THE UNCERTAIN FUTURE OF MANDATORY ARBITRATION OF STATUTORY CLAIMS IN THE UNIONIZED WORKPLACE

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I

INTRODUCTION

For the past seventy years, arbitration has been closely linked to the resolution of labor disputes.[1] Courts have consistently upheld labor arbitration agreements, usually included in collective bargaining agreements (CBAs), because they are the result of negotiations between parties of equal bargaining strength.[2] More recently, however, employers have attempted to use mandatory arbitration to handle disputes relating to individual employees' statutory rights under such laws as Title VII of the Civil Rights Act,[3] the Americans with Disabilities Act (ADA),[4] and the Age Discrimination in Employment Act (ADEA).[5] This use of mandatory arbitration has been the subject of ongoing scrutiny by the courts and commentators because it attempts to use arbitration as a substitute for the courts rather than as the final step of a grievance procedure.[6]

As arbitration processes have improved over the last ten years, the negative perception of mandatory arbitration provisions that apply to statutory claims has decreased. The case law reflects this change in perception, as courts now allow mandatory arbitration of statutory claims brought by nonunion employees. Nonetheless, the almost universal rejection of mandatory arbitration of statutory claims in the collective bargaining context continues. This Article argues that this continued distinction between claims by union and nonunion

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1. Disputes relating to wages, schedules, seniority, and work rules are usually settled exclusively through the grievance procedures found in collective bargaining agreements, which culminate in arbitration.

2. Morton H. Orenstein, *Mandatory Arbitration: Alive and Well or Withering on a Vine?*, 1999 J. DISP. RESOL. 57, 58.

3. 42 U.S.C. §§ 2000e-2000e15 (2000).

4. 42 U.S.C. §§ 12101-213 (2000).

5. 29 U.S.C. §§ 621-34 (2000).

6. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (holding that an employee subject to a collective bargaining agreement requiring the arbitration of all disputes is not precluded from bringing a Title VII claim in federal court).

employees lacks any meaningful justification—that is, that mandatory arbitration of statutory claims is as appropriate, if not more so, in the collective bargaining context as it is in the nonunionized workplace.

Part II of the Article describes the impact of *Alexander v. Gardner-Denver Co.*,[7] the case that remains the precedent for denying unions the right to agree to enforceable mandatory arbitration provisions. Part III explores the changing mentality of the courts regarding mandatory arbitration provisions in individual employment contracts. Part IV clarifies the distinction between individual agreements to arbitrate statutory claims and similar provisions in CBAs and contends that it is a distinction with too little difference to justify disparate treatment by the courts. Part V discusses some recent decisions in which courts have, in fact, rejected this distinction. Finally, Part VI outlines how employers and unions can draft arbitration provisions to increase their likelihood of being upheld in the courts.

II

GARDNER-DENVER AS THE STARTING POINT

In *Alexander v. Gardner-Denver Co.*, the Supreme Court held that an employee does not lose his right to sue under Title VII when he is part of a collective bargaining agreement requiring arbitration of all disputes. In its analysis, the Court distinguished between contractual and statutory rights.[8] While contractual rights are conferred upon employees as a collective, and thus can be bargained away for the benefit of the group,[9] statutory rights are conferred upon the individual and are therefore subject to waiver only on an individual basis. In other words, Title VII rights to equal and fair employment opportunities can be waived only by the person who holds them—the individual worker.[10] The Court also recognized that Congress intended through Title VII to make eliminating discrimination one of the nation's highest priorities.[11] Therefore, the Court held, while arbitration may be appropriate for contractual disputes, an employee's statutory rights under Title VII should not be forfeited by an agreement between his employer and his union.[12]

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7. *Id.*

8. *Id.* at 51. The Court concluded that the submission of a claim to one forum did not foreclose its subsequent submission to another. No inconsistency results from permitting both rights—contractual and statutory—to be enforced in their respectively appropriate forums simply because the dispute stems from the same factual occurrence.

9. A union can lawfully waive certain collective rights of the employees it represents, including the right to strike during the term of a CBA and the right to refuse to cross a lawful picket line. *See, e.g.*, NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967) (holding that a union may waive an employee's right to strike). However, a union cannot waive employees' right to choose a collective bargaining representative under section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (2000). NLRB v. Magnavox Co. of Tenn., 415 U.S. 322, 325 (1974).

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

11. *Id.* at 46.

12. *Id.* at 51.

In addition to distinguishing between contractual and statutory rights, the Court expressed a number of concerns with the arbitration process as it applies to statutory claims. For example, the Court was concerned that union members do not have the opportunity to give individual consent to CBAs and that unions ultimately control access to CBA-mandated arbitration.[13] The Court also suggested that the fact-finding process used in arbitration is not equivalent to the judicial fact-finding process.[14] Moreover, in arbitration, the record is not as complete as it would be in judicial proceedings, "the usual rules of evidence do not apply[,] and rights and procedures that are common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable."[15] The Court further refuted the notion that arbitral processes are equal to judicial processes by pointing out that an arbitrator is required to interpret the CBA to give effect to the parties' intent, not to the governing law. Therefore, when the CBA conflicts with the law, the arbitrator is bound to follow the former.[16]

III

DIFFERENT TIMES OR A DIFFERENT CONTEXT? THE *MITSUBISHI* TRILOGY, *GILMER*, AND *CIRCUIT CITY*

In the two decades following *Alexander v. Gardner-Denver Co.*, as the courts' backlog with employment discrimination claims grew, they began increasingly to accept the use of mandatory arbitration clauses in individual employment contracts. In the late 1980s, the Supreme Court issued a trilogy of opinions allowing employers to require arbitration of claims arising under the Sherman Act,[17] the Racketeer Influenced and Corrupt Organizations Act (RICO),[18] and the Securities Exchange Act of 1934.[19] In *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, the first case in the trilogy, the Court held that even if arbitration is not always appropriate, parties should be held to their agreement to arbitrate statutory claims unless Congress has made clear its intention to prevent the waiver of judicial remedies.[20] The Court ruled that neither the inadequacy of, nor the inherent mistrust in, the arbitration process weighs against enforcing mandatory arbitration agreements. As the Court explained: "We are well past the time when judicial suspicion of the desirability

13. *Id.* at 58 n.19.

