

## SPRING 2010

EVALUATING THE LEGALITY OF EMPLOYER  
SURVEILLANCE UNDER THE FAMILY AND  
MEDICAL LEAVE ACT: HAVE EMPLOYERS  
CROSSED THE LINE? ..... *Brandon Sipherd* 467  
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## ARTICLES

### SUPREME COURT TIPS AGAINST INDIVIDUAL RIGHTS—AGAIN

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#### I. INTRODUCTION

The employment landscape is still shaking from the Supreme Court's pronouncement in *14 Penn Plaza LLC v. Pyett* ("Penn Plaza").<sup>1</sup> In a split decision that already has Congress attempting to modify its holding, the Court continued its expansion of favoring arbitral rights in the employment context.<sup>2</sup> The 5-4 majority opinion, written by Justice Clarence Thomas, found that collective bargaining agreements ("CBA") could compel all union members to arbitrate claims of discrimination under a CBA.<sup>3</sup>

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1. 129 S. Ct. 1456 (2009).

2. Arbitration Fairness Act, S. 931, 111th Cong. § 3(a) (2009). The Senate bill introduced after *Penn Plaza*, while containing a general exclusion from the Federal Arbitration Act for collective bargaining agreement arbitration provisions, also adds that "no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom." *Id.* In introducing the Senate bill, Senator Russ Feingold (D-Wis) specifically noted his intent to reverse the holding in *Penn Plaza*. 111 CONG. REC. S4897-98 (2009). Press Release, U.S. Senator Russ Feingold, Feingold Introduces Consumer Justice Legislation (April 29, 2009), <http://feingold.senate.gov/record.cfm?id=312222>.

3. See *Penn Plaza*, 129 S. Ct. at 1474.

The *Penn Plaza* decision probably raises more questions than it resolves. At face value it presents employers with a solution to employment litigation debacles. All that is required are expansive and specific arbitration provisions and "explicit" waivers in the CBA.<sup>4</sup> However, the dilemma for employers and unions alike is how to craft explicit waivers that adequately protect all members of the union and permit the employer and labor organizations to move forward without jeopardizing individual rights and duty of fair representation ("DFR") claims at the same time.<sup>5</sup> Similarly, individuals and minorities (both political and statutory) may find their rights vanquished by union political machines.<sup>6</sup>

In other words, the dilemma facing labor organizations in a post-*Penn Plaza* world is how to represent both individual and majority interests as well as how to protect the union and its leadership from breach of DFR claims brought on by a failure to arbitrate every single grievance through arbitration.<sup>7</sup>

This article will deal with the historical antecedents leading up to *Penn Plaza*; it will attempt to dissect and then to analyze the effect of *Penn Plaza* on individual rights under the National Labor Relations Act, particularly with regard to section 9 principles of exclusive representation. It will also examine the reactions of federal district courts to *Penn Plaza* and then look to its implications for defining the "knowing and explicit" waiver required by the Supreme Court to qualify

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4. See *id.* at 1465 (citing *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998)).

5. See generally ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* 59-68 (Eden Paul & Cedar Paul trans., Batoche Books 2001) (1911). The principles enunciated by Michels suggest that union leadership will respond to opposition in one of two ways: (1) co-opting dissidents into the leadership group; or (2) crushing the dissidents to maintain their own power. See *id.* Michels discussed the oligarchical tendencies of modern democracy and those principles applied to unions as political organizations. See *id.*; see also Roger B. Jacobs, *The Duty of Fair Representation: Minorities, Dissidents and Exclusive Representation*, 59 B.U. L. REV. 857, 886 n.188 (1979) ("By its very nature, the union is a political institution and its leaders are basically politicians. Applying Michel's comments, by analogy, union leaders will do all that is possible to inhibit their loss of power to dissident groups.")

6. Jacobs, *supra* note 5, at 886-87.

7. The *Penn Plaza* court did not consider the financial implications to labor organizations of even bringing matters to arbitration. See generally *Penn Plaza*, 129 S. Ct. at 1456-74 (containing no consideration of financial implications). The typical CBA, for example, has a multi-step process where the fourth or fifth step is binding arbitration. See *Vaca v. Sipes*, 386 U.S. 171, 175 n.3 (1966) (describing a CBA where arbitration is available after step four). There is a cost to arbitrate even a simple claim. Gary Grenly, *Weigh Cost of Arbitration as Carefully as Cost of a Trial*, PORTLAND BUS. J., Sept. 26, 2008, available at <http://portland.bizjournals.com/portland/stories/2008/09/29/focus7.html>. Thus, the question for labor organizations will be whether they are obligated to arbitrate every single claim in order to effectively represent members and to concomitantly effectively deal with potential DFR claims.

under the majority's opinion.

*A. Exclusivity Principle of Section 9(a) of the National Labor Relations Act*

The National Labor Relations Act ("NLRA") entrusts labor organizations with tremendous, almost unfettered, authority. Section 9(a) of the NLRA states that:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.<sup>8</sup>

In other words, a labor organization selected by a majority of individuals voting is the exclusive representative of all of the employees in a particular bargaining unit whether or not they supported the labor organization.<sup>9</sup>

Labor organizations are invested with enormous power under the NLRA. The notion of exclusive representation has few limitations other than internal political ones based upon the democratic nature of the union, or its failure to properly represent employees.<sup>10</sup>

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8. 29 U.S.C. § 159(a) (2006).

9. A "labor organization" is defined in section 2(5) of the NLRA as "any organization of any kind or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." *Id.* § 152(5). The very notion of a labor organization is the subject of separate and complicated study beginning with the Supreme Court's analysis in *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1958) and its progeny leading up to *Airstream, Inc. v. NLRB*, 877 F.2d 1291 (6th Cir. 1989) and the Seventh Circuit's reinterpretation a few years later in *Electromation, Inc. v. NLRB*, 35 F.3d 1148 (7th Cir. 1994).

10. The Supreme Court enunciated the idea of a DFR by labor organizations in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967) and a series of later cases. See, e.g., *Penn Plaza*, 129 S. Ct at 1473; *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 49 (1998).

### B. Summary of Penn Plaza Holding

In *Penn Plaza*, the Supreme Court held that "a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate Age Discrimination in Employment Act ("ADEA") claims is enforceable as a matter of federal law."<sup>11</sup> Employers may have a basis to dismiss a claim on the grounds that it must be grieved and arbitrated as part of the CBA.<sup>12</sup> While this result may limit individual autonomy with respect to the choice of judicial forum,<sup>13</sup> labor organizations, under the authority granted by NLRA, have the ability to act as the exclusive representative of the employees with regard to the CBA.<sup>14</sup> Thus, the question becomes what are the practical implications of such an agreement for both employers and unions in light of the Court's current analysis in *Penn Plaza*?

### C. Congress' Reaction

Legislation has already been proposed in the Senate that seeks to reverse the ruling of the Supreme Court.<sup>15</sup> The Arbitration Fairness Act seeks to empower employees who lack equal bargaining power with large employers and are subsequently forced into agreements that include mandatory arbitration clauses.<sup>16</sup>

Based upon my analysis, the reasoning behind this legislation is misguided. The holding of *Penn Plaza* dealt with a collective agreement reached by an employer and a large labor organization, not an employer and an individual employee.<sup>17</sup> Thus, any suggestion of uneven bargaining power, at least in this scenario, is misplaced.

11. *Penn Plaza*, 129 S. Ct. at 1474.

12. *See id.*

13. *Id.* at 1464 n.5 ("The right to a judicial forum is not the nonwaivable 'substantive' right protected by the ADEA.").

14. 29 U.S.C. § 159(a) ("Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .").

15. Arbitration Fairness Act, S. 931, 111th Cong. § 3(a) (2009) ("[N]o such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.").

16. *See* Press Release, U.S. Senator Russ Feingold, Feingold Introduces Consumer Justice Legislation (April 29, 2009), <http://feingold.senate.gov/record.cfm?id=312222>.

17. *Penn Plaza*, 129 S. Ct. at 1461-62.

### D. The Dilemma

Labor organizations owe a statutory DFR to members of the bargaining unit when seeking to pursue arbitration.<sup>18</sup> Is that "duty" enough to ensure minority rights? What other safeguards should be taken to ensure that the rights of minority members are not subsumed unfairly to the will of the majority?

### E. Sanctity of or Preference for Arbitration

Arbitration has long held a vaunted status in labor relations as the preeminent tool to resolve employment disputes.<sup>19</sup> Beginning with the *Steelworkers Trilogy*, our national labor policy has favored arbitration as a principal means of adjudicating contractual disputes.<sup>20</sup> The Supreme Court's preference for arbitration presumes expertise by the arbitrator to resolve workplace disputes rather than the need to impose standards from external sources including the courts.<sup>21</sup>

## II. HISTORICAL DEVELOPMENT OF MANDATORY ARBITRATION

### A. *Alexander v. Gardner-Denver Lays the Groundwork*

The initial vehicle for the Supreme Court's post-trilogy interpretation of arbitral primacy in the area of discrimination in the workplace was *Alexander v. Gardner-Denver Co.*,<sup>22</sup> a unanimous opinion authored by Justice Lewis Powell.<sup>23</sup> *Gardner-Denver* is an oft-

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18. See *Vaca v. Sipes*, 386 U.S. 171, 190 (1966) ("A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.").

19. *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 455 (1956) ("[Section 301] expresses a federal policy that federal courts should enforce these [arbitration] agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.").

20. See *USW v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1959) (holding that where an arbitration clause is included in the CBA, questions of interpretation of the agreement are solely for the arbitrator); *USW v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585 (1959) (holding that whether the employer contracting out work was a violation of the CBA would be decided via arbitration); *USW v. Am. Mfg. Co.*, 363 U.S. 564, 569 (1959) (holding that whether the employer violated the provision in the CBA that stated it must hire and promote based on seniority would be decided by arbitration); see also *Textile Workers*, 353 U.S. at 455.

21. See Jacobs, *supra* note 5, at 884-85; see also Roger B. Jacobs, *Confusion Remains Five Years After Alexander v. Gardner-Denver*, 30 LAB. L.J. 623, 623-24 (1979).

22. 415 U.S. 36 (1973).

23. *Id.* at 37.

cited but often misunderstood discussion of arbitral authority with regard to discrimination claims.

### B. The Facts

Plaintiff, Harrell Alexander, Sr., lost at arbitration.<sup>24</sup> Following his discharge, the Union filed a grievance under the CBA.<sup>25</sup> The CBA contained a broad arbitration clause.<sup>26</sup> Alexander claimed that his discharge resulted from racial discrimination.<sup>27</sup> He had also filed a claim with the Colorado Civil Rights Commission, which was deferred to the Equal Employment Opportunity Commission ("EEOC").<sup>28</sup> After its investigation, the EEOC found that Alexander's claim lacked probable cause to believe that a violation of Title VII of the 1964 Civil Rights Act ("CRA")<sup>29</sup> had occurred.<sup>30</sup> Alexander was notified that he had thirty days to institute an action in federal district court, and he filed a claim that resulted ultimately in the Supreme Court's review.<sup>31</sup>

The Supreme Court held in *Gardner-Denver* that an arbitrator's initial rejection of a statutory claim did not preclude an individual from pursuing that statutory claim in a judicial forum.<sup>32</sup> While race discrimination had been mentioned during the arbitration proceeding, it was not the focus of that case.<sup>33</sup> The Court concluded "that a collective bargaining agreement could not waive covered workers' rights to a judicial forum for causes of action created by Congress."<sup>34</sup>

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24. *Id.* at 42.

25. *Id.* at 39.

26. *Id.* at 40.

27. *Id.* at 42.

28. *Id.*

29. See generally 42 U.S.C. §§ 2000e-2000e-17 (2006).

30. *Gardner-Denver*, 415 U.S. at 36.

31. *Id.* at 43; see also 42 U.S.C. § 2000e-5(e)(1) (providing that individuals must file a claim in United States district court within thirty days of issuance of a right to sue letter).

32. *Gardner-Denver*, 415 U.S. at 59-60. The issue presented in *Gardner-Denver* was whether a union employee, who under the terms of the Union's CBA submitted to arbitration, retained the right to bring a Title VII claim in federal court. *Id.* at 38; see also Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining Alexander v. Gardner-Denver in the Wake of Gilmer v. Interstate/Johnson Lane Corp.*, 1997 BYU L. REV. 591, 593 (1997) (stating the case originated from a union's challenge to an employee discharge).

