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Union Refusal to Arbitrate: Pyett's Unanswered Question

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Union Refusal to Arbitrate: *Pyett*'s Unanswered Question

Kravar v. Triangle Services, Inc.[1]

I. INTRODUCTION

14 Penn Plaza LLC v. Pyett has dramatically altered the collective bargaining landscape in the United States.[2] After thirty years of applying *Alexander v. Gardner-Denver*'s[3] holding to invalidate a union-negotiated agreement to arbitrate federal statutory claims, the U.S. Supreme Court changed course. In *Pyett*, the Court held that as long as agreement between a union and an employer to arbitrate federal statutory claims is "clear[] and unmistakabl[e]," an employee can be required to arbitrate his or her federal statutory claims under a collective bargaining agreement.[4] The *Pyett* Court declined to address how courts should handle an employee's federal statutory claim when the employee's union has refused to arbitrate his grievance.[5] Commentators and courts have proposed three distinct theories as to how this situation should be handled.

The *Pyett* Court suggested that the duty of fair representation adequately protects an employee's interests when a union decides not to arbitrate his claim.[6] This approach is an insufficient safeguard to an employee's meritorious claim because it imposes on an employee the extra substantive burden of proving a breach of the duty of fair representation in order to have his or her case heard. Furthermore, a union may decline to arbitrate a meritorious claim without breaching its duty of fair representation.

It has also been suggested that giving an individual employee the right to demand arbitration would adequately protect his interest against the union's independent interest. However, this theory is unworkable in practice because there is no way to balance the costs of arbitration and the discretionary interests of the union in a way that would justify allowing a union and an arbitrator to agree to arbitrate an individual employee's federal statutory claims.

Kravar v. Triangle Services, Inc., provides the most workable solution to date, balancing competing union, employer, and employee interests.[7] *Kravar* gives an employee access to federal court, as a matter of right, in the face of union refusal to arbitrate his or her federal statutory claims.[8] Although the Federal District Court for the Southern District of New York offered little discussion of the policy behind its new rule, there are sound policy rationales underlying it.[9]

1. No. 1:06-cv-07858-RJH, 2009 WL 1392595 (S.D.N.Y. May 19, 2009) (mem) (5-4 decision).
2. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1474 (2009).
3. Alexander v. Gardner-Denver Co., 415 U.S. 36, 59-60 (1974).
4. *Pyett*, 129 S. Ct. at 1463, 1474 (alteration to original).
5. *Id.*
6. *Id.* at 1473.
7. *Kravar*, 2009 WL 1392595.
8. *Id.* at *3.
9. *See id.*

II. FACTS AND HOLDING

Triangle Services (Triangle) employed Eva Kravar as a daytime cleaner.[10] Kravar was a sixty-two year-old Slovakian woman who had worked for Triangle for over twenty-five years at the headquarters of Bloomberg L.P., a client of Triangle.[11] Triangle was a union contractor, subject to a collective bargaining agreement (CBA) with Kravar's union.[12] In August of 2003, Kravar was diagnosed with colon cancer.[13] She underwent extensive abdominal surgery, including a right hemicolectomy in which the right portion of her colon was removed.[14] After the surgery, she was hospitalized for over a week and was unable to return to work for two more months.[15]

In February of 2005, Triangle told Kravar that because it was moving its headquarters to a new location, she would no longer have a job at the current location.[16] She was also told that all of the cleaning employees that currently worked at what was to be Bloomberg's new location would become new hires and could be paid less than the more senior employees at Bloomberg's current location.[17] Bloomberg moved its headquarters to a new location.[18] Seven employees, including Kravar, were transferred from Kravar's workplace to the new Bloomberg location.[19]

On March 25, 2005, Triangle offered Kravar a nighttime cleaning position at her former rate of pay.[20] Approximately ninety-five percent of Triangle's cleaning jobs were nighttime positions, and nighttime positions were "more physically demanding than daytime work."[21] When Triangle offered Kravar the nighttime position, it warned that if she did not take the position, she would be terminated.[22] Kravar responded to Triangle's offer with a note from her surgeon, stating that she had "weakness of her anterior abdominal wall and that heavy work or heavy lifting would be injurious to her health."[23] On both the 2nd & 3rd of May 2005 "Kravar attempted to work night shifts at other buildings serviced by Triangle."[24] Kravar was able to perform light work, but "could not vacuum or perform heavy lifting."[25] Kravar was then assigned to work "standby for regular, daytime workers who were sick or on vacation."[26] Triangle's day operations manager promised Kravar that he would look for a daytime position for her, but he did not take any

10. Kravar v. Triangle Servs., Inc., No. 1:06-cv-07858-RJH-FM, 2009 WL 805807, at *1 (S.D.N.Y. Mar. 27, 2009) (mem).
11. *Id.*
12. *Id.*
13. *Id* at *2.
14. *Id.*
15. *Id.*
16. *Kravar*, 2009 WL 805807, at *2.
17. *Id.*
18. *Id.* at *1.
19. *Id.* at *2.
20. *Id.*
21. *Id.*
22. *Kravar*, 2009 WL 805807, at *2.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at *3.

steps to find her a position.[27] Triangle finally terminated Kravar's employment on August 31, 2005.[28]

The CBA between Triangle and Kravar's union contained a nondiscrimination clause that broadly prohibited discrimination and required union members to submit all claims of discrimination to binding arbitration under the agreement's grievance and dispute resolution procedure.[29] The CBA set out a two-step grievance procedure for perceived violations of the anti-discrimination provision: "The grievance may first be taken up between the representative of management and a representative of the Union. If it is not settled, then it may be filed for arbitration."[30] The CBA also had a provision stating that "[a]ll Union claims are brought by the union alone and no individual shall have the right to compromise or settle any claim without the written permission of the Union."[31]

Kravar gave a sworn statement in which she told her union representative that she wished to arbitrate her disability claims.[32] She also stated that, in response, the union representative laughed and told her that she could not do so because the union would most likely dismiss her complaint.[33] The union representative testified in deposition that he did not recall speaking with Kravar or Triangle about Kravar's medical condition. He also testified that Kravar's grievance was dismissed prior to arbitration because Triangle offered Kravar a permanent night position.[34] Triangle contended that Kravar never claimed through grievance that her rights had been violated under the Americans with Disabilities Act (ADA).[35] The only evidence that Triangle offered to support this contention was a grievance form filled out by the union representative that did not describe any of the claims that Kravar demanded to arbitrate.[36]

After her termination, Kravar filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) against Triangle.[37] Three weeks later she was removed from the payroll.[38] The EEOC issued a determination finding reasonable cause to believe that Triangle failed to provide Kravar with an

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27. *Id.*

28. *Id.*

29. *Kravar*, 2009 WL 1392595, at *1. The nondiscrimination clause stated in relevant part:

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

Id.

