

**SEARCHING FOR THE *WRIGHT* AND *PYETT* ANSWER TO COLLECTIVE
BARGAINING ARBITRATION OF STATUTORY DISCRIMINATION CLAIMS©
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This is a work-in-progress draft introduction/abstract. The full paper will be presented at the AALS Dispute Resolution Section Works in Progress Conference.

BY

MICHAEL Z. GREEN*

* Professor of Law, Texas Wesleyan University School of Law. This Article initially resulted from a presentation at the Second Annual Labor and Employment Scholars Colloquium held at the University of Denver College of Law on September 26, 2007. In early 2008, I learned that the Supreme Court had granted certiorari in *14 Penn Plaza v. Pyett*. That case is a focal point in this Article and it was a basis for the assertion in the 2007 draft of the Article that there was a need for Supreme Court intervention on the issues discussed herein. Although I was elated to find that the Court agreed with me about necessary intervention when it granted certiorari, I thought the Court might have heard the issues in *Pyett* by the end of last term. Then the Article could have been moot and may not have addressed some of the key issues that the Court's decision may generate. The *Pyett* case is now set to be heard in the Court's 2008 term and the 2007 draft Article has been updated after looking at the briefs submitted by the parties and amicus to the Supreme Court. Further development of this 2008 draft Article awaits the Supreme Court's current outlook on this issue. The final analysis will incorporate the Court's decision. Accordingly, I look forward to presenting this Article and gaining further input from ADR colleagues at the AALS Dispute Resolution Section's Works in Process Conference to be held in Phoenix, Arizona on October 25, 2008. I am thankful for the financial support given to me by the Texas Wesleyan University School of Law and the student research assistance provided by Patrick Cannon, Chris Norris, Rachel Phillips, Renee Overstreet, and Jessica Sennett. Margaret Green continues to inspire me in immeasurable ways and I remain eternally grateful.

Introduction/Abstract: The Parameters of Union Arbitration Waivers of Court Actions for Statutory Discrimination Claims -- Ten Years of Waiting for a Supreme Court Answer

A. Background. The law currently remains murky as to whether a union may waive an employee's right to pursue a statutory employment discrimination claim¹ in court and have it resolved instead through labor arbitration. Historically, labor peace, an important policy goal under the National Labor Relations Act ("NLRA"),² has been advanced by fostering support for collective bargaining agreements between employers and unions.³ This labor law policy clearly applies when employers and unions agree to resolve their disputes through final and binding arbitration.⁴

The question of whether an individual employee's statutory discrimination claim represents the kind of dispute that may be collectively bargained to be resolved through the grievance arbitration process involves a number of complex issues under both labor law and federal arbitration law. Supreme Court cases, decided pursuant to analysis under the Federal

¹ Most statutory employment discrimination laws are enforced by the Equal Employment Opportunity Commission. *See* Laws Enforced by the EEOC, www.eeoc.gov/policy/laws.html (last visited Sep. 1, 2008) (referring to the following laws, among others, that the EEOC enforces: Title VII of the Civil Rights Act of 1964, as amended ("Title VII") (EEOC enforcement authority codified at 42 U.S.C. §§ 2000e-4, e-5, and e-12) (2000)); Age Discrimination in Employment Act of 1967 ("ADEA") (EEOC enforcement authority codified at 29 U.S.C. § 628 (2000)); and Title I of the Americans With Disabilities Act of 1990 ("ADA") (EEOC enforcement authority codified at 42 U.S.C. § 121116 (2000)).

² 29 U.S.C. §§ 151-169 (2004).

³ Specifically, Section 1 of the NLRA acknowledges that one of the findings that warranted the passage of the NLRA was the failure of employers to "accept the procedure of collective bargaining" which "lead to strikes and other forms of industrial strife or unrest." 29 U.S.C. § 151 (2004).

