It is a model that—largely—works. Whether it offers any guidance for the adjudication of such claims in the United States, however, remains to be seen.

II. The Forum for Litigation of Statutory Employment Claims After *Pyett:* A New Approach From Management and Labor

Terry Meginniss[67] and Paul Salvatore[68]

Introduction

In 2009, the U.S. Supreme Court decided that a provision in a collective bargaining agreement (CBA) entered into between an employer and a union that waives the right of covered employees to pursue statutory claims of discrimination in a judicial forum is enforceable, provided that the waiver is both specific and clear, and provided that the bargaining agreement creates a sufficient alternative forum for the pursuit of those claims. *See 14 Penn Plaza LLC v. Pyett.*[69] The Supreme Court's holding has been cheered by some and denigrated by others. Those who have welcomed the decision emphasize that (1) the decision authorizes the use of arbitration, a cost-effective and speedy forum, for employers and employees to resolve employment discrimination disputes by a neutral party; (2) the decision will have the salutary effect of easing the burden on an already crowded judicial system; and (3) the Court honored the abilities of arbitrators to hear and rule on these matters.

The Supreme Court's ruling left open a vexing question, however. In *Pyett,* the employees argued that the bargaining agreement's arbitration provision provided the union with the exclusive right to determine whether to bring their discrimination claim to arbitration. They asserted that, because the union had declined to bring the claim to arbitration, they had to be afforded the opportunity to pursue the claim in court; otherwise the mandatory arbitration provision would have effectively extinguished altogether

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[69]14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 105 FEP Cases 1441 (2009), *rev'g* 498 F.3d 88, 104 FEP Cases 807 (2d Cir. 2007).

their right to vindicate the protections guaranteed by the statute. The Court did not decide this issue. After the decision, New York courts heard cases applying the same arbitration provision as the one at issue in *Pyett*, and addressed the issue of individual access with differing results—in some cases, courts have held that the union's refusal to pursue the grievance to arbitration acted as a waiver of the plaintiff's statutory rights, thereby relieving the plaintiff of the contract's waiver of access to a judicial forum, and in others, courts have compelled arbitration, regardless of initial union support.

Against this legal backdrop, the Realty Advisory Board on Labor Relations, Inc. (RAB), and SEIU Local 32BJ (the Union) have adopted a Protocol and Agreement for handling discrimination claims. The Protocol does not attempt to dispose of the legal question of whether an individual employee is forced to forgo a judicial forum when he/she seeks to pursue a discrimination claim the Union has declined to pursue in the contractual arbitration forum; but the Protocol does afford the individual and his/her employer a cost-effective framework for resolving those claims.

Legal Landscape Prior to *Pyett*

In 1974, the Supreme Court decided *Alexander v. Gardner-Denver Co.*,[70] (hereinafter cited as "*Gardner-Denver*"), a case about whether an employee could bring statutory discrimination claims in court following his union's arbitration of a factually related contractual grievance under a CBA's nondiscrimination clause. The Court held that an individual's contractual rights under a CBA were distinct from his or her statutory rights under Title VII of the Civil Rights Act of 1964,[71] and, therefore, the prior resort to arbitration on the contractual claim did not bar the subsequent pursuit of the Title VII claim in a judicial forum. In so holding, the Court noted that "[t]he federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of

[70]Alexander v. Gardner-Denver Co., 415 U.S. 36, 7 FEP Cases 81 (1974), *rev'g* 466 F.2d 1209, 4 FEP Cases 1210 (10th Cir. 1972).
[71]Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

action under Title VII . . . . The federal court should consider the employee's claim *de novo*."[72]

Notably, the Court enunciated the view that "the factfinding process in arbitration usually is not equivalent to judicial fact finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable."[73]

In the decades that followed,[74] the Court's views on arbitration changed markedly. As a result, longstanding judicial hostility to private arbitration as an alternative forum for resolution of employment discrimination claims, and even complex commercial disputes like antitrust claims and claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), diminished.

In 1991, in *Gilmer v. Interstate/Johnson Lane Corp.*,[75] the Court addressed whether a claim under the Age Discrimination in Employment Act (ADEA) could be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application—a *non-union* setting. The Court held that such an agreement, under those circumstances, was enforceable. The Court noted that the burden was on Mr. Gilmer to establish that Congress intended to preclude a waiver of a judicial forum for ADEA claims.[76] Mr. Gilmer conceded that nothing in the text of the ADEA or its legislative history explicitly precluded

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[72]415 U.S. at 59–60.

[73]*Id.* at 57–58.

[74]Employer interest in arbitration of discrimination claims increased dramatically over the last decades of the twentieth century. Jury trials started awarding plaintiffs large awards under common law theories of wrongful discharge, including emotional distress and punitive damages in states like California. In addition, the working population began to age, and combined with business consolidations and reductions in force, an increasing number of age discrimination claims were brought under the Age Discrimination in Employment Act (ADEA) and some state laws, which were decided by unpredictable juries. As a result, employment discrimination lawsuits increased, as did the risks and costs for employers. Indeed, "employment litigation has grown at a rate many times greater than litigation in general. Twenty times more employment discrimination cases were filed in 1990 than in 1970, almost one thousand percent greater than the increase in all other types of civil litigation combined." Brian K. Van Engen, *Note: Post-Gilmer Developments in Mandatory Arbitration: The Expansion of Mandatory Arbitration for Statutory Claims and the Congressional Effort to Reverse the Trend*, 21 IOWA J. CORP. L. 391, 392 (1996) (citation omitted). Then, in 1991, Congress amended Title VII of the Civil Rights Act of 1964 to provide employees claiming discrimination on such grounds as sex, race, national origin, and religion rights to a jury trial and to emotional distress and punitive damages.

[75]Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23, 55 FEP Cases 1116 (1991), *aff'g* 895 F.2d 195, 52 FEP Cases 26 (4th Cir. 1990).

