Missouri Law Review

Volume 65
Issue 1 Winter 2000

Winter 2000

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Union-Negotiated Waivers of an Employee's Federal Forum Rights to Statutory Claims: Are They an Effective Means to Exclusivity?

*Wright v. Universal Maritime Service Corp.*

I. INTRODUCTION

Virtually every collective bargaining agreement provides for the use of labor arbitration in the event that the employer, and the union representing the employee, are unable to reach a mutually agreeable result. However, even after *Wright v. Universal Maritime Service Corp.*, it remains unclear whether an agreement to arbitrate can require arbitration to be an individual employee's exclusive forum for federal statutory claims. This Note analyzes the United States Supreme Court holding in *Wright*, and also analyzes both the case law leading up to the Court's decision, and the existing split among the federal circuits as to whether union-negotiated waivers of an employee's federal forum rights are effective in mandating arbitration as the only available forum.

II. FACTS AND HOLDING

In 1970, Caesar Wright began his employment as a longshoreman in Charleston, South Carolina. At that time, Wright also became a member of the Local 1422 of the International Longshoremen's Association, AFL-CIO ("Union"). The Union provided a hiring hall that supplied workers to several stevedoring companies, represented by the South Carolina Stevedores Association ("SCSA"). Pursuant to the relationship between SCSA and the Union, the two organizations entered into a collective bargaining agreement

4. Id. at 72.
5. Id.
6. Id. The SCSA is a multi-employer bargaining unit organized by several stevedoring companies for the purposes of collectively bargaining with the union.
("CBA"). The CBA compelled all union employees to arbitrate "all matters affecting wages, hours, and other terms and conditions of employment." Specifically, the CBA provided that any "matters under dispute which [could not] be promptly settled between the Local and an individual [e]mployer," should be referred in writing to a "Port Grievance Committee" within 48 hours. If, however, the Port Grievance Committee was unable to reach an agreement within five days after receiving the complaint, the dispute was then to be referred to the District Grievance Committee. The bargaining agreement provided that any majority decision by this District Committee was "final and binding." However, if the District Committee also was unable to reach a majority decision within seventy-two hours after meeting, the committee was required to seek the services of a professional arbitrator.

After more than two decades of employment as a longshoreman, Wright injured his right heel and his back. Wright originally sought compensation for his permanent disability under the Longshore and Harbor Worker's Compensation Act, but later settled his claim for $250,000 and $10,000 in attorney's fees. After an absence of nearly three years from his employment, Wright returned to the union hiring hall and requested work. Over a ten-day period Wright worked for four different stevedoring companies, none of which complained about his work performance. However, once the stevedoring companies realized that Wright had previously settled a claim for a permanent disability against them, the stevedoring companies informed the Union that they would no longer accept Wright for employment.

7. Id.
8. Id. at 73.
9. Id. at 72.
10. The Port Grievance committee is composed of representatives evenly divided from labor and management. Id.
11. Id. at 72-73. The Grievance Committee is also evenly composed of representatives of labor and management. Id. at 73.
12. Id.
13. Id.
14. Id. at 74. The accident occurred on February 18, 1992, while Wright was working for Stevens Shipping. Id. Wright fell off the top of a freight container and shattered his right heel and injured his back. Id. These injuries prevented Wright from engaging in longshore employment for almost three years. Petitioner's Brief, Wright v. Universal Maritime Serv. Corp., 525 U.S. 70 (1998) (No. 97-889), available in 1998 WL 232769, at *2.
16. Id. Apparently, a "major factor in [Wright's] physical disability was a bony spike in his right heel that made walking extremely painful. In late 1994 [however], the bony spike was spontaneously resorbed" and Wright was able to return to work. Petitioner's Brief, Wright (No. 97-889), available in 1998 WL 232769, at *3.
17. Wright, 525 U.S. at 74.
18. Id.

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Union that employees who were "permanently disabled" were not qualified to perform longshore work under the CBA.  

Wright, however, continued to contact the Union about possibly locating longshoreman employment. The Union suggested to Wright that, in lieu of filing a grievance, he should obtain legal counsel and file a claim under the Americans with Disabilities Act ("ADA"). Following the Union's advice, Wright filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") and the South Carolina State Human Affairs Commission, alleging a violation of the ADA. In October 1995, Wright received a right-to-sue letter from the EEOC. In January 1996, Wright filed his complaint, naming as defendants the SCSA and six individual stevedoring companies. Respondents (SCSA and the individual stevedoring companies) asserted various affirmative defenses, including Wright's failure to exhaust his existing remedies under the CBA. The district court agreed with the respondents and dismissed the suit without prejudice, stating that Wright was required to seek his remedy through the grievance procedure provided within the CBA. The United States Court of Appeals for the Fourth Circuit affirmed the district court's dismissal. The Fourth Circuit, relying on prior case law, stated that "collective bargaining agreements to arbitrate employment disputes are binding upon individual employees even when the dispute involves a federal cause of action." The United States Supreme Court granted certiorari.

On appeal to the Supreme Court, Wright argued that both the district court and the Fourth Circuit erred in concluding that his federal forum rights to an ADA statutory claim could be waived by a collective bargaining agreement. Wright argued that the Fourth Circuit's holding resulted from an unfair reading of the leading case, *Gilmer v. Interstate/Johnson Lane Corp.* Wright asserted that *Gilmer* validated only those waivers resulting from individually executed contracts, not *collectively bargained* contracts. In contrast, Respondents argued that the Fourth Circuit's reliance on *Gilmer* was entirely appropriate.

