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Arbitration Agreements: Should a Union Be Allowed to Make Collective Bargaining Agreements That Bind Individuals' Federal Statutory Claims to Arbitration - Brisentine v. Stone & (and) Webster Engineering Corp.

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Arbitration Agreements: Should a Union Be Allowed to Make Collective Bargaining Agreements That Bind Individuals' Federal Statutory Claims to Arbitration?

Brisentine v. Stone & Webster Engineering Corp.[1]

I. INTRODUCTION

With the constant increase of employment litigation[2] among individuals, unions and companies, the use of arbitration clauses continues to grow each day. While it is clear that arbitration clauses can be beneficial, it is not clear when and in what situations they should be binding, and hence, waive the rights of parties to have their day in court. Against this backdrop, the *Brisentine* court faced the issue of whether a union, when making a collective bargaining agreement, can bind individual employee's federal statutory rights to arbitration.

II. FACTS AND HOLDING

Clifford Brisentine ("Brisentine") brought suit in an Alabama District Court alleging Stone & Webster Engineering Corporation ("Stone") violated the Americans with Disabilities Act ("ADA") by terminating his employment.[3]

Mr. Brisentine, an electrician, injured his back at work when he fell off scaffolding.[4] He later underwent surgery and a "work hardening" rehabilitation process.[5] After completing rehabilitation,[6] he was referred by his union for employment with Stone.[7] Upon referral, he became a probationary employee falling

1. 117 F.3d 519 (11th Cir. 1997).
2. *See infra* note 112 and accompanying text.
3. *Brisentine*, 117 F.3d at 519.
4. *Id.* at 521.
5. *Id.*
6. *Id.* After rehabilitation his doctor released him, but he set lifting restrictions of 30 to 45 pounds and restricted repetitive stooping and bending. *Id.*
7. *Id.* Employment at Stone & Webster is a two-step process. The first step is satisfied when a union refers a worker to the company. Upon referral, the worker is classified as a "probationary employee." *Id.* These employees have the same rights and liabilities as regular employees. *Id.* The second step is the employee must complete an application and qualify according to the job specifications. A person who meets step one but fails step two is deemed "terminated" according to the language of the Agreement. *Id.*

under Stone's Project Maintenance and Modification Agreement.[8] Under this collective bargaining agreement, Mr. Brisentine was then required to complete a formal application.[9] In this application for employment, Mr. Brisentine disclosed his lifting, stooping and bending restrictions.[10] Later that day, he was informed by a labor relations manager at Stone that his application was being rejected, terminating his employment due to his disability.[11] Mr. Brisentine contacted his union representative to file a grievance according to the terms of the agreement.[12] The representative recommended that due to the nature of the dismissal, Mr. Brisentine should file a complaint with the Equal Employment Opportunity Commission ("EEOC") instead of pursuing the grievance procedure.[13] Thus, instead of filing a grievance, Mr. Brisentine filed his complaint with the EEOC. He claimed that Stone violated the ADA[14] by terminating him because of his disability and failing to make a reasonable accommodation for it.[15] After receiving his authorization letter from the EEOC, Mr. Brisentine filed this lawsuit in federal court.[16]

Stone moved for summary judgment claiming Brisentine was required, according to the agreement,[17] to file a grievance and submit it for binding arbitration.[18] The district court granted the summary judgment holding that Brisentine's federal statutory claim "was subject to compulsory arbitration pursuant to [the] arbitration clause in [the] collective bargaining agreement."[19] Brisentine then filed with the United States Court of Appeals for the Eleventh Circuit.[20]

The Eleventh Circuit reversed the district court.[21] It held that the mandatory arbitration clause of the agreement did not bar Mr. Brisentine from litigation of the ADA federal statutory claim because he did not individually agree to the contract