[76]*Id.* at 26.

arbitration.[77] The Court rejected Mr. Gilmer's argument that compulsory arbitration agreements would be inconsistent with the statutory framework and purposes of the ADEA.[78] Specifically, Mr. Gilmer argued that the ADEA is designed to, among other things, "further important social policies" and arbitration fails to satisfy those goals by focusing on specific disputes between the parties involved.[79] The Court rejected that argument, noting first that judicial *and* arbitral forums "can further broader social purposes," and second, other statutes, such as RICO and antitrust, are "designed to advance important public policies, but … claims under those statutes are appropriate for arbitration."[80] Ultimately, the Court held that nothing in the ADEA indicates that Congress intended to preclude the use of the arbitral forum for these claims.[81]

Mr. Gilmer raised a host of challenges to the adequacy of the arbitral forum, including that the arbitration panels would be biased and that discovery is more limited in arbitration than in federal courts. The Court dismissed such generalized attacks on arbitration as "out of step" with the Court's current strong endorsement of federal statutes favoring arbitration.[82] Mr. Gilmer also argued there is often unequal bargaining power between employers and employees, resulting in employers' effectively imposing compulsory arbitration of statutory claims requirements in hiring agreements, but the Court determined that this was not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context because parties to an arbitration agreement have legal recourse to challenge the adequacy of the parties' bargain by arguing, for example, the "agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation *of any contract.*'"[83]

The Court distinguished, but did not expressly overrule, its 1974 opinion in *Gardner-Denver* (and its progeny),[84] based on two

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[77] *Id.*
[78] *Id.*
[79] *Id.* at 29.
[80] *Id.*
[81] *Id.* at 26.
[82] *Id.* at 30.
[83] *Id.* at 33 (citation omitted).
[84] *See* Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 24 WH Cases 1284 (1974), *rev'g* 615 F.2d 1194, 24 WH Cases 545 (8th Cir. 1980) and McDonald v. West Branch, 466 U.S. 284, 115 LRRM 3646 (1984), *rev'g* 709 F.2d 1505, 115 LRRM 3712 (6th Cir. 1983).

factors: first, the *Gardner-Denver* line of cases involved whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims, as opposed to the facts of *Gilmer,* which dealt with the enforceability of an agreement to arbitrate statutory claims in the first instance. The Court noted that the employees in the *Gardner-Denver* line of cases "had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, [thus] the arbitration in those cases understandably was held not to preclude subsequent statutory actions."[85] Second, the plaintiff in *Gilmer* was a non-union employee who was not party to a CBA, whereas the arbitrations in the *Gardner-Denver* line of cases was in the context of CBAs, raising "[a]n important concern … [regarding] the tension between collective representation and individual statutory rights, a concern not applicable to the present case."[86]

After the Court's ruling in *Gilmer,* many employers started to routinely include mandatory arbitration language in employment contracts.[87] Federal and state courts increasingly dealt with disputes concerning whether agreements mandating arbitration of employment discrimination claims were enforceable, and quite often found that they were. The Supreme Court took up the question of whether *unions* can waive their members' right to bring

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[85] *Gilmer,* 500 U.S. at 36.

[86] *Id.*

[87] Employers began to appreciate the benefits of arbitration—lower costs, speedier, and somewhat less risky and more predictable than trials by jury. Statistics regarding discrimination suits, in the immediate aftermath of *Gilmer,* illustrate why rational employers would be interested in finding forums other than courts for the litigation of employment-related discrimination claims. For example, "[i]n 1996, over 23,000 discrimination suits were filed in the federal courts [20% of total cases in federal and state courts] … [b]etween 1990 and 1994, federal court filings in employment-related civil rights suits increased ninety-three percent, from roughly 8,700 cases in 1990 to nearly 16,000 in 1994. The average time for resolution of federal cases is eight months, but in 1994 over nine percent of active cases had been pending for over three years [noting that only 8% reached trial]." John W.R. Murray, *Note: The Uncertain Legacy of Gilmer: Mandatory Arbitration of Federal Employment Discrimination Claims,* 26 FORDHAM URB. L.J. 281, 296 (1998). The costs and delays attendant to litigation of employment discrimination claims in judicial forums were problematic for employees as well as for employers: "many blue-collar and non-managerial claimants are unable to secure counsel, who are often reluctant to enter into a contingent fee arrangement with an employee whose potential recovery does not justify the substantial time and expense called for in discovery-intensive discrimination cases." *Id.* Citing the Dunlop Commission on the Future of Worker-Management Relations' Report in 1994, "the costs and time involved in enforcing public employment rights through the court system are increasingly denying a broader slice of American workers meaningful access to employment law protection" and "plaintiffs tend to be white-collar, managerial employees rather than lower-level workers." *Id.* at 296–97 (citing COMMISSION OF THE FUTURE OF LABOR-MANAGEMENT RELATIONS, U.S. DEP'T OF LABOR AND U.S. DEP'T OF COMMERCE, REPORT & RECOMMENDATIONS: EXECUTIVE SUMMARY 25–26 (1994)).

statutory discrimination claims in a judicial forum in 1998, in *Wright v. Universal Maritime Serv. Corp.*[88] In *Wright,* a longshoreman filed suit, alleging that stevedore companies discriminated against him in violation of the Americans with Disabilities Act of 1990 (ADA) when they refused to employ him following his settlement of a claim for permanent disability benefits for job-related injuries.[89] Mr. Wright was subject to a CBA that contained a "general arbitration clause," that covered "all matters affecting wages, hours, and other terms and conditions of employment . . . ."[90] Further, Clause 17 of the CBA stated: "It is the intention and purpose of all parties hereto that no provision or part of this Agreement shall be violative of any Federal or State Law."[91]

