

Gilmer in the Collective Bargaining Context

THEODORE J. ST. ANTOINE*

I. INTRODUCTION

Can a privately negotiated arbitration agreement deprive employees of the statutory right to sue in court on claims of discrimination in employment because of race, sex, religion, age, disability, and similar grounds prohibited by federal law? Two leading U.S. Supreme Court decisions, decided almost two decades apart, reached substantially different answers to this question—and arguably stood logic on its head in the process. In the earlier case of *Alexander v. Gardner-Denver Co.*,¹ involving arbitration under a collective bargaining agreement, the Court held an adverse award did not preclude a subsequent federal court action by the black grievant alleging racial discrimination. But ten years ago, in *Gilmer v. Interstate/Johnson Lane Corp.*,² the Court ruled that an individual employee's agreement to arbitrate all employment disputes prevented him from going to court with the claim he was terminated on the basis of age.

Most disinterested observers have approved *Gardner-Denver*'s rejection of arbitral finality, but have denounced *Gilmer*'s enforcement of a so-called "mandatory arbitration" clause imposed on an employee as a condition of employment.³ Yet, if different results were justified, a good argument can be made from the perspective of voluntariness that the Supreme Court got it backwards. The arbitration provision in *Gardner-Denver* was negotiated by a union that was presumably more nearly equal in bargaining power to the employer than the isolated employee in *Gilmer*. The latter had to sign what was in effect a contract of adhesion. Nonetheless, however plausible may be the abstract objections to mandatory arbitration, my thesis is that the ordinary rank-and-file employee may well be better off as a practical matter having assured access to an arbitrator rather than theoretical access to a judge and jury. An increasing amount of empirical evidence suggests that is true even for the individual employee in the nonunion setting. A fortiori, it should be true for the employee represented by a union in the collective bargaining situation. Employers, too, are likely to gain from the use of arbitration instead of court litigation.

* James E. & Sarah A. Degan Professor Emeritus of Law, University of Michigan.

¹ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

² *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

³ See *infra* note 28 and accompanying text.

II. THE HOLDINGS OF *GARDNER-DENVER* AND *GILMER*

A quarter century ago the Supreme Court appeared to settle the question of whether a private arbitration award could prevent an employee from later pursuing a court action alleging a discriminatory discharge. In *Gardner-Denver* a union had challenged the dismissal of a black worker as a violation of the collective bargaining agreement.⁴ At the arbitration hearing the grievant asserted his dismissal was racially motivated, contrary to the labor contract's nondiscrimination provision. The arbitrator ruled the employee had been terminated for "just cause," but did not specifically address the discrimination claim.⁵ The employee first exhausted the administrative procedures of the Equal Employment Opportunity Commission (EEOC) and then sued the employer in federal district court under Title VII of the 1964 Civil Rights Act.⁶ The Supreme Court rejected the employer's contentions that the adverse arbitral award precluded judicial consideration of the plaintiff's action on the grounds of collateral estoppel, res judicata, election of remedies, and waiver, and allowed the suit to proceed.⁷

The Court in *Gardner-Denver* emphasized that a Title VII litigant vindicates the important congressional policy against employment discrimination, while a party processing a claim through the grievance procedure and arbitration merely enforces private contract rights. Moreover, the arbitrator in this instance was only authorized to decide the contractual issue of discrimination and not the statutory issue.⁸ Apparently the Court was untroubled that the National Labor Relations Board routinely defers to arbitrators' determinations concerning employees' rights under the National Labor Relations Act.⁹ Perhaps the true reason for the approach in *Gardner-Denver* was skepticism about the extent of a union's zeal, at least in the early 1970s, in pursuing Title VII discrimination claims in contrast to claims of antiunion discrimination.

⁴ *Gardner-Denver*, 415 U.S. at 38.

⁵ *Id.* at 42.

⁶ Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1994 & Supp. IV 1998).

⁷ *Gardner-Denver*, 415 U.S. at 59-60; *see also* *Barrentine v. Arkansas-Best Freight Sys. Inc.*, 450 U.S. 728, 745 (1981) (employees not barred by arbitration award on wage claim under union contract from suing under Fair Labor Standards Act). In *Gardner-Denver* the Court noted that the arbitrator's award could be admitted in evidence in subsequent court proceedings, and, if certain procedural safeguards were observed, it could be accorded "great weight." 415 U.S. at 60 n.21.

⁸ *Gardner-Denver*, 415 U.S. at 56-57.

⁹ *See, e.g.,* *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955); *Olin Corp.*, 268 N.L.R.B. 573, 573-77 (1984).

GILMER IN THE COLLECTIVE BARGAINING CONTEXT

Ten years ago the Supreme Court seemed to take a quite different tack from *Gardner-Denver*. In the *Gilmer* case¹⁰ it held that a securities representative was bound by a contract with the New York Stock Exchange to arbitrate a claim of age discrimination against his employer, a brokerage firm.¹¹ *Gardner-Denver* could be distinguished because the arbitrator in *Gilmer* was authorized to handle statutory as well as contractual disputes.¹² The earlier case was also said to involve a “tension” between union representation and individual statutory rights.¹³ The Court further stressed that the *Gilmer* decision meant no loss of statutory rights; there was only a change of forum.¹⁴

Especially notable, and maybe surprising, about the Court’s position in *Gilmer* was its willingness to reach out to endorse arbitration as a substitute for litigation when that was hardly necessary. The case could just as well have been decided on the conventional grounds that the plaintiff had failed to exhaust his internal remedies. In *Gilmer*, unlike *Gardner-Denver*, there had been no arbitration.¹⁵ That underlines the significance of the Court’s acceptance of arbitration as a final dispute-resolution mechanism, even if made a condition of employment. Nonetheless, it should not be overlooked that the Court observed the stockbroker could still file a charge with the EEOC.¹⁶ The arbitration bar only applied to a court action by the individual himself.

¹⁰ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

¹¹ The conclusion that the employee’s arbitration agreement was with the securities exchanges, not with his employer, enabled the majority to skirt an important issue under the Federal Arbitration Act (FAA), which upholds the validity of written contracts providing for arbitration. Section 1 of the FAA excludes from its coverage the “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1 (1994 & Supp. 2000). Most courts of appeals have limited this exemption to employees in the transportation industries or otherwise directly engaged *in* commerce, as distinguished from employees engaged in industries simply *affecting* commerce. See cases cited in *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1086 n.6 (9th Cir. 1999). The Ninth Circuit, the only circuit excluding all contracts of employment from FAA coverage, was recently overruled. *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999), *rev’d*, 121 S. Ct. 1302 (2001). Compare Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 760–62 (1990), with Matthew W. Finkin, *Commentary on “Arbitration of Employment Disputes Without Union,”* 66 CHI.-KENT L. REV. 799, 799–803.