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8. *Id.* This collective bargaining agreement is between Tennessee Valley Authority contractors and subcontractors and the Tennessee Valley Trades and Labor Council unions. *Id.* at 519-520. It is "binding upon and effective in determining the relations between the parties." *Id.* It requires the contractor, Stone, to recognize the union as the exclusive and sole bargaining representative for all craft workers of the contractor. *Id.* Additionally, it does not permit the union or the contractor to discriminate against any applicant or employee for employment because of creed, race, sex, color, age, national origin, or handicap; however, this agreement does not explicitly address the arbitration of federal statutory claims. *Id.* Finally, while it establishes a procedure for grievances where an employee can protest a suspension, termination, or specific provisional violation of this agreement, it does not provide the employee with the right to arbitration. *Id.* Instead, it states, "[a]lthough the individual employee must initiate the grievance procedure, if a settlement is not reached within the first few steps of the grievance procedure, only the Council and the Contractor have the authority to appeal an unfavorable resolution of a grievance to an arbitrator." *Id.*

9. *Id.* at 521.

10. *Id.*

11. *Id.*

12. *Id. See supra* note 8 and accompanying text.

13. *Id.*

14. 42 U.S.C. §1201-12213 (1990). § 12101(b)(1) states, "It is the purpose of this chapter to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."

15. *Brisentine,* 117 F.3d at 521.

16. *Id.*

17. *See supra* note 8 and accompanying text.

18. *Brisentine,* 117 F.3d at 521.

19. *Id.* at 519.

20. *Id.*

21. *Id.* at 526.

with the arbitration clause, the agreement did not explicitly authorize arbitration as a means of resolving federal statutory claims, and the agreement did not give him the right to demand arbitration if the ADA claim was not resolved to his satisfaction.[22]

III. LEGAL HISTORY

In 1957, the Supreme Court held that the federal district courts, according to the Taft-Hartley Act, had the power to enforce arbitration clauses in collective bargaining agreements.[23] Following their previous practices, labor unions continued to benefit from the cost effectiveness and timeliness of binding arbitration clauses, and the Supreme Court, in the "Steelworkers Trilogy," continued to support these clauses.[24] With the successful enforcement of these clauses, they began to appear in employee handbooks, contracts, manuals and employment applications in an attempt to control state and federal anti-discrimination disputes.[25]

A. The Development of the Collective Bargaining Precedent

In *Alexander v. Gardner-Denver Co.*, the Supreme Court faced the issue of whether an employee had the statutory right to proceed to trial under a Title VII claim after he had voluntarily submitted his claim to arbitration under a nondiscrimination clause in a collective bargaining agreement.[26] In *Alexander*, Mr. Alexander, a black employee, was fired by Gardner-Denver Company.[27] He claimed his dismissal was due to discrimination and filed a grievance with the union.[28] The collective bargaining agreement had a broad arbitration clause that outlined a four-step grievance procedure for covering disputes rising out of employment.[29] Ultimately, if the dispute was not settled, it was to be submitted to compulsory arbitration.[30] Such arbitration was to be final and binding upon all parties.[31]

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22. *Id.*

23. Textile Workers Union of America v. Lincoln Mills of Ala., 353 U.S. 448 (1957). This was the first Supreme Court decision to endorse the use of predispute arbitration clauses in collective bargaining agreements.

24. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). These three decisions were rendered on the same day and dealt with the source of arbitral authority, the presumption of arbitrability, and the arbitrator's right to award remedies.

25. *See* Loren K. Allison and Eric H. J. Stahlut, *Arbitration and the ADA: Do the Two Make Strange Bedfellows?*, 37 RES GESTAE 168, 168 (1993).

26. 415 U.S. 36 (1974).

27. *Id.*

28. *Id.* at 39.

29. *Id.* The collective bargaining agreement allowed the company to "hire, suspend or discharge (employees) for proper cause." *Id.* It also stated "there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry." *Id.*

30. *Id.* at 41.

31. *Id.* at 42.