19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 74-75.
23. *Id.* at 75.
24. *Id.*
25. *Id.*
26. *Id.*
30. *Id.*
32. *Wright*, 525 U.S. at 77.
Respondents suggested that due to the existing "federal policy favoring arbitration," a collective bargaining agreement indeed could serve as an effective waiver of an individual's federal forum rights.33

The Supreme Court, however, specifically declined to resolve this highly controversial issue, and instead rested its decision on alternative grounds.34 The Court held that because the particular collective bargaining agreement at issue failed to provide a "clear and unmistakable" waiver of Wright's federal forum rights to his ADA statutory claim, deciding the overarching issue of the enforceability of a "clear and unmistakable" collectively bargained waiver was not necessary.35 Therefore, because no "clear and unmistakable waiver" existed, Wright was not estopped from asserting his statutory rights to a federal forum for resolution of his ADA claim.36

III. LEGAL BACKGROUND

The use of alternative dispute resolution ("ADR") techniques to prevent and resolve disputes in the labor arena has experienced dramatic growth over the last several decades.37 In particular, binding arbitration has become a popular technique used by employers seeking to resolve workplace discrimination complaints.38 Such binding arbitration has been used quite effectively in both the conventional employment arbitration setting and the labor-management arbitration setting.39 Whereas labor-management arbitration "refers to the grievance procedure mandated by collective bargaining agreements between employers and unions,"40 employment arbitration "refers to all arbitration used in contexts other than in the labor arena and includes the general commercial, securities, construction, and textile industries."41 The former of these two settings, labor-management arbitration, is the focus of this Part.
A. The Integrity of Mandatory Arbitration Clauses Under Collective Bargaining Agreements

In modern society, arbitration clauses contained within collective bargaining agreements have become commonplace. However, it was not until the middle of the twentieth century that Congress and the Supreme Court first began to consistently recognize these arbitration clauses as enforceable.

Congressional action, via the enactment of the National Labor Relations Act ("NLRA" or "Wagner Act"), came first. The NLRA was passed by Congress after it recognized an inherent inequality of bargaining power between individual employees and their employers. To help remedy this imbalance, Congress provided individual employees with the right to collectively bargain with their employers regarding working conditions.43 Such a right, Congress suggested, would help neutralize the inherent inequality between individual employees and their respective employers. Congress furthered its legislative efforts by enacting the Labor Management Relations Act ("LMRA" or "Taft-Hartley Act").44 The LMRA went one step further and announced a new federal policy in favor of binding labor arbitration.45 Specifically, Section 203(d) provided that "[f]inal adjustment by a method agreed upon by the parties is . . . to be the desirable method for settlement of grievance disputes."46 The Supreme Court followed suit in three cases termed the Steelworkers Trilogy,47 and announced that "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself."48 With this announcement, the Court denounced its prior hostility toward arbitration and instead endorsed the existent congressional policy favoring enforceability of arbitration clauses contained within collective bargaining agreements.49

The first of the Steelworkers Trilogy was United Steelworkers v. American Manufacturing Co.50 In American Manufacturing, the Union petitioned the Court to compel arbitration of a grievance between the Union, on behalf of the employee, and the employer.51 The Court noted that the collective bargaining agreement contained an arbitration clause stating that "[a]ny disputes,

49. Id.
51. Id. at 564.
misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this [collective bargaining] agreement . . . may be submitted to the Board of Arbitration for decision.\textsuperscript{52} The Supreme Court then referenced Section 203(d) of the LMRA.\textsuperscript{53} This statutory provision provided that "[f]inal adjustment by a method agreed upon by the parties is [t]hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."\textsuperscript{54} The Court concluded that only by giving "full play" to the means chosen for settlement (arbitration) would the congressional policy in Section 203(d) be effectuated.\textsuperscript{55} Therefore, the Court granted the Union's petition to compel arbitration.

Likewise, in United Steelworkers v. Warrior & Gulf Navigation Co.,\textsuperscript{56} the Union petitioned the Court to compel arbitration by the employer.\textsuperscript{57} The Court noted that the "present federal policy is to promote industrial stabilization through the collective bargaining agreement."\textsuperscript{58} The Court then remarked that "[a] major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."\textsuperscript{59} Further, the Court noted that mandatory arbitration clauses were enforceable pursuant to Section 301(a) of the LMRA.\textsuperscript{60}

Finally, in United Steelworkers of America v. Enterprise Wheel & Car Corp.,\textsuperscript{61} the Court narrowly construed its judicial review power over decisions made by arbitrators pursuant to collectively-bargained arbitration clauses. Specifically, the Court noted that "an arbitrator is confined to interpretation and application of the collective bargaining agreement."\textsuperscript{62} However, so long as the arbitrator's decision drew "its essence from the collective bargaining agreement,"\textsuperscript{63} the Court would not stand in the way of the arbitrator's decision.

In sum, after the Court's holdings in the Steelworkers Trilogy, the integrity of binding arbitration clauses within collective bargaining agreements was no longer questionable. Simply put, there now existed an impressive federal policy,
endorsed by both congressional and Supreme Court action, in favor of resolving labor disputes by way of mandatory arbitration.  


While the Supreme Court was becoming receptive to arbitration as an alternative means of resolving labor disputes, "this reception did not extend to all employment related disputes occurring in the context of organized labor." Specifically, a series of cases handed down by the Court "held that statutory rights could not be subordinated to the confines of arbitration."

In the seminal case, Alexander v. Gardner-Denver Co., the Supreme Court struck its first blow to arbitration clauses contained within collective bargaining agreements. Specifically, the Court refused to hold that arbitration of an employee's Title VII claims precluded an employee from also filing a Title VII claim in federal court, despite the existence of the arbitration clause within the collective bargaining agreement. The Court stated that even though "a union can waive certain statutory rights related to collective activity, such as the right to strike," there could "be no prospective waiver of an employee's [federal forum] rights under Title VII." Further, the Court stated that "[t]he purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII," and that "deferral to arbitral decisions is inconsistent with that goal."