33. *Gardner-Denver*, 415 U.S. at 42. While the arbitration was pending, the employee sought relief under Title VII. *Id.* The employer argued that the lawsuit was barred by the initial election of remedies, i.e. arbitration. *Id.* Therefore, the complaint should be dismissed. *Id.*

34. *Pyett v. Pennsylvania Bldg. Co.*, 498 F.3d 88, 91 n.3 (2d Cir. 2007) (citing *Gardner-Denver*, 415 U.S. at 49-51).

*C. Election of Remedies*

A duality of remedies is a lasting signature of *Gardner-Denver*.<sup>35</sup> The Court noted that a "union may waive certain statutory rights related to collective activity . . . ."<sup>36</sup> However, the Court stated that these were rights conferred on employees collectively, essentially for the purpose of bargaining, and "may be exercised or relinquished by the union as collective-bargaining agent . . . ."<sup>37</sup> However, the Supreme Court declared that Title VII "was designed to supplement, rather than supplant" other remedies.<sup>38</sup>

The Court stated that Title VII stands on "plainly different ground" than contractual rights because it concerns "not majoritarian processes, but an individual's right to equal employment opportunities."<sup>39</sup> Significantly, the *Gardner-Denver* Court held those rights that Congress adopted are "absolute" and that "waiver of these rights would defeat the paramount congressional purpose behind Title VII."<sup>40</sup>

The Supreme Court held that the submission of a grievance to arbitration does not "constitute a binding waiver with respect to an employee's rights under Title VII."<sup>41</sup> The Court found that an individual may waive her rights as part of a voluntary settlement, but there was no prospective waiver by Mr. Alexander.<sup>42</sup>

Justice Powell did not disagree with the long-accepted notion that federal courts should defer to the decisions of the arbitrator.<sup>43</sup> However, he cautioned that "deferral to arbitral decisions would be inconsistent with" Congress' intent for "federal courts to exercise final responsibility for enforcement of Title VII."<sup>44</sup> The Court further noted that while the arbitral process may be well suited to the resolution of contractual disputes, that same process may be inappropriate for the resolution of statutory claims.<sup>45</sup>

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35. *Gardner-Denver*, 415 U.S. at 59-60.

36. *Id.* at 51.

37. *Id.*

38. *Id.* at 48.

39. *Id.* at 51.

40. *Id.* Thus, the tension between the *Penn Plaza* Court and *Gardner-Denver*.

41. *Id.* at 52 n.15.

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

43. *Id.* at 55-56.

44. *Id.* at 56.

45. *Id.* at 56. The conclusion rested upon the role of the arbitrator, "whose task is to effectuate the intent of parties rather than the requirements of enacted legislation." *Id.* at 56-57. Additionally, "the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution" is the same process that "makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts."



At footnote nineteen, the Court also suggested that the notion of exclusivity, by its nature, elevated majority interests over those of the individual employee, which "may be subordinated to the collective interests of all employees in the bargaining unit."<sup>46</sup> The Court further noted that "harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made."<sup>47</sup>

Significantly, the Court also declared that "Congress thought it necessary to provide Title VII protections 'against unions as well as employers.'"<sup>48</sup> Thus, after *Gardner-Denver* and *Penn Plaza* it is difficult to assess the application of majority rule principles on discrimination claims despite the potential of extensive waiver recognized by the majority in *Penn Plaza*.<sup>49</sup> The Supreme Court ratified a dual remedy approach that the *Penn Plaza* Court may have permitted to be displaced despite the complementary nature of the remedies.<sup>50</sup>

#### 1. *Gilmer v. Interstate/Johnson Lane Corp.*

In 1991, the Supreme Court issued a decision that "cast a shadow over the viability of *Gardner-Denver* as precedent."<sup>51</sup> In *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>52</sup> the employee, a stockbroker who claimed that his termination was based on age discrimination, was required to sign a standardized stock exchange form that would subject all disputes to mandatory arbitration.<sup>53</sup> After filing an EEOC charge, Gilmer sued in federal court under the ADEA while Interstate moved to

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*Id.* at 58. The Court's controlling principle was soon extended to other statutory claims involving the Fair Labor Standards Act, *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1980), and a civil rights claim under 42 U.S.C. § 1983, *McDonald v. City of West Branch*, 466 U.S. 284 (1983).

46. *Gardner-Denver*, 415 U.S. at 58 n.19.

47. *Id.*

48. *Id.*

49. It appears that Justice Powell anticipated the continued encroachment on individual rights by majority rule in *Gardner-Denver*. The Court stated that "[i]n no event can the submission to arbitration of a claim under the nondiscrimination clause of a collective-bargaining agreement constitute a binding waiver with respect to an employee's rights under Title VII." *Id.* at 52 n.15.

50. *Id.* at 52. The Court cautioned that "a contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination. Both rights have legally independent origins and are equally available to the aggrieved employee." *Id.*

51. Barry Winograd, *A New Day Dawning or Dark Clouds on the Horizon? The Potential Impact of the Pyett Case*, 59 LABOR L.J. 227, 229 (2008).

52. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1990).

53. *Id.* at 23.

compel arbitration under the Federal Arbitration Act ("FAA").<sup>54</sup> The Court agreed with *Interstate* and held that an individual who signed an agreement to waive rights to a federal forum could be compelled to arbitrate the claim.<sup>55</sup>

In reaching its decision, the Supreme Court drew upon past decisions that expanded the preemptive reach of the FAA.<sup>56</sup> Finding that no bar existed to the "arbitration of statutory claims, the court reasoned that the FAA's mandate was paramount."<sup>57</sup> To both respond to and preempt criticism, the Court assured skeptics that "[b]y 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 judicial, forum."<sup>58</sup> Furthermore, the Court assured that the agreement to arbitrate would not undermine the role of the EEOC to enforce the ADEA because individuals could still file claims with the EEOC and the EEOC could still investigate those claims.<sup>59</sup> Finally, the Court assured that the arbitration agreements do not preclude the EEOC from bringing forth independent actions.<sup>60</sup>

The Court's analysis of *Gardner-Denver*, however, was rather limited. The Court noted that *Gilmer* and *Gardner-Denver* did not involve the same issues of enforceability.<sup>61</sup> The *Gilmer* Court tried to distinguish *Gardner-Denver* and its progeny by observing that *Gardner-Denver* involved a dispute under a CBA, while *Gilmer* was the result of non-union arbitration arising under the FAA.<sup>62</sup> Essentially, the Court held that the cases could be distinguished because in *Gardner-Denver* the claimants were represented by unions and in *Gilmer* the claimant was an individual bound to arbitrate by form agreement.<sup>63</sup>

The Court did not opine whether *Gardner-Denver* survived

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54. *Id.* at 23-24.

55. *Id.* at 23.

56. Winograd, *supra* note 51, at 229 (citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1988); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1982)).

57. Winograd, *supra* note 51, at 229.

58. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628).

59. *Id.* at 28-29.

60. *See id.*

61. *See id.* at 35. The Court found that "they involved the quite different issue of whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions." *Id.*

62. *See* Winograd, *supra* note 51, at 230; *see also Gilmer*, 500 U.S. at 33-35.

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

*Gilmer*.<sup>64</sup> Some courts, including the Fourth Circuit, held that *Gilmer* "substantially undercut" *Gardner-Denver* and that employees bound by a collective bargaining agreement may be forced to address their claims solely through the process of arbitration.<sup>65</sup>

The Supreme Court declared that "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."<sup>66</sup> But the Court noted that not all statutory claims may "be appropriate for arbitration . . . ."<sup>67</sup> Additionally, the arbitration in *Gardner-Denver* occurred in the context of a CBA.<sup>68</sup>

## 2. *Wright v. Universal Maritime Service Corp.*

The tension created from *Gilmer* and subsequent cases was presented before the Court in *Wright v. Universal Maritime Service Corp.*<sup>69</sup> Wright was an employee covered by a CBA.<sup>70</sup> He brought suit in federal court alleging that the failure to hire him because of previous work-related injuries violated the Americans with Disabilities Act of 1990 ("ADA").<sup>71</sup> The CBA itself had a general clause in the agreement that required final and binding arbitration for all disputes.<sup>72</sup> The employer argued that Wright's claim should be dismissed for failure to exhaust his remedies under the arbitration agreement.<sup>73</sup>

The Court concluded that while there was some tension between its precedents it "need not reach the question of whether a union could essentially negotiate a waiver of an individual's right to go to court."<sup>74</sup> Instead, the Court framed the issue as "whether a general arbitration clause in a collective-bargaining agreement . . . requires an employee to

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64. See Winograd, *supra* note 51, at 230.

65. See, e.g., *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 880 (4th Cir. 1996). Cf. N. Peter Lareau, *Supreme Court Upholds Bargaining Agreement Requiring Arbitration of Statutory Discrimination Claims*, BENDER'S LABOR & EMPLOYMENT BULLETIN 207, 210 n.14 (May 2009).

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

67. *Id.* Thus, we need to ponder in the post-*Penn Plaza* world exactly what claims are appropriate for arbitration and under what circumstances those claims are appropriate for arbitration?

68. *Id.* at 35. The *Gilmer* Court noted the "tension between collective representation and individual statutory rights," which is a concern of the author and one that is not readily resolved by DFR claims. *Id.*

69. 525 U.S. 70 (1998).

70. *Id.* at 72.

71. See *id.* at 73-75; 42 U.S.C. §§ 12101-12213 (2006).

72. *Universal Mar.*, 525 U.S. at 73.

73. See *id.* at 75.

74. Winograd, *supra* note 51, at 230.

use the arbitration procedure for an alleged violation of the Americans with Disabilities Act of 1990."<sup>75</sup> The Court's restraint was premised on two considerations<sup>76</sup>:

(1) the presumption favoring arbitration was only applicable if the underlying rationale—that arbitrators were in a better position to interpret collective bargaining agreements—was accurate;<sup>77</sup> and

(2) whether the parties could draft a CBA that explicitly provided that an employee is required to pursue statutory claims through arbitration.<sup>78</sup>

The Court found it unnecessary to address the issue of whether a union may waive individual rights to a federal forum as part of the collective bargaining process, and narrowly held that an agreement must be "clear and unmistakable."<sup>79</sup> In *Universal Maritime*, the language was not clear and unmistakable.<sup>80</sup>

*Universal Maritime* posited the idea that the waiver of contractual as well as statutory rights was, at least, possible.<sup>81</sup> The Court declared that "[w]e think the same standard applicable to a union-negotiated waiver of employees' statutory right to a judicial forum for claims of employment discrimination."<sup>82</sup> The Supreme Court suggested that the specific nature of the waiver was critical and characterized the *Gardner-Denver* waiver as "less-than-explicit."<sup>83</sup> Similarly, it found the waiver in the Longshore Seniority Plan under review not to be a "clear and unmistakable waiver."<sup>84</sup>

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75. *Universal Mar.*, 525 U.S. at 72.

76. Winograd, *supra* note 51, at 230.

77. Lareau, *supra* note 65, at 211; see *Universal Mar.*, 525 U.S. at 79 (noting that the presumption favoring arbitration is not applicable because an arbitrator's interpretation of a federal statute is not presumed to be within the arbitration requirement).

78. See *Universal Mar.*, 525 U.S. at 79 ("[W]e think any CBA requirement to arbitrate [a statutory claim] must be particularly clear.").

79. *Id.* at 80.

80. *Id.* ("[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable.") (quoting *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1982)).

81. See *id.*

82. *Id.*

83. *Id.*

84. *Id.* at 81.

