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On Precarious Ground: Binding Arbitration Clauses, Collective Bargaining Agreements, and Waiver of Statutory Workplace Discrimination Claims Post-Pyett - Duraku v. Tishman Speyer Properties, Inc.

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On Precarious Ground: Binding Arbitration Clauses, Collective Bargaining Agreements, and Waiver of Statutory Workplace Discrimination Claims Post-*Pyett*

Duraku v. Tishman Speyer Properties, Inc.[1]

I. INTRODUCTION

During the 1960s, federal and state governments put into place a maze of statutes aimed at protecting the civil rights of minorities, both in society and in the workplace.[2] While these statutes have undoubtedly lessened workplace discrimination for minorities in the United States, there are still some areas that are uncertain or unsettled, especially when a union is involved on behalf of the employees. More to the point, there has been a wealth of confusion as to whether the right to bring a statutory workplace discrimination claim can be waived when a worker joins a union and allows the union to bargain on their behalf. Most recently, in *14 Penn Plaza LLC v. Pyett*,[3] the U.S. Supreme Court took note of this uncertainty.

However, in an attempt to resolve the turmoil, the Court left conflicting, yet controlling, precedents to be solved in future terms. Additionally, some of the conclusions reached in *Pyett* have left the original nature of statutory workplace discrimination claims on uncertain terrain. The U.S. District Court for the Southern District of New York's decision in *Duraku v. Tishman Speyer Properties, Inc.* reflects this turmoil. In *Duraku*, employees who alleged statutory workplace discrimination claims were compelled to follow an *ex post* supplement to their collective bargaining agreement despite the union's refusal to pursue the grievance.[4] In reaching its decision, the court made a harsh determination, reflecting over thirty-five years of ambiguous case law on the subject. The *Duraku* decision gives unions and employers another foothold to continue the consolidation of control over all matters even tangentially related to employment, a control that they have enjoyed for more than 15 years. Worse yet, it puts our justice system on a course where unionized employees will have no judicial forum to grieve statuto-

1. 714 F. Supp. 2d 470 (S.D.N.Y. 2010).

2. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352 (1964) (codified as amended at 42 U.S.C. §§ 2000(c)-2000(e)(15) (2006)); *see also* Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1967) Pub. L. No. 88-352 (1964) (codified as amended at 42 U.S.C. §§ 2000(c)-2000(e)(15) (2006)). etc.

3. 129 S. Ct. 1456, 1463 (2009) (discussing the tension between the Supreme Court's decisions in Alexander v. Gardner-Denver, Co., 415 U.S. 36 (1974), and Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)).

4. *Duraku*, 714 F. Supp. 2d at 471-72.

ry claims and will instead be forced to rely on unions to arbitrate or decide any and all claims on their behalf.

II. FACTS AND HOLDING

Plaintiffs Sonya Duraku, Nieves Sanchez, and Julia Inirio were employed as cleaners at a New York City commercial office building manage by Tishman Speyer Properties.[5] The three plaintiffs were members of Service Employees International Union, Local 32BJ (Union).[6] During their employment, the Union had a binding collective bargaining agreement (CBA) with the Realty Advisory Board on Labor Relations (RAB), a group to which Tishman Speyer was a member.[7] Thus, the plaintiffs were bound to the agreement that governed their employment as well as all grievance procedures.[8] The agreement included a non-discrimination clause[9] and provided that arbitration was the "sole and exclusive method" of grievance resolution in all matters, including violations of the non-discrimination policy and other statutory claims.[10]

During their employment, the three plaintiffs alleged that they were subjected to harassment and retaliation from their supervisors.[11] The plaintiffs originally brought the matter to the attention of the Union, but it refused to arbitrate their claims.[12] Following this refusal, plaintiffs sought and received from the Equal Employment Opportunity Commission (EEOC) a "Notice of Right to Sue".[13] Following receipt of the notice, plaintiffs filed a complaint in October 2009 against Tishman Speyer under Title VII of the 1964 Civil Rights Act,[14] the New

5. *Duraku*, 714 F. Supp. 2d at 471-72.

6. *Id.*

7. *Id.*

8. *Id.*

9.

> There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, sexual orientation, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, 42 U.S.C. § 1981, the Family and Medical Leave Act, or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedures (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.

Memorandum of Law in Support of Defendant's Motion to Compel Arbitration and Dismiss Plaintiff's Complaint at 6-7, Duraku v. Tishman Speyer Props., Inc., 714 F. Supp. 2d 470 (2010) (No. 109CV09351).

10. *Id.*; *Duraku*, 714 F. Supp. 2d at 472.

11. *Duraku*, 714 F. Supp. 2d at 472.

