver* would appear to be a strong candidate for overruling if the dissents’ broad view of its holding were correct.”<sup>138</sup>

In upholding the enforcement of the arbitration clause, the majority not only dispelled the Second Circuit’s *Gardner-Denver* analysis as inapplicable, but also explained why the very broad arbitration provision in *Pyett* should be enforced. The majority held that the arbitration clause was a “freely negotiated term between the Union and the RAB [that] easily qualifies as a ‘condition of employment’ that is subject to mandatory bargaining” under 29 U.S.C. § 159(a).<sup>139</sup> Accordingly, the clause must be enforced unless the ADEA itself specifically removed grievances made under it from the NLRA’s authority.<sup>140</sup> The majority referred to the holding in *Gilmer* that the ADEA does not prohibit arbitrating claims brought under the statute.<sup>141</sup> Accordingly, in *Pyett*, a clause calling for the arbitration of an ADEA claim brought by a union member bound by the CBA was enforceable.<sup>142</sup>

The *Pyett* majority declined to resolve several issues. *Pyett* and his colleagues also made separate arguments that the arbitration clause was not clear and unmistakable, which could nullify its validity.<sup>143</sup> The majority declined to address this issue as the class of grievants did not raise the argument in the lower courts.<sup>144</sup> Additionally, the grievants argued that the arbitration clause functioned as a waiver of their federal right under the ADEA, as it precluded them from a federal judicial forum, and

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<sup>136</sup> *Id.* at 1470.

<sup>137</sup> 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1469 n.8 (2009).

<sup>138</sup> *Id.* at 1469.

<sup>139</sup> *Id.* at 1464 (citing Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 199 (1991)).

<sup>140</sup> *See id.* at 1465.

<sup>141</sup> *See id.* 1464–65 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26–33 (1991)).

<sup>142</sup> *See id.* at 1466.

<sup>143</sup> *See* 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1462 (2009).

<sup>144</sup> *See id.* at 1463.

also permitted the union to block arbitration.<sup>145</sup> However, the majority explained that since this issue was not fully briefed, and there were existing factual disputes, it would not resolve this issue either.<sup>146</sup> Finally, whether the labor contract allows the union to prevent employees “from ‘effectively vindicating’ their ‘federal statutory rights in the arbitral forum’” remains an open question for a future day.<sup>147</sup>

### B. *The Dissents*

Justice Souter’s dissent was joined by Justices Stevens, Breyer, and Ginsburg. They maintained that *Gardner-Denver* established a “seemingly absolute prohibition of union waiver of employees’ federal forum rights,” which was expressly reaffirmed by the Court in *Wright*.<sup>148</sup> As Justice Souter noted: “In sum, *Gardner-Denver* held that an individual’s statutory right of freedom from discrimination and access to court for enforcement were beyond a union’s power to waive.”<sup>149</sup> This holding had been “repeated over the years and generally understood,” and the majority ignored the principle of stare decisis by radically diverging from the rationale of *Gardner-Denver* and enforcing the arbitration clause.<sup>150</sup> Justice Souter’s dissent asserted that if the *Gardner-Denver* holding was actually as narrow as the majority found, then for thirty-five years the Court had been “wreaking havoc on the truth” when it held that there was an absolute prohibition of union waiver of employee’s federal forum rights:<sup>151</sup>

The majority evades the precedent of *Gardner-Denver* as long as it can simply by ignoring it. . . . [B]ut the issue is settled and the time is too late by 35 years to make the bald assertion that ‘[n]othing in the law suggests a distinction between the status of arbitration agreements signed by the individual employee and those agreed to by a union representative.’ In fact, we recently and unanimously said that the principle that ‘federal forum rights cannot be waived in union-negotiated CBAs even if they can be waived in individually executed contracts . . . assuredly finds support in’ our case law, and every

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<sup>145</sup> See *id.* at 1474. The majority noted that “a substantive waiver of federally protected civil rights will not be upheld.” *Id.* (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

<sup>146</sup> See *id.*

<sup>147</sup> *Id.* (quoting *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000)).

