

ALTERNATIVE DISPUTE RESOLUTION
AND COLLECTIVE BARGAINING --
A UNION PERSPECTIVE

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Introduction

In 1991 two seemingly unrelated events resulted in the development and growth of individual employment arbitrations, commonly referred to as alternate dispute resolution (ADR). In that year the Civil Rights Act of 1991 was passed. That Act provided successful plaintiffs with the remedies of compensatory and punitive damages and expanded the availability of jury trials in discrimination cases. Faced with the uncertainty and expense of jury trials as well as the potential of more costly awards, employers had a significant incentive to search for alternatives to litigation.

That same year the Supreme Court seemed to provide a road map for such an alternative. In Gilmer v. Interstate Lane Corporation, 500 U.S. 20 (1991), the Court held that an employee could be compelled to arbitrate his age discrimination claim pursuant to his individual employment contract, rather than pursue his cause of action in federal court. Post-Gilmer, the lower federal courts have generally enforced arbitration provisions in individual employment contracts requiring discrimination and other claims to be adjudicated before arbitrators.

During this same period, courts have generally adhered to the view that collective bargaining agreements, unlike individual employment contracts, do not require the arbitration of individual statutory claims, particularly claims of employment discrimination. Alexander v. Gardner-Denver Company, 415 U.S. 36 (1974). There

appears to be a sharp distinction between the permissible scope of mandatory arbitration provisions in individual employment contracts and collective bargaining agreements. In Wright v. Maritime Service Corporation, the Supreme Court expressly declined to resolve the tension between Gardner-Denver and Gilmer.

The purpose of this paper is to explore some of the policy challenges facing employers and unions in the brave new world of alternative dispute resolution.

Alexander v. Gardner Denver -- The 1964 Civil Rights Act Meets The Collective Bargaining Agreement

In Alexander v. Gardner Denver, the Supreme Court considered whether a black employee's loss of his unjust discharge arbitration barred his pursuit of a Title VII claim in federal court. The collective bargaining agreement in addition to providing a broad, binding grievance/arbitration procedure, also contained a provision prohibiting racial discrimination. Though the initial grievance did not allege that the discharge was the result of racial discrimination, the employee clearly raised this contention in arbitration. The arbitrator denied the grievance, holding that the employee was discharged for just cause. Thereafter, the employee brought a Title VII action challenging his dismissal.

The Supreme Court found that the arbitrator's decision did not bar the employee from pursuing a Title VII claim. The Court started its analysis by reviewing the legislative history of Title VII, concluding that Congress had intended to allow an individual to independently pursue both his rights under Title VII and the

collective bargaining agreement. Title VII was to supplement, not supplant, preexisting statutory rights. 415 U.S. at 48. The Court found that the strong federal policies favoring arbitration as set forth in the Steelworkers Trilogy and other cases, was not applicable to a Title VII claim.

The Court distinguished between those rights collectively given to employees, such as the right to strike, and those which are individual in their nature. While the former can be waived by the union, the latter may not be so waived. A union may not waive an employee's right to pursue Title VII claims in federal court since such a waiver would defeat the Congressional purpose underlying Title VII. While acknowledging that an employee might waive his Title VII claims as part of a settlement, the Court found that the collective bargaining agreement could not prospectively waive such rights even by inclusion of a specific non-discrimination procedure, subject to binding arbitration. Title VII involves individual rights to equal employment opportunities, not concerns subject to "majoritarian processes." 415 U.S. at 51-52. The Court then catalogued the shortcomings of the arbitration procedures for adjudicating Title VII claims. First, the arbitrator's jurisdiction is limited to enforce the collective bargaining agreement, he may not rest a decision "solely" on his views of statutory requirements. 415 U.S. at 56. Second, the arbitrator's expertise is in the law of the shop not statutory mandates. Third, arbitration by its nature is informal and

expedient, without the protection surrounding litigation. The record in arbitration is not complete, the rules of evidence do not apply, and rights such as cross-examination and discovery are often severely limited or unavailable. 415 U.S. at 58-59.

The Court subsequently has extended Gardner-Denver holding that the individual employee is not required to utilize collectively bargained arbitration procedures to pursue statutory rights. Barrantine v. Arkansas Best Freight System, 450 U.S. 728 (1981) (Fair Labor Standards Act); McDonald v. City of West Branch, 466 U.S. 284 (1984) (actions under 42 U.S.C. § 1983); Allis-Chalmers v. Lueck, 471 U.S. 202, 213, n. 8 (1985), and Lingle v. Norge Div. Of Magic Chef, Inc., 486 U.S. 399, 412-13 (1988) (state law individual employee causes of action).

While restricting the scope of arbitrations in the collective bargaining context, the Court has proceeded to broaden the scope of commercial arbitrations. Although it held that labor arbitrators' expertise was limited to the law of the shop, the Court has been increasingly willing to enforce commercial contracts providing for complex legal issues to be resolved through arbitration. See Mitsubishi Motors v. Soler Chrysler Plymouth, 473 U.S. 614 (1985) (Antitrust claims arising from an international transaction arbitrable); Shearson/American Express, Inc. v. McMahon, 482 U.S. 420 (1987) (Securities and Exchange Act and RICO claims arbitrable); Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477 (1989) (FAA compels enforcement of private contract to

arbitrate Securities Act claims). The increasingly divergent views of commercial and labor arbitrations collided in an employment case involving the age discrimination claims of a stockbroker in 1991.

