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Matthew Gierse

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All Bound Up With No Place to Go: A Lack of Individual Alternatives to Binding Arbitration Provisions for Statutory Claims

*Tewolde v. Owens & Minor Distribution, Inc.*¹

I. INTRODUCTION

For the greater part of the twentieth century, arbitration has played a large role in resolving disputes between unions representing employees and employers.² However, during the past few decades, these employment contracts began to incorporate mandatory arbitration agreements for statutory discrimination claims, with at least one-fifth of all employees presently subject to mandatory arbitration.³ During this same period, courts began to broaden the ability of employees to waive their right to a judicial forum for statutory claims⁴; *Tewolde v. Owens & Minor Distribution* is no exception. In 2009, the U.S. Supreme Court ruled for the first time that a union may waive, under a collective bargaining agreement, an individual employee's right to a judicial forum for statutory claims.⁵ The purpose of this note is to examine the unprecedented expansion of the employees' ability to waive their right to a judicial forum for statutory claims by the U.S. District Court for the District of Minnesota.⁶

II. FACTS AND HOLDING

On October 13, 2003, Mesfin Tewolde (Tewolde), a native of Eritrea, began his employment as a "material handler" on the night shift for Owens & Minor Distribution, Inc. (Owens & Minor).⁷ After a ninety-day probationary period, Marc Johnson (Johnson), the general manager for Owens & Minor, told another employee he really liked Tewolde and that he was going to permanently hire him.⁸ As a result of his employment, Tewolde became a member of Minnesota's Health

1. Civil No. 07-4075, 2009 WL 1653533 (Dist. Minn. 2009)

2. William M. Howard, *Arbitrating Employment Discrimination Claims: Do You Really Have To? Do You Really Want To?*, 43 *DRAKE L. REV.* 255, 256-62 (1994); see also Suzette M. Malveaux, *Is it the "Real Thing"? How Coke's One-Way Binding Arbitration May Bridge the Divide Between Litigation and Arbitration*, 2009 *J. DISP. RESOL.* 77 (discussing the increase in arbitration under the FAA).

3. Malveaux, *supra* note 2, at 80-82.

4. See generally Ellwood F. Oakley III & Donald O. Mayer, *Arbitration of Employment Discrimination Claims and the Challenge of Contemporary Federalism*, 47 *S.C. L. REV.* 475, 477-78 (1996).

5. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009).

6. See *Tewolde*, 2009 WL 1653533.

7. *Id.* at *1.

8. *Id.* at *3. This message was relayed to Tewolde through Julkowski, the warehouse manager. *Id.* Julkowski told Tewolde, that even though Julkowski did not personally like Tewolde, Johnson was going to hire him anyway. *Id.*

Care Union Local 113 SEIU (Union).⁹ The Union maintained a collective bargaining agreement (CBA) with Owens & Minor, which contained a provision subjecting disputes between the Union and Owens & Minor to arbitration.¹⁰

Shortly after being hired, in January 2004, Tewolde applied for a lead material handler position.¹¹ Steve Julkowski (Julkowski), the warehouse manager for Owens & Minor, approached more senior employees for the position, mentioning that there had been problems with Tewolde's performance and English language skills.¹² Tewolde then filed complaints with Owens & Minor's human resources department, alleging that he had been subject to discrimination "based on his culture, ethnicity and English-speaking capabilities."¹³

Not long after filing his complaint, Tewolde was disciplined by Julkowski for poor work performance.¹⁴ Johnson then informed Tewolde that he had not been on the job for the necessary 120 days and did not possess the necessary skills for the lead position.¹⁵ Further, Johnson informed Tewolde that his discrimination charges were found to have no merit.¹⁶

An opening for the lead position was again posted in May 2004.¹⁷ Tewolde and another employee applied for the position, but the other employee was chosen.¹⁸ Shortly thereafter, Tewolde filed a grievance with the Union and the Minnesota Department of Human Rights (MDHR), alleging that he had not been chosen for the position as a result of his national origin.¹⁹

On May 2, 2005, Tewolde was terminated allegedly as a result of low productivity and a refusal to follow safety guidelines.²⁰ Tewolde again filed a grievance for national origin discrimination with the Union and a second grievance with the MDHR, for retaliation.²¹ Ruling on both grievances, the MDHR determined that there was probable cause of discrimination by Owens & Minor.²² However, each arbitrator ruling on the May 2004 and May 2005 grievances found that Tewolde suffered from low productivity and a high error rate; thus his grievances were denied and the arbitrator found his termination supported by just cause.²³

Tewolde then filed suit in the U.S. District Court for the District of Minnesota, alleging discrimination based on national origin in violation of the Minnesota

9. *Id.* at *2. The Union maintained a collective bargaining agreement (CBA) with Owens & Minor. *Id.*

10. *Id.* at *4-*5. Further, "the CBA provided that there 'shall be no discrimination by the Union or [Owens & Minor] against any employee because of membership or non-membership in the Union or because of the assertion of rights afforded by this Agreement.'" *Id.* at *2.

11. *Id.* at *3. Tewolde was told that he could apply so long as no employee senior to him had applied. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* Around this time, Johnson mentioned to Julkowski, that Tewolde "had turned out to be not a very good employee." *Id.*

16. *Id.*

17. *Id.* at *4. However, the posting did not state the qualifications for the job. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at *5.

22. *Id.* Tewolde also filed charges with the Equal Employment Opportunity Commission (EEOC), and as a result, received a right to sue letter. *Id.* at *6.

23. *Id.* at *5.

