CHAPTER 8

# INVITED PAPER: MANDATORY ARBITRATION OF STATUTORY ISSUES: *AUSTIN, WRIGHT,* AND THE FUTURE

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In 1991, in *Gilmer v. Interstate/Johnson Lane Corp.*,[1] the U.S. Supreme Court determined that employer promulgated agreements to arbitrate the employment disputes of *individual* employees would be enforced in cases that contained statutory issues. In 1996, the Fourth Circuit extended this concept to employees covered by *collectively bargained* arbitration agreements in *Austin v. Owens-Brockway Glass Container*.[2] In 1997, the Supreme Court granted certiorari in *Wright v. Universal Maritime Service*[3]—a Fourth Circuit case that followed *Austin*.

The issue that underlies the *Austin/Wright* cases is addressed here. Can an employee's statutory rights be made the subject of a collectively bargained arbitration agreement? This is an important issue because it affects (1) employees concerned with fair treatment and social justice, (2) employers attempting to protect the rights of management, (3) the ability of labor unions to represent their constituents, and (4) the institution of arbitration. The decisions of the Fourth Circuit in *Austin* and *Wright* are important, but it is believed that they are wrong. Those decisions will be examined, as well as the reactions of other courts, the older

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[1]500 U.S. 20, 55 FEP Cases 1116 (1991).

[2]78 F.3d 875, 151 LRRM 2673 (4th Cir.), *cert. denied,* 519 U.S. 980, 153 LRRM 2960 (1996).

[3]1997 U.S. App. LEXIS 19299 (4th Cir. 1997), *cert. granted,* 118 S.Ct. 1162, 66 USLW 3575 (1998).

questions that these cases answer, and the newer questions that they raise.

## Background: *Gardner-Denver* and *Gilmer*

The first time that the Supreme Court focused on a case involving the relationship between statutory rights and a collectively bargained arbitration agreement was in its 1974 *Alexander v. Gardner-Denver Co*.[4] decision. In this case, the contractual issue concerned whether the company had just cause to discharge an employee for producing too many defective parts. The statutory issue arose from the fact that the grievant was an African-American, protected by Title VII of the 1964 Civil Rights Act.[5]

Harrell Alexander, Sr., filed a grievance under the nondiscrimination clause of the collective bargaining agreement and a racial discrimination complaint with the Equal Employment Opportunity Commission (EEOC). After losing in both venues, he sued in U.S. district court, claiming that his termination was based upon a racially discriminatory employment practice. Following earlier arbitration law,[6] the district court[7] and the Tenth Circuit[8] held that Alexander was bound by the arbitration decision. But the Supreme Court reversed,[9] deciding that an employee's right to a trial de novo is not precluded by prior submission of a claim to arbitration. Statutory or constitutional rights are to be enforced in the courts, contractual rights through arbitration, and the grievant has the right to both. The presence of an arbitration clause in a collective bargaining agreement does not preclude grievants from taking their case to the federal courts if they are dissatisfied with the decision.

The Court also held that the weight given to the arbitrator's decision in a statutory matter would be determined on a case-by-case basis. Where an arbitrator's decision "gives full consideration to an employee's Title VII rights, a court may properly accord it great weight."[10] This is especially true when the issue is one of fact

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[4]415 U.S. 36, 7 FEP Cases 81 (1974).
[5]42 U.S.C. §§2000e et seq.
[6]The *Steelworkers Trilogy: Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).
[7]*Alexander v. Gardner-Denver Co.*, 346 F. Supp. 1012, 4 FEP Cases 1205 (D. Colo. 1971).
[8]*Alexander v. Gardner-Denver Co.*, 466 F.2d 1209, 4 FEP Cases 1210 (10th Cir. 1972).
[9]*Alexander v. Gardner-Denver Co.*, *supra* note 4.
[10]*Id.* at 60 n.21.

that has been addressed by the parties and decided by the arbitrator on the basis of an adequate record.

Despite challenges, the *Gardner-Denver* framework persisted until the Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*[11] The underlying question in *Gilmer* was whether an employee could have a statutory issue heard in court after he had signed an agreement to arbitrate employment claims in advance. *Gilmer* differed from *Gardner-Denver* in three ways: (1) *Gardner-Denver* answered a question about *preclusion* while *Gilmer* determined whether an agreement to arbitrate would be *enforced,* (2) *Gardner-Denver* dealt with a collectively bargained arbitration agreement while *Gilmer* focused on an individual preemployment agreement to arbitrate, and (3) *Gilmer* was decided under the Federal Arbitration Act (FAA)[12] rather than the National Labor Relations Act (NLRA).[13]

Robert Gilmer was a highly compensated manager of a brokerage firm. When he was hired, he was required to sign a paper signifying his agreement to arbitrate any dispute "arising out of the employment" or its termination under the rules of the New York Stock Exchange (NYSE).[14] After 6 years of service, he was dismissed from his position at the age of 62. When he sued, his employer moved to compel arbitration, and Mr. Gilmer filed a countersuit under the Age Discrimination in Employment Act (ADEA).[15] The federal district court, following *Gardner-Denver,* denied the employer's motion but the Fourth Circuit[16] reversed. Then, in a 7-to-2 vote, the U.S. Supreme Court[17] affirmed the appellate court's decision.

The Court held that Mr. Gilmer was bound by his agreement to arbitrate unless he could show an inherent conflict between arbitration and the ADEA. The Court dismissed any reliance on the *Gardner-Denver* line of cases principally because in those cases (1) *Gardner-Denver* was decided on questions of preclusion rather than enforcement, and (2) *Gilmer* involved an individual agreement to arbitrate rather than one that arose from a collective bargaining agreement. Unions may sometime sacrifice an individual's claim in order to protect the interests of the entire

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[11]*Supra* note 1.
[12]9 U.S.C. §§1 et seq.
[13]29 U.S.C. §§151 et seq.
[14]Known as a U-4 form.
[15]29 U.S.C. §§621 et seq. (1967).
[16]*Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 52 FEP Cases 26 (4th Cir. 1990).
[17]*Gilmer v. Interstate/Johnson Lane Corp., supra* note 1.

bargaining unit. This tension was not present in the Gilmer situation.

The Court concluded that the goals and policies of the ADEA could be achieved through private suits, EEOC actions, or arbitration. It disavowed the mistrust of arbitration that it had expressed in *Gardner-Denver*, saying that the Court is " 'well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.'"[18]

## Today's Controversy: *Austin, Wright,* and *Pryner*

*Austin v. Owens-Brockway Glass Container* [19] began when Linda Austin suffered an on-the-job injury in June 1992. Her collective bargaining agreement contained a grievance procedure that terminated in binding arbitration, provided that claims of gender and disability discrimination were subject to the grievance procedure, and specified that all contractual disputes were subject to arbitration.