<sup>148</sup> *Id.* at 1477 (Souter, J., dissenting) (quoting *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998)).

<sup>149</sup> *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1478 (2009) (Souter, J., dissenting).

<sup>150</sup> See *id.* at 1481.

<sup>151</sup> *Id.* at 1480.

Court of Appeals save one has read our decisions as holding to this position.<sup>152</sup>

Interestingly, Justice Souter's dissent also noted that the majority opinion may ultimately be of little consequence, other than being a glaring, infamous incident of dramatic and unwarranted judicial repudiation of the principle of stare decisis.<sup>153</sup> Justice Souter explained that the majority left open a significant question, as 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."<sup>154</sup> Justice Souter explained that this is often the situation, and it is likely that this issue, which has been a point of contention for almost four decades, will remain a source of controversy unless and until it is definitively resolved by a future Supreme Court decision.<sup>155</sup>

Perhaps most strikingly, Justice Souter's dissent identified the principles of stare decisis that the majority abandoned:

Principles of stare decisis demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends. And considerations of stare decisis have special force over an issue of statutory interpretation . . . . Once we have construed a statute, stability is the rule, and we will not depart from it without some compelling justification. There is no argument for abandoning precedent here, and *Gardner-Denver* controls.<sup>156</sup>

Justice Stevens, who joined Justice Souter's dissent, also wrote separately to emphasize his profound disagreement with the majority's repudiation of stare decisis.<sup>157</sup> Justice Stevens forcefully asserted that the majority arrogantly ignored public policy appropriately established by Congress: "The Court's derision of that 'policy concern' is particularly disingenuous given its subversion of *Gardner-Denver*'s holding in the service of an extratextual policy favoring arbitration."<sup>158</sup> Justice Stevens was deeply disturbed by the raw judicial activism of the Court's majority, particularly since *Gardner-Denver* established quite unequivocally

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<sup>152</sup> *Id.* at 1478–79 (quoting *Wright*, 535 U.S. at 77).

<sup>153</sup> *See id.* at 1478.

<sup>154</sup> *Id.* at 1481.

<sup>155</sup> *See* 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1481 (2009) (Souter, J., dissenting).

<sup>156</sup> *Id.* at 1478 (internal quotations omitted).

<sup>157</sup> *See id.* at 1474 (Stevens, J., dissenting) ("My concern regarding the Court's subversion of precedent to the policy favoring arbitration prompts these additional remarks.").

<sup>158</sup> *Id.* at 1476.

that “Congress did not intend to permit” mandatory arbitration of statutory claims.<sup>159</sup> Justice Stevens concluded that “in the absence of an intervening amendment to the relevant statutory language, we are bound by that decision. It is for Congress, rather than this Court, to reassess the policy arguments favoring arbitration and revise the relevant provisions to reflect its views.”<sup>160</sup>

#### IV. ANALYSIS AND DISCUSSION

##### A. *Jurisprudential Realpolitik, Political Ideology, Stare Decisis, and Justice Souter’s Labor Finale*

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.

Justice Souter’s dissent treats *Pyett* as an aberration. Justice Souter was especially incensed that such a potentially tectonic shift so inimical to workers’ interests was the shameless product of blatant activist arrogance by an ideological majority openly contemptuous of stare decisis and thirty-five years of the well-established *Gardner-Denver* line of cases.<sup>161</sup> Justice Souter hoped that the *Gardner-Denver* rationale would not only continue to percolate under *Pyett*’s ill-fitting and unstable lid, but that *Gardner-Denver* would, under a new liberal majority, soon reemerge and be reestablished as the controlling law, substantially strengthened, paradoxically, by the *Pyett* dissents. With the exceptions of *Gilmer* and *Pyett*, the Supreme Court has eschewed the integrated coherence of arbitration for the dynamic of a labor arbitration followed by external litigation de novo regarding statutory employment discrimination claims.