Human Rights Act (MHRA) and Title VII of the Civil Rights Act of 1964.²⁴ Tewolde argued that he was qualified for the lead position and was not terminated for just cause.²⁵ Owens & Minor asserted that the decision by the arbitrator precluded Tewolde from filing suit in court, and thus Owens & Minor moved for summary judgment.²⁶ The court granted Owens & Minor's motion for summary judgment²⁷ and held that a court will give the arbitrator's decision of a contractual claim "an extraordinary level of deference" in a subsequent Title VII action, and will uphold the decision when the arbitrator is acting within their scope of authority under the CBA.²⁸

III. LEGAL BACKGROUND

Title VII was enacted by Congress as a part of the Civil Rights Act of 1964.²⁹ Title VII explicitly states:

It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.³⁰

Initially, Title VII was silent on whether a judicial forum could be waived.³¹ However, this changed with the Civil Rights Act of 1991 (Act).³² The Act provided that, "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under" Title VII and various other provisions of federal law.³³ Conversely, the Act also provided that individuals may demand a trial by jury when seeking compensatory or punitive damages.³⁴

In light of these conflicting provisions, two congressional committees sought to clarify Congress' intentions.³⁵ The House Committee on Education and Labor established that the use of the ADR section in the Act was "intended to supple-

24. *Id.* at *6.

25. *Id.* at *7.

26. *Id.*

27. *Id.* at *10. The court however denied part of the motion, because a factual inference of discrimination could be drawn from the fact of the relative short time period between Tewolde filing his complaint with Owens & Minor's human resources department and his subsequent reprimand by Julkowsky. *Id.* at *11.

28. *Id.* at *9.

29. Civil Rights Act of 1964, Pub. L. No. 88-352 (1964) (codified as amended at 42 U.S.C. §§ 2000e-2000e-15 (2006)).

30. 42 U.S.C. § 2000e-2(a)(1).

31. *See generally* 42 U.S.C. §§ 2000e-2000e-15.

32. 42 U.S.C. § 1981 (2006).

33. Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071 (1991).

34. 42 U.S.C. § 1981a(c).

35. The two committees being the House Committee on Education and Labor and the House Judiciary Committee. Oakley & Mayer, *supra* note 4, at 489.

ment, not supplant, the remedies provided by Title VII.³⁶ Moreover, the Committee maintained that agreeing to arbitration does not preclude the individual from seeking relief under Title VII.³⁷

Additionally, the House Judiciary Committee stated in its report that it did “not intend for the inclusion of this section to be used to preclude rights and remedies that would otherwise be available.”³⁸ However, these two committee reports did not establish the intent of the full Congress, as no report on behalf of all of Congress was prepared.³⁹ These reports merely offered a hint at Congress’ intentions behind the ADR provision in the Act—intentions that still are not clear and have been the basis for much litigation.

A. Gardner-Denver: *Limiting Arbitration of Statutory Claims*

In reference to mandatory employment arbitration agreements for Title VII discrimination claims, the Supreme Court in *Alexander v. Gardner-Denver Co.* ruled that under Title VII, “an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.”⁴⁰ In *Gardner-Denver*, an employee filed suit under Title VII for racial discrimination after he had previously arbitrated the claim under a general arbitration clause contained in the CBA.⁴¹

In ruling that the subsequent civil claim was not precluded, the Court recognized that there are contractual rights under a CBA and independent statutory rights afforded by Congress, such as Title VII, which are both enforceable by plaintiff-employees.⁴² Moreover, the Court stated that, even though a party may waive its statutory rights to bring a Title VII claim in court as a part of a settlement agreement, “there can be no prospective waiver of an employee’s rights under Title VII.”⁴³

Additionally, the Court was skeptical of an arbitrator’s statutory knowledge, as it said that an arbitrator typically deals with the “industrial common law of the shop” and serves only the parties in a system of self-government under a CBA.⁴⁴

36. H.R. REP. NO. 102-40, pt. 2, at 97 (1991). “The Committee does not intend this section to be used to preclude rights and remedies that would otherwise be available.” *Id.*

37. *Id.* However, the committee did not make clear if the “rights and remedies” in reference were the substantive rights under Title VII or a right to a trial by jury in a judicial forum. See Oakley, III & Mayer, *supra* note 4, at 490.

38. H.R. REP. NO. 102-40, pt. 2, at 97.

39. See Oakley & Mayer, *supra* note 4, at 489-90.

40. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49 (1974); see also *Varner v. Nat’l Super Mkts., Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996) (finding absolute right to adjudicate suits under Title VII despite binding arbitration under a collective bargaining agreement).

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

42. *Id.* at 49-50.

43. *Id.* at 51; see also, *Richardson v. Sugg*, 448 F.3d 1046, 1055 (8th Cir. 2006) (holding that employee could not waive prospective claims under Title VII).

44. *Gardner-Denver*, 415 U.S. at 53; see also *McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984) (“[arbitration] cannot provide an adequate substitute for a judicial proceeding in protecting [federal statutory rights]”); Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1016 (1955) (“He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement.”).

Furthermore, arbitrators do not abide by traditional rules of evidence, and the usual trial procedures such as cross-examination, subpoenas, and testimony under oath are often scaled back or sometimes not even used.⁴⁵ Further, when granting an award, an arbitrator does not have to give the reason.⁴⁶ Because of these informalities, the Court concluded that while arbitration is an “inexpensive and expeditious means” of dispute resolution, it is unsuited for the resolution of Title VII claims.⁴⁷ However, the Court noted that a prior arbitration decision may be admitted as evidence during the subsequent judicial proceeding.⁴⁸

Furthermore, the Court found that the individual interests may be suppressed by the collective interests of the union.⁴⁹ And, even though an individual could claim that the union breached its duty of fair representation, such a breach is often difficult to prove.⁵⁰

The Court expanded on this concern of individual interests being swallowed up by the collective interests of the union in *Barrentine v. Arkansas-Best Freight System, Inc.*⁵¹ In this case, the employees filed a grievance with the union, alleging that they were not being fairly compensated by the company.⁵² After the arbitrator rejected their claim, the employees filed suit under the Fair Labor Standards Act (FLSA), and they also alleged that the union violated its duty of fair representation.⁵³ In ruling that the arbitration did not preclude the subsequent civil claim, the Court noted that a union may “decide not to support the claim vigorously” for a variety of reasons without breaching its duty of fair representation.⁵⁴ Moreover,

45. *Gardner-Denver*, 415 U.S. at 57-58; see also *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) (expressing concern relating to the procedural differences between arbitration and litigation).

