Saint Louis University Law Journal

Volume 44
Number 3 *(Summer 2000)*

Article 11

7-20-2000

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AFTER *GARDNER-DENVER, GILMER* AND *WRIGHT*: THE SUPREME COURT'S NEXT ARBITRATION DECISION

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I. INTRODUCTION

In this year 2000, non-union employees in the United States do not enjoy general protection from unjust termination. Not one state has adopted the Model Employment Termination Act, which would require just cause for discharge.[1] A split in the circuit courts over whether licensed practical nurses performing supervisory work removes them from the coverage and protection of the National Labor Relations Act suggests that employees are not likely to gain broader general rights or protection in the workplace.[2]

A variety of statutes do, however, provide union and non-union employees certain particular rights and protections. Some, such as the Fair Labor Standards Act[3] and the Occupational Safety and Health Act,[4] assure general workplace standards for wages and safety. Other statutes prohibit workplace discrimination based on, inter alia, race, sex, age, and disability.[5] At least to a

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1. Model Employment Termination Act (META) (1991). *See* Daily Labor Report 1/31/95 1995 DLR 20 d 12. Montana is the only state that has enacted legislation requiring an employer to have "just cause" for discharge. Montana Wrongful Discharge Act, Mont. Code Ann. § 39-2-901-905 (1993).

2. National Labor Relations Act (NLRA), 29 U.S.C. § 151 (1994 & Supp. II 1996); *Compare* Glenmark Assoc., Inc., v. NLRB, 147 F.3d 333 (4th Cir. 1998), *with* Waverly-Cedar Falls Health Care Ctr., Inc. v. NLRB, 933 F.2d 626 (8th Cir. 1991).

3. Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. § 201 (1994 & Supp. II 1996).

4. Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. § 651 (1994 & Supp. II 1996). *See also* Family Medical Leave Act (FMLA) of 1993, 5 U.S.C. § 6382 (1994 & Supp. II 1996).

5. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1994 & Supp. III 1997); Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623 (1994 & Supp. IV 1998); Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12112 (1994 & Supp. II 1996); Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076; Equal Pay Act of 1963, 29 U.S.C. § 206 (1994 & Supp. IV 1998).

limited extent, these anti-discrimination statutes protect some employees from unjust dismissals where the injustice stems from prohibited discrimination.

In the 1990s, there was widespread concern for, and much criticism of, mandatory arbitration of statutory employment rights, that is, pre-dispute agreements which require non-union employees to press their statutory claims in arbitration rather than in court, which the Supreme Court approved in *Gilmer v. Interstate/Johnson Lane*.[6] The criticisms focused primarily on the propriety and enforceability of such pre-dispute arbitration agreements which individual employees entered as a condition of employment or of continued employment.[7] In view of the backlog of charges filed with the Equal Employment Opportunity Commission (EEOC), the limited funding of the EEOC and congested court dockets,[8] the value of an individual employee's right to go to court is at least questionable. A part of the criticism stems from the concern that resolution of these claims in arbitration will diminish the already limited employee protection from unjust dismissal.

Union employees, by contrast, generally have a just cause provision as well as a grievance arbitration provision in their collective bargaining agreement. Due to the great success of labor arbitration, it has been a model for comparison and contrast with non-union employment arbitration.[9] In 1974, in *Alexander v. Gardner-Denver Co.*, the Supreme Court resolved the issue of the interplay between a union employee's right to bring a statutory employment claim to court and the right to pursue that claim in the arbitration procedure of a collective bargaining agreement in Solomon-like fashion, deciding that the union employee had the right to seek resolution in arbitration and in court.[10] This conclusion became controversial when the Supreme Court subsequently ruled in *Gilmer* that statutory employment rights could be finally resolved in arbitration. In November 1998, in *Wright v. Universal Maritime Service Corp.*,[11] the Supreme Court ruled that a union-negotiated waiver of an

6. 500 U.S. 20 (1991). For criticism of mandatory, pre-dispute arbitration see, *e.g.*, *NERI's Position on Mandatory Arbitration of Employment Disputes*, 1 EMPLOYEE RTS & EMPLOYMENT POL'Y J. 263 (1997); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 HOFSTRA LAB. L. J. 1 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996); Brian K. Van Engen, Note, *Post*-Gilmer *Developments in Mandatory Arbitration: The Expansion of Mandatory Arbitration for Statutory Claims and the Congressional Effort to Reverse the Trend*, 21 J. CORP. L. 391 (1996).

7. *See, e.g.*, *EEOC Policy Statement on Mandatory Arbitration,* II EEOC Compl. Man. (BNA) at 915.002 (July 10, 1997), *cited in EEOC Policy Statement on Mandatory Arbitration*, Daily Lab. Rep., July 11, 1997, *available in* LEXIS, 1997 DLR 133 d30.

8. *See infra* note 67.

9. *See, e.g.*, Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997). *See also* Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916 (1979).

10. 415 U.S. 36 (1974).