Nevertheless, to attempt to somehow resuscitate the dated *Gardner-Denver* rationale would be a mistake. *Pyett* deserves a fair opportunity to work. While there are a multitude of open questions flowing from the ramifications, both intended and unintended, of the majority’s decision, the major elements of justice and fairness to employees, employers, and

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<sup>159</sup> See *id.*

<sup>160</sup> *Id.*

<sup>161</sup> See *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1476–77 (2009) (Souter, J., dissenting).

unions are within *Pyett* probabilities, and they deserve the opportunity to become operational.

### B. *Why the Court's "Right" Result Isn't Wrong*

The argument for continuing fealty to the thirty-five-year-old *Gardner-Denver* rationale is, at best, anemic and out of touch with positive developments in labor and employment arbitration in recent years. As Justice Holmes would remind us, it is a poor excuse to have a law just because it was a law in the time of King Henry IV.<sup>162</sup> Even assuming there ever was any legitimate basis for anyone to fear that prominent labor arbitrators notoriously lacked sufficient expertise in employment discrimination law, these concerns are simply not well-founded today. The American Arbitration Association, for example, conducts fastidious scrutiny of the already highly qualified and accomplished arbitrators it admits to its panels of arbitrators available to prospective parties. It also demands that each arbitrator make a career-long commitment to the state-of-the-art study of arbitration.<sup>163</sup>

On the eve of a half-century of Supreme Court enthusiasm for labor arbitration, manifested in its 1960 landmark *Steelworkers Trilogy* decisions,<sup>164</sup> the *Pyett* Court reached the correct result, via admittedly somewhat problematic and truncated reasoning that could potentially cause a degree of jurisprudential and practical instability in labor arbitration and in the courts. However, the *Pyett* decision, having achieved the correct result, deserves the opportunity to work in the real world, and parties with such omnibus arbitration provisions in their CBAs deserve the benefit of their one bite at the integrated, globalized apple.

The phenomenon of the Court reaching the correct result, despite, rather than through its particular reasoning, does occur.<sup>165</sup> As a practical matter, it is obviously better to have a sound and workable decision, rather than an unworkable result flowing from complex abstract jurisprudential theory.

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<sup>162</sup> See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

<sup>163</sup> See generally American Arbitration Association, *Qualification Criteria for Admittance to the AAA National Roster of Arbitrators*, <http://www.adr.org/si.asp?id=4223> (last visited Nov. 10, 2009) (listing the requirements necessary for admittance into the American Arbitration Association). Professor Gregory, the lead author of this Article, is a member of the National Academy of Arbitrators, and he serves on, *inter alia*, the labor and the employment arbitrator panels of the American Arbitration Association and United States Federal Mediation and Conciliation Service.

<sup>164</sup> *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

<sup>165</sup> See, e.g., Ely, *supra* note 9 (deploring the reasoning of *Roe v. Wade*, while still favoring the result).

The great practical utility and insight of these principles are especially true in labor and employment law. *Pyett* is certainly not the first, nor will it be the last decision of the Supreme Court that, while not elegantly grounded in sophisticated jurisprudential metaphysics, may nevertheless work well and yield just and fair results for employees, employers, and unions. Whether *Gardner-Denver* or *Pyett* controls, the stakes are significant for everyone. Unions will have continuing concerns about exposure to liability from lawsuits alleging breach of the union duty of fair representation under either model.<sup>166</sup>