## III. PENN PLAZA V. PYETT

## A. Background

One commentator has written that *Universal Maritime* "left open the possibility that a properly framed collective bargaining agreement could foreclose an individual employee from his right to a federal forum and require the employee to resort to contractual procedures to remedy federal statutory discrimination claims."<sup>85</sup>

*Penn Plaza* arises out of a provision within the CBA agreed to by Local 32BJ that required all employees to submit any employment discrimination claims to binding arbitration as laid out under the CBA.<sup>86</sup> Petitioner, 14 Penn Plaza LLC, owned and operated office buildings in New York City.<sup>87</sup> Respondents worked as night watchmen and in other similar capacities prior to August 2003.<sup>88</sup>

In August 2003, with the Union's consent, 14 Penn Plaza hired Spartan Security, an affiliate of respondents' employer, Temco, to provide licensed security guards for the lobby and entrance of the building.<sup>89</sup> Due to the new relationship with Spartan Security, respondents' lobby services were rendered unnecessary and respondents were reassigned to cleaning duty.<sup>90</sup> The Union filed grievances on behalf of the employees challenging their reassignment because it "violated the CBA's ban on workplace discrimination by reassigning respondents on account of their age . . . ."<sup>91</sup> After failing to obtain relief

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85. Lareau, *supra* note 65, at 211.

86. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1461 (2009).

§ 30 NO DISCRIMINATION. There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, . . . or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedures (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

*Id.*

87. *Id.*

88. *Id.* (Respondents were directly employed by petitioner Temco Service Industries, Inc.).

89. *Id.* at 1462.

90. *Id.*

91. *Id.* The Union also filed claims that the petitioner "violated seniority rules by failing to promote one of the respondents to a handyman position; and . . . failed to equitably rotate overtime."  
*Id.*

on the workplace discrimination claim, the Union requested arbitration.<sup>92</sup> The grievances claimed both contractual and statutory violations.<sup>93</sup> Prior to arbitration, the statutory claims were withdrawn and the contractual claims were eventually denied by the arbitrator.<sup>94</sup> After the Union's withdrawal of the age-discrimination claim, respondents filed a complaint with the EEOC and subsequently filed suit against the petitioner in the United States District Court of the Southern District of New York after the EEOC issued a right to sue letter.<sup>95</sup>

### *B. Positions Before the Court*

The employer, 14 Penn Plaza, claimed that *Gilmer* and *Universal Maritime* should be expanded to create an unequivocal waiver of statutory rights under a union-negotiated CBA.<sup>96</sup> This approach would effectively overrule the section of *Gardner-Denver* that precluded a waiver of the individual right to a judicial forum for statutory rights.<sup>97</sup> The employer's position was consistent with the Supreme Court's doctrine favoring arbitration and would help to resolve the tension between *Gardner-Denver* and *Gilmer*.<sup>98</sup>

The respondents contended that upholding *Gardner-Denver* protected individual rights otherwise lost in the union-controlled arbitration agreement.<sup>99</sup> Respondents also argued they should not be left with the difficult burden of proving the breach of a DFR.<sup>100</sup> The respondents claimed that the CBA only gave the Union—and not

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92. *Id.*

93. *Id.*

94. *Id.* ("Because it had consented to the contract for new security personnel at 14 Penn Plaza, the Union believed that it could not legitimately object to respondents' reassignments as discriminatory.").

95. *Id.*

96. Brief for the Petitioner at \*2, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009) (No. 07-581), 2008 WL 3851622.

97. *See id.* at \*1-2; *see also* Winograd, *supra* note 51, at 230.

98. Brief for the Petitioner, *supra* note 96, at \*5.

99. Brief for the Respondents at \*15, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009) (No. 07-581), 2008 WL 2774462 ("[The] combination of union control over the process and inherent conflict of interest with respect to discrimination claims provided the foundation for the Court's holding that arbitration under a collective bargaining agreement could not preclude an individual employee's right to bring a lawsuit in court to vindicate a statutory discrimination claim.").

100. *See id.* at \*38-40. For example, such a claim does not directly target the wrongdoer, the employer; the employee does not have the full benefit of advantages that come with litigation; the range of remedies are also limited; and the union is only required not to act "arbitrar[il]ly, discriminator[il]ly, or in bad faith." *Id.* at \*40.

individuals—a right to pursue statutory claims in arbitration.<sup>101</sup> However, arbitration cannot be compelled when it fails to permit an individual from effectively vindicating his rights.<sup>102</sup>

### C. Procedural Posture

In June 2006, following *Gardner-Denver*, the United States District Court rejected the employer's motion to compel arbitration.<sup>103</sup> The court ruled that CBA arbitration cannot deny an individual the right to bring forth a suit in a federal forum based upon a statutory prohibition against discrimination.<sup>104</sup> The Second Circuit affirmed the District Court's holding, again relying on Supreme Court and circuit precedent.<sup>105</sup> The Second Circuit tried to reconcile *Gardner-Denver* with *Gilmer* by stating that "an individual employee would be free to choose compulsory arbitration under *Gilmer*, but a labor union could not collectively bargain for arbitration on behalf of its members."<sup>106</sup> The employer appealed to the United States Supreme Court and certiorari was granted in February 2008.<sup>107</sup>

### D. Majority Opinion

In a 5-4 opinion, the Supreme Court reversed the decision of the Second Circuit and held that unions are free to bargain for mandatory arbitration of discrimination claims under the ADEA.<sup>108</sup> Relying upon *Gilmer*, the Court found no reason to distinguish between agreements signed by unions or by individuals so long as those agreements were "clear and unmistakable."<sup>109</sup> Justice Thomas, writing for the majority,<sup>110</sup>

101. See *id.* at \*40-41.

102. *Id.* at \*41.

103. *Pyett v. Pennsylvania Bldg. Co.*, No. 04 Civ. 7536, 2006 WL 1520517, at \*3 (S.D.N.Y. June 1, 2006).

104. *Id.* ("[W]e concluded based largely on binding Second Circuit precedent that even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable").

105. See *Pyett v. Pennsylvania Bldg. Co.*, 498 F.3d 88, 93-94 (2d Cir. 2007). The Second Circuit also relied on *Rogers v. New York University*, which held that an arbitration agreement in a CBA, in which an employee's rights to a federal forum were supposedly waived, was unenforceable. 220 F.3d 73, 77 (2d Cir. 2000).

106. 14 Penn Plaza LLC v. *Pyett*, 129 S. Ct. 1456, 1463 (2009).

107. *Pyett v. Pennsylvania Bldg. Co.*, 498 F.3d 88, (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1223 (2008).

108. *Penn Plaza*, 129 S. Ct. 1456, 1472 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1980)).

109. *Id.* at 1463.

took a multi-step approach to answer the many questions left unresolved by Court precedent.<sup>111</sup>

Justice Thomas analyzed the NLRA in relation to the employees' claim that the clause requiring arbitration was not proper because it did not involve a term or condition of employment, but rather implicated "individual, non-economic statutory rights."<sup>112</sup> Under the NLRA, the union is granted broad authority on behalf of its members to collectively bargain with the employer.<sup>113</sup> In exercising this broad authority, the Court reiterated that the Union must bargain in good faith on behalf of its members.<sup>114</sup> In *Penn Plaza*, the Union collectively bargained for a provision that required all discrimination claims to be resolved through arbitration.<sup>115</sup>

Justice Thomas acknowledged and rejected the employees' argument, and found this freely negotiated term of the agreement was a condition of employment.<sup>116</sup> He opined that courts generally do not interfere in a bargained-for exchange.<sup>117</sup> Thus, in his analysis, the CBA's arbitration provision must be honored as a condition of employment.<sup>118</sup>

The next issue addressed by Justice Thomas was whether the ADEA precluded arbitration.<sup>119</sup> In *Gilmer*, the Court explained that "[a]lthough all statutory claims may not be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself as evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" <sup>120</sup> Relying on *Gilmer*, the Court found that nothing in the legislative history of the ADEA precluded arbitration and that arbitration would not undermine

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110. The opinion was joined by Chief Justice Roberts, Justice Scalia, Justice Kennedy, and Justice Alito. *Id.* at 1460.

111. *See generally id.* at 1460-74.

112. *Id.* at 1464.

113. National Labor Relations Act of 1935 § 9(a), 29 U.S.C. § 159(a) (2006) (As permitted by the statute, employees designate the union as their "exclusive representative[] . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .").

114. *Penn Plaza*, 129 S. Ct. at 1463.

115. *Id.* at 1464.

116. *Id.*

117. *See NLRB v. Magnavox Co.*, 415 U.S. 322, 328 (1974) (Stewart, J., concurring in part and dissenting in part) (stating that judicial nullification of a contract "is contrary to what the Court has recognized as '[o]ne of [the] fundamental policies' of the National Labor Relations Act—'freedom of contract.'").

118. *Penn Plaza*, 129 S. Ct. at 1465. *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

119. *Penn Plaza*, 129 S. Ct. at 1465; *see also Mitsubishi Motors Corp.*, 473 U.S. at 628.

120. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1990).



the ADEA's "remedial and deterrent function."<sup>121</sup> Justice Thomas expanded the holding of *Gilmer* by stating that its interpretation of the ADEA applied fully to the collective bargaining context.<sup>122</sup> Justice Thomas also followed *Universal Maritime* and wrote that an agreement to arbitrate statutory claims must be "explicitly stated."<sup>123</sup> In this instance, the Court found the CBA met that obligation.<sup>124</sup>

Justice Thomas also wrote that the ADEA's prohibition of prospective waivers for substantive rights did not apply.<sup>125</sup> Based upon *Gilmer*, Justice Thomas found that the right to a judicial forum was not a substantive right.<sup>126</sup> Therefore, the prospective waiver of a substantive right was not implicated.<sup>127</sup> Justice Thomas appeared to align this decision with *Gardner-Denver*.<sup>128</sup> However, he was critical of *Gardner-Denver* in a number of areas.<sup>129</sup>

According to Justice Thomas, the CBA's arbitration provision was fully enforceable under *Gardner-Denver* and its progeny.<sup>130</sup> He sought a narrower view of the holding of *Gardner-Denver*, that a union CBA cannot preclude an individual from bringing a statutory claim, is not as broad as the employees suggest.<sup>131</sup> He reasoned that the holding in *Gardner-Denver* rested on "the narrow ground that the arbitration was not preclusive because the collective-bargaining agreement did not cover statutory claims."<sup>132</sup> Through Justice Thomas's prism, arbitration was not compelled in *Gardner-Denver* simply because of the CBA's failure to address the arbitration of Title VII claims.<sup>133</sup>

Justice Thomas suggested that the line of cases flowing from *Gardner-Denver* did not expand its holding.<sup>134</sup> Both *Barrentine v.*

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121. *Penn Plaza*, 129 S. Ct. at 1465 (citing *Gilmer*, 500 U.S. at 26-28).

122. *Id.* (holding that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.").

123. *Id.*

124. *Id.*

125. *Id.*

126. *See id.* at 1469 (citing *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998)).

127. *See id.*; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1990) ("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 judicial, forum." (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985))).

128. *Penn Plaza*, 129 S. Ct. at 1469.

129. *See id.* at 1469-73.

130. *See id.* at 1468-69.

131. *See id.*

132. *Id.* at 1467.

133. *Id.*

134. *See id.* at 1468-69.

*Arkansas-Best Freight System, Inc.*<sup>135</sup> and *McDonald v. City of West Branch*<sup>136</sup> "hinged on the scope of the collective-bargaining agreement and the arbitrator's parallel mandate."<sup>137</sup> In both instances the authority granted to the arbitrator was derived from the arbitration clause and only extended to contractual claims, not statutory claims.<sup>138</sup> Those decisions, Justice Thomas wrote, "involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims."<sup>139</sup> Because neither the employees nor the unions agreed to arbitrate the statutory claims, "the arbitration in those cases understandably was held not to preclude subsequent statutory actions."<sup>140</sup>

A possible implication of *Gardner-Denver* was that a required arbitration of statutory rights would be the same as a waiver of those rights.<sup>141</sup> Justice Thomas disagreed with that notion and opined that the *Gardner-Denver* Court had "confused an agreement to arbitrate those statutory claims with a prospective waiver of the substantive rights."<sup>142</sup>

Justice Thomas also addressed *Gardner-Denver*'s assumption that arbitrators were not in a position to adjudicate federal statutory claims.<sup>143</sup> *Gardner-Denver* viewed arbitration as a forum suited for the resolution of contractual disputes, but not for the final resolution of statutory rights.<sup>144</sup> However, this view of arbitration has changed.<sup>145</sup> Justice Thomas stated that:

An arbitrator's capacity to resolve complex questions of fact and law extends with equal force to discrimination claims brought under the

135. 450 U.S. 728, 744 (1980) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1980)).

136. 466 U.S. 284, 290 (1983) (citing *Barrentine*, 450 U.S. at 744).