30. *Id.* at *2.

31. *Id.*

32. *Id.* at *3.

33. *Id.*

34. *Id.*

35. *Kravar*, 2009 WL 1392595, at *3

36. *Id.*

37. Kravar v. Triangle Servs., Inc., No. 1:06-cv-07858-RJH-FM, 2009 WL 805807, at *3 (S.D.N.Y. Mar. 27, 2009) (mem).

38. *Id.*

adequate accommodation for her disability.[39] Based on these findings, the EEOC issued Kravar a "right to sue" letter, and Kravar filed suit against Triangle in the U.S. District Court for the Southern District of New York.[40] Triangle moved to compel arbitration of Kravar's claims under the CBA and the court denied the motion.[41] The court was not in a position to analyze Kravar's claims in the context of Pyett because the denial occurred almost two years before *Pyett*[42] was decided.[43] Triangle then moved for summary judgment and the court granted in part and denied as to Kravar's ADA claim on March 17, 2009.[44] *Pyett* was decided on April 1, 2009 and the *Kravar* court stayed the case to request a supplemental briefing on the effect of *Pyett*.[45] The Federal District Court for the Southern District of New York held that because the CBA operated to preclude Kravar from raising her disability claims in any form, the CBA operated as a waiver of Kravar's substantive ADA rights, and as such, could not be enforced.[46]

III. LEGAL BACKGROUND

Required arbitration of federal statutory rights has been a controversial subject in labor and employment law for over thirty years. To understand the importance of the holding in *Krava,* it is helpful to consider the Supreme Court's development of rules pertaining to agreements to arbitrate statutory rights. The first of these cases was decided in 1974. In *Alexander v. Gardner-Denver Co.*, the Supreme Court took the position that arbitral procedures were adequate to resolve contractual disputes, but that such procedures were "comparatively inappropriate for the final resolution of rights created by Title VII."[47] This reasoning was based on the perception of an arbitrator's role as one which effectuates the "intent of the parties," but not the "requirements of enacted legislation."[48] According to the *Gardner-Denver* Court, the "resolution of statutory or constitutional issues [is] a primary responsibility of the courts," and the arbitrator's realm was "the law of the shop, not the law of the land."[49] The Supreme Court's primary concern in *Gardner-Denver* is expressed in a rather succinct sentence: "It is uncertain whether any minimal savings in judicial time and expense would justify the risk to vindication of Title VII rights."[50]

39. *Id.* at *3, *10. The EEOC also determined that there was reasonable cause to believe Triangle had discriminated against Kravar based on national origin and that Triangle had retaliated against Kravar by eliminating her benefits after she filed the EEOC charge. *Id.* The national origin claim and the retaliation claim were dismissed by summary judgment. *Id.* at *10.

40. *Kravar,* 2009 WL 805807, at *3.

41. *See* Kravar v. Triangle Servs., Inc., No. 1:06-cv-07858-RJH, 2009 WL 5013956 (S.D.N.Y. May 11, 2007) (trial motion to compel arbitration).

42. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009).

43. *See Kravar*, 2009 WL 5013956 (S.D.N.Y. May 11, 2007) (trial motion to compel arbitration).

44. Kravar v. Triangle Servs., Inc., No. 1:06-cv-07858, 2009 WL 1392595, at *3 (S.D.N.Y. May 19, 2009) (mem).

45. *Id.*

46. *Id.*

47. Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974).

48. *Id.* at 56-57

49. *Id.* at 57.

50. *Id.* at 59.

Underlying the Court's decision was the conflict of interest between a collective bargaining unit and an individual employee. The Court distinguished CBA disputes from Title VII claims in that CBAs concern a "majoritarian process," while Title VII deals with an "individual's right to equal employment opportunities."[51] The court believed that this difference, coupled with a "union's exclusive control over the manner and extent to which an individual grievance is presented," could lead the interests of an individual employee to be "subordinated to the collective interests of the bargaining unit."[52] The *Gardner-Denver* Court's solution to this concern was to allow the employee to pursue his remedy under the grievance arbitration clause of a collective bargaining agreement *and* his separate cause of action under Title VII.[53] *Gardner-Denver* has received negative treatment in the subsequent cases discussed in this note, but it has never been directly overruled. Though it has been distinguished thoroughly, it can be said with relative certainty that the proposition that an employee may never *waive* his *substantive* Title VII rights is still as good today as on the day it was decided.[54] The rest of the opinion, however, has been thoroughly distinguished, and it appears that after *Pyett*,[55] *Gardner-Denver* may no longer be good law. The first of these important distinguishing cases is *Gilmer v. Interstate/Johnson Lane Corp.*[56]

Gilmer involved an arbitration clause in a securities registration application purporting to cover "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative."[57] The Supreme Court addressed many of what it characterized as misconceptions in the *Gardner-Denver* opinion, stating:

> [M]istrust of the arbitral process, however has been undermined by our recent arbitration decisions . . . We 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.[58] [S]tatutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.[59]

The Court reasoned that "by agreeing to arbitrate a statutory claim, an *individual* does not forgo the substantive rights afforded by the statute."[60] Instead, it submits that statutory claim not to a judicial forum, but rather to an arbitral forum.[61] The Court found that parties who have made an agreement to arbitrate

51. *Id.* at 51.
52. *Id.*
53. *Gardner-Denver*, 415 U.S. at 51.
54. *Id.*
55. 129 S. Ct. at 1456 (2009).
56. 500 U.S. 20 (1991).
57. *Id.* at 23.
58. *Id.* at 34 (citations omitted) (internal quotations omitted)
59. *Id.* at 26 (emphasis added).
60. *Id.* at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).
61. *Gilmer*, 500 U.S. at 26.