At issue was "whether a general arbitration clause in a [CBA] requires an employee to use the arbitration procedure for an alleged violation of the [ADA]."[92] The Court in *Wright* held that, at a minimum, any waiver of rights to adjudicate statutory claims must be "clear and unmistakable."[93] The general arbitration clause of the CBA did not mandate arbitration for the alleged violation of the ADA.[94] The Court noted that the CBA provision "is very general [only] providing for arbitration of 'matters under dispute'—which could be understood to mean matters in dispute under the contract."[95] The Court acknowledged the "tension" between the two lines of cases—*Gardner-Denver* and *Gilmer*—noting that in *Gardner-Denver,* the Court held that "an employee's rights under Title VII are not susceptible of prospective waiver," and in *Gilmer,* the Court "held that the right to a federal judicial forum for an ADEA *could* be waived."[96] The parties in *Wright* requested that the Court reconcile these two lines of cases as they apply to union-negotiated CBAs.[97] The Court acknowledged that there is support in the text of *Gilmer* for the conclusion that "federal forum rights cannot be waived in union-negotiated CBAs even if they can be waived in individually executed contracts."[98] However,

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[88] Wright v. Universal Maritime Serv. Corp. 525 U.S. 70, 80, 8 AD Cases 1429 (1998), *rev'g* 112 F.3d 702, 157 LRRM 2640 (4th Cir. 1997).
[89] *Id.*
[90] *Id.* at 73.
[91] *Id.*
[92] *Id.* at 72.
[93] *Id.* at 80.
[94] *Id.*
[95] *Id.*
[96] *Id.* at 76–77 (citations omitted, emphasis added).
[97] *Id.* at 77.
[98] *Id.*

since the waiver in *Wright* did not meet the "clear and unmistakable" threshold, the Court did not need to decide whether such a clear and unmistakable union-negotiated waiver would ever be enforceable.[99]

The Supreme Court's Decision in *14 Penn Plaza v. Pyett*

In *Pyett,* the U.S. Supreme Court reached "the question left unresolved in *Wright*."[100] The Court considered the effect of a bargaining agreement clause that the parties to the litigation fully understood to be a clear and unmistakable waiver of the right to litigate statutory discrimination claims in a judicial forum.[101] Prior to the Court's decision in *Pyett*, all of the circuit courts, other than the Fourth Circuit, were of the view that "an individual may prospectively waive his own statutory right to a judicial forum, but his union may not prospectively waive that right for him."[102] The *Pyett* Court sided with the Fourth Circuit.

In a substantial and important ruling, the Court held that arbitration was a suitable vehicle for the vindication of the substantive rights protected in anti-discrimination laws. The Court explained that "[t]he decision to resolve ADEA claims by way of arbitration instead of litigation does not waive [the] statutory right to be free from workplace discrimination; it waives only the right to seek relief from a court in the first instance."[103] Indeed, the Court noted that "[a]n arbitrator's capacity to resolve complex questions of fact and law extends with equal force to discrimination claims brought under the 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 .... At bottom, objections centered on the nature of arbitration do not offer a credible basis for

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[99] *Id.*

[100] 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273, 105 FEP Cases 1441 (2009), *rev'g* 498 F.3d 88, 104 FEP Cases 807 (2d Cir. 2007).

[101] The *Pyett* plaintiffs—four employees covered by that bargaining agreement—did not contend that the particular CBA at issue did not "clearly and unmistakably" require them to arbitrate their ADEA claims at the district court or court of appeals. In fact, they "acknowledged on appeal that the CBA provision requiring arbitration of their federal anti-discrimination statutory claims 'is sufficiently explicit' in precluding their federal lawsuit." *Pyett,* 556 U.S. at 272–73 (citation omitted).

[102] *Pyett,* 556 U.S. at 281 (citation omitted).

[103] *Id.* at 265.

discrediting the choice of that forum to resolve statutory discrimination claims."[104]

However, the Court also affirmed earlier holdings that the waiver of a judicial forum cannot be enforced if it has the effect of waiving the substantive rights contained in the statute.[105] In *Gilmer,* the Court had insisted that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[106] Accordingly, the Court in *Pyett* made clear that "a substantive waiver of federally protected civil rights will not be upheld."[107]

The individual plaintiffs at issue in *Pyett* were longstanding employees in a commercial office building who were reassigned from positions as night watchmen to less desirable positions as night porters and light duty cleaners, allegedly due to their age.[108] They brought suit against the employer and building owners under the ADEA, New York State Human Rights Law (NYSHRL), and the New York City Human Rights Law (NYCHRL).[109] The defendants, commercial building owners/managers, filed a motion to compel arbitration, asserting that the CBA required plaintiffs to arbitrate such claims.[110] The plaintiffs argued that, if the CBA were construed to require arbitration, it would effect a substantive waiver of their statutory rights because the union had declined to take their statutory discrimination claims to arbitration.[111] The Court did not decide that issue. While the Court held that a CBA provision that "clearly and unmistakably" required union members to arbitrate ADEA claims was enforceable as a matter of federal law, it remanded the case to allow the lower court to resolve whether the CBA allowed the union, acting as a gatekeeper of the arbitration process, to prevent the individual employees from "effectively vindicating" their rights in the arbitral forum.[112]

The dissenters in *Pyett* noted that the Majority ignored the broader holding of *Gardner-Denver,* which was that federal forum

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[104] *Id.* at 269.
[105] *Id.* at 258.
[106] *Gilmer,* 500 U.S. at 26 (citation omitted).
[107] *Pyett,* 556 U.S. at 273.
[108] *Id.* at 247–48, 252–55.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.* at 273–74.

rights cannot be waived in union-negotiated contracts.[113] According to Justice Souter, the fact that the agreement in *Gardner-Denver* did not explicitly mention statutory claims was only one of many reasons for its holding.[114] But, the dissenters noted that although the Majority's Opinion may be flawed in its reasoning and approach, its impact may be quite narrow because it did not address whether a waiver of judicial forum is enforceable "when the union controls access to and presentation of employees' claims in arbitration."[115] As such, the Court's holding would have little practical effect because unions typically *do* control access to the arbitration forum created in a CBA, and, at least with respect to those claims the union chooses not to arbitrate, the employee would have to be granted access to a judicial forum to avoid having the employee's substantive claim altogether extinguished.