The Supreme Court reasoned that Title VII was created to be an additional statutory remedy for individuals to pursue their rights against discrimination.[32] Thus, choosing to submit a dispute to arbitration only bound Mr. Alexander's contractual rights, not his statutory rights.[33] The Court held Mr. Alexander should be permitted to pursue both the collective bargaining grievance procedure and the Title VII statutory claim.[34] In concluding this, the Court expressed its concern that arbitrators are not qualified to decide statutory matters.[35] After this decision, the lower courts typically allowed employees to file suits pertaining to civil rights and statutory claims regardless of the collective bargaining agreements to arbitrate.[36] However, there was enough confusion that the Supreme Court continued to accept questions pertaining to the expansion of this precedent.[37]

In *Barrentine v. Arkansas-Best Freight Systems, Inc.*, the Supreme Court dealt with the issue of whether drivers who were not compensated for time spent inspecting and transporting failing trucks could file suit without being bound by the collective bargaining grievance procedure.[38] The Court allowed the employees to avoid the collective bargaining grievance procedures and file suit against their employer for violating the minimum wage provision of the Fair Labor Standards Act.[39] Likewise, in *McDonald v. City of West Branch,* the Supreme Court focused on the issue of whether a discharged police officer who lost in arbitration should be precluded from then bringing a § 1983 court action.[40] The Court held that a decision by an arbitrator pursuant to a collective bargaining agreement would not qualify under § 1983 allowing a collateral estoppel or res judicata effect.[41]

B. The Development of the Commercial Context Precedent

Although the precedent pertaining to the arbitration of statutory rights under collective bargaining agreements seemed mostly settled, in the mid-eighties, a contrary line of precedent began to emerge on the arbitration horizon.[42] In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Supreme Court considered the issue of whether an automobile dealer's counter-claims of antitrust and unfair competition against an international manufacturer had to be arbitrated.[43] The Court held that the collective bargaining line of reasoning did not control commercial disputes.[44] Instead, it adopted the court of appeals' two-step test.[45] First,

32. *Id.* at 47.
33. *Id.* at 52.
34. *Id.* at 59-60.
35. *Id.* at 57. *See* discussion *infra* notes 119-21 and accompanying text.
36. *See, e.g.*, Johnson v. University of Wisconsin-Milwaukee, 783 F.2d 59, 62 (7th Cir. 1986); Criswell v. Western Airlines, 709 F.2d 544, 548 (9th Cir. 1983).
37. *See infra* notes 38-41 and accompanying text.
38. 450 U.S. 728 (1981).
39. *Id.*
40. 466 U.S. 284 (1984).
41. *Id.*
42. *See infra* notes 43-55 and accompanying text.
43. 473 U.S. 614 (1985).
44. *Id.*
45. *Id.* at 628.

the court should determine "whether the parties' agreement to arbitrate reached the statutory issues, and then, upon finding it did, consider whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims."[46] Using this test, the Supreme Court determined that the parties did agree to arbitrate statutory issues and that the Federal Arbitration and Sherman Acts did not render antitrust claims nonarbitrable.[47]

In *Shearson/American Express, Inc. v. McMahon*, the Supreme Court expanded this line of cases.[48] The Court focused on the issue of whether customers of a brokerage firm whose agreements provided for arbitration must arbitrate claims of RICO[49] violations and securities fraud under the Securities Exchange Act of 1934.[50] In applying the two-part test, it endorsed the use of arbitration as pertaining to securities[51] and RICO.[52] In *Rodriguez De Quijas v. Shearson/American Express, Inc.*, the Supreme Court again added to this line of precedent.[53] The Court considered the issue of whether securities investors pursuant to an agreement of arbitration with a brokerage firm must arbitrate alleged violations of the Securities Act of 1933.[54] In determining that an agreement to arbitrate future disputes governed by the Securities Act of 1993 was enforceable, the Supreme Court upheld *McMahon*.[55]

C. The Two Lines of Arbitration Precedent Meet

In 1991, the Supreme Court was confronted with these two lines of precedent in *Gilmer v. Interstate /Johnson Lane Corp.*[56] The issue was whether a claim governed by the 1967 Age Discrimination in Employment Act (ADEA)[57] could "be

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46. *Id.*

47. *Id.* at 628. Additionally the Court stated:

> [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. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.

Id.

48. 482 U.S. 220 (1987).

49. Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961

50. *Id.*

51. This "claim was brought under § 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 48 Stat. 891, 15 U.S.C. § 78j(b)." *Id.* at 222.