Gilmer v. Interstate/Johnson Lane
Individuals Are Bound by Arbitration Provisions

In Gilmer v. Interstate/Johnson Lane Corp. a stockbroker filed an ADEA claim against his employer. In his registration application with the N.Y. Stock Exchange, Gilmer had agreed to arbitrate any dispute arising between him and his employer. The Supreme Court held that the arbitration provision in the application was enforceable under the Federal Arbitration Act (FAA), 9 USCA 1, et. seq., and that the lower court properly dismissed Gilmer's cause of action.

The Court sharply restricted Gardner-Denver, relying on its decisions construing commercial arbitration agreements to find that there is a liberal federal policy in favor of arbitration. Having made a bargain to arbitrate, Gilmer should be held to it, unless Congress intended to prevent a waiver of a judicial forum, and it was his burden to establish that Congress intended to preclude such a waiver for ADEA claims.

The Court rejected Gilmer's various arguments that enforcing arbitration agreements to deny a judicial forum for an ADEA claim was contrary to the policies underlying the statute. Indeed, the Court held that compulsory arbitration was totally consistent with ADEA's flexible approach to the resolution of such claims. The ADEA directs the EEOC to pursue "informal methods of conciliation,

conference, and persuasion," 29 U.S.C. § 626(b), which suggested to the Court that non-judicial dispute resolution, such as arbitration, is consistent with Congressional intent.

The Court also rejected a variety of claimed infirmities in the New York Stock Exchange (NYSE) arbitration process: (1) Arbitrator partiality -- NYSE rules adequately protect against bias, providing that arbitrators' biographical data be provided to the parties, each party be given a preemptory challenge and unlimited challenges for cause, and arbitrators must reveal any circumstances which might preclude them from rendering an impartial opinion. Further, the FAA permits courts to overturn awards where there was evidence of partiality; (2) Discovery -- NYSE rules provide adequate discovery allowing for document production, information requests and subpoenas. Discovery as extensive as that provided in federal courts is not to be expected since the parties have traded the procedures of the courtroom for "the simplicity, informality, and expedition of arbitration"; (3) Lack of Written Opinion -- NYSE rules require arbitration awards be in writing, that they contain the names of the parties, a summary of the issues in controversy and that the award be made public; (4) NYSE Rules did not restrict the arbitrator from granting equitable relief. It is not clear whether the foregoing are required minimal procedural protections.

The Court turned a deaf ear to the claim that there will often be unequal bargaining power between employers and individual

employees. Again relying on its decisions in the context of commercial arbitrations, the Court found "mere inequality in bargaining power" not to be a sufficient basis to decline to enforce an arbitration agreement. Only fraud or "overwhelming economic power" provide sufficient reason to revoke the arbitration provision. The Court left the door open a crack, noting that Gilmer was an experienced businessman, and that claims of unequal bargaining power are best left for resolution in specific cases.

The Court limited Gardner-Denver and its progeny to the collective bargaining context, explicitly rejecting the view that arbitration was in any way inferior to the judicial process. In a collective bargaining contract, only the union, not the employee, has agreed to be bound to arbitrate statutory claims. Moreover, in collective bargaining arbitration, it is the union, not the individual employee, which presents the claim. While rejecting Gardner-Denver's general distrust of the arbitration process, the Court reiterated Gardner-Denver's concern that there may be tension between collective representations and protection of individual statutory rights.¹ In a subsequent decision, the Court, apparently

¹The Court expressly declined to address the AFL-CIO's contention that the Federal Arbitration Act (FAA) does not encompass employment contracts, since this argument was not raised below. 500 U.S. at 25, n. 2. The Supreme Court again declined to decide this issue in its most recent decision, Wright v. Universal Maritime Serv., 119 S.Ct. 391, 395, n. 1 (1998). While this argument found favor with the dissent, it has generally been rejected by the lower federal courts in post-Gilmer decisions. The final clause of the FAA's definitional sections reads: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in

referring to this distinction between collective and individual rights, noted that Gilmer "emphasized its basic consistency" with Gardner-Denver. Lavidas v. Bradshaw, 129 L.Ed.2d 93, 112 at n. 21 (1994).

The Gilmer decision permits employees to individually waive statutory rights, while seeming to leave in tact a policy that prohibits unions from applying collective bargaining strength to that decision. The Court was unimpressed with the claim that compulsory arbitration in individual employment contracts was the product of such unequal bargaining power as to be contracts of adhesion. As discussed below, the lower courts in the non-union context have generally construed Gilmer as giving a green light to mandatory arbitration of employment disputes, while a minority have attempted to define some standard to review the procedural fairness of such arbitrations. Before proceeding, a brief practical note.

Mr. Gilmer was required to arbitrate and had to forego his preferred judicial forum. Notwithstanding, the arbitration panel awarded him \$240,000. In spite of Mr. Gilmer's apparent success,

foreign or interstate commerce." In spite of the apparent breadth of this provision, the lower federal courts, post-Gilmer have interpreted this provision as excluding only seamen, railroad workers or others similarly employes in the actual interstate transportation of goods. See, e.g., Cole v. Burns, 105 F.3d 1465, 1470-72 (DC Cir. 1997); Pryner v. Tractor Supply Co., 109 F.3d 354, 357-58 (7th Cir. 1997); Great Western Mortgage v. Peacock, 110 F.3d 222, 227 (3rd Cir. 1997). For a contrary analysis, see Craft v. Campbell Soup Co., 161 F.3d 1199, (9th Cir. 1998), which relies upon "Workers Contracts Under the U.S. Arbitration's Act: An Essay in Historical Clarification," 17 Berkley, J. Employment & Labor L. 282 (1996).

there is some evidence that securities industry employees have generally fared poorly in arbitration.² In the face of mounting criticism of this process, both the National Association of Securities Dealers (which oversees the NASDAQ Stock Market) and the New York Stock Exchange voted to end their practices of mandatory arbitration of employment discrimination claims.³

²"Men's Club: Riding Crop and Slurs: How Wall Street Dealt With a Sex Bias Case," Wall Street Journal, June 9, 1994; General Accounting Office, "Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes" summarized Daily Labor Report D-6, April 15, 1994.

