Chapter 3

STATUTORY RIGHTS AND ARBITRATOR AUTHORITY: LABOR ARBITRATION AFTER *PYETT*

I. Statutory Rights in Labor Arbitration After *Pyett*

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Introduction

The treatment of the intersection of statutory rights and rights under a collective bargaining agreement has had a long and twisting history both in the public law and in arbitral doctrine. This paper addresses the tortured route of that intersection in public law and suggests that the issues for arbitral doctrine will become more troubling.

I. The Supreme Court's Decision in *Pyett*

In *14 Penn Plaza LLC v. Pyett*,[2] the U.S. Supreme Court held that "a collective-bargaining agreement [CBA] that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law" and could therefore operate as a waiver of individual bargaining unit members' rights to judicial remedies for those violations.[3] *Pyett* arose when Mr. Pyett and other employees working as night service watchmen in a New York City office for a contractor of building owners, 14 Penn Plaza, LCC, were transferred from their positions to less desirable positions because the security work they did was being taken over by a different contractor. SEIU Local 32BJ initially filed grievances on their behalf alleging various violations of its multiemployer CBA with Realty Advisory Board on Labor Relations,

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[1]Schwerin Campbell Barnard Iglitzin & Lavitt LLP.
[2] *14 Penn Plaza LLC v. Pyett*, 556 U.S. ___, 129 S. Ct. 1456, 1461, 1474 (2009).
[3] *Id.* at 1474.

Inc., the multiemployer collective bargaining agent for 14 Penn Plaza. During the arbitration of those grievances, the union withdrew the claim that the transfers had violated the CBA's provisions prohibiting age discrimination. It did so because it believed that the transfers had not involved age discrimination, a belief based somewhat in the local's agreement to the new security contractor coming in. The affected employees then filed charges with the Equal Employment Opportunity Commission (EEOC) alleging violations of the Age Discrimination in Employment Act (ADEA). They secured a right-to-sue notice from the Commission, and then filed suit in federal court.

The employer filed a motion to compel arbitration, which the district court denied. The Second Circuit upheld the denial, citing *Gardner-Denver* as holding that a CBA could not waive employee access to a judicial forum for federal statutory claims and noting the tension between *Gardner-Denver* and the later *Gilmer* decision, the latter holding that individual employees could be compelled to arbitrate a federal age discrimination claim.

The Court's holding in *Pyett*, that the plaintiffs could not access the courts to litigate their statutory age discrimination claims, answered a question it had avoided in *Wright v. Universal Maritime Service Corp.*[4] In *Wright*, the Court noted the tension between *Alexander v. Gardner-Denver Co.*[5] (finding that an arbitrator's decision that the employer had not breached the collective bargaining agreement's anti-discrimination provisions, did not preclude the grievant from pursuing a Title VII race discrimination in court) and *Gilmer v. Interstate/Johnson Lane Corp.*[6] (in which the Court held that an individual (non-union) securities broker who had signed a securities dealer's registration application containing an agreement to arbitrate "any controversy" was required to arbitrate his ADEA claim). The Court, in *Wright,* did not reach the question of whether a union could waive individual bargaining unit members' rights of access to the courts for statutory violations because it held that, even if unions were authorized to execute such waivers, the language of the purported waiver would have to meet the "clear and unmistakable" standard developed in case law concerning union waivers of members' protections under the National Labor Relations Act (NLRA) protections.[7]

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[4] *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998).
[5] *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).
[6] *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991).
[7] *Wright*, 525 U.S. at 77 n.1, 79–80.

In *Pyett*, the Court answered the question left unresolved by *Wright*. It held that, because unions were the statutory collective bargaining representative for their bargaining unit members concerning mandatory subjects of bargaining—including arbitration provisions—unions could effectively bargain arbitration provisions that waived their bargaining unit members' access to judicial forums for the vindication of statutory rights.[8] This general ruling was subject to the caveat that the statute, itself, must not remove the particular class of grievances "from the NLRA's broad sweep." The Court gave a narrow reading to the precedential value of *Alexander*, interpreting it as holding that, because the collective bargaining agreement there did not expressly incorporate Title VII statutory protections, the arbitrator's decision—that the employer had just cause to discharge Mr. Alexander—did not have preclusive effect in subsequent litigation of a Title VII race discrimination claim in court. Thus construed, *Alexander* did not stand for the proposition that a collective bargaining agreement could not waive a bargaining unit member's right of access to a judicial forum for statutory claims. The Supreme Court thus distinguished *Alexander* as not applicable to the issue presented in *Pyett,* which involved a CBA that expressly incorporated statutory protections, including those under the ADEA.[9] The Court, adhering to its reasoning in *Gilmer*, distinguished the selection of a forum, which could be prospectively waived, from "substantive" rights under the ADEA, which could not be prospectively waived.[10] Furthermore, the Court held that:

> The NLRA provided the Union and the RAB with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to federal age-discrimination claims in the ADEA. Accordingly, there is no legal basis for the Court to strike down the arbitration clause in this CBA, which was freely negotiated by the Union and the RAB, and which clearly and unmistakably requires respondents to arbitrate the age-discrimination claims at issue in this appeal.[11]

Because the plaintiffs had not challenged the sufficiency of the waiver provisions of the CBA, the Supreme Court refused to address that question, and instead held only that "a collective-bargaining agreement that clearly and unmistakably requires union

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[8] *Pyett,* 129 S. Ct. at 1474.
[9] *Id.* at 1469.
[10] *Id* at 1464 n.5, 1474.
[11] *Id.* at 1466.

members to arbitrate ADEA claims is enforceable as a matter of federal law."[12]