14. *Id.* at 56.

15. *Id.* at 57-58.

16. *Id.* at 57.

17. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 632 (1985) (finding that the complexity of an antitrust case does not bar arbitration when the parties have agreed to arbitrate all disputes).

18. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 242 (1987) (concluding that Congress did not intend to prevent enforcement of agreements to arbitrate RICO claims).

19. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 486 (1989) (holding that the use of arbitration does not undermine any of the substantive rights afforded under the Act).

20. *Mitsubishi*, 473 U.S. at 630-32.

of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[21]

In *Gilmer v. Interstate/Johnson Lane Corp.*,[22] the Court held for the first time that an agreement to arbitrate a statutory employment discrimination claim is enforceable under the Federal Arbitration Act (FAA).[23] Starting with the presumption that the dispute was arbitrable under the individual employment agreement, the Court then searched the language and history of the underlying statute, the ADEA, for anything that might overcome this presumption.[24] The Court concluded that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; [he] merely submits their resolution to an arbitral, rather than a judicial, forum."[25] "So long as the prospective litigant effectively may vindicate his statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[26]

In the wake of *Gilmer*, the courts have generally held that a nonunion employee can be compelled to submit an employment-related claim to arbitration pursuant to a predispute arbitration agreement.[27] For example, in *Circuit City Stores v. Adams*, the Court upheld a mandatory arbitration clause in an individual employment agreement purporting to cover an employment discrimination claim arising under state law.[28] In so holding, the Court affirmed *Gilmer* and reiterated the benefits of arbitration in the employment context, ruling that the enforcement of mandatory arbitration clauses in individual employment contracts is consistent with the pro-arbitration purposes of the FAA.

IV

IS THERE (OR SHOULD THERE BE) A DISTINCTION BETWEEN THE UNIONIZED AND NONUNIONIZED WORKPLACE IN THE ENFORCEMENT OF ARBITRATION AGREEMENTS?

The Court in *Gilmer* did not overrule *Gardner-Denver*. Instead it distinguished the two cases, in part on the ground that *Gilmer* involved an individually signed employment agreement, while *Gardner-Denver* involved a collective

21. *Id.* at 626-27.

22. 500 U.S. 20 (1991).

23. 9 U.S.C. §§ 1-16 (2000).

24. *Gilmer*, 500 U.S. at 26.

25. *Id.* (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)) (brackets omitted).

26. *Id.* at 28 (quoting *Mitsubishi*, 473 U.S. at 637).

27. *See, e.g.*, Circuit City Stores v. Adams, 532 U.S. 105, 113 (2001); Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000); Wright v. Universal Maritime Serv. Corp., 525 U.S. 70, 75-76 (1998); Floss v. Ryan's Family Steakhouse, Inc., 211 F.3d 306, 313-14 (6th Cir. 2000); Kuenher v. Dickinson & Co., 84 F.3d 316 (9th Cir. 1996).

28. 532 U.S. at 113.

bargaining agreement ratified by the employee's union.[29] For the most part, the Supreme Court and lower courts have continued to accept this distinction.[30] In doing so, they point out that unionized employees do not have individual input into union arbitration policy, that the union decides which cases to take to arbitration and how to present them, that labor arbitrators do not have the experience or authority to decide statutory claims, and that there is no federal policy supporting mandatory arbitration of statutory claims in the collective bargaining context.[31] However, a review of these purported distinctions shows that arguments supporting arbitration for individual but not unionized employees are misguided; any differences between the two types of workplaces suggest that mandatory arbitration should be favored in the union setting as much as, if not more than, the individual employment setting.

A. Power to Consent

The majority of courts and scholars oppose the inclusion of mandatory arbitration clauses in CBAs because employees, who are not actual parties to a CBA,[32] do not individually consent to any arbitration provision within it. These critics argue further that unions may not adopt arbitration procedures that are favorable to all employees.[33]

A union is not required to submit a proposed CBA to its membership for ratification before agreeing to it. In fact, the members do not even have the

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29. *Gilmer,* 500 U.S. at 34. The other grounds for the Court's distinction were (1) that *Gardner-Denver* "did not involve the issue of the enforceability of an agreement to arbitrate statutory claims," but instead "the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims," and (2) that *Gardner-Denver* was not decided under the FAA." *Id.*