¹² *Gilmer*, 500 U.S. at 35.

¹³ *Id.*

¹⁴ *Id.* at 26, 34.

¹⁵ *Id.* at 24.

¹⁶ *Id.* at 28. The courts of appeals are divided on whether the EEOC can seek both equitable and monetary relief in the face of an individual’s mandatory arbitration

III. DISTINCTIONS BETWEEN *GARDNER-DENVER* AND *GILMER*

As indicated, the Supreme Court in distinguishing *Gilmer* from *Gardner-Denver* relied primarily on the difference in the arbitrator's authority to decide statutory claims and the difference between individual representation and collective representation. The difference in an arbitrator's authority will mean little, however, if a union and an employer can provide in their collective bargaining agreement that the arbitrator has the power to resolve disputes concerning statutory as well as contractual rights.¹⁷ There may be more substance to the second distinction, as explained by Judge Harry Edwards in *Cole v. Burns International Security Services*.¹⁸ He emphasized that in arbitrations pursuant to an individual contract of employment, the employee decides whether and how to proceed, while in arbitrations under a collective bargaining agreement, the union customarily determines the course of action.¹⁹

Other distinctions between *Gardner-Denver* and *Gilmer* are possible. Alleged racial discrimination in violation of Title VII was at issue in the earlier case. The Age Discrimination in Employment Act (ADEA)²⁰ was the subject of *Gilmer*. Some of the most prominent legislative history of the Civil Rights Act of 1991 vigorously rejected any notion that arbitration should be a substitute for Title VII's judicial procedures.²¹ On the other

agreement, or whether it is limited to an equitable remedy to vindicate public policy. Compare *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999) (both remedies available), with *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998), and *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999) (no monetary award allowed). Cf. *Merrill Lynch, Inc. v. Nixon*, 210 F.3d 814 (8th Cir. 2000) (state agency immune under Eleventh Amendment from employer's action to enjoin the agency from proceeding with employee's discrimination claims against employer after the alleged victim had gone through arbitration).

¹⁷ In *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 80 (1998), the Supreme Court held that any union-negotiated waiver of an employee's recourse to a judicial forum had to be "clear and unmistakable."

¹⁸ *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997).

¹⁹ *Id.* at 1475-77.

²⁰ Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994 & Supp. IV 1998).

²¹ Although section 118 of the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1081 (1991), "encouraged" the use of alternative dispute resolution "[w]here appropriate and to the extent authorized by law," the House Report emphasized that those ADR procedures were only intended to "supplement" and not "supplant" Title VII rights and remedies. H.R. Rep. No. 102-40, pt. 1, at 97 (1991) (discussing H.R. 1, 102d Cong. (1st Sess. 1991)). Two leading legislators limited or disavowed *Gilmer*. 137 CONG. REC. S3021-02 (1991) (Sen. Dole: "where the parties knowingly and voluntarily elect to use

hand, ADEA expressly permits waivers under certain prescribed conditions.²² It might also be argued that the categories protected against discrimination by Title VII (race, sex, religion, national origin) are more sensitive than the discrimination because of age prohibited by ADEA.²³ Advancing age is a stage all persons experience in normal course.

Most courts of appeals have regarded the critical distinction to be between collective bargaining agreements (*Gardner-Denver*) and individual employee contracts (*Gilmer*). They have generally upheld an employee's agreement to arbitrate rather than sue, on Title VII claims as well as ADEA claims,²⁴ but have ruled against employers trying to prevent court actions on the basis of a union-negotiated arbitration clause.²⁵ The Fourth Circuit

these [alternative] methods"; emphasis supplied); 137 CONG. REC. 30665 (1991) (Rep. Edwards: "No approval whatsoever is intended of [*Gilmer*]"); cf. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1194-97 (9th Cir. 1998) (holding the Civil Rights Act of 1991 precludes compulsory arbitration of Title VII claims). But most courts of appeals have held that the Civil Rights Act of 1991 does not prevent the enforcement of compulsory arbitration agreements. See, e.g., *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999); *Desidero v. National Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198 (2d Cir. 1999); *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998), cert. denied, 525 U.S. 1139 (1999); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996); *Koveleskie v. SBC Capital Mkts*, 167 F.3d 361 (7th Cir. 1999), cert. denied, 528 U.S. 811 (1999).

²² 29 U.S.C. § 626(f) (1994) (waiver must be "knowing and voluntary").

²³ The Supreme Court does not treat age as a "suspect" classification. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312-14 (1976).

²⁴ *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1479-86 (D.C. Cir. 1997) (holding that due process standards would have to be observed and that (2-1) the employer would have to pay all the arbitrator's fees); *Rosenberg*, 170 F.3d at 21 (arbitration not enforced on facts of case); *Seus*, 146 F.3d at 175; *Rojas v. TK Communications, Inc.*, 87 F.3d 745 (5th Cir. 1996); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991); *Koveleskie v. SBC Capital Mkts, Inc.*, 167 F.3d 361 (7th Cir. 1999), cert. denied, 528 U.S. 811 (1999); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997); *Metz v. Merrill Lynch, Pierce, Fenner & Smith*, 39 F.3d 1482 (10th Cir. 1994); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217 (11th Cir. 2000). But see *Duffield*, 144 F.3d at 1189-90 (holding the Civil Rights Act of 1991 prevents individual waiver of right to sue under Title VII). For a recent overview of the cases, see Charles J. Coleman, *Mandatory Arbitration of Statutory Issues: Austin, Wright, and the Future*, in *ARBITRATION 1998: THE CHANGING WORLD OF DISPUTE RESOLUTION, PROCEEDINGS OF THE 51ST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 134 (Steven Briggs & Jay E. Grenig eds. 1999).

²⁵ *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997); *Varner v. National Super Mkts.*, 94 F.3d 1209 (8th Cir. 1996); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519 (11th Cir. 1997). Cf. *Haskins v. Prudential Ins. Co. of Am.*, 230 F.3d 231 (6th Cir. 2000) (employee's rights under union contract did not preclude enforcement of

stands alone in concluding that *Gilmer* has superseded *Gardner-Denver* even with regard to collective bargaining agreements.²⁶ On its facts, the Fourth Circuit holding could also be explained as involving a failure to exhaust internal remedies. Like the employee in *Gilmer*, but unlike the one in *Gardner-Denver*, the plaintiff in the Fourth Circuit case had not invoked an available arbitration procedure before bringing suit.²⁷

IV. THE PROS AND CONS OF MANDATORY ARBITRATION

The case against mandatory arbitration of statutory claims is easy to state, and it is powerful. Congress, or some other legislative body, has prohibited various types of employment discrimination and has prescribed certain procedures for the vindication of those statutory rights. The specified procedures, sometimes including the right to a jury trial, may be almost as important as the substantive rights themselves. No employer, acting either alone or in conjunction with a union, should be able to force an employee to waive the statutorily provided forum and procedures as the price of getting or keeping a job. Conditioning employment on the surrender of statutory entitlements would seem a blatant affront to public policy. Furthermore, one can say that an employer dealing with an individual employee is the "repeat player" against the one-timer, and invariably much more knowledgeable about both the arbitration forum and the arbitrator cadre.