The employer, 14 Penn Plaza LLC, warned during oral argument before the Supreme Court that “forbidding unions from bargaining about the procedural right to an arbitral forum will carve a judicial exception into the labor law permitting employees to bypass the union and deal directly with their employees, defeating Congress’s national labor policy.”<sup>167</sup> To bring all grievance claims, including those involving statutory rights, such as employment discrimination claims, into one integrated arbitration could be problematic, however. The grievance process could become rigid. If the parties begin taking all statutory claims into arbitration, the dispute resolution process could become flooded with grievances and with both parties feeling little can be gained by settling grievances earlier in the procedure.<sup>168</sup> Yet, to repudiate *Pyett* would undermine the role of the union as the exclusive bargaining agent, and would encourage employees to deal directly with employers, in derogation of Congress’s central role in setting “national labor policy.”<sup>169</sup> To effectuate *Pyett*, however, also poses many challenges and raises a host of implicit unanswered procedural and substantive questions.

Perhaps the most thoughtful and realistic template as to whether, and under what circumstances, employees represented by labor unions and subject to the protections of anti-discrimination provisions in CBAs may be bound to arbitrate, rather than litigate, statutory claims was set forth by the Eleventh Circuit in *Brisentine v. Stone & Webster Engineering Corp.* in 1997.<sup>170</sup> In *Brisentine*, an employee brought an action against his employer in federal district court, alleging violations of the

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<sup>166</sup> Perhaps union concerns about Union DFR litigation are overwrought. See Mitchell Rubinstein, *Duty of Fair Representation Jurisprudential Reform: The Need to Adjudicate Disputes in Internal Union Review Tribunals and the Forgotten Remedy of Re-Arbitration*, 42 U. MICH. J.L. REFORM 517 (2009). But that does not translate necessarily into any reduction in the volume of Union DFR litigation that is filed.

<sup>167</sup> Transcript of Oral Argument at 3–4, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (No. 07-581).

<sup>168</sup> See *id.*

<sup>169</sup> See *id.*

<sup>170</sup> See *Brisentine v. Stone & Webster Eng’g Corp.*, 117 F.3d 519, 526–27 (11th Cir. 1997).

ADA.<sup>171</sup> The defendant employer moved for summary judgment, contending that the plaintiff's claims were subject to a mandatory arbitration clause in the CBA.<sup>172</sup> The district court granted summary judgment in favor of the employer, which the employee then appealed.<sup>173</sup>

On appeal, the Eleventh Circuit reversed, holding that the mandatory arbitration provision of the labor contract was unenforceable.<sup>174</sup> The appellate court made several distinctions between *Gardner-Denver* and *Gilmer*, and ultimately decided that it would not enforce the union-negotiated waiver of a judicial forum for statutory claims.<sup>175</sup> In reaching this conclusion, the Eleventh Circuit formulated a three-part analytical framework derived from *Gardner-Denver* and *Gilmer*.<sup>176</sup> First, the employee must have expressly individually agreed to the waiver of the right to bring statutory claims in court.<sup>177</sup> Second, the parties must have expressly authorized the arbitrator to resolve statutory claims.<sup>178</sup> Third, and perhaps most dramatically, the individual employee has the right to take statutory claims to arbitration,<sup>179</sup> which, more than coincidentally, Penn Plaza emphasized during oral argument before the Supreme Court in *Pyett*.<sup>180</sup> Pointing to the black letter language of the CBA, Penn Plaza argued that "all claims" regarding statutory rights are required to be arbitrated.<sup>181</sup> Therefore, if the union, for whatever reason, does not pursue the statutory claims of individual grievants to arbitration, "the individuals then have [the right] to go to arbitration with their private counsel . . . and have their claims heard in the arbitral forum."<sup>182</sup>

The *Pyett* employer expressly stated at oral argument: "As this Court has approved in *Gilmer*, what we are talking about is moving the forum from the judicial one to the arbitral one."<sup>183</sup> Justice Scalia framed the essence of the matter astutely at oral argument: "[I]f the union chooses not to arbitrate [the grievance regarding statutory claims] the

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<sup>171</sup> See *id.* at 520.

<sup>172</sup> See *id.*

<sup>173</sup> See *id.*

<sup>174</sup> See *id.* at 526–27.