Because of a factual dispute which required remand, the Court left open a significant question: whether the arbitration process outlined in the CBA in *Pyett* might also have operated to deny the substantive ADEA rights of the plaintiffs, and under what circumstances a CBA arbitration procedure would so deprive employees of their substantive rights as to be ineffective as a waiver of their right to proceed in court on statutory claims. Pyett and his fellow plaintiffs contended that their union's right to decide not to proceed to arbitration on their age discrimination claims effectively deprived them of any forum and, therefore, deprived them of their substantive ADEA rights. The employer contended that the plaintiffs had a right under the CBA process to proceed without the union, a fact the union and the plaintiffs contested. Because of this fact dispute, the Court did not reach the issue of whether a union's ability to determine which cases proceed to arbitration and which do not, and how those arbitration cases that proceed will be tried, constitutes an unenforceable prospective waiver of substantive rights.[13]

As Justice Souter observed in dissent, the majority in *Pyett* "explicitly reserve[d] 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.*"[14] The majority noted that, were the "CBA [to] allow the Union to prevent [the employees] from 'effectively vindicating' their 'federal statutory rights in the arbitral forum,'" the provision would not be enforced. Still, the majority avoided deciding whether, in practice, the *Pyett* CBA would create such a problem, on grounds that there existed a factual dispute as to this question.[15] Further, the Court provided no guidance as to what standards would govern whether a collectively bargained arbitration process would constitute an adequate alternative to the courts, even if the union was *not* empowered to "block" arbitration.

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[12] *Id.* at 1474.

[13] *Pyett,* 129 S. Ct. at 1474; *see also* 129 S. Ct. at 1481 (Souter, J., dissenting): "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. …"

[14] *Id.* at 1481.

[15] *Id.* at 1474.

II. Collectively Bargained Provisions Concerning Submission of Statutory Claims to Arbitration and Wiaver of Access to Court

A. The Language in *Pyett*

The CBA in *Pyett* contained grievance procedure language you will find appended to this article. The CBA also contained the following "No Discrimination" language:

> 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 [ADA], 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 regulation. 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.

B. "Clear and Unmistakable" Waiver Pre-*Pyett*

Whether the *Pyett* CBA language satisfies the *Wright* "clear and unmistakable test" remains an open question. Pre-*Pyett*, courts generally construed the *Wright* test strictly, and found few instances of waiver where provisions had been collectively bargained. Even in the Fourth Circuit, which had actively developed the law in this area, only a handful of courts have found a clause preclusive of the right to litigate. As a general matter, under the Fourth Circuit law, the clause must meet one of two tests: (1) it must be a "clear and unmistakable provision under which the employees agree to submit to arbitration all federal causes of action arising out of their employment"; or (2) if the language is "not so clear," the agreement must, in addition to "general arbitration clauses," contain "additional provisions mandating 'explicit incorporation of statutory anti-discrimination requirements,' which 'make[] it unmistakably clear that the discrimination statutes at issue are part of the agreement.' "[16]

Singletary v. Enersys, Inc.[17] (unpublished) provides a rare example of a clause meeting the former test. In that case, an employee

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[16] *Carson v. Giant Food, Inc.*, 175 F.3d 325, 331–32 (4th Cir. 1999).
[17] *Singletary v. Enersys, Inc.*, 57 Fed. Appx. 161, 164 (4th Cir. 2003).

suffering from paranoid schizophrenia was discharged after he had difficulty adjusting to new medications. The employee alleged violations of the ADA and the Family and Medical Leave Act (FMLA). The CBA contained the following provisions:

> Article V (Non-Discrimination): The company and the union recognize the importance of providing all employees with equal employment opportunities, as provided by applicable laws. Therefore, the Company and the Union agree that no employee will be discriminated against based upon their race, color, creed, religion, sex, national origin, age, disability, or status as a Vietnam era veteran. The Company and the Union will comply with all laws preventing discrimination and regarding employment of individuals. … *Any and all claims regarding equal employment opportunity or provided for under this Article of the Agreement or under any federal or state employment law shall be exclusively addressed by an individual employee or the Union under the grievance and arbitration provisions of this Agreement* [emphasis added].[18]

The Fourth Circuit reversed a district court finding that the non-incorporation of specific statutory rights rendered the language insufficient to satisfy *Wright*. The Circuit Court ruled that the CBA language need not meet the second test if it meets the first, and that the *Singletary* CBA "refers explicitly to 'any and all claims … under any federal or state employment law'; thus, its application to statutory claims arising in the employment context is certainly clear. Simply put, it includes the entire set of such claims, leaving no room for courts and litigants to speculate on the margins about which claims are covered and which are not."[19] See also *Saunders v. International Longshoreman's Ass'n*.[20] In *Saunders*, the CBA prohibited "unlawful discrimination and harassment" and provided that "all disputes, claims, charges or complaints arising under" the contract "including those claiming violation of Title VII of the Civil Rights Act of 1964 … shall be brought before the Contract Board." The CBA also stated that the parties "waive any rights they may otherwise have to pursue such disputes … in any judicial forum." The Court found that the language precluded litigation.

Safrit v. Cone Mills Corp.[21] provides an example of the outer limits of CBA language considered sufficient under the second *Wright* test. In that case, the CBA stated that the parties "agree that they will not discriminate against any employee with regard to race,

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[18] *Id.*
[19] *Id.*
[20] *Saunders v. Int'l Longshoreman's Ass'n*, 265 F. Supp. 2d 624, 627 (E.D. Va. 2003).
[21] *Safrit v. Cone Mills Corp.*, 248 F.3d 306, 308 (4th Cir. 2001) (per curiam).

color, religion, age, sex, national origin or disability. … The parties further agree[] that they will abide by all the requirements of Title VII of the Civil Rights Act of 1964." That same CBA section further noted that "[u]nresolved grievances arising under this Section are the proper subjects for arbitration."[22] The Fourth Circuit found it "indisputable" that this language operated as a waiver, and opined that "it is hard to imagine a waiver that would be more definite or absolute."[23] *Safrit* appears to stand for the proposition that, at least in the Fourth Circuit, virtually any CBA reference to a federal law in proximity to an arbitration provision will be deemed to satisfy the test for "clear and unmistakable" waiver. *See also Aleman v. Chugach Support Services, Inc.*[24] (The CBA stated that "[t]he parties expressly agree that a grievance shall include any claim by an employee that he has been subjected to discrimination under Title VII … and/or all other federal, state, and local antidiscrimination laws.")