46. *Gardner-Denver*, 415 U.S. at 58 (citing *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960)).

47. *Id.*

48. *Id.* at 60. The Court stated that the weight given to the decision will be determined by a variety of factors such as: whether the provision in the CBA closely conforms to the statute; “the degree of procedural fairness in the arbitral forum;” the sufficiency of the record pertaining to discrimination; and the capability of particular arbitrators. *Id.* at 60, n.21. However, such weighing of prior arbitration decisions should not take place in summary judgment, as the court may not “place the parties’ competing evidence in a balance scale when deciding whether to grant summary judgment.” *Bell v. Conopco, Inc.*, 186 F.3d 1099, 1102 (8th Cir. 1999).

49. *Gardner-Denver*, 415 U.S. at 58 n.19; see also *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337-39 (1944) (“The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group.”); *McDonald v. City of West Branch*, 466 U.S. 284, 291 (1984) (“The union’s interests and those of the individual employee are not always identical. . . . As a result, the union may present the employee’s grievance less vigorously, or make different strategic choices, than would the employee.”).

50. *Gardner-Denver*, 415 U.S. at 58 n.19; see, e.g., *Vaca v. Sipes*, 386 U.S. 171 (1967); *Humphrey v. Moore*, 375 U.S. 335, 342, 348-351 (1964). Moreover, Congress thought it was necessary to protect employees under Title VII not just from employers, but from unions as well. *Gardner-Denver*, 415 U.S. at 58.

51. 450 U.S. 728 (1981).

52. *Id.* at 730-31.

53. *Id.* at 731-33.

54. *Id.* at 742. See also *McDonald*, 466 U.S. at 291 (“[W]ere an arbitration award accorded preclusive effect, an employee’s opportunity to be compensated for a constitutional deprivation might be lost merely because it was not in the union’s interest to press his claim vigorously.”).

the Court also found that the goal of a union is to maximize compensation for all, not just one employee.⁵⁵

Further, the Court continued to be skeptical of the arbitrability of statutory claims when it echoed *Gardner-Denver* and stated that arbitrators deal mostly with “the law of the shop, not the law of the land.”⁵⁶ Moreover, the Court noted that at the time the case was decided, many arbitrators were not even attorneys.⁵⁷ Additionally, an award given by the arbitrator would normally be limited by the language of the CBA, and it would be highly unlikely that an arbitrator would award “liquidated damages, costs, or attorney’s fees.”⁵⁸

Likewise, in *McDonald v. City of West Branch*,⁵⁹ a factually similar case to *Tewelde*,⁶⁰ the Court found that arbitration decisions are not judicial proceedings and therefore a court need not give “full faith and credit” to these decisions.⁶¹ Additionally, the U.S. District Court for the District of Minnesota has found that “affording preclusive effect to arbitration decisions has the potential to undermine the Congressional intent of employee-protection statutes.”⁶²

B. *The Tide Turns: Expanding the Ability to Arbitrate Statutory Claims*

Beginning with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court began to reconsider the legality of mandatory arbitration agreements of discrimination claims and lifted many of the limitations that it had previously placed on such claims.⁶³ Revisiting earlier skepticism of the arbitral process, such as that mentioned in *Barrentine*, the Court asserted that “we are well past the time when judicial suspicion . . . of arbitral tribunals inhibited the development of arbitrations as an alternative means of dispute resolution.”⁶⁴

The Court further expanded on this view in *Gilmer v. Interstate/Johnson Lane Corp.*, where it found that in order to gain the informality and simplicity of arbitration, a party could freely trade “the procedure and opportunity for review”

55. *Barrentine*, 450 U.S. at 742 (citing *Gardner-Denver*, 415 U.S. at 58).

56. *Id.* at 743 (quoting *Gardner-Denver*, 415 U.S. at 57).

57. *Id.* (citing *Gardner-Denver*, 415 U.S. at 57); see also *McDonald*, 466 U.S. at 290 n.9 (“[M]any arbitrators are not lawyers.”); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) (“The change from a court of law to an arbitration panel may make a radical difference in ultimate result . . . Arbitrators do not have the benefit of judicial instruction on the law.”).

58. *Barrentine*, 450 U.S. at 745; see also *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) ([An arbitrator’s] “award is legitimate only so long as it draws its essence from the collective bargaining agreement.”).

59. 466 U.S. 284 (1984).

60. In *McDonald*, the plaintiff was discharged from his job and subsequently filed a grievance with the union arguing that he was fired without just cause. *Id.* at 285-86. The arbitrator found for the employer and instead of appealing the arbitrator’s decision, the plaintiff filed suit against multiple defendants in federal district court. *Id.* at 286. At trial, the jury ruled in the plaintiff’s favor against one of the defendants. *Id.*

61. *Id.* at 288. “[J]udicial proceedings [of any court of any State] shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . . from which they are taken.” *Id.* at 288-89. (quoting 28 U.S.C. § 1738 (2006)).

62. *Dillaway v. Ferrante*, No. Civ. 02-715 (JRT/JSM), 2003 WL 23109696, at *7 (Dist. Minn. Dec. 9, 2003).

