

## Casenote

# REJECTING THE MYTH OF *AUSTIN V. OWENS-BROCKWAY GLASS CONTAINER*: EXALTING THE VITALITY OF *GARDNER-DENVER* AND THE DISTINCTION WITHIN *GILMER*

Mtendeweka Owen Mhango†

In 1974 the United States Supreme Court, in *Alexander v. Gardner-Denver Co.*,<sup>1</sup> held that arbitration pursuant to a collective bargaining agreement did not preclude the same discrimination claim in federal court. Less than three decades after the decision in *Gardner-Denver*, the Supreme Court revisited this notion and, without superseding it, held that any waiver of Title VII rights, in the context of a union negotiated collective bargaining agreement provision must be “clear and unmistakable.”<sup>2</sup> The critics of *Gardner-Denver* have frequently argued, inter alia, against what amounts to individual employees having two bites at the apple. Individual employees are able to pursue both Title VII and other statutory claims in court and also have access to union negotiated dispute resolution procedures.<sup>3</sup> Despite these arguments, courts continue to recognize

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† L.L.M. Wayne State University Law School, 2004; J.D., Michigan State University College of Law, 2003; A.B., Morehead State University 2000. I am grateful to Estelle Davidson and John Runyan for their comments and support. I also would like to make a special thank you to my late and beloved wife Sacha T. Mhango for her comments, encouragement and research assistance, and to my parents for their inspiration and encouragement in this project.

1. 415 U.S. 36 (1974).

2. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998) (recognizing the “tension” between *Gardner-Denver* and *Gilmer* but concluding that it was unnecessary to decide whether *Gilmer* had so undermined *Gardner-Denver*). The opinion acknowledged that the fundamental question remaining unsettled was the *validity of any union-negotiated waiver of an employee’s statutory right to a judicial forum*. Compare *id.* at 77 with *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

3. See, e.g., Amanda Dealy, *Compulsory Arbitration in the Unionized Workplace: Reconciling Gilmer, Gardner-Denver and the Americans With Disabilities Act*, 37 B.C.L. Rev. 479 (1996) (arguing that courts should require arbitral resolution before allowing an employee to file individual suit under the ADA); Carla Wong McMillian, *Collective Bargaining, and Title VII: Varner v. National Super Markets, Inc.*, 32 GA. L. REV. 287

statutory interests in guarantees of nondiscrimination and access to the courts in furtherance of the congressional commands against discrimination and employment policies that serve interests distinct from those noteworthy and customary labor policies under the collective bargaining agreement's alternative dispute resolution procedures.<sup>4</sup> In *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>5</sup> the Supreme Court held that an arbitration agreement in a securities registration application barred an individual employee from pursuing his claim in federal court. The federal claim alleged discrimination in violation of the Age Discrimination in Employment Act (ADEA). The *Gilmer* Court explained that an employee who wished to avoid arbitrating his ADEA claim must show, inter alia, congressional intent to bar waiver of his rights to a judicial forum.

This Article maintains that *Gardner-Denver* remains good law in the framework of a collective bargaining agreement. While *Gilmer* is limited to individual circumstances there is no inconsistency between the two decisions and *Gilmer* does not undermine *Gardner-Denver*. In making this contention, the Article reviews the Fourth Circuit decision in *Austin v. Owens Brockway Glass Container, Inc.*<sup>6</sup> and maintains that the Fourth Circuit's decision failed to appreciate the reasoning in *Gardner-Denver* and *Gilmer* to the detriment of thousands of union employees.

The Article also examines the congressional history of Title VII, as amended by the Civil Rights Act of 1991 (Civil Rights Act), including the Americans with Disabilities Act (ADA), and argues that a complete review of that history shows Congress intended to bar prospective waivers of statutory complaints.

Part I generally examines the history of discrimination cases after *Gardner-Denver*. Its primary focus is a review of some of the lower court

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(1997) (explaining why courts should require a victim of sexual discrimination to exhaust her remedies under a collective bargaining agreement before being allowed to file suit in court against her employer under Title VII of the Civil Rights Act of 1964); Geraldine Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395 (1999) (contending that individuals may effectively resolve their statutory rights in the arbitration forum).

4. *Paris v. Dallas Airmotive, Inc.*, 130 F. Supp. 2d 844 (N.D. Tex. 2001) (holding that collective bargaining agreement did not divest federal courts of jurisdiction to hear employees Title VII claims); *Ralph v. Lucent Techs., Inc.*, 135 F.3d 166, 171 (1st Cir. 1998) (rejecting the employer's preemption argument, noting that statutory rights exist independently of the collective bargaining agreement); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 965 F. Supp. 190 (D. Mass. 1997) (holding that Congress did not intend to permit compulsory arbitration of Title VII claims and the arbitral forum at issue was inadequate to resolve the plaintiff's ADEA claim); *Darby v. North Mississippi Rural Legal Servs., Inc.*, 154 L.R.R.M. (BNA) 3060 (N.D. Miss. 1997) (refusing to require employee to exhaust collective bargaining agreement rights before filing federal suit under the ADA).

5. 500 U.S. 20 (1991).

6. 78 F.3d 875 (1997).

decisions that have cited *Gardner-Denver* with approval.<sup>7</sup> It critiques some of the lower court decisions that have questioned the validity of the notion in *Gardner-Denver* in light of the Court's ruling in *Gilmer*.<sup>8</sup> Part II focuses on the congressional history of Title VII, particularly the history of the Civil Rights Act, amending Title VII, and the ADA, regarding the waiver of prospective statutory rights.