12. *Id.*

13. *Id.* The EEOC has broad statutory authority to enforce most claims of employment or workplace discrimination. *See, e.g.*, §§ 2000(e)(2), (e)(3), (e)(5); 42 U.S.C. § 2000(e)(5) (2006). Under this authority, the EEOC requires that any individual that plans to bring a claim for relief for workplace discrimination must first file a complaint with the EEOC. Following receipt of the complaint and investigation of the grievance, the EEOC will either dismiss the complaint or grant the claimant a "Notice of Right to Sue", which allows the claimant to bring a cause of action in federal district courts on the claims granted by the EEOC. 29 C.F.R. § 1601.28 (2009). The process is more fully explained on the EEOC's website. U.S. Equal Employment Opportunity Commission (EEOC), *Filing a Lawsuit*, http://www.eeoc.gov/employees/lawsuit.cfm (last visited Oct. 7, 2010).

14. 42 U.S.C. § 2000(e) (2006).

York State Human Rights Law (NYSHRL),[15] and the New York City Human Rights Code (NYCHRC).[16] In response, Tishman Speyer filed a motion to dismiss the complaint and compel arbitration.[17] After plaintiffs filed an opposition, Tishman Speyer replied, indicating for the first time that a supplemental agreement had been made between the Union and the RAB in February 2010 (The February 2010 Agreement).[18] The February 2010 Agreement between the Union and the RAB acknowledged that, following the *Pyett* decision, there was a dispute as to whether the original CBA allowed employees to bring post-union-refusal claims in court.[19] They also stipulated in the February 2010 Agreement that the protocols listed therein were, in essence, a temporary "pilot program on discrimination claims" established in hopes of finding a middle ground acceptable for all parties.[20] The February 2010 Agreement established a protocol for non-binding mediation followed by binding arbitration in discrimination cases.[21] The February 2010 Agreement further stipulated that in cases where mediation was unsuccessful and the Union declined to pursue the claim, members of the Union were bound to arbitrate with the RAB.[22]

In *Duraku*, the issue before the court was whether the February 2010 Agreement, made after the time of the incident in the claim and after the claims were brought, was binding on the plaintiffs in terms of resolving an individual statutory grievance. The plaintiffs argued that, despite the language of the original CBA, they were not bound to arbitrate by the February 2010 Agreement.[23] Tishman Speyer argued that the February 2010 Agreement compelled all members of the Union to arbitrate, despite what time the alleged grievance may have occurred.[24] The instant court agreed with Tishman Speyer's assertion, and held that the February 2010 Agreement between the Union and the RAB compelled all members of the Union to arbitrate, despite the fact that the agreement went into effect after the filing of the plaintiffs' complaint.[25] However, rather than fully granting Tishman Speyer's motion to dismiss and compel arbitration, the court ordered a stay pend-

15. N.Y. EXEC. LAW § 290 (McKinney 2004).

16. *Duraku*, 714 F. Supp. 2d at 472 (citing N.Y.C. Admin. Code § 8-502 (2009)).

17. *Duraku*, 714 F. Supp. 2d at 472.

18. *Id.*

19. *See* Declaration of Michael Badowski in Support re: MOTION to Compel Arbitration. MOTION to Dismiss Plaintiffs' Complaint, Duraku v. Tishman Speyer Props., Inc., 714 F. Supp. 2d 470 (S.D.N.Y. May 27, 2010) (No. 109CV09351); *see also* Exhibit #1 (Attached), Agreement and Protocol, Signed Feb. 17, 2010.

20. *Id.* The Union contended that the CBA "do[es] not make provision for arbitration of any claims that the Union does not choose to take to arbitration, including statutory discrimination claims, and therefore, individual employees are not barred from pursuing their claims in court where the Union has declined to pursue them in arbitration." The RAB contended otherwise. *See* Exhibit #1 at *1. Both parties agreed to submit the dispute to arbitration in June of 2009, but decided to hold that arbitration in abeyance for a period of time (no less than 90 days) while they determined whether the pilot program was successful in resolving the dispute. *Id.*

21. *Duraku*, 714 F. Supp. 2d at 472.

22. *Id.* at 473.

23. *Id.* at 474.

24. *Id.* at 472-73.

25. *Id.* at 473.

ing the compelled arbitration.[26] The court reasoned that a stay was proper because it would allow the case to move more quickly through the arbitration process.[27]

III. LEGAL BACKGROUND

The instant court relied primarily upon a recent decision of the U.S. Supreme Court, *14 Penn Plaza LLC v. Pyett*,[28] in making its decision. However, the issue of compelled arbitration for statutory claims of discrimination can essentially be laid out in three eras: the era of *Alexander v. Gardner-Denver Co.*,[29] where the Supreme Court was clear in stating that statutory claims could not be waived and submitted solely to arbitration; the era of *Gilmer v. Interstate/Johnson Lane Corp.*,[30] which saw a slight but significant reversal of the Supreme Court's decision in *Gardner-Denver*; and the current post-*Pyett* era. The *Pyett* court in particular seems to have completely overturned all case law related to *Gardner-Denver*, leaving a bleak future for those who wish to bring such statutory claims in a non-arbitral forum.

