

MANDATORY LABOR ARBITRATION OF STATUTORY CLAIMS, AND THE FUTURE OF FAIR EMPLOYMENT:14 PENN PLAZA v. PYETT, 19 CORNELL JOURNAL OF LAW AND PUBLIC POLICY (Publication forthcoming, March 2010)

By: David L. Gregory* and Edward McNamara**

***The Dorothy Day Professor of Law, St. John's University School of Law. gregoryd@stjohns.edu; 718.990.6019. J.S.D., 1987, Yale Law School. St. John's University School of Law provided a faculty scholarship summer stipend. I thank all of my fellow labor and employment law professors who provided helpful comments and suggestions following my presentation on the *Pyett* decision at the Worklaw Conference of the Association of American Law Schools, Long Beach, California, June 11, 2009. I especially thank my colleague Mitchell Rubinstein for his astute critique of an earlier draft of this article.**

****J.D., 2009, St. John's University School of Law; A.B., 2004,
Harvard College.**

ABSTRACT

By its 5-4 sharply divided decision in *14 Penn Plaza v. Pyett*, 556 U.S. (April 1, 2009), the United States Supreme Court dramatically endorsed mandatory labor arbitration, rather than external litigation, to resolve labor union-represented employees' statutory claims of unlawful age-based employment discrimination. The Court summarily isolated and trivialized as jurisprudentially obsolete, but did not deem it necessary to formally overrule, 35 years of well-established precedent that had protected the employee's right to litigate de novo statutory claims of unlawful employment discrimination, without suffering any *res judicata* or collateral estoppel effects from a prior adverse arbitration decision. The Court substantially clarified, and perhaps simplified, what had become an increasingly complex and potentially inconsistent panorama of

decisions as to whether labor union-represented employees can be mandated to arbitrate, and thus be foreclosed from litigating de novo, statutory claims, most frequently and most classically, those alleging unlawful employment discrimination by the employer. By its controversial activist methodology, the political, ideological Court ran roughshod over *stare decisis* principles. A host of questions, ramifications, and unintended consequences could well transform the dynamics of arbitration well beyond the present contours of labor-union represented employment environments. This article will critically assess the salient foreseeable consequences and likely ramifications of the *Pyett* decision. On the eve of a half-century of Supreme Court enthusiasm for labor arbitration, grounded in the landmark *Steelworkers Trilogy* in 1960, the *Pyett* decision perhaps reached the correct result, favoring a single, globalized, omnibus arbitration, rather than second bites at the apple in serial litigation. But, the Court engaged in deeply problematic, severely truncated reasoning to reach this result. Unfortunately, *Pyett* is not the rare exception. The phenomenon of the Court reaching the correct result ,

but through badly fractured and spasmodic reasoning, while not the norm, occurs with some frequency. Pragmatically, a sound functional result from a problematic and jagged opinion undeniably is markedly superior to an elegant theory yielding an obsolete, wrong result. The great practical utility of these quintessentially Lincolnian principles is palpable in labor and employment law. *Pyett* is certainly not the first, and will not be the last, decision of the Court that, while not elegantly grounded in sophisticated jurisprudential metaphysics, may nevertheless work well and yield just and fair results for employees, employers, and unions who favor a single, integrated arbitration forum for the resolution of all contractual and statutory claims. Meanwhile, those employees, employers, and unions wishing to retain independent judicial recourse for litigating statutory claims are not precluded from doing so, and are left unaffected by, the *Pyett* decision.