Lower Courts' Interpretations of *14 Penn Plaza v. Pyett*

Following *Pyett,* the lower courts have devolved several principles concerning whether an individual whose terms of employment were covered by a bargaining agreement that expressly waives the right to proceed on statutory discrimination claims in a judicial forum may, nevertheless, do so.

The lower courts have looked first to whether the language in the CBA was sufficient to waive the right to proceed on the statutory claim in a judicial forum. The waiver must be both "explicitly stated" and "clear and unmistakable." The "clear and unmistakable" standard established in *Wright* was restated in *Pyett* (although not expressly decided by the Supreme Court on the facts of *Pyett,* as both parties conceded that the waiver language of the CBA was indeed "clear and unmistakable"), and the lower courts generally apply a rigorous test in deciding whether the bargaining agreement expressly limits litigation of statutory discrimination claims to the contract's arbitration forum. A number of lower courts have declined to find a waiver where the bargaining agreement's definition of what is arbitrable was broadly stated and the contract

[113] *Id.* at 274.
[114] *Id.*
[115] *Id.* at 285.

included a general no-discrimination clause but did not specifically reference statutory discrimination provisions.[116]

On the other hand, a few courts have held that a CBA that generally prohibits discrimination and provides for the arbitration of such claims *does* provide a "sufficiently clear and unmistakable waiver."[117]

In other instances, courts have found a waiver where the contract language did not name specific statutes, but did include references that were sufficiently descriptive of statutory claims that it was clear the parties intended statutory discrimination claims to be included.[118]

Where the courts have determined that the contract explicitly provides for arbitration of statutory discrimination claims, and provides that those claims may only be litigated in the parties' grievance and arbitration procedure, courts have made two further inquiries before barring litigation in the judicial forum: (1) whether the plaintiff sought to have his or her claim arbi-

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[116] *See, e.g.,* Evans v. Wayne Cnty., No. 2:10-CV-11275, 2011 U.S. Dist. LEXIS 130341, at *4–5, 191 LRRM 3313 (E.D. Mich. Nov. 10, 2011) (distinguishing *Pyett, inter alia,* on the ground that, in *Pyett,* the contract clause expressly named the discrimination statutes for which a violation could be the subject of a grievance); Shipkevich v. Staten Island Univ. Hosp., No. 08-CV-1008 (FB) (JMA), 2009 U.S. Dist. LEXIS 51011, at *2 (E.D.N.Y. June 16, 2009) (noting that the CBA provision did not mention specific statutes and any such disputes "may be referred" to arbitration); St. Aubin v. Unilever HPC NA, No. 09 C 1894, 2009 U.S. Dist. LEXIS 55626, at *4 (N.D. Ill. June 26, 2009) (CBA had separate antidiscrimination and arbitration provisions and the arbitration provision did not reference the antidiscrimination provision); Pulkkinen v. Fairpoint Commcn's, Inc., No. 09-cv-99-P-H, 2010 U.S. Dist. LEXIS 23917, at *15 (D. Me. Feb. 23, 2010) (no language that clearly refers to statutory claims, only that an "employee-adverse arbitration decision is simply meant to result in a final employment decision"); Manuele v. City of Springfield, 718 F. Supp. 2d 939, 16 WH Cases 375 (C.D. Ill. 2010); Barnes v. Harsthorn, No. 09-2299, 2010 WL 3540919 (C.D. Ill. July 15, 2010); Alderman v. 21 Club, Inc., 733 F. Supp. 2d 461 (S.D.N.Y. 2010).

[117] *See* Cardine v. Holten Meat, Inc., No. 10-cv-309-MJR-DGW, 2010 U.S. Dist. LEXIS 127889, at *1 (S.D. Ill. Dec. 3, 2010) (holding that a CBA that included a no-discrimination provision passed the "clear and unmistakable" waiver standard; the provision stated only that the "Employer and the Union agree not to discriminate against any employee for reasons of sex, race, religion, age, national origin, handicap [or] union activity. This Section is subject to the grievance and arbitration provision."); and Jensen v. Calumet Carton Co., No .11 C 2785, 2011 U.S. Dist. LEXIS 123170, at *3 (N.D. Ill. Oct. 25, 2010) (noting that "[a]lthough the CBA does not specifically reference Title VII or violations of federal law, Jansen has not cited any controlling Seventh Circuit precedent since *14 Penn Plaza LLC* that requires such specific details in order to satisfy the standard in that case").

[118] *See, e.g.,* Thompson v. Air Transp. Int'l LLC, 664 F.3d 723, 726–27, 18 WH Cases 872 (8th Cir. 2011), *aff'g* No. 4:10CV02007 JLH, 2011 U.S. Dist. LEXIS 10063 (W.D. Ark. Jan. 25, 2011) (holding that arbitration clause, which required "claims of discrimination arising within the employment relationship between the Company and the Crewmembers, whether such claims are made under the collective bargaining agreement or in state or federal court and alleged to be violations of state or federal law… are to be addressed, resolved and finalized" under the grievance procedure can serve to "waive the judicial forum as an avenue for bringing federal statutory claims and state anti-discrimination claims as part of a mandatory arbitration agreement").

trated; and (2) whether the union declined to take the matter to arbitration.

With respect to the first inquiry, the lower courts have dismissed claims where the bargaining agreement provided for a waiver of the right to litigate discrimination claims in a judicial forum and the plaintiff never sought to have the union bring the claim to the contractual arbitration forum. Dismissal in these circumstances represents the imposition of a kind of exhaustion requirement.[119]

The second inquiry has a more complicated history. Where the employee has sought to have the union bring the discrimination claim to arbitration and the union has declined to do so, employees have argued that barring litigation in a judicial forum can have the effect of altogether extinguishing the claim without any hearing at all. The *Pyett* majority acknowledged that barring litigation in the judicial forum could serve as a waiver of the substantive statutory right itself.