A. The Origin of Compelled Arbitration In Cases of Statutory Discrimination Claims—Alexander v. Gardner-Denver Co.

In 1974, the Supreme Court had its first chance to rule on arbitration proceedings in the context of statutory claims made under Title VII of the relatively new Civil Rights Act of 1964.[31] In *Alexander v. Gardner-Denver Co.*, a manufacturing company terminated the three-year employment of an African-American employee, alleging that the employee had a high rate of producing defective or unusable parts.[32] Following discharge by the company, the employee filed a grievance with his union against the employer for wrongful termination.[33] The filed grievance contained no claim of racial discrimination.[34] After his claims were rejected, the grievance was sent to arbitration, per the collective bargaining agreement.[35] Prior to the hearing, the employee filed a racial discrimination complaint with the Colorado Civil Rights Commission, who forwarded the complaint to the EEOC.[36] Following a ruling by the arbitrator that the termination was for cause, and a district court and appellate level finding of the same, the U.S. Supreme Court granted

26. *Id.* at 475.
27. *Duraku*, 714 F. Supp. 2d at 475.
28. 129 S. Ct. 1456 (2009).
29. 415 U.S. 36 (1974).
30. 500 U.S. 20 (1991).
31. Civil Rights Act of 1964, Pub. L. No. 88-352 (1964) (codified as amended at 42 U.S.C. §§ 2000(c)-(e)(15) (2006)).
32. *Gardner-Denver*, 415 U.S. at 38.
33. *Id.* at 39.
34. *Id.*
35. *Id.* While the company retained the right to make any employment decision regarding hiring or termination for "proper cause," the agreement also contained explicit non-discrimination provisions, and a broad arbitration clause covering all provisions in the agreement and requiring compulsory arbitration for all grievances arising out of terms of employment, including for statutory discrimination claims. *Id.*
36. *Id.* at 42.

certiorari.[37] In a unanimous decision, the Court held that a prior submission of a claim to final arbitration did not extinguish a statutory right to a trial *de novo*.[38] The Court came to that holding based on several conclusions. First, the Court held that Title VII was intended to be a supplement and not a replacement for existing laws and institutions.[39] Second, the Court found that mere submission of a claim to arbitration does not waive a cause of action under Title VII, as the rights conferred cannot be prospectively waived and can form no part of the collective-bargaining process.[40] Further, the Court determined that an arbitrator can only rule on issues and questions of contractual rights, even if those rights resemble or duplicate Title VII rights.[41] The Court also ruled that a Title VII action is not a review of an arbitrator's decision but instead, an assertion of a statutory right independent of the arbitration process.[42] Finally, and perhaps most importantly, the Court found that Congress clearly intended Title VII to hold federal courts finally responsible for enforcement, and deferral by courts to an arbitrator's decision would lead to incomplete fact-finding, emphasizing the "law of the shop" rather than the "law of the land".[43]

B. Confusion on the Issue—Gilmer v. Interstate/Johnson Lane Corp.

Case law for the next seventeen years proceeded under the context laid out in *Gardner-Denver*. Several subsequent cases, most notably *Barrentine v. Arkansas-Best Freight System, Inc.*[44] and *McDonald v. West Branch*,[45] ruled along the lines that statutory claims—discriminatory or other—were independent of the collective-bargaining process. Thus, courts determined that such claims could be brought in federal court and were not bound by arbitration, even under collective-bargaining agreements mandating arbitration and even in cases where the claims

37. *Id.* at 42-43.

38. *Gardner-Denver*, 415 U.S. at 59-60.

39. *Id.* at 48-49.

> Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.

Id.

40. *Id.* at 51-52.

> [W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. . . . Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities . . . . [T]he [Title VII] rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.

Id.

41. *Id.* at 53-54.

42. *Id.* at 54.

43. *Id.* at 57-59.

44. 450 U.S. 728 (1981) (involving workers asserting a minimum-wage claim under the Fair Labor Standards Act, 29 U.S.C. §§ 102-219 (1988).

45. 466 U.S. 284 (1984) (involving a discharged police officer asserting a wrongful termination and civil rights claim under 42 U.S.C. § 1983).

had been submitted to an arbitral forum.[46] In this context, the Supreme Court had seemingly resolved most issues regarding the nature of statutory claims under collective-bargaining agreements, at least with regard to Title VII.