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

64. *Id.* at 626-27.

available in a judicial setting.⁶⁵ Even though judicial review of arbitration awards is limited, the Court found that the review procedure is still “sufficient to ensure that arbitrators comply with the requirements of the statute.”⁶⁶ In addition, the Court found it unlikely that an age discrimination claim required more discovery than other arbitrable claims.⁶⁷ Therefore, even with limited discovery in the arbitral setting, a party could still prove discrimination.⁶⁸

Furthermore, the Court in *Gilmer* argued a matter that would become a much larger theme in subsequent cases: that “by agreeing to arbitrate . . . , a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”⁶⁹ Additionally, if a party later seeks to sue in court after that party had already waived its statutory right to a judicial forum, that party must establish that Congress intended that statutory right to be unwaivable.⁷⁰

Most importantly, the Court held that the *Gardner-Denver* line of cases⁷¹ did not apply to its decision for several reasons.⁷² First, those cases involved parties who did not explicitly waive their statutory rights to bring a claim in a judicial forum.⁷³ Second, the Court noted those cases involved a CBA where the employee was represented by a union, and there was a concern between “collective representation and individual statutory rights.”⁷⁴ Neither of these reasons applied in *Gilmer* because the agreement clearly waived the employees’ statutory right to a judicial forum.⁷⁵ Further, the case involved no tension between collective representation and individual rights, as the employee did not belong to a union.⁷⁶

The Court further hinted at the direction of its future decisions with *Wright v. Universal Maritime Serv. Corp.*⁷⁷ In *Wright*, an employee filed suit against the company under the Americans with Disabilities Act (ADA) without first arbitrating the claim under the CBA.⁷⁸ A unanimous Court found that the suit was not

65. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (citing *Mitsubishi*, 473 U.S. at 628). *Gilmer* was decided under the Age Discrimination in Employment Act (ADEA). *Id.* at 23. The individual employee not operating under a CBA explicitly agreed to arbitrate his statutory claims. *Id.* at 35.

66. *Id.* at 32 n.4 (citing *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987)).

67. *Id.* at 31.

68. *Id.*

69. *Id.* at 26 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); see also, *Richardson v. Sugg*, 448 F.3d 1046, 1055 (8th Cir. 2006) (holding that “so long as some forum is available to hear prospective claims, civil rights statutes are not violated”) (emphasis in original).

70. *Gilmer*, 500 U.S. at 26; see also, *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1465 (2009) (finding that legislative history need not be examined when the statutory text is clear).

71. *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981); *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

72. *Gilmer*, 500 U.S. at 35.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* A third reason was that the *Gardner-Denver* line of cases were not decided under the FAA, which features a more “liberal policy favoring arbitration agreements.” *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985)).

77. 525 U.S. 70 (1998).

78. *Id.* at 74-75.

precluded because the CBA did not contain an explicit waiver⁷⁹ of an employee's right to bring a statutory discrimination claim in a federal forum; any CBA requirement to arbitrate these claims "must be clear and unmistakable."⁸⁰

Since the Court found no waiver occurred, the Court refused to "resolve the question of the validity of a[n explicit] union-negotiated waiver."⁸¹ However, the Court, for the time being, did leave open the question of whether *Gardner-Denver* would survive *Gilmer*, but it noted that *Gardner-Denver* was at least important enough to protect an employee's right to a judicial forum "against [a] less-than-explicit union waiver in a CBA."⁸²

The Court finally resolved the question of the validity of an explicit union waiver in a CBA in *14 Penn Plaza LLC v. Pyett*.⁸³ Unlike *Wright*, the CBA in *Penn Plaza* contained an explicit waiver of the employees' statutory right to a federal forum for discrimination claims when the union agreed in the CBA to arbitrate these claims.⁸⁴ In a closely divided court, the majority declared that "a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate [Age Discrimination in Employment Act] claims is enforceable."⁸⁵

Moreover, the Court found that the agreed-upon decision to arbitrate "employment-discrimination claims is no different from the many other decisions made by parties in designing grievance machinery."⁸⁶ The Court noted that a union most likely would agree to such language as a result of concessions from the employer and nullifying such concessions during this "bargained for ex-

79. The CBA generally stated that "[i]t is the intention and purpose of all parties hereto that no provision or part of this Agreement shall be violative of any Federal or State Law." *Id.* at 73.

80. *Id.* at 80, 82; see also *Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994) ("[A] waiver that would have to be 'clear and unmistakable'"); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 409 n.9 (1988) ("[W]e would require 'clear and unmistakable' evidence . . . in order to conclude that such a waiver had been intended."); *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) ("[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable.").

81. *Wright*, 525 U.S. at 77.

82. *Id.* at 80 (emphasis added). The CBA in *Wright* did not contain an agreement that specifically incorporated antidiscrimination statutes. *Id.* The CBA merely contained a clause that stated that all "matters under dispute" would be subject to arbitration, which the court determined was hardly "clear and unmistakable." *Id.*

83. 129 S. Ct. 1456 (2009).

84. *Id.* at 1461. The CBA provided that

"[t]here shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, . . . or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedures."

Id.

85. *Id.* at 1474.