52. *Id.*

53. 490 U.S. 477 (1989).

54. *Id.*

55. *Id.* at 485. This decision overruled Wilko v. Swan, 346 U.S. 427 (1953), which refused to allow arbitration of disputes arising under the Securities Act of 1933. Additionally, *Wilko* was the case that *Alexander* relied heavily on in making its decision that arbitrators were not qualified to handle certain complex matters.

56. 500 U.S. 20 (1991).

57. 81 Stat. 602, as amended, 29 U.S.C. § 621.

subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application."[58]

Interstate/Johnson Lane Corporation (Interstate) employed Gilmer as a Financial Services Manager.[59] Gilmer, then as required by Interstate, register ed with several stock exchanges, including the New York Stock Exchange ("NYSE") as a securities representative.[60] This application stipulated that Gilmer would arbitrate "any dispute" pertaining to this agreement under the by-laws, rules, or constitutions of the organizations with which he registers.[61] After being terminated at the age of 62, Gilmer filed an age discrimination claim with the Equal Employment Opportunity Commission and filed suit charging violation of the ADEA.[62] Interstate, relying on the Federal Arbitration Act ("FAA")[63] and the arbitration agreement of the application, filed a motion to compel Gilmer to arbitrate the claim.[64] The district court, citing *Alexander*, denied the motion.[65] The Fourth Circuit Court of Appeals reversed, holding "nothing in the text, legislative history, or underlying purposes of the ADEA indicat[ed] a congressional intent to preclude enforcement of arbitration agreements."[66] The Supreme Court affirmed the Fourth Circuit because "Gilmer ha[d] not met his burden of showing that Congress, when enacting the ADEA, intended to preclude arbitration of claims under that Act."[67] Additionally, the Court discussed the difference in the two lines of cases and their application.[68]

In the aftermath of *Gilmer*, there was a split among the circuit courts in determining whether to apply *Gilmer* or *Alexander* to collective bargaining

58. *Gilmer*, 500 U.S. at 23.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. 9 U.S.C. § 1 (1990).
64. *Gilmer*, 500 U.S. at 24.
65. *Id.* The Court stated that "Congress intended to protect ADEA claimants from waiver of a judicial forum. *Id.*
66. Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 197 (4th Cir. 1990).
67. *Gilmer*, 500 U.S. at 35.
68. *Id.* The Court stated:

> First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they 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, the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representative and individual statutory rights, a concern not applicable to the present case. Finally, these cases were not decided under the FAA, which as discussed above, reflects a 'liberal federal policy favoring arbitration agreements.

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

agreements.[69] The Second,[70] Seventh,[71] Eighth,[72] and Tenth Circuits[73] applied *Alexander* to collective bargaining agreements. However, the Third,[74] and Fourth[75] Circuits applied *Gilmer* to collective bargaining agreements. While the decisions of many circuits are yet to be determined, the Eleventh Circuit was the most recent to cast its vote in an attempt to clarify this confusion.[76]

IV. INSTANT DECISION

In *Brisentine*, the Eleventh Circuit faced the issue of whether an ADA statutory claim was "subject to compulsory arbitration pursuant to an arbitration clause in a collective bargaining agreement."[77] The court noted that this area of law is addressed by two Supreme Court decisions, neither being directly on point, which reached different conclusions.[78] The Eleventh Circuit found that *Gilmer* distinguished but did not overrule *Alexander*.[79] Therefore, the court determined it should look at the distinctions of the cases to decide which *Brisentine* more closely resembled.[80]

First, the *Brisentine* court stated that *Alexander* "involved an agreement to arbitrate contractual claims that did not extend to statutory claims."[81] In *Gilmer*, however, the arbitration agreement covered both statutory and contractual claims.[82] Additionally, the Brisentine court found the provisions in the agreement stating the authority of the arbitrator over the grievance procedure were practically identical to Alexander's agreement.[83] Therefore, the court determined that the instant case more closely resembled *Alexander* than *Gilmer*.[84]

The court stated that the second distinction pertained to the nature of the agreements being individual versus collective.[85] It noted *Gilmer* dealt with individual agreements while *Alexander* focused on collective bargaining agreements.[86] It