<sup>175</sup> See *id.*

<sup>176</sup> See *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 523–27 (11th Cir. 1997).

<sup>177</sup> See *id.* at 526.

<sup>178</sup> See *id.* at 527.

<sup>179</sup> See *id.*

<sup>180</sup> See Transcript of Oral Argument at 5, 14 *Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (No. 07-581).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 16.

individual must have the right to arbitrate it on his own,”<sup>184</sup> a framing of the issue that the employer “wholeheartedly endorse[d].”<sup>185</sup>

This has stunning possibilities, and could utterly transform labor arbitration in deeply problematic ways. The employer, union, and employees/grievants usually design grievance negotiations to fairly and justly resolve grievance disputes well prior to arbitration. Both institutional employer and union interests are especially implicated, as are the interests of most grievants in obtaining fair resolution of grievances through good faith negotiations at the lower, quicker, and more immediate steps of the labor contract’s grievance procedure.

*Pyett* poses many challenges and opportunities for the conventional grievance and arbitration procedure. If the union does not pursue the statutory employment discrimination claims to arbitration, would the union likely have greater exposure to suits alleging breach of the union’s duty of fair representation? Is *Pyett* thus a full employment bill for attorneys seeking to work within, or be retained by, labor unions? How many, if any, unions currently have sufficient internal expertise to evaluate correctly and work within a *Pyett* grievance presentation and negotiation dynamic up to, and including, arbitration? Would the presence of a statutory claim pressed by a grievant’s personal attorney debilitate the union’s prerogatives as the NLRA Section 9 exclusive bargaining representative? What are most unions’ prospects if they refuse outright, or grudgingly admit, and resent, interactions with private attorneys? What are the ethical responsibilities of any attorney in such a dynamic—especially, what is the role and duty of the private attorney? Who pays the attorney’s fees for private counsel successfully representing a grievant at the arbitration, with the union absent and not in the picture for any numbers of reasons?

*Pyett* may have the unintended, ominous consequence of having ushered everyone into a limbo-like no-man’s land. 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 union-less arbitration with the employer, with the union absorbing the private counsel legal fees.<sup>186</sup> Obviously, this is a large leap, and may not be the case. In *Pyett*, the union informed its employees that they could individually present their statutory claims before the arbitrator, and that their own private counsel could represent them, but that their attorney’s fees and the arbitration

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<sup>184</sup> *Id.* at 17.

<sup>185</sup> *Id.*

<sup>186</sup> *Cf.* Mitchell H. Rubinstein, *Assignment of Labor Arbitration*, 81 ST. JOHN’S L. REV. 41 (2007).

fees would be the responsibility of the individual worker, and not of the union.<sup>187</sup> For all practical purposes, that could well be the end of the matter, since few grievants have the financial means to hire private counsel and absorb a share of the arbitrator's fee.

Certainly not least is the central practical question—who really pays?<sup>188</sup> What if the statutory claim grievant does not have funds sufficient to hire private counsel to take those statutory claims to arbitration? If the union is institutionally responsible for the cost of the grievant's attorney, it would probably be more cost-efficient for the union itself to take every statutory claim to arbitration. If, however, every statutory claim can come to arbitration, what incentive is there for the employer and the union to bargain for resolution of the grievance in the lower steps of the labor contract's grievance procedure?

Discovery could proliferate dramatically, with corresponding motion practice becoming virtually ubiquitous. These dimensions, imported from employment discrimination law, could flood and freeze the CBA's grievance arbitration system with meritless grievances to the detriment of meritorious grievances now inexorably subjected to interminable delays in an increasingly clogged and dysfunctional arbitration system.