## I. THE GENESIS OF THE SUPREME COURT'S ARBITRATION JURISPRUDENCE

Since the Supreme Court decided the Steelworkers Trilogy,<sup>9</sup> in 1960, the Court has encouraged the arbitration of disputes arising under collective bargaining agreements. In the Trilogy, the Court proclaimed that grievance arbitration would be the approved procedure for resolving industrial disputes arising under a collective bargaining agreement.<sup>10</sup> For that purpose, the Court limited the court's function to deciding whether the parties had agreed to arbitrate the dispute and instructed courts that "[d]oubts should be resolved in favor of coverage."<sup>11</sup> Furthermore, the Court analyzed the court's role in post-arbitration review of awards in the Trilogy, concluding that courts should not reconsider the quality of an arbitrator's decision. The following subsection examines how the Supreme Court has applied its arbitration jurisprudence.

### A. *The Gardner-Denver Decision*

The Supreme Court's preference for grievance arbitration as an alternative to industrial strife was by no means a preference for arbitration as an alternative for litigation of statutory complaints, as it clarified in *Gardner-Denver*.<sup>12</sup> The employee in *Gardner-Denver* was a member of a

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7. See *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997), *cert. denied*, 522 U.S. 912 (1997); *Varner v. National Super Mkts., Inc.*, 94 F.3d 1209 (8th Cir. 1996), *cert. denied*, 519 U.S. 1110 (1997); *cf.* *Martin v. Dana Corp.*, 135 F.2d 765 (3d Cir. 1997); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996), *cert. denied*, 519 U.S. 980 (1996).

8. See, e.g., *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1490 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699-700 (11th Cir. 1992); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (9th Cir. 1992); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991).

9. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

10. See *Warrior & Gulf Navigation Co.*, 363 U.S. at 582; *Enterprise Wheel & Car Corp.*, 363 U.S. at 599; *American Mfg. Co.*, 363 U.S. at 568.

11. *Warrior & Gulf Navigation Co.*, 363 U.S. 593.

12. *Warrior & Gulf Navigation Co.*, 363 U.S. at 578; see also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974) (stating that "[t]he clear inference is that Title VII

collective bargaining agreement unit who complained that he had been discharged because of his race.<sup>13</sup> The employer in that case alleged that the termination was justified by the employee's poor work performance.<sup>14</sup> Following the discharge, the union filed a grievance on behalf of the employee that was arbitrated under the just cause provision of the collective bargaining agreement between the employer and the union. It raised his complaint of race discrimination in the arbitration. In the interim, the employee also filed a Title VII complaint in Federal Court.<sup>15</sup> The arbitrator's decision denied the grievance, concluding that the discharge was for just cause, but did not specifically address the question of racial discrimination. Subsequent to the arbitrator's decision, the employer moved for summary judgment on the Title VII complaint.<sup>16</sup> The District Court agreed with the employer's argument that the employee in this case was barred from bringing a cause of action under Title VII due to the finality of the Arbitrators' decision, and the Tenth Circuit affirmed.<sup>17</sup> The Supreme Court reversed and held that the employee was not barred from prosecuting his Title VII complaint, despite the arbitrator's decision.<sup>18</sup>

The question before the Court in *Gardner-Denver* was whether a union's agreement to arbitrate statutory complaints could comprise a plaintiff's right to sue under Title VII.<sup>19</sup> The Court found that it could not, referencing the potential disharmony between the interest of the Union and its individual members.<sup>20</sup> The Court's holding declared:

[T]here 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. These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. 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. Title VII's strictures are absolute and represent a congressional command that each

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was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.").

13. See *Gardner-Denver*, 415 U.S. at 39.

14. See *id.* at 38.

15. See *id.* at 39, 42.

16. See *id.* at 43.

17. See *id.*

18. See *id.* at 59-60.

19. See *id.* at 45-46.

20. See *id.* at 55.

employee be free from discriminatory practices. Of necessity, the 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.<sup>21</sup>

The *Gardner-Denver* Court also found that arbitration was an inappropriate forum for resolving Title VII complaints.<sup>22</sup> The Court noted that arbitrators did not have the experience or authority to enforce statutory complaints as opposed to the area of collective bargaining agreement.<sup>23</sup> In addition, the Court expressed uneasiness with the fact-finding procedures in arbitration. It further said that the lack of regulation of arbitration hearings, particularly the lack of applicability of the rules of evidence and the absence of discovery, cross examination and testimony under oath, made arbitration less suitable than Article III courts for Title VII complaints.<sup>24</sup> Lastly, in dismissing all of the employer's contentions, the *Gardner-Denver* Court declared that "federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under grievance arbitration clause of a collective-bargaining agreement and his cause of action under Title VII."<sup>25</sup>

#### *B. From Gardner-Denver to Gilmer*

Since *Gardner-Denver* was decided, the Supreme Court has upheld the notion in *Gardner-Denver* on two occasions. The first was in *Barrentine v. Arkansas-Best Freight System, Inc.*,<sup>26</sup> and the second was in *McDonald v. City of West Branch, Michigan*.<sup>27</sup> On both occasions, the Court held that employees claiming rights under a collective bargaining agreement could pursue those rights in court in addition to the procedures provided for by the agreement.<sup>28</sup>

In *Barrentine*, the plaintiffs sought compensation for time spent on safety inspections and transportation.<sup>29</sup> After the arbitrator found for the employer, the employees filed a complaint in federal court against the employer under the Fair Labor Standards Act (FLSA)<sup>30</sup> and against the

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21. *See id.* at 51–52 (citations omitted).

22. *See id.* at 56.

23. *See id.* at 57 n.18.

24. *See id.* 57.

25. *See id.* at 59–60.

26. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981).

27. *McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984).

28. *Barrentine*, 450 U.S. at 745; *McDonald*, 466 U.S. at 292.

29. *Barrentine*, 450 U.S. at 730–731.