When the rights involved are as sensitive as guarantees against discrimination because of race, sex, religion, ethnicity, age, and disability, the arguments against dilution of statutory claims are all the stronger. Numerous scholars and public and private bodies have accordingly condemned the use of mandatory arbitration.²⁸ In addition, it was been contended that some sizable, well-publicized jury verdicts could do much more to deter workplace discrimination than any number of smaller,

his separate agreement with securities exchanges to arbitrate all disputes with his employer).

²⁶ See *Austin*, 78 F.3d at 875.

²⁷ *Id.* at 879.

²⁸ See, e.g., David E. Feller, *Fender Bender or Train Wreck?: The Collision Between Statutory Protection of Individual Employee Rights and the Judicial Revision of the Federal Arbitration Act*, 41 ST. LOUIS U. L.J. 561 (1997); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996); see also *infra* notes 31-32, 35-39 and accompanying text.

confidential arbitration awards.²⁹ Judge Harry Edwards has also observed that the diversion of a large amount of civil rights litigation from the courts to arbitration, with the resulting decrease in the number of published judicial opinions, could have an enervating effect on the development of legal doctrine in this area.³⁰

Besides the academic scholars, two federal agencies and two prestigious private bodies have gone on record as opposed to mandatory arbitration of statutory employment claims. The EEOC declared in a 1995 policy statement: “[P]arties must knowingly, willingly, and voluntarily enter into an ADR proceeding.”³¹ According to the EEOC, an employee should be able to withdraw from an arbitration any time before a decision is rendered.³² But *Gilmer* can be regarded at best as involving a “knowing” agreement on the employee’s part.³³ It was hardly “voluntary” in the EEOC sense of the word.³⁴ The General Counsel of the National Labor Relations Board seemed

²⁹ See, e.g., Reginald Alleyne, *Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum*; 13 HOFSTRA LAB. L.J. 381, 429-31 (1996). Arbitral awards are traditionally not published unless all parties consent.

³⁰ Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?* 16 GA. ST. U. L. REV. 293, 297 (1999).

³¹ EEOC: *Alternative Dispute Resolution Policy*, 8 Lab. Rel. Rep. (BNA) 405:7301, 405:7302 (July 7, 1997) [hereinafter *ADR Policy*]. In July 1997, the EEOC issued a longer and even stronger condemnation of compulsory arbitration or pre-dispute agreements to arbitrate, declaring that “even the best arbitral systems do not afford the benefits of the judicial system.” EEOC: *Mandatory Arbitration of Employment Discrimination Disputes as a Condition of Employment*, 8 Lab. Rel. Rep. (BNA) 405:7511, 405:7520 (July 7, 1997) [hereinafter *Mandatory Arbitration*].

³² *ADR Policy*, *supra* note 31, at 405:7302.

³³ The federal courts have used at least three different approaches to the necessary state of mind for holding an employee bound by an agreement to arbitrate. See *Haskins v. Prudential Ins. Co. of Am.*, 230 F.3d 231, 235–39 (6th Cir. 2000) *cert. denied*, 121 S. Ct. 859 (2001). One view is that the employee must “knowingly” agree to arbitrate. *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994). Another is that the employee is accountable, absent fraud or duress or other standard contractual defenses, for the provisions in the writing he or she signs. *Haskins*, 230 F.3d at 238–39. There is an intermediate position, denying enforcement of the arbitration agreement when that is “appropriate.” *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 20 (1st Cir. 1999) (employer failed to familiarize plaintiff employee with arbitration rules).

³⁴ EEOC apparently treats all employee agreements to arbitrate before a dispute has actually arisen (so-called “pre-dispute” agreements) as “involuntary.” See *Mandatory Arbitration*, *supra* note 31, at 405:7520. The notion is that at such a time a worker’s whole concern is being hired or pleasing the boss, and there is no freely expressed consent to arbitration. After a dispute has occurred, however, employees may have little to lose by opposing the employer (they are likely to have been discharged), and, in any

ready at one point to issue unfair labor practice complaints against any effort to impose mandatory arbitration agreements, but later that was apparently limited to attempts to prevent the filing of charges with the NLRB.³⁵

The Dunlop Commission on the Future of Worker-Management Relations stated in its December 1994 Report: “[A]ny choice between available methods for enforcing statutory employment rights should be left to the individual who feels wronged rather than dictated by his or her employment contract.”³⁶ The Commission hinted at the possibility of more flexibility in the future, however, by suggesting that the issue be revisited after there was more experience with the arbitration of statutory claims.³⁷ The country’s foremost organization of professional labor arbitrators, the National Academy of Arbitrators, has officially expressed its opposition to “mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights.”³⁸ But the Academy added that, given the present state of the law, its members could serve as arbitrators in such cases. Members nonetheless were advised to observe certain guidelines as to the fairness of these procedures.³⁹ A broadly constituted Task Force sponsored by the American Bar Association took no position in a May 1995 “Protocol” concerning the timing (pre-dispute or post-dispute⁴⁰) of arbitration

event, they act with a heightened awareness of the consequences. That probably explains why EEOC believes “post-dispute” agreements may be truly voluntary.

³⁵ See *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1479 (D.C. Cir. 1997).

³⁶ COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP’T OF COMMERCE AND LABOR, REPORT AND RECOMMENDATIONS 33 (1994) [hereinafter COMMISSION].

³⁷ *Id.*

³⁸ NATIONAL ACADEMY OF ARBITRATORS, *Statement on Condition of Employment Agreements*, in ARBITRATION 1997: THE NEXT FIFTY YEARS, PROCEEDINGS OF THE FIFTIETH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS app. at 312 (Joyce M. Najita ed., 1998).