11. 525 U.S. 70 (1998).

individual union employee's right to take a statutory employment claim to court must be clear and unmistakable (that is, a union's agreement that individual employee statutory employment claims will be resolved by the arbitration provision of the collective bargaining agreement must be clear and unmistakable). But the Court specifically refrained from deciding whether such a "clear and unmistakable" waiver would be enforceable.

This essay will present some observations on this unanswered question and conclude that where a clear and unmistakable waiver exists, and the arbitration provision of the collective bargaining agreement provides for a fair arbitral process including arbitral authority to award the full range of statutory remedies, individual union grievants should be bound by the arbitral resolution of the statutory claim.

II. FROM *GARDNER-DENVER* TO *WRIGHT*

Private resolution of disputes arising out of a collective bargaining agreement through labor arbitration has been a fact since the 1930s and, currently, almost all collective bargaining agreements provide for arbitration of grievance disputes.[12] In the Labor Management Relations Act of 1947, Congress recognized arbitration as a major factor in achieving the national goal of labor peace.[13] The Supreme Court elaborated on this federal policy favoring labor arbitration in 1957 and 1960 in a series of cases which established the enforceability of a grievance arbitration clause against a union or an employer,[14] a presumption of arbitrability of disputes arising under the collective bargaining agreement,[15] and the enforceability of the arbitration award unless it failed to draw its essence from the collective bargaining agreement.[16]

This promotion of labor arbitration occurred at a time when courts were otherwise hostile to commercial (i.e. non-labor) arbitration as an inferior method of dispute resolution and a completely unsuitable forum for the resolution of a statutory claim.[17] Ten years after the passage of the Civil

12. *See generally* LAURA J. COOPER & DENNIS R. NOLAN, LABOR ARBITRATION; A CASEBOOK 5-15 (1994).

13. LMRA, ch. 120, § 203(d), 61 Stat. 153 (1978) (current version at 29 U.S.C. § 173(d) (1994)).

14. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (citing LMRA, ch. 120, § 301, 61 Stat. 156 (1947)) (current version at 29 U.S.C. § 185 (1994 & Supp. IV 1998)).

15. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960) (noting that parties should be ordered to arbitrate "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute").

16. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

17. *See, e.g.*, Wilko v. Swan, 346 U.S. 427 (1953) (refusal to enforce arbitration of a claim arising under Securities Act of 1933).

Rights Act of 1964[18] the Supreme Court faced the issue of the effect of an adverse labor arbitration award on a union grievant's right to sue his employer for racial discrimination under Title VII of the Act in *Alexander v. Gardner-Denver Co*.[19] The Supreme Court concluded that Mr. Alexander had two completely separate rights: a contractual right under the collective bargaining agreement to just cause grounds for termination, plus a statutory right under Title VII prohibiting termination based on his race.[20] Noting that Congress assigned general power to federal courts to secure Title VII rights and gave individual claimants an important role in the enforcement process, the Court rejected an election of remedies or waiver analysis based on the inference that Congress designed Title VII "to supplement, rather than supplant existing laws and institutions relating to employment discrimination."[21] Despite the union's ability to waive statutory rights relating to collective activity, the Court stated an employee's individual Title VII rights could not be prospectively waived.[22] Supporting this conclusion was "further concern" for the tension between the union's role of representing the collective interests of all employees in deciding whether and how to take a grievance to arbitration and the individual grievant's interests.[23] Finally, the following deficiencies of the labor arbitration process were noted: the lack of arbitral authority to decide the statutory claim; the lack of arbitral experience and expertise to decide statutory claims because, inter alia, arbitrators need not be lawyers, and (by contrast to judicial procedure) the lack of discovery, rules of evidence and reasons for the award.[24] Despite these drawbacks, the Court concluded that the arbitration award would be admissible and accorded the weight deemed appropriate in the union employee's court case, based on consideration of the following factors: collective bargaining provisions that conform to the statute, procedural fair process, adequacy of the record as to the statutory claim, "special competence" of the arbitrator, full consideration of the statutory claim and whether the claim presented a purely factual issue.[25] In two subsequent cases in 1981 and 1984, the Court followed this analysis allowing union employees to bring statutory claims to court despite a labor arbitration award.[26]

18. 42 U.S.C. § 2000e-2.

19. 415 U.S. 36 (1974).

20. *Id*. at 49-50.

21. *Id*. at 48-49.

22. *Id.* at 51-52 & n.15.

23. *Id*. at 58 & n.19.

24. *Alexander*, 415 U.S. at 57-59.

25. *Id.* at 60 & n.21.

26. McDonald v. West Branch, Mich., 466 U.S. 284 (1984) (claim under Rev. Stat. § 1979, 42 U.S.C. § 1983); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981) (claim under Fair Labor Standards Act of 1938, 29 U.S.C. § 201).