⁴ *See generally* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455-56 (1957) (finding that the employer's agreement to arbitrate acted as a quid pro quo for the employees' agreement not to strike and avoid industrial strife). Three decisions issued by the Supreme Court in 1960 (and all involved the Steelworkers Union) have become known as the "Steelworkers Trilogy." Those decisions made clear the federal labor policy of preferring the resolution of labor disputes through the collectively bargained grievance and arbitration process rather than using methods that cause industrial strife such as strikes. *See* United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers v. Enterprise Wheel and Car. Corp. (1960).

Arbitration Act (FAA),⁵ have consistently enforced agreements to arbitrate statutory employment discrimination claims when applied in a non-union setting.⁶ However, in the labor union setting, the Supreme Court has addressed the issue of arbitrating statutory employment discrimination claims a bit differently.

In an important case decided nearly thirty five years ago, *Alexander v. Gardner-Denver*,⁷ the Supreme Court found that an individual employee could not be precluded from bringing a statutory employment discrimination claim in federal court even if the underlying dispute had been addressed in grievance arbitration pursuant to the terms of a collective bargaining agreement.⁸ The Court also found that a union cannot agree to waive an individual employee's future pursuit of statutory rights in court.⁹ Some of the rationale for the Court's finding in *Alexander*, including the inability of arbitrators to handle statutory employment discrimination claims, has subsequently been rejected by the Supreme Court in its FAA jurisprudence addressing the non-union setting.¹⁰

On the other hand, one important component of the Court's concerns in *Alexander* still needs to be addressed. Labor arbitration reflects a "majoritarian" process pertaining to collective contractual rights, not the statutory employment discrimination rights of individual members.¹¹

⁵ 9 U.S.C. §§ 1-16 (2004).

⁶ See *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20 (1991); *Circuit City v. Adams*, 532 U.S. 105 (2001).

⁷ 415 U.S. 36 (1974).

⁸ *Id.* at 50 (finding that "[t]he distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.").

⁹ *Id.* at 51. The Court subsequently banned prospective waivers by a union of an individual employee's rights under other statutes in *McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984) (banning waivers under 42 U.S.C. § 1983 (2000)) and *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 745 (1981) (banning waivers under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19 (2000)).

¹⁰ *Gilmer*, 500 U.S. at 26 (finding no concern with agreeing to use an arbitrator to resolve a statutory employment discrimination claim based on age and citing Supreme Court cases allowing parties to arbitrate statutory disputes under other federal laws including the Sherman Act, the Securities Act, the Exchange Act, and the Racketeer Influenced and Corrupt Organizations Act (RICO)).

¹¹ *Alexander*, 415 U.S. at 51-52 (finding that a union may waive certain employee rights, like the right to strike, as part of a collective bargaining process to benefit the majority of its

Under labor law, unions operate pursuant to the majority rule principle whereby the collective strength of the members that selected the union becomes the focus that may be imposed upon individual bargaining unit members despite their protestations or superior individual positions.¹² The key limitation on this concept of majority rule is that a union must fairly represent all the members in the bargaining unit including those who may not have voted for the union or agree with its actions.¹³ Nevertheless, a union may choose legitimately not to pursue some grievances to arbitration out of a concern for the general costs that the entire union membership will incur both in terms of the financial impact and the impact on the overall collective bargaining relationship.¹⁴

members, but a union may not waive prospectively employee rights to pursue a statutory employment discrimination claim which “concerns not majoritarian processes, but an individual’s right to equal employment opportunities”). *See also* Ronald Turner, *The Case Against Union Waiver of the Individual Worker’s Statutory Right to a Judicial Forum*, 49 Emory L. J. 135 (2000) (asserting the general concerns with giving unions the opportunity to waive the rights of their union members to pursue statutory discrimination claims and especially the concerns that unions may misuse this process to effectuate further discrimination).