**MANDATORY LABOR ARBITRATION OF STATUTORY
CLAIMS, AND THE FUTURE OF FAIR EMPLOYMENT:
14 PENN PLAZA v. PYETT**

By: David L. Gregory and Edward McNamara

- I. Introduction**
- II. From Gardner-Denver to Circuit City: A Brief Synopsis**
 - A. Alexander v. Gardner-Denver**
 - B. Gilmer v. Interstate Johnson Lane Corp.**
 - C. Wright v. Universal Maritime Service Corporation**
 - D. Circuit City Stores v. Adams**
- III. The Evolution Toward 14 Penn Plaza v. Pyett in the Second Circuit**
 - A. *Rogers v. New York University*, 220 F.3d 73 (2d Cir. 2000)**
 - B. *Pyett v. Pennsylvania Building Co.***
- IV. The Supreme Court's Decision in 14 Penn Plaza v. Pyett**

A. The Majority Opinion

B. The Dissents

V. Analysis and Discussion

A. Jurisprudential Realpolitique, Political Ideology, Stare Decisis, and Justice Souter's Finale

B. Why the Court's Right Result Isn't Wrong

VI. Conclusion

I. Introduction

By its 5-4 sharply divided¹ decision in *14 Penn Plaza v. Pyett*,² the United States Supreme Court dramatically endorsed mandatory labor arbitration, rather than external litigation, to resolve labor union-represented employees' statutory claims of unlawful age-based employment discrimination. The Court summarily isolated and trivialized as jurisprudentially obsolete, but did not deem it necessary to formally overrule, 35 years of well-established precedent³ that had protected the employee's right to litigate de novo statutory claims of unlawful employment discrimination, without suffering any *res judicata* or

¹ Justice Thomas wrote the Majority Opinion, joined by Chief Justice Roberts and Associate Justices Scalia, Kennedy, and Alito. Justice Souter wrote the Dissenting Opinion, joined by Justices Stevens, Breyer, and Ginsburg. Justice Stevens also wrote a separate dissenting opinion. The amici were also ideologically divided. The United States Chamber of Commerce and the Equal Employment Advisory Council supported the employer. Respondent employees were supported by, inter alia, the Lawyers Committee for Civil Rights, the American Association of People with Disabilities, the Asian American Justice Center, the Mexican American Legal Defense and Education Fund, the National Partnership for Women and Families, the National Women's Law Center, the National Employment Lawyers Association, the AFL-CIO, the National Right to Work Legal Defense Foundation, the National Academy of Arbitrators, and the Service Employees International Union, Local 32BJ.

² 129 S.Ct. 1456 (2009). Subsequent decisions applying *Pyett* include: *Matthews v. Denver Newspaper Agency*, F.Supp.3d , 2009 WL 1231776 (D. Colorado, May 4, 2009) at 4: ("Under the reasoning of the Supreme Court in *Pyett*, because the parties recognized that the CBA's arbitration agreement covered Plaintiff's statutory claims, I conclude that *Gardner-Denver* does not preclude me from finding that Plaintiff waived his right to seek a judicial remedy by voluntarily pursuing arbitration under the CBA and that his discrimination claims are now barred by the doctrine of *res judicata*.")

³ See *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974) (discussed infra). See also Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining Alexander v. Gardner-Denver in the Wake of Gilmer v. Interstate/Johnson Lane Corp.*, 1997 B.Y.U. L. REV. 591 (2007); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997); Julius Getman, *Was Harry Shulman Right?: The Development of Arbitration in Labor Disputes*, 81 ST. JOHN'S L. REV. 15 (2007); William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609 (2006).

collateral estoppel effects from a prior adverse arbitration decision. The Court substantially clarified, and perhaps simplified, what had become an increasingly complex and potentially inconsistent panorama of decisions as to whether labor union-represented employees can be mandated to arbitrate, and thus be foreclosed from litigating de novo, statutory claims, most frequently and most classically, those alleging unlawful employment discrimination by the employer. By its controversial activist methodology, the political, ideological Court ran roughshod over *stare decisis* principles.⁴ A host of questions, ramifications, and unintended consequences could transform the dynamics of arbitration well beyond the present contours of labor-union represented employment environments.