30. 29 U.S.C. §§ 201–219 (1978).

union for breach of its duty of fair representation.<sup>31</sup> The district court found in favor of the employees, but avoided discussing the complaint under the FLSA.<sup>32</sup> The Eighth Circuit affirmed the decision, with Circuit Judge Heaney dissenting on the FLSA complaint, and found that the district court had correctly refused to discuss the FLSA complaint.<sup>33</sup> The Supreme Court reversed the Eighth Circuit's decision that the employees were barred from pursuing their complaint in federal court.<sup>34</sup> The Supreme Court explained that courts are not required to defer to arbitration decisions when individual statutory rights are at risk.<sup>35</sup> The Court then concluded, while citing *Gardner-Denver*, that statutory complaints were better reserved for determination by a court, thereby determining that Congress intended to afford individual employees a non-waivable right to bring wage claims in federal court.<sup>36</sup>

Following the *Barrentine* ruling, the Court was presented with another disharmony between statutory rights and rights under the collective bargaining agreement. The Plaintiff in *McDonald v. City of West Branch, Michigan* was discharged from the police force and after losing in arbitration, he filed a complaint under 42 U.S.C. § 1983 claiming a violation of first amendment rights.<sup>37</sup> The jury's verdict found for the plaintiff against only one defendant, the chief of police, Paul Longstreet.<sup>38</sup> The Sixth Circuit reversed the judgment against Longstreet, pronouncing that the arbitration agreement bound the parties.<sup>39</sup> Adhering to *Gardner-Denver* and *Barrentine*, the Supreme Court underscored that Congress intended complaints such as section 1983 to be adjudicated by courts and not

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31. *Barrentine*, 450 U.S. at 730–33.

32. *See id.* at 733.

33. *See id.* at 733–34; *Barrentine v. Arkansas-Best Freight Sys.*, 615 F.2d 1194 (8th Cir. 1980).

34. *Barrentine*, 450 U.S. at 734.

35. *See id.* at 737 (explaining that “while courts should defer to an 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 guarantee to individual workers.”).

36. *See id.* at 739–46. The dissenting Justices agreed with the majority that an individual’s “congressionally created” FLSA rights “may not be waived through a collective-bargaining agreement between an employer and the worker’s union or through a direct agreement between an individual worker and the employer.” *Id.* at 746.

37. *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 285–86 (1984).

38. *See id.* at 286 n.3 (pursuing a complaint against Longstreet as well as the following city officials: Acting City Manager Bernard Olson, City Attorney Charles Jennings, and City Attorney Demetre Ellias).

39. *See id.* at 286–87 (finding no abuse in the arbitration procedure, the Court of Appeals determined that McDonald’s First Amendment complaint was barred by res judicata and collateral estoppel).

arbitrators.<sup>40</sup> The Court analogized section 1983 to Title VII and FLSA and pursued the congressional objective to have courts decide matters under those statutes.<sup>41</sup> Although the Supreme Court had held that employees' statutory right to trial under Title VII, FLSA or section 1983 is not barred by submitting complaints to arbitration under the collective bargaining agreement,<sup>42</sup> the Court in *Gilmer* ruled that statutory complaints could be bound by an arbitration agreement.<sup>43</sup>

In *Gilmer*, the 62-year-old plaintiff was discharged from his position as manager of financial services.<sup>44</sup> As a condition of employment, plaintiff was required to register with the New York Stock Exchange.<sup>45</sup> The registration included an arbitration provision in which plaintiff agreed to arbitrate any dispute arising from his employment.<sup>46</sup> Plaintiff was not a member of a collective bargaining unit and, thus, had signed the agreement in his individual role.<sup>47</sup> When his employment was terminated, plaintiff filed a complaint under the ADEA, and his employer moved to enforce the arbitration agreement.<sup>48</sup> The district court relied on *Gardner-Denver* and upheld plaintiff's right to pursue his statutory claim in federal court.<sup>49</sup> However, the Fourth Circuit reversed the decision after finding "nothing in the legislative history, or underlying purposes of the ADEA including a congressional intent to preclude enforcement of arbitration agreements."<sup>50</sup> The *Gilmer* Court began its analysis by looking at cases that compelled arbitration of statutory complaints on the basis that by agreeing to arbitrate a statutory complaint, 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.<sup>51</sup> The Court then found that absent a legislative intent against waivers, the ADEA did not bar arbitration of statutory rights.<sup>52</sup> The Court explained that looking at "the text of the ADEA, its legislative history and the ADEA underlying purpose," could rebut the presumption in

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40. *See id.* at 288–90.

41. *See id.* at 293.

42. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 34 (1974); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981); *McDonald*, 466 U.S. 284.

43. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

44. *See id.* at 23.

45. *See id.*

46. *See id.*

47. *See id.* at 33.

48. *See id.* 23–24.

49. *See id.* at 24.

50. *See Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 196 (4th Cir. 1990).

51. *See Gilmer*, 500 U.S. at 26; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 623 (1985).

52. *See Gilmer*, 500 U.S. at 26 (stating that "it is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the [Federal Arbitration Act]").

favor of arbitration<sup>53</sup> At least one commentator has aptly observed that the plaintiff in *Gilmer* lost on appeal because he failed to prove that Congress intended to bar arbitration of ADEA complaints.<sup>54</sup>

The *Gilmer* Court set aside several of the plaintiff's arguments. One of the arguments advanced by the plaintiff and rejected by the Court is that arbitration provides an inadequate forum for resolving employment discrimination complaints.<sup>55</sup> The Court also rejected plaintiff's claim that arbitration provided insufficient discovery procedures for the pursuit of employment discrimination complaints, contending that this component was counterbalanced by the fact that arbitrators are not bound by rules of evidence.<sup>56</sup> In addition, the plaintiff in *Gilmer* referred to the authority of *Gardner-Denver* in support of his complaint. The Court, instead of undermining its earlier decision, distinguished *Gardner-Denver* in three aspects.<sup>57</sup> First, it noted that *Gardner-Denver* arose out of a collective bargaining agreement, presenting a 'wrangle between collective rights and individual statutory rights,' while in the *Gilmer* scenario, the disputes were not controlled by a Union. Moreover, *Gardner-Denver* was concerned with the tension between the prohibitive effects of an arbitration decision and the right to eventually litigate a statutory complaint; however, the question before the *Gilmer* Court was whether an individual agreement to arbitrate a statutory complaint could be imposed. And finally, the Court distinguished *Gardner-Denver* on the grounds that *Gilmer*, unrelated to *Gardner-Denver*, was determined under the Federal Arbitration Act (FAA).<sup>58</sup>