³Daily Labor Report, August 8, 1997, at AA-1 (NASD vote); June 24, 1998 at A-10 (SEC approval of NASD vote); September 8, 1998 at A-8 (NYSE vote).

Post-Gilmer -- Mandatory Arbitration
of Individual Employment Claims (Non-Collective Bargaining)

Although mandatory arbitration of individual statutory claims has been criticized by the EEOC⁴, the Chairman of the NLRB,⁵ the Commission on the Future of Worker-Management Relations (Dunlop Commission),⁶ and the National Academy of Arbitrators,⁷ such procedures in non-union settings have received widespread judicial approval.⁸ Courts have been willing to enforce such provisions in virtually any written document. In Gilmer and its progeny, the arbitration contract was found in a securities registration application.⁹ It has also been found in an employment

⁴Daily Labor Report, April 26 and July 10, 1997; see discussion in Cole v. Burns Intern. Security Services, 105 F.3d 1465, 1479 (D.C. Cir. 1997).

⁵154 LRR 463 (April 21, 1997).

⁶Report and Recommendations, Commission on the Future of Worker-Management Relations, December 1994, at p. 33.

⁷Daily Labor Report, May 29, 1997.

⁸The judiciary's favorable response to Gilmer may, in part, be the result of the mounting number of employment discrimination cases being filed. Since 1992, filings of such cases have more than doubled, going from 10,771 in 1992 to 23,000 in 1996. Washington Post, May 12, 1997, "Worker Bias Causes Are Rising Steadily."

⁹Mouton v. Metropolitan Life, 147 F.3d 453 (5th Cir. 1998); Seus v. Noreen, 146 F.2d 175 (3rd Cir. 1998); Kidd v. Equitable Life Assurance, 32 F.3d 516 (11th Cir. 1994); Alford v. Dean Witter Reynolds, 939 F.2d 229, 975 F.2d 1161 (5th Cir. 1992); Willis v. Dean Witter Reynolds, 948 F.2d 305 (6th Cir. 1991); Saari v. Smith Barney Harris, Upham & Co., 968 F.2d 877 (9th Cir. 1992); Bender v. A. G. Edwards, 971 F.2d 698 (11th Cir. 1992); Herko v. Metropolitan Life Ins. Co., 978 F.Supp. 141, 145-47 (W.D. N.Y. 1997); Cremin v. Merrill Lynch Pierce Fenner & Smith, 957 F.Supp. 1460, 1475-76 (N.D. Ill. 1997). But see Prudential Insurance Co. v. Lai, 42 F.2d

application,¹⁰ individual employment contracts,¹¹ employee handbooks or manuals,¹² and partnership agreements.¹³ Even in the absence of a written agreement to arbitrate, an employee submission to

1299 (9th Cir. 1994).

The Seventh Circuit has distinguished the National Association of Securities Dealers' (NASD) rules from the N.Y. Stock Exchange's, finding that the former does not encompass employment disputes. Farrand v. Lutheran Brotherhood, 993 F.2d 1253 (7th Cir. 1993) (Gilmer did not establish a grand presumption in favor of arbitration, it interpreted and enforced the texts on which the parties had agreed." Accord, Kresock v. Bankers Trust Co., 21 F.2d 776 (7th Cir. 1994).

¹⁰Magoo v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992). In Sheller v. Frank's Nursery, 957 F.Supp. 150 (N.D. Ill. 1997), the court found that even a minor signing an employment application with an arbitration provision was barred from pursuing his Title VII claim.

¹¹Cole v. Burns Inter. Security Services, 105 F.3d 1465 (DC Cir. 1997); DiCrisci v. Lyndon Guar. Bank of N.Y., 807 F.Supp 947 (W.D. N.Y. 1992); Hull v. NCR Corp., 826 F.Supp 303 (E.D. Mo. 1993); Scott v. Farm Family Life Ins. Co., 827 F.Supp 76 (D. Mass. 1993); Hampton v. ITT Corp., 829 F.Supp. 202 (S.D. Tex. 1993); Crawford v. N.J. Health Systems, 847 F.Supp 1232 (D. N.J. 1994); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 837-38 (8th Cir. 1997); Miller v. Public Storage Management, Inc., 121 F.3d 215, 218 (5th Cir. 1997); Asplundh Tree Expert Co. V. Bates, 71 F.3d 592 (6th Cir. 1995); but see Oldroyd v. Elmire Savings Bank, F.S.B., 956 F.Supp. 393, 398-99 (W.D. N.Y. 1997) (where arbitration clause applied to "any disputes, controversies or claims arising under or in connection with this Agreement," retaliatory discharge claims under federal statute not required to be arbitrated).

¹²Lang v. Burlington Northern R.R. Co., 835 F.Supp 1104 (D. Minn. 1993); Lacheney v. Profitkey International, 818 F.Supp 922 (E.D. Va. 1993); Kelly v. UHC Management Co., Inc., 967 F.Supp. 1240, 1251 (N.D. Ala. 1997). But see Kummetz v. Tech Mold, Inc., 152 F.3d 1155 (9th Cir. 1998).