This article will critically assess the some of the salient foreseeable consequences and likely ramifications of the *Pyett* decision. On the eve of a half-century of Supreme Court enthusiasm for labor arbitration, grounded

⁴ See JEFFREY TOOBIN, *THE NINE* (2007); STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007); RICHARD A. POSNER, *HOW JUDGES THINK* (2008); Clifford W. Taylor, *Merit Selection: Choosing Judges Based on Their Politics Under the Veil of a Disarming Name*, 32 HARV. J. L. & PUB. POL'Y 97 (2009); Stephen B. Presser, *Judicial Ideology and the Survival of the Rule of Law: A Field Guide to the Current Political War Over the Judiciary*, 39 LOY. U. CHI. L.J. 427 (2008); Frank H. Easterbrook, *Pragmatism's Role in Interpretation*, 31 HARV. J. L. & PUB POL'Y 901 (2008).

the landmark *Steelworkers Trilogy*⁵ in 1960, the *Pyett* decision perhaps reached the correct result, favoring a single, globalized, omnibus arbitration, rather than second bites at the apple in serial litigation. But, the Court engaged in deeply problematic, severely truncated reasoning. Unfortunately, *Pyett* is not the rare exception. The phenomenon of the Court reaching the correct result, but through badly fractured and spasmodic reasoning, while not the norm, occurs with some frequency.⁶ Pragmatically, a sound functional result from a problematic and jagged opinion undeniably is markedly superior to an elegant theory yielding an obsolete, wrong result.

⁵ *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960). See also Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, 75 MICH. L. REV. 1146 (1976-1977); William B. Gould IV, *Judicial Review of Labor Arbitration Awards—Thirty Years of the Steelworkers Trilogy: The Aftermath of AT&T and Misco*, 64 NOTRE DAME L. REV. 464 (1984); Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 CHI.-KENT L. REV. 3 (1988).

⁶ For example, John Ely, clerk to Earl Warren, Stanford Law Dean, and quintessential liberal scholar and author of, *inter alia*, *DEMOCRACY AND DISTRUST* (1980) said of *Roe v. Wade* that he favored the result, but that he deplored its diocre legal reasoning. See John Hart Ely, *Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920 (1972-1973).

The great practical utility of these quintessentially Lincolnian principles is especially true in labor and employment law. *Pyett* is certainly not the first, and will not be the last, decision of the Court that, while not elegantly grounded in sophisticated jurisprudential metaphysics, may nevertheless work well and yield just and fair results⁷ for employees, employers, and unions who favor a single, integrated arbitration forum for the resolution of all contractual and statutory claims. Meanwhile, those employees, employers, and unions wishing to retain independent judicial recourse for statutory claims are not precluded from doing so, and are left unaffected by, the *Pyett* decision.

II. From Gardner-Denver to Circuit City: A Brief Synopsis

A. Alexander v. Gardner-Denver

⁷ A certain inelegance is the price readily paid for the democratic experience, and experiment in democracy, that is very much part of the Brandeisian principle that the states are the “laboratories” of Jeffersonian democracy. *See* *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) (Brandeis Concurring); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Construction Trades Council*, 485 U.S. 568 (1988). So, too, the workplace. *See*, Thomas Kohler, *Labor Law: “Making Life More Human”—Work and the Social Question*, in *RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW* (Michael A. Scaperlanda & Teresa Stanton Collett eds., 2007). Chicago labor lawyer Thomas Geoghegan contends that the decline of labor in the workplace has contributed to a rise in litigation, as most workers have no genuine familiarity with workplace ADR mechanisms. Thomas Geoghegan, *SEE YOU IN COURT* (2007).

In a necessarily chronological, but decidedly less than linear, fashion, the Supreme Court has articulated a series of benchmarks bearing on the “arbitration or litigation” dynamic, commencing with its landmark decision in *Alexander v. Gardner-Denver*⁸ in 1974.⁹ Mr. Alexander was a