The legal landscape then changed dramatically with the Supreme Court's determination, in a new arbitration trilogy, that statutory claims could be finally resolved in arbitration pursuant to the Federal Arbitration Act.[27] According to the Court, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[28] It was not long before the Court applied this analysis in an employment discrimination case to the Age Discrimination in Employment Act (ADEA)[29] claim of an employee manager of financial services terminated by his employer, in *Gilmer v. Interstate/Johnson Lane Corp*.[30] The agreement to arbitrate employment disputes contained in Mr. Gilmer's New York Stock Exchange registration application was covered by the FAA which contains "a liberal federal policy favoring arbitration agreements."[31] Nothing in the text or legislative history of the ADEA precluded arbitration and the Court was not persuaded that mandatory arbitration would undermine the statute's framework or purpose.[32] Gilmer's general attacks on arbitration as an inferior process (which echoed those listed in *Gardner-Denver*), inter alia, were rejected as vestiges of a prior judicial hostility to the arbitral process and "far out of step with [the Court's] current strong endorsement" of arbitration.[33] The Court specifically dismissed general arguments of arbitral bias or incompetence, insufficient discovery, and lack of written opinions and of public knowledge of results, citing the FAA safeguards against arbitral bias and procedural deficiencies, and the requirements of the NYSE rules.[34] Further, unequal bargaining power between the parties in the employment context, without more, would not preclude enforcement of arbitration agreements.[35] And, though limited, judicial review was deemed sufficient to ensure arbitral compliance with statutory requirements.[36]

Finally, the *Gardner-Denver* analysis did not control Gilmer's situation because in *Gardner-Denver* the employee had distinct contractual and statutory

27. FAA, 9 U.S.C. § 1.

28. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (Sherman Act, 15 U.S.C. §§ 1-7); s*ee also* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (Securities Act of 1933); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (civil provisions of Racketeer Influenced & Corrupt Organizations Act and 10(b) of the Securities Exchange Act of 1934).

29. 29 U.S.C. § 621.

30. 500 U.S. 20 (1991).

31. *Id*. at 25 (citing Moses H. Cone Mem'l Hosp. v. Mercury Const. Co., 460 U.S. 1, 24 (1983)). The Court ruled that the agreement did not fall within the FAA § 1 exclusion. *Id.* at n.2.

32. *Id*. at 26-28.

33. *Id*. at 30 (citing *Rodriguez de Quijas*, 490 U.S. at 481).

34. *Id*. at 30-32; FAA, 9 U.S.C. § 10.

35. *Gilmer*, 500 U.S. at 33.

36. *Id*. at 32 n.4 (quoting *McMahon*, 482 U.S. at 232).

rights, the employee had not agreed to arbitrate the statutory right and the arbitrator lacked authority to resolve the statutory right, because a concern existed that the collective interests of the bargaining unit would outweigh the individual grievant's interests, and because the FAA and its strong policy favoring arbitration did not apply to *Gardner-Denver* and its progeny.[37]

Since the *Gilmer* decision, courts have upheld the arbitrability of employment claims under a number of statutes including Title VII,[38] the Americans with Disabilities Act,[39] and the Family and Medical Leave Act.[40]

In 1998 in *Wright v. Universal Maritime Service*, the Supreme Court reviewed a Fourth Circuit decision that a union employee's Americans with Disabilities Act claim was covered by his collective bargaining agreement's arbitration provision, and that the arbitration agreement was enforceable.[41] The case seemed to present the question of whether *Gilmer* had overruled *Gardner-Denver*, that is, was a union-negotiated prospective waiver of individual statutory rights still barred or had the Court's radical shift in attitude towards agreements to arbitrate statutory claims vitiated the *Gardner-Denver* distinction?[42] The question remains unanswered.

The Court concluded that the presumption of arbitrability of claims arising under a collective bargaining agreement does not attach to an individual employee's statutory claim, but that ordinary analysis of the collective bargaining agreement text may demonstrate that the parties agreed to arbitrate these claims.[43] Such an agreement to arbitrate would require a clear and unmistakable union waiver of the individual employee's right to take a statutory employment claim to court, akin to the standard for union waivers of statutory rights under the NLRA.[44] The Court found no such waiver in the *Wright* case. More significantly, the Court expressly did "not reach the question whether such a waiver would be enforceable."[45] The next section will analyze the circumstances under which the Court should approve and enforce such a waiver and require an individual union employee to resolve a statutory

37. *Id*. at 33-35.

38. *See, e.g.*, Seus v. John Nuveen & Co., 146 F.3d 175 (3rd Cir. 1998) (collecting cases); *but see* Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998) (concluding that Congress intended in the Civil Rights Act of 1991 to bar mandatory pre-dispute agreements to arbitrate Title VII claims).

39. *See, e.g.*, McWilliams v. Logicon, Inc., 143 F.3d 573 (10th Cir. 1998).

40. *See, e.g.*, O'Neil v. Hilton Head Hosp., 115 F.3d 272 (4th Cir. 1997).

41. 525 U.S. 70 (1998).

42. *Id*. at 77.

43. *Id*. at 78-79.

44. *Id*. at 80. Because no such clear and unmistakable waiver existed in this case, the Supreme Court ruled that Wright was not obliged to submit his ADA claim to arbitration under the collective bargaining agreement and could pursue his claim in court.