The Fourth Circuit notwithstanding, court rulings since *Pyett* indicate that it will be rare that a CBA is held to waive bargaining unit members' access to a judicial forum for their statutory claims.

1. Waiver Post-*Pyett*

Since the Supreme Court's decision in *Pyett*, several lower courts have addressed the question of whether various CBA language constitutes an effective waiver of access to a judicial forum for statutory claims. Many lower courts use the contractual language in *Pyett* as the standard, notwithstanding that the Supreme Court did not expressly hold that the *Pyett* CBA contained a valid waiver. Despite the frequency with which the sufficiency of waiver provisions has been tested, in general, there have been few cases in which a waiver has been found preclusive. The exceptions are those involving master contract language like that of the *Pyett* CBA. The questions left open in *Pyett* have proven troubling in successive cases; those cases are discussed in Section II.B.2. below.

In the recent and first appellate decision since *Pyett*, the Tenth Circuit Court of Appeals relied on the continued vitality of *Gardner-Denver* to hold that a bargaining unit employee who had arbitrated alleged CBA violations of national origin discrimination

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[22] *Id.*
[23] *Id.*
[24] *See also Aleman v. Chugach Support Serv., Inc.*, 485 F.3d 206, 216 (4th Cir. 2007).

and retaliation was not precluded from litigating the Title VII claim in court. In *Mathews v. Denver Newspaper Agency*,[25] the union had allowed the grievant, with his own lawyer, to arbitrate both a contractual national origin discrimination claim and a retaliation claim. In *Mathews*, the parties understood that the definition of discrimination contained in the CBA was identical to that of Title VII. Key to the court's decision was the following:

(1) The CBA non-discrimination language did not incorporate statutes but "simply [provided] contractual guarantees against discrimination precisely coterminous with those given in federal law." Thus, "[a]lthough the parties acknowledged that violations of statutory law would *also* constitute violations of the contract, this does not mean that the CBA covered statutory claims or that the parties believed it to do so."[26] (The "distinctly separate nature" of contractual and statutory rights … is "not vitiated merely because both were violated as a result of the same factual occurrence.")

(2) The court noted that "Critically, the arbitration agreement in *Gardner-Denver* did not provide the arbitrator with authority to resolve questions of statutory rights."[27] (citing *Gardner-Denver*, 415 U.S. at 53). The *Mathews* CBA arbitration clause stated that "[t]he arbitrator shall have no power to add to, subtract from, change or modify any provision of this Agreement, but shall be authorized only to resolve the dispute submitted to him or her." The court noted that the dispute submitted to arbitration by Mathews asserted a violation of Article II, Section 11, of the CBA and a vague complaint of retaliation, but no statutory claims under Title VII or 42 U.S.C. §1981. Because the arbitration agreement empowered the arbitrator to resolve only the dispute submitted, and because the dispute, as submitted, made no mention of statutory claims, the court held that the arbitral decision could in no way determine the question of Mathew's statutory rights.[28]

(3) The court interpreted the *Pyett* decision as holding that the *Gardner-Denver* "jurisprudence remain(s) sound, but does not "control the outcome where … the collective-bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimination claims." Thus, no preclusive effect

[25] *See Mathews v. Denver Newspaper Agency*, 2011 WL 892752 (10th Cir. Mar. 16, 2001).
[26] *Id.* at *5, *6 (citing *Gardner-Denver*, 415 U.S. at 50).
[27] *Id.* at *4.
[28] *Id.* at *6.

needed to be given to a prior arbitral decision if the collective-bargaining agreement did not cover statutory claims.[29]

In *Alderman v. 21 Club Inc.*,[30] a class of plaintiffs brought suit against the employer under the Fair Labor Standards Act (FLSA) and New York labor law, and the employer moved for summary judgment, contending that the state law claims were preempted and that the CBA contained a waiver of judicial forum for the FSLA claims. The CBA did not specify that disputes arising under federal law would be subjected to arbitration but, rather, stated that all disputes arising under the CBA must be submitted to arbitration. The court held that the CBA language was too general to demonstrate a "clear and unmistakable" intent to submit federal statutory claims to arbitration.[31]

In *Martinez v. J. Fletcher Creamer & Son, Inc.*,[32] a union construction worker brought suit against the employer for violations of the FLSA, the California Labor Code, and the California Business and Professions Code. Rather than move to compel arbitration, the employer moved for summary judgment, relying on *Pyett* to argue that the sole method to process the claims was through the contract's arbitration procedure. The court rejected this argument. It noted that, while the language in the CBA called for arbitration to be the exclusive remedy for any violation of the CBA,[33] the CBA did not explicitly reference any statutes or relevant provisions of the FLSA or California law, and that the CBA contained no "clear and unmistakable" waiver of a judicial forum for claims arising under those laws.[34] The court also held that "[t]o the extent the CBA 'mirrors' the relevant statutory requirements, … mere parallelism with the statutes does not constitute an express waiver of Plaintiff's statutory rights."[35]

In *Thompson v. Air Transport International Ltd. Liability Co.*,[36] the employee alleged that the employer had retaliated against him for exercising his rights under the FMLA. The employer moved to dismiss, contending that the CBA precluded an action in a judicial forum. The CBA both referenced the specific laws, and explicitly