¹³Williams v. Katten, Muchin & Savis, 837 F.Supp 1430 (N.D. Ill. 1993).

arbitration has been determined post-Gilmer to constitute a waiver of any claim made or which could have been made in arbitration.¹⁴

Only the Ninth Circuit has gone beyond the four corners of the claimed arbitration agreement to determine whether the language was sufficient to put employees on notice that they were agreeing to arbitrate sexual discrimination claims. Relying on the legislative history surrounding the adoption of the 1991 Civil Rights Act, the Court held that Congress intended that there must be a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the remedies and procedural rights in Title VII and related state statutes. Prudential Insurance Co. v. Lai.¹⁵ While the Ninth Circuit was critical that the broker registration statements in question failed to describe the types of disputes subject to arbitration, these technical objections may have reflected a more basic concern over the unequal bargaining power of the parties.

Subsequently, the Ninth Circuit, relying solely on the legislative history of the 1991 Civil Rights Act, has gone beyond the issue of knowing waiver addressed in Lai and concluded that Congress intended to preserve a judicial forum for the resolution

¹⁴Nyhiem v. NEC Electronic, 25 F.3d 1437 (9th Cir., 1994); Solomon v. Duke University, 850 F.Supp. 372 (MD NC 1993).

¹⁵42 F.2d 1299 (9th Cir. 1994). See Nelson v. Cyprus Bagdad Cooper Corp., 119 F.3d 756, 762 (9th Cir. 1998); Kummentz v. Tech Mold, Inc., *supra*. (Employer has burden of establishing knowing waiver). But see Seus v. John Nuveen & Co., 146 F.3d 175, 183-84 at n. 2; Patterson v. Tenent Healthcare, 113 F.3d 832, 838 (8th Cir. 1997) (rejecting knowing and voluntary standard).

of Title VII claims. The security industry's compulsory arbitration of such claims was, therefore, found to be unenforceable as contrary to Congressional intent. Duffield v. Robertson Stephens & Co.¹⁶ The court did not distinguish its prior decision requiring the arbitration of a Title VII claim under the same security industry procedures.¹⁷

With the exception of Duffield, courts have consistently declined to find Congressional or state legislative intent to limit arbitration and applied Gilmer to dismiss a variety of claims.¹⁸

¹⁶144 F.3d 1182 (9th Cir. 1998). The court found that Section 118 of the Civil Rights Act which encouraged, but did not require arbitration of Title VII claims, reflected Congress' intent to prohibit compulsory arbitration of such claims. The court rejected the Fourth Circuit's reliance on Section 118 to reach the opposite result. But see Seus v. John Nuveen & Co., 146 F.3d at 182.

¹⁷Mago v. Shearson Lehman Co., 956 F.2d 932 (9th Cir. 1992). See Kushner v. Dickinson, 84 F.3d 316 (9th Cir. 1996) (enforce arbitration of FLSA claim).

¹⁸Saari v. Smith Barney, Harris Upham & Co., 968 F.2d 877 (9th Cir. 1992) (federal and state polygraph protection acts and slander.

Title VII -- see, e.g., Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992); Willis v. Dean Witter Reynolds, 948 F.2d 305 (6th Cir. 1991); Alford v. Dean Witter Reynolds, 939 F.2d 229 (5th Cir. 1991); Bender v. A. G. Edwards & Sons, 971 F.2d 698 (11th Cir. 1992). But see, Duffield v. Robertson Stephens & Co., 76 FEP Cases 1450 (9th Cir. 1998).

42 U.S.C. § 1981 -- Williams v. Katten, Mushin & Zavis, 837 F.Supp. 1430 (N.D. Ill. 1993).

FLSA -- Hampton v. ITT Corp., 829 F.Supp. 202 (S.D. Texas 1993); Kuehner v. Dickinson, *supra*.

ADEA -- Mathews v. Rollins Hudig Hall Co., 72 F.3d 50 (7th Cir. 1995).

ADA -- Bercovitch v. Baldwin School, Inc., 133 F.3d 141, 151 (1st Cir. 1998).

OWBPA -- Seus v. John Nuveen & Co., *supra*.

Miscellaneous -- Saari v. Smith Barney, Harris Upham Co., 968 F.2d 877 (9th Cir. 1992) (federal and state polygraph protection

Similarly, courts seem unsympathetic to any claim of unequal bargaining power.¹⁹

The American Arbitration Association,²⁰ the Dunlop Commission,²¹ and the Bar Association of the City of New York²² have each promulgated model rules to govern employee ADR arbitrations. However, it remains unclear whether any of these models establish the minimum requirements of fairness.

In Cole v. Burns Intern. Security Services,²³ the DC Circuit, in enforcing a pre-employment agreement to arbitrate, established such standards. Judge Edwards, writing for the court, started his analysis with the proposition that, while Gilmer permitted employees to agree to arbitrate their individual statutory claims, it did not give "an employer a free hand in requiring arbitration

act); ITT Consumer Financial Corp. v. Wilson, 61 F.E.P. Cases 509 S.D. Miss. 1991) (state claims of sexual harassment, invasion of privacy and emotional distress)

¹⁹Seus v. John Nuveen & Co., Inc., 146 F.3d at 184; Great Western Mortgage v. Peacock, 110 F.3d at 227-28. In Williams v. Katten Muchin & Savis, 837 F.Supp 1430 (N.D. Ill. 1993), plaintiff sued her law firm. The court rejected her claim of unequal bargaining power even though the partnership agreement limited arbitrator selection to one who practiced law in a firm containing over fifty lawyers.

²⁰National Rules for the Resolution of Employment Disputes, American Arbitration Association (effective June 1, 1996).

²¹Commission on the Future of Worker-Management Relations, Report and Recommendations, pp. 30-31 (1994).

²²Committee on Labor and Employment Law, Model Rules for the Arbitration of Employment Disputes (1995).