Shortly after *Pyett*, some courts—interpreting the same CBA language as in *Pyett*—allowed plaintiffs to pursue their claims in court if the union declined to pursue them in arbitration. In *Kravar v. Triangle Servs., Inc.,* the court held that the plaintiff could proceed with litigation of her claim in federal court simply because the union had declined to advance the claim to arbitration.[120] The Court noted that "[i]n view of the Supreme Court's analysis in *Pyett* and *Gilmer,* there is little question that if Ms. Kravar's union prevented her from arbitrating her disability discrimination claims, the CBA's arbitration provision may not be enforced as to her. The court finds that this in fact occurred."[121] Similarly, in *Borrero,*[122] the court dismissed without prejudice, permitting the plaintiff to seek

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[119] *See, e.g.,* Johnson v. Tishman Speyer Props., L.P., No. 09 Civ. 1959 (WHP), 2009 U.S. Dist. LEXIS 96464, at *4 (S.D.N.Y. Oct. 16, 2009) (holding that a union member had to seek to have the union bring his Title VII claim to arbitration, even though the union member alleged that the union would have treated his claim with hostility; this "hostility" alone did not prevent him from having his claim arbitrated. The Court noted that "an exception to the enforceability of a union-negotiated arbitration provision may exist where a union prevents a member from arbitrating discrimination claims.... However, because Johnson concedes that he declined to pursue his grievance, this Court need not consider this exception"); *see also* Borrero v. Ruppert Hous. Co., No. 08-CV-5869 (HB), 2009 U.S. Dist. LEXIS 52174, at *2 (S.D.N.Y. June 19, 2009) (dismissing without prejudice to permit the plaintiff to seek to have the union bring the matter to arbitration and noting 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") (citation omitted).

[120] Kravar v. Triangle Servs., Inc., No. 1:06-CV-07858-RJH, 2009 U.S. Dist. LEXIS 42944 (S.D.N.Y. May 19, 2009).

[121] *Id.* at *3.

[122] 2009 U.S. Dist. LEXIS 52174, at *14.

to have the union invoke arbitration on the claim, but providing that the plaintiff could bring the matter back to court if the union prevented him from litigating the claim in that forum.[123]

RAB and 32BJ's Adoption of "No-Discrimination Protocol"

Neither the RAB nor the Union (the bargaining parties in *Pyett*) was a party to *Kravar, Borrero,* or *Morris*. A central question in those cases—whether the bargaining agreement provided that an individual employee must submit his or her claim to arbitration when the union has declined to pursue it to the regular contractual arbitration forum—is an issue that remains in dispute between the RAB and 32BJ. In each of these cases, the RAB and 32BJ were left in the very uncomfortable position of watching the courts interpret their bargaining agreement without the benefit of the evidence on bargaining history and context that only the union and the employer could provide.

Knowing that the courts might decide the central question in a way that at least one of the parties would find incorrect, the RAB and 32BJ agreed to *directly* arbitrate the issue. The case was brought to arbitration in February 2010, but, shortly before the hearing, the parties reached an agreement to take a different, beneficial, course. The parties adopted the No-Discrimination Protocol (reproduced in the Appendix at the end of this section) that would govern all statutory discrimination claims, including claims brought by individual employees if the union declined to pursue those claims.

In the Protocol, the RAB and the Union parties agreed to leave the central legal issue undecided, at least for the time being—whether the CBAs' no-discrimination and arbitration clauses require an individual employee to submit his or her statutory discrimination claim to some arbitration forum even when the union has declined to advance the claim to the regular contractual arbitration forum. The dispute between the RAB and 32BJ on that subject remains, and either party is permitted to invoke

[123] *Id.* at *2. *See also* Morris v. Temco Serv. Indus., No. 09 Civ. 6194 (WHP), 2010 U.S. Dist. LEXIS 84885, at *5 (S.D.N.Y. Aug. 12, 2010) (holding that "[a]lthough an agreement to arbitrate is enforceable against an employee who withdrew or otherwise decided not to pursue his grievance, the record shows that it was not Morris but the Union which chose to abandon her discrimination claims" thus the arbitration provision of the employee's CBA could not be enforced as against plaintiff).

arbitration of the issue at any time with 30 days' written notice to the other.

The Protocol established a mediation process and also provided for assistance to individual employees and employers seeking to arbitrate claims where mediation has failed in instances in which the Union declined to seek arbitration of the claim. The first step, the mediation process, is a mandatory step for all such claims. The Protocol established a panel of mediators selected by the RAB and 32BJ from which the parties may choose, and all costs of the mediation are borne equally by the RAB and 32BJ. The mediators are given robust plenary power to require production of evidence and position statements, as well as confer separately with each party in order to vigorously pursue settlement. A pre-mediation conference must be scheduled within 30 days of the mediator's appointment. At the conclusion of the mediation, the mediator may make a settlement proposal to the parties. The mediator also has authority to order sanctions if he or she believes one or both of the parties failed to comply with his or her directives in good faith. The parties' experience with the Protocol over the last two years is such that a great number of claims are resolved in mediation.

If mediation does not resolve the matter, the individual employee or employees, regardless of whether they are represented by counsel, may pursue their claims as they see fit in arbitration. The RAB and 32BJ prepared a list of employment discrimination trained and qualified arbitrators from the American Arbitration Association (AAA) to hear the claims, but the union will not otherwise participate in or pay for the arbitration. All terms of the arbitration, including financial compensation, are to be worked out between the litigating parties, with the RAB usually representing the employer.

After the initial period where the parties implemented the Protocol as a "pilot program," the parties recognized its success and incorporated its terms into their master agreements at the end of 2011.

Responses to the "Protocol"

A number of courts and government agencies have deferred to the process outlined by the parties in the Protocol. A few months after the parties agreed to the Protocol, the U.S. District Court in the Southern District of New York, in *Duraku v. Tishman Speyer*

Properties,[124] stayed an individual's claim pending arbitration, noting that arbitration should ensue even if the union declined to bring the claim.