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[29] *Id.* (*Gardner-Denver*, 415 U.S. at 53–54).
[30] *Alderman v. 21 Club Inc.*, 733 F. Supp. 2d 461, 463–64, 467 (S.D.N.Y. 2010).
[31] *Id.* at 470.
[32] *Martinez v. J. Fletcher Creamer & Son, Inc.*, 2010 WL 3359372 (C.D. Cal. Aug. 13, 2010).
[33] *Id.* at *1.
[34] *Id.* at *4.
[35] *Id.* at *4.
[36] *Thompson v. Air Transport Int'l Ltd. Liability Co.*, 2011 WL 251110 at * 1 (E.D. Ark. Jan. 25, 2011).

waived members' rights to bring causes of action under the statutes and at common law.[37] The plaintiff contended that the FMLA prohibited prospective waiver of claims arising under it and that, therefore, the CBA waiver was ineffective. Relying on *Pyett*, the court held that such a CBA provision did not constitute a prospective waiver of substantive rights but required only that those rights be enforced through arbitration rather than in a judicial forum.[38] The court ruled that arbitration was the sole forum for litigating the employee's claim because, under the terms of the CBA, arbitration was the exclusive forum for adjudication of discrimination claims.

In *Barnes v. Hartshorn,*[39] the plaintiff, a deputy with the county sheriff's office, alleged that the county had violated the ADEA. The court ruled that the arbitration clause was not sufficiently explicit to satisfy the *Pyett* standard because, while the CBA contained language that prohibited discrimination based on race, creed, color, etc., it did not refer either specifically to the ADEA or generally to "federal statutory rights." Rather, it merely required all grievances to be submitted to binding arbitration.[40]

In *Manuele v. City of Springfield, Ill.*, [41] city employees responsible for road construction and repair alleged that the city had violated the FLSA. The court held that the CBA did not explicitly, clearly, or unmistakably require plaintiffs to submit FLSA claims to arbitration because it did not mention the FLSA or even federal law generally, but only that a "grievance" must be submitted for binding arbitration.[42]

In *Catrino v. Town of Ocean City,*[43] the plaintiff sued under the ADA after the union lost a grievance arbitration concerning his discharge. The CBA contained a non-discrimination clause requiring the employer to refrain from discriminating on the basis of disability, referred to the ADA for its definition of disability, and provided for the arbitration of violations of the CBA's non-discrimination clause. The court held that there had been no waiver of a judicial forum for disability discrimination claims because the CBA did not expressly state that statutory causes of action were arbitrable. The court specifically held that the CBA did not waive

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[37] *Id.* at *2.
[38] *Id.* at *3.
[39] *Barnes v. Hartshorn*, 2010 WL 3540919 at * 1 (C.D. Ill. Jul. 15, 2010).
[40] *Id.* at *5.
[41] *Manuele v. City of Springfield, Ill.*, 718 F. Supp. 2d 939, 941 (C.D. Ill. 2010).
[42] *Id.* at 947.
[43] *Catrino v. Town of Ocean City*, 2009 WL 2151205 (D. Md. July 14, 2009).

access to court on the ADA claim. However, it dismissed the case on other grounds.

In *Shipkevich v. Staten Island University,*[44] the court similarly held that there was no waiver where a CBA did not expressly refer to statutes, did not explicitly say that statutory claims were arbitrable, and did not waive the grievant/plaintiff's access to court for Title VII employment discrimination.

St. Aubin v. Unilever[45] involved a CBA preamble in which the parties agreed to comply with all employment laws, including the FMLA. Other CBA provisions stated that, "Grievances 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. …" The court held that the language of the CBA did not constitute a clear and unmistakable waiver, and also held that the plaintiff's act of having submitted evidence, at the arbitration hearing, of a claimed FMLA violation did not imbue the arbitration decision with preclusive effect.

In *Reid v. Swift Pork Co.*,[46] the court easily denied the employer's motion to dismiss an employee's discrimination case, noting that the CBA's grievance procedure appeared to cover only "'grievance[s] pertaining to … specific violations of the CBA' and 'violations of employee's working conditions.'" The employee's statutory rights, held the court, "are separate from his rights under the CBA, and were not decided [in the grievance process]. He is therefore not precluded from litigating them in court."

In *Dunnigan v. City of Peoria,*[47] the court rejected the employer's argument that an arbitration award of no just cause for termination should be should be given preclusive effect for the employee's Title VII race discrimination and retaliation claims. The court so ruled because the defendant had not put the CBA into evidence and had thus failed to prove that the CBA required the plaintiff to arbitrate such claims.

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[44] *Shipkevich v. Staten Island Univ.*, 2009 WL 1706590, 2009 U.S. Dist. LEXIS 51011 (June 16, 2009, E.D.N.Y.).

[45] *St. Aubin v. Unilever*, 2009 WL 1871679, *4–5 (N.D. Ill. June 2009).

[46] *Reid v. Swift Pork Co.*, 2010 WL 1795533 (W.D. Ky., May 4, 2010).

[47] *Dunnigan v. City of Peoria,* 2009 WL 2566958 (C.D. Ill. August 14, 2009).