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69. *See infra* notes 70-76 and accompanying text.
70. Tran v. Tran, 54 F.3d 115 (2nd Cir. 1995).
71. Pryner v. Tractor Supply Company, 109 F.3d 354 (7th Cir. 1997); Equal Employment Opportunity Commission v. Board of Governors of State Colleges and Universities, 957 F.2d 424 (7th Cir. 1992).
72. Varner v. National Super Markets, Inc., 94 F.3d 1209 (8th Cir. 1996).
73. Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997); Ryan v. City of Shawnee, 13 F.3d 345 (10th Cir. 1993).
74. Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996).
75. Martin v. Dana Corp., 114 F.3d 421 (3rd Cir. 1997). This opinion was removed from the bound volume after rehearing en banc was granted, and the opinion was vacated July 1, 1997.
76. *Brisentine*, 117 F.3d at 519.
77. *Id.* at 520.
78. *Id.* at 521.
79. *Id.* at 523.
80. *Id.*
81. *Id.*; *See supra* note 8 and accompanying text.
82. *Brisentine*, 117 F.3d at 524.
83. *Id.*
84. *Id.* at 523-24.
85. *Id.* at 524.
86. *Id.* at 524-25.

reasoned this was important because with collective bargaining agreements, the union represents employee-claimants in arbitration proceedings which may result in disparity of interests between an employee and union regarding prosecution of employee's individual statutory rights.[87] Furthermore, unlike individual employment contracts, this disparity of interests in collective bargaining agreements weighed against enforcement of arbitration clauses as the worker's exclusive remedy for individual statutory rights.[88] The instant case dealt with an employee under a collective bargaining agreement; therefore, the court concluded that *Brisentine* resembled *Alexander* for the second distinction.[89]

The court stated that the third important distinction between *Gilmer* and *Alexander* was whether the claim arose under the FAA.[90] *Gilmer* arose out of an FAA claim, whereas *Alexander* did not.[91] It reasoned this was important because one of the reasons *Gilmer* enforced the arbitration clause as to individual statutory rights was the FAA's liberal policy for favoring arbitration agreements.[92] Again, the court found that the instant case was more similar to *Alexander* than *Gilmer* since *Brisentine* dealt with an ADA, not an FAA claim.[93] Considering all three distinctions, the court determined that the instant case was more like *Alexander* than *Gilmer*; thus, the court followed the precedent of *Alexander*.[94]

Following the *Alexander* precedent, the court looked to three factors in deciding *Brisentine*.[95] First, the court considered whether Mr. Brisentine individually agreed to the contract with the arbitration clause.[96] Concluding that he did not individually agree to the contract with the arbitration clause, the court stated that the union agreeing for workers during collective bargaining would not count.[97] Second, the court considered whether the agreement authorized the arbitrator to decide federal statutory claims.[98] It concluded that the *Brisentine* agreement did not authorize the arbitrator to decide federal statutory claims. The court also stated that it is not sufficient that an arbitrator can decide contract claims, even when factual issues from these claims overlap with statutory claim issues.[99] Third, the court considered whether the agreement gave Mr. Brisentine the right to demand arbitration if the grievance process did not resolve to his satisfaction the federal statutory claim.[100] The court concluded that agreement did not provide Mr. Brisentine with "the right to insist on arbitration if the federal statutory claim [was] not resolved to his satisfaction."[101] From this, the court concluded that none of the three factors were

87. *Id.* at 525
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 521.
94. *Id.* at 525.
95. *Id.* at 526.
96. *Id.*
97. *Id.*
98. *Id.* at 527.
99. *Id.*
100. *Id.*
101. *Id.*

satisfied, leading to the required conclusion that the mandatory arbitration clause did not bar litigation of federal statutory claims.[102] Following this conclusion, the Eleventh Circuit overturned the district court's decision.[103]