45. *Id*. at 82.

employment claim under the arbitration provision of a collective bargaining agreement.

III. CONSIDERATIONS AFTER *WRIGHT*

Since the *Gardner-Denver* decision, the judicial attitude toward resolution of statutory claims in arbitration has shifted from hostile resistance to strong endorsement.[46] Still the Supreme Court withheld judgment on the enforceability of the arbitration procedure under a collective bargaining agreement to resolve the statutory claim of an individual represented employee. Three overlapping considerations guide the analysis of this issue: first, what may constitute an effective union-negotiated waiver of an individual employee's right to bring a statutory claim to court; second, does the collective bargaining agreement's arbitration procedure authorize the arbitrator to resolve a statutory claim and provide for a fair process, and third, do labor arbitrators have the expertise to resolve these claims. If these concerns are satisfied, it is submitted that labor arbitration may provide an "appropriate,"[47] accessible forum which will benefit individual employees and further statutory goals.

After *Wright*, an enforceable "clear and unmistakable waiver" of an individual employee's right to bring a statutory claim to court will have an explicit submission to arbitration of all federal and/or state statutory claims arising from the employment relationship.[48] To ensure that a court will find a clear and unmistakable waiver, the arbitration clause could expressly list some specific statutes and/or claims covered,[49] such as the ADA, ADEA, FMLA, but also specify that the list is not exclusive. Courts will be less likely to find a clear and unmistakable waiver in the mere combination of a nondiscrimination provision (even one which refers to specific federal statutes) with a broad agreement to arbitrate all claims.[50]

46. *See* discussion *supra* Part II.

47. *See Wright*, 525 U.S. at 82 n.2 (referencing ADA endorsement of arbitration in appropriate cases); *see also* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in 42 U.S.C. §§ 2000e, 1981); *but see Duffield*, 144 F.3d 1182 (9th Cir. 1998) (concluding that Congress intended in the Civil Rights Act of 1991 to bar mandatory pre-dispute agreements to arbitrate Title VII claims).

48. *See, e.g.*, Carson v. Giant Food, Inc., 175 F.3d 325, 331-32 (4th Cir. 1999).

49. *See, e.g.*, Bratten v. S.S.I. Serv., Inc., 185 F.3d 625, 631-32 (6th Cir. 1999) (non discrimination clause and arbitration provision failed to expressly reference the ADA).

50. *See, e.g.*, *Carson*, 175 F.3d at 331-32 (clear and unmistakable waiver of right to statutory forum may be found in express arbitration clause submitting statutory discrimination claims to arbitration, or may be found if arbitration clause is less explicit but e.g. the anti-discrimination clause "makes it unmistakably clear that the discrimination statutes at issue are part of the agreement.") *See also* Brown v. ABF Freight Sys., Inc., 183 F.3d 319 (4th Cir. 1999).

The union-negotiated agreement to arbitrate statutory employment claims also must provide for the "full panoply of statutory remedies."[51] Any limitation of the statutory remedial authority of the arbitrator lends credence to the argument that the agreement to arbitrate these claims effectively requires the individual employee to forego part of the substantive statutory right and consequently constitutes more than a mere choice of forum. Such limitations also undercut assertions that arbitral resolutions will serve statutory policies and goals. Moreover, a collective bargaining agreement arbitration clause which expressly covers statutory employment claims and provides for full statutory remedies would clearly and unquestionably authorize the arbitrator to resolve these claims.

Adoption in the arbitration clause of the relevant safeguards the "Due Process Protocol for Mediation and Arbitration of Statutory Disputes arising out of the Employment Relationship" would assure a fair arbitral procedure for the statutory employment claim.[52] The Due Process Protocol safeguards include the aforementioned arbitral authority to provide remedies equal to those provided by the law and further call for adequate access to information necessary to process the employee's claim, for written awards with an opinion and reasons, and for limited judicial review of the binding award.[53] The majority of collective bargaining agreements currently require that a written reasoned opinion accompany the award because the employer and the union have to understand the arbitrator's interpretation of the agreement and to react to the award, e.g., by reinstating an employee, adjusting pay etc.

Concerns for a "knowing" agreement to arbitrate statutory employment claims[54] may be allayed by the previously recommended explicit provision committing resolution of statutory claims to arbitration. A clear provision will not only support a judicial finding of arbitrability but also will notify represented employees that these claims will be resolved in arbitration. The inclusion of such an explicit arbitration clause in the collective bargaining agreement also may prompt the employer to bring this provision to the attention of union members to avoid claims of surprise. The union may be similarly motivated to alert employees to the coverage of statutory claims

51. David E. Feller, *Compulsory Arbitration of Statutory Discrimination Claims Under A Collective Bargaining Agreement: The Odd Case of Caesar Wright*, 16 HOFSTRA LAB. & EMP. L. J. 53, 82 (1998).

52. Christopher A. Barreca, et al., Document, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, DISP. RESOL. J., Oct-Dec. 1995, at 37-39 [hereinafter *Due Process Protocol*].

53. *Id*. at 38-39.