However, 1991 saw the Supreme Court revisit the issue in *Gilmer v. Interstate/Johnson Lane Corp.*[47] In *Gilmer*, an employee brought a wrongful termination statutory claim against his employer under the Age Discrimination in Employment Act of 1967 (ADEA).[48] By requirement of the employer, the plaintiff in *Gilmer* was required to register with the New York Stock Exchange (NYSE).[49] Among other items in the NYSE's registration application was a rule requiring arbitration in any instance where a grievance was brought by a NYSE-registered representative against an employer for any issues related to "employment or termination" of the representative.[50] Based on the arbitration clause in the application and on the Federal Arbitration Act (FAA), the employer moved to compel arbitration. The employer's motion was based on the precedent set forth in *Gardner-Denver*.[51] The *Gilmer* Court, however, held that a claim brought under the ADEA could indeed be subject to compulsory arbitration.[52] The Court noticed the possible conflict and was quick to distinguish *Gilmer* from *Gardner-Denver*. The Court noted that *Gardner-Denver*, *Barrentine*, and *McDonald* were all predicated on whether arbitration of contract-based claims precluded a later resolution of statutory claims in a judicial forum.[53] In *Gilmer*, the Court noted that those cases contained no agreements by the employees or the union to arbitrate statutory claims and thus, did not bar subsequent judicial actions on statutory claims.[54] The Court in *Gilmer* also noted that union representatives, rather than an individual attorney, would have represented the employee in *Gardner-Denver*.[55] Because the arbitration clause in *Gilmer* did not bind a union and its members to arbitration, but rather an individual and the employer, the employee in *Gilmer* would have procured his own representation, thus affording him more control and representation over the proceedings.[56]

On a final note, the *Gilmer* court took into account (although not explicitly stating so) that, unlike Title VII, there was no observable Congressional intent to preclude arbitration of claims under the ADEA.[57] As such, the Court ruled in favor of allowing compelled arbitration to serve as a complete and total substitute for judicial proceedings on statutory claims arising under the ADEA. In ruling as it did, the Court also gave rise to a new level of uncertainty for allowing compelled arbitration to serve as a substitute for judicial proceedings on statutory claims of discrimination in general.

46. *McDonald*, 466 U.S. at 290-91; *Barrentine*, 450 U.S. at 745-46.
47. 500 U.S. 20 (1991).
48. *Id.* at 23-24; *see also* 29 U.S.C. §§ 621-634 (1967).
49. *Gilmer*, 500 U.S. at 23.
50. *Id.*
51. *Id.* at 24.
52. *Id.* at 26-27.
53. *Gilmer*, 500 U.S. at 34-35.
54. *Id.*
55. *Gilmer*, 500 U.S. at 35.
56. *Id.* (Stevens, J. dissenting).
57. *Id.* at 29, 33-34.

C. Conflicting Yet Controlling Precedent—14 Penn Plaza LLC v. Pyett

With the terrain unstable, the Court handled several cases involving statutory claims in a collective-bargaining environment but deigned to rule on the issue of whether such claims were arbitrable under either the *Gilmer* standard or the FAA. Most notable of the post-*Gilmer* line of cases is *Wright v. Universal Maritime Service Corp.*[58] The *Wright* Court noted the tension between the *Gardner-Denver* and *Gilmer* line of cases, and yet, it failed to resolve that tension.[59]

In 2009, the Supreme Court revisited the issue yet again with the decision in *14 Penn Plaza LLC v. Pyett.* In *Pyett*,[60] several employees of Temco Service Industries (Temco), a maintenance service, were normally assigned to a building owned and operated by 14 Penn Plaza, LLC (Penn Plaza), in the capacity of night lobby watchmen.[61] Following a Union-approved contract between Penn Plaza and a private security firm to fill those capacities, Temco reassigned the employees to other areas in the same building.[62] The employees filed grievances with the Union alleging that the reassignments were based on age discrimination and led to loss in income and emotional distress.[63]

After the Union's filing of the grievances and failure to obtain relief on any claims, the Union requested arbitration under its collective-bargaining agreement.[64] Following the initial arbitration hearing, the Union withdrew the claims related to age discrimination, reasoning that the Union's approval of the contract between Penn Plaza and the private security firm meant that there could be no legitimate objections by the Union to the reassignment.[65] The employees then filed a complaint with the EEOC, which dismissed their complaint for failure to find a violation of the ADEA based on the evidence but notified them of their right to sue.[66] The employees then filed a complaint in district court, to which Temco and Penn Plaza filed motions compelling arbitration.[67] The motions by Temco and Penn Plaza were denied by both the district court and the Second Circuit appellate court, holding that *Gardner-Denver*'s decision that a collective-bargaining agreement could not waive statutory rights remained good law.[68] The Second Circuit, in particular, noted the tension between *Gardner-Denver* and *Gilmer.*[69] The Second Circuit reconciled this tension by holding that an individual could waive statutory claims and choose compulsory arbitration, but that a union could not collectively bargain for arbitration on behalf of its members for those claims.[70]

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58. 525 U.S. 70 (1998) (alleging discrimination in violation of American with Disabilities Act (ADA) for refusal ro rehire longshoreman, injured on the job).

59. *Id.* at 76-77.

60. *See generally* 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009) (addressing a controversy between the same local Union and RAB that are present in this case).