¹² *See* J.I. Case Co. v. NLRB, 320 U.S. 332, 338-39 (1944) (describing how majority interests bind a dissenting employee to the terms of the collective bargaining agreement so that individuals may not pursue their interests at the expense of the group’s interests); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 64 (1975) (finding that considerations of the national policy against workplace discrimination do not trump the concept of majority rule because “[i]n vesting the representatives of the majority with this broad power, Congress did not, of course, authorize a tyranny of the majority over the minority interests” because individual employees’ minority interests still have protections through democratic union procedures, the limits of what the law deems to be an appropriate bargaining unit, and the limitations on union actions imposed by their duty of fair representation).

¹³ *See generally* *Steele v. Louisville & National Railroad*, 323 U.S. 192 (1944) (finding that because a union is the exclusive representative, it is charged with a duty to represent fairly each of the employees as bargaining agent regardless of the majority members’ biases and decided under the Railway Labor Act); *Syres v. Oil Workers, Local 23*, 350 U.S. 892 (1955) (finding the same duty of representation exists under the NLRA).

¹⁴ *See* *Vaca v. Sipes*, 386 U.S. 171, 191-192 (1967) (noting the “union discretion to supervise the grievance machinery and to invoke arbitration” provides that “both sides are assured that similar complaints will be treated consistently, and major problems of interpretation of the collective bargaining contract can be isolated and perhaps resolved” and it prevents an individual employee from undermining the union and greatly increasing the costs of the grievance process so that arbitration would not function successfully).

Accordingly, a union's exercise of that discretion within its duty of fair representation may only be challenged for arbitrary and capricious actions.¹⁵

Thus, employment arbitration, a process that has grown out of the Supreme Court's approval of resolving statutory employment discrimination claims in the non-union setting, works quite differently from labor arbitration. Unlike labor arbitration, which operates as a substitute for industrial strife, employment arbitration merely operates as a forum substitute for the judicial forum.¹⁶ In enforcing agreements to arbitrate a statutory employment discrimination dispute in the non-union setting, and distinguishing this situation from a labor agreement to arbitrate, the Supreme Court has focused on the individual litigation aspects of what the arbitral forum offers.¹⁷

Most of the judicial decisions involving enforcement of agreements to arbitrate statutory employment discrimination claims have focused their concern on whether an employee can effectively vindicate his or her claim in the arbitral forum.¹⁸ The question of effective vindication

¹⁵ *Id.* at 177, 190 (explaining how the judicially-created duty of fair representation developed in response to a series of cases involving alleged discrimination by unions against individual members on the basis of their race, as found in *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944), and how it requires the union not act arbitrarily); see also Marion Crain & Ken Matheny, "Labor's Divided Ranks": *Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1562-66 (1999) (describing the duty of fair representation and its potential for exploiting black workers' rights to the exclusion of white male dominated unions); Michael Z. Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U. PA. J. LAB. & EMP. L. 55, 79-80 (2004) (describing the origins of the duty of fair representation as a concern about unions using the power of the majority to make discriminatory and racist decisions).

¹⁶ *Gilmer*, 500 U.S. at 26 ("[B]y agreeing to arbitrate a statutory claim [an employee] does not forego the substantive rights afforded by statute [and] only submits to their resolution in the arbitral, rather than a judicial, forum.").

¹⁷ *Id.* at 28 (finding the arbitration agreement should be enforced to apply to a statutory employment discrimination claim "so long as the prospective litigant effectively may vindicate his statutory cause of action in the arbitral forum.").

¹⁸ See Michael Z. Green, *Ruminations About the EEOC's Policy Regarding Arbitration*, 11 EMPLOY. RTS. & EMP. POL'Y J. 154, 181-184 & n.198 (2007) (citing Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. Pa. L. Rev. 379, 397-98 (2006) (referring to the "effectively vindicate" doctrine as a creature of the court's application of the FAA to allow statutory claims to be arbitrated); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements – with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 254, 269-273 (2006) (describing the "effectively vindicate" doctrine along with its origins and applications)).

has also led to concerns about the availability of discovery, remedies, and class actions along with issues about the costs of paying the arbitrator's fees.¹⁹ These matters, and others addressing rights that are missing from the arbitral forum, call into question whether the arbitral forum provided so differs from what the judicial forum offers that these distinctions create a substantive change rather than a mere procedural variation in the forum.