statutory claims should be held to that agreement unless Congress intended that no such waiver be allowed.[62] The Court further reasoned that Congress, when enacting the Age Discrimination in Employment Act (ADEA), did not intend to provide any protections against a waiver of judicial forum.[63] *Gilmer* also made it clear that "an individual ADEA claimant subject to an arbitration agreement covering such an ADEA claim, though unable to sustain a private judicial action, will still be free to file a charge with the EEOC."[64] The Court found that arbitration offers an adequate framework for protection of statutory rights under the ADEA.[65] "So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[66] The Court found that, though "judicial review of arbitration is...limited,...it is sufficient to ensure that arbitrators comply with the requirements of the statute."[67]

After the *Gilmer* decision, most courts developed a distinct line between required arbitration of federal statutory claims under an individual employment contract and a CBA. Courts applied *Gilmer* to private employment contracts, but continued to apply *Gardner-Denver* in cases involving a CBA.[68] Judge Posner stated in *Pryner v. Tractor Supply Co.* that "[t]he conservative reading of *Gilmer* is that it just pruned some dicta from [*Gardner-Denver*]—and it certainly cannot be taken to hold that collective bargaining agreements can compel the arbitration of statutory rights."[69] There are two main reasons why courts have continued to apply *Gardner-Denver* to CBA cases.[70] First, courts believe that to waive one's right to judicial forum for such claims, one must individually agree to this provision.[71] Second, the courts are concerned that because the union has exclusive control over the arbitration process, the union could deny the individual vindication of his or her statutory rights.[72]

However, after the *Gilmer* decision, the Fourth Circuit extended *Gilmer*'s holding to arbitration of federal statutory claims under CBAs in *Austin v. Owens-Brockway Glass Container, Inc.*[73] In that case, the Fourth Circuit reasoned that the "union has the right and duty to bargain for the terms and conditions of employment" under the National Labor Relations Act (NLRA), and the "right to arbitrate is a term or condition of employment."[74] Therefore, the union had the

62. *Id.*
63. *Id.* at 29.
64. *Id.* at 28.
65. *Id.* at 30.
66. *Id.* at 28.
67. *Gilmer*, 500 U.S. at 31-32 & n.4.
68. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123-24 (2001) (holding that *Gilmer* dictates that an arbitration agreement in a private employment contract is enforceable in regard to federal statutory claims); *but see* Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 749-52 (1981) (holding that *Gardner-Denver* dictates that individual federal statutory rights cannot be required to be arbitrated under a collective bargaining agreement).
69. 109 F.3d 354, 365 (7th Cir. 1997).
70. Paul Salvatore & John F. Fullerton, III, *Arbitration of Discrimination Claims in the Union Setting: Revisiting the Tension Between Individual Rights and Collective Representation*, 14 LAB. L. 129, 137 (1998).
71. *Id.*
72. *Id.*
73. 78 F.3d 875, 879 (4th Cir. 1996).
74. *Id.* at 885.

right and duty to bargain for this right.[75] The court acknowledged that because this case arose out of a CBA, "there may be concern for any tension between collective representation and statutory rights."[76] The court disposed of this concern by stating that Austin was a "party to a voluntary agreement" in which she specifically "agreed to the arbitration of her statutory complaints" and the court further relied on the "federal labor law policy encouraging arbitration of labor disputes as expressed in the *Steelworkers Trilogy*."[77]

The Supreme Court did not initially embrace the Fourth Circuit's reasoning in *Owens-Brockway Glass*. The Court reigned in the Fourth Circuit's application of *Gilmer*'s decision to collective bargaining agreements by suggesting in *Wright v. Universal Maritime Service Corp.*, that when a cause of action arises, not out of the collective bargaining agreement, but rather out of the meaning and application of a federal civil rights statute, a decision by an arbitrator may not be appropriate.[78] The Court held that a waiver of judicial forum for employees' statutory rights must be "explicitly stated" in the agreement to be enforceable. The Court addressed the highly contentious provision of the ADA, which stated that the use of dispute resolution methods, including arbitration, is encouraged in resolving disputes under the relevant section.[79] The Court concluded that this provision meant that when there had been a "waiver of employee rights to a federal judicial forum" that is "clear and unmistakable," it may be appropriate to submit such a claim to arbitration.[80] If there had been no such waiver, then it would be inappropriate to compel arbitration.[81] The *Wright* Court found that there was no such "clear and unmistakable" waiver in the collective bargaining agreement at issue in the case, and did not reach the question of whether such a waiver would be enforceable.[82]

The Supreme Court finally reached the question of whether such a "clear and unmistakable" waiver was enforceable in *Pyett*.[83] In the wake of *Wright*, Second Circuit precedent had evolved into the principle that "even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable."[84] The Court granted *certiorari* to answer this question, left unresolved by *Wright*. The majority reasoned that the rights provided by the ADEA could not be waived in any instance, but submitting these claims to arbitration did not constitute a waiver of those rights.[85] The Court did not explicitly overrule *Gardner-Denver* or *Gilmer*, but instead distinguished

75. *Id.*

76. *Id.* at 883 n.2.

77. *Id*; *see* e.g., (Steelworker's Trilogy) United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Am. Mfg., Co., 363 U.S. 564 (1960).

78. 525 U.S. 70, 78-82 (1998).

79. *Id.* at 82 n.2.

80. *Id.*

81. *Id.*

82. *Id.* at 82.

83. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1463 (2009).

84. *See* 498 F.3d 88, 91 (2d Cir. 2007), *cert. granted*, 14 Penn Plaza LLC v. Pyett, 552 U.S. 1178 (2008), *rev'd*, 129 S. Ct. 1456 (5-4 decision) (2009); *see also* Rogers v. New York Univ., 220 F.3d 73 (2d Cir. 2000).