54. While taking no stand on mandatory agreements to arbitrate individual statutory claims, the *Due Process Protocol* states that "such agreements should be knowingly made." *Id*. at 37-38. *See also* Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299 (9th Cir. 1994) (individual employee not bound by agreement to arbitrate Title VII discrimination claims unless knowingly made).

under the arbitration clause and may also promote awareness of the clause if it is seen as a benefit.

The enforceability of a clear and unmistakable waiver negotiated by the union on behalf of individual union members also raises concern for the individual's lack of choice or assent to submit these statutory claims to arbitration. But a union-negotiated clear and unmistakable waiver as defined in *Wright* should be evaluated in light of the conclusion in *Gilmer* that an arbitration agreement which is the product of unequal bargaining power, e.g., between employer and employee or securities dealer and investor, is still enforceable.[55] The union-member's limited choice or lack of actual assent to the arbitration agreement is strikingly similar to the degree of assent necessary to enforce individual, non-union employees' agreements to arbitrate statutory claims.[56] Adhesion contracts are enforceable so long as the terms of the bargain are not so unfair as to produce an unconscionable agreement.[57] Thus a collective bargaining agreement with an arbitration clause which provides a fair process for the resolution of the individual's statutory claims should be viewed as a fair and enforceable term. Moreover, Professor Theodore J. St. Antoine has noted that, "in terms of bargaining power, one might argue that a union's agreement to arbitrate and waive the judicial forum should be more acceptable - less of a 'contract of adhesion' - than an isolated individual employee's agreement."[58]

The union and the employer are the parties to the arbitration clause of the collective bargaining agreement and under most collective bargaining agreements, the union decides whether to pursue the claim of an individual grievant to arbitration. Concern for potential conflict and tension between the union's role as the representative of collective interests and protection of the statutory rights of the individual union member are at least substantially diminished by the union's duty of fair representation[59] to all represented

55. *Gilmer*, 500 U.S. at 33 ("Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.").

56. *See* Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining* Alexander v. Gardner-Denver *in the Wake of* Gilmer v. Interstate/Johnson Lane Corp., 1997 B.Y.U. L. REV. 591, 610-11 (the union employee and the "Gilmer employee" face the same options: take the arbitration agreement or find another job). *But see* Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of* Gilmer, 40 ST. LOUIS U. L.J. 77, 87 (1996) (asserting that, in theory, the individual, non-union employee may strike a separate deal excluding arbitration, while this is not an option for union employees).

57. *See, e.g.*, E. ALLEN FARNSWORTH, CONTRACTS 307-16 (3rd ed. 1999).

58. Theodore J. St. Antoine, *Krinock Lecture Series: Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1, 3 (1998).

59. *See* Vaca v. Sipes, 386 U.S. 171, 191 (noting that a union may not "arbitrarily ignore a meritorious grievance or process it in perfunctory fashion").

employees. Fear of the mere filing of duty of fair representation lawsuits, regardless of whether the union may have a strong likelihood of winning that lawsuit, motivates unions to take serious cases (such as discharge cases) and even cases of questionable merit to arbitration.[60] Unions have had much experience handling the responsibility of representing a variety of interests. One of the most important union functions is to resolve tensions between represented employees and to "deal with these conflicts on a principled basis, subject to the duty of fair representation."[61] And times have changed since *Gardner-Denver*. In the 1990s AFL-CIO President John J. Sweeney pronounced recruitment and inclusion of women and minorities as a priority of the union movement.[62] Obviously this should translate into increased harmony of interests between unions and represented employees with discrimination claims.[63] It is noteworthy that Title VII applies to unions as well as to employers and thus provides an additional incentive to avoid a conflict of interest in pursuing these claims.[64]

It is submitted that while judicial review of labor arbitration awards must be limited to provide and preserve the benefit of finality of the process, courts still have demonstrated the capacity to provide sufficient judicial review of statutory claims resolved in labor arbitration, primarily on grounds of violation of public policy.[65] Without any change in law, courts will surely provide

60. For a fuller discussion of this point, see Daniel Roy, Note*: Mandatory Arbitration of Statutory Claims in the Union Workplace After* Wright v. Universal Maritime Service Corp., 74 IND. L.J. 1347, 1364-68 (1999).

61. *See* Feller, *supra* note 51, at 78.

62. *See, e.g.*, AFL-CIO President John J. Sweeney's Keynote Address to the AFL-CIO Convention, Sept. 22, 1997, BNA DAILY LABOR REPORT, Sept. 23, 1997 *available in* LEXIS, 1997 DLR 184 d23.

63. At least one commentator has suggested that individually represented employees could be given the option of choosing to "arbitrate all discrimination claims at their own expense." Ann C. Hodges, *Protecting Unionized Employees Against Discrimination: The Fourth Circuit's Misinterpretation of Supreme Court Precedent*, 2 EMPLOYEE RTS. & EMPLOYMENT POL'Y J., 123, 163 (1998). This proposal would likely prove unworkable because the employee would have difficulty finding an attorney to handle the claim and the expense of the process would put the process beyond the means of many employees. *Id*. at 164-66. Assuming that the statutory claims are intertwined with the labor contract claims, another significant drawback is that the perspective of the union would be lost in terms of helping the grievant and of protecting the bargaining unit interests. *See id*.; *see also* Roy, *supra* note 60, at 1368-71; Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Reconciliation*, 77 B.U. L. Rev. 687, 759 (1997).