⁸ 415 U.S. 36 (1974). Justice Powell wrote the opinion for the unanimous Court. *Alexander v. Gardner-Denver* and its progeny have spawned significant law review commentaries. . See, for example, Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331 (2006); Richard A. Bales & Christopher J. Kippely, *Extending OWBPA Notice and Consent Protections to Arbitration Agreements Involving Employees and Consumers*, 8 Nev. L.J. 10 (2007); Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining Alexander V. Gardner-Denver in the Wake of Gilmer v. Interstate/Johnson Lane Corp.*, 1997 B.Y.U. L. REV. 591 (2007); Harry T. Edwards, *Where are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 Ga. St. L. Rev. 293 (1999); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997); David E. Feller, *Fender Bender or Train Wreck?: The Collusion Between Statutory Protection of Individual Employee Rights and the Judicial Revision of the Federal Arbitration Act*, 41 St. Louis L.J. 561 (1997); Julius Getman, *Was Harry Shulman Right?: The Development of Arbitration in Labor Disputes*, 81 ST. JOHN'S L. REV. 15 (2007); William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609 (2006); Michael Z. Green, *Measures To Encourage and Reward Post-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 8 NEV. L.J. 58 (2007); Ann C. Hodges, *Arbitration Of Statutory Claims in the Unionized Workplace: Is Bargaining with the Union Required?*, 16 OHIO ST. J. ON DISP. RESOL. 513 (2001); John Kagel, *Arbitration And Due Process: The Way We Were at the Time of Gilmer*, 11 EMPLOYEE RTS. & EMP. POL'Y J. 267 (2007); Mark G. Kisicki, *Alternative Dispute Resolution Issues After Circuit City and Wright v. Universal Maritime Service*, SL070 ALI-ABA 683 (2006); Ronald J. Kramer, *Wright Or Wrong: Can Employers and Unions Waive an Employee's Right to a Judicial Forum For Statutory Claims?*, 36 URB. LAW. 825 (2004); Mark R. Kravitz & Daniel J. Klau, *Developments in the Second Circuit*, 34 CONN. L. REV. 833 (2002); Janet McEaney, *Arbitration of Statutory Claims I a Union Setting: History, Controversy and a Simpler Solution*, 15 Hofstra Labo. & Empl. L.J. 137 (1997); Julian J. Moore, *Arbitral Review (Or Lack Thereof): Examining the Procedural Fairness of Arbitrating Statutory Claims*, 100 Columbia L. Rev. 1572 (2000); Mtendeweka Owen Mhango, *Rejecting the Myth Of Austin v. Owens-Brockway Glass Container: Exalting the Vitality Of Gardner-Denver and the Distinction Within Gilmer*, 7 U. PA. J. LAB. & EMP. L. 1013 (2005); George Nicolau, *Gilmer v. Interstate/Johnson Lane Corp.: Its Ramifications and Implications for Employees, Employers and Practitioners*, 1 U. PA. J. LAB. & EMP. L. 177 (1998); Mary K. O'Melveny, *One Bite of the Apple and One of the Orange: Interpreting Claims that Collective Bargaining Agreements Should Waive the Individual Employee's Statutory Rights*, 19 LAB. LAW. 185 (2003); Stephen A. Plass, *Privatizing Antidiscrimination Law with*

member of a labor union and was protected by a collective bargaining agreement. Through the union, the grievance protesting his discharge was taken to arbitration. The grievance was denied and the discharge sustained. Mr. Alexander then filed a lawsuit in federal district court, alleging that he had been unlawfully discriminated against on the basis of his race. The employer, Gardner Denver, unsuccessfully argued that the adverse arbitration award had res judicata effect, and thus precluded his subsequent litigation. The Supreme Court, however, found that Mr. Alexander had the right to a de novo trial in federal district court of his statutory claims of alleged unlawful employment discrimination on the basis of his race. He

Arbitration: The Title VII Proof Problem, 68 MONT. L. REV. 151 (2007); Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203 (2002); Elizabeth A. Roma, *Mandatory Arbitration Clauses in Employment Contracts and the Need for Meaningful Judicial Review*, 12 AM. U. J. GENDER SOC. POL'Y & L. 519 (2004); Eileen Silverstein, *From Statute to Contract: The Law of the Employment Relationship Reconsidered*, 18 HOFSTRA LAB. & EMP. L.J. 479 (2001); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996); Clyde Summers, *Mandatory Arbitration: Privatizing Public Rights: Compelling the Unwilling to Arbitrate*, 6 U. Pa. J. Labor. & Emp. L. 685 (2004); Liquita Lewis Thompson, *Arbitrators--Unlike Too Many Cooks--Do Not Spoil The Soup! Making the Case for Allowing Pre-Dispute Mandatory Arbitration of Unfair Labor Practice Charges in Nonunion Workforces*, 23 LAB. LAW. 301 (2008); Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735 (2001).