Two months after the injury, her physician released her for light-duty work. Because none was available, the company placed her on medical leave. During her leave, the company eliminated her job and terminated her services. She filed suit in federal district court, alleging that Owens-Brockway violated the Americans with Disability Act (ADA)[20] and Title VII by (1) refusing to assign her to light-duty work, and (2) terminating her, while (3) reassigning the only other employee in her job classification (a male) to another position. The company argued that her claims were subject to the arbitration clause of the bargaining agreement and it asked the court to dismiss for lack of subject matter jurisdiction.

Basing its decision upon *Gilmer*, the district court[21] granted summary judgment in favor of the company. Ms. Austin appealed the decision to the Fourth Circuit—the same court that decided *Gilmer*. After reviewing *Gilmer* and a half-dozen cases under that ruling,[22] the court extended *Gilmer* to collective bargaining agree-

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[18]*Id.* at 34 n.5 (quoting *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626–27 (1985)).

[19]*Supra* note 2.

[20]42 U.S.C. §§12101 et seq. (1994).

[21]*Austin v. Owens-Brockway Glass Container*, 844 F. Supp. 1103, 145 LRRM 2445 (W.D. Va. 1994).

[22]*Austin v. Owens-Brockway Glass Container, supra* note 2, at 882–83. The court noted that every case decided in the courts of appeal that dealt with a conflict between an individual's

ments. The majority concluded that *Gilmer* recognized that the arbitration of a statutory claim did not imply the surrender of any statutory rights. It simply meant that rights were to be processed through another forum.

Judge Widener, expressing the majority viewpoint, said that once a party has made an agreement to arbitrate, the party should be held to it, unless Congress itself has precluded a waiver of judicial remedies for the statutory rights at issue.[23] Whether "the dispute arises under a contract of employment growing out of securities registration application, a simple employment contract, or a collective bargaining agreement,"[24] a voluntary agreement to arbitrate should be enforced. The employee must "exhaust" the arbitration process before seeking judicial relief.

According to the court, both the ADA and Title VII permitted the arbitration of statutory claims in voluntary agreements because both laws encouraged the use of alternative dispute resolution. The plaintiff had the burden of showing that Congress intended to preclude arbitration of statutory claims. Ms. Austin failed to do so and, thus, had to resolve her statutory claim through binding arbitration. If a union can bargain away rights protected by the NLRA, such as the right to strike, it certainly can bargain for the right to arbitrate.

Judge Hall dissented.[25] After noting that the majority concluded that the only difference between *Gilmer* and this case arose from the collective bargaining contract, he said that the "majority fails to recognize, however, that the only difference makes all the difference."[26] A labor union may not prospectively waive a member's individual right to choose a judicial forum for a statutory claim. Following *Gardner-Denver*, Judge Hall concluded that "the 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 action under Title VII."[27]

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agreement to arbitrate and the civil rights laws has "enforced anticipatory agreements to arbitrate claims involving statutory rights." *Id.* at 882 (footnote omitted).

[23] *Id.* at 881.
[24] *Id.* at 885.
[25] *Id.* at 886.
[26] *Id.*
[27] *Id.* at 887.

In *Wright v. Universal Maritime Service Corp.*,[28] the Fourth Circuit revisited *Austin*. Caesar Wright was a longshoreman who had been injured at work. He filed suit for workers' compensation benefits and settled the claim for $250,000. Three years after his injury he appeared at the union's hiring hall, armed with a supportive physician's note, saying that he was ready to return to work. The union referred him to four different stevedoring companies, but once the prospective employers learned of his settlement, they advised the union that he would not be accepted for employment.

The arbitration clause in the collective bargaining agreement covered all matters affecting terms and conditions of employment. However, the contract did not contain a nondiscrimination provision that named the affected statute. Following his union's advice, Mr. Wright filed suit against the employer under the ADA without filing a grievance. The court reaffirmed *Austin*.

The court explained that collective bargaining agreements to arbitrate employment disputes are binding upon individual employees even when the dispute involves a statutory issue. The court was not deterred by the absence of a nondiscrimination clause in the contract. It determined that: "An employer need not provide a laundry list of potential disputes in order for them to be covered by an arbitration clause."[29]

The Seventh Circuit's decision in *Pryner v. Tractor Supply Co.*[30] disagrees with *Austin*. Chief Judge Posner's opinion in that case is frequently cited today. The statutory issues included racial discrimination under Title VII, the ADA, and the ADEA. The two grievants in this case were employed under two different collective bargaining agreements that contained clauses prohibiting discrimination for race, age, and/or disability. Neither grievant completed the grievance/arbitration procedure and both filed discrimination suits asking for reinstatement, damages, and attorney fees. The defendants moved to stay the suits pending arbitration, and appealed when the district court denied their motions.[31]

The *Pryner* decision revolved around three considerations. The first was the protection of the individual's statutory rights. Judge Posner said that the "honey tongued assurances" of the employers'

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[28]1977 U.S. App. LEXIS 19299 (4th Cir. 1997), *cert. granted,* 118 S.Ct. 1162, 66 USLW 3575 (1998).

[29]*Id.*

[30]109 F.3d 354, 154 LRRM 2806 (7th Cir. 1997).

[31]*Pryner v. Tractor Supply Co.*, 927 F. Supp. 1140, 154 LRRM 2845 (S.D. Ind. 1996).

counsel did not persuade him that the plaintiffs' statutory rights could be fully protected by the arbitration clause in the bargaining agreement. The plaintiffs' rights under that agreement "are not as extensive as their statutory rights."[32]

A second theme focused on the tension between individual and collective rights. The court expressed concern about the control of the arbitration procedures by the union and its ability to decide to prosecute or not prosecute a grievance.

> The collective bargaining agreement is the symbol and reality of a majoritarian conception of workers' rights. . . . The statutory rights at issue in these two cases are rights given to members of minority groups because of concern about the mistreatment . . . of minorities by majorities. . . . The employers' position delivers the enforcement of the rights of these minorities into the hands of the majority, and we do not think that this result is consistent with the policy of these statutes or justified by the abstract desirability of allowing unions and employers to cut their own deals.[33]

Finally, the decision distinguished between prospective and retrospective agreements to arbitrate. "All we are holding is that the union cannot consent *for* the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery. . . ."[34] If a worker agrees that a dispute be arbitrated, and the bargaining agreement does not preclude side agreements, there is nothing to prevent a binding arbitration.