³⁹ *Id.*

⁴⁰ Management representatives testified before the Dunlop Commission that employers would generally not be willing to enter into post-dispute agreements to arbitrate. See COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP’T OF COMMERCE AND LABOR, FACT FINDING REPORT 118 (1994). Employers will wait out most small claims, assuming employees will not be able to pursue them. See *infra* note 42 and accompanying text. Conversely, employees and their lawyers will be unlikely to agree to arbitrate the big case rather than get it before a judge and jury. Pre-dispute agreements to arbitrate, when neither party knows what may later occur, are the most realistic for both sides.

agreements—and thus effectively their “voluntariness”⁴¹—but it did agree they should be “knowingly made.”⁴²

The opposition to mandatory arbitration, formidable as it is, may not be the last word. Facts have an ornery way of upending theoretical constructs. Highly pragmatic considerations indicate that the ordinary rank-and-file worker may be better off with the actuality of arbitration, even of the mandatory variety, than with the beguiling, but often illusory, possibility of a court suit. Experienced plaintiffs’ attorneys have estimated that only about 5% of the individuals with an employment claim who seek help from the private bar are able to obtain counsel.⁴³ One of the Detroit area’s top employment specialists was more precise in a conversation with me. His secretary kept an actual count; he took on one out of eighty-seven persons who contacted him for possible representation. Of course, some of those who are rejected will not have meritorious claims. But others will be workers whose potential dollar recovery will simply not justify the investment of the time and money of a first-rate lawyer in preparing a court action. For those individuals, the cheaper, simpler process of arbitration is the most feasible recourse. It will cost a lawyer far less time and effort to take a case to arbitration; at worst, claimants can represent themselves or be represented by laypersons in this much less formal and intimidating forum. In the unionized context, arbitration is far more readily available, with the collective bargaining agent supplying representation.

The employee with a minimal claim is likely to find little relief from the EEOC. Before a severely overburdened and under-funded Commission resorted to its “triage” procedure a few years ago, classifying cases as “A,” “B,” or “C” priorities, depending on merit and importance, and tossing out many charges after the briefest of investigations, its backlog had soared past 100,000, and it was receiving almost 100,000 new charges a year.⁴⁴ The

⁴¹ See *supra* note 34.

⁴² TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1995), reprinted in DISP. RESOL. J., Oct.–Dec. 1995, at 37–39, available at <http://www/adr.org/education/education/protocol.html> (May 9, 1995) [hereinafter PROTOCOL]. The Task Force consisted of management, union, and plaintiffs’ attorneys from the American Bar Association and the National Employment Lawyers Association, and representatives of the American Arbitration Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, and the Society of Professionals in Dispute Resolution.

⁴³ Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 58 (1998).

⁴⁴ 149 Lab. Rel. Rep. (BNA) 13, 14 (May 1, 1995); 151 Lab. Rel. Rep. (BNA) 143, 156 (Feb. 5, 1996).

situation was so bleak that one knowledgeable scholar recommended, quite understandably, that the EEOC get out of the business of handling individual charges and husband its limited resources for routing out systemic unlawful practices.⁴⁵ At best, the Commission tends to concentrate on the big case or the test case.

If claimants are able to sue in court, there is no reason to think they will be better off than in arbitration. Several studies show that employees actually prevail more often in arbitration than in court. The American Arbitration Association, in one study, found a winning rate of 63% for arbitral claimants.⁴⁶ In a much-criticized system operated by the securities industry, employees still prevailed 55% of the time, according to the U.S. General Accounting Office.⁴⁷ By contrast, claimants' success rates in separate surveys of federal court and EEOC cases were only 14.9% and 16.8%, respectively.⁴⁸ Even if the latter figures are somewhat skewed because they may omit pretrial settlements, the relative attractiveness of arbitration for claimants cannot be denied.⁴⁹ As might be expected, successful plaintiffs obtain larger awards from judges or juries. But claimants as a group recover more in arbitration.⁵⁰ All these statistics reflect the situation before the ABA's Due Process Protocol was adopted, when many flawed systems were in existence. Arbitration procedures should be even more favorable for employees now.

⁴⁵ Maurice E.R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219 (1995).

⁴⁶ Maltby, *supra* note 43, at 46.

⁴⁷ *Id.* at 50. The National Association of Securities' Dealers Office of Dispute Resolution, which administers over 5,000 arbitrations a year, recently reported that an independent survey by two college professors indicated that about 93% of the participants who answered a questionnaire (54% were claimants) concluded their cases were handled "fairly and without bias." Press Release, NASD Regulation, Inc., NASD Arbitration Forum Overwhelmingly Praised for Fairness According to Independent Survey (Aug. 5, 1999) (on file with the Ohio State Journal on Dispute Resolution), at http://www.nasdadr.com/news/pr1999/ne_section99_196.html.

⁴⁸ Maltby, *supra* note 43, at 49.

⁴⁹ Cf. Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L. J. 399, 418-62 (2000). For more sympathetic treatments of mandatory arbitration than those provided by the first wave of academic commentators, see Richard A. Bales, *Creating and Challenging Compulsory Arbitration Agreements*, 13 LAB. LAW. 511 (1998); Samuel Estreicher, *Pre-dispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1182 (1997); Susan A. FitzGibbon, *Reflections on Gilmer and Cole*, 1 EMPLOYEE RTS. & EMPLOYEE POLICY J. 221 (1997).

⁵⁰ Maltby, *supra* note 43, at 54.

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Delay in securing relief can be devastating for the fired worker without a job or with a much-reduced income. Most court dockets, both federal and state, are heavily backlogged and delay is almost invariably greater than in arbitration. A more conservative judiciary than existed in earlier years, especially among occupants of the federal bench, may be all too willing to grant summary judgment against those civil rights plaintiffs who do manage to file suit. In contrast, traditional labor arbitrators must remain mutually acceptable to unions and employers, and the same should become true for arbitrators in the new employer-individual employee field as an increasingly savvy plaintiffs' bar develops. No comparable check exists on the lifetime appointees to the federal judiciary or, as a practical matter, on longtime incumbents of state courts.

Even for the individual employee, let alone the unionized worker backed up by a labor organization, the accumulating empirical data about the actual experience of discrimination victims in the arbitral forum are largely positive. At the very least, they suggest considerable caution in dismissing arbitration, whether voluntary or mandatory, as an alternative to court litigation for the vindication of employees' statutory civil rights.

V. ARBITRATION IN COLLECTIVE BARGAINING

Gardner-Denver,⁵¹ the seminal Supreme Court case on arbitration as an alternative to civil rights litigation in the courts, involved an employee who had arbitrated his claim of employment discrimination under a union-management contract. Most of the subsequent cases in the lower courts, however, have dealt with an individual employee's agreement to arbitrate.⁵² The Supreme Court's decision in *Gilmer*,⁵³ sustaining such individual commitments generally, raised the question whether *Gardner-Denver* was still good law in holding that arbitration in the collective bargaining context did not preclude a later resort to the courts on a statutory claim of discrimination.⁵⁴

⁵¹ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *see supra* notes 4-8 and accompanying text.