64. Id.
66. Id.
68. Id. at 51.
69. Id.
70. Id. at 56. However, the Court did suggest that an arbitral decision could be admitted as evidence in federal court and accorded such weight as the court deemed appropriate. Id. at 60. While the Court did not adopt any required standards in determining the weight the arbitral decision must be accorded, the Court did provide the following discussion regarding considerations that a lower federal court should make: Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record.
In *Gardner-Denver*, the Court refuted the notion "that arbitral processes are commensurate with judicial processes."\(^{71}\) The Court first suggested that one inadequacy of the arbitral process is due to the special role of the arbitrator, in that the arbitrator is required to effectuate the intent of the parties involved *rather* than the requirements of federal legislation.\(^{72}\) As such, where the details of the collective bargaining agreement would conflict with the requirements of federal law, an arbitrator would necessarily be bound by the collective bargaining agreement. Such a result, the Court intimated, certainly ran afoul of congressional intent.\(^{73}\) The Court also noted that an arbitrator's "specialized competence . . . pertains primarily to the law of the shop, not the law of the land."\(^{74}\) Therefore, the Court suggested that courts, not arbitrators, be given the responsibility of interpreting "the law of the land [federal statutory claims, like the ADA]."\(^{75}\) Additionally, the Court suggested that the fact-finding process used in arbitration proceedings is not equivalent to the judicial fact-finding process.\(^{76}\) The Court expressed additional concerns that "[t]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable."\(^{77}\)

Finally, in a highly persuasive footnote, the *Gardner-Denver* Court expressed one last major concern with allowing arbitration as a commensurate forum to the federal courts for the resolution of statutory claims.\(^{78}\) Specifically, the Court was concerned with the notion that unions have exclusive control over the manner and extent to which an individual grievance is presented.\(^{79}\) The Court noted that "[i]n arbitration, as in the collective bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit."\(^{80}\) Moreover, the Court continued, "[h]armony of interest between the union and the individual

But courts should ever [be] mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.

*Id.* at 60 n. 21.
71. *Id.* at 56.
72. *Id.* at 56-57.
73. *Id.* at 57.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 57-58.
78. *Id.* at 58 n.19.
79. *Id.* (citing Vaca v. Sipes, 386 U.S. 171 (1967); Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965)).
80. *Id.* (citing J.I. Case Co. v. NLRB, 321 U.S. 332 (1944)).
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employee cannot always be presumed, especially where a claim of racial discrimination is made.\textsuperscript{81} Therefore, the Court’s legitimate concern was that enforcement of a mandatory arbitration provision may, in some instances,\textsuperscript{82} effectively result in the stripping away of all the employee’s forum rights.

The next logical progression for the Supreme Court was to apply the reasoning of \textit{Gardner-Denver} to other federal statutory claims. The Court was presented that opportunity in \textit{Barrentine v. Arkansas-Best Freight System, Inc.}\textsuperscript{83} In \textit{Barrentine}, the Court applied the reasoning of \textit{Gardner-Denver} to a statutory claim under the Fair Labor Standards Act ("FLSA").\textsuperscript{84}

The \textit{Barrentine} Court provided that "[n]ot all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining."\textsuperscript{85} Specifically, the Court suggested that "[w]hile courts should defer to arbitral decision where the employee’s claim is based on rights arising out of the collective bargaining agreement, different considerations apply where the employee’s claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers."\textsuperscript{86} Therefore, the Court held that an arbitration provision contained within a collective bargaining agreement could not serve as an effective waiver of an employee’s judicial forum.\textsuperscript{87}

In so holding, the \textit{Barrentine} Court specifically expressed concern with unions having exclusive control over the extent and manner in which the arbitration process takes place.\textsuperscript{88} The Court suggested that because a union’s proper objective is to maximize overall compensation of its members, and not to ensure that each employee receives the best compensation deal available, "a union balancing individual and collective interests might validly permit some employees’ statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole."\textsuperscript{89} Additionally, the Court expressed

\textsuperscript{81} \textit{Id.} (citing Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944); Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944)).

\textsuperscript{82} If, for example, the Union determined the employee did not have a legitimate claim.

\textsuperscript{83} 450 U.S. 728 (1981).


\textsuperscript{85} \textit{Barrentine}, 450 U.S. at 737.

\textsuperscript{86} \textit{Id}.

\textsuperscript{87} \textit{Id.} at 745.

\textsuperscript{88} \textit{Id.} at 742.

\textsuperscript{89} Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981) (citing Humphrey v. Moore, 375 U.S. 335, 349 (1964) ("We are not ready to find a breach of the collective bargaining agent’s duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another."); Ford Motor Co. v. Huffman, 345 U.S. 330, 337-39 (1953)).
grave concern with the general lack of competence of arbitrators to decide federal law issues. The Court suggested that "even [where] a particular arbitrator may be competent to interpret and apply statutory law, he may not have the contractual authority to do so." That is, an arbitrator "has no general authority to invoke the public laws that conflict with the bargain between the parties."

The Court progressed one step further in McDonald v. City of West Branch. In McDonald, the Court applied the Gardner-Denver reasoning to an employee's Section 1983 claim. After restating much of its prior holdings in both Gardner-Denver and Barrentine, the McDonald Court stated: "According preclusive effect to arbitration awards in Section 1983 claims would severely undermine the protection of federal rights that the statute is designed to provide." As such, the Court held that where an employee arbitrated his Section 1983 statutory claim pursuant to the terms of a collective bargaining agreement, that employee could not be collaterally estopped from bringing his Section 1983 claim to federal court.

In sum, during the 1970s and 1980s, the Supreme Court consistently held that mandatory arbitration clauses contained within collective bargaining agreements could not serve as effective waivers of employees' federal forum rights for statutory claims.