86. *Id.* at 1464; see *Litton Fin. Printing Div., Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190, 199 (1991); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) ("[A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.").

change” would be contrary to “one of the fundamental policies of the National Labor Relations Act—freedom of contract.”⁸⁷

The Court differentiated its opinion from the *Gardner-Denver* line of cases, and in so doing, severely limited the scope of the holding in those cases. The Court determined that the holding in *Gardner-Denver* was simply that “arbitration of contract-based claims [did not preclude] subsequent judicial resolution of statutory claims” when there was a less-than-explicit agreement to arbitrate the statutory claims.⁸⁸ Further, the Court found that the key distinction between *Gilmer* and *Gardner-Denver* was not that the agreement was signed by an individual employee or a union, but that the employee in *Gilmer* explicitly agreed to arbitrate statutory discrimination claims, whereas the employees in *Gardner-Denver* did not.⁸⁹ Therefore, the Court determined that the *Gardner-Denver* line of cases did not apply when there was an explicit “agreement to arbitrate statutory claims.”⁹⁰

The Court then undercut another basis of *Gardner-Denver*'s holding when it stated that “there is ‘no reason to color the lens through which the arbitration clause is read’ simply because” an individual’s interest may be suppressed by the collective interest of the union.⁹¹ If a union member feels his claim has been advocated “less than vigorous[ly,]” he may file a claim against the union for failing its duty of fair representation.⁹² If employees want to assert their individual statutory rights, they may do so by filing discrimination claims with the Equal Employment Opportunity Commission (EEOC) or the National Labor Relations Board (NLRB), who may then file suit on behalf of the individual.⁹³

Tewolde, as of this writing, is the most recent case to discuss the issue of a less-than-explicit waiver of an employee’s right to a judicial forum, and it threatens what little remains of *Gardner-Denver*, as the court decided the issue of

87. *14 Penn Plaza*, 129 S. Ct. at 1464 (quoting *NLRB v. Magnavox Co.*, 415 U.S. 322, 328 (1974) (Stewart, J., concurring in part and dissenting in part)).

88. *Id.* at 1468 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991)). The Court found that it was long past “judicial suspicion of the desirability of arbitration” and that the mistrust of the arbitral process, which was discussed at length in *Gardner-Denver*, forced the Court to thus limit its scope to only its core holding. *Id.* at 1470. Further, the Court determined that *Gardner-Denver* had “erroneously assumed” that one waived their substantive statutory rights when agreeing to arbitrate those statutory claims and that *Gardner-Denver* had a “distorted understanding of the compromise made when an employee agrees to compulsory arbitration.” *Id.* at 1469-70.

89. *See id.* at 1465. Additionally, the Court virtually ignored half of the basis for its holding in *Gilmer* when it stated that the law only required that “an agreement to arbitrate statutory antidiscrimination claims be ‘explicitly stated’ in the collective-bargaining agreement. *Id.* (citing *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 80 (1998)). *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

90. *14 Penn Plaza*, 129 S. Ct. at 1468-69. Since the Court so limited *Gardner-Denver*'s scope and found that it did not control, the Court asserted that the principals of *stare decisis* were not violated. *Id.* at 1469. However, if *Gardner-Denver*'s holding were any broader, the Court determined that it would then “be a strong candidate for overruling.” *Id.* at 1469 n.8.

91. *Id.* at 1472 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1991)).

92. *Id.* at 1473; *see, e.g.*, *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998).

93. *14 Penn Plaza*, 129 S. Ct. at 1473; *see also EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295-296 (2002). The Court did not shut the door completely on arguing that one waives their substantive rights under a statute by agreeing to arbitrate these claims, when it left the issue unanswered that arbitration agreements in a CBA do act as a substantive waiver, as employees not only are prohibited from bringing an individual claim, but that a union may block arbitration of those claims as well. *14 Penn Plaza*, 129 S. Ct. at 1474.

whether a less-than-explicit agreement to arbitrate statutory claims precluded a subsequent civil claim in a judicial forum.

IV. INSTANT DECISION

In *Tewolde*, the U.S. District Court for the District of Minnesota ruled that the arbitrator acted within the scope of the CBA; therefore, the court deferred to the arbitrator's ruling, which found that Owens & Minor did not discriminate against Tewolde on the basis of his national origin.⁹⁴ The court began by noting that it is clear that an agreement to arbitrate statutory claims must be explicit, and a subsequent civil claim will not be precluded by an arbitrator's decision if there was no explicit waiver in the CBA.⁹⁵ However, the court stated that it was unclear whether the arbitration of a contractual claim would bar a subsequent statutory discrimination claim in the Eighth Circuit.⁹⁶

For the proposition that an employee's right to a judicial forum cannot be waived, the court relied on a case from the Sixth Circuit, *Nance v. Goodyear Tire & Rubber Co.*,⁹⁷ which heavily cited to *Gardner-Denver*. However, the court noted that *Penn Plaza* undercut much of *Gardner-Denver* and, therefore, *Nance* no longer applied, and an arbitrator's prior ruling interpreting the CBA must be given "an extraordinary level of deference."⁹⁸

Additionally, by quoting *Penn Plaza* and *Gilmer*, the court adopted the rule that agreeing to arbitrate statutory claims does not waive an employee's right to be free from discrimination; it merely changes the forum for bringing the claim.⁹⁹ Moreover, the court further quoted *Penn Plaza* and *Gilmer* when it stated that the procedures associated with arbitration were not insufficient to protect an employee's right to bring a claim of discrimination.¹⁰⁰ Additionally, the court continued to reference *Penn Plaza* when it broadly stated that there was no weight to the claim that an employee's individual rights would be suppressed by the collective interests of the union.¹⁰¹

Further, the court determined that extreme deference should be given to an arbitral decision that interprets a CBA that explicitly references federal discrimination statutes.¹⁰² Such decisions would still be subject to judicial review.¹⁰³ However, the scope of such review would be very limited.¹⁰⁴

94. *Tewolde v. Owens & Minor Distr. Inc.*, Civil No. 07-4075, 2009 WL 1653533 at *10.

95. *See id.* at *7 (citing *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997)); *see also Gardner-Denver*, 415 U.S. at 39; *Bell*, 186 F.3d at 1101.