## Developments in the Circuit Courts

The cases described below are presented chronologically. *Tran* was decided before *Austin*; *Varner* was decided between *Austin* and *Pryner*; and the rest, after *Pryner*.

### *The Second Circuit*

*Tran v. Tran*.[35] This 1995 case dealt with a union member, covered by an arbitration clause in a collective agreement, who

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[32]109 F.3d at 361–62, noting the plaintiffs' possible surrender of the right to a jury trial.
[33]*Id.* at 362–63.
[34]*Id.* at 363 (emphasis in original). The Seventh Circuit extended the thinking of *Varner v. National Super Mkts.*, 94 F.3d 1209, 71 FEP Cases 1367 (8th Cir. 1996), *cert. denied*, 519 U.S. 1110, 73 FEP Cases 1355 (1997), in *Johnson v. Bodine Elec. Co.*, 142 F.3d 363, 157 LRRM 2897 (7th Cir. 1998), holding that "a CBA cannot be the source of the consent to arbitrate an individual worker's Title VII claims." *Id.* at 367.
[35]54 F.3d 115, 149 LRRM 2350 (2d Cir. 1995).

sued for wages under the Fair Labor Standards Act (FLSA).[36] The district court[37] dismissed the claim because he failed to seek arbitration. The issue for the Second Circuit was whether Tran was required to arbitrate the FLSA claims before seeking judicial relief, and the court held that he was not: "There is nothing in *Gilmer* which appears to throw anything but favorable light upon the continuing authority of [the *Gardner-Denver* line]."[38]

*The Eighth Circuit*

*Varner v. National Super Markets*.[39] This case involves sexual harassment charges brought under Title VII. The plaintiff was a teen-aged, female produce worker in a food store who claimed harassment by her male supervisor. She did not participate in the grievance procedure but filed her complaint with the EEOC and the cognate state agency. She received a $30,000 award in federal district court and the company appealed. The Eighth Circuit concluded that the pursuit of a claim through arbitration under a collective bargaining agreement does not preclude a statutorily based civil suit. The "'federal courts have been assigned plenary powers to secure compliance with Title VII.'"[40]

*The Tenth Circuit*

*Harrison v. Eddy Potash, Inc*.[41] This complex case involved several claims by an employee about her supervisor's unwelcome sexual behavior. One of her claims involved Title VII of the Civil Rights Act. Although the district court supported many of her charges and awarded her $142,500 in compensatory and punitive damages, it found the company innocent of the Title VII violation. Ms. Harrison appealed this ruling, and the employer cross-filed, contending that the court had no jurisdiction because she failed to comply with the contractual grievance procedure.

For a number of reasons associated with Title VII law, the Tenth Circuit affirmed the ruling of the district court on Ms. Harrison's substantive claims. On the matter that is of relevance to this paper,

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[36]29 U.S.C. §215 (1938).
[37]847 F. Supp. 306, 146 LRRM 2248 (S.D.N.Y. 1994) *and* 860 F. Supp. 91, 144 LRRM 2149 (S.D.N.Y. 1993).
[38]54 F.3d at 117.
[39]*Supra* note 34.
[40]*Id.* at 1213 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45, 7 FEP Cases 81 (1974)).
[41]112 F.3d 1437 (10th Cir. 1997).

the court also concluded that a person's right to process a Title VII claim in court cannot be waived by a union as part of a collective bargaining agreement. "Nothing in *Gilmer* suggests that the Court abandoned its concern about the inherent conflicts between group goals and individual rights that exist in the give-and-take of the collective bargaining process." The Fourth Circuit "stands alone" in rejecting *Gardner-Denver* in cases that involve the mixture of statutory rights and arbitration agreements found in labor contracts.[42] [**Editor's Note:** The Supreme Court later vacated this decision but on grounds that had nothing to do with the Tenth Circuit's statements about the plaintiff's rights to take her claims to court. The order to vacate was based upon the Supreme Court's decision in *Farragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), which focused on the employer's liability for sexually harassing behavior by members of its supervisory force.]

*The Eleventh Circuit*

*Brisentine v. Stone & Webster Engineering Corp.*[43] Clifford Brisentine, an electrician who fell off a scaffold, was covered by a collective bargaining agreement that contained an arbitration clause and a nondiscrimination provision that extended to disabilities. The company discharged him after he said that he would be unable to perform his job fully until he completed a period of work hardening. When he told his union about his termination, the union representative advised him to file his complaint through statutory procedures.

The district court dismissed the case because of Brisentine's failure to arbitrate, but the Eleventh Circuit reversed for these reasons: (1) tension between the interests of a union and those of an employee regarding the prosecution of an individual's statutory rights, (2) uncertainty surrounding the application of the FAA to collective bargaining agreements (the court noted that the circuits differed on this issue and the Supreme Court had not spoken), and (3) the arbitrator only had the authority to interpret the contract—not a statutory question.[44] The court closed by saying that it disagreed "with the result and reasoning of the Fourth Circuit" (in

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[42]*Id.* at 1453.
[43]117 F.3d 519, 155 LRRM 2858 (11th Cir. 1997).
[44]*Id.* One can argue that the arbitrator would not exceed the bounds of contractual authority by interpreting a nondiscrimination clause in a collective bargaining agreement.

*Austin*) and that it found Judge Hall's dissent more persuasive than the majority opinion.[45]

*The Third Circuit*

*Martin v. Dana*.[46] In July 1997, a divided panel of the Third Circuit held that an employee must arbitrate statutory discrimination claims pursuant to an arbitration provision in the collective bargaining agreement. Mr. Martin's claim involved charges of racial discrimination and the panel concluded that he had to arbitrate his dispute, rather than litigate, because the collective bargaining agreement permitted him to initiate the grievance/arbitration procedure on his own, independent of union control.[47]

Three weeks later a majority of the active judges on the Third Circuit vacated the decision and voted for rehearing *en banc*. The *en banc* court, in turn, referred the case to the original panel to determine whether the bargaining agreement did, in fact, permit Martin to initiate arbitration on his own. When the panel found this time that he could not, it reversed itself and concluded that the agreement did not bar his suit.[48]