61. *Id.* at 1458.

62. *Id.* at 1461-62.

63. *Id.* at 1462.

64. *Id.*

65. *Id.*

66. *Pyett*, 129 S. Ct. at 1462.

67. *Id.*

68. *Id.* at 1462-63.

69. *Id.* at 1463.

70. *Id.*

The *Pyett* Court, however, reversed the decisions of the lower courts, holding that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA and other statutory claims is enforceable and binding as a matter of federal law.[71] The Court came to this conclusion by first looking at the National Labor Relations Act (NLRA), which mandates that representatives selected for collective bargaining shall have the ability to bargain for all "conditions of employment," provided that there are proper grievance procedures in place.[72] The Court then looked at past precedent regarding the bargaining process between a union and an employer, reasoning that the normal flow of such negotiations may include tradeoffs in the CBA such as what statutory and contractual rights are covered.[73] The Court also examined past holdings, which held that courts "generally may not interfere in this bargained-for exchange."[74] Thus, the Court determined that the language of a statute that outlines a particular grievance (or class of grievances) must also preclude that grievance(s) from being resolved under the NLRA in order for courts to ignore a collective-bargaining agreement that compels arbitration for the grievance(s).[75] The Court also distinguished *Gardner-Denver* by establishing that the arbitration clause at issue in *Gardner-Denver* did not cover both statutory and contractual claims in explicitly "clear and unmistakable language."[76]

However, one particular facet of *Pyett* still leaves uncertainty for future cases involving statutory claims. The employees in *Pyett* failed to bring up two arguments in the lower courts, which were later advanced in front of the Supreme Court. First, they argued that the collective-bargaining agreement did not "clearly and unmistakably require them to arbitrate their ADEA claims."[77] Second, they claimed that although a substantive waiver of federally-protected civil rights is never to be upheld, the collective-bargaining agreement allowed the Union to prevent them from vindicating their federal statutory rights in the arbitral forum.[78] As such, the Supreme Court pronounced that they had forfeited those arguments. The Court stated that ruling on those arguments would not be proper because it would require the Court to come to conclusions of fact rather than law.[79] Further, the *Pyett* opinion restated that the Court's general principle is to be hesitant to invalidate arbitration agreements based on speculation.[80]

Although the *Pyett* court took several steps to try and clarify the law with regard to compelled arbitration on statutory claims, there are still several questions left unaddressed—which is reflected in the instant decision.

71. *Id.* at 1474.
72. *Pyett*, 129 S. Ct. at 1460, 1466 (2009); *see also* 29 U.S.C. § 159(a) (2006).
73. *Pyett*, 129 S. Ct. at 1464.
74. *Id.*
75. *Id.* at 1465.
76. *Id.* at 1468-69.
77. *Id.* at 1473-74.
78. *Id.* at 1474.
79. *Pyett*, 129 S. Ct. at 1474.
80. *Id.*

IV. THE INSTANT DECISION

In *Duraku*, the court for the Southern District of New York began by looking at the substantive federal policy surrounding arbitration, noting that federal policy, as embodied in the FAA, strongly favors arbitration as an alternative means of dispute resolution.[81] The court also noted that the purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to the terms of the agreement and implied that courts should not interfere with such agreements.[82]

The court then proceeded to analyze using a four part test, whether it had power to determine if the parties involved had agreed to arbitrate the issue.[83] First, the court examined whether the parties actually agreed to arbitrate.[84] Second, the court found that if such an agreement existed, they were to determine to what extent that agreement existed between the parties.[85] Third, the court looked at whether any federal statutory claims (if asserted) were non-arbitrable under the intent of Congress.[86] Finally, the court had to determine whether to stay the balance of the proceedings pending arbitration if some but not all claims of the case were arbitrable.[87]

The court began its rationale by looking to *Pyett's* holding that a collective-bargaining agreement which "clearly and unmistakably requires" arbitration for statutory employment discrimination claims was enforceable under federal law.[88] They also looked to *Pyett*'s ruling that such requirements remained enforceable unless the statute itself precluded a waiver of judicial remedies for the rights at issue.[89] The court then applied that holding and found, in the instant case, that the CBA and supplementary agreement expressly required resolution of statutory employment discrimination claims through mediation and arbitration.[90] The court further found that Congress did not intend to make the statutory discrimination and retaliation claims non-arbitrable.[91]

Having determined that Congress did not intend to preclude a waiver of judicial remedies for statutory employment discrimination claims, the court proceeded to the issue of the Agreement.[92] More specifically, the court looked to the express language of the Agreement, which stated, "[w]henever it is claimed that an employer has violated the no discrimination clause (including claims based in statute) of one of the CBAs, . . . the matter *shall* be submitted to mediation."[93] Using

81. Duraku v. Tishman Speyer Props., Inc., 714 F. Supp. 2d 470, 473 (S.D.N.Y. 2010) (citing Ragone v. Atlanta Video, 595 F.3d 115, 121 (2d Cir. 2010)).