In other cases post-Protocol, Courts in the Southern District have similarly held that the parties' arbitration provision did *not* constitute a prospective waiver of plaintiffs' statutory rights since plaintiffs were entitled to bring the grievances to arbitration without union support.[125]

The New York City Commission on Human Rights has consistently deferred hearings on claims brought before it by employees working under the parties' CBAs until resolution of the matter through the Protocol.

The Protocol has received scholarly acclaim, as well. For instance, Professor Michael Z. Green, Texas Wesleyan University, in an article published in 2012, noted that the agreement between the RAB and Local 32BJ "provide[d] fairer arbitration procedures for its diverse membership regarding the selection of arbitrators to hear these statutory discrimination claims … to diversify the panel of arbitrators to better reflect the Union's membership, to develop procedures appropriate for such cases."[126] Professor Green also noted that "SEIU Local 32BJ should be applauded for offering its members with race discrimination complaints an opportunity not usually provided in the court system—a forum where their complaints can be heard by a diverse decision maker while being provided legal representation and a much better chance of a favorable resolution … the interests of employees in vindicating their race discrimination claims can converge with their union's interest in fairly representing all their members' workplace concerns and their employer's interest in having a productive mechanism to resolve race discrimination complaints."[127]

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[124]Duraku v. Tishman Speyer Properties, 714 F. Supp. 2d 470 (S.D.N.Y. 2010).

[125]*See, e.g.,* Gildea v. Building Mgmt., No. 10 CIV. 3347 (DAB), 2011 U.S. Dist. LEXIS 93662 (S.D.N.Y. Aug. 16, 2011); Garcia v. Newmark Knight Frank & 641 Owner, LLC, No. 09 Cv. 4599 (BSJ), 2010 U.S. Dist. LEXIS 142619 (S.D.N.Y. July 28, 2010); Veliz v. Collins Bldg. Servs., Inc., 10 Civ. 00615 (RJH), 2011 U.S. Dist. LEXIS 109351, at *13–14 (S.D.N.Y. Sept. 26, 2011) (the court held that "Veliz's claims against [the employer] are dismissed without prejudice because if the CBA operates to preclude Veliz's attempt, if any, to resolve his statutory claims through the procedures set forth therein, the CBA will be unenforceable and Veliz will have the right to re-file his claim in federal court.").

[126]Michael Z. Green, *Reading Ricci and Pyett to Provide Racial Justice Through Union Arbitration*, 87 IND. L.J. 367, 403 (2012).

[127]*Id.*

Examples of the "Protocol" in Action

Overall, since the Protocol's enactment, 29 individuals have brought discrimination claims. Of those 29, all but one have proceeded to mediation and 7 have settled (with an additional case that may be settled shortly). Approximately 16 cases have proceeded to arbitration during this time period with others to follow. The following anecdotes illustrate how productive the Protocol is as a mechanism for dispute resolution.

An example of the Protocol in action occurred in a matter involving Zija Cukovic, who was terminated on February 25, 2008.[128] Mr. Cukovic filed a grievance with 32BJ alleging his termination was without just cause due to the employer's alleged discrimination on the basis of national origin, age, and disability. 32BJ declined to take the matter to arbitration. Mr. Cukovic filed a charge with the National Labor Relations Board alleging that 32BJ violated its duty of fair representation, which was denied. On November 3, 2008, Mr. Cukovic filed a complaint with the New York State Division of Human Rights, which did not find probable cause that the employer discriminated against Mr. Cukovic for his national origin or medical disability. The Equal Employment Opportunity Commission (EEOC) issued a right-to-sue letter, and Mr. Cukovic filed a complaint in the U.S. District Court, Southern District of New York, alleging discrimination due to national origin and age. The District Court stayed the discrimination claim pending the outcome of the procedures under the Protocol.[129] Unable to resolve the claim in mediation, Mr. Cukovic brought the matter before Arbitrator Mona Glazer, and the claims were dismissed as lacking merit.[130]

While the RAB and 32BJ do not agree on the central legal issue that gave rise to the establishment of the Protocol, they agree that implementation of the Protocol has been successful because it frequently leads to resolutions without costly litigation. In particular, the Protocol's mediation is a forum where individual plaintiffs have a chance to tell their stories to an interested neutral party—often, the opportunity to be heard is something the individual plaintiff greatly values. Also, the very fact that the RAB and 32BJ have declined to finally decide the reserved question is useful to

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[128] Cukovic v. Tecmo Serv. Indus., Inc., No. 09 Civ. 6233 (AKH), 2010 U.S. Dist. LEXIS 77717, at *1–2 (S.D.N.Y. July 30, 2010).

[129] *Id.* at *4.

[130] *In re* Cukovic and Tecmo Servs. Indus., Inc. (2012) (Glazer, Arb.).

the mediation effort—neither party knows for certain whether the case will be litigated in a judicial forum or in arbitration, and to the extent that this is an issue of significance to the parties, the very uncertainty about the outcome should provide a further incentive to settle the merits in mediation. It should be noted that many parties, if mediation fails, are well-satisfied with arbitration as the forum to resolve their disputes. However, the RAB and 32BJ expect that a great number of these claims will be resolved in mediation, and in fact the parties' experience has been consistent with that expectation.