Subsequent to *Gilmer*, several lower courts have raised questions about the validity of *Gardner-Denver*.<sup>59</sup> One of those cases is *Austin*,<sup>60</sup> which involved a plaintiff who was a member of a bargaining unit. Her bargaining agent had negotiated a contract provision providing for mandatory arbitration.<sup>61</sup> The collective bargaining agreement also contained an antidiscrimination clause subject to arbitration procedure.<sup>62</sup> Due to this provision in the collective bargaining agreement, the Fourth

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53. *See id.*

54. T. Christopher Baile, Comment, *Reconciling Alexander and Gilmer: Explaining the Continued Validity of Alexander v. Gardner-Denver Co. in the Context of Collective Bargaining Agreements*, 43 ST. LOUIS U. L. J. 219, 243 (1999).

55. *See Gilmer*, 500 U.S. at 30.

56. *See id.* at 31.

57. *See id.* at 35.

58. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 730-31 (1981).

59. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996), *cert. denied*, 519 U.S. 980 (1996); *Martin v. Dana Corp.*, 114 F.3d 428 (3d Cir. 1997), *reh'g granted*, 124 F.3d 590 (3d Cir. 1997), *rev'd*, 135 F.3d 765 (3d Cir. 1997); *Varner v. National Super Mkts., Inc.*, 94 F.3d 1209 (8th Cir. 1996), *cert. denied*, 522 U.S. 912.

60. *Austin*, 78 F.3d at 875.

61. *See id.* at 875.

62. *See id.* at 879-80.



Circuit concluded that plaintiff had voluntarily agreed to submit her discrimination complaint to the grievance procedure and dismissed her complaint when she failed to invoke the grievance and arbitration procedure of the collective bargaining agreement.<sup>63</sup> The Fourth Circuit directed its reasoning on *Gilmer* and examined Title VII and the ADA to ascertain whether Congress elected to bar waiver of statutory rights.<sup>64</sup> The Fourth Circuit found no such election and discovered that both the ADA and Civil Rights Act, amending Title VII, contained language inspiring the exercise of alternative dispute resolution.<sup>65</sup> Because both statutes address voluntary exercise of alternative dispute resolution, the Fourth Circuit erroneously neglected the authority of Congress and concluded that *Austin* involved a voluntary arbitration.<sup>66</sup>

In another case, *Martin v. Dana Corp.*,<sup>67</sup> concerning an anti-discrimination provision, the Third Circuit upheld a mandatory arbitration provision in a collective bargaining agreement.<sup>68</sup> In that case, the plaintiff, who brought a Title VII complaint against his employer, was a member of a collective bargaining unit.<sup>69</sup> The employer moved to dismiss the complaint and enforce the collective bargaining agreement.<sup>70</sup> The district court dismissed *Gardner-Denver's* authority and accepted the reasoning in *Austin* to find for the employer.<sup>71</sup> The Third Circuit affirmed the decision.<sup>72</sup> What these post-*Gilmer* cases have in common is their lack of appreciation for the distinction between *Gardner-Denver* and *Gilmer* which had been drawn by the *Gilmer* Court and the diverse statutory schemes under which these two cases were determined.

The next section discusses the congressional history of the Civil Rights Act of 1991, and concludes that despite encouragement of ADR, Congress considered prospective waivers of Title VII rights inappropriate

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63. *See id.* at 885.

64. *See id.* at 880–82.

65. *See id.* at 881. *But see* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, 965 F. Supp. 190, 199 (D. Mass. 1997) (holding that Congress did not intend to permit compulsory arbitration of Title VII claims and the arbitral forum at issue was inadequate to resolve the plaintiff's ADEA claim).

66. *Austin*, 78 F.3d at 885–86; *see also* Harvey S. Mars, *An Overview of Title I of the Americans with Disabilities Act and its Impact upon Federal Labor Law*, 12 HOFSTRA LAB. L.J. 251 (1995) (maintaining that the *Austin* court neglected the authority of Congress and made an erroneous conclusion).

67. *Martin v. Dana Corp.*, 114 F.3d 428 (3d Cir. 1997), *reh'g granted*, 124 F.3d 590 (3d Cir. 1997), *rev'd*, 135 F.3d 765 (3d Cir. 1997).

68. *Martin*, No. 96-1746, 1997 WL 313054, at \*1 (3d Cir. June 12, 1997).

69. *See id.*

70. *See id.*

71. *See Martin*, 114 F.3d 428 (3d Cir. 1997) (vacating its decision and granting a rehearing, en banc. The case was remanded and later reversed the lower court's decision without issuing a published opinion).

72. *See id.*

in the context of a collective bargaining agreement. The section also contends that prospective waivers of Title VII rights are not only inherently against public policy, but also contravene the congressional objectives to eliminate employment discrimination.

## II. WHY *GARDNER-DENVER* REMAINS GOOD LAW

Despite the fact that the Fourth Circuit's decision in *Austin* raised doubts as to the validity of *Gardner-Denver*, *Gilmer* did not undermine the Court's prior decision. A review of Circuit Court decisions demonstrates that the *Gardner-Denver* holding remains good law with respect to collective bargaining agreements,<sup>73</sup> while *Gilmer* is limited to individual circumstances outside the collective bargaining agreement.<sup>74</sup> The following section examines the validity of the *Gardner-Denver* decision and critiques the reasoning in *Austin*. Viewed in their entirety, the congressional history of both Title VII and the ADA indicate that Congress has shown no election of ratifying arbitration of statutory complaints as an exclusive forum.