⁹ In the same Term, the Court held that a union could not waive the distribution rights of employees, as NLRA Section 7 statutory rights. *NLRB v. Magnavox*, 415 U.S. 322 (1974). See, Matthew Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 Minn. L. Rev. 183 (1980).

was not foreclosed by the prior adverse arbitration decision, which did not have res judicata effect; “an individual does not forfeit his private cause of action if he first pursued his grievance to final arbitration under the non-discrimination clause of the collective bargaining agreement.”¹⁰

Perhaps the most compelling rationale for preserving the subsequent external litigation avenue is grounded in the jurisprudential and practical reality that courts may sometimes be the best and only recourse for employees. This deep mistrust of “private justice”¹¹ is reflected especially in the populist, class-based ideology that employment relationships are essentially adhesion contracts, with the dominant corporate employer

¹⁰ *Alexander v. Gardner Denver*, 415 US 36, 49 (1974).

¹¹ There is a voluminous and rich literature deeply critical of the privatized justice of Alternative Dispute Resolution, especially when the courts are marginalized in the rush to ADR. . See, for example, Owen Fiss, *Against Settlement* (1984). On April 9, 2009, Fordham Law School convened a symposium conference to mark the 25th anniversary of this important work. Of course, ADR is here to stay. See, David L. Gregory and Francis A. Cavanagh, *Transatlantic Perspectives on Alternative Dispute Resolution Symposium Introduction*, 81 *St. John’s L. Rev.* 1 (2007).

dictating terms to the helpless, subordinated worker.¹² To entirely privatize the resolution of disputes through mandatory arbitration and to foreclose external litigation is to ignore Justice Douglas' fundamental truth that "the loss of the proper judicial forum inexorably carries with it the loss of substantial rights."¹³

The National Labor Relations Board, however, has largely acquiesced to the consolidation of virtually all authority in the hands of private labor arbitrators, including resolution of Section 8 unfair labor practice contentions.¹⁴ Thus, the leap from *Gardner-Denver* is not as

¹² This bleak, Great Depression scenario is synthesized in the opening policy provision of the National Labor Relations Act, 29 USC 151, enacted in 1935 to bring some rough equilibrium to this markedly skewed reality. Many contemporary critics of the Act, including many labor leaders, assert that the politicized NLRB since the end of the Carter administration has fundamentally failed. See, William Gould IV, *Labored Relations* (scathing criticisms of Board politics and internecine warfare, by former NLRB Chairman during the Clinton administration. See, David L. Gregory, 2 *Employment Rights Quarterly* 74-75 (2001), reviewing William B. Gould, *LABORED RELATIONS* (2000). See also, David L. Gregory, *The Long View of the NLRA at 70... Or, the More Things Change?*, 56 *Labor Law Journal* 172 (Fall, 2005)

¹³ *Scherk v. Alberto-Culver Co.*, U.S. (1974)

¹⁴ "Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the [National Labor Relations] Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their dispute through that machinery." *United Technologies Corp.*, 268 NLRB 557 (1984), reiterating the NLRB's *Spielberg* 112 NLRB 1080 (1955) and *Collyer* 192 NLRB 837 (1971) doctrines that essentially transfer from the NLRB to private labor arbitrators the power to resolve NLRA Section 8 unfair labor practices.

dramatic or unprecedented as those championing its retention would assert. Paradigmatic liberal political theory holds nearly sacrosanct the primacy of the individual person vis a vis the bureaucratic, institutional corporate state.

B, Gilmer v. Interstate Johnson Lane Corp.