⁵² *See supra* note 24 and cases cited.

⁵³ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20(1991); *see supra* notes 10-16 and accompanying text.

⁵⁴ *See, e.g., Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996) (holding that *Gilmer* superseded *Gardner-Denver*). For decisions to the contrary, *see supra* note 25.

The Supreme Court has made at least one thing clear. In *Wright v. Universal Maritime Service Corp.*,⁵⁵ the Court declared that any union-negotiated waiver of employees' statutory right to a judicial forum would have to be "clear and unmistakable." But the Court expressly left open whether "*Gardner-Denver*'s seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer*."⁵⁶

The first question that needs to be addressed is the intent of the union and the employer in providing for arbitration in their labor contract. As the Supreme Court seems to have recognized in *Wright*, it would be a mistake to assume that an arbitration provision automatically constitutes a union attempt to waive an employee's right to invoke administrative or judicial procedures provided by a statute, either instead of or after pursuing grievance and arbitration procedures provided by the collective agreement. The "standard form" arbitration provision covers all disputes between the parties "as to the meaning, interpretation and application of the provisions of *this agreement*."⁵⁷ A particular labor contract may not prohibit discrimination because of race, sex, religion, age, and so on. Even if it does, was the intent of the parties merely to add a substantive contractual right (as in *Gardner-Denver*), rather than to confine employees to the contractual grievance and arbitration procedures for both contractual and statutory claims (by analogy to *Gilmer*)?

Gardner-Denver has been on the books for over a quarter century. In light of that, the assumption ought surely to be that union and management negotiators did not intend to waive employees' rights to a statutory forum in the absence of what *Wright* characterized as a "clear and unmistakable" expression to that effect. Union representatives have informed me privately that most labor organizations would be extremely reluctant at this time to enter into such an agreement. The reasons are due partly to internal politics and partly to ingrained convictions about basic fairness. *Gardner-Denver* gives employees what appears the best of both worlds; they can arbitrate their contractual claims and reserve the right to sue on their statutory claims. Some employees will be vociferous in resisting any shift in the status quo. Yet I can imagine a change of heart if the relatively high success rate and

⁵⁵ *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 80 (1998) (emphasis added).

⁵⁶ *Id.* For analysis from an academic and a union point of view, see Stuart L. Bass, *What the Courts Say About Mandatory Arbitration*, DISP. RESOL. J., Nov. 1999, at 24; Leonard D. Polletta, *What's Left After Wright?: Do Employees Still Have Two Bites at the Apple?*, DISP. RESOL. J., Nov. 1999, at 48.

⁵⁷ *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 565 (1960) (emphasis added).

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greater accessibility of arbitration continues and knowledge about it spreads; if the courts (especially the federal courts) are increasingly unreceptive to discrimination claims and increasingly willing to accept prior adverse arbitration awards as determinative;⁵⁸ and if employers begin to press for finality by making arbitration mandatory and preclusive of court actions, in return for an enticing quid pro quo for the union and the work force as a whole. That would squarely present the issue of the validity of union waivers of employees' rights to statutory forums.⁵⁹

Let us suppose, then, that after due deliberation and perhaps for some appropriate return, a union agrees with an employer that their grievance and arbitration procedures shall apply to employees' discrimination claims under civil rights statutes as well as under the collective contract. Furthermore, these internal procedures are to be the sole and exclusive method for enforcing both contractual and statutory rights, and the results of any arbitration will be final and binding on the union, the employer, and the employees.⁶⁰ If the union is treated as the authorized representative of the employees,⁶¹ this negotiation would seem far more "knowing" and "voluntary" than what occurs when an employer presents a new or incumbent individual worker, like Robert Gilmer, with a mandatory

⁵⁸ The now famous footnote 21 of *Gardner-Denver* authorizes courts to admit and accord "great weight" to arbitral awards, depending on such factors as "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, . . . the special competence of particular arbitrators . . . [and] an arbitral determination [that] gives full consideration to an employee's Title VII rights." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21 (1974).

⁵⁹ Justice Scalia, speaking for the Court in *Wright*, distinguished between "an individual's waiver of his own rights [*Gilmer*], rather than a union's waiver of the rights of represented employees [*Gardner-Denver*]." 525 U.S. at 80.

⁶⁰ There is current legal authority that a collective bargaining provision conditioning access to an employer's grievance and arbitration procedure on an employee's waiver of the right to file statutory charges may constitute "retaliation" under the civil rights laws. *See, e.g., EEOC v. Ill. Bd. of Governors*, 957 F.2d 424, 429-30 (7th Cir. 1992) (action under ADEA). This decision could be limited to ensuring an employee's right to file charges with the EEOC. *See supra* text at note 16.

⁶¹ The National Labor Relations Act makes the representatives selected by the majority of the employees in an appropriate bargaining unit the "exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a) (1994 & Supp. 2000). *See, e.g., ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 374-81 (1976); THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 376-88 (Patrick Hardin et. al. eds., 3d ed. 1992).*

arbitration agreement on a take-it-or-leave-it basis. Except for such persons as the superstar athlete, the network news anchor, or the high-ranking corporate executive, the isolated employee will ordinarily have nowhere near the bargaining power of a labor organization in dealing with an employer.⁶² In terms of voluntariness, at least, the *Gardner-Denver* (collective bargaining) situation appears much more acceptable than the *Gilmer* (individual employee) situation. Failure to recognize the difference might indeed suggest that the Supreme Court got it backwards in the two cases.

Voluntariness in the negotiation, however, is not the only consideration. The fairness and effectiveness of the union's representation must also be taken into account. There will be those who would question—as the Supreme Court may have questioned in *Gardner-Denver* in the early 1970s—the ardor of a white-male-dominated labor organization in championing blacks, women, and other minorities.⁶³ Yet the duty of fair representation,⁶⁴ enforceable under the National Labor Relations Act by both the courts⁶⁵ and the National Labor Relations Board,⁶⁶ requires unions “to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty,

⁶² GORMAN, *supra* note 61, at 379 (“Congress intended [in the National Labor Relations Act] to substitute the strength of the collectivity for the weakness of the individual bargainer”).

⁶³ See WILLIAM B. GOULD, *BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES* 424-30 (1977).

⁶⁴ See, e.g., *THE CHANGING LAW OF FAIR REPRESENTATION* (Jean T. McKelvey ed., 1985) [hereinafter *FAIR REPRESENTATION*].