### A. *The Error in Austin and the Validity of Gardner-Denver*

Despite the general policy favoring arbitration, all Circuit Courts of Appeals except the Fourth Circuit have held that labor unions cannot waive individual employee statutory rights to a judicial forum.<sup>75</sup> Subsequent to the *Gardner-Denver* and *Gilmer* decisions, two lines of cases have emerged. In the first line of cases, which begins with *Gardner-Denver*, the Court has determined that submission of discrimination complaints to binding

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73. See *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1453 (10th Cir. 1997), cert. denied, 534 U.S. 1019 (2001) (adopting the majority view that "Alexander and its progeny 'remain good law and that statutory employment claims are independent of a collective bargaining agreement's grievance and arbitration procedures.'") (citations omitted); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997), cert. denied, 522 U.S. 912 (1997); *Penny v. United Parcel Serv.*, 128 F.3d 408, 413 (6th Cir. 1997); *Varner v. National Super Mkts., Inc.*, 94 F.3d 1209 (8th Cir. 1996), cert. denied, 522 U.S. 912; *Tran v. Tran*, 54 F.3d 115 (2d Cir. 1995).

74. See *Kirkendall v. United Parcel Serv.*, 964 F. Supp. 106, 108 (W.D.N.Y. 1997).

75. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 882 (4th Cir. 1996), cert. denied, 519 U.S. 980 (1996) (compelling arbitration of Title VII and ADA claims under an arbitration clause in a collective bargaining agreement); but see sources cited *supra* note 72 (upholding *Gardner-Denver*). Several other courts have used the reasoning employed in the *Austin* majority. See, e.g., *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir. 1992) (requiring arbitration of Title VII claim brought by stockbroker who had signed an agreement to arbitrate disputes with the employer); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 934 (9th Cir. 1992) (finding that an employee who filed a sexual harassment suit did not meet her *Gilmer* burden). But see *Penny*, 128 F.3d at 408 (refusing to compel arbitration on the basis of the *Austin* majority opinion).

arbitration in accordance with a collective bargaining agreement does not bar successive litigation of an identical complaint in federal court.<sup>76</sup> In the second line of cases, the Supreme Court found arbitration of statutory complaints appropriate. The *Gilmer* Court found that the FAA required arbitration of complaints under the ADEA. Prior to *Gilmer*, the Court held that not all statutory complaints are proper for arbitration, and it reiterated the two step process for arbitrability of statutory complaints articulated in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*<sup>77</sup> Under that process, a court asked to enforce an arbitration clause purporting to reach statutory complaints must first determine whether the parties agreed to arbitrate that particular type of dispute.<sup>78</sup> Assuming there is sufficient evidence of the parties' agreement to arbitrate, the court must then look within the language of the statute at question for evidence that Congress did not elect that complaints under it be subject to arbitration.<sup>79</sup> The *Gilmer* Court applied this test in the context of the ADEA and found that the question was within the ambit of the arbitration arrangement, and that nothing in the ADEA evidenced a congressional resolution that such complaint should not be arbitrated.<sup>80</sup>

The *Austin* opinion trusted *Gilmer's* holding that an individual may agree to arbitrate statutory complaints, such as those found in Title VII and the ADA. The toxic error in *Austin* is its failure to appreciate the holdings in *Gardner-Denver* and *Gilmer*, particularly with regard to the distinctions made in *Gilmer*.<sup>81</sup> The *Austin* court fundamentally discards the decision in *Gardner-Denver* by stating that "*Gilmer* thus rejects the principal construction in . . . [*Gardner-Denver*] . . . that arbitration is an 'inappropriate forum' for the resolution of Title VII rights."<sup>82</sup> Fortunately, *Austin* has not generated many supporters. In fact Judge Hall, the dissenting panel member in *Austin*, who convincingly argued that nothing about *Gilmer* alters *Gardner-Denver's* holding that a "labor union may not prospectively waive a member's individual rights to choose a judicial forum for a

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76. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49 (1974).

77. 460 U.S. 1, 24 (1983) (involving a construction dispute in which the constructor filed a federal lawsuit seeking to compel arbitration. Before the suit, the hospital sought declaratory relief in a state court that the matter was not arbitrable. Both suits involved the same issue: whether the dispute should be arbitrable. The Supreme Court affirmed a Court of Appeals decision compelling arbitration. The decision referred to a "federal policy favoring arbitration" and pronounced boldly that "we vigorously enforce agreements to arbitrate.") (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-28 (1985)).

78. See *Mitsubishi*, 473 U.S. at 626.

79. See *id.* at 627.

80. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-27 (1991).

81. See *supra* note 66 and accompanying text (emphasis added).

82. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 880 (4th Cir. 1996), *cert. denied*, 519 U.S. 980 (1996).

statutory claim,"<sup>83</sup> has often been cited with more approval than the majority.<sup>84</sup> One case in point was decided two months after *Austin*, in which the Eleventh Circuit, faced with an identical question, rejected the "result and reasoning of the Fourth Circuit" in *Austin* and found Judge Hall's dissent more persuasive.<sup>85</sup>

Furthermore, two other court decisions have criticized *Austin* on separate grounds. In the first decision, the District Court for the Southern District of Indiana expressed dissatisfaction that "*Austin* is not an accurate interpretation of federal law as it presently stands."<sup>86</sup> In the second decision, the United State District Court in the Northern District of California criticized that the "*Austin* majority minimizes the factual differences between an agreement to arbitrate in the context of a simple employment contract and such an agreement in the collective bargaining agreement context" and agreed with Judge Hall's dissent that this "difference makes all the difference."<sup>87</sup> Moreover, a number of court decisions display more fidelity to the Court's holding in *Gardner-Denver* and *Gilmer* than does *Austin*.<sup>88</sup> In previous cases, the Court had emphasized the difference between contractual rights under collective bargaining agreement and individual statutory rights, the narrow authority and power of arbitrators, and the possible disharmony in interests between labor unions engaged in collective representation and an individual employee.<sup>89</sup> This is why *Gilmer* emphasized that the plaintiff in that case had entered into an individual employment agreement to arbitrate statutory complaints outside the collective bargaining agreement context.<sup>90</sup>

Therefore, with regard to statutory complaints under collective bargaining agreements, *Gardner-Denver* is undoubtedly good law and represents the correct interpretation of federal law with regard to statutory complaints under collective bargaining agreement while *Gilmer*, on the other hand, is limited to an individual agreement negotiated by employees.