C. The Individually-Negotiated Waiver of Federal Statutory Claims: Arbitration Prevails

While Gardner-Denver and its progeny expressed extreme discomfort with mandatory arbitration of statutory claims in the collective bargaining arena, this discomfort was not present for mandatory arbitration of all statutory claims within the individual bargaining arena. The absence of such discomfort was due in large part to the presence of the Federal Arbitration Act ("FAA"), which

90. Id. at 743 n.21. ("Because the 'specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land,' many arbitrators may not be conversant with the public law considerations underlying the FLSA.") (citations omitted). The Court further noted that "a substantial portion of labor arbitrators are not lawyers." Id. at 743 n.21 (quoting Alexander v. Gardner-Denver, Co., 415 U.S. 36, 57 n.18 (1974)).
91. Id. at 744.
92. Id.
94. Id. at 285.
95. Id. at 292.
96. Id.
97. See supra notes 65-96 and accompanying text.
applied to individually-negotiated arbitration clauses, but not to those clauses obtained through collective bargaining.100

In the cases termed the Mitsubishi Trilogy,101 the Supreme Court was asked to decide whether private agreements to arbitrate antitrust and federal securities claims signed by securities investors102 and automobile dealers103 could establish arbitration as the exclusive forum available to the individuals. In dealing with these claims, the Court dismissed the arguments that arbitration was an inadequate forum for all statutory claims and held that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."104

The Mitsubishi cases further held that parties are bound by their pre-dispute agreements to arbitrate "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."105 Finally, the Mitsubishi line of cases disregarded the attacks placed on the efficacy of the arbitral process and provided that such attacks were "far out of step with [the] current strong endorsement of the federal statutes favoring this method of resolving disputes."106

The next logical progression for the Court concerning individually-negotiated waivers was Gilmer v. Interstate/Johnson Lane Corp.107 In Gilmer, a sixty-two year old registered securities representative filed suit under the ADEA108 after being fired by his employer.109 The employer filed a motion to compel arbitration (as the exclusive forum) pursuant to the existing arbitration agreement in Gilmer’s registration application.110 The Court held that the ADEA claim could be subjected to exclusive compulsory arbitration.111


102. Rodriguez de Quijas, 490 U.S. at 477; Shearson/American, 482 U.S. at 220.

103. Mitsubishi, 473 U.S. at 617.

104. Id. at 628.

105. Id.

106. Rodriguez de Quijas, 490 U.S. at 481.


110. Id. at 24.

111. Id. at 26-27.
In holding Gilmer's ADEA claim subject to mandatory (exclusive) arbitration, the Court stated that a party must be held to an agreement to arbitrate claims absent congressional intent "to preclude [such] a waiver." The Court rejected Gilmer's host of challenges concerning the inadequacy of arbitration procedures. Gilmer first argued that arbitration panels would be biased. The Court, however, "decline[d] to indulge in the presumption that the parties and the arbitral body conducting a proceeding [would] be unable or unwilling to retain competent, conscientious and impartial arbitrators." Gilmer next argued that arbitration was an inappropriate forum in that the discovery allowed in arbitration was much more limited than in the federal courts. The Court suggested, however, that this limitation was of little harm because arbitrators were not bound by the Federal Rules of Evidence.

The Gilmer Court, in dicta, concluded by distinguishing the Gardner-Denver cases on three grounds. First, the Gilmer Court recognized that in labor-management arbitration the issue is contractual, rather than statutory, in nature. Second, the Court reasoned that there may be a tension between the union's interest in collective representation and individual interests, such that the union may not be an adequate representative in negotiating a waiver of an individual's statutory rights. Finally, the Court recognized that the Gardner-Denver line of cases was not decided under the FAA, which reflected a "liberal federal policy favoring arbitration agreements."

Therefore, the Supreme Court, through the Mitsubishi cases and the Gilmer case, affirmatively announced a radical shift towards favoritism of mandatory and exclusive arbitration of federal statutory employment claims.

D. The Existing Circuit Split over the Enforceability of Union-Negotiated Waivers of Federal Statutory Claims After Gilmer

An important issue arguably remained unresolved by the United States Supreme Court. That issue was whether the Court in Gilmer intended to establish two separate and distinct rules for individually bargained agreements
and collectively bargained agreements. Not surprisingly, the federal circuits have provided different answers. 122

All but one of the federal circuits deciding the issue have held that the Supreme Court’s holding in *Gilmer* failed to displace the holding of *Gardner-Denver* regarding mandatory arbitration of statutory claims within the collective bargaining realm. 123 Perhaps most representative of the majority view within the circuits is the Sixth Circuit’s decision in *Pryner v. Tractor Supply Co.* 124

In *Pryner*, the Sixth Circuit recognized the ostensible conflict between the *Gilmer* and *Gardner-Denver* case lines, noting that “[e]ach side has its favorite Supreme Court case that it [may] flog[] mercilessly to yield the desired holding.” 125 However, after a thorough analysis of Supreme Court precedent, as well as the relevant public policy concerns, the *Pryner* court concluded that a union may not enter into an enforceable collective bargaining agreement on behalf of its member-employees with their employer “that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement.” 126

In so holding, the *Pryner* court first examined the employer’s argument that such mandatory arbitration provisions do “not take away any of the workers’ substantive statutory rights, but merely substitute an arbitral for a judicial proceeding as the means of vindicating the rights.” 127 The court, however, suggested that in many instances the remedies available to an arbitrator, as well as the rights conferred under a collective bargaining agreement, will fall short of fully vindicating the employee’s substantive rights. 128 In response, the


123. See supra note 122 and accompanying text.


125. *Id.* at 363-64.

126. *Id.* at 363.

127. *Id.* at 361.