⁶⁵ *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Humphrey v. Moore*, 375 U.S. 335 (1964); *Vaca v. Sipes*, 386 U.S. 171 (1967); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). The duty of fair representation was first enunciated in *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944), a case arising under the Railway Labor Act, 45 U.S.C. §§ 151-63, 181-88 (1994 & Supp. 2000), and involving racial discrimination by a union representing railroad firemen; see also *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324 (1969) (plaintiffs in court action charging racial discrimination need not exhaust grievance and arbitration remedies when employer and unions were allegedly scheming together to bar blacks from promotion); *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991) (behavior of the union must be so “outside a wide range of reasonableness” that it is irrational for a union's actions in order to be considered arbitrary and in breach of its duty of fair representation); Matthew W. Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183 (1980); Clyde W. Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?* 126 U. PA. L. REV. 251 (1977).

⁶⁶ *Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966); *NLRB v. Int'l. Longshoremen's Ass'n, Local No. 1581*, 489 F.2d 635 (5th Cir. 1974); *Pac. Mar. Ass'n*, 209 N.L.R.B. 519 (1974).

and to avoid arbitrary conduct."⁶⁷ Title VII and the other civil rights statutes provide further protection against union discrimination because of race, sex, religion, ethnicity, age, and disability.⁶⁸ Almost any experienced labor arbitrator can attest that labor organizations do not take these obligations lightly. Unions frequently appear to bring cases to arbitration primarily for the purpose of avoiding the possibility of liability (and a jury's award of damages) under either the duty of fair representation or civil rights legislation.⁶⁹

Professor Sarah Rudolph Cole proffers another reason for labor unions' attentiveness to the needs and concerns of minority members. Relying on modern public choice theory, she points out that any elective body naturally responds to the special interests of any group who can organize easily by identifying similarly situated individuals.⁷⁰ As examples of this disproportionate influence in the union setting, she cites the widespread inclusion of nondiscrimination clauses in collective bargaining agreements, fetal protection policies, union promotion of the Americans with Disabilities Act, and labor support for affirmative action policies.⁷¹ While conceding that "historically, unions were hardly thought of as protectors of minority rights," Professor Cole concludes with the prediction that today "agreements to arbitrate statutory claims would not be included in collective bargaining agreements if the well-organized protected groups believed that such agreements were not in their best interest."⁷²

Can union-management arbitration effectively enforce employees' rights against discrimination? On this score the comments of an eminent trio of federal judges are reassuring. Judges Harry Edwards of the District of Columbia Circuit, Betty Fletcher of the Ninth Circuit, and Alvin Rubin of the Fifth Circuit have all stressed arbitration's merits of speed, cost savings,

⁶⁷ *Vaca*, 386 U.S. at 177.

⁶⁸ In addition to Title VII and ADEA, see Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12117, 12201–12213 (1994 & Supp. IV 1998). See BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* (Paul W. Cane, Jr. et al. eds., 3d ed. 1996 & Supp. 2000); CHARLES A. SULLIVAN et al., *EMPLOYMENT DISCRIMINATION* (2d ed. 1988).

⁶⁹ Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 844 (1996); see also Clyde W. Summers, *Individual Rights in Arbitration*, in *ARBITRATION IN PRACTICE* 142, 144 (Arnold M. Zack ed., 1984).

⁷⁰ Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining Alexander v. Gardner-Denver in the Wake of Gilmer v. Interstate/Johnson Lane Corp.*, 1997 BYU L. REV. 591, 600-01.

⁷¹ *Id.* at 601–02.

⁷² *Id.* at 602, 605.

and relative informality.⁷³ They specifically lauded these advantages of arbitration over litigation, even in vindicating statutory rights against discrimination. None of these endorsements, it must be emphasized, dealt with mandatory arbitration. But they should at least quiet the doubts often expressed about the capability of trained arbitrators to resolve the statutory interpretive problems presented in the usual discrimination case. Implicit in this favorable assessment of the arbitral process by the three judges must be the conviction that unions are generally able and conscientious employee advocates.⁷⁴ Labor organizations are also "repeat players" in arbitration, no less than employers, with an equivalent insight into the operations of the workplace.

One further, absolutely vital, set of conditions must apply to any mandatory arbitration scheme, whether individually or collectively negotiated. The employee must be accorded due process. A reasonable consensus has developed about the procedural requirements for a fair individual arbitration, voluntary or otherwise. Both the Dunlop Commission Report and the Due Process Protocol of the ABA Task Force came up with very similar lists of procedural guarantees. They include the following:

⁷³ Harry T. Edwards, *Advantages of Arbitration over Litigation: Reflections of a Judge*, in ARBITRATION 1982: CONDUCT OF THE HEARING, PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 16, 27-28 (James L. Stern & Barbara D. Dennis eds., 1983); Betty Binns Fletcher, *Arbitration of Title VII Claims: Some Judicial Perceptions*, in ARBITRATION ISSUES FOR THE 1980S, PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 218, 228 (James L. Stern & Barbara D. Dennis eds., 1982); Alvin B. Rubin, *Arbitration: Toward a Rebirth*, in TRUTH, LIE DETECTORS, AND OTHER PROBLEMS IN LABOR ARBITRATION, PROCEEDINGS OF THE THIRTY-FIRST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 30, 38 (James L. Stern & Barbara D. Dennis eds., 1979) [hereinafter TRUTH].

⁷⁴ It must be acknowledged that in routine cases union representation can occasionally be inadequate, probably because of overwork and lack of time. Russell A. Smith, *The Search for Truth—The Whole Truth*, in TRUTH, *supra* note 73, at 40, 45. But in my experience, and that of arbitrator colleagues with whom I have discussed the matter, a serious discrimination claim elicits the most careful union preparation, often by a lawyer with special expertise in the area.

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1. A jointly selected neutral arbitrator who knows the law.
2. Simple, adequate discovery.
3. Cost-sharing to ensure arbitrator neutrality.⁷⁵
4. Representation by a person of the employee's choice.
5. Remedies equal to those provided by the law.
6. A written opinion and award, with reasons.
7. Limited judicial review, concentrating on the law.⁷⁶

These standards would need only slight adaptation for application to the collective bargaining context. Joint union-management selection of an

⁷⁵ In *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1468 (D.C. Cir. 1997), the court required (2-1) the employer to pay all the arbitrator's fees as a condition for enforcing an individual employee's waiver of a judicial forum. Surely Judge Edwards, speaking for the majority, was right that the *source* of payment is not the key to arbitrator neutrality. *Id.* at 1485. Arbitrators are naturally concerned about getting their fee but, ordinarily, not about where it comes from. *Id.* Individual employees, of course, may feel more comfortable paying part of the arbitrator's fee, being unable to accept the notion there is no connection between the source of payment and a potential bias on the part of the decision-maker.