137. *Penn Plaza*, 129 S. Ct. at 1468.

138. See *McDonald*, 466 U.S. at 290-91; *Barrentine*, 450 U.S. at 744.

139. *Penn Plaza*, 129 S. Ct. at 1468 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1990)).

140. *Id.* (quoting *Gilmer*, 500 U.S. at 35).

141. See *id.*; see also text accompanying notes 104-05.

142. *Id.* at 1469.

143. *Id.* at 1471 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1980)).

144. *Gardner-Denver*, 415 U.S. at 56-57. "The 'factfinding process in arbitration' is 'not equivalent to judicial factfinding' and the 'informality of arbitral procedure . . . makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.'" *Penn Plaza*, 129 S. Ct. at 1471 (quoting *Gardner-Denver*, 415 U.S. at 57-58).

145. See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1986) ("[A]rbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims . . ."); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985) ("We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.").

ADEA. Moreover, the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration.<sup>146</sup>

Justice Thomas disagreed with the notion that allowing unions to agree to arbitrate statutory claims created a conflict of interest that was not adequately addressed by other protections, e.g. the DFR.<sup>147</sup> Justice Thomas stated that while unions certainly must balance the needs and interests of some employees against the needs and interests of the workforce as a whole, that "does not justify singling out an arbitration provision for disfavored treatment."<sup>148</sup> Justice Thomas conceded there is an inherent conflict between different groups within the union, but reasoned that Congress had accounted for this problem through the DFR and the ability to file claims with the EEOC.<sup>149</sup>

Justice Thomas addressed a procedural issue raised by the employees. They contended that the CBA acted as a substantive waiver of their rights not only because it precluded a federal forum, but because it also allowed the Union to block the arbitration of claims altogether.<sup>150</sup> Because this issue required the resolution of certain contested factual issues and had not been briefed, the question was not addressed by the Court.<sup>151</sup> The majority stated that the Court was not in a position to determine whether a CBA can allow a union to prevent employees from effectively vindicating their statutory rights.<sup>152</sup>

### *E. Dissents*

Justice Stevens, writing for himself, presented a simple and straightforward dissent: the issue presented in this case had already been decided to the contrary in *Gardner-Denver*.<sup>153</sup> According to Justice Stevens, "[n]otwithstanding the absence of change in any relevant statutory provision, the Court has recently retreated from, and in some cases reversed, prior decisions based on its changed view of the merits

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146. *Penn Plaza*, 129 S. Ct. at 1471.

147. *Id.* at 1472-73.

148. *Id.* at 1472.

149. *See id.* at 1473.

150. *Id.* at 1474.

151. *Id.*

152. *Id.* ("Resolution of this question at this juncture would be particularly inappropriate in light of our hesitation to invalidate arbitration agreements on the basis of speculation.")

153. *Id.* (Stevens, J., dissenting).

of arbitration."<sup>154</sup> Due to the lack of intervening legislation, the Court should be bound by the holding in *Gardenr-Denver*.<sup>155</sup>

Justice Souter,<sup>156</sup> like Justice Stevens, argued that the Court should have adhered to the precedent in *Gardner-Denver*, which was a "seemingly absolute prohibition of union waiver of employees' federal forum rights."<sup>157</sup> Although, *Gardner-Denver* involved Title VII claims, Justice Souter argued that the Title VII analysis was "just as pertinent to the ADEA [claim] in this case."<sup>158</sup> Justice Souter ended his analysis with an interesting observation:

On one level, the majority opinion may have little effect, for it explicitly reserves the question whether a CBA's waiver of a judicial forum is enforceable when the union controls access to and presentation of employees' claims in arbitration, which "is usually the case." But as a treatment of precedent in statutory interpretation, the majority's opinion cannot be reconciled with the *Gardner-Denver* Court's own view of its holding, repeated over the years and generally understood, and I respectfully dissent.<sup>159</sup>

#### IV. MOVING FORWARD FROM *PENN PLAZA*

##### A. Practical Effect of *Penn Plaza*

If the holding of *Penn Plaza* is limited to the broad waiver clause in section 30, *Penn Plaza* may have very little practical effect.<sup>160</sup> Unions, and to some extent employers, very seldom demand a clause that subjects all discrimination claims to arbitration.<sup>161</sup> In such a scenario, the holding of *Penn Plaza* may be restricted to only those cases where employers and unions agree to an arbitration provision that requires the employee to arbitrate both contractual and statutory claims.

*Penn Plaza* stands for the notion that ADEA claims may be waived

154. *Id.* at 1475.

155. *Id.* at 1476 (stating that "[i]t is for Congress, rather than this Court, to reassess the policy arguments favoring arbitration and revise the relevant provisions to reflect its views.").

156. Joined by Justice Stevens, Justice Ginsburg, and Justice Breyer.

157. *Penn Plaza*, 129 S.Ct. at 1477 (Souter, J., dissenting) (quoting *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998)).

158. *Id.* at 1478.

159. *Id.* at 1481 (citations omitted).

160. LAURA J. COOPER ET AL., *ADR IN THE WORKPLACE* 605 n.2 (2d ed. Supp. 2009).

161. *Id.*

through mandatory arbitration clauses.<sup>162</sup> However, there does not seem to be a substantive basis for distinguishing between the ADEA and other statutory rights provided that the text and legislative history of other statutes do not expressly exclude claims under the statute from compulsory arbitration.

In general, the CBA must meet a very high standard for courts to conclude that individuals have waived their right to a judicial forum. Specifically, the CBA must do three things:

- 1) contain an express prohibition against protected characteristics under federal, state and local laws;
- 2) specifically name the statute(s); and
- 3) explicitly state that all claims are subject solely to the arbitration procedure.<sup>163</sup>

The holding of *Penn Plaza* appears to be rather limited and factually specific. However, the questions left unanswered leave much unsettled landscape. This uncertainty will be the legacy of *Penn Plaza* and will impact future arbitration agreements.

#### B. Forum Waiver

*Penn Plaza*, as discussed above,<sup>164</sup> distinguished itself from the earlier holding in *Gardner-Denver* that an agreement to submit statutory claims to arbitration was the equivalent to a waiver of those rights.<sup>165</sup> Justice Thomas was specific in stating that the agreement to arbitrate a statutory claim "waives only the right to seek relief from a court in the first instance."<sup>166</sup>

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162. *Penn Plaza*, 129 S. Ct. at 1474. (holding "that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law").

163. *See id.* at 1465, 1468-69, 1474; *see also* Shipkevich v. Staten Island Univ. Hosp., No. 08-CV-1008, 2009 WL 1706590, at \*2 (E.D.N.Y. June 16, 2009) (showing that employers looking to take advantage of *Penn Plaza*'s holding should draft a tightly written arbitration provision). In *Shipkevich*, the court declined to enforce the arbitration clause when it did not state that the anti-discrimination claims were subject to mandatory arbitration. *Shipkevich*, 2009 WL 1706590, at \*2.

164. *See supra* text accompanying notes 109-11, 130-33.

165. *Penn Plaza*, 129 S. Ct. at 1469.

166. *Id.*

## V. THE POST-PENN PLAZA WORLD

In one of the first post-*Penn Plaza* cases, the federal district court in Colorado was asked to address the issue of whether an individual who elected to take his statutory claim to arbitration, pursuant to the CBA, may then, after losing on his claim, bring forth the same claim in federal court.<sup>167</sup>

Relying heavily on *Penn Plaza*'s analysis of the waiver presented in both *Penn Plaza* and *Gardner-Denver*, the district court, in *Mathews v. Denver Newspaper Agency LLP*, concluded that the individual waived his right to seek a judicial remedy by voluntarily pursuing arbitration.<sup>168</sup> The court found that this case was more similar to *Penn Plaza* than *Gardner-Denver* because the CBA covered statutory claims.<sup>169</sup> In *Gardner-Denver*, the CBA was limited to contractual claims.<sup>170</sup> Specifically, the CBA in *Mathews* gave the arbitrator the authority to decide statutory claims.<sup>171</sup> It also provided that individuals may either take their claims before an arbitrator or pursue them in court.<sup>172</sup>

In many ways *Mathews* is factually similar to *Gardner-Denver*. In both cases the plaintiff had gone before an arbitrator, presented his claims and lost. However, in *Mathews*, the court applied the election of remedies doctrine that the Court, in *Gardner-Denver*, declined to follow.<sup>173</sup> The district court found that waiver can be established through an express statement or through a party's implied conduct.<sup>174</sup> In *Mathews*, the employee's choice to pursue arbitration precluded him from relitigating a claim that was subject to a previous final judgment.<sup>175</sup>

*Mathews* limited *Gardner-Denver* to only those cases where there was no express grant of authority to arbitrate statutory issues.<sup>176</sup> Even if an individual had the option to arbitrate a claim or take the claim to a judicial forum, once the individual made a decision he was bound by that election.

*Mathews* differs slightly from *Penn Plaza* because waiver was found in different forms. In *Penn Plaza*, the issue was whether the

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167. *Mathews v. Denver Newspaper Agency LLP*, No. 07-cv-02097-WDM-KLM, 2009 WL 1231776, at \*3 (D. Colo. May 4, 2009).

168. *Id.* at \*5.

169. *See id.*

170. *Id.* at \*4.

171. *Id.* at \*4-5.

172. *Id.*

173. *Id.* at \*5.

174. *Id.*

175. *Id.*

176. *Id.* at \*6.

union can waive individuals' rights.<sup>177</sup> In *Mathews*, the waiver was not the result of the CBA, but rather the result of the employee's own decision to take his claim to arbitration.<sup>178</sup> Although the waiver was found in a different place, it is likely that the waiver of statutory rights will only occur if it is expressly mentioned in the arbitration agreement regardless of who makes the ultimate decision to waive that right.

#### VI. OTHER POST-PENN PLAZA DECISIONS AND IMPLICATIONS

At least one court in New Jersey has recently gone back to the "two bites" approach from the *Gardner-Denver* progeny. In *Township of Wyckoff v. PBA Local 261*,<sup>179</sup> the appellate division found that Groslinger, who had filed a discrimination lawsuit prior to the arbitration at issue, was not precluded from pursuing her lawsuit.<sup>180</sup> In other words, despite the *Penn Plaza* decision upholding the exclusivity of arbitration in discrimination cases, the New Jersey Appellate Court held in *Wyckoff*, and citing *Gardner-Denver*, that "[t]he United States Supreme Court has stated that an individual does not forfeit her private cause of action if she first pursues her grievance to final arbitration under the nondiscrimination clause of a collective bargaining agreement, at least in cases in which arbitration is not mandatory."<sup>181</sup> The appellate court continued by stating that "the relief sought by Groslinger in her civil action was largely different from that obtained by arbitration. We see no reason in these circumstances why parallel pursuit of the two avenues of recovery should be precluded."<sup>182</sup>

Thus, despite the holding in *Penn Plaza*, this New Jersey Court was not constrained from permitting the *Gardner-Denver* notion of duality to continue. Curiously, the court did not mention *Penn Plaza*, although it had already been decided, and instead relied upon *Gardner-Denver*, perhaps to suggest differences in the arbitration provision.<sup>183</sup> Frankly, the author finds the decision to be a puzzlement.<sup>184</sup>

177. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1461 (2009).

178. *Mathews*, 2009 WL 1231776, at \*2.

179. 976 A.2d 1136 (N.J. Super. Ct. App. Div. 2009).

180. *Id.* at 1138.

181. *Id.* at 1144 (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49 (1980)).

182. *Id.*

183. *See generally id.* at 1136-45.