30. *See, e.g.*, McDonald v. City of W. Branch, 466 U.S. 284 (1984) (holding that "in a § 1983 action, a federal court should not afford res judicata or collateral-estoppel to effect an award in an arbitration proceeding brought pursuant to the terms of a collective-bargaining agreement"); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981) (holding that a CBA-based arbitration decision does not preclude a subsequent suit based on the same underlying facts alleging a violation of the minimum wage provisions of the Fair Labor Standards Act); Williams v. Cigna Fin. Advisors, Inc., 197 F.3d 752, 761 (5th Cir. 1999) ("The Supreme Court's opinions and scholarly commentary have cogently pointed out the inherent differences in purpose, structure, and methodology between labor and commercial arbitration. In fact, the disparities are so great that they largely explain the difference in attitude of the Supreme Court in permitting only discretionary deference to labor arbitration awards under LMRA collective bargaining agreements . . . in Title VII actions, while allowing ADEA claims to be subjected to compulsory arbitration under the FAA pursuant to a prospective pre-employment arbitration agreement.") (citations omitted); Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997) (holding squarely that CBAs cannot be used to "compel an employee to arbitrate a claim that he may have under one of the federal statutes . . . that confer litigable rights on employees"), *cert. denied*, 522 U.S. 912 (1997); Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997); Brisentine v. Stone & Webster Eng'g Corp., 117 F.3d 519 (11th Cir. 1997); Penny v. United Parcel Serv., 128 F.3d 608 (6th Cir. 1997); Varner v. Nat'l Supermarkets., Inc., 94 F.3d 1209 (8th Cir. 1996); *see also* Harvey R. Boller & Donald J. Petersen, *Job Discrimination Claims Under Collective Bargaining*, 53 DISP. RESOL. J. 38, 39 (1998) (providing a summary of where the circuits stand on the issue).

31. *See, e.g.*, *City of W. Branch*, 466 U.S. at 290-91.

32. *See* Loss v. Blankenship, 673 F.2d 942, 947 n.3 (7th Cir. 1982).

33. *See, e.g.*, *Barrentine*, 450 U.S. at 742 (discussing reasons why a mandatory arbitration clause in a collective bargaining agreement might cause an employee to lose the rights to a minimum wage and overtime pay).

right to see the agreement in advance, to comment on it, or to vote on it. Individual union members may not even be aware that the CBA has waived their rights and protections under Title VII, the ADA, and other statutes.[34] In addition, while the majority of the membership may have selected the union, the union's decisions impact all of the workers in the union, including those who did not choose that particular union or want any union at all.[35] In *Barrentine v. Arkansas-Best Freight System, Inc.*,[36] the Supreme Court recognized that a union's objective is to maximize overall compensation of its members, not to ensure that each individual employee receives the best deal available. Thus, a union must balance individual interests against collective interests and may act in ways that negatively affect individual employees while benefiting the unit as a whole.[37]

While these concerns are valid, they do not justify an across-the-board rule treating union and individual arbitration agreements differently. As long as a union employee is made aware of the details of the arbitration provision at the time the CBA is adopted, he has the same choice as an individual employee—accept the provision as written or find another job. Neither union nor individual employees have the opportunity to directly comment on the arbitration agreements to which they are held.

In fact, arbitration provisions in CBAs are likely to be more employee-friendly than similar provisions that apply to individual employees because union employees, though their elected representatives, have a more realistic opportunity to consent to the mandatory arbitration policies to which they are held. Employees in nonunion workplaces have less bargaining power than unionized workers and are therefore less likely to be able to give true consent to take-it-or-leave-it clauses.[38] As one commentator states:

> [T]he notion that [nonunion] employees sit down at the bargaining table with their employers and hammer out their own, personalized employment contract is an illusion. An overwhelming majority of these workers are never given the opportunity to personalize their employment contracts in any way. Rather, the non-union, at-will workplace is governed not by individualized employment agreements, but by form contracts, employment manuals, and clauses in job applications, all of which include the terms of employment set forth by the employer. It is within these "agreements" where clauses mandating the arbitration of statutory claims are likely to be found.[39]

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34. Ann C. Hodges, *Protecting Unionized Employees Against Discrimination: The Fourth Circuit's Misinterpretation of Supreme Court Precedent*, 2 EMPLOYEE RTS. & EMP. POL'Y J. 123, 151 (1998).

35. Johnson v. Bodine Elec. Co., 142 F.3d 363, 365 (7th Cir. 1998); *see* Air Line Pilots Ass'n v. Miller, 523 U.S. 866, 876 (1998) ("[A]rbitration is a matter of contract[,] and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.") (citing United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 682 (1960)).

36. 450 U.S. 728 (1981).

37. *Id.* at 742.

38. *See* Daniel Roy, *Mandatory Arbitration of Statutory Claims in the Union Workplace After* Wright v. Universal Maritime Service Corp., 74 IND. L.J. 1347, 1359-61 (1999) (discussing the realities of how nonunion employees agree to mandatory arbitration clauses).

39. *Id.* at 1359-60.

Individual employees' lack of bargaining power when compared that of union members draws into question the relevance of the *Gilmer* Court's distinction between union and nonunion arbitration agreements. The arbitration provision at issue in *Gardner-Denver* was negotiated by the employer and the union selected by a majority of the plaintiff's co-workers. The union, like the employer, was likely a repeat player "with an equivalent insight into arbitration and the operations of the workplace,"[40] and with the experience and knowledge necessary to draft a fair arbitration agreement. By comparison, the individual employee in *Gilmer* had to sign a contract in which he had little, if any, input.[41] If the Court were to enforce the arbitration clause in either of the two cases, it should have enforced the one in *Gardner-Denver*.