In a patently confused decision, the court in *Cardine v. Holten Meat, Inc.*[48] found waiver in a CBA provision prohibiting discrimination, where the CBA did not reference any statute, and its arbitration clause included discrimination claims but did not state that arbitration was to be the sole remedy. The court ordered that the plaintiff's claim—of retaliation for having filed an EEOC complaint—be submitted at the last step of the grievance process, but also permitted the plaintiff to return to court should the employer not arbitrate the claim.[49]

Although the "clear and unmistakable" standard derives from NLRA jurisprudence, the court in *Warfield v. Beth Israel Deaconess Medical Center*[50] applied the same standard to an employment dispute. The court held that the language of the employment agreement was too vague to waive access to a judicial forum. This holding was consistent with the Supreme Court's rulings that statutory claims will not be presumed to be within the scope of a collectively bargained arbitration agreement.[51]

Similarly, in another state case, *Edwards v. Cascade County Sheriff's Department*,[52] the Montana Supreme Court held that the plaintiffs—county employees alleging violations of state anti-discrimination statutes (for political beliefs) and of state wage and hour laws—were not precluded from seeking judicial enforcement of their claims. The court noted that, although the CBA "covered" those types of claims and also required the payment of wages "calculated according to applicable Montana State Law," it did not "clearly and unmistakably" waive the plaintiffs' access to court on statutory claims.[53] The court held that the CBA was not sufficiently explicit and that its language could be interpreted to exclude the cause of action from the arbitration provision.[54] The court observed that "[n]o language in the CBA unmistakably waives the [plaintiffs'] rights to seek judicial relief to enforce the County's corresponding [statutory] duties."[55]

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[48] *Cardine v. Holten Meat, Inc.*, 2010 WL 5014327 at *1 (S.D. Ill. Dec. 03, 2010).
[49] *Id.* at * 2.
[50] *Warfield v. Beth Israel Deaconess Med. Ctr.*, 454 Mass. 390, 401, 910 N.E.2d 317, 327 (2009).
[51] *See Wright*, 525 U.S. at 79.
[52] *Edwards v. Cascade County Sheriff's Dept.*, 2009 WL 5160007, 2009 MT 451 at ¶¶58–63 (Mont. Dec 31, 2009).
[53] *Id.* at ¶61.
[54] *Id.* at ¶62.
[55] *Id.* at ¶63.

In an interesting state law case, *Portland State University Chapter of American Ass'n*,[56] the CBA stated that the employer, a state university, could refuse arbitration if an individual member of the employees' association filed a claim with an outside agency or judicial body. The state Employment Relations Board ruled (pre-*Pyett*) that the provision allowing the employer to opt out of arbitration constituted unlawful retaliation for exercise of statutory rights, and the employer's refusal to arbitrate the employee's grievance had been in retaliation for the employee's having filed a complaint with the EEOC and Bureau of Labor and Industries. The Board held that the University was in violation of Title VII and state law.[57] The court of appeals reversed, citing *Pyett* and noting that "a right to antidiscrimination established under a *contract* may differ from the right to antidiscrimination established by *statute*"[58] (emphasis in original). The court noted that, because the arbitration clause at issue spoke solely to contractual issues and not statutory law, the adversity of the employer's decision to decline arbitration was limited to the plaintiff's contractual grievance process.[59] A dissent noted that Title VII specifically protects against discrimination against employees who file actions or assist in investigations.[60] The majority opinion is consistent with *Richardson v. Commission on Human Rights & Opportunities*[61] (election of forum clause in CBA did not violate Title VII), but in conflict with *EEOC v. Board of Governors*[62] (depriving a bargaining unit employee of a contractual remedy because of his or her exercise of a statutory remedy itself violates federal discrimination statutes); *Johnson v. Palma*[63] (depriving a bargaining unit employee of a contractual remedy because of his or her exercise of a statutory remedy itself violates federal discrimination statutes).

2. Effective Forum Waiver or Ineffective Substantive Waiver?

The few cases decided since *Pyett* demonstrate the reluctance of the lower courts to find there to be an effective waiver where the

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[56] *Portland State Univ. Chap. of Am. Ass'n*, 240 Or. App. 108, ___ P.3d ___, 2010 WL 5359190 at *1 (Or. App. Dec. 29, 2010) (2-1 decision).
[57] *Id.* at *2, 3.
[58] *Id.* at *5.
[59] *Id.*
[60] *Id.* at *6.
[61] *Richardson v. Commission on Human Rights & Opportunities,* 532 F.3d 114 (2d Cir. 2008).
[62] *EEOC v. Board of Governors*, 957 F.2d 424 (7th Cir.), *cert. denied*, 506 U.S. 906 (1992).
[63] *Johnson v. Palma*, 931 F.2d 303 (2d Cir. 1991).

individual employee has sought arbitration under the CBA, but the union has declined to proceed. For example, in a case involving the same contractual language as in *Pyett*, a district court held that, where the CBA left total control over the decision to arbitrate to the union and the union declined to pursue an individual grievant's statutory claim through arbitration, the grievant/plaintiff's substantive right would be denied if she were then precluded from pursuing that claim in court.[64] The court also rejected the employer's argument that, because it had agreed to arbitrate the claim after the union had declined to do so, an enforceable waiver of judicial forum had occurred. The court noted that the CBA's preclusion provision was an agreement between the company and the union, and not between the company and the plaintiff/employee, who had never agreed to arbitration.[65] This case was appealed to the Second Circuit but settled before a decision issued. *See also Borrero v. Ruppert Housing Co. Inc.*[66] (in a case involving the same language as *Pyett*, the court dismissed the employee/plaintiff's complaint without prejudice stating that, if the union thereafter interfered with the plaintiff's ability to arbitrate, the court would allow the action to be filed again).