184. The applicable CBA provided in section 1.01 that "[t]here shall be no discrimination by the Township or the PBA against Employees on account of race, color, creed, sex or national origin." *Id.* at 1140. In its discussion of the substance of the underlying grievance, the appellate division noted that the "issue of sex discrimination was also necessarily implicated" by the grievant's submission regarding disparate treatment to the arbitrator. *Id.* at 1144. In addition,

*A. Shipkevich v. Staten Island University Hospital*

In *Shipkevich v. Staten Island University Hospital*,<sup>185</sup> a federal court in Brooklyn held that post-termination arbitration of claims was not required despite *Penn Plaza*.<sup>186</sup> Senior District Judge Frederic Block ruled that the underlying CBA was not sufficiently specific to preclude arbitration.<sup>187</sup> The plaintiff, Yemelyan Shipkevich, alleged discrimination in violation of Title VII of the CRA,<sup>188</sup> the New York Human Rights Law,<sup>189</sup> and the New York City Human Rights Law.<sup>190</sup> The plaintiff was a Russian-American Jew born in Moldova.<sup>191</sup>

The defendant Hospital filed dispositive motions seeking dismissal because the mandatory arbitration provision in the agreement governing Shipkevich's employment required that he arbitrate claims against the Hospital, among other theories.<sup>192</sup> The court denied all of defendant's motions.<sup>193</sup>

The Hospital argued that the suit could not proceed because the parties were bound under the CBA to seek arbitration.<sup>194</sup> The applicable provision of the CBA provided that "[n]either the Employer nor the Union shall discriminate against or in favor of any Employee on account of race, color, creed, national origin, political belief, sex, sexual orientation, citizenship status, marital status, disability or age."<sup>195</sup>

The agreement provided for arbitration.<sup>196</sup> The court noted that *Penn Plaza* was decided during the pendency of its consideration of defendant's motions.<sup>197</sup> The court opined that the Supreme Court made

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contrary to the suggestion of the appellate panel regarding the mandatory nature of arbitration, Groslinger sought relief from arbitration. *Id.* In other words, rather than being compelled to arbitrate her claims in a mandatory arbitration context, Officer Groslinger sought to arbitrate her claims and included claims under New Jersey's Law Against Discrimination, N.J. STAT. ANN. § 10:5-1-10:5-42 (West 1993), in her filing. All of these facts make the Court's conclusion and omission of *Penn Plaza* a curiosity.

185. No. 08-CV-1008, 2009 WL 1706590 (E.D.N.Y. June 16, 2009).

186. *Id.* at \*2.

187. *Id.*

188. Civil Rights Act of 1964, 42 U.S.C. §§ 2000c-2000e-17 (2006).

189. N.Y. EXEC. LAW §§ 290-301 (Consol. 2009).

190. N.Y.C. Admin. Code §§ 8-101-8-131 (2006); see also *Shipkevich*, 2009 WL 1706590, at

\*1.

191. *Shipkevich*, 2009 WL 1706590, at \*1.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. See *id.*

197. See *id.* at \*1-2.



clear in *Penn Plaza* that "the content of the CBA is determinative."<sup>198</sup> The Supreme Court also noted that anti-discrimination exclusions had to be "explicitly stated" in the CBA.<sup>199</sup>

Contrary to the Hospital's argument, Judge Block ruled that the CBA "does not mandate arbitration of Shipkevich's claims because it does not 'clearly and unmistakably require[]' arbitration of statutory anti-discrimination claims."<sup>200</sup>

The court continued with its analysis, tracking the original discussion in *Gardner-Denver* as follows:

Nowhere in the CBA is there an explicit statement that such claims are subject to mandatory arbitration. On the contrary, the CBA here is more similar to the one at issue in *Gardner Denver* than the one in *14 Penn Plaza*: The CBA in *Gardner Denver* prohibited discrimination with a list of protected characteristics and did not mention any statutes. It contained a broad definition of the events that could trigger the grievance procedure, and provided that disputes not settled by the grievance procedure "may be referred to arbitration." Despite this broad language, *Gardner Denver* held, as explained in *14 Penn Plaza*, that the "collective-bargaining agreement did not mandate arbitration of statutory antidiscrimination claims."<sup>201</sup>

The district court concluded that "*Penn Plaza* requires the same result in the present case: the CBA does not require arbitration of Shipkevich's discrimination claims."<sup>202</sup>

#### *B. Catrino v. Town of Ocean City*

In *Catrino v. Town of Ocean City*,<sup>203</sup> a district court in Maryland,

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198. See *Id.* at \*2.

199. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1465 (2009).

200. *Shipkevich*, 2009 WL 1706590, at \*2.

201. *Id.* (citations omitted).

202. *Id.* (emphasis added). The court also reviewed and rejected each of the other claims of defendants. *Id.* at \*1. Defendant Aramark asserted it was never Shipkevich's employer and could not be liable under Title VII or the discrimination provisions of New York State or City law. *Id.* at \*2. The court found otherwise, holding that an "employer" has been construed liberally under Title VII and does not require a direct employer/employee relationship. *Id.* at \*3. Minimally, Shipkevich alleged that three of his direct supervisors were Aramark employees; that one controlled his overtime and that he was terminated because of his refusal to do something he was asked to do. *Id.* While some of the factors used to determine employment status are incomplete, the court concluded there were factual disputes precluding dismissal. *Id.* Similarly, the New York Whistleblower claim did not bar continuation of the discrimination claim and the arguments regarding labor law and other federal pre-emption were rejected. See generally *id.* at \*3-6.

203. No. WMN-09-505, 2009 WL 2151205 (D. Md. July 14, 2009), *vacated*, 2009 U.S. Dist.

relying on *Gardner-Denver* and citing *Penn Plaza*, found the applicable provision of the CBA not explicit.<sup>204</sup>

Plaintiff had brought a claim under the ADA.<sup>205</sup> He had been employed by Ocean City as a police officer beginning in 1994.<sup>206</sup> In February 2007, he informed defendant that he suffered from diabetes and requested an accommodation regarding meal breaks.<sup>207</sup> He was accommodated until July 21, 2007.<sup>208</sup> Due to his condition, plaintiff left his post to go home to attend to his medical condition, i.e. eat a meal, and was considered to have voluntarily separated from employment.<sup>209</sup>

Plaintiff filed a grievance pursuant to the CBA between the Ocean City Lodge No. 10, Fraternal Order of Police ("FOP"), and the Town of Ocean City.<sup>210</sup> The applicable provision of the CBA stated that:

[A]ny "dispute concerning the application or interpretation of the terms of this Agreement or a claimed violation, misrepresentation or misapplication of the rules or regulations of the Mayor and City Council of Ocean City, Maryland, municipal corporation, or the employer affecting the terms and conditions of employment" is to be settled under the grievance and arbitration process set forth in the CBA. CBA Article 6. This provision also states that the "arbitrator's decision shall be final and binding on all parties."<sup>211</sup>

Plaintiff Catrino lost at arbitration and filed an appeal under Maryland law.<sup>212</sup> Plaintiff also brought the current action in United States District Court asserting a violation of the ADA.<sup>213</sup> Defendant sought its dismissal contending, among other things, that the anti-discrimination language in the "CBA constituted a waiver of Plaintiff's right to proceed with an ADA claim in federal court."<sup>214</sup> Article 5 of the CBA provided as follows:

The provisions of this Agreement shall be applied equally to all employees in the bargaining unit for which the FOP is the certified

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LEXIS 95599 (D. Md. Oct. 14, 2009).

204. *See id.* at \*4.

205. *Id.* at \*1; 42 U.S.C. §§ 12101-12213 (2006).

206. *Catrino*, 2009 WL 2151205, at \*1.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at \*2.

213. *Id.*

214. *Id.* at \*3.

representative without discrimination as to age, sex, marital status, race, creed, color, national origin, political affiliation, disability as defined in the Americans with Disabilities Act (ADA), or sexual orientation.<sup>215</sup>

Defendant relied upon *Penn Plaza* to urge that the language of Article 5 combined with the language of Article 6 constituted a "clear and unmistakable" agreement to arbitrate all anti-discrimination claims.<sup>216</sup> The district court rejected defendant's argument, specifically finding that the CBA did not mandate arbitration of plaintiff's ADA claim.<sup>217</sup> The court noted the distinction between submitting contractual claims to arbitration and statutory, and ruled, based on *Penn Plaza*, that "an agreement to arbitrate statutory antidiscrimination claims must be 'explicitly stated' in the collective bargaining agreement."<sup>218</sup>

The *Catrino* Court found that the CBA did nothing more than "mandate arbitration of contractual discrimination claims."<sup>219</sup> In Article 5, defendant contractually agreed not to discriminate and, in Article 6, agreed that should there be an alleged violation, the dispute must be submitted to arbitration.<sup>220</sup> However, "nowhere in the CBA does it express or imply that claims based on federal statutes must be arbitrated."<sup>221</sup>

The court noted that the ADA is mentioned in Article 5.<sup>222</sup> However, it stated that it is "only for the purpose of providing a shorthand means of defining the term 'disability.'"<sup>223</sup> The court ruled that the CBA was similar to the CBA in *Gardner-Denver*, which was "found to only mandate arbitration of contractual claims."<sup>224</sup> The *Catrino* Court rejected defendant's argument and reaffirmed the viability of *Gardner-Denver*, noting that it "remains good law."<sup>225</sup> It also cited *Penn Plaza* affirmatively regarding preclusion to suggest affirmative magic words must be invoked.<sup>226</sup>

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215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at \*4.

219. *Id.*

220. *Id.*

221. *Id.* In other words, the court is suggesting, at least to this author, that specific words and phrases must be used to abrogate plaintiff's right to proceed in district court on ADA claims.

222. *See id.* at \*3.

223. *Id.* at \*4.

224. *Id.*

225. *Id.*

226. *Id.* at \*5. Curiously, while the court did not find plaintiff's ADA claims to be barred by the arbitrator's decision, it did reject plaintiff's complaint for failure to state a claim.

*C. St. Aubin v. Unilever HPC NA*

Following *Penn Plaza*, the United States District Court for the Northern District of Illinois, in *St. Aubin v. Unilever HPC NA*,<sup>227</sup> also ruled that the waiver in the CBA was not "clear."<sup>228</sup> Donald St. Aubin sued Unilever, his former employer, for violation of the Family and Medical Leave Act ("FLMA")<sup>229</sup> and sought "to vacate an arbitration award upholding his discharge."<sup>230</sup> St. Aubin was a member of Local 7-0336 of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers, International Union, AFL-CIO, CLC.<sup>231</sup> The Union and Unilever were parties to a CBA.<sup>232</sup>

St. Aubin was terminated for viewing pornography, in violation of the company's internet usage policy, and grieved his discharge.<sup>233</sup> He argued that he was fired in retaliation for taking permissible FMLA time.<sup>234</sup> St. Aubin claimed that he should not be precluded by a negative arbitral award under the Supreme Court's ruling in *Gardner-Denver*.<sup>235</sup> The federal court took an opportunity to clarify its thinking regarding arbitration and preclusion by stating that "the Supreme Court recently abrogated the skepticism of arbitration espoused in *Gardner-Denver* and its progeny."<sup>236</sup> The court specifically reviewed the CBA at issue in Article XI.<sup>237</sup>

The court also noted that the preamble to the CBA stated "the parties agree to comply with all employment laws, including the FMLA."<sup>238</sup> In *St. Aubin*, the federal court declared that this provision did not meet the "clear and unmistakable" requirement to arbitrate employment discrimination claims prescribed in *Penn Plaza*.<sup>239</sup> Amplifying its interpretation of the Supreme Court's *Penn Plaza* ruling,

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227. No. 09 C 1874, 2009 WL 1871679 (N.D. Ill. June 26, 2009).

228. *Id.* at \*5.

229. 29 U.S.C. § 2615 (1993).

230. *St. Aubin*, 2009 WL 1871679, at \*1.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at \*2.

236. *Id.* at \*3 (citing 14 *Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009)).

237. *Id.* at \*4. Article XI provided as follows: "[g]rievances within the meaning of the grievance procedure and of this arbitration clause shall consist only of disputes about the interpretation or application of particular clauses of this Agreement and about alleged violations of the Agreement. The arbitrator shall have no power to add to, or subtract from, or modify any of the terms of this Agreement . . . ." *Id.*

238. *Id.*

239. *Id.*

the district court wrote:

The anti-discrimination clause is part of the CBA's preamble; it does not refer to arbitration. The CBA requires arbitration "only" of disputes about the interpretation or application of the CBA's provisions and violations of the CBA. The arbitration clause does not refer to the anti-discrimination provision. Unilever does not meet its burden of establishing the arbitration award precludes Count I for FMLA retaliation.<sup>240</sup>

Thus, *St. Aubin* suggests some defining uniformity by the district courts that "clear and unmistakable" means just that—an explicit reference to and recitation of submission of specific discrimination claims that will be precluded from further review and must be submitted to binding arbitration as a result of a CBA.