96. *See Tewolde*, 2009 WL 1653533 at *7.

97. 527 F.3d 539 (6th Cir. 2008).

98. *Tewolde*, 2009 WL 1653533, at *9 (quoting *Crawford Group, Inc. v. Holekamp*, 543 F.3d 971, 976 (8th Cir. 2008)).

99. *See id.* (quoting *14 Penn Plaza v. Pyett LLC*, 129 S. Ct. 1456, 1469 (2009)) ("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.")

100. *Id.* (citing *14 Penn Plaza*, 129 S. Ct. at 1471).

101. *Id.* (citing *14 Penn Plaza*, 129 S. Ct. at 1472).

102. *Id.* (citing *14 Penn Plaza*, 129 S. Ct. at 1471 n.10).

103. *See id.*

104. *Id.* A decision will generally be overturned where there is evidence of fraud, corruption, or undue means. 9 U.S.C. § 10(a) (2006).

In deferring to the arbitrator's decision, the court determined that Tewolde was not qualified for the lead position and that he could not provide enough evidence to establish a prima facie case of national origin discrimination.¹⁰⁵ However, the court did find a prima facie case of retaliation, given the proximity of Tewolde's complaint with human resources to his disciplinary action from Julkowski, which occurred the very next day.¹⁰⁶

The court concluded that it will defer to an arbitrator's previous decision on a contractual claim in a subsequent Title VII action and will uphold the arbitrator's decision when the arbitrator is arguably acting within their scope of authority under the CBA.¹⁰⁷

V. COMMENT

Tewolde signifies a considerable step in a long line of cases affirming an employee's ability in an employment contract to waive the right to a judicial forum for statutory discrimination claims.¹⁰⁸ But this step is unwarranted. The court correctly noted that the waiver of an employee's right to file a civil claim must be explicit.¹⁰⁹ Nonetheless, the court neglected to apply this rule to the facts at hand. Instead, the court was caught up in the Supreme Court's recent decision in *Penn Plaza*.¹¹⁰

Nothing in the court's opinion supports the proposition that Tewolde's right to bring a civil claim was explicitly waived by the Union.¹¹¹ The only clause of the CBA mentioned by the court that resembles an explicit waiver is a clause generally providing that there "shall be no discrimination by the Union or [Owens & Minor] against any employee because of membership . . . in the Union or because of the assertion of rights afforded by this Agreement."¹¹²

This hardly follows *Penn Plaza*, where the provision that explicitly waived an employee's right to a judicial forum specifically incorporated statutory law.¹¹³ To the contrary, this agreement clearly falls under *Penn Plaza*'s narrowed interpretation of *Gardner-Denver*, where the "arbitration of contract-based claims [does not preclude] subsequent judicial resolution of statutory claims" when there was a less-than-explicit agreement to arbitrate the statutory claims.¹¹⁴ The court in *Te-*

105. *Tewolde*, 2009 WL 1653533, at *10. To establish a prima facie case of discrimination, "an employee must show that he: (1) is a member of a protected class; (2) applied for the promotion; (3) was qualified for the promotion; and (4) lost the promotion to persons who were not members of the protected class." *Id.* (citing *Cardenas v. AT&T Corp.*, 245 F.3d 994, 998 (8th Cir. 2001)).

106. *Id.* at *11. Therefore, because of the inference, Owens & Minor's motion for summary judgment was denied for the claim of retaliation. *Id.*

107. *Id.* at *9-10. The arbitrator need only have "arguably construed and applied the CBA." *Id.* at *10 (emphasis added).

108. See *supra* note 95 and accompanying text.

109. See *supra* notes 79-82 and accompanying text.

110. See *Tewolde*, 2009 WL 1653533, at *9

111. See generally, *id.* at *1-7.

112. *Id.* at *2.

113. See *supra* note 84 and accompanying text. Cf. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 80 (1998) (finding arbitration agreement that called for arbitration for "matters in dispute" was less than explicit).

114. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1468 (2009) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 22 (1991)).

wolde erroneously assumed that *Penn Plaza* disposed of *Gardner-Denver* entirely, instead of merely narrowing the Court's holding.

Additionally, because of the Supreme Court's holding in *Penn Plaza* and its narrowed-but-still-valid holding in *Gardner-Denver*, the court in *Tewelde* was incorrect when it noted that it was an open question within the Eighth Circuit as to whether earlier arbitration of contractual issues in a CBA precludes a later civil claim of the same facts under statutory discrimination laws.¹¹⁵ The Court in *Gardner-Denver* and *Penn Plaza* clearly spoke to this issue, and therefore the Supreme Court's interpretation must control.¹¹⁶

Likewise, the Court's recent decision in *Penn Plaza* left many questions unanswered and failed to allay an employee's fear of future discrimination when it broadly stated that arbitration will adequately protect an employee's statutory rights and that arbitration should not be looked upon suspiciously.¹¹⁷ Even though the Court was justified when it stated that suspicion should not inhibit the further development of arbitration, and despite the Court's generalized dismissal of arbitration criticism,¹¹⁸ further suspicions still remain for the use of arbitration for statutory discrimination claims.

The Court attempted to play down the significance of the loss of a judicial forum by stating that a union's decision to arbitrate statutory claims is "no different from . . . other decisions made by parties in designing grievance machinery."¹¹⁹ However, the Court failed to see that agreeing to waive employees' statutory right to a judicial forum under Title VII is inherently different from any other provision within the grievance machinery.