85. *Pyett*, 129 S. Ct. at 1469-70.

the two cases.[86] *Gardner-Denver* and its progeny, Justice Thomas explained, were limited to instances in which the "agreement did not cover [federal] statutory claims."[87] In the *Gardner-Denver* line of cases, the agreements at issue simply did not cover statutory claims.[88] The Court concluded that this line of cases had nothing to do with the arbitrability of federal statutory claims, but they were instead decided on the scope of the contract.[89] Therefore, *Gardner-Denver* shed no light on the issue of whether an arbitration agreement that expressly covered federal statutory claims would be enforceable.[90] The Court, in limiting *Gardner-Denver* to its facts, recognized that *Gardner-Denver* was not decided solely on its facts.[91] The *Pyett* Court dismissed the rest of the *Gardner-Denver* Court's concerns as "mistrust of the arbitral process."[92] The Court stated "[t]hese misconceptions have been corrected . . . [and] there is no reason to assume at the outset that arbitrators will not follow the law."[93] The Court held "that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law."[94] However, the Court refused to answer the question "of whether [a] CBA allows [a u]nion to prevent [employees] from effectively vindicating their federal statutory rights in the arbitral forum."[95] Instead, the Court reserved this question for a later date because any decision in that case would have been speculative.[96] Justice Souter surmised in his dissent that "the majority opinion may have little effect, for it explicitly reserves the question whether a CBA's waiver of a judicial forum is enforceable when the union controls access to and presentation of employees' claims in arbitration . . . which is usually the case . . . ."[97]

Clearly, Justice Souter's speculation that the majority opinion would have little effect was incorrect, as lower courts have not been hesitant to apply *Pyett*'s holding to union-negotiated CBAs. However, lower courts have been left with the challenge of determining the applicability of its holding. Many early decisions citing *Pyett* held that the "clear and unmistakable" standard is synonymous with an "express" waiver. In *Warfield v. Beth Israel Deaconess Medical Center, Inc.*,[98] neither the contract nor the arbitration clause at issue made any mention of "em-

86. *Pyett*, 129 S. Ct. 1456 *passim*.

87. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1467 (2009) (5-4 decision) (Souter, J., dissenting); *see* Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 744 (1981) (reasoning that "[a]n arbitrator's power is both derived from, and limited by, the collective-bargaining agreement . . . so as to effectuate the collective intent of the parties."); *See also* McDonald v. City of W. Branch, Mich., 466 U.S. 284, 290-91 (1984) (stating that "because an arbitrator's authority derives solely from the contract, an arbitrator may not have the authority to enforce" a federal, statutory claim when that provision is left unaddressed by the arbitration agreement (citation omitted)).

88. *Pyett*, 129 S. Ct. at 1467.

89. *Id.* at 1468.

90. *Id.* at 1469.

91. *Id.*

92. *Id.* at 1469-70.

93. *Id.*

94. *Pyett*, 129 S. Ct. at 1471.

95. *Id.* (internal quotation marks omitted).

96. *Id.*

97. *Id.* at 1480 (5-4 decision) (Souter, J., dissenting) (citation omitted) (internal quotation marks omitted).

98. 910 N.E.2d 317, 326-27 (Mass. 2009).

ployment discrimination statutes or claims."[99] The district court held that because of the absence of "reference to employment discrimination statutes or claims," the "terms of the agreement were insufficiently clear" to compel federal statutory civil rights claims.[100]

In *Shipkevich v. Staten Island Univ. Hosp.* the collective bargaining agreement at issue contained a nondiscrimination clause, which made no mention of Title VII claims.[101] The district court held that this nondiscrimination provision did not satisfy *Pyett*'s "clear and unmistakable" waiver standard, and, therefore, the employee was not required to arbitrate his Title VII claims.[102] The nondiscrimination clause in the collective bargaining agreement at issue in *Markell v. Kaiser Foundation Health Plan of Northwest* went one step further than *Shipkevich*, stating that the employer and union will each "fully comply with applicable laws and regulations regarding discrimination."[103] The district court found that this reference to "applicable laws and regulations" was insufficient to satisfy the "clear and unmistakable" standard to require the arbitration of statutory claims.[104] The court went on to assert that where an arbitration agreement authorized only contract-based claims (as opposed to statutory claims) "the preclusive effect of an arbitral decision on subsequent federal litigation of statutory claims remains governed by *Gardner-Denver* and its progeny."[105]

The collective bargaining agreement at issue in *Catrino v. Ocean City* contained a nondiscrimination clause similar to the ones in *Shipkevich* and *Markell*, with one important distinction. *Catrino*'s arbitration clause expressly referenced

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99. *Id.* at 321. The arbitration agreement stated in relevant part:

> Any claim, controversy or dispute arising out of or in connection with this Agreement or its negotiations shall be settled by arbitration. Each party hereto shall designate an independent arbitrator and these two arbitrators shall select a third independent arbitrator who shall be chairperson of the panel. The arbitrators shall then conduct the arbitration at a mutually acceptable site and a majority shall render a decision as to the matter in dispute, which decision shall be binding on the parties hereto. Each party shall bear the expense of its own arbitrator and an equal share of the expense of the third arbitrator. To the extent not otherwise hereinabove provided, the arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The full rules of discovery shall apply to any such proceeding.

Id. (citation omitted).

100. *Id.* at 328.

101. No. 08-CV-1008 (FB)(JMA), 2009 WL 1706590, at *1 (E.D.N.Y. June 16, 2009) (mem.). The nondiscrimination provision stated in relevant part: "Neither the Employer nor the Union shall discriminate against or in favor of any Employee on account of race, color, creed, national origin, political belief, sex, sexual orientation, citizenship status, marital status, disability or age." *Id.*

102. *Id.* at *2.

103. No. CV 08-752-PK, 2009 WL 3334897, *2 (D. Or. Oct. 15, 2009). The nondiscrimination clause stated in relevant part:

> The Employer and the Union agree that each will fully comply with applicable laws and regulations regarding discrimination and will not discriminate against any Employee because of such person's race, religion, color, national origin, ancestry, gender, age, marital status, physical or mental handicap, veteran status, sexual orientation, or the membership in and/or activity on behalf of the Union.

Id.

104. *Id.* at *7.

105. *Id.* at *7; *see also* Jones v. Verizon Commc'ns, Inc., Civil No. 09-10525-RGS, 2009 WL 3488079, *2 (Oct. 23, 2009) (finding that the arbitration clause was contractual, and not statutory, and, therefore, controlled by *Gardner-Denver*, not *Pyett).*

the ADA, but only to define the term "disability" in the agreement.[106] The district court held that, though the discrimination clause was "premised on the same underlying facts" of the ADA claim, the employee had not "waived his right to pursue [that claim] in federal court because the CBA did not express or imply that [the] claims based on federal statutes must be arbitrated."[107]

Cases that have found a "clear and unmistakable" waiver have tended to closely mirror the arbitration agreement at issue in *Pyett*. In *Jorge-Colon v. Mandra Spa Puerto Rico, Inc.* the nondiscrimination clause provided that arbitration was the "required and exclusive forum" for disputes "arising under Title VII."[108] The district court compelled arbitration because the clause "expressly provid[ed] for arbitration of Title VII claims."[109] Similarly, both *Johnson v. Tishman Speyer Properties, L.P.*[110] and *Borrero v. Ruppert Housing Co.*[111] held that agreements that expressly provided for arbitration of Title VII claims satisfied the "clear and unmistakable" standard in *Pyett*.[112] It appears that courts are showing little resistance to *Pyett* when the arbitration agreement is substantially similar in substance to the arbitration clause at issue in *Pyett*. *Kravar* is the first case since the *Pyett* decision to take on the Supreme Court's unanswered question as to whether a union refusal to arbitrate an employee's federal statutory claim would invalidate an arbitration agreement.