*The Sixth Circuit*

*Penny v. United Parcel Service*.[49] This 1997 case involved James R. Penny, a vehicle operator who was injured in a lifting incident in 1991 and missed a great deal of time after his return to work. After the company failed to grant his request for a truck with power steering and the "lightest route possible," he brought suit under the reasonable accommodation provisions of the ADA. The district court found no merit in Mr. Penny's ADA claims and the Sixth Circuit affirmed. The court noted that "Austin has not inspired many followers," and that the circuit courts that have disagreed with *Austin* "display more fidelity to the Supreme Court's holdings in *Gardner-Denver* and *Gilmer* than does *Austin*."[50] *Gilmer* does not

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[45]*Id.* at 526.
[46]*Martin v. Dana Corp.*, 114 F.3d 421 (3d Cir. 1997).
[47]155 LRRM 2762.
[48]The order to vacate is found at 124 F.3d 590. The decision explaining the reasons for that decision is found at 156 LRRM 3137. The contract clause that affected the decisions stated that: "Any and all claims regarding equal employment opportunity provided for under this agreement or under any federal, state, or local fair employment practice law shall be exclusively addressed by an individual employee or the union under the grievance and arbitration procedure of the agreement." *Id.* at 3138.
[49]128 F.3d 408, 156 LRRM 2618 (6th Cir. 1997).
[50]*Id.* at 413.

alter *Gardner-Denver*'s holding that a labor union cannot waive prospectively an individual's statutory rights.

*The Ninth Circuit*

*Duffield v. Robertson Stephens & Co.*[51] Unlike almost all of the cases discussed here, *Duffield* does not involve a collectively bargained arbitration clause. This case revisits the individual employment agreement (i.e., the U-4 form) that was at the core of the seminal *Gilmer* decision. *Duffield* will be reexamined below, but the court's comments about *Austin* are relevant to this discussion. The court found *Austin* to be "troubling" insofar as it:

> [F]latly rejected *Gardner-Denver*, which in our view circuit courts are not free to do. . . . The Fourth Circuit also ignored the reasoning of eight Justices on the subject of statutory analysis, relied on a separate opinion by Justice Scalia, and partially on the basis of that reasoning decided to disregard the legislative history of the 1991 Civil Rights Act. . . . We respectfully conclude that the Fourth Circuit simply misconstrued the controlling law.[52]

## The Situation in the District Courts

Tables 1 and 2 provide summary information on district court decisions concerning employee grievances that involve collectively bargained arbitration clauses and statutory law. The cases in Table 1 are 1997 cases decided after *Austin* but before *Pryner*. They have been introduced as a proxy for the older decisions on the issue. Table 2 deals with the cases decided after the *Pryner* decision, reflecting the current situation in the circuit courts outside the Fourth Circuit.

Table 1 shows that the district courts split in the 1997 cases decided before *Pryner*. Three courts echoed the thinking in *Austin*, two did not, and one compromised. The *Krahel* [53] court questioned the ability of a union to waive an employee's Title VII rights prospectively through collective bargaining, but it is listed as a compromise because the court also ordered the plaintiff to exhaust

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[51] 144 F.3d 1182, 76 FEP Cases 1450 (9th Cir.), *cert. denied,* 119 S. Ct. 445, 78 FEP Cases 1056 (1998).

[52] *Id.* at 1192 (citations and footnote omitted).

[53] *Krahel v. Owens-Brockway Glass Container*, 971 F. Supp. 440, 155 LRRM 2921 (D. Or. 1997).

**Table 1.** 1997 District Court Decisions on *Austin v. Owens-Brockway Glass Container:*[1] Pre-*Pryner v. Tractor Supply Co.*[2] Decisions

| *Circuit* | *Case* | *Followed* Austin | *Statutory Issues and Significant Comments* |
|---|---|---|---|
| 2 | *Almonte v. Coca-Cola Bottling Co. of N.Y.*, 959 F. Supp. 569, 155 LRRM 2518 (D. Conn. 1997) | Y | Title VII:[3] Race discrimination. Individual statutory claims are excluded from grievance procedures unless the collective bargaining agreement provided otherwise. |
| 6 | *Gray v. Toshiba Am. Consumer Prods.*, 959 F. Supp. 805, 155 LRRM 2346 (M.D. Tenn. 1997) | N | Title VII:[3] Sex discrimination. Federal statutory claims are independent of contractual claims under the collective bargaining agreement. |
| 7 | *Smith v. CPC Foodservice*, 955 F. Supp. 84 (N.D. Ill. 1997) | Y | Family and Medical Leave Act.[4] Followed the *Austin* concept without citing the case. |
| 9 | *Albertson's v. Food & Commercial Workers*, 1997 U.S. Dist. LEXIS 4554 (1997) | N | Fair Labor Standards Act.[5] "Public policy is for the courts to decide." |
| 9 | *Krahel v. Owens-Brockway Glass Container*, 971 F. Supp. 440, 454, 155 LRRM 2921 (D. Or. 1997) | C | Title VII:[3] Sex discrimination and harassment. Finds the *Austin* analysis unpersuasive but ordered the plaintiff to exhaust the grievance procedure because "she still has resort to the courts." |
| 11 | *Peterson v. B.M.I. Refractories*, 154 LRRM 2835, 2842, (N.D. Ala. 1997), *rev'd and remanded*, 132 F.3d 1405, 157 LRRM 2193 (11th Cir. 1998) | Y | Title VII:[3] Race discrimination. "[I]f a union bargains away the right to proceed in a judicial forum, the plaintiff has not lost the ability to protect his individual interests." |

*Note.* Y = Yes, N = No, C = Compromise
[1]78 F.3d 875, 151 LRRM 2673 (4th Cir.), *cert. denied*, 519 U.S. 980, 153 LRRM 2960 (1996).
[2]109 F.3d 354, 154 LRRM 2806 (7th Cir. 1997).
[3]Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq.
[4]26 U.S.C. §2601 (1994).
[5]26 U.S.C. §§215 et seq.