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83. *See id.* at 886.

84. *See* *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519 (11th Cir. 1997); *Penny v. United Parcel Serv.*, 128 F.3d 408, 413 (6th Cir. 1997); *Pryner v. Tractor Supply Co.*, 927 F. Supp. 1140, 1145 (S.D. Ind. 1996); *Buckley v. Gallo Sales Co.*, 949 F. Supp. 737, 743 (N.D. Cal. 1996).

85. *See* *Brisentine*, 117 F.3d at 526.

86. *See* *Pryner*, 927 F. Supp. at 1145.

87. *Buckley*, 949 F. Supp. at 743.

88. *See* cases cited *supra* note 73.

89. *See* *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 34-35 (1974); *see also* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991); *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 291 (1984); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 734-35 (1981).

90. *Gilmer*, 500 U.S. at 35 (emphasizing that *Gilmer* only involved individual statutory rights unlike *Gardner-Denver* where "there was a concern about the tension between collective representation and individual statutory rights that is not applicable in this case.").

In other words, while an individual is free to waive his rights to a judicial forum, a workers' union, through its negotiations with the employer, may not. This is the distinction between *Gardner-Denver* and *Gilmer* that *Austin* failed to appreciate. Furthermore, assuming there was a split in the circuits as some commentators have contended,<sup>91</sup> then such split was resolved by the recent Supreme Court decision in *Wright v. Universal Maritime Services*.<sup>92</sup> In *Wright*, the Supreme Court conclusively rejected a comparable argument that prevailed in *Austin*, thereby inherently undermining *Austin*.<sup>93</sup> If there were anything to be learned from the *Austin* opinion, it would be an example of what is not the declared plan of Title VII and the ADA. It should be found to be an erroneous interpretation of both legislative histories.<sup>94</sup>

### B. Congressional History of the Civil Rights Act of 1991 and the ADA

In *Austin*, the Fourth Circuit Court of Appeals alleged the statutory language of the Civil Rights Act and the ADA manifested congressional acquiescence of arbitration of discrimination complaints, and found support for this declaration.<sup>95</sup> The problem with the Fourth Circuit's rationale is

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91. See, e.g., William W. Fick, *Gnawing at Gilmer: Giving Teeth to "Consent" in Employment Arbitration Agreements*, 17 YALE L. & POL'Y REV. 965 (1999) (exploring the circuit split over enforceability of arbitration clause in collective bargaining agreement); Lynette Oka, *Disarray in the Circuits After Alexander v. Gardner Denver Co.*, 9 HARV. L. REV. 605 (1987) (dismissing the confusion in the circuits after *Gardner-Denver*).

92. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998).

93. See *id.* at 80; *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 9 (1st Cir. 1999) (noting that *Austin* was implicitly overruled by the *Wright* decision in which the Supreme Court rejected the same argument that prevailed in *Austin*); see also *Wright*, 525 U.S. 70 (1998). In *Wright*, the employee brought an ADA claim against his employer who contended that such claims must be arbitrated under the terms of the collective bargaining agreement. *Wright*, 525 U.S. at 72–75. The Supreme Court held that the normal presumption of arbitrability of claims does not apply to statutory claims but decided that "a clear and unmistakable" agreement to arbitrate would prevent litigation. *Id.* at 79–80. The record presented that *Wright* was not forced to arbitrate because a clear and unmistakable waiver of statutory rights was not presented. *Id.* at 70.

94. Both Title VII and the ADA were created with similar purposes and objectives—to rid the nation of the evils of discrimination in the workplace—except the ADA addresses the problem by prohibiting discrimination on the basis of disability while Title VII on race, color, religion, sex, and national origin. See 42 U.S.C. §2000e-2[§703]; 42 U.S.C. §12112; see also *Connecticut v. Teal*, 457 U.S. 440, 447 (1982) (discussing that the purpose of Title VII was to remove barriers in employment); *Sutton v. United Airlines Inc.*, 527 U.S. 471, 497 (1999) (stating that the purpose of the ADA is to provide a clear and comprehensive national mandate for the elimination of discrimination).

95. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881 (4th Cir. 1996) (citing 42 U.S.C. § 12212 (1995)); see also Civil Rights Act of 1991, Pub. L. No. 102-116, § 118, 105 Stat. 1071, 1081 (1991) (codified as amended at 42 U.S.C. §1981) (amending Title VII). In *Austin*, the court looked at the language of both the Civil Rights Act of 1991 and the ADA, which state "[w]here appropriate and to the extent authorized by law, the use

that it neglected to consider the complete legislative history of the Civil Rights Act, leaning on certain portions of the history in isolation of the other. A closer consideration of that complete legislative history might have afforded a different outcome. For example, one critic recently observed that even though the ADA's legislative history indicates that arbitration is considered the preferable method of dispute resolution,<sup>96</sup> it was not meant to supplant federal rights created under the statute. As was noted in the Judiciary Committee Report on the ADA, arbitration of an ADA claim was not meant to waive an individual's right to sue under the Act. The Judiciary Committee pointed out that "any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of this Act."<sup>97</sup> Additionally, in the House committee report accompanying the amendments to Title VII, the Committee referred to the language in *Gardner-Denver* and said: "this view is consistent with the Supreme Court's interpretation of Title VII of the Civil Rights Act of 1964, whose remedial provisions are incorporated by reference in Title I." The Committee understood that the approach articulated by the Supreme Court in *Gardner-Denver* applies equally to the ADA.<sup>98</sup>