The more sensitive problem, at least as a matter of appearances, is who chooses the arbitrator. Employers are far more likely to be repeat players in arbitration than employees. *Id.* Thus, an arbitrator's continuing acceptability probably turns more on employer than employee attitudes. *Id.* This is not a matter on which the source of payment is going to have much effect. One has to count primarily on the inherent integrity of the great body of arbitrators—and on their knowledge that recognition of that integrity in the labor-management community is indispensable for their capacity to practice.

Cole may have gone too far in insisting that the employer pay *all* the arbitrator's fee. Access to a court, at least initially, would ordinarily not be cost-free. *Id.* at 1484. Some modest but reasonable (a maximum of one week's pay?) sharing of the arbitrator's charges may serve as a realistic deterrent to an employee's filing of frivolous claims. If the employee ultimately prevails, then the arbitrator, like a court, could apportion fees and costs accordingly.

Fortunately, none of these justifiable concerns about the role of payments to the arbitrator—and their potentially inhibiting effects upon access to arbitration by individual employees—should have anywhere near as much significance in the union setting. Equal sharing of arbitration costs by the union and the employer is the customary arrangement. FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 25 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997) [hereinafter ELKOURI].

⁷⁶ COMMISSION, *supra* note 36, at 118–19; PROTOCOL, *supra* note 42, at 38–39. The Fourth Circuit, ordinarily most receptive to arbitration in place of court litigation, nonetheless refused to enforce an agreement to arbitrate a claim of sexual harassment when the employer's unilaterally established procedures were “so one-sided that their only possible purpose [was] to undermine the neutrality of the proceeding.” *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999).

arbitrator is almost invariable and cost-sharing is the norm.⁷⁷ Formal discovery is relatively rare, because the more informal grievance procedure preceding arbitration generally results in substantial disclosure.⁷⁸ Representation is somewhat more ticklish. While an exclusive bargaining agent is by definition the choice of the majority of the employees in an appropriate unit,⁷⁹ that does not mean that individual grievants are always satisfied with the union as their representative. Some may want personal counsel, especially if they are members of a minority and are charging some form of discrimination.⁸⁰ Nonetheless, I believe the fourth condition of "representation by a person of the employee's choice" should be satisfied by the agency of their union, acting subject to its duty of fair representation⁸¹ and subject to the employee's right to bypass arbitration upon a credible claim of union complicity.⁸² The federal courts are in accord.⁸³

A major change that has to be made in conventional collective bargaining arbitration to accommodate statutory claims is authorizing remedies "equal to those provided by the law." The traditional remedy in labor arbitration for a wrongfully discharged or disciplined employee is reinstatement with or without back pay, but not general damages.⁸⁴ Under Title VII, however, intentional unlawful discrimination is subject to the award of compensatory damages, and malicious discrimination to punitive damages as well.⁸⁵ The parties' submission of a statutory discrimination

⁷⁷ ELKOURI, *supra* note 75, at 25, 184. If the parties cannot agree on an arbitrator, they may delegate the choice to an appointing agency, such as the American Arbitration Association. *Id.* at 186. Occasionally, the parties provide that the loser pays the arbitrator's fees. *Id.* at 25.

⁷⁸ *Id.* at 217-20.

⁷⁹ See *supra* note 61 and accompanying text.

⁸⁰ Gerald Aksen, *Post-Gardner-Denver Developments in Arbitration Law*, in ARBITRATION 1975: PROCEEDINGS OF THE TWENTY-EIGHTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 24, 55-58 (Barbara D. Dennis & Gerald G. Somers eds., 1976); Robert J. Rabin, *Fair Representation in Arbitration*, in FAIR REPRESENTATION, *supra* note 64, at 173, 198-200.

⁸¹ See *supra* text at notes 64-70.

⁸² See *supra* note 65 and accompanying text on *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324 (1969).

⁸³ *E.g.*, *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1179-81 (7th Cir. 1995); *Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480, 1483-84 (9th Cir. 1985).

⁸⁴ ELKOURI, *supra* note 75, at 939; David E. Feller, *Remedies in Arbitration: Old Problems Revisited*, in ARBITRATION ISSUES FOR THE 1980S, PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 109, 111-12, 116-18 (James L. Stern & Barbara D. Dennis eds., 1982).

⁸⁵ 42 U.S.C. § 1981 (1994 & Supp. 2000).

claim to arbitration should implicitly empower the arbitrator to award the remedies available under the statute, but an express statement to that effect would be preferable.

The requirement of written, reasoned opinions by arbitrators should pose no new problems. Most unions, employers, and arbitrators favor them even in ordinary contract disputes.⁸⁶ I think it inevitable, and probably not undesirable, that courts will subject arbitral awards dealing with statutory rights to a somewhat more searching review on the law than has been the practice with awards dealing only with contractual rights.⁸⁷ Courts are going to retain the power to prevent an arbitrator from mangling an employee's statutory protections against discrimination. This may somewhat diminish the finality usually accorded arbitrators' awards, but nowhere near as much as an entirely separate court action on the statutory claim.

Employer enthusiasm for mandatory arbitration, even for individual employees, is not all that it was in the past.⁸⁸ Management has become aware of the greater accessibility of arbitration for employees, and of their greater success rate there than in court litigation.⁸⁹ Still, combining the arbitration of statutory and contractual claims would offer certain obvious advantages for unionized employees, beyond those available for their nonunion peers. A union employee alleging discrimination is ordinarily able to arbitrate a discharge or other discipline under the collective bargaining agreement's "just cause" provision, regardless of whether there is a separate nondiscrimination clause. Making arbitration the exclusive forum for all discrimination claims would relieve the employer of the threat of the six-or-seven-figure award that is much likelier to come from a jury than an arbitrator.⁹⁰ Litigation counsel across the country tell me that even a

⁸⁶ ELKOURI, *supra* note 75, at 384.

⁸⁷ For the limited nature of judicial review of arbitration awards in traditional U.S. collective bargaining disputes, see *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *E. Associated Coal Corp. v. Mine Workers of Am.*, Dist. 17, 121 S. Ct. 462 (2000).

⁸⁸ See, e.g., Green, *supra* note 49, at 418–62; Daniel B. Tukel, *To Arbitrate or Not to Arbitrate Discrimination Claims: That is Now the Question for Michigan Employers*, 79 MICH. BUS. L.J. 1206, 1207–08 (2000).

⁸⁹ See *supra* notes 46–50 and accompanying text.