B. Authority of the Arbitrator

Courts also oppose mandatory arbitration in the union workplace because labor arbitrators have traditionally had only the authority to decide disputes based on the language of the contract at issue, not on the applicable law.[42] Admittedly, the standard arbitration provision found in most CBAs states that the provision covers only disputes between the parties as to the meaning, interpretation, and application of the provisions of the particular agreement.[43] This tradition, however, is no basis for an across-the-board rule. The traditional provision can simply be reworded to give labor arbitrators the power to also resolve statutory claims.

C. Lack of Federal Authority

Opponents of mandatory arbitration in the union context also argue that no federal policy favors including mandatory arbitration clauses in collective bargaining agreements.[44] *Gilmer* and its progeny were decided under the FAA. Congress enacted the FAA in 1925 to counteract the federal courts' aversion to arbitration agreements.[45] The Act gives arbitration agreements the same legal standing as other contracts[46] and preempts any state law that would allow an

40. Theodore J. St. Antoine, Gilmer *in the Collective Bargaining Context*, 16 OHIO ST. J. ON DISP. RESOL. 491, 506 (2001) (discussing whether union-management arbitration can effectively enforce employee rights against discrimination).

41. The agreement involved in *Gilmer* not even an employment contract but instead a New York Stock Exchange registration application that Gilmer's employer required him to sign as a condition of his employment. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991); *cf.* St. Antoine, *supra* note 40, at 491 (stating that nonunion employees sign what amounts to a contract of adhesion).

42. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974).

43. United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 565 (1960).

44. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991); *see* Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1454 (10th Cir. 1995) (stating that the court has "previously concluded that [the FAA exclusion] encompasses collective bargaining agreements, and ha[s] thus held the FAA is generally inapplicable to labor arbitration").

45. *See Gilmer*, 500 U.S. at 24.

46. *Id.*

employee to litigate all statutory claims despite an agreement to arbitrate.[47] Critics claim that the FAA does not govern CBAs because they are among the employment contracts excluded from the scope of the Act.[48] The Supreme Court, however, weakened this argument when it held, in *Circuit City Stores v. Adams*,[49] that the FAA excludes employment contracts only in industries that are directly involved in interstate commerce, such as transportation. After *Circuit City*, a strong argument can be made that the FAA and its national policy favoring arbitration applies to all CBAs in industries not directly involved in interstate commerce.

D. Union Control Over Which Cases to Arbitrate

The strongest barrier to the overturning of *Gardner-Denver* and the union/nonunion distinction is the tradition of union control over entry into the arbitration process. While arbitration in the individual employment context is merely the substitution of a different forum,[50] under traditional CBAs, "the union has broad discretion whether or not to prosecute a grievance."[51] Thus, if the union decides not to arbitrate, the employee has lost altogether his right to bring a claim.[52]

However, arguments relying on this aspect of CBA-mandated arbitration underestimate the impact of the unions' duty of fair representation, which gives unions an incentive to take meritorious claims to arbitration.[53] It requires them to serve the interests of all members without hostility or discrimination, to exercise their discretion with complete good faith and honesty, and to avoid arbitrary conduct.[54] Furthermore, because defending even one lawsuit for breach of

47. *See* Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) (holding that the FAA preempts all state laws that single out and "undercut the enforceability of arbitration agreements" covered by the Act).

48. *See, e.g.*, Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 311 (6th Cir. 1991) ("[T]his court has held that collective bargaining agreements are 'contracts of employment' and therefore outside the scope of the FAA.") (citing Bacashihua v. United States Postal Serv., 859 F.2d 402, 404-05 (6th Cir. 1988)).

49. 532 U.S. 105, 118 (2001).

50. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

51. Pryner v. Tractor Supply Co., 109 F.3d 354, 362 (7th Cir. 1997), *cert. denied*, 522 U.S. 912 (1997); *see* Vaca v. Sipes, 386 U.S. 171, 190-91 (1967); Ann C. Hodges, *Arbitration of Statutory Claims in the Unionized Workplace: Is Bargaining with the Union Required?*, 16 OHIO ST. J. ON DISP. RESOL. 513, 533-534 (2001) (arguing that while individual arbitration might be merely the substitution of a different forum, arbitration under a collective bargaining agreement is different because the union controls the arbitration process).

52. *See*, *e.g.*, Moore v. Duke Power Co., 971 F. Supp. 978, 983 (W.D.N.C. 1997) (finding that an employee was precluded from bringing his disability discrimination claim because of an arbitration agreement, even though his union never arbitrated the issue of disability discrimination).

53. Clyde W. Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251, 260-61 (1977) (explaining that the Court in *Vaca* had "emphasized that the union's exclusive control over grievance procedures did not carry with it 'unlimited discretion to deprive injured employees of all remedies for breach of contract'") (quoting *Vaca*, 386 U.S. at 186)); *see* Roy, *supra* note 38, at 1367. *See generally Vaca*, 386 U.S. at 177 (documenting the development of the duty of fair representation).

54. *See* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944) (inferring from the powers of the union as the exclusive bargaining representative under the Railroad Labor Act a duty to represent

the duty of fair representation costs much more than multiple arbitrations, unions have an incentive to take even borderline cases to arbitration.[55]

The duty of fair representation does not require unions to arbitrate every case that comes before them.[56] Unions traditionally have broad discretion and therefore may, for example, choose not to pursue a claim in which the conflict involves two or more union members (such as when one employee makes a sexual harassment claim against another).[57] In addition, a union may have limited financial resources, leaving it unable to pursue a claim because of monetary constraints.[58] A union may also decide not to pursue a claim because it questions the validity of the employee's claim.[59]

One solution would be to incorporate into CBAs provisions allowing employees to take their claims to arbitration individually when the union chooses not to pursue a claim, perhaps bearing their own expenses in doing so.[60] This solution might be difficult to implement because unions might resist relinquishing their influence over the grievance procedure and employer-employee interactions. However, even if employers and unions cannot agree to implement such a solution, union control of access to arbitration does not alone support the distinction between mandatory arbitration provisions in individual employment agreements and those in collective bargaining agreements.