*D. Borrero v. Ruppert Housing Co.*

In *Borrero v. Ruppert Housing Co.*,<sup>241</sup> Senior District Judge Harold Baer, Jr., followed an earlier interpretation of *Penn Plaza in Kravar v. Triangle Services, Inc.*<sup>242</sup> and concluded that the underlying claims by Leo Borrero must be arbitrated.<sup>243</sup> Plaintiff Borrero, pro se, asserted claims of discrimination against his former employer.<sup>244</sup> Judge Baer concluded that Borrero was required to arbitrate his claims: "the terms and conditions of his employment were governed by a [contract] between the Service Employees International Union, Local 32BJ, AFL-CIO (the Union) and the Realty Advisory Board on Labor Relations (RAB) to which Defendant [wa]s a party."<sup>245</sup>

Borrero "assert[ed] claims of national origin and disability discrimination against Ruppert Housing."<sup>246</sup> The CBA expressly prohibited such discrimination in a clause that was "materially

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240. *Id.* Unilever also argued that "St. Aubin's voluntary submission of the facts underlying his FMLA retaliation claim to the arbitrator" and introduction of evidence constituted his "agreement to arbitrate the statutory claim." *Id.* The court did not consider this argument on a preliminary motion. *Id.*

241. No. 08 CV 5869(HB), 2009 WL 1748060 (S.D.N.Y. June 19, 2009).

242. No. 1:06-cv-07858-RJH, 2009 WL 1392595 (S.D.N.Y. May 19, 2009).

243. *Borrero*, 2009 WL 1748060, at \*1.

244. *Id.* Part of the difficulty may be, as the court noted, that plaintiff's complaint was "a truly bare-bones affair." *Id.* at n.3.

245. *Id.* Borrero also had a parallel suit pending in federal court regarding the Union's DFR. *See id.* at \*1 n.4.

246. *Id.*

indistinguishable from that at issue here."<sup>247</sup> Judge Baer ruled that the CBA "unambiguously" required Borrero to arbitrate his claims.<sup>248</sup> The court directed the parties to proceed to arbitration.<sup>249</sup>

However, in dismissing the complaint without prejudice Judge Baer noted that "if Borrero is prevented by the Union from arbitrating his claims, the CBA's arbitration provision will not be enforceable."<sup>250</sup> Thus, the *Kravar* conundrum emerges and gains strength by suggesting to Local 32BJ that it must proceed to arbitrate Borrero's claims.<sup>251</sup> The "mandatory" nature of the arbitration obligation of the union suggested by Judge Baer is augmented by his comment that "[s]hould Borrero's attempts to arbitrate his claims be thwarted by the Union, the CBA will have operated as a 'substantive waiver' of his statutorily created rights and he will have the right to re-file his claims in federal court."<sup>252</sup> At least two federal courts in New York now seem to be suggesting that *Penn Plaza* requires arbitration of all grievances, thereby undermining the statutory role of labor organizations relying upon *Penn Plaza*.<sup>253</sup> Only time will tell.

#### *E. Dunnigan v. City of Peoria*

Another Illinois Federal Court recently addressed the post-*Penn Plaza* world in *Dunnigan v. City of Peoria*.<sup>254</sup> District Judge Michael M. Mihm adopted the Magistrate's report and recommendations regarding claims of race discrimination and retaliation.<sup>255</sup> Apparently, an arbitration had been held regarding plaintiff's primary issues.<sup>256</sup> A copy of the arbitration award and settlement agreement between the parties

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247. *Id.* at \*2.

248. *See id.* (explaining that the Supreme Court's decision in *Penn Plaza* forces Judge Baer to rule that the CBA was unambiguous).

249. *See id.*

250. *Id.*

251. *See id.* at \*3 (concluding that the Union must arbitrate Borrero's claim) (citing *Kravar v. Triangle Servs., Inc.*, No. 1:06-cv-07858-RJH, 2009 WL 1392595, at \*3 (S.D.N.Y. May 19, 2009)). However, as the majority representative, the Union has an obligation to all of its employees to objectively and lawfully assess the viability of claims. Is Judge Baer suggesting that every claim, like Borrero's, must be presented to arbitration?

252. *Id.* at \*2.

253. *See id.* at \*3 (holding that *Penn Plaza* compels that court to order Borrero to arbitrate); *see also Kravar*, 2009 WL 1392595, at \*1. The only reason that *Penn Plaza* does not apply in *Kravar* is because the case fell "within an exception to the enforceability of a union-negotiated arbitration agreement . . . ." *Id.*

254. No. 09-1064, 2009 WL 2566958 (C.D. Ill. Aug. 14, 2009).

255. *Id.* at \*1.

256. *See id.* (explaining that a report was filed by a Magistrate Judge who had previously handled the case).

was attached to the City's submission to the court.<sup>257</sup> However, the court noted the City did not address *Gardner-Denver* and did not submit the CBA.<sup>258</sup> The plaintiff only submitted the first few pages of that agreement.<sup>259</sup> Thus, the court ruled that "the City has not demonstrated that the arbitration proceedings require dismissal of [the] case" on any grounds.<sup>260</sup>

Based upon the limited record presented to the court, Magistrate Judge Byron G. Cudmore found there to be "nothing to suggest that Plaintiff agreed to submit his Title VII claims to arbitration, or that he did submit his Title VII claims to arbitration, or that the arbitrator addressed the Title VII claims."<sup>261</sup> In addition, the court specifically stated that there was "no mention of the discrimination or retaliation claim in the arbitrator's findings."<sup>262</sup> The "meaning" of *Dunnigan* is unclear since most of the finding appears to be based upon limited submissions by the parties.

*F. Mendez v. Starwood Hotels & Resorts Worldwide Inc.*

More interesting, at least to this author, is the short opinion by the United States Court of Appeals for the Second Circuit in *Mendez v. Starwood Hotels & Resorts Worldwide Inc.*<sup>263</sup> affirming a decision of Judge Nicholas Tsoucalas. The court refused to compel Moises Mendez to arbitrate his employment discrimination claims against Starwood even though the parties had a one-page letter agreement.<sup>264</sup> The district court found the agreement between Mendez and Starwood to be unenforceable because Mendez was a member of a union that had a CBA with Starwood.<sup>265</sup> Mendez was a member of the New York Hotel & Motel Trades Council, AFL-CIO.<sup>266</sup> The Union was designated as the collective bargaining representative with exclusive authority pursuant to the NLRA.<sup>267</sup> Pursuant to the NLRA, only the union may contract the terms and conditions of employment on behalf of its members.<sup>268</sup> The

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257 *Id.* at \*2.

258 *Id.* at \*3.

259 *Id.*

260 *Id.*

261 *Id.* n.4.

262 *Id.*

263 186 L.R.R.M. (BNA) 3359 (2d Cir. 2009).

264 *See id.* at 3360.

265 *Id.*

266 *Id.*

267 *Id.*

268 29 U.S.C. § 159(a) (2006)

court declared that the "[r]epresented employees are bound by these negotiated terms and conditions of employment, which are mandatory subjects of bargaining."<sup>269</sup>

The court concluded that "an agreement to arbitrate employment disputes [wa]s among the terms and conditions of employment over which a designated bargaining representative ha[d] exclusive . . . authority."<sup>270</sup> Therefore, the court ruled that "only Mendez's union had the authority to negotiate such an arbitration agreement and the provision in the individual letter-agreement between Starwood and Mendez is an unenforceable 'side agreement.'"<sup>271</sup>

The court noted that the individual agreement was not limited to statutory claims but to "any disputes with respect to [Mendez's] employment."<sup>272</sup> Significantly, the Second Circuit opined that "*Penn Plaza* confirms that a union designated under [section] 159(a) has exclusive authority to negotiate agreements to arbitrate statutory discrimination claims. Nothing in *Penn Plaza* gives an employer the right to do so outside of the collective-bargaining context."<sup>273</sup>

In *Mendez*, the court of appeals leaves us to conclude that individual agreements, where unions are duly recognized, are unacceptable. In addition, the terms and conditions of the arbitration agreement, as discussed in other decisions, must be "explicit."

## VII. MAJORITY RULE AND THE PROTECTION OF INDIVIDUAL RIGHTS

The Supreme Court, in reaching a decision in *Penn Plaza*, rejected the long-standing concern from *Gardner-Denver* about the conflict between basic majoritarian principles and the protection of individual rights.<sup>274</sup> This departure from *Gardner-Denver* was not unprecedented or contrary to previous Supreme Court decisions regarding the inherent conflict between these two groups.<sup>275</sup>

269. *Id.* (citing *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967)).

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. Michael Z. Green, *Divided Supreme Court Allows Union Waiver of Judicial Forum*, 37 A.B.A. SEC. LAB. & EMP. L. 1, 1 (2009); see also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1973) ("Certain collective rights such as the right to strike are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities.").

275. See, e.g., *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975) (discussing the principles of the majority rule and the protection of individual rights within the



In *Emporium Capwell Co. v. Western Addition Community Organization*,<sup>276</sup> the Supreme Court stated that "[i]n establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interests of the majority."<sup>277</sup>

*Emporium-Capwell* represented the "inevitable clash among conflicting forces of exclusive representation, minority demands, and the duty of fair representation."<sup>278</sup> The Court's opinion in *Emporium-Capwell* demonstrated a preference for the resolution of nonmajoritarian problems through the CBA's contractual or statutory schemes.<sup>279</sup> Writing for the majority, Justice Marshall cautioned against allowing individuals or minority groups to interfere with the rights bargained for by the majority.<sup>280</sup> *Penn Plaza* did not directly address the issue of the interference of individual rights with the concept of majority rule, but in dicta suggested that Congress had already provided for protection of minority rights in the form of the DFR and the ability to bring forth claims under the EEOC.<sup>281</sup> While not directly stating it, the holding of *Penn Plaza* is in line with the principle of majority rule that is central to the NLRA.<sup>282</sup>

However, tied in with the Court's dismissal of the conflict between majoritarian and individual rights, is the failure of the Court to address the fact that the "union could contractually waive individual employee rights to court access and then . . . decide not to pursue such a claim in arbitration within the limits of its duty of fair representation under the NLRA."<sup>283</sup>

Coincidentally, Justice Souter noted that the holding in *Penn Plaza*

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minority): *Vaca v. Sipes*, 386 U.S. 171, 190-91 (1966) (discussing the protection of individual rights with regards to the statutory scheme protecting the majoritarian principle).

276 420 U.S. 50 (1975).

277. *Id.* at 62.

278. Jacobs, *supra* note 5, at 866.

279. See *Emporium Capwell*, 420 U.S. at 73 (holding that the NLRA did not protect activity by minority employees and followed that statutory construction of exclusive representation).

280. *Id.* at 70 ("[W]hile a union cannot lawfully bargain for the establishment or continuation of discriminatory practices, it has a legitimate interest in presenting a united front on this as on other issues and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests.") (citations omitted).

281. See 14 *Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1473 (2009).

282. See *Emporium Capwell*, 420 U.S. at 62; see also 29 U.S.C. § 159(a) (2006) (standing for the principle that unions are free to negotiate based on democratic and majoritarian principles for a CBA that will benefit the union members as a whole and not necessarily each union member individually).

283. See Green, *supra* note 274, at 11.

"may have little effect" because the Court failed to answer the question of enforceability when the union controls both access to and presentation of an individual employee's claim in arbitration.<sup>284</sup> Although in *Emporium Capwell* Justice Douglas conceded that employees may reasonably be expected to approach the union first and exhaust contractual remedies, he cautioned that minority employees "should not be under continued inhibition when it becomes apparent that the union response is inadequate."<sup>285</sup> Based upon *Penn Plaza*, if the union has the ability to waive an individual's forum rights, it essentially has the ability to waive the enforcement of individual statutory claims.

Perhaps the place to start our discussion is Justice Thurgood Marshall's own words in *Emporium Capwell*, where he wrote:

Section 7 affirmatively guarantees employees the most basic rights of industrial self-determination, "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right to refrain from these activities. These are, for the most part, collective rights, rights to act in concert with one's fellow employees; they are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife "by encouraging the practice and procedure of collective bargaining."<sup>286</sup>

The majority then stated the central premise underlying the rights of the labor organization sanctioned by the NLRA and the Congress:

Central to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule. If the majority of a unit chooses union representation, the NLRA permits it to bargain with its employer to make union membership a condition of employment, thereby imposing its choice upon the minority. In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority. As a result, "[t]he complete satisfaction of all who are

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284. *Penn Plaza*, 129 S. Ct. at 1481 (Souter, J., dissenting). For this reason, Justice Douglas referred to minority parties in *Emporium Capwell* as "prisoners of the Union." *Emporium Capwell*, 420 U.S. at 73 (Douglas, J., dissenting).