The question of whether collective bargaining agreements to arbitrate can waive individual statutory discrimination claims in the courts was expected to be answered by the Supreme Court ten years ago. Unfortunately, in its 1998 decision, *Wright v. Universal Maritime Services, Inc.*,²⁰ the Court failed to answer the question of whether and how a provision in the collective bargaining agreement involving an agreement to arbitrate could also prevent an employee from pursuing a statutory employment discrimination claim in court. Instead, the Court, in *Wright*, specifically refused to decide whether a union could ever agree to such a waiver.²¹ The Court did find that if a union might legally obtain such a waiver of an employee's right to pursue a statutory claim in court, it would have to establish a clear and unmistakable waiver of that right. Because the provision in the collective bargaining agreement in *Wright* failed to establish a clear and unmistakable waiver, the Court resolved the matter in that case without specifying what elements would be necessary to establish this type of waiver.²²

Since *Wright*, most courts have found that a union may not create a waiver of an employee's statutory right to pursue an employment discrimination in court.²³ However, a clear

¹⁹ *Id.*

²⁰ 525 U.S. 70 (1998).

²¹ *Id.* at 77 (“[W]e find it unnecessary to resolve the validity of a union-negotiated waiver, since it is apparent to us, on the facts and arguments presented here, that no such waiver has occurred.”).

²² *Id.* at 82 (“We hold that the collective-bargaining agreement in this case does not contain a clear and unmistakable waiver of the covered employees’ rights to a judicial forum for federal claims of employment discrimination. We do not reach the question whether such a waiver would be enforceable.”).

²³ *See, e.g.*, *Plumley v. S. Container, Inc.*, 303 F.3d 364, 373-74 (1st Cir. 2002) (statutory rights cannot be consigned to the grievance process); *Rogers v. New York University*, 220 F.3d 73, 75-77 (2d Cir. 2000) (per curiam) (finding that a clear and unmistakable waiver can occur only when the collective bargaining agreement: 1) contains a provision whereby employees specifically agree to submit all federal causes of action arising out of employment to arbitration, or 2) language explicitly incorporating the statutory anti-discrimination laws into the agreement to arbitrate); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363-65 (7th Cir. 1997) (the union cannot agree to assign statutory employment discrimination rights to the grievance process); *Albertson’s*

conflict in the federal courts has arisen. The United States Court of Appeals for the Fourth Circuit has consistently applied *Wright* to find that language in a collective bargaining agreement banning discrimination in the workplace can constitute a clear and unmistakable waiver of an employee's right to pursue a statutory claim in court.²⁴ On the other hand, the United States Court of Appeals for the Second Circuit has applied *Wright* and found that a union can never agree in a collective bargaining agreement to waive an employee's statutory right to pursue a discrimination claim in court.²⁵

When it comes to addressing important questions regarding arbitration of statutory employment discrimination claims, the Court has previously opened the door and then sidestepped any controversial issues to allow further development before returning to clarify those matters a decade later.²⁶ Exactly ten years after *Wright*, the question of union waiver of an employee's right

Inc. v. United Food & Commercial Workers Union, 157 F.3d 758, 760-62 (9th Cir. 1998) (statutory rights can never be prospectively waived through collective bargaining agreement); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 525-27 (11th Cir. 1997) (statutory rights may not be waived through grievance process); *see also* *Jonites v. Exelon Corp.*, 522 F.3d 721, 725 (7th Cir. 2008) (finding that most courts since *Wright* have found that while an individual worker can waive his right to a judicial remedy, a union cannot do so on his behalf); Mary K. O'Melveny, *One Bite of the Apple and One of the Orange: Interpreting Claims that Collective Bargaining Agreements Should Waive the Individual Employee's Statutory Rights*, 19 LAB. LAW. 185, 197 (2003) ("In considering statutory claims raised by employees subject to collectively bargained grievance remedies post-*Wright*, most courts have continued to follow the *Gardner-Denver* paradigm, holding that the contractual grievance machinery was insufficient to establish a "clear and unmistakable waiver").