82. *Id.* (citing 9 U.S.C. § 2; Stolt-Nielson, S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1773 (2010)).

83. *Id.* at 473-74 (citing JLM Industries, Inc. v. Stolt-Nielson, S.A., 387 F.3d 163, 169 (2d Cir. 2004)).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* (citing *Pyett*, 129 S. Ct. at 1465).

88. *Duraku*, 714 F. Supp. 2d at 473.

89. *Id.* (citing *Pyett*, 129 S. Ct. at 1465).

90. *Id.* at 474.

91. *Id.* (citing Desiderio v. Nat'l Ass'n of Sec. Dealers, 191 F.3d 198, 204-05 (2d Cir. 1999), and Rodriguez v. Four Seasons Hotels, Ltd., 2009 WL 2001328, at *3 (S.D.N.Y. July 10, 1999)).

92. *Duraku*, 714 F. Supp. 2d at 474.

93. *Id.* (emphasis in original)

literal interpretation, the court read the term "whenever" to apply to all points covered by the original CBA.[94] It then took the protocols set forth in the Agreement, which included a mandated right for individual employees to arbitrate all claims against the employer—including statutory discrimination claims.[95] Thus, the instant court held that the scope of the Agreement explicitly addressed its application to the claims in the instant case.[96]

Having proceeded through the four-part test and having determined that arbitration was and should be compelled, the court had one decision to make: whether to grant Tishman Speyer's motion to dismiss the court proceedings, or alternatively, to stay the proceedings until completion of arbitration.[97] The court found that a dismissal is reviewable by an appellate court under section 16(a)(3) of the FAA, whereas a stay is an unappealable interlocutory order under section 16(b).[98] The court then applied what it determined to be a general policy of the Second Circuit in cases dealing with compelled arbitration: that any determination to stay or dismiss a claim should be mindful of the liberal federal policy favoring arbitration and that courts should avoid unnecessary delays of the arbitral process through appellate review.[99] In accordance with the Second Circuit's general policy, the instant court elected to stay the motion pending arbitration.[100]

V. COMMENT

The *Duraku* opinion is a reflection of the unsteady terrain for statutory workplace discrimination claims in the post-*Pyett* era. With possible implications that could carry far beyond the jurisdiction of the Southern District of New York, there are a few issues left by the instant decision that should give pause to those concerned with the state of statutory civil rights in modern American law.

A. The Court Places An Unequal Reliance on Pyett

Perhaps the most visible issue in *Duraku* is the full weight that the court gives to the *Pyett* decision, coupled with an almost complete departure from the *Gardner-Denver* precedent. While a court may correctly give strong consideration to the *Pyett* rationale, courts should also realize that *Gardner-Denver* still remains good case law. It has accurately been observed that while there are seemingly conflicting precedents made in *Pyett*, *Pyett* did not overrule *Gardner-Denver*'s

94. *Id.*

> Plaintiffs' arguments against arbitration are unavailing. The fact that the February 2010 Agreement does not expressly state that it applies "retroactively" or to employees who, like plaintiffs, have already elected to pursue their statutory rights in another forum does not relieve plaintiffs of their obligation to abide by the mediation and arbitration protocol.

Id.

95. *Duraku*, 714 F. Supp. 2d at 474. The court stated, "[A]rbitration is mandated under the protocol when "the Union has declined to take an individual employee's employment discrimination claim . . . and the employee is desirous of litigating the claim." *Id.*

96. *Id.*

97. *Id.*

98. *Id.*; *see also* 9 U.S.C. §§ 16(a)(3)-16(b) (2010).

99. *Duraku*, 714 F. Supp. 2d at 475.

100. *Id.*

holdings, but merely narrowed them.[101] The *Pyett* Court left standing many of the key precepts in *Gardner-Denver*: that earlier arbitration of contractual issues does not extinguish any civil claims brought after the arbitral hearings; etc. Yet, the instant court relied upon the *Pyett* decision without giving any deference to *Gardner-Denver*.

Despite the *Pyett* Court's rendering of the *Gardner-Denver* rule of barring binding arbitration clauses on federal statutory claims to mere dicta, there are two passages in *Gardner-Denver* that others have suggested would indicate that the rule was a key holding and not dicta.[102] First, *Gardner-Denver* stated that "there can be no prospective waiver of an employee's rights under Title VII,"[103] as they are "individual" rights that "represent a congressional command that each employee be free from discriminatory practices" and allowing such a waiver as part of a collective-bargaining agreement would "defeat the paramount congressional purpose behind Title VII."[104] Second, the *Gardner-Denver* Court refused to adopt the employer's suggested rule of deference to claims already in arbitration, citing the unlikeliness that Congress intended a position of judicial deference to arbitral forums on issues of Title VII statutory rights and giving a number of reasons why Congress did and would find that a judicial forum would be more appropriate.[105]

Thus, *Pyett*'s rendering of much of *Gardner-Denver* as dicta has left two conflicting precedents in place. A standard rule that many federal circuits use for determinations of cases where there are conflicting precedents is to recognize the earliest case as binding.[106] Yet *Duraku* does not reflect this conflict, and instead chooses to follow the latter decision as binding. In doing so, it leaves a precedent for future Southern District judges approaching the same type of question—and completely ignores what is still a very uncertain and unsettled area of arbitration-related case law.