V. COMMENT

Brisentine clarified the Eleventh Circuit's position and presented its interpretation of the legal effect of *Alexander* in light of the *Gilmer* decision. Unlike the Third and Fou.th Circuits,[104] the Eleventh Circuit decided *Brisentine* by recognizing how *Gilmer* distinguished *Alexander*[105] with regard to collective bargaining agreements not binding arbitration of federal statutory rights without "casting *Alexander* upon the judicial mulch heap."[106] Recognizing these distinctions, *Brisentine* joined the majority of the circuits which have decided this issue by adopting the *Alexander* line of precedent.[107] It also, however, hinted at the potential for the Supreme Court making future changes within this area of the law.[108]

The effect of this line of precedent is potentially both beneficial and detrimental. At first glance, protecting individual employees from unions collectively bargaining away their right to a judicial forum for federal statutory claims appears beneficial.[109] The reasoning behind this idea is the potential for a large disparity between an employee's interest and the union's interest in pursuing the statutory rights of an individual.[110] Such "disparity weigh[s] against the enforcement of arbitration clauses as the employee's exclusive remedy for individual statutory rights."[111] However, the precedent is detrimental because the union's lack of this right causes much more litigation leading to clogged federal courts.[112] Logically, this leads to higher costs for businesses who pass these expenses to customers by higher product prices.

In considering these issues, the Supreme Court used a balancing approach to determine if individuals' federal statutory rights weighed heavier than other policy issues.[113] While this seems to be a logical outcome, the other line of precedent[114] shows the Supreme Court is willing to bind individuals who knowingly waive their

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102. *Id.*
103. *Id.*
104. *See supra* notes 74 and 75 and accompanying text.
105. *Gilmer*, 500 U.S. at 33-35. *See also supra* note 68 and accompanying text.
106. *Brisentine*, 117 F.3d at 523.
107. *See supra* notes 26-41 and accompanying text.
108. *See infra* note 117 and accompanying text.
109. *Id.* This point is strongly supported by the *Alexander* line of authority.
110. *Gilmer*, 500 U.S. at 35.
111. *Alexander*, 415 U.S. at 51.
112. Between 1971 and 1991, federal court employment disputes increased twentyfold. Such an increase is a 1000% greater than all types of other civil litigation combined. *See* Hope B. Eastman & David M. Rothenstein, *The Fate of Mandatory Employment Arbitration Amidst Growing Opposition: A Call for Common Ground*, 20 EMP. REL. L.J. 595, 595 (1995).
113. Looking at *Alexander* and *Gilmer*, the Court is constantly weighing policy issues when trying to reach decisions.
114. *See supra* notes 42-55 and accompanying text.

rights to arbitrate federal statutory issues.[115] Even though the majority of circuits follow the *Alexander* precedent when dealing with collective bargaining agreements,[116] they are bound to do so.[117] However, it is clear the circuit courts do so in anticipation of changes in the imminent future.[118] Additionally, the Supreme Court has warmed considerably toward mandatory arbitration of federal statutory rights since *Alexander*.[119] In *Mitsubishi*, the court expressed the positive aspects of the use of alternative dispute resolution.[120] These views were also embraced in *Gilmer*.[121]

Accepting these views and predictions, it is not clear what approach the Supreme Court may choose. One alternative would be to overrule *Alexander* and supplant it with *Gilmer's* arbitration-friendly line of precedent. While this is possible, it is doubtful considering the Court's focus in this line of cases on the importance of weighing the tension between individual statutory rights and collective bargaining representation being not applicable to *Gilmer*.[122] In light of this factor, it is doubtful that the Supreme Court would be willing to modify *Gilmer* to include this consideration.

The Court could also modify *Alexander*. Considering the tension between individual statutory rights and collective representation,[123] the litigation overload,[124] the Court's friendlier attitude toward arbitration,[125] and additional costs such litigation causes businesses and customers, the Court could choose to create an arbitration-friendly version of *Alexander*. Such an approach would allow collective bargaining agreements to require, as a first step, the arbitration of an individual's

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115. *Id.*

116. *See supra* notes 70-73 and accompanying text.