V

CLOSING THE GAP: *AUSTIN*, *WRIGHT*, . . .

Since *Gilmer* was decided, a few courts have recognized that there is little reason to distinguish between mandatory arbitration provisions in individual employment contracts and those in collective bargaining agreements. In 1996, in *Austin v. Owens-Brockway Glass Container, Inc.*,[61] the Fourth Circuit rejected any absolute ban on mandatory arbitration of statutory claims in the collective bargaining context. The court noted the strong federal policy favoring arbitration of labor disputes and thus rejected the distinction between CBAs

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all employees within the bargaining unit "without hostile discrimination, fairly, impartially, and in good faith"); *see also* Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1955) (inferring the same obligation under the NLRA).

55. Roy, *supra* note 38, at 1364 (discussing unions' incentives to take cases to arbitration). In cases in which the union does breach the duty of fair representation, the employee can sue the union for its breach, and the union might then be subjected to multiple proceedings to enforce the same right—the suit for the breach, the arbitration, and a subsequent appeal. *See Pryner*, 109 F.3d at 362.

56. Michael P. Wolf, *Give 'Em Their Day in Court: An Argument Against Collective Bargaining Agreements Mandating Arbitration to Resolve Employee Statutory Claims*, 56 J. MO. BUS. 263, 268 (2000) (stating that unions are empowered to determine which cases they will ultimately pursue, so long as they exercise their decisionmaking power "without hostility, discrimination or arbitrariness") (quoting Hodges, *supra* note 34, at 145).

57. *Id.*

58. *Id.*

59. *Id.*

60. *See infra* Part VI.C.

61. 78 F.3d 875 (4th Cir.), *cert. denied*, 519 U.S. 980 (1996).

that require arbitration and individual agreements to arbitrate.[62] The Fourth Circuit's analysis focused on the *Gilmer* Court's noting the similarities between individuals and unions in the arbitration context[63] and its acceptance of arbitration as an alternative, rather than an inferior, forum.[64] The court in *Austin* also accepted the employer's argument that the real distinction between the cases adhering to *Gardner-Denver* and those following *Gilmer* is the radical change over the past two decades in the Court's receptivity to arbitration.[65]

Although no other circuit has explicitly adopted the Fourth Circuit's reasoning, enough uncertainty had arisen to persuade the Supreme Court to grant certiorari in *Wright v. Universal Maritime Service Corp.*,[66] which offered the Court an opportunity to clarify the reasons for distinguishing between individual employment agreements to arbitrate and arbitration clauses found in CBAs. Wright was a member of a union whose collective bargaining contract contained a clause that provided for the arbitration of all disputes "affecting wages, hours, and other terms and conditions of employment."[67] When several employers under contract with the union refused to hire him because he had previously claimed permanent disability, he filed suit in federal district court, alleging that the employers' refusal to hire violated the ADA. The employers countered that Wright was bound to arbitrate his claims.

Unfortunately, the Court refused to resolve whether *Gilmer* rejected the absolute prohibition of a union's waiver of employees' statutory rights to a federal forum.[68] Instead, the Court ruled even assuming that a CBA arbitration clause waiving federal forum rights would be enforceable, the clause at issue did not clearly enough express such a waiver. Holding the CBA to a higher standard than that set for individual employment agreements, the Court concluded that this general clause did not constitute a "clear and unmistakable" waiver of Wright's statutory rights and therefore did not preclude his suit.[69] The Court also confirmed that, contrary to the rule established in *Gilmer* for individual employment contracts, statutory claims are never presumed to be arbitrable under a CBA because the courts are in a better position than arbitrators to interpret disputes arising under federal law.[70]

The decision in *Wright* protects against unclear waivers, but it does not completely ban prospective, union-negotiated waivers of federal forum rights.[71] This flexibility opens the door for the lower courts to decide whether claims

62. *Id.* at 879.
63. *Id.* at 885.
64. *Id.* at 880.
65. *Id.*
66. 525 U.S. 70 (1998).
67. *Id.* at 73.
68. *Id.* at 76-77.
69. *Id.* at 80-81.
70. *Id.* at 77.
71. Michelle Hartmann, Comment, *A Myriad of Contradiction with Title VII Arbitration Agreements*—Duffield *as the Past*, Austin *as the Future, and the EEOC as the Target of Restructuring*, 54 SMU L. REV. 359, 376 (2001).

under Title VII and other statutes are subject to binding arbitration provisions found in CBAs. The Eastern District of New York seized this opportunity in *Clarke v. UFI, Inc.*[72] The CBA at issue in *Clark* incorporated Title VII's provision on sexual harassment and expressly charged the arbitrator to resolve disputes over whether that statute had been violated. The court concluded that the provision met the clear-and-unmistakable standard and ruled that the plaintiff was bound by the provision.[73] Likewise, the Middle District of North Carolina, in *Safrit v. Cone Mills*, found that the CBA at issue contained a valid waiver.[74] The court described the CBA as "an agreement not to discriminate against any employee because of gender and to abide by Title VII of the Civil Rights Act of 1964."[75]

VI

THE UNIONIZED WORKPLACE: CAN ARBITRATION BE MANDATORY OR NOT?