285. *Emporium Capwell*, 420 U.S. at 76 (Douglas, J., dissenting).

286. *Id.* at 61-62 (citations omitted).

represented is hardly to be expected."<sup>287</sup>

Justice Marshall also recognized the danger in majority rule when he noted that "Congress did not, of course, authorize a tyranny of the majority over minority interests."<sup>288</sup> He discussed unit appropriateness as one modifier of power.<sup>289</sup> He also talked about guarantees in the Landrum-Griffin amendments aimed at democratization of unions as political institutions.<sup>290</sup> Finally, he commented on the DFR and the obligation of the exclusive bargaining representative to "fairly and in good faith . . . represent the interests of minorities within the unit."<sup>291</sup>

More significantly, Justice Marshall discussed at length the underlying notion in *Emporium Capwell* that minority interests in the Union sought distinctive protections "free from the constraints of the exclusivity principle of [section] 9(a)."<sup>292</sup> Significantly, the majority cited national labor policy that "embodies the principles of nondiscrimination as a matter of highest priority . . ."<sup>293</sup> The Court ruled that separate bargaining was not necessary to help eliminate discrimination and concluded that the grievance procedure was "directed precisely at determining whether discrimination has occurred."<sup>294</sup> Since arbitral awards are enforceable in court, the *Emporium Capwell* majority reasoned that such a process was satisfactory.<sup>295</sup>

Interestingly, the Supreme Court seemed to have a crystal ball regarding the post-*Penn Plaza* dilemma for unions and grievants alike. In footnote eighteen of *Emporium Capwell*, the Court noted that "[e]ven if the arbitral decision denies the putative discriminatee's complaint his access to the processes of Title VII and thereby to the federal courts is not foreclosed."<sup>296</sup> The Court seemed prescient by declaring that:

The decision by a handful of employees to bypass the grievance

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287. *Id.* at 62 (citations omitted).

288. *Id.* at 64.

289. *See id.* (citing *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 171 (1971)).

290. *See id.*

291. *Id.* (citing *Vaca v. Sipes*, 386 U.S. 171, 182 (1966)). Justice Marshall noted, for example, that the NLRB had sanctioned employers that refused to process grievances against racial discrimination. *See id.* at 65.

292. *Id.* The court also noted that this principle was discussed at oral argument. *See id.* at 65 n.15. It was conceded that this exception might also apply to "any identifiable group of employees—racial or religious groups, women, etc.—that reasonably believed themselves to be the object of invidious discrimination by their employer." *Id.*

293. *Id.* at 66 (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1973)).

294. *Id.*

295. *Id.* at 66-67.

296. *Id.* at 66 n.18 (citing *Gardner-Denver*, 415 U.S. at 44).

procedure in favor of attempting to bargain with their employer, by contrast, may or may not be predicated upon the actual existence of discrimination. An employer confronted with bargaining demands from each of several minority groups would not necessarily, or even probably, be able to agree to remedial steps satisfactory to all at once.<sup>297</sup>

The opinion should be contrasted with the post-*Penn Plaza* rulings suggesting that individual agreements regarding arbitrability of all claims are unacceptable, particularly in light of *NLRB v. Allis-Chalmers Manufacturing Co.*<sup>298</sup>

The Court clearly ruled, in *Emporium Capwell*, that the protection of minority rights and the right to be free from racial and other discrimination in the workplace "cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA."<sup>299</sup> Interestingly, the *Emporium Capwell* Court issued its ruling while *Gardner-Denver* was the law of the land. With a seeming expansion of arbitral authority from *Penn Plaza*, the notion of seeking relief from discrimination in federal court may, unwittingly, now be undermined.

Essentially, the *Emporium Capwell* Court advised the parties, litigants, and the nation that whatever the factual merits of the concern raised in *Emporium Capwell*, their argument is "properly addressed to the Congress and not to this Court or the NLRB."<sup>300</sup> The Court noted that the legislation was based upon "consciously made decisions within the exclusive competence of the Legislature."<sup>301</sup>

The dilemma posited by the post-*Penn Plaza* world may have been captured in an earlier analysis when the author wrote that "[t]he strong federal policy favoring use of the grievance machinery under the collective bargaining agreement has some obvious and ascertainable limits."<sup>302</sup> The author further noted that:

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297. *Id.* at 67.

298. 388 U.S. 175 (1966).

299. *Emporium Capwell*, 420 U.S. at 69.

300. *Id.* at 73.

301. *Id.* As many scholars have noted, Justice Douglas dissenting in *Emporium Capwell*, raised the clarion call and said that the Court's opinion "makes these Union members—and others similarly situated—prisoners of the Union." *Id.* (Douglas, J., dissenting). He also noted that law should "facilitate the involvement of unions in the quest for racial equality in employment, but it should not make the individual a prisoner of the union." *Id.* at 76. Finally, Justice Douglas concluded in what may be a call to action contrary to the *Penn Plaza* majority: "Union conduct can be oppressive even if not made in bad faith. The inertia of weak-kneed, docile union leadership can be as devastating to the cause of racial equality as aggressive subversion. Continued submission by employees to such a regime should not be demanded." *Id.*

302. Jacobs, *supra* note 5, at 888.

Unless a minority employee can justify his demands in terms of interest to the majority, there is no guarantee that the majority's representative will respond itself or effectively present the minority's view to the employer in the grievance process. It appears that only if the minority can muster sufficient political support to create tensions felt by the majority will the representative respond in the interest of defusing these tensions.<sup>303</sup>

Thus, the *Emporium Capwell* scenario places a great responsibility on the section 9 representative, who must effectively and fairly represent all members. However, in light of *Penn Plaza*, the main question is whether every grievance must be taken to arbitration. In other words, if a majority representative lawfully determines that a grievance is not meritorious or that pursuing it is not cost-effective for the union, will the failure of the majority representative to pursue arbitration be a breach of the union's DFR?<sup>304</sup>

#### VIII. DFR LIMITATIONS

In *Penn Plaza*, the Supreme Court suggested the DFR was a sufficient protection for individuals when their rights are not adequately protected by the union.<sup>305</sup>

The Court is silent as to whether the same approach shall be taken when the union acts as the gatekeeper for individual statutory rights.<sup>306</sup>

303. *Id.* at 889.

304. An earlier three-part solution was posited by this author as follows:

1. Only employees who are union members are required to exhaust their grievance mechanisms under the agreement in a section 301 suit. Nonunion employees may not be bound to exhaust contractual or internal union mechanisms in a section 301 suit for violation of the DFR against their union.

2. Complaints arising under non-section 301, quasi-DRF causes of action do not require exhaustion of contractual remedies.

3. Complaints based on LMRA and title VII rights require exhaustion of either union procedures or administrative procedures, respectively, by clear statutory mandate.

*Litigation on behalf of unfairly represented employees in contexts other than section 1985(3) could be more responsive to the realities of the employment situation if the burden were shifted to the union to prove its response has not been inadequate once the plaintiff made a threshold showing of DFR violation under, for example, section 301.*

*Id.* at 891 (emphasis added).

305. 14 *Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1474 (2009). The DFR, as first spelled out in *Steele v. Louisville & N. R. Co.*, stated that the Union was not granted plenary power "to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority." 323 U.S. 192, 199 (1944). The burden upon the employee, however, has increased, with the Court holding that the actions of the Union must be "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1966); see also *Emporium Capwell*, 420 U.S. at 73, 74 (Douglas, J., dissenting).

306. The Court in *Penn Plaza* goes to great lengths to differentiate between the prospective

When the union is the individual's only avenue for redress to proceed to arbitration on some, or none, of an individual's statutory claims, there must be other protections offered to ensure that the individual can pursue individual statutory rights and remedies.<sup>307</sup>

The union is a collective body that is in the best position to look out for the needs of the union members as a whole. The DFR may simply not be enough to protect individual statutory claims. Even if a union is not acting arbitrarily, discriminatorily, or in bad faith, the individual is still, in effect, a "prisoner" and prospectively waiving substantive rights.<sup>308</sup>

The Supreme Court, in *Penn Plaza*, expressly declined to answer the question of the legality of the CBA's waiver of a judicial forum when the union controls both the access and presentation of an employee's claim in arbitration.<sup>309</sup> While the Court has left this issue for another day,<sup>310</sup> at least one court has interpreted Justice Souter's skepticism in *Penn Plaza* as a means to invalidate the CBA's arbitration provision.<sup>311</sup>

In *Kravar*, the court was asked to consider an arbitration clause that

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waiver of the right to a judicial forum and the substantive right itself. While the Court states that the CBA only works to waive the right to a judicial forum, it is silent as to what happens when the substantive right is effectively waived by the agreement to enter into the CBA. See *Penn Plaza*, 129 S. Ct. at 1464.

307. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1973) (expressing concerns about the Union's control over the presentation and extent to which an individual's claims may come before arbitration).

A further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented. In arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all the employees in the bargaining unit. Moreover, harmony of interest between the union and the individual employee cannot always be presumed. . . . And a breach of the union's duty of fair representation may prove difficult to establish. In this respect, it is noteworthy that Congress thought it necessary to afford the protections of Title VII against unions as well as employees.

*Id.* (citations omitted).

308. See Generally Mitchell H. Rubinstein, *Duty of Fair Representation Jurisprudential Reform: The Need to Adjudicate Disputes in Internal Union Review Tribunals and the Forgotten Remedy of Re-Arbitration*, 42 U. MICH. J.L. REFORM 517 (2009) (arguing that the DFR does not work for employees because of the need to satisfy the close-to-impossible burden of proof within a short statute of limitations does not work for unions because they are often required to file pointless grievances to avoid costly litigation, and does not work for employers who are often dragged into the litigation because of their deep pockets).

309. See *Penn Plaza*, 129 S. Ct. at 1473-74.

310. *Id.* at 1474 ("Resolution of this question at this juncture would be particularly inappropriate in light of our hesitation to invalidate arbitration agreements on the basis of speculation.").

311. *Kravar v. Triangle Servs., Inc.*, No. 1:06-cv-07858-RJH, 2009 WL 1392595, at \*3 (S.D.N.Y. May 19, 2009).

required union members to submit all claims to binding arbitration.<sup>312</sup> Although the arbitration provision was nearly identical to that in *Penn Plaza*, the district court found that it was not enforceable because the Union had declined to arbitrate the individual's discrimination claim.<sup>313</sup>

The court found that the Union's refusal to take the claim before an arbitrator was an impermissible waiver of the individual's substantive rights.<sup>314</sup> Because the CBA "operated to preclude [the individual] from raising her disability[] claim[] in any forum . . . the CBA operated as a waiver over [the individual's] substantive rights, and may not be enforced."<sup>315</sup>

Lower courts may follow the Southern District of New York and refuse to enforce otherwise enforceable arbitration provisions, at least according to *Penn Plaza*, if the union uses the holding of *Penn Plaza* as a way to prevent individuals from effectively vindicating their statutory rights. *Kravar* creates an exception to *Penn Plaza* when a waiver is created because the union, not the employee, controls whether the claim will go to arbitration. This interpretation would mean that even the most "clear and unmistakable" mandatory arbitration provision would preclude arbitration only if the union took the claim to arbitration. Thus, in this type of situation, the court is looking beyond the DFR to ensure that the individual's substantive rights are not prospectively waived.

Unlike the approach of the *Mathew's Court*, where *Gardner-Denver* becomes limited to cases where there is no express grant of authority to decide statutory question, the approach taken in *Kravar* may give renewed life to *Gardner-Denver*. *Kravar* requires a forum for statutory claims even if they are bargained away in the CBA.<sup>316</sup>

#### IX. WHERE DOES THAT LEAVE THE ARBITRATION FAIRNESS ACT?

Both *Mathews* and *Kravar* suggest that questions left unresolved in *Penn Plaza* will continue to play out until the Supreme Court rules on these issues. While *Mathews* and *Kravar* interpret different portions of *Penn Plaza*,<sup>317</sup> the widespread interpretation of the true meaning of *Penn*

312. *Id.* at \*1

313. *Id.* at \*3 (holding that thereby an individual is precluded from any avenue of redress for her claims of discrimination).