²⁴ *See, e.g.*, *Safrit v. Cone Mills, Corp.*, 248 F.3d 306, 308 (4th Cir. 2001) (finding that general anti-discrimination provision in collective bargaining agreement was enough to waive employees' statutory right to pursue employment discrimination claims in court); *Aleman v. Chugach Support Serv., Inc.*, 485 F.3d 206, 215-18 (4th Cir. 2007) (finding a "clear and unmistakable waiver" in the following language: "The parties expressly agree that a grievance shall include any claim by an employee that he has been subjected to discrimination under Title VII . . . and/or all other federal, state, and local antidiscrimination laws" even if the employees did not understand the language in the agreement because they did not speak English).

²⁵ *Pyett v. Penn. Bldg. Co.*, 498 F.3d 88 (2nd Cir. 2007) *cert. granted*, 14 Penn. Plaza L.L.C. v. *Pyett*, 128 S. Ct. 1223 (2008) (mem.).

²⁶ For example, in the 1991 *Gilmer* decision, the Supreme Court ruled for the first time that employees could be required to arbitrate their statutory employment discrimination claims. 500 U.S. at 35. However, the Court in *Gilmer* sidestepped the issue of whether the FAA had language that excluded employment agreements from coverage by finding that the actual agreement to arbitrate was not an employment agreement by leaving that question for "another

to pursue a claim in court through an arbitration clause in a collective bargaining agreement will be addressed by the Supreme Court. By granting certiorari in the Second Circuit Case, *14 Penn Plaza v. Pyett*, the Court appears to be primed to close the gap that it left open ten years ago in *Wright*. Now the merger of labor law principles regarding majority decisions pertaining to labor arbitration can be reconciled with the broad principles under federal arbitration law encouraging employment arbitration of individual statutory discrimination claims.

B. Thesis. The thesis embraced within this Article focuses on a compromise between the opposing extremes found in the two key conflicting Circuit Court opinions. This Article asserts that a union can waive an employee's right to pursue a statutory claim in court but only if the waiver expressly states the intent to do so and it provides a fair arbitral forum in which the employee can still have her statutory claim effectively vindicated.²⁷ None of the cases, including *Pyett*, have provided sufficient clarity to be a clear and unmistakable waiver. With the *Pyett* case pending before the Supreme Court, it will be interesting to see what the Court does. At this point, this Article asserts that the Court should find that the *Pyett* waiver is insufficient to be clear and unmistakable.

Then, unlike *Wright*, the Court should identify the key elements that must be present for a waiver of the employees' right to pursue a future statutory discrimination to be clear and unmistakable. There are some statutory rights, including the right to strike²⁸ and the right of union officers to not be treated differently under labor law,²⁹ that a union may effectuate a clear and unmistakable waiver for as part of the collective bargaining process. However, waiving individual statutory rights to pursue a discrimination claim in court due to terms of a labor agreement's arbitration process requires even more particulars before a clear and unmistakable waiver can occur.

Because labor law leaves it up to the union to decide which claims to process through to final and binding arbitration, an employee could be left with no forum to hear her claim if the union decides not to process the claim through the arbitration process. Thus, the decision to waive an employee's statutory right to pursue a statutory discrimination claim in court cannot be valid without making certain that the employee will have a forum in which to effectively vindicate

day.” *Id.* at 25 n.2 Then in 2001, the Supreme Court resolved that matter in *Circuit City*.

²⁷ *See infra*.

²⁸ *See Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 283 (1956) (discussing statutory right to strike and how any waiver must clearly address this type of right).