64. Sections 703(c) & (d), 42 U.S.C. §§ 2000e-2(c) & (d); *see* Goodman v. Lukens Steel Co., 482 U.S. 656, 669 (1987) (union must process individual grievances in a non-discriminatory fashion and may not "categorize racial grievances as unworthy of pursuit.").

65. *See, e.g.*, United Paperworks Int'l Union v. Misco, Inc., 484 U.S. 29 (1987). *See also* Stroehmann Bakeries, Inc. v. Teamsters Local 776, 969 F.2d 1436 (3d Cir.) *cert. denied* 506 U.S. 1022 (1992) (vacating on public policy grounds an award which reinstated a driver discharged for apparently assaulting a female customer by grabbing her breast, pushing himself against her and

review "sufficient to ensure that arbitrators comply with the requirements of the statute at issue."[66]

In sum a collective bargaining agreement with an explicit agreement to arbitrate statutory claims which specifically authorizes the arbitrator to resolve these claims and to award the full range of remedies and provides a fair arbitration procedure should be deemed a clear and unmistakable waiver of a union-represented employee's right to bring a statutory employment claim to court. Reasons supporting enforcement of such a waiver will now be addressed.

Under a usual grievance arbitration procedure, the union and employer mutually select the arbitrator according to a labor contract procedure or through an appointing agency, such as the American Arbitration Association or the Federal Mediation and Conciliation Service, which supplies a list of arbitrators. The union, more than an individual employee, will have access to information on various arbitrators, e.g., from past experience or from other unions, and should be able to select a capable, impartial arbitrator. The union and employer also pay for the arbitrator's fee, hearing room charges, etc. and the union supplies a representative for the grievant in arbitration. Given the overwhelming number of charges filed with the EEOC and the agency's limited budget and the backlog of cases on judicial dockets, the majority of employment claims will not be resolved by EEOC action or by trial, so the opportunity to pursue a statutory employment claim in arbitration provides the employee the real benefit of a forum.[67] Professor St. Antoine has observed that the small potential recovery of the vast majority of discrimination claimants limits their ability to find an attorney who can afford to take the case and that for these claimants "arbitration is the most feasible recourse."[68] Citing another practical benefit of arbitration to employees, Chief Judge of the U.S. Court of Appeals for the D.C. Circuit Harry T. Edwards has noted, "Arbitration also offers employees a guarantee that there will be a hearing on the merits of their claims; no such guarantee exists in litigation where relatively few employees

making offensive remarks); Newsday, Inc. v. Long Island Typographical Union Local 915, 915 F.2d 840 (2d Cir. 1990) *cert. denied* 499 U.S. 922 (1991) (vacating on grounds of public policy, an award which reinstated a male employee who had been terminated for sexually harassing female coworkers). For a discussion of how courts effectively review labor arbitration awards on public policy grounds and despite the limited standard of review to determine whether the award "draws its essence from the collective bargaining agreement," see United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). *See* Susan A. FitzGibbon, *The Judicial Itch*, 34 ST. LOUIS U. L.J. 485 (1990).

66. *Gilmer*, 500 U.S. at 23 n.4 (citation and internal quotation marks omitted).

67. Susan A. FitzGibbon, *Reflections on* Gilmer *and* Cole, 1 EMPLOYEE RTS. & EMPLOYEE POL'Y J. 221 (1997). *See also* Bales, *supra* note 63, at 743, 749-50, 753 (noting that arbitration of statutory claims under a collective bargaining agreement would provide the advantages of access to an adjudicatory forum and preservation of the employment relation).

68. St. Antoine, *supra* note 58, at 7-8.

survive the procedural hurdles necessary to take a case to trial in the federal courts."[69]

Shifting to a broader perspective, it is noteworthy that after reviewing an extensive number of court cases and published labor arbitration awards dealing with sexual harassment, Professor Vern Hauck concluded that in the collective bargaining context, arbitrators consistently ruled against employers who failed to proscribe sexual harassment according to the Supreme Court standard and that these awards prompted adoption of aggressive anti-sexual harassment policies.[70] This serves as an example of how resolution of statutory employment claims in an arbitration forum designed to have a connection to and an impact on the workplace also will further the broader goals of the employment statutes because managers and coworkers will be well aware of and forced to deal with the results of arbitration.[71] Also, the arbitral resolution will certainly be faster than litigation. A decision closer in time to the statutory violation is more likely to send a message to and have a conduct-regulating effect on the workplace, especially, e.g., if the arbitrator reinstates an employee terminated in violation of a statute.[72] Moreover, if union employees with "small" statutory claims take advantage of the availability of the labor arbitration forum, then the relatively quick resolution of numerous small statutory employment claims in labor arbitration will also exert a powerful conduct-regulating effect on the workplace. In light of the fact that Congress passed anti-discrimination legislation to eradicate employment discrimination from the workplace, a forum which affords the opportunity to effectuate that goal fairly and efficiently should be accepted.[73]