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106. Civ. A. No. WMN-09-505, 2009 WL 2151205, at *3 (D. Md. July 14, 2009) (mem.), *vacated on other grounds by*, Civ. A. No. WMN-09-505, 2009 WL 3347356 (D. Md. Oct. 14, 2009) (mem.). The nondiscrimination provision stated in relevant part:

> The provisions of this Agreement shall be applied equally to all employees in the bargaining unit for which the FOP is the certified representative without discrimination as to age, sex, marital status, race, creed, color, national origin, political affiliation, disability as defined in the Americans with Disabilities Act (ADA), or sexual orientation.

Id.

107. *Id.* at *4.

108. 685 F.Supp.2d 280, 284-85 (D. P.R. Feb. 18, 2010).The arbitration clause stated in relevant part:

> The required and exclusive forum for the resolution of all disputes relating to and arising out of [the employees'] employment or the termination of employment (and which are not resolved by the internal dispute resolution procedure), including but not limited to claims, demands or actions under Title VII of the Civil Rights Act of 1964 . . . and any other federal, state or local statute, regulation or common law doctrine, regarding employment discrimination, conditions of employment, compensation, benefits or termination of employment.

Id.

109. *Id.* at 287 n.8.

110. No. 09 Civ. 1959 (WHP), 2009 WL 3364038, at *3 (S.D.N.Y. Oct. 16, 2009) (mem.).

111. No. 08 CV 5869 (HB), 2009 WL 1748060, *2 (S.D.N.Y. June 19, 2009).

112. *Johnson*, No. 09 Civ. 1959 (WHP), 2009 WL 3364038 at *2-*3. "The CBA provides that employment discrimination claims made pursuant to, *inter alia*, Title VII, the NYSHRL, and the NYCHRL "shall be subject to the grievance and arbitration procedure . . . as the sole and exclusive remedy for violations." *Id.* at *2; *Borrero v. Ruppert Hous. Co.*, 2009 WL 1706590 at *1. The CBA provided that "discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, sexual orientation, union membership, or any characteristic protected by law, including but not limited to claims made pursuant to Title VII ... [and] the Americans with Disabilities Act." CBA at ¶ XVII.23. The CBA further provides that "all such claims shall be subject to the grievance and arbitration procedure ([set forth in] Articles V and VI) as sole and exclusive remedy for violations. *Id.*

IV. INSTANT DECISION

The U.S. District Court for the Southern District of New York denied Triangle's first motion to compel arbitration on September 17, 2007.[113] In that case, the court relied on *Alexander v. Gardner-Denver*,[114] and the Second Circuit precedent of *Pyett v. Pennsylvania Building Co.*[115] and *Rogers v. N.Y.U.*[116], holding unenforceable a union-negotiated CBA, which mandated arbitration of Kravar's claims of discrimination under Title VII and the ADA.[117] When *14 Penn Plaza v. Pyett* was handed down, Triangle moved to compel arbitration a second time in light of the new precedent.[118] *Pyett* held that a "collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate [statutory claims] is enforceable as a matter of federal law."[119] The court found that the arbitration clause at issue in *Pyett* was "identical in all material respects" to the one at issue in *Kravar*.[120]

The court then considered the U.S. Supreme Court's decision to decline to consider "whether the CBA operates as a substantive waiver of the plaintiff's [statutory rights] because it not only precludes a federal lawsuit, but also allows the Union to block arbitration of these claims."[121] In light of this unresolved issue, the court found that "there was little question that if Kravar's union prevented her from arbitrating her disability discrimination claims, the CBA's arbitration provision may not be enforced as to her."[122] The court admitted that the current record was sparse, considering the conflicting testimony of the union representative, the sworn statement of Kravar, and the less-than-complete grievance form.[123] Nonetheless, the district court found that the sparse record only supported the conclusion that the CBA in this case "operated to preclude Ms. Kravar from bringing her disability discrimination claims in any forum."[124] As such, the court found it "operated as a waiver over Ms. Kravar's substantive rights, and may not be enforced."[125]

Triangle argued that the fact that the union failed to arbitrate Kravar's claim was irrelevant to it, because Triangle was always willing to arbitrate Kravar's ADA claim.[126] The court dismissed Triangle's argument as confusion of the issue in that neither the union nor the employer's consent is more critical.[127]

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113. Kravar v. Triangle Servs. Inc., 509 F.Supp.2d 407, 409 (S.D.N.Y. 2007).
114. *Gardner-Denver*, 415 U.S. 36.
115. 498 F.3d 88 (2d Cir. 2007), *cert. granted*, 14 Penn Plaza LLC v. Pyett, 552 U.S. 1178 (2008), *rev'd*, 129 S. Ct. 1456 (5-4 decision) (2009).
116. 220 F. 3d 73 (2d Cir. 2000), *abrogated by Pyett*, 129 S. Ct. 1456 (2009).
117. *Kravar*, 509 F.Supp.2d at 409.
118. Kravar v. Triangle Servs. Inc., No. 1:06-cv-07858-RJH, 2009 WL 1392595, *1 (S.D.N.Y. May 19, 2009) (mem).
119. *Id.*
120. *Id.* at *2.
121. *Id.*
122. *Id.*
123. *Id.* *3.
124. *Kravar*, 2009 WL 1392595 at *3
125 *Id.*
126. *Id.* at *4.
127. *Id.*

V. COMMENT

Pyett resolved *Wright*'s open question as to whether a union can waive its employees' right to a judicial forum for federal statutory claims. The Court found that as long as the arbitration agreement in a CBA contains a "clear and unmistakable" waiver of the right to a judicial forum for the statutory right at issue, the employer may compel arbitration from the employee.[128] However, *Pyett* left open a far more difficult question and provided only speculative guidance: What effect does a union's refusal to arbitrate an employee's federal statutory grievance under a CBA have on the enforceability of the arbitration clause itself? *Kravar* clearly illustrates the struggle courts face in attempting to balance the tension of individual employees' interests with union interests regarding the arbitration of federal statutory rights. The fact that *Kravar* was decided only forty-nine days after the *Pyett* decision indicates that this question is not one made for speculative argument, but rather one that will have real and substantial implications in the labor arbitration landscape. Commentators and courts have been quick to attempt to answer *Pyett*'s open question with the greatest fairness to all parties.