Interpreting the statutory language of the Civil Rights Act of 1991 and the ADA together with their history, Congress has shown no plan of ratifying arbitration of statutory complaints as an exclusive forum, nor has it discussed the concern raised in *Gardner-Denver* about waiver of statutory rights. As indicated in *Gardner-Denver*, nothing in the decision prevents a plaintiff from waiving a cause of action as a result of a settlement or after having arbitrated the dispute.<sup>99</sup> What the Supreme Court proscribes in *Gardner-Denver* is the workers' union's ability to negotiate a prospective waiver of the Plaintiff's rights. This is what the Court found to be Congress' plan when it amended Title VII and is equally applicable to the ADA.<sup>100</sup> Moreover, a prospective waiver of statutory rights is against

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of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title," and concluded that there was no conflict between the arbitration and the purposes of Title VII and the ADA. *Austin*, 78 F.3d at 881.

96. See 136 CONG. REC. H4582, H4606 (daily ed. July 12, 1990); see also Baile, *supra* note 54, at 244-46; Mars, *supra* note 66, at 307 n.339.

97. House Comm. on the Judiciary, American With Disabilities Act of 1990, H.R. Rep. No. 596, 101st Cong., 2d Sess. 89 (1990), reprinted in 1990 U.S.C.C.A.N. 565, 598; see also Baile, *supra* note 54; Mars, *supra* note 66.

98. H.R. Rep. No. 485 (III), 101st Cong., 2d Sess., 76-77, reprinted in 1990 U.S.C.C.A.N. 445, 499-500.

99. *Alexander v. Gardner-Denver*, 415 U.S. 36, 52 (1974).

100. See *supra* note 97 and accompanying text.

public policy<sup>101</sup> and inconsistent with Congress' objectives to eliminate discrimination in employment.<sup>102</sup> Therefore, those courts, such as *Austin* and *Jesses*,<sup>103</sup> which require arbitration under a collective bargaining agreement on the basis of 'congressional intent', are inconsistent with federal law and unconvincing.<sup>104</sup>

### III. CONCLUSION

In this Article, I have attempted to explore the vitality of *Gardner-Denver* and underscore the distinctions drawn by the *Gilmer* decision. The exploration critiques the logic and holding in *Austin*, concluding that the *Austin* court fundamentally misconstrued the declared policy behind Title VII and the ADA insofar as it enforced a union negotiated prospective waiver of statutory rights. I hope that this Article will contribute to the debate on the harmony between the *Gardner-Denver* and *Gilmer* decisions. To demonstrate the harmony between the two decisions, consider the

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101. See *William v. Vukovich*, 720 F.2d 909, 926 (6th Cir. 1983) (holding that prospective waiver of "an individual's right to equal employment opportunities" would defeat the purpose behind Title VII); *United States v. Trucking Employers, Inc.*, 561 F.2d 313, 319 (D.C. Cir. 1977) (citing *Gardner-Denver* as holding that in the context of consent decrees and other settlement agreements, a waiver of prospective claims under Title VII violates public policy).

102. Compare *Connecticut v. Teal*, 457 U.S. 440, 447 (1982) (discussing that the purpose of Title VII was to remove barriers in employment), with *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979) (stating the purpose of Title VII is to eliminate discrimination), and *Sutton v. United Airlines*, 527 U.S. 471 (1999) (stating that the purpose of the ADA is to provide a clear and comprehensive national mandate for the elimination of discrimination), and *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674 (2001) (stating that Congress enacted the ADA to remedy widespread discrimination).

103. *Jesses v. Carter Health Care Ctr., Inc.*, 930 F. Supp. 1174, 1176 (E.D. Ky. 1996) (relying on *Austin*'s interpretation of the ADA's legislative history to require arbitration of a complaint under that statute).

104. *Pryner v. Tractor Supply Co.*, 927 F. Supp. 1140, 1145 (S.D. Ind. 1996) (noting that "it is the court's assessment that *Austin* is not an accurate interpretation of federal law as it presently stands"); see also *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526 (11th Cir. 1997) (rejecting the result and reasoning in *Austin*, and finding Judge Hall dissent persuasive); *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1304 (9th Cir. 1994) (refusing to compel arbitration of employee Title VII claims pursuant to arbitration agreement in securities registration application, finding that the waiver was not made knowingly as required by Congress in the legislative history of the 1991 Civil Rights Act); *Lachance v. Northeast Publ'g, Inc.*, 965 F. Supp. 177, 187 (D. Mass. 1997) (stating, "though Congress wanted to encourage arbitration of ADA claims, it also clearly intended that aggrieved individuals retain the right to pursue a claim in a judicial forum. Precluding plaintiff's claim would contravene the intent of the ADA."); *Hill v. Am. Nat'l Can Co./Foster Forbes Glass Div.*, 952 F. Supp. 398, 407 (N.D. Tex. 1996) (holding that "the history of [the ADA's] enactment clarifies the law established in [*Gardner-Denver*] specifically with respect to the ADA. Clearly, Congress intended citizens to have a clear path to the rights and remedies created by the ADA.").

following two hypothetical scenarios.

Assume that Abner, a 55-year-old salesperson who lost his job several months ago, applies for a job opening at a large restaurant chain. Prior to his interview, Abner obtains from his prospective employer a booklet marked "Acknowledgment of Working Conditions" (AWC). He fills out an application form, takes a standard restaurant management test and provides referrals. Following an interview, Abner is offered the position as an assistant general manager. He accepts the position without reading the AWC. Few days later he reads the AWC. It outlines various corporate rules and policies regarding holidays, parking spaces, overtime, dress code, obscene behaviors, tardiness, etc. On the last page it provides, "I further acknowledge and agree that any claim concerning, or arising out of employment or its termination shall be subject to final and binding arbitration rules maintained by the employer at its corporate headquarters." Assume further that after working for three years, Abner gets injured on the job. He sustains back injuries and develops a skin condition on both hands that prevents him from working in his current position. Abner leaves work for three weeks to attend to his injuries. Prior to returning, he requests the employer to transfer him to a light work assignment. The employer refuses his request and terminates his employment.