Despite the opening created by *Wright*, few courts thus far have enforced mandatory arbitration provisions contained in collective bargaining agreements against statutory employment claims. Employers therefore must draft mandatory arbitration provisions purporting to apply to statutory claims carefully if they hope to have them upheld in the courts.

A. Incorporation of Statutory Claims

To meet the clear-and-unmistakable standard imposed by *Wright*, the CBA must explicitly state that employees are required to submit all causes of action arising out of their employment to arbitration, and it must also list the individual federal statutes covered under the arbitration clause, including the nondiscrimination clause.[76] An alternative format for writing the CBA is to include both a nondiscrimination clause and an arbitration clause that clearly applies to all provisions of the contract, including the nondiscrimination clause.[77] However, neither a general anti-discrimination requirement nor contractual language that parallels—or even parrots—the relevant anti-discrimination statutes is sufficient to establish a waiver in the Fourth Circuit,[78] the circuit most likely to enforce a mandatory arbitration provision. In addition, it is insufficient to

72. 98 F. Supp. 2d 320 (E.D.N.Y. 2000).

73. *Id.* at 335.

74. No. 4:97 CV00646, 1999 WL 1111516, at *2 (M.D.N.C. Nov. 9, 1999) (mem.).

75. *Id.* at *1. Section XX of the CBA required that any grievance for discrimination be submitted to arbitration. *Id*.

76. Roy, *supra* note 38, at 1373 (outlining language meeting the "clear and unmistakable" standard developed in *Wright*).

77. Jennifer A Naber & Joseph M. Gagliardo, *Alternative Dispute Resolution of Employment Law Claims*, *in* 29TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 2000, at 43, 67 (PLI Litig. & Admin. Practice Course, Handbook Series No. 638, 2000).

78. *See* Brown v. ABF Freight Sys., Inc., 183 F.3d 319, 322 (4th Cir. 1999) (holding that the arbitration of statutory discrimination claims is required only if a CBA clearly includes the relevant anti-discrimination statute).

merely state in the CBA that the parties have agreed not to discriminate in violation of the law. Instead, the language must clearly state that the federal anti-discrimination statutes have been incorporated into the agreement.[79]

B. Design of the Arbitration Procedure

When designing or negotiating procedures that will apply to statutory claims, employers should consider incorporating certain features. The American Bar Association, the American Arbitration Association, JAMS, and the United States Department of Labor's Commission on the Future of Worker-Management Relations have recommended: (1) providing the parties with access to simple discovery; (2) requiring the arbitrator to prepare a written opinion and award; (3) outlining a cost-sharing plan that ensures arbitrator neutrality but is not cost-prohibitive for the employee; (4) providing for joint selection of a neutral arbitrator; (5) providing for limited judicial review of the arbitrator's application of the law; (6) permitting the arbitrator to award remedies equal to those provided by the law; and (7) allowing the employee to be represented by a person of his choosing.[80]

Many of these recommendations are actually easier to implement in a unionized workplace. In a unionized workplace, for example, the informal grievance procedures preceding arbitration generally result in substantial discovery.[81] In addition, most unions and employers already favor written opinions, even in ordinary contractual disputes.[82] Increasing the number of written opinions will further assist the arbitrators by establishing a body of precedent for use in deciding future claims.[83] Finally, since the union generally covers the costs of arbitration under the collective bargaining agreement, the cost-sharing suggestion (which some courts might mandate) has already been satisfied.

Some of the other recommendations, if adopted, would address the criticisms of mandatory arbitration in the unionized workplace. For example, it is suggested that the parties jointly select a neutral arbitrator with knowledge of the law. These arbitrators should undergo special training so that they are competent to handle the substantive and procedural issues that arise in employment discrimination cases. Another suggestion is for judicial review of

79. Carson v. Giant Food, Inc., 175 F.3d 325, 331-32 (4th Cir. 1999).

80. Gina K. Janeiro, *Balancing Efficiency and Justice: In Support of the Equal Employment Opportunity Commission's Policy Statement Regarding Mandatory Arbitration and Employment Contracts*, 7 AM. U. J. GENDER SOC. POL'Y & L. 125, 145-47 (1999) (outlining the recommendations of organizations specializing in arbitration and other forms of dispute resolution).

81. FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 217-20 (1997); *see* Mark Zinny, *Arbitration of Statutory Employment Disputes under Collective Bargaining Agreements*, *in* CONTEMPORARY ISSUES IN LABOR AND EMPLOYMENT LAW 175, 177 (Samuel Estreicher ed., 1997) (concluding that the amount of discovery necessary in arbitration pursuant to a CBA should be far less than in the nonunion context because the union has the right under the NLRA to access information during the grievance procedure, but arguing that more discovery is needed when the employee retains outside counsel or when the case involves a disparate impact claim).