**Table 2.** 1997 and 1998 District Court Decisions on *Austin v. Owens-Brockway Glass Container:*[1] Post-*Pryner v. Tractor Supply Co.*[2] Decisions

| *Circuit* | *Case* | *Followed* Austin | *Statutory Issues and Significant Comments* |
|---|---|---|---|
| 1 | *LaChance v. Northeast Publ'g*, 965 F. Supp. 177, 189, 155 LRRM 2425 (D. Mass. 1997) (footnote omitted) | N | ADA:[3] Disability. "[T]he Fourth Circuit erred in failing to address the Supreme Court's recognition of the continuing viability of *Gardner-Denver*." |
| 2 | *Kirkendall v. United Parcel Serv.*, 964 F. Supp. 106, 108–09 n.2 (W.D.N.Y. 1997) | N | ADA:[3] Disability. "[T]his Court rejects the Fourth Circuit's extension of *Gilmer* as an improper interpretation of the law." |
| 2 | *Chopra v. Display Producers*, 980 F. Supp. 714, 718, 157 LRRM 2360 (S.D.N.Y. 1997) | N | Title VII:[4] Sexual harassment. "This court agrees with the *Austin* dissent." |
| 3 | *Nieves v. Individualized Shirts*, 961 F. Supp. 782, 790, 156 LRRM 2175 (D.N.J. 1997) | N | ADA:[3] Disability. The *Gilmer* Court "recognized the established difference between an individual employment contract and a collective bargaining agreement. . . ." |
| 3 | *Glickstein v. Neshaminy Sch. Dist.*, 156 LRRM 2706, 2711 (E.D. Pa. 1997) (quoting *Austin*, at 886) | N | Title VII:[4] Sexual harassment and discrimination. "This court agrees with Judge Hall's dissent in *Austin*: 'The only difference makes all the difference.'" |
| 3 | *Testerman v. Chrysler Corp.*, 1997 U.S. Dist. LEXIS 21392 (D. Del. 1997) | N | ADA[3] and state statute: The plaintiff's right to bring suit "remains whether or not the discrimination claim has actually been submitted to arbitration." |
| 5 | *Coleman v. Houston Lighting & Power Co.*, 984 F. Supp. 576 (S.D. Tex. 1997) | N | Title VII:[4] Racial discrimination. Statutory employment claims are independent of a collective bargaining agreement's grievance and arbitration procedures. |

*continues*

**Table 2.**—*continued*

| *Circuit* | *Case* | *Followed* Austin | *Statutory Issues and Significant Comments* |
|---|---|---|---|
| 5 | *Davis v. Houston Lighting & Power Co.*, 990 F. Supp. 515, 517, 158 LRRM 2317 (S.D. Tex. 1998) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51, 7 FEP Cases 81 (1974)) | N | Title VII[4] and Equal Pay Act:[5] The rights conferred by statute "'can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose [of] Title VII.'" |
| 9 | *Araiza v. National Steel Shipbuilding Co.*, 973 F. Supp. 963, 969 (S.D. Cal. 1997) | N | ADEA[6] and ADA[3]: Age and disability. An employee operating under an individual agreement can control the claim and be represented by counsel. "Union employees compelled to arbitrate would not have the same access to redress." |
| 11 | *Breech v. Alabama Power Co.*, 962 F. Supp. 1447, 1455 n.6 (S.D. Ala. 1997), *aff'd*, 140 F.3d 1043 (11th Cir. 1998) | N | Title VII:[4] Religious discrimination. "This court believes that *Austin* was erroneously decided." |

*Note.* N = No
[1]78 F.3d 875, 151 LRRM 2673 (4th Cir.), *cert. denied*, 519 U.S. 980, 153 LRRM 2960 (1996).
[2]109 F.3d 354, 154 LRRM 2806 (7th Cir. 1997).
[3]Americans with Disabilities Act (1990), 42 U.S.C. §§12101 et seq. (1994).
[4]Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq.
[5]29 U.S.C. §215.
[6]Age Discrimination in Employment Act (1967), 29 U.S.C. §§621 et seq.

contractual remedies. Table 2 shows that all of the district courts rejected *Austin* in the 10 cases decided after *Pryner*, often with stinging comments. The issues included Title VII, the ADA, the ADEA, and the Equal Pay Act.

## Old Questions Answered and New Questions Raised

In its 1991 *Gilmer*[54] decision, the Supreme Court left many questions unanswered. It failed to give precise instructions on (1) the scope of the Court's decision, (2) the application of the FAA, (3) the standard of judicial review, and (4) remedies available to arbitrators.[55] One of these questions has been the focus here: whether the *Gilmer* holding applies to collectively bargained contracts. A review has shown that virtually all of the lower courts have rejected the extension of *Gilmer* to collective bargaining. One of the old questions, at least for now, has been answered.

But in answering this question, other questions have emerged. One is the question that the Supreme Court will probably decide during the 1998–1999 term: has the Fourth Circuit decided the *Austin/Wright* cases correctly? The remaining questions focus on the role of arbitration in statutory disputes, the role of the arbitrator, and that of the courts.

## Is the Fourth Circuit Wrong?

### *A Limited Following*

The absence of followers suggests that *Austin* and *Wright* have been wrongly decided. Seven circuits have addressed mandatory arbitration of statutory disputes under collective bargaining agreements. None has followed *Austin* and many have dismissed it with scathing comments. Since the *Pryner* decision, district courts in six circuits have issued 10 decisions, and all were contrary to the *Austin* ruling (see Table 2).

Even the Fourth Circuit and its subordinate courts seem to have second thoughts. In 1997, the Fourth Circuit accepted an appeal in a case involving a union member covered by a collective bargaining agreement who had charged her employer with sexual harassment, sexual discrimination, and unlawful retaliation.[56] The contract provided for binding arbitration and prohibited sexual harassment and discrimination. The district court, following *Austin*, granted the defendant's motion to compel arbitration.

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[54]*Gilmer v. Interstate/Johnson Lane Corp.*, 500 US 20, 55 FEP Cases 1116 (1991).

[55]For discussion, *see* Gorman, *The* Gilmer *Decision and the Private Arbitration of Public Disputes*, 3 U. Ill. L. Rev. 635 (1995).

[56]*Brown v. Trans World Airlines*, 127 F.3d 337, 156 LRRM 2481 (4th Cir. 1997).

On appeal, the Fourth Circuit affirmed the general principles that it had articulated in *Austin*, but it concluded that the district court had misinterpreted *Austin* and had misapplied the bargaining agreement. This collective bargaining agreement limited the arbitrator's authority to disputes that grew "out of the interpretation or application of any of the terms *of this Agreement*."[57] Focusing on those last three words, the court concluded (1) that this agreement did not intend to submit any noncontractual or statutory dispute to arbitration, and (2) was significantly narrower than the language construed in *Gilmer* and *Austin*.[58]

In *Abendschein v. Montgomery County, Maryland*,[59] one of the district courts within the Fourth Circuit showed signs of discomfort with the *Austin* doctrine. The court refused to extend *Austin* to a case involving the FLSA. The court held that the Supreme Court had made it clear that congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation package. FLSA rights can neither be waived nor abridged by contract.