Abner believes that he has suffered discrimination on the basis of his handicap and age and files a lawsuit in federal court alleging violation of the ADEA and ADA. The employer files a motion to enforce the arbitration agreement. Does the employer in this hypothetical succeed against Abner? The answer is most likely yes. The court will probably enforce the arbitration agreement with regard to the ADEA claims pursuant to *Gilmer* but not the ADA claims. The reasons are threefold. First, Abner's agreement to arbitrate would likely be enforced because he entered into that agreement in his individual capacity and the Court has found no legislative intent that prohibits arbitration of ADEA claims.<sup>105</sup> Secondly, while the AWC effectuates an effective waiver of Abner's statutory rights, the Court would possibly deny compelling arbitration of ADA claims because in the ADA Congress intended to bar arbitration of statutory claims as an exclusive forum. Furthermore, Abner would not be forced to arbitrate because of lack of a "clear and unmistakable" waiver of statutory rights.<sup>106</sup>

In contrast, consider these facts that favor the need for a continued fidelity to *Gardner-Denver*. After Abner is fired from his restaurant job, he gets another job with a unionized restaurant chain. Given his experience with his previous employer, Abner joins the union, which had recently negotiated a collective bargaining agreement covering a period of 5 years.

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105. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

106. *Wright*, 525 U.S. 70 (1998). See *Rogers v. New York Univ.*, 220 F.3d 73 (2d Cir. 2000) (exemplifying what courts have accepted as clear and unmistakable language).



The agreement refers “all complaints, disputes or grievances” to binding arbitration. It provides in pertinent part: “The agreement shall confer no individual rights on an employee and may be enforced only by the union and the employer. Any agreement between the Union and the employer shall be binding upon the employee involved.” Further assume that Abner’s career with this employer was marked by repeated conflicts with supervisors and co-workers, most of whom were also union officials. He received in excess of ten complaints covering his use of profanity, poor performance and absenteeism. During his last year of employment, Abner became a born again Christian. Nevertheless, his problems persisted. For example, he was suspended for refusing to work on a Sunday. The Union challenged the decision to terminate and Abner was reinstated. After his reinstatement, Abner continued to disagree with his co-workers and supervisors. He is called names such as “dumb born again Christian” and ridiculed that “God may have your soul, but your ass belongs to me.” Along with these developments, Abner continues to rack up disciplinary warnings until he is finally terminated on the basis of his disciplinary history, inability to work with others, and general disruptive attitude.

The Union grieves Abner’s termination and after an arbitration hearing, the Arbitrator finds for the employer without mentioning Abner’s religion complaints. Abner believes he has been discriminated against on the basis of his religion and files a complaint with the Equal Employment Opportunity Commission. Following an investigation, he is granted the right to sue. He then files a federal lawsuit for violation of this Title VII rights and the employer moves to dismiss his claims on the grounds that the arbitration decision bars his complaint. The question is, should the employer prevail on this claim? The answer is probably no because arbitration of discrimination claims pursuant to the grievance procedures contained in collective bargaining agreement does not bar a union employee from subsequently pursuing the same discrimination claim in federal court under Title VII.<sup>107</sup> This hypothetical is clearly distinguishable from the first in that it involves a union-negotiated waiver of statutory rights: something the Court in *Gardner-Denver* explicitly prohibited.<sup>108</sup> This distinction “makes all the difference” and demands a different outcome.<sup>109</sup> Moreover, the second hypothetical conclusively shows why *Gardner-Denver* should enjoy a continuing validity. In this situation where a union employee has a long history of hostility with a great number of supervisors and co-workers, including union officials, it could reasonably be assumed that such union officials have little to lose politically and

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107. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49 (1974).

108. *Id.* at 49–53.

109. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 886 (4th Cir. 1996), *cert. denied*, 519 U.S. 980 (1996).

conceivably something to gain if an arbitrator upholds a decision to terminate an employee such as Abner. Under these circumstances, there could be reasonable apprehension that the union representation in an arbitration hearing might even be less than energetic. It is of little importance whether or not this is precise in most situations; the significant thing is that there is a possibility of it. Therefore, the validity of *Gardner-Denver* would be best suited for similar cases.

Much can be made of the need to recognize the continued validity of the *Gardner-Denver* ruling. Congress demonstrated, and the Supreme Court upheld, that the arbitration provision in a collective bargaining agreement does not bar a union employee from pursuing his Title VII statutory rights in federal court. The *Gilmer* ruling, while restrictive of *Gardner-Denver*, did not supersede the validity of *Gardner-Denver*. The legislative history of the Civil Rights Act shows clearly that Congress made a considered decision that the *Gilmer* rationale should only be applicable to individual employees outside the union setting.

This Article calls for the Supreme Court to clarify the *Gilmer* distinctions and requires courts to distinguish cases where arbitration agreements were contained within individual employment contracts from those in collective bargaining agreements. In considering whether to enforce an arbitration agreement, a court should also examine whether the union prospectively waived the statutory rights of the individual employee, or whether the employee made the agreement voluntary. If that is creditable, then the next inquiry should be whether the language in the agreement evinces a "clear and unmistakable" waiver of statutory rights by such an employee.<sup>110</sup>

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110. See *Wright*, 528 U.S. 70 (1998). Following the *Wright* decision, most employers have successfully avoided *Gardner-Denver* by expressly listing statutory grounds in collective bargaining agreements. See, e.g., *Rogers v. New York Univ.*, 220 F.3d 73 (2d Cir. 2000).