Furthermore, would the arbitrator have the authority to award the full range of remedies typically available in employment discrimination, including compensatory and punitive damages and attorney's fees to the prevailing party, and who would pay them? If so, where would such arbitral authority be grounded? Would it implicitly flow from the *Pyett* decision? Or would the labor contract have to be formally amended to allow the full range of damages and remedies available in federal court? Adding compensatory and punitive damages and attorney's fees considerations to the *Pyett* equation will significantly transform the conventional labor arbitration of the pre-*Pyett* era, making it unrecognizable.

The parties do have influence in this post-*Pyett* world. If the *Pyett* process becomes very expensive for the institutional parties, they remain the masters of their conduct—nothing compels parties to violate statutory employment discrimination law, for example. If the *Pyett* process becomes too burdensome and loses many of the distinct advantages that labor arbitration offers—specifically, significantly less time and less expense to present the case in arbitration—and instead becomes the func-

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<sup>187</sup> See Brief for Service Employees International Union, Local 32BJ as Amicus Curiae Supporting Respondents, 14 Penn Plaza LLC v. *Pyett*, 129 S. Ct. 1456 (2009) (No. 07-581); Barry Winograd, *A New Day Dawning Or Dark Clouds On The Horizon? The Potential Impact Of The Pyett Case*, 59 LAB. L. J. 227, 228 (2008).

<sup>188</sup> See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997); see also Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293 (1999); Kenneth May, *Labor Lawyers at ABA Session Debate Role of American Arbitration Association*, DAILY LAB. REP., Feb. 15, 1996, at A-12.

tional equivalent of an endless federal court case extracting every last dime from the parties, the parties are also the masters, presumably, of their CBA. They are certainly free to negotiate down the many matters subject to the grievance arbitration process of the labor contract.

For example, if *Pyett* proves difficult to implement in practice, parties could negotiate new labor contract language that could bar bringing most, if not all, anti-discrimination matters into the grievance arbitration mechanisms of the labor contract while pledging all parties to the spirit and letter of all applicable federal, state, and local statutory law. While this may not make for the best public relations or most enlightened human resources—seemingly making the union and the employer appear as regressive and reactionary endorsers of unlawful employment discrimination—*Gardner-Denver* remains the fully lawful default position in the event that *Pyett* is not workable, as the *Pyett* majority readily stated that their holding does not reach, let alone overrule, *Gardner-Denver*.

Labor arbitration has many virtues, ranging from time and cost efficiency, due to minimal discovery and no pre-hearing motion practice, to no shifting of compensatory or punitive damages or attorney's fees to the loser. Institutional employers and unions, over time, develop mature and productive relationships, making labor grievance arbitration an important part, but only a part, of the parties' larger labor management dynamic. Under the *Pyett* regime, however, there is at least the potential that some of these salient positive attributes of labor arbitration could be quickly debilitated. If the *Pyett*-era arbitration system becomes flooded with statutory-rights claimants accompanied by their personal attorneys suing the union and the employer with hybrid Section 301/breach of the union's duty of fair representation claims, all of whom are resolutely headed for the labor arbitration of their statutory claim as a matter of right, the institutional parties will amend their labor contracts to much more carefully contour *Pyett* issues.

In the latter instance, employers pleased with the unitary, integrated result achieved in *Pyett* may come to rue the day that they no longer had to worry about *Gardner-Denver* external litigation of statutory claims subsequent to the labor arbitration. In the *Pyett* era, as employers may face arbitration of statutory claims as a matter of employee rights, a flooded grievance arbitration system overloaded with individual grievants represented by their private attorneys, resolved to arbitrate, does not present an attractive picture. Under this parade of horrors, it is possible that the employer could be held entirely responsible for the fees of both the grievant's private, personal attorney and for the fees of the arbitrator in those statutory rights cases that the union declines to take to arbitration.

Nevertheless, despite the many formidable challenges, the undeniable advantages of a unitary labor arbitration of all claims are very significant, with probable time, cost, and efficiency economies. In short order, meritless claims at labor arbitration are going to lose, and the corresponding word will quickly spread among the workers. Accordingly, statutory claims of merit will be addressed, either in arbitration or in court. Those employers and unions refusing to adopt *Pyett* language in their labor contract will thereby not be exempt from litigation externally in court for statutory claims that may be brought. Rather, in the absence of an omnibus *Pyett*-like grievance arbitration definition in the labor contract, external litigation is guaranteed.