Johnson v. Tishman Speyer Properties, L.P.[67] involved a CBA with the same clauses as *Pyett*. Tishman discharged Johnson for having violated security rules. Johnson grieved the termination; the union did not assert any discrimination claims. Johnson then filed a discrimination suit and Tishman moved to compel arbitration of the discrimination claims. The court granted the motion, holding that, unlike *Kravar,* it need not reinstate the case if the union failed to proceed with the arbitration, because Johnson had conceded that he had declined to arbitrate the discrimination claims.[68] In *Duraku v. Tishman Speyer Properties, Inc.*,[69] the plaintiffs alleged they were subject to harassment in the workplace, in violation of Title VII and the New York state and New York City human rights laws. The employer moved to dismiss. The CBA gave the union sole discretion to decide whether to grieve or arbitrate such claims, and the union had refused to bring the claims to arbitration.[70] The court ruled that the CBA provisions were an effective waiver

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[64] *Kravar v. Triangle Serv.*, 2009 WL 1392595 (S.D.N.Y. May 19, 2009).
[65] *Id.*
[66] *Borrero v. Ruppert Housing Co. Inc.*, 2009 WL 1748060 (S.D.N.Y. July 2, 2009).
[67] *Johnson v. Tishman Speyer Prop., L.P.*, 2009 WL 3364038 (S.D.N.Y. Oct. 16, 2009).
[68] *Id.* at *4.
[69] *Duraku v. Tishman Speyer Prop., Inc.*, 714 F. Supp. 2d 470, 472 (S.D.N.Y. 2010).
[70] *Id.* at 472.

of the plaintiffs' right to litigate, and that arbitration was the sole process for remedying their statutory discrimination claims.[71] Three months after the plaintiffs filed their complaint, the union and the employer entered into a supplemental agreement allowing individual employees to bring claims of discrimination to arbitration if the union declined to do so.[72] (This may have been in response to the earlier *Tishman* case, cited above.) The court held that the new supplemental agreement applied retroactively to the plaintiffs' claims because that agreement had stated that "*whenever* it is claimed that an employer violated the no discrimination clause . . . the matter *shall* be submitted to mediation"[73] (emphasis in original).

In *Morris v. Temco Service Industries, Inc.*,[74] the union arbitrated an employee's claim for unjust termination without asserting a claim of statutory discrimination. The employee/plaintiff sued Temco, alleging that the company had violated Title VII, New York state and New York City human rights laws by discriminating against her race and national origin. The employer moved to compel arbitration. The court ruled that, while the CBA stated that arbitration was to be the sole remedy of statutory claims, the union's refusal to bring the discrimination claim to arbitration made the CBA's waiver of litigation unenforceable.[75] The court thus answered the question left open in *Pyett*: where the CBA provides for the arbitration of statutory claims, the union's non-pursuit of such a claim in arbitration will be seen as a *substantive* waiver of the statutory right, and will reinstate the employee's access to the courts:

> It follows that where a collective bargaining agreement functions to prevent an aggrieved member from vindicating her statutory civil rights claims in any forum, it strips the statute of "its remedial and deterrent function" and operates as a substantive waiver of federally protected civil rights.[76]

In *Powell v. Anheuser-Busch, Inc.*,[77] the district court granted the plaintiff's motion for reconsideration of the court's earlier ruling

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[71] *Id.* at 472, 474.
[72] *Id.* at 472–73.
[73] *Id.* at 474.
[74] *Morris v. Temco Serv. Ind., Inc.*, 2010 WL 3291810 at *1 (S.D.N.Y. Aug. 12, 2010).
[75] *Id.* at *1, 6.
[76] *See Gilmer*, 500 U.S. at 28; *see also 14 Penn Plaza*, 129 S. Ct. at 1481 (Souter, J., dissenting): "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." (citations omitted).
[77] *Powell v. Anheuser-Busch, Inc.*, CV 09-729-VBF(VBFx) (C.D. Cal. January 10, 2010).

which had been based on *Pyett*, staying the plaintiff's statutory discrimination suit and compelling arbitration. The court lifted the stay, finding that there had "been an impasse—a complete breakdown in the arbitration process" because the parties could not "agree on arbitration procedures and related issues" and because the CBA was "silent as to these procedures." The court rejected the employer's argument that *Pyett* governed in that circumstance. The case is now pending in the Ninth Circuit and may address the question of labor arbitration procedure and substantive waiver.

3. Individual Waivers by Union-Represented Employees

In an unpublished opinion, the Second Circuit held that an agreement to arbitrate all work disputes, signed by an individual bargaining unit member, was not effective because only the union, as the collective bargaining agent, had the authority to negotiate such agreements. *Mendez v. Starwood Hotels*[78] citing *Pyett.*

III. Collateral Estoppel: Effect of an Arbitrator's Award on Subsequent Litigation

In the wake of the *Pyett* Court's overruling of one aspect of *Alexander v. Gardner-Denver Co.,*[79] and its general embrace of mandatory arbitration of statutory claims when brought by unions representing employees, employers have argued that *Pyett* also swept away another teaching of *Alexander*: that an "arbitral decision may be admitted as evidence [in subsequent litigation] and accorded such weight as the district court deems appropriate," but that the arbitrator's decision will not preclude relitigation of facts in the judicial forum. By and large, courts appear skeptical of employers' claims that *Pyett* has had an expansive effect on the weight to be given to arbitration decisions dealing with solely contractual matters.

For example, in *Jones v. Verizon Communications, Inc.,*[80] an employee brought a discrimination suit subsequent to his union having lost the arbitration of his termination (just as Alexander had done). Verizon moved to dismiss the litigation, arguing that

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[78] *Mendez v. Starwood Hotels*, 2009 WL 2379985, *2 (2d Cir. Aug. 3, 2009) (unpublished).
[79] *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).
[80] *Jones v. Verizon Communications, Inc.*, 2009 WL 3488079 (D. Mass. Oct. 23, 2009).

collateral estoppel effect must be given to the arbitration award, even though the CBA did not incorporate statutory discrimination claims or require arbitration as their exclusive remedy. The court held that "*Gardner-Denver* in its relevant aspects … remain[s] good law" and denied a motion for partial judgment.[81] In *Pulkkinen v. Fairpoint Communications, Inc.*,[82] the employer asserted that the findings of two prior arbitrations (handled by union counsel described by the employer as a "highly respected attorney with twenty-five years of experience") should be accorded preclusive force against an ADA plaintiff. The court rejected the argument on grounds that, even assuming *arguendo* that the CBA language operated as a waiver under *Wright*, the *Pyett* decision had not expressly overruled this aspect of *Alexander*. *See also Markell v Kaiser Foundation Health Plan of Northwest*[83] (court refused to give preclusive effect to prior arbitration in suit alleging age discrimination). In *Markell*,[84] the court succinctly explained that *Pyett* had no effect on the weight to be given to arbitration decisions dealing with only contractual claims:

> Where a collective-bargaining agreement authorizes arbitration of contract-based claims only, the preclusive effect of an arbitral decision on subsequent litigation of federal statutory claims remains governed by *Gardner-Denver* and its progeny.[85] Under *Gardner-Denver*, the absence of a clear and unmistakable waiver of a federal judicial forum for resolution of disputes regarding statutory rights is fatal to the theory that the arbitral decision could preclude litigation of Markell's ADEA claim.[86] The Supreme Court's recent decision in *14 Penn Plaza* therefore provides no reason to disturb the court's previous disposition of Kaiser's first-filed motion for summary judgment.

Although a few courts have found to the contrary, those decisions appear rather anomalous. In *Tewolde v. Owens & Minor Distribution,*[87] the court found that the CBA had not waived the plaintiff's right to a judicial forum for his discrimination claim (national origin) but that, nonetheless, *Pyett* required the court's deference to the arbitrator's factual findings and conclusion and

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[81] *Id.* at *2.
[82] *Pulkkinen v. Fairpoint Communications, Inc.*, 2010 WL 716109 (D. Me. Feb. 23, 2010).
[83] *Markell v. Kaiser Foundation Health Plan of Northwest*, 2009 WL 3334897 (D. Or. Oct. 15, 2009).
[84] *Markell*, 2009 WL 3334897 at *7.
[85] *See 14 Penn Plaza,* 129 S. Ct. at 1468–69.
[86] *See Gardner-Denver,* 415 U.S. at 49–50.
[87] *Tewolde v. Owens & Minor Distribution,* 2009 WL 1653533 (D. Minn. June 10, 2009).

that, in the case at hand, that requirement for deference defeated the employee's statutory discrimination claim and one of the two bases for his retaliation claim. In *Mathews v. Denver Newspaper Agency,*[88] the court found that the parties had treated the CBA as incorporating statutory non-discrimination duties, and ruled that a grievant/plaintiff who voluntarily submitted his race discrimination claim to arbitration under the CBA and who used his own lawyer, waived his right to a judicial forum. The court further ruled that the doctrines of *res judicata* and collateral estoppel applied, and precluded his lawsuit.

In a different twist, one court found no waiver, but nonetheless stayed the case pending arbitration. In *Kayser v. Southwestern Bell Telephone Co.,*[89] the plaintiffs alleged that the employer had violated the FLSA. The employer moved to dismiss the litigation and to compel arbitration. The court held that there had been no "clear and unmistakable waiver of plaintiffs' rights to assert their FLSA claims in a judicial forum" because the CBA had not specifically referenced the FLSA but, rather, had called for "disputes over the meaning or application of any CBA provision [] to be arbitrated."[90] The court reiterated the Supreme Court's holding in *Wright v. Universal Mar. Serv. Corp.,*[91] that there is no implicit waiver of the right "to bring statutory claims in a federal forum simply by agreeing to a CBA that provides that none of its provisions should be read to conflict with federal law."[92] However, the court stayed the case to allow arbitration to proceed first, anticipating that even if the arbitrator's decision did not resolve the issues in dispute, it would be useful to the court should the litigation go forward.[93]

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[88] *Mathews v. Denver Newspaper Agency*, 2009 WL 1231776 (D. Colo. May 4, 2009), *reversed*, 2011 WL 892752 (10th Cir. March 16, 2001).

[89] *Kayser v. Southwestern Bell Telephone Co.*, 2010 WL 5139351 at *1 (E.D. Mo. Dec. 10, 2010).

[90] *Id.* at *3.

[91] *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 79 (1998).

[92] *Id.*

[93] *Id.* at *5.

IV. A Note Regarding Other Implications of *Pyett* for Labor Arbitration

A. The Duty of Fair Representation in Arbitration of Statutory Claims

Arbitration under a collective bargaining agreement on behalf of an employee is ordinarily initiated and controlled by the union. The union determines how to proceed, subject to its duty of fair representation. *Hines v. Anchor Motor Freight, Inc.*; *Vaca v. Sipes*.[94] In *Pyett*, the Court rejected arguments that a union might, in some instances, have an inherent conflict of interest in asserting an individual's discrimination grievance against the general interests of all of its members. The Court blithely commented that:

> [T]his attribute of organized labor does not justify singling out an arbitration provision for disfavored treatment. This "principle of majority rule" to which respondents object is in fact the central premise of the NLRA. *Emporium Capwell Co. v. Western Addition Community Organization*.[95] "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."[96]; *see also Ford Motor Co. v. Huffman*[97] ("The complete satisfaction of all who are represented is hardly to be expected"); *Pennsylvania R. Co. v. Rychlik*[98] (Frankfurter, J., concurring). It was Congress' verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands. Respondents' argument that they were deprived of the right to pursue their ADEA claims in federal court by a labor union with a conflict of interest is therefore unsustainable; it amounts to a collateral attack on the NLRA.[99]

Yet the cases addressing unions that decline to proceed with individuals' statutory discrimination claims raise significant questions about duty of fair representation (DFR) liability. Many DFR complaints are processed through the National Labor Relations

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[94] *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Vaca v. Sipes*, 386 U.S. 171 (1967).

[95] *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 62, 95 S. Ct. 977, 43 L. Ed. 2d 12 (1975).

[96] *Id.* (footnote omitted).