²³105 F.3d 1465 (DC Cir. 1997).

as a condition of employment."²⁴ The employee cannot be required, as a condition of employment, to waive "access to a neutral forum in which statutory employment discrimination claims may be heard."²⁵ The court found that the four standards discussed in Gilmer must be met in order to enforce the arbitration agreement. These are that that arbitration arrangement (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, and (4) provides for all of the types of relief that would otherwise be available in court.²⁶ To these, the court added a fifth: that the employee is not required to pay either unreasonable costs or any arbitrators' fees or expenses.²⁷

The foregoing establishes that, outside of the Ninth Circuit, employers have generally been given wide latitude to impose ADR procedures on their employees. While courts may be willing to review the fundamental fairness of the process, it is clear that outside of the Ninth Circuit the overwhelming weight of judicial authority is to enforce the ADR procedures. By contrast, as noted

²⁴Ibid at 1480.

²⁵Ibid.

²⁶Accord: Paladino v. Avnet Computer Technologies, 134 F.3d 1054, 1061-62 (11th Cir. 1998). The Third Circuit has enforced the ADR procedure even though the agreement did not provide for remedies that are coextensive with those available in the statute, finding that the employee challenging the validity of the agreement must present that contention to the arbitrator. Great Western Mortgage v. Peacock, 110 F.3d 222, 231-32 (3rd Cir. 1997).

²⁷Accord: Shankle v. B-G Maintenance, 163 F.3d 1230, 1234-35 (10th Cir. 1999).

below, the Court has left open the question of whether compulsory arbitration of individual statutory claims could be made part of the collective bargaining agreement.²⁸

Post-Gilmer -- Statutory Claims
and the Collective Bargaining Agreement

Lower courts have rejected claims that arbitration provisions in collective bargaining agreements require that individual employees arbitrate their statutory claims. These decisions have cited Gardner-Denver for the proposition that unions may not waive employees' individual statutory rights,²⁹ although at least one case suggested that this proposition only establishes a presumption which may be rebutted by sufficiently clear contract language.³⁰ Another court had interpreted Gilmer as requiring an employee to

²⁸Wright v. Universal Maritime Service, 119 S.Ct. 391 (1998).

²⁹See, e.g., Ryan v. City of Shawnee, 13 F.3d 345, 347 (10th Cir. 1995); Tran v. Tran, 54 F.2d 115 2nd Cir. 1995); Bates v. Long Island Railroad, 976 F.2d 1028, 1034-35 (2nd Cir. 1993); Bolden v. SEPTA, 953 F.2d 807 (3rd Cir. 1991); EEOC v. Board of Governors, 957 F.2d 424, 431 (7th Cir. 1992) (dicta); Sewell v. N.Y. Transit Authority, 809 F.Supp 208, 215-17 (E.D. N.Y. 1992); Humphrey v. Council of Jewish Federations, 901 F.Supp 703, 704-10 (S.D. N.Y. 1995); Jackson v. Quanex Corp., 889 F.Supp 1007, 1110-11 (E.D. Mich. 1995); Randolph v. Cooper Industries, 879 F.Supp 518, 520-22 (W.D. Pa. 1994); Griffith v. Keystone Steel & Wire Co., 858 F.Supp 802 (C.D. Ill. 1994); Rosen v. Transx Ltd., 816 F.Supp 1364 (D. Minn. 1993); Block v. Art Iron, Inc., 866 F.Supp 380 (N.D. Ind. 1994).

³⁰Clapps v. Moliterno Store Sales, 819 F.Supp 141 (D. Conn. 1993).

exhaust arbitration procedures in the collective bargaining agreement but not be bound by the result.³¹

The Fourth Circuit, however, reached the opposite conclusion in Austin v. Owens-Brockway Glass, 78 F.3d 875 (4th Cir. 1996). Relying heavily on Gilmer, the court affirmed the district court's grant of summary judgment to the employer on the basis that the employee failed to utilize the grievance/arbitration procedure in the collective bargaining agreement to resolve his claims of disability discrimination under ADA and sexual discrimination under Title VII.

The collective bargaining agreement required the employer and union to comply with all discrimination laws and that the contract be administered in conformity with the ADA. Any disputes under this provision were subject to the grievance and arbitration procedures. Citing the Steelworkers' Trilogy and section 118 of the Civil Rights Act of 1991,³² the Court found that there is a federal policy to encourage labor arbitration.

The circuit's opinion is not limited to exhaustion. Rather, the court viewed the arbitration procedure as substituting the arbitration for the judicial forum.

³¹Knox v. Wheeling Pittsburgh Steel Corp., 899 F.Supp. 1529 (N.D. WVa. 1995) (employee required to exhaust collective bargaining arbitration procedures). See Adams v. Burlington Northern Railroad, 843 F.Supp 686 (D. Kan. 1994).

³²See discussion at n. 16 supra.

Though a few courts have followed the Fourth Circuit's reasoning in Austin,³³ most had not.³⁴ Among the latter is the Seventh Circuit's opinion in Pryner v. Tractor Supply,³⁵ which explicitly rejected the Fourth Circuit's reasoning in Austin.

Relying on Alexander v. Gardner-Denver, the Seventh Circuit upheld the district court's refusal to stay two Title VII causes of action, pending the outcome of arbitration. The court concluded that the employer could not compel the arbitration of such claims under the collective bargaining agreement. The court acknowledged that there are competing interests: One, the interest in allowing unions and employers to establish comprehensive systems for the

³³Jessie v. Carter Health Care Center, Inc., 930 F.Supp 1174 (E.D. Kan. 1996).