A. Duty of Fair Representation

Although *Pyett* did not establish how courts should handle a union's refusal to arbitrate an individual employee's statutory claim, it did provide a reason why this was not a compelling concern in its ultimate decision. The reason put forth by the Court was that the union was obligated to operate under the "duty of fair representation."[129] The Court reasoned that because the National Labor Relations Act (NLRA) had been interpreted to impose such a duty on the union, and that "given this avenue that Congress has made available to redress a union's violation of its duty to its members, it is particularly inappropriate to ask this Court to impose an artificial limitation on the collective-bargaining process."[130] The Court, however, did not reach the question of whether the CBA allows a union to prevent employees from effectively vindicating their federal statutory rights in the arbitral forum.[131] The Court left that question for another day, because that was not at issue in the case.[132]

The Court's suggestion, that the duty of fair representation will sufficiently protect an employee with a meritorious claim that the union has declined to pursue, is tenuous at best. To sustain a claim for breach of the duty of fair representation, an employee must satisfy a two pronged test. The employee must first show a breach of contract by the employer—that his original claim was meritorious. Second, the employee must show that the union conduct is "arbitrary, discriminatory, or in bad faith.[133] Within the second prong, the questions of whether the

128. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1474 (5-4 decision) (2009).
129. *Id.* at 1463.
130. *Id.* at 1473.
131. *Id.* at 1474.
132. *Id.*
133. Mitchell H. 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, 525 (2009) (citing Vaca v. Snipes 386 U.S. 171, 190 (1967); *see also*

union acted arbitrarily, discriminatorily, or in bad faith must each be analyzed separately.[134] Not only does this test impose an extraordinary burden on the employee, it offers no protection to an employee when that employee has a meritorious claim, but the union has denied the claim without breaching its duty of fair representation. Because the test is two pronged, an employee with an entirely meritorious claim could be denied arbitration based on union concerns that have no relation to the merit of the employee's claim and yet, because the union is not doing so arbitrarily, discriminatorily, or in bad faith, the union will not be liable for breach of the duty of fair representation.[135] This would leave the employee without a forum in which he or she may vindicate his or her federal statutory rights.

There are many reasons that a union might reject an employee's meritorious grievance and still not breach its duty of fair representation.[136] "A union does not have to process a grievance that it deems lacks merit, as long as it makes that determination in good faith."[137] The union may independently decide that an employee's claim lacks merit, and even if that determination is negligently in error, dismissal of the grievance would not be a breach of the duty of fair representation,.[138] So if the union did not act in bad faith, arbitrarily, or in a discriminatory manner, the employee, with an otherwise meritorious claim, is left with no remedy in either the arbitral forum or the judicial forum. Even if the employee could prove that the union did breach its duty of fair dealing, the grieved employee's action lies against the union, not against the employer, the original alleged wrongdoer. The employee may have many reasons for wishing not to pursue an action against his own union. He or she may be concerned about retaliation from the union, or may have a loyalty toward the collective group, and not wish to bring such an action. The employee may also want to vindicate his rights against the employer who wronged him, not the union, of which he is still a member.

The facts of *Kravar* illustrate the difficulties of applying a rule that relies on the duty of fair dealing. If the *Kravar* court relied on this duty of fair dealing to protect Kravar's rights, the court would have no choice but to compel arbitration under the collective bargaining agreement, to which the union would presumably have responded by refusing to allow her to arbitrate her claim in the grievance process, as it had done previously. Kravar would be left only with an action for breach of the duty of fair dealing against her union. She would then, in a new action, have to prove not only that her claim was meritorious, but additionally that the union acted in "bad faith," "arbitrarily," or "discriminatorily." This extra pro-

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Soremekun v. Thrifty Payless, Inc., 509 F.3d 878, 987 (9th Cir. 2007) (holding that a plaintiff employee bears the burden of proving both a breach of the duty of fair representation by the union, and a breach of contract by the employer).

134. Rubenstein, *supra* note 133, at 528-29. "Under Vaca, a union's actions are considered arbitrary if they are so far outside a wide range of reasonableness as to be considered irrational." *Id.* "A showing of bad faith requires establishing fraudulent, deceitful or dishonest action." *Id.* "To establish discrimination, a plaintiff must show animus on behalf of the union and that the plaintiff was treated differently than others." *Id.*

135. *Id.* at 529.

136. "The duty of fair representation does not require that a union fully pursue every grievance filed." Driver v. U.S. Postal Serv., Inc., 328 F.3d 863, 869 (6th Cir. 2003).

137. *Id.*

138. Harris v. Air Transp. Dist. 143 Int'l Ass'n of Machinists, 132 Fed. Appx. 693, 694 (9th Cir. 2005).

cedural hoop and additional substantive burden seems ludicrous when considered with the fact that the "primary goal of arbitration . . . is to provide the efficient, economical and expeditious resolution of private disputes."[139]

The extra substantive hoop of proving the union acted arbitrarily, discriminatorily, or in bad faith would result in greater litigation costs as well. The facts of *Kravar* demonstrate how difficult the inquiry into whether the union acted arbitrarily, in bad faith, or discriminatorily can be. Kravar contended that her union declined to prosecute her claims for disability discrimination, and that her union representative laughed when she told him that she wanted to arbitrate her claim.[140] She also stated that the union representative told her that she could not do so because the union would most likely dismiss her complaint.[141] Although a representative laughing at an employee is not the hallmark of cordiality, is it a showing of bad faith or arbitrariness on the part of the union? And furthermore, does the fact that a union representative denied a claim on the belief that the union would dismiss the claim establish any one of the elements of the second prong of the breach of the duty of fair dealing by the union? Persuasive arguments can be made both in favor of the union and employee, and resolving those arguments would add a substantial and costly extra hurdle to vindication of federal statutory rights, making the duty of fair dealing nearly worthless in protecting an employee who has been denied the opportunity to arbitrate a meritorious claim by his or her union.