### *Why the Limited Following?*

*Austin*'s limited following seems to come from problems in the decision. First, *Austin* ignored the carefully drawn distinctions that the *Gilmer* court made between individual and collective agreements. The court said that: "Miss [Linda] Austin is a party to a voluntary agreement which has explicitly agreed to the arbitration of her statutory complaints. That should be enforced."[60] The *Austin* majority ignored the fact that the Supreme Court reached its decision in *Gilmer* precisely because the issue concerned an *individual* agreement rather than a *collective* one.[61] Judge Hall's comment in the dissent, the "majority fails to recognize, however, that the only difference [i.e., individual v. collective agreement] makes all the difference,"[62] is the most quoted phrase in the decision.

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[57]*Id.* at 341 (emphasis in original).

[58]The language of the NYSE agreement required arbitration of "any dispute, claim, or controversy" arising out of employment. The *Austin* contract made specific reference to the ADA and specified that contractual disputes are subject to the grievance procedure.

[59]984 F. Supp. 356 (D. Md. 1997).

[60]*Austin v. Owens-Brockway Glass Container*, 78 F.3d 875, 882–83, n.2 885, 151 LRRM 2673 (4th Cir.), *cert. denied*, 519 U.S. 980, 153 LRRM 2960 (1996).

[61]Focusing on the tension between collective representation and statutory rights.

[62]78 F.3d at 886.

A second problem is that *Austin* treated the *Gilmer* decision as if it had supplanted *Gardner-Denver* rather than distinguished it. Ironically, the *Austin* decision has led to a string of cases in other circuits that have not only affirmed the vitality of *Gardner-Denver*, but have extended its holding. *Gardner-Denver* dealt only with whether an arbitration award precluded litigation, and answered that it did not. The *Austin* progeny extended *Gardner-Denver* thinking about court review into cases where the arbitration procedure had not been exhausted. The post-*Austin* courts now protect the individual's right to sue on a statutory issue even when the arbitration procedure in a collective bargaining agreement has been ignored.

Third, using the example of the right to strike, the *Austin* court correctly noted that unions may waive certain statutory rights. But the court ignored the distinction between the statutory right to strike, which affects the union and its *collective* ability to perform its role, and statutory rights that protect individuals from harm.[63] These are different rights with different purposes and different statutory foundations.

Fourth, *Austin* also concluded that individuals did not surrender any substantial rights when their claim was submitted to arbitration. This is plainly wrong. Quoting only one of the district courts that rejected this notion:

> In a judicial forum, plaintiff would have an absolute right to pursue her Title VII claims. She would not need the Union's blessings to pursue her claims, nor could her claims be involuntarily dismissed by the Union. Her cause would be decided by a jury or a federal judge, not a panel selected exclusively by the defendants. Plaintiff would be at liberty to retain counsel of her own choosing and to present her own case . . . [rather than being] represented during the grievance and arbitration procedure by the Union or by an attorney representing the Union.[64]

Finally, the court described Ms. Austin's agreement to arbitrate as voluntary. This is also wrong. The arbitration procedure and the antidiscrimination provisions were in place when she accepted the job. Under the union's grant of exclusive jurisdiction, the bargaining agreement establishes terms and conditions of employment for every member of the unit. Neither she nor her union could change that agreement for her.

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[63] *Id.* at 885, 887.
[64] *Supra* note 53, at 452.

### Are Any Prospective Agreements Enforceable?

Concentration here has been upon mandatory arbitration of statutory issues under collective bargaining agreements, ignoring individual agreements to arbitrate statutory issues. However, two recent cases lead into this area because of their potential impact on the arbitration of statutory disputes under collective bargaining agreements. The two cases focus on the involuntary nature of these agreements and abuses to the process.

In May 1998, the Ninth Circuit decided that the arbitration agreement required as a condition of employment by the NYSE and the National Association of Securities Dealers was invalid when applied to Title VII issues.[65] When Tongja Duffield was hired, she signed a standard agreement to arbitrate all employment disputes. It was the same agreement that Robert Gilmer had signed many years before (the U-4 form). In January 1995, Ms. Duffield sued in federal court, alleging sexual discrimination and harassment in violation of Title VII and related California statutes. As a threshold matter, she requested a declaratory judgment stating that employees in the securities industry cannot be compelled to arbitrate their employment disputes under the U-4. The district court rejected this request.

On appeal, the Ninth Circuit distinguished between three kinds of arbitration agreements: (1) "compulsory arbitration agreements," under which employers compel prospective employees as a condition of employment to waive their rights to litigate employment-related disputes in a judicial forum (this case); (2) agreements where employees waive those rights after a dispute has erupted; and (3) agreements signed after employees have been given a choice between arbitration and the courts for the resolution of employment-related disputes. After reviewing the leading cases and the legislative history, the court concluded that the stock exchange's compulsory arbitration agreement (as defined above) could not be enforced in Title VII actions. Congress did not intend to authorize compulsory arbitration of civil rights claims when it amended the Civil Rights Act in 1991.[66] The context, the language, and the history of the 1991 amendments "'make out a conclusive case' . . . that Congress intended to preclude compulsory arbitra-

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[65]*Duffield v. Robertson Stephens & Co.*, *supra* note 51.
[66]Pub. L. No. 102-166, 105 Stat. 1071 (1991).

tion of Title VII claims."[67] The U-4 was held to be unenforceable when applied to these claims.

Although the vast majority of company-sponsored arbitration programs are probably developed in a good-faith effort to find a fair, efficient way of resolving disputes with employees, some employers have apparently used their power to take an unfair advantage. A recent decision by the U.S. District Court for South Carolina in *Hooters of America v. Phillips*[68] shows that unfairness can destroy the enforceability of a company's arbitration program.

Hooters is a restaurant chain whose stock in trade is scantily clad, statuesque waitresses. The central character in this complex case is a former "Hooters girl," who complained of sexual harassment by Hooters managers and by the brother of the company's chief operating officer. She had signed a company-crafted agreement through which she surrendered the right to litigate employment claims in court. When she was discharged, she brought action in the federal district courts seeking damages and injunctive relief against the company under Title VII. Hooters responded by seeking enforcement of the arbitration agreement.