³⁴Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997); Peterson v. BMI Refractories, 132 F.3d 1405, (11th Cir. 1997), rev'g. 154 LRRM 2835 (N.D. Ala. 1997); Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997); Penny v. United Parcel Service, 128 F.3d 408, 414 (6th Cir. 1997); Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997); Brisentine v. Stone & Webster Engineering Co., 117 F.3d 519 (11th Cir. 1997); Varner v. National Super Markets, 94 F.3d 1209 (8th Cir. 1996); Vargas v. Gronko, 977 F.Supp. 996, 1000 (N.D. Cal. 1997); Krahel v. Owens-Brockaway Glass Container, Inc., 971 F.Supp. 440, 447-48 (D. Ore. 1997); Davis v. Houston Lighting & Power, 990 F.Supp. 515, 517-18 (S.D. Tex. 1998); Coleman v. Houston Light & Power, 984 F.Supp. 576, 587 (S.D. Tex. 1997); LaChance v. Northeast Publishing, Inc., 965 F.Supp. 177, 189-90 (D. Mass. 1997); Kirkendall v. United Parcel Service, 964 F.Supp. 106, 107-08 (W.D. N.Y. 1997); Chopra v. Display Producers, Inc., 980 F.Supp. 714, 718-19 (S.D. N.Y. 1997); Foster v. Bechtel Corp., 154 LRRM 2060 (N.D. Cal. 1996); Bush v. Carriers Air Conditioning, 940 F.Supp. 1040 (E.D. Tex. 1996). See, Duffield v. Robertson Stephens & Co., supra. See also Marshall v. Bell Atlantic Network Services, Inc., 2 F.Supp. 2d 820, 822 (E.D. Va. 1998) (Austin limited to situations where grievance arbitration is always available, i.e., non-discretionary).

³⁵109 F.3d 354 (7th Cir. 1997).

adjustment of employment disputes, and the other, the interest in effectuating enforcement of rights designed for the protection of workers whom Congress has classified as belonging to vulnerable groups -- i.e., minorities, women, the aged. Judge Posner, writing for the court, characterized this as a conflict between majority and minority rights. Assuming that the union will not engage in actionable discrimination, the court concluded nonetheless that unions would not be "highly sensitive" to the special interests of those in the protected groups. It is the union representing the majority interest which controls which grievances are arbitrated and how. Under Gardner-Denver, employees may not be compelled to have their statutory individual rights adjudicated in a forum controlled by the majority through its collective representative. However, Judge Posner concludes the opinion by asking rhetorically whether, after Gilmer, there is enough left of Gardner-Denver to compel such a result, concluding that only the Supreme Court can answer that question.

Wright v. Maritime Service Corporation

The Supreme Court had the opportunity to address Judge Posner's question in Wright v. Maritime Service Corporation,³⁶ but declined to do so, issuing a narrow ruling, explicitly reserving this issue for another day.

Cesar Wright was a longshoreman, represented by Local 1422 of the International Longshoremen Association. The collective

³⁶119 S.Ct. 391 (1998).

bargaining agreement between the union and the Stevedoring Association contained a typical arbitration provision which covered "all matters affecting wages, hours, and other terms and conditions of employment." The agreement further stated that the parties did not intend that any provision "shall be violative of any Federal or state law."

Wright filed a claim for disability under the Longshore Harbor Workers' Compensation Act, ultimately settled his claim for \$250,000 and \$10,000 in attorney fees, as well as social security disability benefits. Thereafter, Wright attempted to return to work, but the stevedoring companies refused to accept him on the grounds of his disability settlement. When Wright asked the union for assistance, it suggested that, instead of filing a grievance, he file an EEOC charge. Wright followed this advice, eventually bringing an ADA claim against the involved employers. The district court dismissed because of his failure to exhaust the grievance process. The Fourth Circuit Court of Appeals, relying on its decision in Austin v. Owens-Brookway Glass Container, supra, affirmed. 121 F.3d 702 (4th Cir. 1997).

The Supreme Court acknowledged that there was "obviously some tension" between Gardner-Denver and Gilmer. The parties urged the Court to resolve this tension by determining that unions either could or could not prospectively waive employees' rights to a judicial forum to vindicate their statutory rights. The Court, however, found it unnecessary to decide the question, holding that,

regardless of whether the union had the authority to do so, the collective bargaining agreement in question did not contain such a waiver. 119 S.Ct. at 395.

While noting that there is generally a presumption in favor of arbitrability, that presumption only involves alleged breaches of the collective bargaining agreement, not statutory claims. Id. at 396. The Court found that Wright's claims arose from the ADA, not the collective bargaining agreement. Although the stevedoring companies might well defend by arguing that Wright was unfit for work under the collective bargaining agreement, even if true, Wright would still prevail if the refusal to hire violated the ADA.³⁷

While concluding that the language in question did not incorporate the ADA, as was the case in Owens-Brockway, the Court found that, even if it had done so, thereby creating a contractual right that was coextensive with the ADA, the issue for arbitration would have been based on federal law. Accordingly, there would still be no presumption favoring arbitration. Id.

Not only was there no presumption in favor of the arbitration of statutory claims, but, under the Court's prior rulings dealing with the union's waiver of employee rights, any such requirement

³⁷Wright's claims were not, therefore, inextricably intertwined with the collective bargaining agreement. See, Lavidas v. Bradshaw, 129 L.Ed.2d at 108-110.

must be clear and unambiguous.³⁸ While explicitly not deciding whether Gardner-Denver's prohibition on a union's waiver of employment rights survives Gilmer, the Court held that Gardner-Denver "at least stands for the proposition that the right to a federal forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA." Id.