Unlike other contractual provisions which affect a group of employees, such as "no-strike clauses," Title VII rights have always been seen as personal.¹²⁰ Furthermore, unlike these other collective provisions, a union is much more likely not to vigorously assert—and may sometimes even ignore—an individual's claim of discrimination under Title VII because the goal of a union is to maximize compensation for all, not just for a single employee.¹²¹ A union may forfeit an individual's discrimination claim if the resources needed to arbitrate the claim could instead obtain increased benefits for the whole.¹²² Further, if a union does fail to

115. *Tewelde*, 2009 WL 1653533 at *7.

116. *14 Penn Plaza*, 129 S. Ct. at 1468-69; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

117. *14 Penn Plaza*, 129 S. Ct. at 1470, 73.

118. *Id.*; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

119. *14 Penn Plaza*, 129 S. Ct. at 1464.

120. *See Gardner-Denver*, 415 U.S. at 44; *Dillaway v. Ferrante*, No. Civ. 02-715 (JRT/JSM), 2003 WL 23109696, at *7 n.6 (D. Minn. Dec. 9, 2003) ("Employees may waive some rights through the collective bargaining process, but only those rights considered collective, such as the right to strike."); Stephen A. Plass, *Arbitrating, Waiving and Deferring Title VII Claims*, 58 BROOK. L. REV. 779, 793 (1992).

121. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987), *superseded by statute*, 28 U.S.C. 1468 (2006), *as recognized in Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382-383 (2004); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 742 (1981); Plass, *supra* note 120, at 814.

122. *Barrentine*, 450 U.S. at 742.

vigorously assert an employee's statutory claim, proving that a union failed in its duty of fair representation is very difficult to establish.¹²³

The Court in *Penn Plaza* dismissed this argument by finding that individual employees have an alternative to arbitrating a statutory claim through the union: file a claim with the EEOC and have it sue the employer on the individual's behalf.¹²⁴ However, it does not take much before one sees the trouble with this "alternative." Despite its optimism, the Court failed to see that the EEOC rarely—if ever—files suit on behalf of individuals.¹²⁵

For example, during the 2000 fiscal year, 79,896 claims were filed with the EEOC.¹²⁶ Even though the EEOC found merit in 8,248 of these claims, it filed 291 lawsuits or intervened in 111 others a miniscule percentage of 0.5% of all of the claims and five percent of those found to have merit.¹²⁷ Further, a total of 21,032 employment discrimination suits were filed during this same period, making the EEOC a party in only two percent of all employment discrimination claims.¹²⁸ This hardly is an adequate alternative.

With the limited resources of the EEOC,¹²⁹ it is virtually impossible for individuals, whose claims are precluded by prior arbitration decisions, to have suits filed on their behalf by the EEOC. Therefore, those individuals whose unions had failed to arbitrate their claim, and who failed to win the EEOC lottery, are left out in the cold with nothing but perhaps a "right to sue" letter from the EEOC.¹³⁰ This is of no use when individuals are precluded from the judicial system and are left with no remedy for their discrimination. This is hardly the outcome Congress sought when it passed the Civil Rights Acts of 1964 and 1991.¹³¹

Suspicion is further raised by the manual the arbitrator in *Gilmer* used, which stated that "[a]rbitrators are not strictly bound by case precedent or statutory law. Rather, arbitrators are guided in their analysis by the underlying policies of the law and are given wide latitude in interpreting legal concepts."¹³² This clearly supports the Supreme Court's earlier suspicion of arbitrators as deciders of statu-

123. *Gardner-Denver*, 415 U.S. at 58 n.19; *Barrentine*, 450 U.S. at 742 (finding that unions fail to adequately arbitrate claims for a variety of reasons without breaching their duty of fair representation).

124. *14 Penn Plaza*, 129 S. Ct. at 1473.

125. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 290 (2002).

126. *Id.*; Richard T. Seymout, *Recent Developments in Arbitration*, SJ037 ALI-ABA 739, 748 (2003).

127. *Waffle House*, 534 U.S. at 290. Moreover, during a nine month period spanning October 2004 to June 2005, the EEOC filed suit only 144 times out of over 56,000 charges filed; a percentage of less than 0.3%. *EEOC: Nine Month Report Shows 'Significant' Drop in Discrimination Charges Filed With EEOC*, 169 Daily Lab. Rep. (BNA), at A-6 (Sept. 1, 2005). The fact that the EEOC filed suit only 144 times was especially significant given the fact that it had only filed suit 123 times a year earlier. *Id.* Even with this "increase," it furthers the point that the percentage of all discrimination suits filed by the EEOC remains miniscule. Even with the increase in suits brought in 2004-2005 to 144, the percentage of suits filed out of the total number of meritorious claims actually decreased from 0.5% in 2000 to 0.3% in 2004-2005.

128. *Waffle House*, 534 U.S. at 290.

129. See Seymout, *supra* note 126, at 748.

130. A "right to sue" letter is "a notice . . . issued in accordance with the law which gives the charging party 90 days in which to file a lawsuit on his or her own behalf." U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC'S CHARGE PROCESSING PROCEDURES, http://archive.eeoc.gov/charge/overview_charge_processing.html (last visited Mar. 16, 2010).

131. 42 U.S.C. §§ 2000e-2000e-15 (2006); § 1981a(c) (2006).

132. Howard, *supra* note 2, at 275 (quoting SECURITIES INDUSTRY CONFERENCE ON ARBITRATION, THE ARBITRATOR'S MANUAL 26 (1992)).

tory claims,¹³³ when it found that arbitrators deal with “the law of the shop, not the law of the land.”¹³⁴

Moreover, allowing an arbitrator to ignore statutory law undermines the Court’s proposition that employees are not waiving their substantive right to be free from discrimination, but are merely agreeing to a different forum.¹³⁵ Even though such language may not be in every arbitrator’s manual and may not directly lead to a waiver of an employee’s statutory rights under Title VII, it plainly leaves the door open for such substantive waivers to occur when an arbitrator is given the authority to blatantly disregard precedent or statutory law for broad policy-based determinations.