314. *Id.*

315. *Id.* (using as support the notion in *Penn Plaza* that if the issue were properly briefed the court could consider whether the CBA effectively works to prevent individuals from vindicating their statutory rights).

316. *See id.* (finding that the CBA operates as a waiver of substantive rights because it precludes plaintiff's claim from being raised in any forum).

317. *Mathews v. Denver Newspaper Agency*, No. 07-cv-02097-WDM-KLM, 2009 WL

*Plaza* may lead right back to the Supreme Court. However, Congress may preempt further decision-making by the Court. The Senate's version of the Arbitration Fairness Act ("Act") takes the interpretation out of the hands of the Court. The Act states that "no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom."<sup>318</sup> This version of the Act would explicitly overrule *Penn Plaza* and direct courts to permit at least two bites at the apple. The text of the Act goes right to the heart of *Penn Plaza*. It provides that no such agreement may waive an employee's right to bring a statutory claim in court.<sup>319</sup>

#### X. ANALYSIS

The problems created by *Penn Plaza* stem from the union's control of access to the arbitral forum. While monetary considerations may play a role in the eventual outcome, the majority of issues that will call for a definite resolution come from a union's failure to arbitrate within the current parameters of the DFR.<sup>320</sup> A possible tension could occur if, as in *Gardner-Denver*, the employee arbitrated his claim and then decided to pursue it in the courts. While *Mathews* held that choosing to take a claim to arbitration waived the right to then take that claim to the courts, that holding may also be limited to those situations where the CBA gives the employee the choice of forum, but then binds that employee to his choice.<sup>321</sup> If there is no such language, the courts may reach the same result as *Gardner-Denver* that the individual is free to pursue statutory claims in court.

##### A. The Post-Penn Plaza World

Rather than clarifying the rights and responsibilities of parties in

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1231776, at \*2 (D. Colo. May 4, 2009) (interpreting an individual's waiver of his statutory rights before the court after voluntarily submitting to arbitration); *Kravar*, 2009 WL 1392595, at \*3 (interpreting the issue left open in both the majority and dissent of what happens when the union does not move forward with an individual's statutory claim).

318. S. 931, 111th Cong. § 3(a) (2009).

319. *See id.*

320. David L. Gregory & Edward McNamara, *Mandatory Labor Arbitration of Statutory Claims, and the Future of Fair Employment*: 14 *Penn Plaza v. Pyett* 40 (St. John's Univ. Sch. of Law Legal Studies Research Paper Series, Paper No. 09-0174), available at <http://ssrn.com/abstract=1433877>.

321. *See Mathews*, 2009 WL 1231776, at \*6.



CBAs, the Supreme Court has made them murkier. The decision did not elucidate the obligations of labor organizations leading to arbitration. Recent post-*Penn Plaza* federal court decisions suggest confusion has begun to reign. For example, unions are now facing a near requirement, evidenced by District Judge Baer in *Borrero*, to compel every grievance to be taken to arbitration. The very nature of majoritarian representation, albeit a flawed one, compels unions to make economic and political decisions that are not likely to satisfy every member, or Judge Baer.

The Court has now elevated personal pique to an actionable right. It appears that the Court has signaled, and lower courts have urged, that every grievant has a right to be heard when it is alleged that discrimination caused the action, e.g. termination or discipline. By its decision, the Supreme Court has simply moved the forum from the EEOC, for example, or even the courthouse, to arbitration.

Part of the notion of exclusive representation involves deliberate decision-making by the labor organization. Instead of placing a greater burden on unions to process to completion every grievance alleging discrimination, the courts could have and should have focused on strengthening remedies for alleged failures to fairly represent. It is axiomatic that succeeding on DFR claims is difficult. Achieving awards for DFR claims is hard for plaintiffs. However, the Court could have suggested a streamlined course of action for individuals who believe representation has been less than adequate instead of green-lighting maximum movement to arbitration.

Another aspect of the decision that is equally troubling is its lack of clarity regarding the waiver of claims. The Court stated that it must be "explicit" in order for anti-discrimination claims to be forced into the arbitral forum. The dilemma in determining whether a waiver complies with that shorthand multiplies itself in larger organizations. The more attenuated the individual member is from the actual bargaining table, the more difficult it would appear to be for members to even have knowledge of what is being placed in the arbitration provision.

Additionally, employers seem to be unnecessarily disadvantaged by the Court's directive, since employers will obviously share the burden and ultimate cost when these claims have to be re-processed. The goal of arbitration itself—to simplify the resolution of workplace problems—is thwarted when employers cannot reasonably rely upon representations at the table due to fear that individual members or employees will later emerge clueless regarding the language of anti-discrimination provisions.

*B. Notions of Exclusivity*

This author long ago opined that a modification of the exhaustion requirement might not be incompatible with the twin goals of national labor policy: contractual resolution of grievances arising out of the CBA, and elimination of employment discrimination.<sup>322</sup> In the author's article published in the Boston University Law Review, the author stated that "[t]he protection of individual employee's rights, therefore, cannot be eclipsed by a collective agreement."<sup>323</sup> This author explored at length the notions of majority versus minority concerns in the union, and stated at that time that "complaints of minority and dissident employees should not always be required to go through the various union-controlled steps of the contractual procedures."<sup>324</sup> Thus, this author previously suggested and now reiterates that an exception to the exhaustion requirement might be appropriate due to the complicated political nature of the DFR.

Employees seeking relief under the DFR framework must show to a court that the union's response has been "inadequate."<sup>325</sup> Some facts emerge from the current state of the law, as well as proposed guidelines:

1. Only employees who are union members are required to exhaust their grievance mechanisms under the agreement in a section 301 suit. Nonunion employees may *not* be bound to exhaust contractual or internal union mechanisms in a section 301 suit for violation of the DFR against their union.
2. Complaints arising under non-section 301, quasi-DFR causes of

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322. Jacobs, *supra* note 5, at 889.

323. *Id.*

324. *Id.* at 888. The author also noted that:

Dissident unionists present a more difficult problem because of the political nature of their grievances. Their complaints often raise noncontractual concerns, based upon method of leadership and abuse of the political power: resting in the exclusive representative. Because these political concerns appear not to belong in the courtroom, the DFR and quasi-DFR tools must be carefully guarded from misuse and abuse. In other words, individuals should not be permitted to challenge in court legitimate union leadership that it could not defeat in an election. Courts must always remain cognizant of the fact that a labor organization is still an elected democratic institution, ruled by democratic principles. Although every voice is entitled to be heard, the individual dissenter in a union will remain a numerical as well as a philosophical minority. The harm flowing from abuse of union power and the impossibility of achieving redress through the union are the factors most important to a court contemplating exclusive representation and an exhaustion exception.

*Id.* at 889-90 (footnotes omitted).

325. *Id.* at 890.

action do not require exhaustion of contractual remedies.

3. Complaints based on LMRDA and title VII rights require exhaustion of either union procedures or administrative procedures, respectively, by clear statutory mandate.<sup>326</sup>

The author has previously proposed a bifurcation of the DFR process as follows:

Issues arising under the collective agreement for breach of the agreement and the DFR should be recognized under section 301 with its exhaustion and other requirements. But, alleged breaches of the DFR based on race, sex, religion, national origin, alienage, handicap, age, and pro- or anti-union activity should be recognized as quasi-DFR suits actionable under 42 U.S.C. [sections] 1981 and 1985(3), exempted from the exclusive representation and exhaustion principles.<sup>327</sup>

However, the vexing problem remains after *Penn Plaza* of the utility of arbitration in discrimination cases and the potential obligation of the union to process every case through to arbitration. Obviously, when negotiating arbitration clauses, employers, as well as unions, should seek to be explicit in the list of and inclusion of potential statutory matters that are to be the subject of arbitration. It is conceivable, at least to this author, that unions will now be faced with the horns of a dilemma: do they absorb the time and expense of processing every claim through to arbitration to avoid claims of DFR and potential damages, or do they simply attempt to exclude these claims from arbitration to save themselves from perhaps a futile exercise and then place the employer on a circular path with regard to the resolution of workplace disputes?

Employers will need to require specific, explicit, and enforceable waivers by labor organizations regarding arbitration provisions. Arbitration clauses will need to be detailed, including all of the potential claims that could have arisen in the workplace regarding discrimination and other matters to be arbitrated. Unions may consider individual signoff from members to avoid or mitigate possible DFR claims and to ensure that individual members at least are on notice regarding waiver.

Despite each of these safety valves, courts may still seek to exclude and preserve a "second bite" for certain individuals who appear to either

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326. *Id.* at 891.

327. *Id.* at 892.

be particularly aggrieved or who are lacking in specific knowledge, or in cases where deferral agreements are not adequately explicit. At least in those circumstances, the modification of the DFR burdens, as previously discussed, might be appropriate.

Mandatory arbitration has proven itself to be a system that works.<sup>328</sup> Despite its doubters, recent empirical studies as well as learned scholars have endorsed it as a reasonable, practical, effective, and efficient means of claims resolution.<sup>329</sup> For example, authors Sherwyn, Estreicher, and Heise stated in 2005 that "[r]eplacing litigation with an arbitration system allows such employers and their employees to address issues in a relatively nonadversarial, low-cost forum."<sup>330</sup> However, the authors noted that an important element of fairness would be promoted if "adjudicative costs do not overwhelm the claim resolution process."<sup>331</sup>

Professor Theodore J. St. Antoine also discussed the fees and costs issue in his Michigan study in 2008. Professor St. Antoine commented as follows:

The Due Process Protocol required a sharing of the arbitrator's fees by employer and employee, on the theory that the source of payment might affect at least the appearance of the arbitrator's neutrality. The D.C. Circuit's *Cole* decision repudiated that perception and took the more practical position that imposing arbitral fees and costs on employees might block their access to arbitration. Since then the question has become what, if any, fees and costs can lawfully be assessed against employees without invalidating the payment requirement or even the arbitration agreement as a whole. In many instances, however, this issue never arises. The employer frequently bears the entire cost of the arbitration proceedings, though usually not the employee's attorney fees or other representational costs.<sup>332</sup>

In other words, various scholars and practitioners have examined the practical aspects of arbitration as a problem-solving technique. The Court has now given its imprimatur to the utilization of arbitration as a comprehensive remedy. Further work must be done to flush out and provide for fundamental fairness. Fee sharing and cost issues are

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328. See David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1580-81 (2005) (discussing the benefits of mandatory arbitration).

329. See *id.* (describing the study that the authors conducted); see also Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 810-11 (2008).

330. Sherwyn et al., *supra* note 328, at 1560.

331. *Id.*

332. St. Antoine, *supra* note 329, at 807.

obviously factors. However, it appears to this author that the most significant result from *Penn Plaza* may be the requirement or constraint on unions to bring more and possibly non-meritorious claims through to binding arbitration. Such a result is contrary to the Congressional intent of the NLRA, as well as most subsequent rulings, including those on the role of unions. Modification of the burdens required to establish breach of the DFR and vigorous monitoring of such claims may be a simpler answer.<sup>333</sup>

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333. The concerns raised in Justice Stevens' dissent should remain front and center in any discussion and resolution of this issue. Justice Stevens expressed great concern regarding the Court's "retreat" from precedent, including *Gardner-Denver*. 14 *Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1475 (2009) (Stevens, J., dissenting). He also acknowledged the "potential conflict between the collective interest and the interests of an individual employee seeking to assert his rights." *Id.* Justice Stevens stated that moving to a system that permits resolution of all claims, particularly ADEA in this case, by arbitration should be made by Congress and not the Supreme Court. *Id.* Justice Souter followed that line of reasoning and wrote that "[t]he majority evades the precedent of *Gardner-Denver* as long as it can simply by ignoring it." *Id.* at 1478 (Souter, J., dissenting). He stated that the majority "misread" *Gardner-Denver*. *Id.* at 1479. Justice Souter also noted, somewhat curiously, that "Congress has unsurprisingly understood *Gardner-Denver* the way we have repeatedly explained it and has operated on the assumption that a CBA cannot waive employees' rights to a judicial forum to enforce antidiscrimination statutes." *Id.* at 1481.