Wright demonstrates the Court's sensitivity to the differences between individual statutory rights and contractual rights under a collective bargaining agreement. First, the Court limited any presumption in favor of arbitrability to alleged breaches of the collective bargaining agreement, not to statutory claims arguably subject to the arbitration procedures of the collective bargaining agreement. This limitation is consistent with well established precedent holding that collectively bargained grievance arbitration procedures are based on a national policy to encourage arbitration of disputes over the meaning and application of the agreement, not statutory rights. See, AT&T Tech, Inc. v. Communications Workers, 475 U.S. 643, 650 (1986) (The presumption of arbitrability "furthers the national labor policy of peaceful resolution of labor disputes."); Hawaiian Airlines v. Norris, 512 U.S. 246 (1991) (mandatory arbitration provisions of the Railway Labor Act do not extend to statutory or common law claims).

³⁸See, Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983); Lavidas v. Bradshaw, 512 U.S. 107, 125; Lingle v. Norge Div. Of Magic Chef, 486 U.S. 399, 409 at n. 9 (1988).

Second, the Court's analysis relies on the well established principle that the waiver of statutory rights must be clear and unambiguous. Although not expressly discussed in Wright, this concept is part of a broader body of precedent distinguishing between a union's right to waive collective, as opposed to individual, rights.³⁹ Gardner-Denver is based in part on the view that unions as collective bargaining representatives should not be waiving individual rights.

The Court's reliance on traditional labor law concepts suggests that it will be reluctant to approve a traditional collective bargaining arbitration system as an alternative to a judicial forum for the resolution of individual statutory claims. Gilmore rests on the concept -- that, in agreeing to arbitrate a statutory claim, the employee does not forego substantive rights but merely submits their resolution to an arbitral, rather than a judicial, forum. However, the traditional collectively bargained arbitration system is not a substitute for a judicial forum, but rather is a substitute for collective action through a strike.

Union discretion in all facets of handling grievances has been viewed as essential to collective bargaining.⁴⁰ Thus, unions must have discretion in determining whether to progress, settle or withdraw a grievance, and if it proceeds to arbitration, the

³⁹Metropolitan Edison v. NLRB, *supra*; NLRB v. Magnavox, 415 U.S. 322 (1974).

⁴⁰Vaca v. Sipes, 386 U.S. 171 (1967); IBEW v. Foust, 442 U.S. 42, 51 (1979).

evidence and argument to be presented to the arbitrator. To be sure, there are limits to this discretion, but those limits have been broadly established taking into account the union's need to serve the collective interest of the entire bargaining unit.⁴¹ The union may consider a grievance's impact on morale, productivity and broader interests of the bargaining unit.⁴² Grievance progression is merely another form of collective bargaining, and unions should be free to compromise individual claims to further collective interest as well as to take positions on the issues involving disputes between groups of employees. To restrict unions' discretion inevitably weakens the collective bargaining system.⁴³

A few simple examples demonstrate the tension between the traditional collective bargaining model and arbitration as a substitute for a court proceeding:

Example 1 -- A union officer reviews a grievance after a last step denial and concludes that, while the claim may have arguable merit, it lacks sufficient strength to justify the cost of arbitration.

Example 2 -- Union member files grievance over his denial of a promotion. Other employees have similar grievances pending.

⁴¹Humphrey v. Moore, 375 U.S. 335, 349 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

⁴²See, Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581 (1960).

⁴³See, ALPA v. O'Neill, 499 U.S. 65, 78 (1991).

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Union settles all claims on the basis that the employer will in the future change the promotion procedures.

Each of these examples are relatively common in the collective bargaining context and, assuming good faith on the part of the union, each is well within the union's discretion. However, place these same examples in the context of a Gilmore-type arbitration, and the union's same conduct appears to encroach on the individual's rights to have his statutory claims heard.

In short, engrafting an ADR system for the resolution of individual statutory claims onto collectively bargained arbitration procedures does a disservice both to the individual employee and to the collective bargaining system. To include Gilmore arbitration procedures with traditional collectively bargained arbitration raises serious questions regarding the union's role. Will the union retain its broad discretion to decline to progress a grievance to arbitration? If so, will the union then be the final adjudicator of the employee's Title VII claim? If not, what standards are to be applied? If the traditional standards are no longer applicable, is the union responsible to pay the costs of the arbitration?⁴⁴ If a discrimination claim involves complex factual and legal issues, is the union responsible to retain counsel for the arbitration? If not, will union officers handling the arbitration be held to the traditional fair representation standard as opposed to the standards of attorneys? Will the normal

⁴⁴See, Payner v. Tractor Supply Co., 109 F.3d at 362.

broad discretionary standards apply if there is a conflict between an individual claim and the broader interests of the bargaining unit, such as seniority? Can the union compromise an individual's claim in order to secure a concession from the employer as to interpretation of contract language?

The tension between majoritarian and individual rights identified in Gardner-Denver can, however, be resolved through the adoption of an ADR system that is separate and apart from the traditional collectively bargained arbitration system. The following is a suggested means for doing so.

ADR and Collective Bargaining--A Different Model

As noted above, Gardner-Denver rejects mandatory arbitration of individual statutory discrimination claims in the collective bargaining context, because unions, not the individual employee, controls the process. These concerns could be addressed if the collective bargaining agreement called for an ADR arbitration system where the employee, not the union, controlled the process. Such a system would not be unique. The Railway Labor Act permits individual employees the right to progress their own grievances to arbitration,⁴⁵ and government employees have traditionally enjoyed similar rights to progress claimed violations of civil service rules.

⁴⁵45 U.S.C. § 153. Hawaiian Airlines v. Norris, 129 L.Ed.2d 203 (1994).