128. *Id.*
employers, and their amici, argued that where arbitration does in fact fall short of fully vindicating an employee’s substantive rights, the employee is free to resume his suit in federal court.129 However, the court was not satisfied with this result because an employee would be required to go through two separate proceedings before having his substantive statutory rights properly vindicated.130

The Pryner court was also concerned that “the grievance and arbitration procedure [could] be invoked only by the union, and not by the worker.”131 For example, the court feared that sometimes an employee will be unable to persuade the union to submit his claim to arbitration.132 In response, the employers pointed out “that if the union arbitrarily refuse[d] to prosecute a grievance, let alone refuse[d] on racial or other invidious grounds to do so, the [employee could] bring suit against the union for breach of its duty of fair representation.”133 Again, the Pryner court was unsatisfied, noting that “[t]his raises the spectre of three suits to enforce a statutory right—the suit against the union to force it to grieve and if necessary arbitrate the grievance, the arbitration proceeding, and the resumed district court proceeding if the workers’ rights under the collective bargaining agreement are more limited than their statutory rights.”134 Moreover, the court recognized that in many situations a union may decide not to prosecute or arbitrate a grievance due to “tactical and strategic” factors.135 Under such circumstances, the union’s broad discretion may very well not give rise to a breach of fair representation.136 The court therefore suggested that where an employee asked the union to grieve a statutory violation, he could not have great confidence in knowing that either the union would do so, or that if the union did not, the courts would intervene and force the union to do so.137

The Pryner court noted that the “essential conflict [was] between majority and minority rights.”138 The court stated that “[w]e may assume that the union will not engage in actionable discrimination against minority workers. But we may not assume that [the union] will be highly sensitive to their special interests, which are the interests protected by Title VII and the other discrimination statutes. . . .”139 Therefore, the court concluded that the enforcement of the

129. Id.
130. Id. at 361-62.
131. Id. at 362.
132. Id.
133. Id. (citing DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 164 (1983)).
134. Id.
135. Id.
136. Id. (citing Vaca v. Sipes, 386 U.S. 171, 191-92 (1967)).
137. Id.
138. Id.
139. Id.
statutory rights of minorities should not be placed in the hands of the majority unions. 140

Finally, the Pryner court suggested that it was "not holding that workers' statutory rights are never arbitrable." 141 Rather, the court stated that "[i]f the worker brings suit, the employer suggests that their dispute be arbitrated, the worker agrees, and the collective bargaining agreement does not preclude such side agreements," 142 then there would be nothing to prevent binding arbitration. 143 Moreover, the court noted that while Gilmer "pruned" some of the dicta of Gardner-Denver, it certainly could not "be taken to hold that collective bargaining agreements can compel the arbitration of statutory rights." 144

The Fourth Circuit, however, in Austin v. Owens-Brockway Glass Container, Inc., 145 held that it was proper for the district court to grant summary judgment against an employee who failed to submit her Title VII and ADA claims to mandatory arbitration pursuant to a collective bargaining agreement. 146 In so holding, the court cited Gilmer, stating "that arbitration of a statutory claim is not equal to giving up any right under a statute, it is simply another forum in which to resolve the dispute." 147

The Austin court continued by looking to the language of the amendments to Title VII and the ADA. 148 The court noted that both statutes contain identical language: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions" of federal law. 149 The court further suggested that a study of the legislative history did not reveal any congressional hostility towards arbitration. 150 Therefore, the Austin court concluded that because Gilmer required there to be some evidence of congressional intent to preclude arbitration, and because no such evidence existed, the parties were bound by their arms-length agreement to arbitrate their claims. 151

140. Id. at 363.
141. Id. (citing Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 899 (4th Cir. 1996)) (other citations omitted).
142. Id.
143. Id.
144. Id. at 365.
145. 78 F.3d 875 (4th Cir. 1996), cert. denied, 519 U.S. 980 (1996).
146. Id. at 877.
147. Id. at 880.
148. Id. at 881.
149. Id. (citing 42 U.S.C. § 12212 (1994)).
150. Id. The court however recognized one conference report that stated: "It is the intent of the conferees that the use of these alternative dispute resolution procedures is completely voluntary." Id.
151. Id.
Finally, in *Austin*, the court noted that unions indeed have "the right and duty to bargain for the terms and conditions of employment." Through this collective bargaining process, the court provided: "[U]nions may waive the right to strike and other rights protected under the National Labor Relations Act." Further, the *Austin* court noted that the Supreme Court had previously determined such waivers valid because they firmly rested within the premise of fair representation. Therefore, the court held that there was "no reason to distinguish between a union bargaining away the right to strike and a union bargaining for the right to arbitrate."

In conclusion, while several federal district courts have agreed with the reasoning of *Austin*, all the remaining federal circuits to have addressed the issue have adopted a rationale similar to that of *Pryner v. Tractor Supply Co.* With this existing split among the circuits, all eyes and ears were sharply focused on the Supreme Court as it handed down its decision in the principal case, *Wright v. Universal Maritime Service Corp.*

**IV. INSTANT DECISION**

In *Wright v. Universal Maritime Service Corp.*, the Supreme Court held that the general arbitration clause contained within the CBA failed to establish a clear and unmistakable waiver of Wright’s rights to a judicial forum for resolution of his federal claim of employment discrimination. At the same time, however, the Court specifically declined to hold whether such a "clear and unmistakable" waiver would in fact be enforceable.

In so holding, the Court first examined the language contained within the CBA. Specifically, the agreement provided that "all matters affecting wages, hours, and other terms and conditions of employment" would be covered under the arbitration agreement. The Court then recognized that the Fourth Circuit had concluded that this general arbitration provision "was sufficiently

152. *Id.* at 885.
154. *Id.* (citing *Metropolitan Edison*, 460 U.S. at 705).
155. *Id.*
159. *Id.*
160. *Id.* at 82.
161. *Id.*
162. *Id.* at 72-73.
163. *Id.* at 73.
broad to encompass a statutory claim arising under the ADA, and that such a provision was enforceable."\textsuperscript{164} The circuit court's conclusion, the Court noted, brought into question the continued vitality of two diverging lines of Supreme Court precedent.\textsuperscript{165} The holdings of \textit{Alexander v. Gardner-Denver Co.}\textsuperscript{166} and \textit{Gilmer v. Interstate/Johnson Lane Corp.}\textsuperscript{167} represent these two diverging lines of authority.