²⁹ *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983) (discussing the authority of the union to agree to waive the statutory rights of its officials to not be discriminated against in the exercise of their rights under the NLRA by agreeing to differential treatment for union officials in a collective bargaining agreement).

the statutory discrimination claim. Merely putting language in a collective bargaining agreement that allows statutory discrimination claims to be pursued through the grievance and arbitration process and even identifying specific statutes should still not be enough to effectuate a clear and unmistakable waiver. Only language that requires the parties provide an actual and fair forum for the employee to hear and vindicate her statutory claim would be able to effectuate a clear and unmistakable waiver.

A final point remains in addressing the intersection between labor arbitration and employment arbitration as part and parcel of the thesis of this Article. That point involves the duty to bargain under labor law. If a union and an employer can never bargaining about waiving the statutory right to pursue a claim in court, then some authority exists to support the claim that the employer could just unilaterally bargain with individual unionized workers about agreeing to arbitrate statutory claims.³⁰ This authority is somewhat limited and the National Labor Relations Board (NLRB), the federal agency charged with enforcing the NLRA, has not established a clear position on this issue.

However, if a union and an employer may bargain about a waiver of statutory employment discrimination claims, the question would be whether the employer could insist to impasse upon such a provision.³¹ That would generally mean that the issue of waiver would be a mandatory subject of bargaining. On the other hand, if the employer and union could bargain about the subject but could not be compelled to impasse, the issue would be a permissive subject of bargaining under labor law. This distinction between a permissive versus a mandatory subject of bargaining will have major implications.³²

This Article asserts that this clear and unmistakable waiver must be a permissive subject. It is not something that the employer should be able to implement and insist upon to impasse because it involves matters that are solely within the control of the union in exercising its discretion to process grievances to arbitration. Also, if the employer could bargain to impasse, labor law allows the employer to implement the last offer on the table. It would make no sense that any language that was implemented in a last offer as part of impasse would then bind individual employees to have to pursue statutory claims through labor arbitration.

³⁰ See *Air Line Pilots Association, International v. Northwest Airlines, Inc.*, 199 F.3d 477 (D.C. Cir. 1999).

³¹ See generally Ann Hodges, *Protecting Unionized Employees Against Discriminations: The Fourth Circuit's Misinterpretation of Supreme Court Precedent*, 2 EMPLOY. RTS. & EMP. POL'Y J. 123 (1998).

³² See generally Ann C. Hodges, *Arbitration of Statutory Claims in the Unionized Workplace: Is Bargaining with the Union Required?*, 16 Ohio St. J. on Disp. Resol. 513 (2001).

Even if such waivers were found to be mandatory subjects of bargaining, this Article asserts that in order to be a clear and unmistakable waiver, the language must include some affirmative agreement by the union and the employer to provide the employee with representation through arbitration as final resolution.³³ Such waivers would also prohibit the union and employer from settling the statutory grievance without approval of the individual employee or without allowing the employee the opportunity to pursue his own claim in the court instead if the union chooses not to pursue it. Also, the waiver must insure that the employee will be able to effectively vindicate the statutory claim through arbitration to be clear and unmistakable.

In Section II, this Article discusses the historical development of arbitration in the union setting, so-called labor arbitration, and compares and contrasts this history with the more recent development of arbitration of statutory employment discrimination claims, so-called employment discrimination arbitration. Section III identifies the potential problems involved with creating union waivers of employee statutory rights and explains why these waivers should be allowed as long as employees can still be provided with a fair forum. Section IV establishes the analysis that courts should use when assessing whether and how unions and employers can agree to a clear and unmistakable waiver of an employee's right to pursue a statutory claim in court by language in a collective bargaining agreement. Section IV concludes that by establishing the criteria in which a union may make a clear and unmistakable waiver of an employee's statutory right to pursue a discrimination claim in court, unions, employers, and most of all, employees, will now have clarity and fairness in merging labor disputes with employment discrimination disputes into an appropriate arbitration process.

³³ See generally Albert Y. Kim, Comment, *Arbitrating Statutory Rights in the Union Setting: Breaking the Collective Interest Problem Without Damaging Labor Relations*, 65 U. CHI. L. REV. 225 (1998).