### CONCLUSION

On the eve of the half-century anniversary of the landmark *Steelworkers Trilogy*, the most classic of the many Supreme Court enthusiastic endorsements of labor arbitration as the preferred means of dispute resolution in the unionized labor-management relationship, much remains to be said for the reinvigoration and unequivocal restoration of *Gardner-Denver* precedent. But, much can also be said for judicial deference to the successful bargain made by the parties endeavoring to utilize the unitary labor arbitration as the integrated setting for the resolution of all contractual and statutory claims.

*Pyett* is a significant, but not radical, exception to the *Gardner-Denver* genre of dispute resolution modalities. For all practical purposes, unless the union and the employer expressly negotiate a *Pyett* provision mandating omnibus inclusion of statutory claims in the grievance arbitration procedure, *Gardner-Denver* remains the default position. If there is no *Pyett* provision, then *Gardner-Denver* controls, with the potential for statutory claims being subsequently litigated in court de novo after the conclusion of an arbitration proceeding that lacks any res judicata or collateral estoppel force.

Meanwhile, unfortunately due to the transparent bitterness among some of the ideologically driven Justices, and the equally raw activism marginalizing and subordinating *Gardner-Denver* (yet purportedly not overruling it), *Pyett* became one of the more contentious labor and employment decisions in the past several terms of the Supreme Court.

The more controversial implications of *Pyett* may catalyze and revitalize a plethora of legislative initiatives,<sup>189</sup> such as the Arbitration Fairness Act of 2009,<sup>190</sup> from their recent languishing dormancy. Much of

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<sup>189</sup> See Michael J. Lockerby, 'Fairness' Looms in New Congress, NAT'L L. J., November 24, 2008, at 13-17 (surveying pending legislation).

<sup>190</sup> H.R. 1020, 111th Cong. (1st Sess. 2009).

the reform legislation is, despite benign titles, in fact hostile to labor and employment arbitration. *Pyett* may add fuel in the short term to those pernicious populist legislative fires. The Arbitration Fairness Act, for example, would render unenforceable any and all agreements to arbitrate entered into before a dispute arose, a gross overreaction to the proven efficacy and fairness of labor and employment arbitration.<sup>191</sup> In addition, the proposed Act would amend the FAA so as to invalidate all mandatory predispute agreements to arbitrate all employment, consumer, franchise, and civil rights disputes.<sup>192</sup> The Act further provides that the determination of the validity and enforceability of an agreement to arbitrate shall be determined by courts with reference to federal law, and not by arbitrators.<sup>193</sup>

*Pyett's* seeming initial attractiveness to some employer and union institutional interests is presumably genuine. A single labor arbitration resolving all labor contract and statutory claims, with subsequent litigation of the statutory claims foreclosed, presents the great advantage of the unitary omnibus process. *Pyett* offers unions and employers the alternative of one, rather than at least two serial, bite(s) at the proverbial apple.

*Pyett* is a significant alternative to *Gardner-Denver*; but it is *Pyett* that is the innovative, intriguing exception, while *Gardner-Denver* remains the default, the norm, and, quite likely, the prevailing dynamic for the foreseeable future. Meanwhile, it is not a zero-sum war between *Gardner-Denver* and *Pyett*. The latter is an interesting alternative that merits the careful consideration of employers, employees, and unions, especially by those dissatisfied with the serial proceedings and seemingly never-ending litigation virtually guaranteed by *Gardner-Denver*.

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<sup>191</sup> See Lockerby, *supra* note 189, at 13–17.

<sup>192</sup> See *id.* at 15.

<sup>193</sup> See *id.*