The Court then examined its prior holding in \textit{Alexander v. Gardner-Denver Co.}\textsuperscript{166} The Court noted that in \textit{Gardner-Denver} it had held that "an employee does not forfeit his right to a judicial forum for claimed discriminatory discharge in violation of Title VII [ ] if 'he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective bargaining agreement.'"\textsuperscript{169} The Court further recognized that the \textit{Gardner-Denver} Court held that a statutory cause of action could not be waived by an agreement to arbitrate within a collective bargaining agreement because "there [could] be no prospective waiver of an employee's rights under Title VII."\textsuperscript{170} Finally, the Court noted that it had, several times previously, applied the holding of \textit{Gardner-Denver} when "deciding the effect of [collective bargaining agreement] arbitration upon employee claims under other statutes."\textsuperscript{171}

Next, the Court examined its prior holding in \textit{Gilmer v. Interstate/Johnson Lane Corp.}\textsuperscript{172} The Court noted that in \textit{Gilmer} it had held that "a claim under the [ADEA] could be subject to compulsory arbitration pursuant to an arbitration provision in a securities registration form."\textsuperscript{173} The Court noted that it had several times previously held that "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."\textsuperscript{174}

After discussing both \textit{Gilmer} and \textit{Gardner-Denver}, the Court recognized that "[t]here [was] obviously some tension between these two lines of cases."\textsuperscript{175} Specifically, the Court reiterated that "[w]hereas \textit{Gardner-Denver} stated that 'an

\begin{itemize}
\item\textsuperscript{164} \textit{Id.} at 75.
\item\textsuperscript{165} \textit{Id.}
\item\textsuperscript{166} 415 U.S. 36 (1974).
\item\textsuperscript{167} 500 U.S. 20 (1991).
\item\textsuperscript{168} Wright v. Universal Maritime Serv. Corp., 525 U.S. 70, 75-76 (1998).
\item\textsuperscript{169} \textit{Id.} (citing \textit{Gardner-Denver}, 415 U.S. at 49-50).
\item\textsuperscript{170} \textit{Id.} at 76 (citing \textit{Gardner-Denver}, 415 U.S. at 51).
\item\textsuperscript{172} \textit{Id.} (discussing \textit{Gilmer} v. \textit{Interstate/Johnson Lane Corp.}, 500 U.S. 20 (1991)).
\item\textsuperscript{173} Wright, 525 U.S. at 76 (citing \textit{Gilmer}, 500 U.S. at 23).
\item\textsuperscript{175} \textit{Id.}
\end{itemize}
employee's rights under Title VII are not susceptible of prospective waiver, & #176; Gilmer held that the right to a federal judicial forum for an ADEA claim could be waived. & #177; The Court first entertained the arguments of Petitioner-Wright and the United States as amicus. & #178; They argued that federal forum rights could not be waived in union-negotiated collective bargaining agreements, even if they could be waived in individually executed contracts. & #179; The Court recognized that such a distinction "assuredly [found] support in the text of Gilmer." & #185; Next, the Court entertained the arguments of Respondents and their numerous amici. & #181; They argued that the real distinction between the two lines of cases was "the radical change, over the [past] two decades, in the Court's receptivity to arbitration." & #182; However, the Court abruptly ended the discussion by stating: "[W]e find it unnecessary to resolve the question of the validity of a union-negotiated waiver." & #183; Instead, the Court determined that on the facts presented, no such waiver had occurred. & #184; In so holding, the Court first addressed Respondent's argument that because there was a presumption of arbitrability, stemming from Section 301 of the LMRA, & #185; the general language of the arbitration clause should be sufficient to encompass Wright's statutory claims. & #186; The Court stated, however, that the presumption does "not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts to interpret the terms of a [collective bargaining agreement]." & #187; The Court then noted that the cause of action which Wright asserted arose from the ADA, not from the CBA between the Union and Wright's employer. & #188; Therefore, the Court concluded, because the ultimate question for the arbitrator in this case would be what in fact federal law (the ADA) required, not what the CBA required, the presumption of arbitrability should not appropriately extend to Wright's statutory claims. & #189;

177. Id. at 77 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)).  
178. Id.  
179. Id.  
180. Id.  
181. Id.  
182. Id.  
183. Id.  
184. Id.  
187. Id. at 78.  
188. Id. at 79.  
189. Id.  

https://scholarship.law.missouri.edu/mlr/vol65/iss1/11
Finally, the Court stated that Wright’s statutory claim was not subject to a presumption of arbitrability, and that any collective bargaining agreement to arbitrate statutory claims must be “clear and unmistakable.” The Court referenced its prior holding in Metropolitan Edison Co. v. NLRB, where it held that a union could waive its officers’ statutory rights under Section 8(a)(3) of the NLRA only if the waiver was “clear and unmistakable.” The Court then determined that this same “clear and unmistakable” standard was applicable to union-negotiated waivers of employees’ statutory rights to judicial forums for claims of employment discrimination. The Court applied this standard to the waiver contained within the CBA and determined that the waiver was unenforceable because it was not “clear and unmistakable.” Therefore, the Court vacated the Fourth Circuit’s holding and remanded the case for further proceedings consistent with its holding.

V. COMMENT

The Supreme Court’s decision in Wright is well supported by the Court’s previous precedent. One need look no further than the Court’s decision in Metropolitan Edison v. NLRB to find that a waiver of forum rights to a statutory claim must be “clear and unmistakable.” However, one cannot help but be disappointed with the Court for its refusal to go one step further and decide whether a “clear and unmistakable” waiver is in fact enforceable. Certainly, the Court’s decision rests comfortably within the doctrine of judicial restraint because this particular issue was not technically relevant to the facts of the Wright case. However, one need not search long before finding numerous instances where the Court has gone well out of its way to decide issues that clearly were not then before it.