While the case has many tantalizing aspects, the important element concerns the fairness and suitability of the arbitration procedure. The company argued that Annette Phillips' signature signified knowing and voluntary consent. A meeting of the minds had occurred because the company's representatives had read the arbitration agreement to the employees, recommended that they consult an attorney with any questions, and gave them time to return the signed form. The court found these arguments deficient, and questioned their fundamental premise. The court said that: "There is serious doubt whether such waivers of substantive statutory rights in an arbitration agreement, even if knowing and voluntary, can ever be valid."[69]

The court also found that the arbitration agreement had unconscionably stripped Ms. Phillips of substantial rights to a judicial forum under Title VII when it:

- Limited the company's liability for back pay, front pay, and punitive damages, and required a showing of frivolity for an award of attorney fees;
- Allowed the company to control the list of arbitrators;

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[67]144 F.3d at 1199 (quoting *Thompson v. Thompson,* 484 U.S. 174, 187 (1988)).
[68]76 FEP Cases 1757 (S.D.S.C. 1998).
[69]*Id.* at 1778.

- Limited the plaintiff's discovery rights to 1 day;
- Required her to divulge the names of her witnesses in advance without imposing the same requirement on the company;
- Required sequestration of her witnesses but not those of the company; and
- Gave Hooters control over the record.[70]

The court concluded that Hooters had created a "sham arbitration, deliberately calculated to advantage [the company] in any proceeding in which claims are initiated against it."[71] One-sided arbitration procedures, that precluded one party from taking an appeal from an arbitration award, were unenforceable.

### Duffield, Hooters, *and Arbitration Under Collective Bargaining Agreements*

*Duffield* goes to the core of the *Gilmer* decision: Can individuals waive Title VII rights prospectively? What constitutes knowing and voluntary consent?[72] *Hooters* raises a red flag for those employers who would seek to take unfair advantage of employees through company-sponsored arbitration processes. Probably much more so than *Wright*,[73] these are cases that could stimulate a comprehensive review of *Gilmer* by the Supreme Court.

But these cases, along with the collective bargaining cases that have been discussed, also raise questions about the whole idea of arbitrating statutory disputes. What is the difference between signing a U-4 form as a condition of employment, or otherwise agreeing to waive statutory rights, and being forced to accept arbitration of statutory issues as a result of the provisions in a union contract? Do any of these situations constitute voluntary consent? And if the U-4 agreement and the Hooters program are unenforceable in relation to Title VII rights, does the same apply to the arbitration clause in a collective bargaining agreement? In many of the cases discussed earlier, the appellate courts allowed the individual to bypass the grievance / arbitration provisions in the collective agreement.[74] Do these cases signify that we are coming to a stage where the courts will permit an employee covered by a collective

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[70]*Id.* at 1780.
[71]*Id.* at 1784.
[72]The *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 154 LRRM 2806 (7th Cir. 1997), decision also dealt with this question and came to a similar conclusion, *supra* note 30.
[73]*Wright v. Universal Maritime Serv. Corp.*, 1977 U.S. App. LEXIS 19299 (4th Cir. 1997).
[74]*E.g., Tran v. Tran*, 54 F.3d 115, 149 LRRM 2350 (2d Cir. 1995).

bargaining agreement to ignore the contractual grievance procedure whenever a statutory issue is involved?

## It's a Contract, Stupid![75]

*The Role of the Arbitrator*

What is the arbitral role in a statutory case? The decisions that have been reviewed here have made it clear that the courts repeatedly and consistently assert that the interpretation of statutes is their domain. The cases suggest that arbitrators should enter this area of statutory interpretation warily. Although lock-step solutions to difficult problems are distrusted, the basic rule should be this: "It's a contract, stupid!" The law may provide a framework for the thinking, but the decisions should be based upon the contract, without relying on the law, except:

1. In cases that involve the National Labor Relations Act, the arbitrator should apply the *Spielberg* doctrine.[76] The emphasis in such cases would be on securing the parties' permission to permit the arbitrator to address both statutory and contractual issues, writing an award that shows that the statutory issue was addressed, and rendering a decision not repugnant to the statute.
2. In cases where the statute is explicitly cited or tracked or the contract instructs the arbitrator to apply the statute. This represents what is considered to be a sufficient requirement for employing the statute, construed in harmony with the contract whenever possible, in the resolution of the dispute.[77]
3. In cases where the statutory remedies are cited. This represents a necessary condition for assessing attorney fees, witness and other costs, and even punitive damages.

If a statutory issue meets one of these requirements, the arbitrator should take special pains to establish a record showing that the issue was discussed.[78] The arbitrator should consider insisting on a

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[75]This felicitous phrase has been taken from Summers, *The* Trilogy *and Its Offspring Revisited: It's a Contract, Stupid*, 71 Wash. Univ. L.Q. 1021 (1993).

[76]*Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955).

[77]The arbitrator's fundamental job is to interpret the contract. The presence of such a clause gives the arbitrator's decision a contractual as well as a statutory basis.

[78]As required in *Spielberg Mfg. Co.*, *supra* note 71, and suggested in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21, 7 FEP Cases 81 (1974).

stenographic record or briefs on the topic. The award itself should review the parties' arguments on the statutory topic, show that those arguments have been considered, and how the decision, while grounded in the contract, has addressed the underlying statutory issues.[79] The most difficult but safest solution would be for arbitrators to get all of the affected parties to sign a separate agreement empowering them to incorporate statutory considerations into the decision.[80]

Arbitrators should make it known in advance that they will apply the contractual clauses relating to the statute along with the other relevant contract clauses, using the normal rules of contract interpretation. Some of these rules would include construing clauses in ways that give meaning to both the contract and the law, and the primacy of the specific over the general. Thus, a specific seniority clause could prevail over a more general discrimination clause. In the *Austin* case, for example, the contract's layoff and recall provisions might take precedence over its ADEA or Title VII clauses.

## And Now to the Courts

### *Which Applies,* Gardner-Denver *or* Gilmer*? A Simple Solution*

With all of the controversy that has surrounded mandatory arbitration of statutory claims, the answer to the most basic question may very well have been obscured. The basic question that a court confronts is which case is to govern the decision, *Gardner-Denver*[81] or *Gilmer*.[82] "The multiplicity of issues and criteria for decision-making has produced a profusion and confusion of differing holdings and pronouncements."[83] There is a simple way to decide when and whether to enforce an arbitration agreement. The only question that need be asked is: "Who made the bargain?" If it is an individual agreement to arbitrate, made knowingly and voluntarily, with a suitable procedure, the *Gilmer* decision prevails. If the bargain was made by an employer and a

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[79]Hayford & Sinicropi, *The Labor Contract and External Law: Revisiting the Arbitrator's Scope of Authority,* 1993 J. Disp. Resol. 249 (1993).

[80]Thereby approaching the National Labor Relations Board deferral requirements, one of which is that the parties agree to be bound by the decision when a statutory issue is involved.

[81]*Alexander v. Gardner-Denver Co., supra* note 78.

[82]*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991).