While the Protocol, by its terms, does not settle the issue of where an employee desiring to pursue a discrimination claim that the Union has declined to take to arbitration is to go, the RAB and the Union recognized that some of these claims will be litigated in some forum (and not settled in mediation), and that the litigation may raise legal and/or procedural issues that are of concern to the RAB and the Union. For example, neither collective bargaining party will look favorably on the prospect that overlapping claims might be litigated simultaneously in each tribunal (e.g., the union's claim that an employee was discharged "without just cause" would be litigated in the union-employer arbitration forum while the individual employee's claim that he was discharged for discriminatory reasons—a claim that the union had declined to pursue—would be litigated in another).[131] Additional problems

[131]Similar problems are also presented when the Union asserts in the contractual arbitration forum both the claim that the employee was discharged without just cause, and the claim that the employee was discharged for discriminatory reasons. The first of these is a claim that is commonly advanced in union—employer arbitration under a collective bargaining agreement, and arbitrators have traditionally held that, in those cases, the employer carries the burden of proof of just cause for discharge and would be called upon to present its case first. *See* ELKOURI & ELKOURI: HOW ARBITRATION WORKS 949 (Volz & Goggins, eds., 6th ed. 2003). On the other hand, the employee bringing a claim that he/she has been discriminated against in violation of a state or federal statute would generally carry the burden of proof (and generally the burden of production) on that claim and would be called upon to present his/her claim first. The parties to arbitrations in which both claims are litigated frequently fence over these competing obligations: Who goes first? How does the arbitrator sort out the varying burdens? If the arbitrator reaches the decision that the employee was disciplined without just cause, must he/she decide the discrimination claim?

In addition, the RAB and the Union have agreed that the procedural devices available to a discrimination plaintiff in a judicial forum, including discovery, will be available to the Union advancing the claim that an employee was discharged without cause. Certainly, resort to discovery often results in the final disposition of the claim being delayed. While the time it takes to reach a final resolution of the discrimination claim in arbitration is likely to be shorter than the time it would take to reach a final disposition of the claim in court, it is likely to be considerably longer than the time it takes to dispose of the traditional just cause claim. Unions face the prospect that an aggrieved member

are presented if the individual member demands relief that is inconsistent with the bargaining agreement, or if the member advances a construction of the bargaining agreement that either the Union or the RAB believes is wrong. Of course, if the individual is litigating these issues in a judicial forum and the Union or the RAB believe that their own interests may be affected in the litigation, each will have no way to protect those interests other than to seek intervention. With respect to litigation in an arbitral forum, the RAB and the Union included in the Protocol certain provisions intended to protect, to the extent feasible, against the harm of decisions that impact adversely on their interests. The Protocol includes language to the effect (1) that an arbitrator's decision on an individual claim will have no precedential effect with respect to the construction of the underlying contract, and (2) that the arbitrator hearing claims under the Protocol shall not be empowered to require alteration of any existing agreement between the RAB and the Union.

To date, however, these vexing issues have surfaced only rarely and have not posed insurmountable problems for the various parties. Indeed, the bulk of claims brought under the Protocol are "garden-variety," where the underlying facts and circumstances of the alleged adverse employment action overlap as the basis for both the breach of the CBA and the discrimination claims. In light of the nature of the building service industry employment relationship, the parties anticipate that "garden-variety" claims—quite suitable for resolution under the Protocol—will continue to dominate.

Conclusion

The Supreme Court's ruling in *14 Penn Plaza v. Pyett* affirmed that the parties in a collective bargaining relationship may agree to pre-dispute mandatory arbitration for statutory discrimination claims. The legal issue of whether courts, under these circumstances, would bar employees from bringing suit if the union declined to pursue the claim in arbitration has been set aside by the RAB and 32BJ. Instead, the parties adopted a two-

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with a valid claim is out of work a longer period of time when the discrimination claim is added to the arbitration mix; employers face the prospect of a much larger back pay award in that event.

step process providing for mandatory mediation and a potential arbitration forum in the event mediation fails. The Protocol is an effective dispute resolution mechanism for the more than 60,000 commercial real estate workers in New York City subject to the parties' CBAs. The parties' experience with the Protocol has been resoundingly positive. The Protocol has worked well for New York's commercial real estate industry, and it may work for other sophisticated employer/union relationships with similarly strong grievance arbitration infrastructures and dedication to employees' civil rights.

Appendix: No-Discrimination Protocol

Protocol[132]

The parties to this Agreement, the Union and RAB, believe that it is in the best interests of all involved—employees/members, employers, the Union, the RAB and the public interest—to promptly, fairly and efficiently resolve claims of workplace discrimination, as covered above (collectively "claims"). Such claims are very often intertwined with contractual disputes under this Agreement. The RAB, on behalf of its members, maintains that it is committed to refrain from unlawful discrimination. The Union maintains it will pursue its policy of evaluating such claims and bringing those claims to arbitration where appropriate. To this end, the parties, notwithstanding the continuing disagreement between them described below, establish the following system of mediation and arbitration applicable to all such claims, whenever they arise. The Union and RAB want those covered by this Agreement and any individual attorneys representing them to be aware of this protocol.

As background, following the decision of the Supreme Court in *14 Penn Plaza,* 556 U.S. 247 (2009), the RAB and the Union have had a dispute about the meaning of the "no discrimination clause" and the grievance and arbitration clauses in the collective bargaining agreements (CBAs) entered into between these parties. The Union contends that the CBAs do not make provision for arbitration of any claims that the Union does not choose to take to arbitration, including statutory discrimination claims, and there-

[132]The parties intend this provision to apply to all CBAs between them superseding the Agreement & Protocol entered into February 17, 2010.

fore, individual employees are not barred from pursuing their discrimination claims in court where the Union has declined to pursue them in arbitration. The RAB contends that the CBAs provide for arbitration of all individual claims, even where the Union has declined to bring such claims to arbitration.

The parties agree that, should either the Union or the RAB deem it appropriate or necessary to do so, that party may bring to arbitration the question so reserved. The parties intend that the reserved question may only be resolved in an arbitration between them and not in any form of judicial proceeding. The outcome of the reserved question hinges on collective bargaining language and bargaining history, which are subjects properly suited for arbitration. Such arbitration may be commenced on 30 days' written notice to the other party. The arbitrator for such arbitration shall be Roberta Golick, unless she is unable to serve, in which case the parties shall agree upon an arbitrator, and failing agreement shall submit the case to arbitration before the American Arbitration Association, in New York City.