With that said, the remainder of this Note provides both an analysis of the considerations that the Court would likely have discussed had it chosen to resolve the existing split over the principal issue as well as a discussion of the likely impact this case will have on the future of union-negotiated arbitration clauses.

193. Metropolitan Edison, 460 U.S. at 708.
195. Id. at 82.
196. Id.
198. Id. at 709.
A. Potential Considerations for the Supreme Court in Resolution of the Existing Circuit Split

As a base point, the initial query should be whether the Supreme Court's prior holding in Alexander v. Gardner-Denver Co. is still good law. Therefore, an appropriate discussion would need to consider whether the Court still adheres, at least to some extent, to the underlying rationales involved in the Gardner-Denver holding, or alternatively whether these rationales have been supplanted by the Court's later holding in Gilmer v. Interstate/Johnson Lane Corp.

The first rationale given by the Court in Gardner-Denver for not allowing mandatory arbitration of statutory claims within the collective bargaining arena was the inadequacy of the arbitral process. This rationale, however, has been rejected by the Mitsubishi Trilogy and Gilmer. In fact, the Court has provided: "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."

The Court's reversal in attitude from hostility toward reception of arbitration appears justifiable. For example, as the Gilmer Court noted, modern arbitration proceedings now commonly provide discovery provisions, which allow for document production, information requests, depositions, and subpoenas. Additionally, in modern arbitration proceedings, the arbitrator may be required to issue the award in writing, name the parties, summarize the issues involved, and describe the award issued. Moreover, the competency of the arbitrator can no longer be questioned, for "most labor arbitrators have experience in labor law or labor relations." In fact, many labor-management arbitrators are lawyers or law professors who have expansive knowledge of the intricate legal issues involved. Finally, the Federal Mediation and Conciliation Service ("FMCS") has since been established, and it provides well trained labor-management arbitrators.

However, several arguments suggest that arbitration is not entirely commensurate with the judicial forum. While arbitration should be commended

201. Gardner-Denver, 415 U.S. at 56.
204. Gilmer, 500 U.S. at 31.
205. Id. at 31-32.
207. Id.
for its timely resolution of grievances, an unfortunate side effect may be that individual grievances go unheard. For example, in *Wright*, the labor agreement provided that all grievances were to be referred in writing to a grievance committee within forty-eight hours.\(^{208}\) So then, as in *Wright*, where an individual is unsuccessful in persuading the union to pursue his grievance within forty-eight hours, that individual's statutory claim may very well be defaulted.\(^{209}\) This result would follow even if the individual had retained an attorney within fifteen days of the dispute.\(^{210}\) Therefore, even assuming that the labor arbitration process was commensurate with the judicial forum, the potential that an individual may not have the opportunity to proceed with an arbitration proceeding is entirely plausible.

In addition, the arbitrator in a labor-management arbitration proceeding may not have the full range of statutory remedies available to her. Unlike the situation in *Gilmer*, where the relevant rules for securities arbitration did not restrict the remedies available, labor arbitrators will many times be limited in their available remedies.\(^{211}\) Moreover, the Court has recently determined that arbitrators in securities arbitration cases, like *Gilmer*, have the authority to award punitive damages.\(^{212}\) The Court, however, has nowhere suggested that arbitrators in labor-management cases may award punitive damages. In addition, many collectively-bargained arbitration clauses, like the one in *Wright*, will only require the employer "to make financial restitution." Such language generally connotes back pay, and possibly fringe benefits, and therefore it is doubtful that an arbitrator, pursuant to such a provision, would be given the authority to issue compensatory and punitive damages.\(^{213}\)

Further, many labor-management arbitration mechanisms provide a system where the individual is to first present his claim to a grievance committee composed of representatives from labor and management.\(^{214}\) As such, if a mutual decision is reached by this committee, that decision will be considered "final and binding."\(^{215}\) Under such circumstances, an individual will not have the opportunity to bring his claim to an otherwise independent arbitration proceeding. Moreover, many times these grievance committees are composed of members who are not lawyers, and who many times may have no formal education beyond high school.\(^{216}\).


\(^{210}\) Id.

\(^{211}\) Id.


\(^{214}\) See Petitioner's Brief, *Wright* (No. 97-889), available in 1998 WL 232769, at *34.

\(^{215}\) Id. at 35.

\(^{216}\) Id.
Finally, the procedural limitations of labor-management arbitration may make it incompatible with the resolution of statutory claims. While the Court in *Gilmer* flatly rejected such an assertion by Gilmer, it did so only after noting that the relevant rules for securities arbitration authorized both a limited amount of discovery and that arbitration awards be placed in writing to allow public access.\(^{217}\) However, in the labor-management arbitration arena, the rules for securities arbitration are irrelevant.

Second, and perhaps more problematic, the *Gardner-Denver* Court expressed concern about whether a union should be allowed to waive an individual’s statutory rights because of the union’s overall goal of increasing the welfare of its members collectively.\(^{218}\) While many courts have been willing to assume that a majority-backed union will not itself engage in actionable discrimination against minority employees, these same courts have refused to assume that a union will be highly sensitive to the minorities’ interests.\(^{219}\) Because these minority interests are those protected by Title VII, the ADA, the FLSA, and the ADEA, it is highly problematic to allow unions exclusive control over the manner and extent to which these statutory claims are handled.