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In negotiating ADR provisions, unions could assure that the process provides adequate discovery, and that the arbitrator is given full authority to provide the same panoply of remedies as a court.⁴⁶ Unions could participate in selecting a panel of qualified arbitrators and could advise employees as to which would be best to hear their case. By participating in the selection process, unions would assure that there would be another party, other than the employer, with an ongoing interest in the arbitrations system. In so doing, unions would be able to remedy the perception, real or imagined, of arbitrators favoring an employer because only it, not the employee, would likely be participating in future arbitrations.⁴⁷

Unions would not assume the financial responsibility for such an ADR system. Arbitration fees should be paid for either by the employer or divided in some fashion between the employer and individual employee.⁴⁸ Outside counsel, not union representatives, should present the employee's case, and the employee or, if

⁴⁶Co-extensive remedial authority is not necessarily required in commercial arbitrations, Shearson/American Express v. McMahon, 482 U.S. 220, 240-41 (1987), and may not be required in employment ADR. See, Great Western Mortgage v. Peacock, supra.

⁴⁷Cole v. Burns International Security Services, 105 F.3d 1465, 1475, 1485 at n. 17 (DC Cir. 1997).

⁴⁸The D.C. Circuit Court has held that ADR procedures cannot require the individual employee pay any portion of the arbitrator's fees. Cole v. Burns Intern. Services, supra.

successful, the employer should be responsible for his fees.⁴⁹ Unions could prepare lists of approved counsel to handle such cases. In doing so, unions can verify that counsel are qualified and negotiate for a more favorable fee arrangement. So long as employees are not required to select counsel from such a list, there should be no objections from state bar associations. See UTU v. Michigan Bar Association, 401 U.S. 576 (1971).

While the system described above or some variation of it might well pass muster, such procedures will only be adopted if they serve the pragmatic interests of labor and management.⁵⁰ The first obstacle is the current unsettled status of the law. After Wright, counsel must caution any party willing to engage in such an effort that they are likely facing a serious court challenge. One of the purposes of ADR is to avoid protracted litigation. Collectively-bargained ADR procedures will not initially provide this advantage.

⁴⁹So long as there is uniform treatment, the issue of fees should not raise a DFR problem. See, Treasury Employees v. FLRA, 800 F.2d 1165 (D.C. 1986); DeCasal v. Eastern Airlines, 634 F.2d 245.

⁵⁰Unions clearly have an interest in asserting that the imposition of an ADR arbitration system is a mandatory, and not a permissive, subject of bargaining. To allow an employer to impose an alternative arbitration system dealing with important employment issues without the involvement of the union will inevitably lead to a loss of collective strength. The Supreme Court's decision in Emporium Capwell v. Community Org., 420 U.S. 50 (1974), supports the view that such arbitration procedures are mandatory subjects of bargaining. In that case, the Court found that the elimination of discrimination was an appropriate subject for bargaining, and that arbitration of claims of racial discrimination was the proper procedure to seek redress, not strike action.

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From the employer perspective, it is unclear whether the perceived benefits ADR provides employers warrants the establishment of such procedures for rank and file union members. Generally, ADR has been adopted for higher paid employees such as stockbrokers -- not the rank and file union represented work force.

From the union perspective, an ADR system requires that it waive employee rights to a judicial forum. Arguably, the benefits to the employer of not being faced with a jury trial far outweigh any potential benefit to employees. Further, as a practical matter, union negotiators are not faced with membership pressure to deliver an ADR system as the fruits of their negotiating efforts.

Unions may be leery of adopting ADR procedures because of a fear of increased exposure to unfair representation claims. By their nature, such claims often involve questions of disparate treatment. While unions do have to resolve competing claims between its members, doing so a highly charged discrimination case may well increase the likelihood for fair representation litigation. The system suggested above, however, should largely eliminate these concerns.⁵¹

⁵¹The ADR system suggested above as a possible model should not raise this issue since the union's role is limited to negotiating the procedures -- not presenting the case. Moreover, it has been generally held that the fair representation responsibility is co-extensive with the obligation to act as exclusive representative and does not extend to individual statutory claims. See, Baker v. C&O Railroad, 959 F.2d 1361 (6th Cir. 1992); Felio v. Seves, 142 LRRM 2441 (3rd Cir. 1993); Cruz v. Robert Abbey, Inc., 138 LRRM 2648 (E.D. N.Y. 1990); Hawkins v. Babcock & Wilcox, 105 LRRM 3438 (N.D. Ohio 1980).

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Notwithstanding the foregoing, a legitimate case can be made that ADR is in the interest of unions and their members. All parties have an interest, as well as a responsibility, to eradicate discrimination from the workplace. Arguably, ADR can play an important role in attaining that goal. It is, however, fair to say that there is a divergence of views at least among union counsel on this issue. The differences can be simplified as being between those who perceive the fear of a large jury verdict outside of an ADR system as being a greater inducement to employer vigilance in avoiding discriminatory conduct than any advantage of ADR⁵²; and those who perceive a procedure that expeditiously and relatively inexpensively resolves employment discrimination claims as a better method to reach the same goal. The difficulty of this debate is that there is little empirical data to support either view.

At this juncture, the unsettled status of the law, the opposition of a number of commissions to mandatory arbitration, and the abandonment of such procedures by the New York Stock Exchange and the National Association of Securities Dealers, caution against unions agreeing to ADR procedure. At most, unions might be agreeable to experimenting with ADR for short periods of time to determine whether it is a useful tool in eliminating discrimination. For those brave enough to do so, the model suggested above protects individual interest without impinging upon the discretion afforded the collective representative.

⁵²While it is widely assumed by practitioners that juries will grant more generous awards than arbitrators, it is not clear that this perception is necessarily accurate.