No employer will be deterred from engaging in discrimination under a system that allows for broad arbitral discretion and ignores adherence to the rule of law.¹³⁶ Employers could begin to justify their current discriminatory conduct by rationalizing that the circumstances are somehow different from past conduct, something that would be more difficult to accomplish under a system that adheres more to precedent and bright-line rules. Likewise, if an arbitrator did ignore the rule of law, it is extremely difficult to have that arbitrator’s decision overturned by an appellate court, in that a decision will generally only be overturned under very limited circumstances.¹³⁷

133. *Barentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 743 (1981). See *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) (“The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result.”); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) (“Arbitrators have no obligation to the court to give their reasons for an award.”); *McDonald v. City of West Branch*, 466 U.S. 284, 290-91 (1984) (“[The] decisions in *Barentine* and *Gardner-Denver* compel the conclusion that [arbitration] cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard. As a result, according preclusive effect to an arbitration award in a subsequent § 1983 action would undermine that statute’s efficacy in protecting federal rights.”); *Shulman*, *supra* note 44.

134. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974) (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-83 (1960)).

135. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1465, 1469 (2009).

136. Moreover, “[A]rbitration is like Christmas for [employers]” in that they “stack the deck in their favor” when they develop arbitration rules and agreements. *Seymour*, *supra* note 127 at 749. Likewise, many employers see arbitration agreements as “an effective forum-shifting device to remove the vast majority of discrimination suits from potential runaway juries, to arbitrators.” MERRICK T. ROSSEIN, *EMPLOYMENT DISCRIMINATION LAW AND LITIGATION* § 13:21 n.2 (7th ed. 2007).

137. 9 U.S.C. § 10(a) (2006); see also *Hall Street Assoc. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008) (holding that §§ 10 and 11 provide the exclusive regimes for review under the FAA, but stricter review may be implemented under state statutory or common law). In the Eighth Circuit, an arbitrator’s award may be subject to two additional hurdles on review. “First, an arbitrator’s award can be vacated if it is completely irrational, meaning it fails to draw its essence from the agreement. . . . The second judicially created standard for vacating an arbitration award is when the award evidence[s] a manifest disregard for the law.” *Williams v. Nat’l Football League*, 582 F.3d 863, 883 (8th Cir. 2009) (quoting *Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 788 (8th Cir. 2003)). Even though *Williams* was decided after *Hall Street*, *Williams* oddly enough makes no mention of *Hall Street* or the fact that *Hall Street* ruled that manifest disregard may not be a separate level of review. “Maybe the term ‘manifest disregard’ was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them.” *Hall Street*, 552 U.S. at 585.

Further suspicion is the result of a study done by the General Accounting Office (GAO) in 1994, which found that the vast majority of arbitrators were, on average, sixty-year-old, highly educated white males.¹³⁸ Such uniformity goes against the statutory provisions put in place to ensure that jurors in federal court are selected “at random from a fair cross section of the community.”¹³⁹ Such safeguards seek to ensure that one has the right to an impartial finder of fact, something that may be difficult to find in the arbitral forum.

In the Supreme Court’s race to support the expansion of arbitration, specifically over statutory claims, it is blinding itself to the effect that closing the door to a judicial forum has over these individual claimants. It appears that the Court, in the spirit of disregarding the “unwarranted suspicions”¹⁴⁰ of the past, is all too willing to ignore the prospect that an individual may be left without an adequate remedy. If courts continue to expand the ability of a third party to waive an individual’s right to a judicial forum and ignore the prospect that insufficient alternatives may leave an individual locked out of a judicial forum, then perhaps the individual is waiving more than the forum, but the right to be free of statutorily proscribed discrimination.

VI. CONCLUSION

The ruling in *Tewolde* creates a concern that future courts may see this decision as justification to find that an employee’s right to a judicial forum may be waived, even when the language in the CBA purporting to support that conclusion is less than explicit. This is particularly worrisome after *Penn Plaza*, as a third party, such as a union, may now waive the right of one of its members to sue in a judicial forum.

It is further concerning that courts will continue to uphold the waiver of individual rights while ignoring the fact that those rights may be supplanted by the collective interests of a union. Additionally, courts may continue to ignore the fact that an individual is left with virtually no alternative remedy if a union refuses to adequately arbitrate a claim. If arbitrators continue to have the ability, such as in *Gilmer*, to ignore precedent and statutory law in favor of the circumstances, then individuals will involuntarily have their substantive right to be free of discrimination waived by a third party in favor of efficiency and cost-effectiveness.

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138. Howard, *supra* note 2, at 276 (citing UNITED STATES GENERAL ACCOUNTING OFFICE REPORT, EMPLOYMENT DISCRIMINATION: HOW REGISTERED REPRESENTATIVES FARE IN EMPLOYMENT DISCRIMINATION DISPUTES, GAO/HEHS-94-17 (March 1994)). “[O]f the 50,000 neutrals on American Arbitration Association panels, only 6% are women and of members of the National Academy of Arbitrators (consisting of only labor arbitrators), an estimated 7% are women.” *Id.* (citing Dorissa Bolinski & David Singer, *Why Are So Few Women in the ADR Field?*, 48 ARB. J. 61, 61 (1993)).

139. 28 U.S.C. § 1861 (2006); *see also* Howard, *supra* note 2, at 276.

140. These “suspicions” merely resulted in an arbitrator’s decision being used as evidence in a judicial forum, not prohibiting access to the judicial forum. Even with these “suspicions,” parties would still be encouraged to reap the benefits of the less adversarial system of arbitration, such as efficiency and cost-effectiveness.