The grievance and arbitration procedures provided for in collective bargaining agreements can only be invoked by the union.\(^{220}\) Therefore, the employee must persuade the union to prosecute his grievance or submit it to arbitration, or the employee’s claim may well be lost forever.\(^{221}\) Employers are quick to suggest, however, that if indeed “the union arbitrarily refuses to prosecute a grievance, let alone refuses on racial or other invidious grounds,” the worker may bring an action against the union for a breach of its duty of fair representation.\(^{222}\) However, there are three major critiques of such an argument. First, this will force the individual to be involved in two suits simply to have his rights vindicated. Specifically, the employee will be required not only to bring a suit against the union to force it to arbitrate the grievance, but also to go through the arbitration process to have his grievance heard. Second, a union may very well refuse to arbitrate an employee’s grievance without being found in breach of its duty of fair representation. For example, a union has broad discretion in deciding whether to prosecute a grievance, and “may take into account tactical and strategic factors such as its limited resources and consequent need to establish priorities.”\(^{223}\) Third, if the employee was successful in his breach of duty of fair representation claim against the union, the employer (and initial wrongdoer) would be greatly benefitted. That is, where a union has


\(^{218}\) McMillian, *supra* note 37, at 310-11.

\(^{219}\) See *supra* note 139 and accompanying text.

\(^{220}\) See *supra* note 130 and accompanying text.

\(^{221}\) Id.

\(^{222}\) Id.

\(^{223}\) Id.
breached its duty of fair representation, it is held *solely* liable for all of the worker's losses after the time the union's breach caused the losses to continue.\(^{224}\) As such, the employer will be relieved of much of the liability for harm it has wrongly caused.

On the other hand, one might question whether the tension between the majority-backed union and the minority-employee is counterbalanced by other considerations. For example, the *Gilmer* Court held that individuals may effectively bargain away their federal forum rights through mandatory arbitration provisions.\(^{225}\) Likewise, the *Gilmer* Court rejected the argument that "mere inequality in bargaining power" is enough to void a clause compelling arbitration of statutory claims.\(^{226}\) Therefore, one potential result of *Gilmer* may be that enforcement of individually-negotiated arbitration clauses will dilute individual statutory rights to a working environment free from discrimination because employers may simply offer such clauses on a take-it-or-leave-it basis.\(^{227}\) However, in the collective bargaining realm, unions possess more bargaining power than individual employees. As such, an arbitration clause contained within a collective bargaining agreement is much more likely to result from an arms-length bargain than is one contained within an individual employment contract. Therefore, one could reasonably argue that because the Court has enforced mandatory arbitration clauses within individually-negotiated agreements, the mandatory arbitration clauses contained within collective bargaining agreements should certainly be enforceable.

Third, the *Gardner-Denver* decision was not decided under the FAA,\(^{228}\) as was the Court's decision in *Gilmer*. Instead, Section 301 of the LMRA\(^{229}\) provides the vehicle for establishing uniform construction of collective bargaining agreements.\(^{230}\) Therefore, it would seem inappropriate to suggest that the Court's decision in *Gilmer*, which was predicated on an entirely different statute, would have any detrimental effect on its prior decision in *Gardner-Denver*. Even the *Gilmer* case supports this proposition. Quite simply, the *Gilmer* Court distinguished its case from the *Gardner-Denver* line of cases by noting that those cases were not decided under the FAA, which reflected a "liberal federal policy favoring arbitration agreements."\(^{231}\)

In conclusion, a majority of the arguments suggest that the holding of *Gardner-Denver* would, or perhaps should, be followed by the Court even after its decision in *Gilmer*. Still, the *Gilmer* case casts doubt on the firmness of the

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226. *Id.* at 33.
Court’s views toward mandatory/exclusive arbitration of individual statutory claims.

B. Potential Impact of Supreme Court’s Holding in Wright

At first glance, it may appear that the Supreme Court’s decision in Wright was uneventful or unimportant. One might suggest that the only result of the Court’s decision is that now employers will simply change the language in arbitration agreements so that such agreements comport with the “clear and unmistakable” standard. However, such a suggestion would be unfair to the numerous considerations involved. One must first consider the effect of the Wright decision on not only the employer, but also the individual employees and the union.

As discussed above, the individual employees have perhaps the most to lose when a waiver of their rights to bring statutory claims to federal court occurs. Quite simply, by agreeing to such a waiver, the individual employees place themselves at the mercy of the union. If the employees are unable to persuade the union to arbitrate their claims, they may be stripped of all their available forums. Certainly this is a major concern for individual employees. Still, individual employees may decide that they would prefer an arbitration mechanism over a judicial forum. Perhaps the employees fear that they would either be unable to afford an attorney, or alternatively, unable to convince an attorney to take their claims on a contingency basis due to the small amount of damages available.

Putting aside the considerations of individual employees, the union may also be unwilling to argue “clear and unmistakable” waiver language within the arbitration provision. Quite simply, the union may not want to put itself in the position of having to defend itself against employee charges of breach of its duty of fair representation if the union decides not to pursue every individual employee’s grievance to arbitration.

As a practical matter, negotiations between employers and unions may well lead to compromise. A union might agree to enter into a “clear and unmistakable” waiver of its member-employee’s federal forum rights in exchange for the right of its employees to seek arbitration with the employer even if the union decides not to seek arbitration on the employee’s behalf. Under this compromise, the employer, the union, and the individual employees will benefit. First, the employer will benefit because it will not be forced to defend itself against statutory claims in federal court. Instead, all claims will necessarily be resolved in arbitration. Second, the union will benefit because it will no longer be forced to pursue every employee grievance to arbitration in fear that a court may later find that the union breached its duty of fair representation. Finally, the employee will benefit because he or she will be guaranteed a forum to resolve disputes, regardless of whether the union decides not to pursue the claim on the employee’s behalf.
VI. CONCLUSION

After *Wright v. Universal Maritime Service Corp.*, it remains unclear whether mandatory arbitration clauses contained within collective bargaining agreements are effective in establishing arbitration as the exclusive forum for resolution of federal statutory claims. However, the Supreme Court’s decision in *Wright* may prove very important in collective bargaining labor relations. Quite simply, unions and employers will now be forced to determine whether a “clear and unmistakable” waiver of federal forum rights for individual statutory claims is mutually agreeable. Perhaps the end result of these negotiations may be a compromise, whereby not just the employer’s but also the union’s and the individual employees’ rights receive equal protection.

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