82. ELKOURI & ELKOURI, *supra* note 81, at 384.

83. Zinny, *supra* note 81, at 178.

the disputed legal issues. If adopted, these policies should calm fears that an arbitrator accustomed to dealing only with contractual issues will misapply the employment discrimination laws.[84]

These organizations have also suggested that any mandatory arbitration procedure provide remedies equal to those provided by the law. This safeguard is necessary for arbitration procedures contained in a CBA because the traditional remedy under a CBA for the wrongful discharge of an employee is for reinstatement—with or without back pay—but not for general damages.[85] In comparison, an employee prevailing on a Title VII claim is entitled to compensatory damages, and in the case of malicious discrimination, punitive damages as well.[86]

C. Additional Precautions Unique to the Collective Bargaining Context

To satisfy the concerns raised in both the cases and commentary, employers of unionized workers should propose a few additional procedures when negotiating arbitration agreements. These procedures would address those factors that currently prevent the complete collapse of *Gardner-Denver*.[87]

The *Gardner-Denver* Court's first concern with CBA-mandated arbitration was employees' ignorance that their union may be negotiating away some of their statutory rights.[88] A relatively simple solution to this problem is to require the union to inform the employees of the arbitration policy before ratification of the contract.

The Court's second concern was that arbitration procedures do not provide union employees with the same procedural safeguards they would have in

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84. The National Academy of Arbitrators (NAA) has promulgated specific guidelines for arbitrators handling mandatory employment arbitrations. *See* NAT'L ACAD. OF ARBITRATORS, GUIDELINES ON ARBITRATION OF STATUTORY CLAIMS UNDER EMPLOYER-PROMULGATED SYSTEMS (May 21, 1997), *at* http://www.ilr.cornell.edu/alliance/resources/Guide/statement_guidelines_of_NAA.html. It suggests that arbitrators first consider whether they should even take a particular case. Questions that the arbitrator should ask himself include: Do I have a conflict of interest that should be disclosed? Do the parties have adequate rights of representation? Was I selected in a fair manner? Am I satisfied that I can serve in light of the employment documents and agency laws governing the dispute? Am I empowered to provide remedies consistent with the statute? Am I satisfied that the compensation arrangement is consistent with fairness and impartiality? Once an arbitrator accepts a case, the NAA recommends that he identify and resolve issues regarding the conduct of the hearing. Some key issues involve the production of evidence, the extent of discovery, the parties' access to documents, and the schedule for exchanging and submitting evidence. Another issue to be resolved is which rules of evidence apply—federal, state, or informal. The NAA suggests that arbitrators "seek a comfortable balance between the traditional informality and efficiency of arbitration and court-like diligence in respecting and safeguarding the substantive, statutory rights of the parties" and "be mindful of instances where application of an informal rule would prejudice an underlying substantive right." Finally, the NAA advises arbitrators to write detailed opinions reciting findings of fact based on material supplied at the hearing, outlining the statutory issues raised, and incorporating the jurisprudence of agencies and courts.

85. ELKOURI & ELKOURI, *supra* note 81, at 939.

86. *See* 42 U.S.C. §1981a (2000); *see also* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 534-35 (1999).

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

88. *Id.* at 51-52.

court.[89] Any arbitration provision in a CBA should specify that procedural limitations, such as time constraints on filing claims, apply only to contractual grievances. The arbitration provision should also outline separate procedures for statutory grievances that more closely resemble the procedures used by the courts.

The third concern—an employee's inability to compel arbitration at the hands of the union representative—is the most difficult to resolve. In the eyes of the Court, the ideal procedure would allow the employee to bring his claim regardless of the union decision. The cost of the proceeding would then be the responsibility of the employee or the employer, depending on the employee's financial status. Assuming that a union would agree to such a provision, employers should understand that allowing employees to bring their claims to arbitration without union consent would almost certainly increase the number of arbitrations. On the other hand, such a policy would not extend union employees' rights beyond the rights of nonunion employees operating under individual arbitration agreements.

A less attractive alternative for employers would be to negotiate for the employee to have a choice of a forum for his statutory claim—either arbitration or litigation—in return for an agreement to resolve the dispute in that forum exclusively. The EEOC strongly suggests that all employers adopt an arbitration policy under which the employee chooses the forum after the dispute arises.[90] While under current law, a union employee may have the option to take his claim both to court and to arbitration because of the overlap of contractual and statutory claims,[91] such a provision would eliminate the employee's ability to take two bites at the apple. Employers should not, however, voluntarily enact such a provision, since, by doing so, they would forfeit much of the benefits of arbitration. If arbitration is available but not mandatory, employees with small, uncertain claims will choose arbitration, while employees with strong cases worth large amounts will choose to litigate.[92]

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89. *Id.*

90. Janeiro, *supra* note 80, at 145-47.

91. Hodges, *supra* note 51, at 534. The National Association of Securities Dealers (NASD) was one of the first organizations to require all brokers to sign predispute agreements to arbitrate all disputes with customers and with employers. While members of the NASD favored arbitrating customer disputes, they resisted mandatory arbitration of employment claims. Consequently, while individual employers can still require the arbitration of employment disputes as a condition of employment, the NASD no longer requires statutory employment discrimination claims to be arbitrated. Instead, such claims are eligible for arbitration only when the parties agree to arbitrate after the claim has arisen. Additionally, for the arbitration of statutory claims, the NASD allows broader discovery, including depositions, provides a special roster of arbitrators familiar with employment law disputes, and requires arbitrators to state the reasons for their rulings. *See* George H. Friedman, *Securities Arbitration, Today's Trends, Predictions for Tomorrow*, *in* SELECTED DEVELOPMENTS OF NASD DISPUTE RESOLUTION 2000, at 135, 140 (PLI Corp. L. & Practice Course, Handbook Series No. 1196, 2000).