Notwithstanding the above disagreement, in 2010, the parties initiated the pilot program provided for in this section (Agreement and Protocol, February 17, 2010, the "No-Discrimination Protocol") as an alternative to arbitrating their disagreement. The parties have now agreed to include the No-Discrimination Protocol as part of this Agreement, as set forth below. The Union and the RAB agree that the provisions of this Protocol do not resolve the reserved question. Neither the inclusion of this Protocol in the CBAs nor the terms of the Protocol shall be understood to advance either party's contention as to the meaning of the CBAs with regard to the reserved question, and neither party will make any representation to the contrary.

Mediation

A. Whenever it is claimed that an employer has violated the no discrimination clause (including claims based in statute), whether such claim is made by the Union or by an individual employee, notice shall be provided of such claim to the Union, the RAB and the affected employee(s), and the matter shall be submitted to mediation, absent prior resolution through informal means. A notice of claim shall be filed within the applicable statutory statute of limitations, provided that if an employee has timely filed such

claim in a forum provided for by statute, the claim will not be considered time-barred.

B. Promptly following receipt of the notice, the administrator of the Office of Contract Arbitrator (OCA), 370 Seventh Avenue, New York, NY, shall appoint a Mediator from the Mediation Panel described below. All mediators on the panel shall be attorneys with appropriate training and experience in the conduct of mediations and significant knowledge of employment discrimination statutes. The Mediation Panel shall be a distinct panel from the Contract Arbitrator Panel. A person listed on the Mediation Panel will be removed when either the Union or the RAB gives notice to the other party that such person's name shall be removed. A person may be added to the Mediation Panel list upon mutual agreement of the Union and the RAB. The Union and RAB mutually commit to appointing mediators with appropriate skill and experience, as they view mediation as the important step in which many claims will be resolved.

C. OCA shall appoint a Mediator from the Mediation Panel. Such appointments shall be made by a random selection (e.g., "spinning the wheel") of available panel members.

D. Within 30 days of being appointed, the Mediator shall notify the parties of his/her appointment and schedule a pre-mediation conference. (For this purpose, "Parties" refers to the person or entity asserting the claim and the respondent/defendant.) At the conference, the Parties shall discuss such matters as they deem relevant to the mediation process, including discovery. The Mediator shall have the authority, after consulting with the Parties, to (1) schedule dates for the exchange of information and position statements, and (2) schedule a date for mediation. Any disputes shall be decided by the Mediator. In the event the Mediator concludes that there has not been good faith compliance with his/her directive, including directives as to the holding of conferences and the conduct of discovery, the Mediator may, after notice and an opportunity to be heard, order appropriate sanctions.

E. The entire mediation process is a compromise negotiation for the purposes of the Federal Rules of Evidence and the New York rules of evidence.

F. At the mediation, each party shall be entitled to present witnesses and/or documentary evidence. The Mediator shall be entitled to meet separately with each Party for the purpose of exploring settlement.
G. At the conclusion of the mediation, the Mediator shall be entitled to make a proposal to the Parties of a settlement agreement. Neither Party shall be required to adopt the proposal.
H. Mediation shall be completed before the claim is litigated on the merits. However, if the Union alleges the claim of a violation of the no discrimination clause, the Union may proceed directly to arbitration and bypass this Mediation procedure if it so chooses.
I. The fees of the Mediator shall be split equally between the Union and the RAB. The Union and RAB shall provide language interpreters at their jointly shared cost.

Arbitration

A. The undertakings described here with respect to arbitration apply to those circumstances in which the Union has declined to take an individual employee's employment discrimination claim under the no discrimination clause of the CBA (including statutory claims) to arbitration and the employee is desirous of litigating the claim. The forum described here will be available to employers and employees who are represented by counsel and to those who are unrepresented by counsel.
B. The Union and the RAB have elicited from the American Arbitration Association a list of arbitrators who (1) are attorneys, and (2) are qualified to decide employment discrimination cases. In the event that an employee and RAB member employer seek arbitration of a discrimination claim in the circumstances described in paragraph A, the list of arbitrators provided by the AAA shall be made available to the individual employee and the RAB member employer by the administrator of OCA. The manner by which selection is made by the RAB member employer and the individual employee and the extent to which each shall bear responsibility for the costs of the arbitrator shall be decided between them. A person may be added to or removed from the Statutory Arbitration Panel list upon

mutual agreement of the Union and the RAB. Any such arbitrations shall be conducted pursuant to the AAA National Rules for Employment Disputes, except those rules pertaining to administration by the AAA and the payment of fees, and any disputes about the manner of proceeding shall be decided by the arbitrator selected.

C. The hearings in any arbitration provided for in the preceding paragraph may be held at the OCA, however, it is understood that this forum is not a forum provided for in the CBA.

D. The Union will not be a party to the arbitration described above and the arbitrator shall not have authority to award relief that would require amendment of the CBA or other agreement(s) between the Union and the RAB or conflict with any provision of any CBAs or such other agreement(s). Any mediation and/or arbitration outcome shall have no precedential value with respect to the interpretation of the CBAs or other agreement(s) between the Union and the RAB.

III. PANEL DISCUSSION

Moderator: **Sharon Henderson Ellis,** National Academy of Arbitrators, Brookline, MA

Panelists: **Randi Hammer Abramsky,** National Academy of Arbitrators, Toronto, ON

Jacquelin F. Drucker, National Academy of Arbitrators, New York, NY

Larry Engelstein, Executive Vice President, SEIU Local 32BJ, New York, NY

Michel G. Picher, National Academy of Arbitrators, Ottawa, ON

Paul Salvatore, Proskauer Rose, New York, NY

Sharon Henderson Ellis: Welcome. I'm Sharon Henderson Ellis, Co-Chair of the Academy's Employment Issues Committee.

The scripted title for today is, "Would you like a Piece of Pyett with that?" A less tasty but more accurate title would be, "Arbitrating Statutory Claims Arising in the Workplace."