A final point for consideration is whether labor arbitrators have sufficient expertise to handle statutory employment claims. In the *Gilmer* decision, the Supreme Court rejected the "judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals."[74] Since the *Gardner-Denver* decision, labor arbitrators have developed experience and expertise in the course of deciding numerous arbitration matters involving statutory claims. Based on review of thousands of labor arbitration decisions and numerous court decisions, the authors of what may be viewed as the Bible of labor

69. Harry T. Edwards, *Where Are We Heading With Mandatory Arbitration of Statutory Claims in Employment?*, Paper presented during the "Alternative Dispute Resolution" Conference at The W.J. Usery, Jr. Center for the Workplace, Georgia State University 1, 15 (Nov. 2, 1999).

70. *See* VERN E. HAUCK ED., ARBITRATING SEXUAL HARASSMENT CASES at 1-22 (1995) (collecting awards). Hauck noted that "over 125 published arbitration awards have considered sexual harassment since 1945, and few have been vacated." *Id*. at 1-2.

71. *See generally* FitzGibbon, *supra* note 67, at 251-55.

72. *Id*.

73. *See, e.g.*, ADEA, 29 U.S.C. § 621; Section 703, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a); ADA, §§ 2, 102, 42 U.S.C. § 12101 and § 12112.

74. *Gilmer*, 500 U.S. at 34 n.5 (citing *Mitsubishi*, 473 U.S. at 626-27).

arbitration, "How Arbitration Works," concluded in the 1997 edition that labor arbitrators have demonstrated the ability to handle statutory claims as well as (and, sometimes even better than) courts.[75] As previously noted, Professor Hauck similarly found that labor arbitrators capably applied legal standards in resolving numerous sexual harassment issues.[76]

Parties who prefer an arbitrator with a law degree to handle statutory claims may so provide in the arbitration clause and/or request a list of arbitrators with a specific qualification, such as a law degree, from impartial agencies such as the Federal Mediation and Conciliation Service (FMCS) and American Arbitration Association (AAA).[77] A 1988 report concerning the members of the National Academy of Arbitrators (NAA), the preeminent group of labor arbitrators in the United States, and of a random sampling of non-NAA arbitrators in the United States and Canada, found that 58.5% of NAA members possessed a law degree and that 55.9% of the non-NAA arbitrators had a law degree.[78] Especially since the *Gilmer* decision in 1991, there have been numerous educational programs and training opportunities for arbitrators to learn more about the resolution of statutory claims. For example, every year since 1991, the Annual Meeting of the National Academy of Arbitrators and the published proceedings of the meeting have included at least one presentation dealing with statutory employment claims: the 1998 meeting explored sexual harassment claims in the context of workplace romances,[79] the 1997 meeting addressed "Melding External Law with the Collective Bargaining Agreement" and "What to Expect at Your Employment Arbitration";[80] the 1996 meeting presented discussion of reasonable accommodation in the workplace;[81] the 1995 meeting raised issues of

75. FRANK ELKOURI, HOW ARBITRATION WORKS 538-39 (5th ed. 1997).

76. HAUCK, *supra* note 70, at 1-2 and 1-22.

77. COOPER & NOLAN, *supra* note 12, at 17-18.

78. Mario F. Bognanno & Clifford E. Smith, *The Demographic and Professional Characteristics of Arbitrators in North America*, *in* ARBITRATION 1988: EMERGING ISSUES FOR THE 1990S 266, 267-71 (Gladys W. Gruenberg eds. 1989). This same study found that the majority of labor arbitrators were white males over fifty years old. *Id.* at 271-76. Those who are concerned about diversity in the pool of labor arbitrators and for the ability of this "average" labor arbitrator to handle discrimination claims should also consider the fact that these older arbitrators lived through the civil rights struggles of the 1950s and 1960s and witnessed the conditions in U.S. society which led to passage of anti-discrimination laws.

79. http://www.bnasoftware.com/bnabooks/press/naa.htm.

80. Rosemary A. Townley, et al., *What to Expect at Your Employment Arbitration*, *in* ARBITRATION 1997: THE NEXT FIFTY YEARS 235 (Joyce M. Najita ed., 1997).

81. Katherine Swinton et al., *Reasonable Accommodation in the Workplace: New Developments in the United States and Canada*, *in* ARBITRATION 1996: AT THE CROSSROADS 164 (Joyce M. Najita ed., 1996).

"Discipline, External Law and Procedure,"[82] and topics covered at the 1991 through 1994 meetings included "Family Benefits and Homosexual Employees' Cohabitants," arbitration of sexual harassment and the *Gilmer* decision.[83] Other groups including, e.g., the American Arbitration Association and the Center for Public Resources (CPR), also offer programs to train and educate arbitrators to handle statutory employment claims. Labor arbitrators thus have a demonstrated capacity to handle statutory issues and have opportunities for continuing education in the resolution of these claims.