92. By requiring mandatory arbitration, employers accept settling a greater number of minor disputes in exchange for avoiding a major suit that settles for seven figures before a sympathetic jury. Arthur D. Rutkowski & Barbara Land Rutkowski, *U.S. Supreme Court Decision Gives Life to Mandatory Arbitration of Statutory Discrimination Claims in an Employment Setting*, 16:4 EMP. L. UPDATE 1, 8 (2001); *see* Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims:*

D. Bypassing the Union

An alternative for the employer who does not want to involve the union in mandatory arbitration is to bypass the union and impose waivers on employees individually. In most cases, this will be impossible because the employer will be prohibited from bypassing the union and negotiating directly with employees, even with the employees' consent, because it undermines collective bargaining.[93] Individual contracts may not be used to defeat or delay collective bargaining.[94] Even though the agreement would be imposed at the time of hire, when the employee is not yet a member of the bargaining unit, any individual contract that affects the terms and conditions of employment must comply with both the National Labor Relations Act and the applicable CBA.[95] Additionally, the employer may benefit from negotiating with the union because employees may be more willing to accept a procedure negotiated by their union representative.[96]

E. The Unionized Company: Is Mandatory Arbitration Still Worth the Trouble?

While an employer hoping to enforce a mandatory arbitration agreement in an individual employment contract might find it beneficial to incorporate provisions discussed above, employers hoping to enforce a mandatory arbitration agreement in a CBA will likely find it essential to incorporate such procedures. One commentator argues that "the end result . . . would seem to negate the very advantages that made arbitration a desirable resolution mechanism in the first place."[97] The added procedures certainly will complicate arbitration, but the inherent value of arbitration remains.

Providing limited discovery might slightly increase the costs of arbitration, but the altered process would still be much less expensive than litigation.[98] Providing an extended period to file grievances, limited discovery, and judicial

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Unmitigated Evil or Blessing in Disguise?, 15 T.M. COOLEY L. REV. 1, 7 (1998) (discussing employers' rationales for desiring mandatory arbitration).

Union attorneys who otherwise advocate the use of arbitration in the collective bargaining context continue to insist on the necessity of an employee election. *See, e.g.*, Zinny, *supra* note 81, at 178. But it is illogical to insist on this election while simultaneously supporting a belief that changes to arbitration processes, such as increased discovery and judicial review, make arbitration a fair alternative to litigation.

93. *See* Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 687 (1944).

94. J.I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944).

95. *Id.* at 335-37. *But see* Air Line Pilots Ass'n v. N.W. Airlines, 199 F.3d 477, 486 (D.C. Cir. 1999) (holding that an employer can lawfully impose arbitration agreements on employees individually because statutory arbitration is not a mandatory subject of bargaining).

96. Hodges, *supra* note 51, at 534 (advocating that employers try to negotiate arbitration agreements with unions rather than trying to bypass them).

97. Wolf, *supra* note 56, at 269 (arguing that mandatory arbitration should not be used in collective bargaining agreements because the changes necessary to make the process fair would destroy the value of that process).

98. Joshua M. Javits & Francis T. Coleman, *High Court to Revisit Issue of Mandatory Arbitration*, NAT'L L.J., Oct. 5, 1998, at B8.

review might prolong the arbitration process, but, once again, arbitration would likely remain much faster than litigation. Judicial review might diminish the finality of arbitration, but judicial review would still be much quicker than an entirely separate court action, which, as stated previously, is an option for a union employee with both statutory and contractual claims.[99] And providing for written awards would not threaten the confidentiality of arbitration so long as both parties' consent were required before an arbitration opinion could be published.100

VII

CONCLUSION

If mandatory arbitration of statutory claims is to be permitted in any employment context, it should be permitted in the collective bargaining context. Union employees have more, not less, power to negotiate a favorable agreement than individual employees, and they are protected by a union that has knowledge and skills concerning arbitration that match those of the employer. Many of the concerns expressed by the Supreme Court in *Alexander v. Gardner-Denver Co.* were at that time also concerns about individual employee arbitration agreements. As the Court recognized in *Gilmer*, however, the generalized mistrust of mandatory arbitration evinced in *Gardner-Denver* has since been rejected,[101] in part because arbitral processes have matured. The unique concerns that remain over union arbitration—primarily, union employees' unfamiliarity with the provisions in CBAs and unions' ability to control access to arbitration—can be addressed through well-drafted arbitration procedures.

As two attorneys with experience representing management in labor disputes advise, "mandatory arbitration agreements that focus on a change of forum (from judicial to arbitral) rather than attempt to truncate the breadth of the laws are more likely to survive judicial scrutiny."[102] Relatively recent precedent established by *Austin* and *Wright*, among others, suggests that some courts are now willing to consider the fairness of a particular procedure as long as employees are fully aware of the rights they have waived. But not even the most progressive court will enforce an arbitration procedure that does not contain the safeguards discussed throughout this Article. The arbitration process that remains after these safeguards are incorporated may be less favorable than the process that employers have long championed, but it is still a process preferable to litigation.

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99. St. Antoine, *supra* note 40, at 501.

100. Boyd A. Byers, *Mandatory Arbitration of Employment Disputes*, 67 J. KAN. B. ASS'N. 18, 20 (1998).

101. *Gilmer*, 500 U.S. at 34 n.5.

102. Cynthia M. Surrisi & Timothy E. Delahunt, Growth of ADR in the Labor and Employment Arena and Its Likely Role in the Coming Decade (June 8, 2000) (unpublished manuscript presented at the National Conference on Labor-Management Relations: Labor Law in the Year 2000 and Beyond, June 8-9, 2000) (on file with *Law and Contemporary Problems*).