In *Gilmer v. Interstate Johnson Lane Corp.*¹⁵ in 1991, however, the Court held that a nonunionized white collar worker in the financial services sector was bound by the terms of the mandatory arbitration agreement he had executed at the commencement of employment. Thus, he was precluded from subsequently litigating in court his allegation that his employment was terminated for, inter alia, unlawful age discrimination in violation of the federal Age Discrimination in Employment Act of 1967.

C. Wright v. Universal Maritime Service Corporation

¹⁵ 500 U.S. 20 (1991)

In *Wright v, Universal Maritime Service Corporation*¹⁶ in 1998, the Court declined to break the one to one tie between *Gardner-Denver* and *Gilmer*. Justice Scalia, castigating the indiscriminate boiler plate language of the arbitration provision of the collective-bargaining agreement, found that the absence of careful contouring obviously could not preclude Mr. Wright from pursuing in court his claims of the employer's bad-faith interference with his insurance and medical benefits for his bad back.

Mr. Wright was injured while working as a longshoreman. He sought worker's compensation for permanent disability, and settled his claim, receiving also social security disability benefits. A few years later, Wright sought employment again at the dock, with various stevedoring companies. He was hired and worked until the companies found out about his worker's compensation claim. The companies refused to allow him to work, claiming he was "unqualified" due to his disability—despite the fact that he had been performing his duties adequately. Wright filed charges with the Equal Employment Opportunity Commission (EEOC) alleging

¹⁶ 525 U.S. 70 (1998)

violation of the Americans with Disabilities Act (ADA), ignoring an all-encompassing arbitration provision in the applicable collective bargaining agreement (CBA), on the union's advice.

Justice Scalia and the majority were able to distinguish *Wright* from both *Gilmer* and *Gardner-Denver*. First, the Court noted that the presumption of arbitrability it had previously expressed in the *Steelworkers Trilogy* should “not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than the courts to interpret the terms of a CBA.”¹⁷ Here, though, the CBA only called for arbitration of all disputes in general, and the federal court system is better suited for a claim under the ADA.

Next, the Court found that “[T]he right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit *union* waiver in a CBA.”¹⁸ If such a waiver of rights is to be upheld, the waiver must be stated in “clear and unmistakable” language. This stringent requirement necessary to find effective waiver of individual statutory

¹⁷ *Id.* at 77—78.

¹⁸ *Id.* at 80 (emphasis added)

claims was not met here. Consequently, the Court had no need to discuss whether an explicit union waiver would have been upheld. The decision in *Gilmer* was not affected because the employee there waived his own individual rights, negating the need for the standard to apply.¹⁹

D. Circuit City Stores v. Adams

In *Circuit City Stores, Inc. v. Adams*²⁰ in 2001, the Court weighed in favor of mandatory arbitration of unlawful employment discrimination allegations brought by a nonunionized employee.

Mr. Adams signed an employment contract upon being hired by Circuit City, including a mandatory arbitration agreement.²¹ Two years later, when Adams filed an employment discrimination suit in California, the Ninth Circuit Court of Appeals held that the Federal Arbitration Act (FAA) did not apply to employment contracts, and therefore Adams did

¹⁹ *Id.*

²⁰ 532 U.S. 105 (2001).

²¹ *Adams*, 532 U.S. 105, 110 (2001)

not have to use arbitration to settle his claim. The Supreme Court granted certiorari to clarify the extent of the FAA's exemption for certain contracts.²²

The Court held that the exemption to the FAA regarded only employment contracts of seamen, railroad employees, and those "actually engaged in the movement of goods in interstate commerce." The interpretation used by the Ninth Circuit and others made the exemption superfluous. If it were meant to apply to all contracts of employment, it would have said so.²³

Perhaps the most significant aspect of the decision, for present purposes, is that the Court did not regard the former employee as having irrevocably waived his statutory claims; rather, the Court deemed Mr. Adams had agreed to the arbitral, rather the judicial, forum for the resolution of his statutory claims.

²² *Id.*

²³ *Id.* at 112.