In the 1960s the Supreme Court recognized the special competence of labor arbitrators to resolve collective bargaining agreement disputes. In the context of deciding these disputes, labor arbitrators unquestionably contributed to the development of a common law of each individual shop which has as its centerpiece the development of the concept of just cause for discipline or discharge. Experienced labor arbitrators thus bring to the resolution of statutory claims a unique perspective and understanding of the context and contours of workplace disputes.

The great majority of statutory employment claims will present factual issues similar to factual issues routinely resolved by labor arbitrators and will rarely raise novel or groundbreaking claims.[84] Labor arbitrators are indisputably well equipped to handle the factual claims and, as noted earlier, have demonstrated the capacity to properly resolve even novel issues.[85]

Beyond establishing the mere capacity of labor arbitrators to handle statutory claims, it is submitted that by virtue of their unique perspective and experience labor arbitrators will provide just resolutions of these claims. As Professor David E. Feller has noted, labor arbitrators who decide statutory employment claims may provide a special benefit:

> [T]here is the delicate and intricate relationship between the requirements of anti-discrimination statutes and the requirements of a collective bargaining agreement. This relationship is particularly acute where there is a conflict

82. Richard I. Bloch et al., *Discipline, Discharge, External Law and Procedure – Roundtable Discussion, in* ARBITRATION 1995: NEW CHALLENGES AND EXPANDING RESPONSIBILITIES 227 (Joyce M. Najita ed., 1995).

83. Tim Bornstein, *Arbitration of Sexual Harassment, in* ARBITRATION 1991: THE CHANGING FACE OF ARBITRATION IN THEORY AND PRACTICE 109 (Gladys W. Gruenberg ed., 1991); Calvin William Sharpe, *Adjusting the Balance Between Public Rights and Private Process:* Gilmer v. Interstate/Johnson Lane Corporation, *in* ARBITRATION 1992: IMPROVING ARBITRAL AND ADVOCACY SKILLS 161 (Gladys W. Gruenberg ed., 1992); Steven Briggs, *Family Benefits and Homosexual Employees' Cohabitants, in* ARBITRATION 1993: ARBITRATION AND THE CHANGING WORLD OF WORK 153 (Gladys W. Gruenberg ed., 1993); Joan G. Dolan, *Special Reference to the ADA, in* ARBITRATION 1994: CONTROVERSY AND CONTINUITY 42 (Gladys W. Gruenburg ed., 1994).

84. "Most employment discrimination claims are entirely factual in nature and involve well-settled legal principles." Edwards, *supra* note 69, at 11.

85. *See* HAUCK, *supra* note 70, at 1-2 & 1-22; ELKOURI, *supra* note 75.

> between the reasonable accommodation requirement of the ADA and the seniority provisions of a collective bargaining agreement. It is also true of the requirements of Title VII and the ADEA. Knowledge about the realties of the relationships and practices in the workplace - the "common law of the shop" if you will - is important for the proper implementation of the statutory prohibitions and provision of remedies that will in fact work. Arbitrators chosen by the parties are in a far better position to accomplish that objective than are the courts where the union and the employer authorize such action by their agreement.[86]

Yet another benefit of the resolution of statutory employment claims in labor arbitration is the fact that most collective bargaining agreements call for a written, reasoned opinion with the award. These opinions and awards are routinely scrutinized by representatives of unions and of employees who keep track of how and how well arbitrators decide various claims. Arbitrators must demonstrate fairness and competence to maintain "acceptability" and to be selected by the parties. And, as previously noted, these written opinions and awards also substantially contribute to the conduct-regulating effect of arbitration in the workplace.

In conclusion the concerns underlying the *Gardner-Denver* decision have diminished, and where a clear and unmistakable waiver exists, *Gardner-Denver* should not be followed. Where the collective bargaining agreement authorizes the arbitrator to resolve statutory employment claims and to award full statutory remedies and further provides for a full hearing of the statutory claims and a fair process, the represented employee should be bound by the arbitration agreement. Such an arbitration process will offer the following real benefits: actual access to a forum; a decisionmaker with the ability to handle statutory claims and special expertise to resolve workplace disputes; and the process will serve the goals of the employment statute by sending a timely conduct-regulating message to the workplace.

IV. CONCLUSION

If most labor arbitration agreements would provide, as suggested herein, for the resolution of represented employees' statutory employment claims in labor arbitration, labor arbitrators could further develop expertise in resolving these claims. There would be more labor awards resolving statutory employment claims to assess, scrutinize and criticize. Represented employees with smaller meritorious and even frivolous claims would have the benefit of a forum for resolution of their claims and quicker (than judicial) arbitral decisions publicized in the workplace would exert a conduct regulating effect and serve the goals of the employment statutes.

86. Feller, *supra* note 51, at 78-80.

The real benefit to employees would be the development of an arbitral forum to resolve contractual and statutory employment issues in a workplace context. This evolving arbitration system could then serve as an example of how justice may be achieved in the workplace.