B. The "Retroactive" Agreement

While the *Duraku* court's departure from and failure to consider *Gardner-Denver* remains most striking on the face of the opinion, perhaps the most egregious aspect of the instant decision was the reliance upon a very tenuous Agreement, and the court's omission of any mention of the temporary nature of the Agreement. The only scintilla of a conflict of interpretation between the Union and the RAB was addressed in a footnote—a footnote attached to a contention

101. Matthew Gierse, Note, *All Bound Up With No Place To Go: A Lack of Individual Alternatives to Binding Arbitration Provisions for Statutory Claims*, 2010 J. DISP. RESOL. 189, 199-200 (2010) (analyzing Tewolde v. Owens & Minor Distrib., Inc., Civil No. 07-4075, 2009 WL 1653533 (Dist. Minn. 2009) (involving Title VII statutory claims made in the presence of a collective bargaining agreement)).

102. E.E. Keenan, *Collectively Bargained Employment Arbitration:* 14 Penn Plaza LLC v. Pyett, 15 HARV. NEGOT. L. REV. 261, 273-74 (2010).

103. *Id.* at 273 (citing *Gardner-Denver*, 415 U.S. at 51).

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

105. Keenan, *supra* note 104, at 274 (citing *Gardner-Denver*, 415 U.S. at 56-58).

106. *See* Folger Coffee Co. v. Int'l Union, 368 F. App'x 605, 606 (citing Rios v. City of Del Rio, Tex., 444 F.3d 417, 425 n.8 (5th Circ.2006)) ("Where two previous holdings or lines of precedent conflict the earlier opinion controls and is the binding precedent in this circuit."); *see also* POLICY OF AVOIDING INTRA-CIRCUIT CONFLICT OF PRECEDENT, 3rd Cir. IOP 9.1 (2002)..

from the plaintiffs that did not deal with the Agreement and which only mentioned that matters of interpretation of the collective bargaining agreement are matters for the Union and the RAB to resolve. Absent that footnote, there is absolutely no indication that the Agreement was transient in nature.

Yet the *Duraku* court uses a very dubious method of contractual interpretation and reasoning to conclude that the Agreement was binding on the plaintiffs. First, the court ignored the fact that the agreement was *ex post* complaint.[107] Second, the court ignored the fact that the Agreement was made during court proceedings on the instant controversy.[108] Third, the court ignored that the Agreement was made with no knowledge, input, or approval on the part of the plaintiffs.[109] Fourth, the court ignored the fact that the Agreement was made with the understanding and admission that both the Union and the RAB were still in dispute on whether claims similar to the instant claim were allowable under the original CBA.[110] It is clear from the published opinion that the entirety of the court's decision to compel the plaintiffs to arbitrate rests upon the Agreement.[111] If so, one would certainly expect the tenuous and temporary structure of the Agreement to at least be addressed in the dictum of the opinion, if not the actual background or discussion portions.

The court's decision to apply the Agreement retroactively, during an ongoing case, is of much concern to those concerned about the protection of statutory rights in the workplace. The language of the Agreement was extremely vague in terms of a timeline of applicability, with no explicitly outlined retroactivity clause. Rather, the Agreement only stated, "*Whenever* it is claimed . . . ."[112] Without an explicit retroactivity agreement, the term "whenever" could best be described as either a term of art, or most likely a descriptor for events going forward from the point of agreement. Even if one were to use the *Pyett* allowance of a waiver of statutory rights, the instant court seemingly fails to recognize that the Agreement does not contain a "clear . . . and unmistakabl[e]" waiver on behalf of the plaintiffs, insomuch as it is unclear whether the Agreement was meant to be retroactively binding to the plaintiffs.[113] Rather, even the standard set forth by the instant court would seem to indicate, from the vagaries of whether the plaintiffs fall under the Agreement, that there is no real "clear and unmistakabl[e]" requirement that binds the plaintiffs to arbitrate a grievance that is already being pursued in the judicial system.