[83]McEneaney, *Arbitration of Statutory Claims in a Union Setting: History, Controversy, and a Simple Solution*, 15 Hofstra Lab. & Employment L.J. 137, 169 (1997).

union in a collective bargaining agreement, *Gardner-Denver* is to be followed.[84]

*The Final Question: Court Review of Arbitration Awards in Statutory Cases*

Suppose a court orders a person to arbitrate a case that involves a statutory issue that has arisen under an individual employment agreement or a collective bargaining contract. Suppose, after doing so, the person think the arbitrator botched the job. Can he or she relitigate and, if so, what standard of review is to be employed? Should the review be restricted to such fundamental questions as whether the arbitrator was honest, disclosed pertinent information, etc.? Should it also focus on questions about whether the arbitrator exceeded authority or based the decision on the agreement? Should it be a review for statutory compliance only or should there be a trial de novo?

In the case of a collective bargaining agreement, *Gardner-Denver* provides the plaintiff with the right to de novo review. But will a case arising under the individual agreement get the same treatment? The unsettled nature of the review problem is reflected in two recent decisions of the circuit courts. Chief Judge Edwards in *Cole v. Burns International Security Services*[85] implies that court review of these awards "will always remain available to ensure that arbitrators properly interpret the dictates of public law . . .."[86] On the other hand, Chief Judge Posner said in *Pryner v. Tractor Supply Co.*[87] that if plaintiffs sought judicial review of their arbitration award, "the findings made by the arbitrators might be entitled to collateral estoppel effect in the resumed suits."[88]

As the cases that have been discussed here have shown, whether the arbitration agreement is individual or collective in nature, the courts have the right to review whenever a statutory issue is involved. The argument here, however, along with the District of Columbia Circuit, is that it should be a "focused review of arbitral legal determinations . . . to ensure compliance with public law."[89] The reason that the Supreme Court gave for reviewing arbitration awards in *Gardner-Denver* was the protection of statutory rights.

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[84]*Id.*
[85]105 F.3d 1465, 72 FEP Cases 1775 (D.C. Cir. 1997).
[86]*Id.* at 1469.
[87]*Supra* note 72.
[88]109 F.3d at 361.
[89]105 F.3d at 1487.

Furthermore, one of the reasons why the courts have begun to embrace alternative forms of dispute resolution comes from the unwieldy case backlog.[90] Are not both concerns satisfied with court review targeted on "compliance with public law"?

This narrow form of review would be much less time-consuming than the de novo form advocated in *Gardner-Denver*. Would it not balance the needs of the individual for justice, the needs of the courts for efficiency and speed, and the needs of the arbitration process for a reasonable degree of finality and deference? There would be (1) rigid enforcement of the agreement to arbitrate, that would (2) remove most challenges to the enforcement of arbitration agreements from the docket, with (3) a limited, focused review of the results for compliance with the law alone.

## Summary and Conclusions

The Fourth Circuit has said in *Austin*[91] and in *Wright*[92] that it would enforce an agreement to arbitrate found in a collective bargaining contract when the case contained statutory issues. In light of the pending Supreme Court review of that concept, the Fourth Circuit's approach, the reaction of other courts, whether the decision was right or wrong, the old questions that the recent case law has answered, and the new questions that those cases have raised have been examined.

Table 3 summarizes the material discussed here. None of the other circuit courts have followed the *Austin/Wright* decisions and neither have the recent decisions of federal district courts. The rule outside the Fourth Circuit is that when employee grievances under collective bargaining agreements contain statutory issues, they may be heard in the courts, even if the grievance procedure has not been exhausted.

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[90]When *Gilmer* was decided in 1991, there were 33,428 civil cases pending in the U.S. courts of appeal and 226,439 cases pending in the U.S. district courts. *Director of the Administration of the U.S. Courts Annual Report* (1992), 130.

[91]*Austin v. Owens-Brockway Glass Container*, 78 F.3d 875, 151 LRRM 2674 (4th Cir.), *cert. denied*, 519 U.S. 980, 153 LRRM 2960 (1996).

[92]*Wright v. Universal Maritime Serv. Corp.*, *supra* note 73.

**Table 3.** On the Status of Agreements to Arbitrate Statutory Issues in Individual and Collective Bargaining Agreements

| *The Question* | *The Supreme Court* | *Fourth Circuit* | *Other Circuits* |
|---|---|---|---|
| Enforcement of the agreement to arbitrate | Under *Gilmer*,[1] yes, for individual agreements. | Yes for individual and collective agreements. | Yes for individual, no for collective agreements. |
| Preclusion of appeals of arbitration awards to the courts | Under *Gardner-Denver*,[2] the individual is not precluded by an agreement to arbitrate in a collective bargaining agreement. In dicta, *Gilmer* implies that an arbitration award is not reviewable in an individual contract case.[3] | Implies that an arbitrator's award could have collateral estoppel effect. | Implies that an arbitrator's award could be relitigated, following *Gardner-Denver* principles. |
| Degree of deference to an arbitration award | Under *Gardner-Denver* the degree of deference must be determined by the court, considering the facts and circumstances of each case and the arbitrator's treatment of the statutory issue. *Gilmer* disavows the Court's previous mistrust of arbitration.[4] | Implies that an arbitration award would be enforced with very limited review. | Implies *Gardner-Denver* standards of review. |

[1]*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991).
[2]*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974).
[3]The Court said that: "An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action." 500 U.S. at 28.
[4]Under *Gilmer*, " '[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.'" 500 U.S. at 34 n.5 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626–27 (1985)).

[**Editor's Note:** On November 16, 1998, the Supreme Court vacated the decision of the Fourth Circuit in *Wright v. Universal Maritime Service Corp.* (LEXIS No. 96-889) and remanded the case for further proceedings consistent with its opinion. The Court, therefore, decided the case in the way that is argued in this paper, but the decision was made on the narrowest of grounds.

The Court based its decision on the wording of the contract's arbitration clause. The Court stated that any agreement to arbitrate must be clear and unmistakable if it is to waive an employee's right to process statutory claims in a federal court. The Court found no such clear and unmistakable waiver in the collective bargaining agreement, because the arbitration clause was very general and the contract contained no explicit incorporation of statutory antidiscrimination requirements. The Court also noted that this case brought into focus the tension between the *Gardner-Denver* line of cases and those associated with *Gilmer*. However, it also found it unnecessary to resolve questions about the validity of a union-negotiated waiver of an employee's statutory rights.

In sum, the Court decided the case without touching the underlying issue or answering many of the questions that have been raised.]