B. Individual Right to Demand Arbitration

Commentators have also suggested that an individual right to demand arbitration and exercise control over appropriate issues would adequately protect an employee's federal statutory rights against union refusal to arbitrate.[142] Under this theory, the employee would have a right to arbitration of his or her claim upon demand under the CBA.[143] The legitimacy of this solution is threatened by the question of who would bear the expense of arbitration. If courts require unions to bear the costs of the grievant's insisted-upon arbitration, the union would be stripped of its discretionary power to reject frivolous claims.[144] The employee would have an unfettered incentive to bring his claim, because he would have nothing to lose but the union's resources. Union discretion in determining which grievances to arbitrate is essential to the functioning of the collective bargaining system.[145] If the union were stripped of its discretionary spending power as a

139. City of Bridgeport v. Kasper Group, Inc., 899 A.2d 523, 535 (Conn. 2006) (internal quotation marks omitted).

140. Kravar v. Triangle Servs. Inc., No. 1:06-cv-07858-RJH, 2009 WL 1392595, *3 (S.D.N.Y. May 19, 2009) (mem).

141. *Id.*

142. Mark Berger, *A Step Too Far:* Pyett *and the Compelled Arbitration of Statutory Claims Under Union-Controlled Labor Contract Procedures*, 60 SYRACUSE L. REV. 55, 88-89 (2009).

143. *Id.*

144. *Id.* at 89.

145. *See* Vaca v. Snipes 386 U.S. 171, 191 (1967) ("If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined . . . . "); *see also* Jones v. Omnitrans, 22 Cal. Rptr.3d 706, 712 (Cal. Ct. App. 2004).

prerequisite to bargaining for arbitration of all its member's federal statutory claims, it would be unlikely that any union would enter into such an agreement.

One solution offered by Professor Mark Berger is to make the grievant responsible for his or her own representation costs, while the employer foots the bill for the cost of the arbitral proceeding (e.g., arbitrator's fee).[146] In such an agreement, the employer would be required to pay for arbitration proceedings, and the employee's claim would not be subject to any form of union discretion. Because the claim would not be subject to discretion, the employee would be entitled to a full hearing and decision on the employer's dime without any of discretionary safeguards that currently exist in both grievance arbitration processes and judicial proceedings. It is hard to see why any employer would bargain for such a mechanism over the court system, which at least has the power to efficiently dismiss frivolous claims.

It is also nearly impossible to see any benefit to the claimant under such an agreement.[147] The employee would retain none of the benefits of CBA grievance procedures when arbitrating federal statutory rights. The employee "would be in the same situation as many individual complainants in non-union arbitrations," but at least those non-union complainants bargained personally for their arbitration agreement.[148] It is not logical that the union be able to bargain away employees' rights to a judicial forum when the union will not be the one responsible for the costs of arbitration representation. The union would bear no responsibility to the grievant in this situation, and therefore, it is not its right to bargain.

Because the employer is unlikely to enter into an agreement that makes it subject to unlimited nondiscretionary arbitration costs, and because the union has no logical authority to bargain away its member's rights without subsequent union support, allowing an individual right to demand arbitration is not an adequate or feasible protection for an individual grievant.

C. Kravar*'s Approach: Nonenforceability of Arbitration Provision in the Face of Union Refusal to Arbitrate*

Justice Souter's dissent in *Pyett* suggested, "[T]he majority opinion may have little effect, for it explicitly reserves the question whether a CBA's waiver of judicial forum is enforceable when the union controls access to and presentation of employee's claims in arbitration . . .which is usually the case."[149] It is clear that lower courts generally have not been hesitant to apply *Pyett*'s "clear and unmistakable" waiver to allow employers to compel arbitration under a CBA as long as the language closely tracks the language in the arbitration clause in *Pyett.*[150] To

146. Berger, *supra* note 142, at 90-91.

147. Berger argues that benefit to the claimant would be that the employee has greater access to the arbitral proceeding, rather than a judicial forum because of cost savings. *Id.* at 89-90. However, this logic does not provide a reason for why the employee benefits from allowing the union to bargain its member's right to a judicial forum without subsequent union support.

148. *Id.* at 91.

149. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1480 (2009) (Souter, J., dissenting) (citation omitted) (internal quotation marks omitted).

150. Jorge-Colon v. Mandara Spa P.R., Inc., 685 F.Supp.2d at 284-85 (D. P.R. 2010); Johnson v. Tishman Speyer Props., L.P., No. 09 Civ. 1959 (WHP), 2009 WL 3364038, at *3 (S.D.N.Y. Oct. 16,

that immediate extent, Justice Souter's proposition that *Pyett's* decision will have little effect has been incorrect. However, early cases such as *Kravar* suggest that his proposition may carry more weight as *Pyett*'s progeny develops.

In *Kravar,* the Federal District Court for the Southern District of New York fashioned a rule stating that, in the face of union refusal to arbitrate a grievant's claims, the arbitration agreement is not enforceable against that grievant.[151] The court stated the rule in absolutes, requiring no showing by the employee of a breach of duty of fair dealing, or any showing of the merits of the underlying claim. Instead, *Kravar* established an absolute right to a judicial forum in the face of union refusal to arbitrate federal statutory claims covered by a CBA's arbitration agreement. Although this is not exactly what Justice Souter stated in his *Pyett* dissent, it bears his sentiment insofar as it invalidates agreements to arbitrate statutory claims when the access to the grievance process is union controlled. *Kravar* adds the additional requirement for invalidation that the union exercise that control to deny that employee an arbitral forum.

The court in *Kravar* did not offer a detailed, logical explanation of its reasoning for invalidating the CBA's arbitration agreement as applied to Kravar. Instead, it simply stated "[t]he current record is sparse, but it only supports a single conclusion: The CBA here operated to preclude Ms. Kravar from raising her disability-discrimination claims in *any* forum. As such, the CBA operated as a waiver over Ms. Kravar's substantive rights, and may not be enforced."[152] This contention may be subject to scrutiny in that it sounds similar to *Gardner-Denver*, finding that the grievance procedure acted as a waiver of the employee's substantive rights.[153] *Gilmer* and *Pyett* expressly dispelled those "arbitral mistrusts".[154] Those criticisms aside, the rule has logical foundations and sound policy results.