While it is often considered acceptable to come to supplementary collective bargaining agreements that act retroactively in nature, it offends the concept of justice to allow such agreements to be enacted and effective after a party has properly elected to grieve their claim in the forum of their choosing. The rarity of such cases is testament to that principle. To allow such an agreement to act re-

107. Duraku v. Tishman Speyer Props., Inc., 714 F. Supp. 2d 470, 472 (S.D.N.Y. 2010).
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Duraku*, 714 F. Supp. 2d at 474. (emphasis added).
113. *Id.* at 743 ("A collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate statutory employment discrimination claims is enforceable as a matter of federal law unless Congress precluded waiver of judicial remedies for the statutory rights at issue.").

troactively, when the retroactive nature itself is in question, and when it pertains to such important rights, the argument can be made that no fundamental rights are safe from such overly expansive agreements.

C. Are Unionized Employees Truly Involved in a "Bargained-For Exchange"?

A common precept of labor law is that an employee (or in this case, a union) and an employer are participants in a "bargained-for exchange"—that is, that an employee and an employer make certain concessions when negotiating the employment agreement or contract. The *Duraku* court, as well as past courts, made mention of this bargained-for exchange in support of its decision. However, in a modern era where one cannot be hired unless one maintains membership in the union, that is a misleading argument. For example, during May 2010 in the New York City-White Plains-Wayne metropolitan area, those employed in "service occupations," as defined by the Bureau of Labor Statistics[114] accounted for roughly 21.2 percent[115] of a workforce of approximately 3,699,700 individuals—roughly 784,336 service occupation workers total.[116] Considering that the Union in the instant case represents over 70,000 workers by their own account,[117] that would mean roughly 9 percent of service-industry workers in New York City are represented by one union alone. Considering that 24.2 percent of New York State's workforce is unionized employees,[118] approximately 189,809 service occupation workers in New York City would be union employees. While there are other options available, the numbers suggest that there is a much narrower range of options available for employment with non-unionized workplaces.

Of course, correlation does not equal causation. But it does raise a question: when so many workplaces are unionized, requiring mandatory membership and compulsory assent to the collective bargaining agreement as a condition of employment, is it truly a "bargained-for exchange"? When one employee does not even comprise one-one thousandth of the union's membership, should a union be allowed to "bargain" away an individual employee's statutory rights in pursuit of

114. The United States Bureau of Labor Statistics (BLS) groups the subclassifications of "healthcare support occupations", "protective service occupations", "food preparation and service related occupations", "building and grounds cleaning and maintenance occupations", and "personal care and service occupations" into the broad classification of "service occupations". *See* BLS, The 2010 SOC: A Classification System Gets An Update, http://www.bls.gov/opub/ooq/2010/summer/art02.pdf at 17 (last visited Nov. 07, 2010); *see also* BLS, 2010 Standard Occupational Classification Structure, http://www.bls.gov/soc/soc_structure_2010.pdf at 19-24 (last visited Nov. 07, 2010).

115. BLS, Occupational Employment and Wages in New York-White Plains-Wayne, May 2009, http://www.bls.gov/ro2/oes9705.pdf. While "service occupations" is not specifically listed in this document, the subclassifications under "service occupations" can be added to determine the approximate percentage of the workforce who works in a "service occupation".

116. BLS, New York City Total Nonagricultural Payroll Employment--Current Employment Statistics, http://www.bls.gov/ro2/nycces9465.pdf (last visited Nov. 08, 2010). While this number is not verified, it can be estimated by taking the U.S. Bureau of Labor Statistics totals for number of people employed in the New York-White Plains area, and applying the percentage of workers that the Bureau claims are employed in "service occupations."

117. SEIU 32BJ, Home, (Nov. 08, 2010), http://www.sciu32bj.org/au/District_NYM.asp.

118. BLS, Economic News Release—Union Members Summary, http://www.bls.gov/news.release/union2.nr0.htm (last visited Nov. 08, 2010).

an agreement? Claims very similar to that of the instant case were at the heart of *Gardner-Denver*, and it is hard to imagine that those who implemented Title VII and those who ruled on *Gardner-Denver* finding that a compulsory surrendering of statutory rights would be perfectly suitable under the law that they crafted.

VI. CONCLUSION

Some may posit that *Duraku* is merely but the most recent case in an evolution—or devolution, depending on one's point of view—of arbitration case law over the last four decades. Some may (and have) argued that arbitration—once considered "flimsy" by the legal community—has now evolved into a complex and appropriate forum where two parties in controversy might be able to resolve their differences in a less adversarial manner, thus allowing both parties to leave the controversy behind, satisfied with the outcome. What those people might fail to realize is that the continued, and increasingly uptempo, path of forcing individual employees to waive individual statutory, non-contractual rights to a collective body as part of a condition of employment, puts a great number of citizens at risk.

Arbitration was intended to be a forum to resolve contractual disputes, but has evolved—or devolved—into a non-mutual forum where individual rights are sacrificed and ignored to the collective, and where the power of the corporate dollar can rule supreme due to unequal representation. This is a starkly dark and gloomy cloud on the horizon, and should be disconcerting for those interested in maintaining a mutually beneficial and equal balance between employer and employee.

J. NICHOLAS HAYNES