117. The *Brisentine* court stated:

> [T]he Supreme Court has yet to address arbitration clauses in collective bargaining agreements in light of *Gilmer*. Unless and until it does so, the present case, a collective bargaining agreement case like *Alexander*, is not distinguishable from *Alexander* on that basis, either . . . It may be that the Supreme Court has cut *Alexander* back so far that it will not survive. Perhaps, but we are not convinced we are authorized to sing the dirge of *Alexander*. We will leave that to the Supreme Court[.]

Brisentine, 117 F.3d at 525; The *Pryner* Court, a Seventh Circuit decision embracing the *Alexander* line of precedent, stated:

> On balance our case is closer to *Alexander*; but is enough left of *Alexander* to compel a decision in favor of the plaintiffs? Only the Supreme Court can answer that question; and we are timid about declaring decisions by the Supreme Court overruled when the Court has not said so.

Pryner, 109 F.3d at 365.

118. *See supra* note 117 and accompanying text.

119. *Alexander*, 415 U.S. at 56-58. The *Alexander* Court expressed its opinion that arbitration, while appropriate for resolving contractual issues, is inferior for resolving federal statutory issues. *Id.* at 56.

120. *Mitsubishi*, 473 U.S. at 626-27. The Court stated, "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Id.*

121. *Gilmer*, 500 U.S. at 34, n.5.

122. *Id.* at 35. This idea is consistently emphasized in the *Alexander* line of precedent, but the Supreme Court stated that this tension was not an applicable concern in *Gilmer*. *Id.*

123. *Id.*

124. *See supra* note 112 and accompanying text.

125. *See supra* notes 119-21 and accompanying text.

federal statutory rights. This arbitration, however, would not be binding, but would probably encourage settlements since it would allow both sides to evaluate the claim based on an arbitrator's decision. If the individual was unhappy with the decision, she could then file her claim in federal court. If, however, she was willing to accept the outcome of arbitration or agree to a settlement, she would waive her right to a federal court action[126] subject to the terms of a drafted agreement. While such an approach is not free from potential problems,[127] it appears to offer a means of reducing litigation and costs while still observing individual rights to statutory claims.

Another approach would be to clarify and affirm how *Gilmer* distinguished *Alexander*. If the Supreme Court, unlike the circuit courts, feels that *Alexander* is strong and alive, it may choose to bring the Third[128] and Fourth[129] Circuits into line with a future decision. However, the most likely approach of the Supreme Court will be to continue to deny certiorari on this issue. This is likely because the split is currently either four-to-two or four-to-one.[130] With most of the courts in unison and with the strong policy of protecting individuals' federal statutory rights, the Court is not likely to accept this issue for review unless more courts follow the Fourth Circuit. Regardless of which approach the Supreme Court chooses, it is clear that *Brisentine* followed the *Alexander* line of authority bringing the Eleventh Circuit Court of Appeals into line with the majority.

VI. CONCLUSION

While *Brisentine* had two separate lines of precedent to consider, the court chose to apply the *Alexander* line of authority. With this choice, *Brisentine* joined the majority in concluding a union does not have the right to make collective bargaining agreements that bind an individual's federal statutory claims to arbitration. However, the court did recognize that *Alexander* had been substantially limited by *Gilmer*, and the Supreme Court may in the near future change its approach to collective bargaining agreements binding individuals' federal statutory claims.

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126. This would be nearly equivalent to the approach in *Gilmer* where individuals are allowed to knowingly waive their rights to litigate federal statutory issues. *See supra* notes 56-58 and accompanying text. Of course, here it would be a postdispute instead of predispute agreement.

127. One might ask what benefits this approach provides since the parties would have time to settle before trial after considering discovery results regardless. This approach would, however, provide an opportunity to make an educated decision before spending money for formal discovery and accordingly would not require the court's time. A person may also ask how does this help the employee. It provides the opportunity for a faster, less expensive resolution. Of course, if the matter goes to court, this mandatory step would only have prolonged the process and added costs.

128. *See supra* note 75 and accompanying text.

129. *See supra* note 74 and accompanying text.

130. This is because the Third Circuit case was withdrawn and vacated. Thus, it is unclear what position they may adopt. *See supra* note 75 and accompanying text.