⁹⁰ See *supra* text at notes 49–50. Individual plaintiffs in wrongful discharge cases have been awarded \$20 million, \$4.7 million, \$3.25 million, \$2.75 million, \$2 million, \$1.5 million, \$1.19 million, and \$1 million. Kenneth Lopatka & Julia Martin, *Developments in the Law of Wrongful Discharge*, in AMERICAN BAR ASS'N, INSTITUTE ON LITIGATING WRONGFUL DISCHARGE, AND INVASION OF PRIVACY CLAIMS vii, 13–18 (1986). The mean damages awarded by federal district courts in the mid-1990s in discrimination cases was \$530,611. Maltby, *supra* note 43, at 47, 49.

successful defense in a jury trial may cost \$100,000 to \$200,00, and a complex discrimination case may run into the millions. I have little doubt that, if unions and the employees they represent were willing, the vast majority of employers would happily accept arbitration as the exclusive forum for resolving all discrimination claims.

VI. CONCLUSION

According to the ideology of voluntarism—and voluntarism is a good ideology, as ideologies go—there is a strong case against mandatory arbitration for individual employees. Typically, a company will present a solitary job applicant, as part of the hiring process, with a sheaf of papers to sign. Among them will be a form requiring all employment disputes, including statutory claims, to be submitted to final and binding arbitration. This waiver of any right to a court action will be made a condition of getting the job. The employee's consent in such circumstances may often not be "knowing." It can hardly be called "voluntary" in any meaningful sense. For many persons, such a scenario is enough to establish that the employee's agreement to arbitrate statutory claims and surrender the right to a judicial forum is invalid as contrary to the public policy embodied in nondiscrimination legislation.

Even for the individual employee, however, there is another side to the story. Pragmatically, the assembly-line worker or retail clerk may actually be better off by being entitled to arbitrate statutory claims, despite the price of losing the capacity to bring a court suit. As has been shown, access to arbitration is easier in the run-of-the-mill discrimination case, with a job but only a few dollars at stake, and employees are likelier to win in arbitration than in court.⁹¹ What is truly at issue is the opportunity for the professional employee or middle-range executive to secure an occasional bonanza from a jury against the most realistic chance for the mass of rank-and-file workers to get their jobs back through arbitration. I would opt for the greater good for the greater number.

When it comes to the collective bargaining context, where a union representing the majority of the employees may have agreed with an employer to make arbitration the exclusive forum for vindicating statutory rights, I find objections even on the grounds of ideology ring hollow. The basic concern about voluntariness is met by the exclusive bargaining authority of the union.⁹² Questions about the readiness of labor organizations

⁹¹ See *supra* text at notes 43 and 46–50.

⁹² See *supra* note 61–62 and accompanying text.

to treat their minority members evenhandedly, if not preferentially, are answered by the formal guarantees of the duty of fair representation and Title VII⁹³ and by the actuality of observed union behavior.⁹⁴ Like employers, unions are repeat players in the arbitration process, and they are generally skilled in the representation of employee interests.

If unions and employers are going to be prohibited from making arbitration the sole recourse of an employee alleging job discrimination, there has to be something inherently defective in such an arrangement. Assuming a voluntary agreement and fair and effective representation by the union, I see only the loss of the right to proceed from a losing arbitration to a second chance in a court as a basis for employees' opposition. But why should an employee have, if not two bites at the apple, a bite at each of two apples (contract and statute) in two different forums? By hypothesis the arbitrator has been empowered to entertain both the contractual and the statutory claims, the substantive content is essentially the same, and the remedies available in arbitration match those available in court. Finally, the odds are the losing grievant in arbitration will have even less of a chance to win in a court action.⁹⁵

Neither the labor nor the management community benefits by the prolonging of litigation. It is a waste of the time, money, and other resources of unions, employers, and employees—not to mention society at large—to allow grievants to move from one tribunal to another for a *de novo* hearing simply because they are dissatisfied with the first results. Prejudicial errors of law in an arbitration could be corrected through limited judicial review.⁹⁶ Otherwise, one proceeding that meets due process standards should be enough.⁹⁷

⁹³ See *supra* text at notes 64–68.

⁹⁴ See *supra* text at notes 69–72.

⁹⁵ See *supra* text at notes 46–50. Harrell Alexander was the plaintiff in the Supreme Court's landmark *Gardner-Denver* decision that established the right of a losing grievant in contract arbitration to proceed to court on a statutory claim. On remand, Alexander fared no better than he had in arbitration. A federal district judge found his discharge was "for cause unrelated to race" and dismissed his complaint. *Alexander v. Gardner-Denver Co.*, 1974 WL 298, at *2 (D. Colo. Nov. 19. 1974), *aff'd*, 519 F.2d 503 (10th Cir. 1975).

⁹⁶ See *supra* text at note 87.

⁹⁷ Some persons might suggest that the ideal solution would be to give employees the option of either arbitration or court action. Employers are unlikely to agree, especially in nonunion settings and probably in collective bargaining situations as well. Workers with routine claims will choose arbitration, while higher-ranking employees, with a chance for a large dollar recovery, will choose the court route. The appeal for employers in authorizing arbitrators to handle all discrimination claims and to provide the full range of statutory remedies for statutory violations is the desire to escape costly court suits and

Ideology, and not a sober appraisal of the facts and their practical implications, seems in the end the major obstacle to an acceptance of mandatory arbitration, even when it is coupled with adequate procedural safeguards.⁹⁸ The apparent plight of the isolated individual employee makes understandable the continuing resistance to an employer's conditioning a job on the employee's agreement to arbitrate all employment disputes, including statutory claims. Indeed, I too would reverse my position if the various early studies on the advantages of arbitration for employees were refuted by later research.⁹⁹ In the unionized setting, with effective representation readily available, the likelihood of refutation is slim. The skeptical attitude toward arbitration and union representation reflected in *Gardner-Denver* is outmoded.¹⁰⁰ *Gilmer's* advanced view, approving waiver of the judicial forum, is far more appropriate in the collective bargaining context.

the wrath of emotionally aroused juries. Rich payoffs are much more often generated by professional or executive personnel with substantial financial claims who can afford the best lawyers. *See supra* notes 46, 90 and accompanying text.

⁹⁸ Opponents can point to certain horrific examples of overcharging arbitrators or arbitral systems that amount to stacked decks in favor of the employer. But these aberrant defects are always subject to judicial correction. *See supra* notes 75–76 and accompanying text.

⁹⁹ *See supra* text at notes 43, 46–50.

¹⁰⁰ Overruling *Gardner-Denver* is unnecessary. It is clearly distinguishable on the grounds the arbitrator there had not been authorized to entertain statutory claims and the union had not “clearly and unmistakably” waived employees’ right to sue in court.