The *Kravar* rule sufficiently protects employees' interests, which may be in conflict with collective union interests. Under *Kravar*, if an employee's union denies his or her grievance, that employee, as a matter of right, has a cause of action in federal district court. Though the employee will not have the benefit of the union bearing the costs of representation, the employee will be in the same position as he or she would have been had the union not bargained away his or her right to a judicial forum for federal statutory rights in favor of an arbitral forum. The employee will also be able to retain the collective benefits of the union and employer's selection of the arbitral forum to settle disputes when the union does not deny the employee's grievance. When an employee's grievance is denied by his or her union, the employee will not be required to show some wrongdoing on the union's part to have his or her claim heard, as he or she would have to show to prove in an action for breach of duty of fair dealing. The *Kravar* rule would impose no extra burden on the employee, and would ensure he or she has a forum for vindication of his or her statutory rights. Furthermore, if an employee truly

2009) (mem.); Borrero v. Ruppert Hous. Co., No. 08 CV 5869 (HB), 2009 WL 1748060, *2 (S.D.N.Y. June 19, 2009).

151. Kravar v. Triangle Servs. Inc., No. 1:06-cv-07858-RJH, 2009 WL 1392595, *3 (S.D.N.Y. May 19, 2009) (mem).

152. *Id.*

153. *Gardner-Denver*, 415 U.S. at 51-52.

154. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 34 n.5 (1991); *Pyett,* 129 S. Ct. at 1464 n.5.

wished to arbitrate his or her federal statutory claim under the collective bargaining agreement instead of bringing the action in a court, he or she could still choose to pursue a cause of action against the union under the duty of fair representation.

The *Kravar* rule also sufficiently protects union interests. The union would not lose its discretion subject to an employee's demand to arbitrate, as it would if an individual had the right to demand arbitration under the CBA. The union's ability to filter frivolous claims from worthwhile claims is an important union function.[155] This rule would allow the union to continue to exercise discretion, while retaining the collective benefits of arbitrating individual federal statutory discriminatory claims.

Finally, the *Kravar* rule seems to impose the greatest burden on the employer. The employer's incentive to require arbitration of statutory claims is undoubtedly litigation cost savings. This incentive would be seriously undermined by a rule that allowed an employee to circumvent the arbitration agreement based on union refusal to arbitrate (over which the employer has no control). However, employer incentive to require arbitration is adequately preserved by two counterbalancing considerations. First, the employee will be required to bear the costs of his own litigation. Because the union rejected his grievance, the employee will be discouraged, not prevented, from bringing a frivolous claim, leaving only those claims with merit remaining. Of course, this will not discourage all frivolous suits, but the few that remain will be easily disposed of with the second counterbalancing consideration—summary judgment.[156] If an employee's claim is truly frivolous, summary judgment will dispose of his claim with relative efficiency. Still, even with those two counterbalancing considerations, there will be claims in the judicial forum that will survive summary judgment motions. Claims that survive summary judgment motions do so because there remains a genuine issue of material fact, and those claims are precisely the ones that should be protected.[157] If there remains a genuine issue of material fact, then an employee should be entitled to have his case heard. If the union and the employer have prevented the employee from obtaining such a hearing by agreeing to arbitrate federal statutory claims, then the employee should, as a matter of right, be entitled to have his claim heard in federal court.

Since the *Kravar* decision, the Southern District of New York has cited its own rule twice with approval, though in those cases it was not directly applicable.[158] In *Borrero v. Ruppert Housing Co., Inc.* the court indicated the pervasiveness of its newly fashioned rule as it compelled plaintiff's arbitration of statutory claims under *Pyett*, but dismissed the case without prejudice because the employee had not yet filed a grievance with the union. The court suggested that it dismissed the case without prejudice because if the employee's grievance were to

155. Vaca v. Snipes, 386 U.S. 171, 191 (1967) ("If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined . . . .").

156 *See* Dennis R. Nolan, Disputatio: *"Creeping Legalism" as a Declension Myth*, 2010 J. DISP. RESOL. 1, 16 (2010) ("Even when employees file suit, federal courts have been surprisingly willing to dismiss their claims on summary judgment").

157. FED. R. CIV. P. 56(c)(2).

158. Borrero v. Ruppert Hous. Co.,.No. 08 CV 5869 (HB), 2009 WL 1748060, *2 (S.D.N.Y. June 19, 2009); Johnson v. Tishman Speyer Props., L.P., No. 09 Civ. 1959 (WHP), 2009 WL 3364038, at *4 (S.D.N.Y. Oct. 16, 2009) (mem.).

be denied by the union, his action would be proper in the federal district court.[159] The Southern District of New York has further developed the rule only to apply after an employee has pursued a grievance of the specific statutory clams, and the union has denied arbitration of those statutory claims.[160] It is also notable that if the *Kravar* rule is appealed from the Southern District of New York, it will be heard in the Second Circuit Court of Appeals. It is the Second Circuit's hostility to *Wright* that led to the decision in *Pyett*. Whether the decision in *Kravar* is simply remaining hostility towards *Wright* or an attempt to answer the difficult question left open by *Pyett* is yet to be determined, as *Pyett*'s progeny has only begun to take shape.

VI. CONCLUSION

Kravar's solution is by no means perfect. However, it is currently the best answer offered to *Pyett*'s open question: What happens when the union refuses to arbitrate an employee's claim under a collective bargaining agreement? It protects employee interests by ensuring them a forum for vindication of their federal, statutory rights. It protects union interests by preserving union discretion in the grievance process, and it does so without shouldering the union with any extra costs. It protects the employer's interests because it allows them to require arbitration of statutory claims brought by the union, and efficiently dispose of frivolous claims through summary judgment. The only claims left in federal court will be the meritorious claims that have fallen through the cracks of the grievance procedure. Those claims should not be sacrificed for any federal policy favoring arbitration.

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159. *Borrero*, 2009 WL 1748060, at *2.

160. *Johnson*, 2009 WL 364038, at *4. In *Johnson*, the plaintiff was suspended for violating building safety requirements. He was covered by a CBA containing a clear and unmistakable requirement to arbitrate federal statutory claims. The plaintiff filed a grievance with said union claiming unjust suspension, but the plaintiff asserted no claims of discrimination or retaliation. The plaintiff's union held the grievance in abeyance to determine whether or not it should be pursued, and plaintiff failed to comply with procedure, so the grievance was dismissed without prejudice. The plaintiff then filed an action in the Federal District Court of the Southern District of New York claiming discrimination by his supervisors and hostility from union representatives regarding his grievance. *Id.* at *2.