[97] *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S. Ct. 681, 97 L. Ed. 1048 (1953).

[98] *Pennsylvania R. Co. v. Rychlik*, 352 U.S. 480, 498, 77 S. Ct. 421, 1 L. Ed. 2d 480 (1957).

[99] *Pyett*, 129 S. Ct. at 1772–73.

Board rather than the courts. The Board has yet to reveal how it will deal with the predicted "explosion" of DFR complaints relating to both waivers of judicial access and to the arbitration of statutory rights. Will unions that bargain exclusive procedures for enforcing such rights be subject to a heightened standard in discharging those responsibilities; will it be similar to the standard often imposed on unions operating exclusive hiring halls? For example, *Jacoby v. NLRB*[100] suggests that negligence may suffice to impose liability, even without a showing of discrimination or bad faith.

Will the Board and the courts begin to incorporate due process standards from non-collective bargaining arena case law or arbitration rules? *E.g.*, *Circuit City Stores v. Adams,*[101] *see 14 Penn Plaza v. Pyett.*[102] The Court in *Pyett* noted that *Circuit City* dealt with individual employment contracts, rather than collectively bargained agreements. Will courts apply unconscionability doctrines in evaluating the adequacy of the process for presenting the bargaining unit members statutory rights, as was implied in Justice Souter's dissent in *Pyett*? Will courts borrow substantive, if not procedural, unconscionability doctrine from cases arising under the Federal Arbitration Act (FAA), even though those originate in state law contract doctrine while labor contracts are interpreted under Section 301 jurisprudence? *See e.g., Stirlen v. Supercuts, Inc.*,[103] which held that ("An agreement may be suspect in terms of substantive unconscionability if it 'reallocates the risks of the bargain in an objectively unreasonable or unexpected manner.'"). The *Powell* case, which is now pending in the Ninth Circuit, may reach this issue.

B. The Standard of Review for Labor Arbitration of Statutory Claims

In *United Steelworkers of America v. Enterprise Wheel & Car Corp.*,[104] the Court held that the purpose in reviewing an arbitrator's award is to ensure that the award draws its essence from the underlying collective bargaining agreement. The Court distinguished between a labor arbitrator appropriately looking to external

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[100] *Jacoby v. NLRB*, 233 F.3d 611, 617 (D.C. Cir. 2000).
[101] *Circuit City Stores v. Adams*, 532 U.S. 105 (2001).
[102] *14 Penn Plaza v. Pyett*, 498 F.3d 88, 91 (2d Cir. 2007).
[103] *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1532 (1997).
[104] *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

public law for guidance in interpreting a collective bargaining agreement, and a labor arbitrator inappropriately applying solely public law.[105] Although in *W. R. Grace & Co. v. Rubber Workers Local 759*,[106] the Court observed that a labor arbitrator may accept a defense of illegality, the distinction between the arbitrator's proper and improper uses of external public law (as set forth in *Enterprise Wheel*) continues to be relevant to the judiciary's review and enforcement of labor arbitration awards.

In the future, when labor arbitrators are called upon to adjudicate statutory claims under statutory standards, the reliance on statutory analysis will be unavoidable. Will the scope of review of labor arbitration decisions become the equivalent to the "manifest disregard for the law" standard, viewed as shorthand for review of arbitration awards under the Federal Arbitration Act? *See, e.g.*, *Comedy Club, Inc. v. Improv West Associates,*[107] citing *Hall Street Associates v. Mattel Inc.*[108]

The arbitration of contract claims entailing allegations of unfair labor practices is a class of statutory claims that will be affected by *Pyett*. In 2009, the NLRB issued a memorandum (OM 10-13) in which it recognized that "a new approach to cases involving arbitral deference may be warranted." Regional offices were instructed to submit post-arbitral deferral cases to the Division of Advice, for a case-by-case review, in order to develop that new approach. Subsequently (in January 2011), the NLRB Acting General Counsel issued a further memorandum (GC 11-05), in which he urged the Board to modify its *Spielberg/Olin* approach.

The *Spielberg/Olin* standard applies four factors in deciding whether to defer to an arbitration award: (1) whether the arbitration proceeding was fair and regular, (2) whether all parties agreed to be bound by the decision, (3) whether the contractual issue considered by the arbitrator was factually parallel to the unfair labor practice issue, and (4) whether the resulting arbitration decision is "clearly repugnant" to the National Labor Relations Act.

The General Counsel's memorandum urged the following modifications to the *Spielberg/Olin* approach:

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[105] *Id.*, 363 U.S. at 597.
[106] *W. R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 759 (1983).
[107] *Comedy Club, Inc. v. Improv West Assoc.*, 553 F.3d 1277 (9th Cir. 2009).
[108] *Hall Street Assoc. v. Mattel Inc.*, 128 S. Ct. 1396 (2008).

1. The party urging deferral should have the burden of demonstrating that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue.
2. If the party urging deferral makes that showing, the Board should defer unless the award is clearly repugnant. The award should be considered clearly repugnant if it reached a result that is "palpably wrong," i.e., the arbitrator's award is not susceptible to an interpretation consistent with the Act.
3. The Board should not defer to a pre-arbitral award grievance settlement unless the parties themselves intended the settlement to also resolve the unfair labor practice issues. Where the evidence demonstrates that the parties intended to settle the unfair labor practice charge, the Board should continue to apply current non-Board settlement practices and procedures, including review under the standards of *Independent Stave*.[109]

The General Counsel's memorandum (GC 11-05) sets forth the analysis and rationale for these changes at length; a copy of the memorandum is appended to this paper.

Conclusion

The law is only beginning to be shaped in these areas. The questions that *Pyett* raised—more questions than it answered—are likely to be litigated for years to come.

[109] *Independent Stave*, 273 NLRB 1546, 1547–48 (1985).