III. The Evolution Toward *14 Penn Plaza v. Pyett* in the Second Circuit

A. Rogers v. New York University, 220 F.3d 73 (2d Cir. 2000)

In *Rogers v. New York University*,²⁴ the Second Circuit addressed whether a collective bargaining agreement could include a mandatory arbitration provision, whereby employees waived their right to litigate statutory claims, including alleged unlawful employment discrimination, in federal court. Susan Rogers was a clerical employee of New York University, and subject to the collective bargaining agreement between the University and Local 3882, United Staff Association of NYU, AFT, AFL-CIO.²⁵ The collective bargaining agreement contained a no discrimination

²⁴ *Rogers v. New York University*, 220 F.3d 73 (2d Cir. 2000). Other pre-Pyett decisions by the Second Circuit were analogous to *Rogers*. See, e.g., *Fayer v. Town of Middlebury*, 258 F.3d 117 (2d Cir. 2001) (Town employee could bring constitutional law claims in litigation, subsequent to an adverse arbitration decision.); *Guyden v. Aetna Inc.*, 544 F.3d 379 (2nd Cir. 2008) (Whistleblower claims under the Sarbanes-Oxley Act of 2002 are arbitrable) New York State courts, however, have deemed mandatory arbitration as binding, and corresponding waivers of employee rights to bring law suits regarding statutory claims as legitimate and effective. See *Garcia v. Bellmarc Property Management Corp.*, 295 A.D.2d 233 (1st Dept, 2002) (citing *Circuit City Stores Inc. v. Adams*, 532 US 105, for the proposition that submitting to arbitration is not surrender of substantive statutory rights, but, rather, only the agreement of an arbitral, rather than a judicial, form, coupled with the public policy favoring arbitration over litigation.); *Sum v. Tishman Properties Corp.*, 37 A.D.3d 284 (1st Dep't, 2007) (Motion to appeal granted by New York Court of Appeals, December, 2007) (mandatory arbitration upheld, since the waiver of the right to litigate met the Circuit City test of being “clear and unmistakable.”

²⁵ *Rogers*, 220 F.3d at 74.

provision, guaranteeing employees the protections of all federal and state discrimination law, including the Family and Medical Leave Act of 1993.²⁶

Rogers went on medical leave under the FMLA in August 1997. New York University terminated Rogers three months later, purportedly because her leave time expired.²⁷ She filed a claim of unlawful employment discrimination with the federal Equal Employment Opportunity Commission, which issued her a right to sue letter. In March, 1998 she filed a lawsuit against the University in the Southern District of New York, with an amended complaint in January, 1999. Rogers claimed that the university discriminated against her in violation of the FMLA, Americans with Disabilities Act, and the New York State Human Rights laws.²⁸

²⁶ *Id.* Pertinent sections of the collective bargaining agreement state, “[t]here shall be no discrimination as defined by applicable Federal, New York State, and New York City laws, against any present or future employee by reason of ... physical or mental disability.... “[e]mployees are entitled to all provisions of the Family and Medical Leave Act of 1993 [‘FMLA’] that are not specifically provided for in this agreement.” Another section of the agreement contained an arbitration clause that stated challenges which arose under the agreement would be arbitrated. *Id.*

²⁷ *Rogers*, 220 F.3d at 74.

²⁸ *Id.*

NYU moved to stay the lawsuit under §3 of the Federal Arbitration Act.²⁹ The District Court denied the motion. Setting forth two separate reasons for denying NYU's motion, the Court relied on *Alexander v. Gardner-Denver*³⁰ for the principle that employees cannot waive their right, via a collective bargaining agreement, to bring federal statutory actions in federal court.³¹ The District Court maintained that it was accordingly bound to follow the Supreme Court's holding. Furthermore, the District Court held that while *Gardner-Denver* resolves the issue, the same conclusion could be reached under the Supreme Court's somewhat different line of reasoning in *Wright v. Universal Maritime Service Corp.*: namely, even if such a provision was enforceable, a condition precedent to the enforcement of the provision is that the language of the waiver be clear and unmistakable.³² The District Court held that the waiver in NYU collective bargaining agreement did not meet this important threshold of

²⁹ *Id.*

³⁰ *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974).

³¹ *Rogers*, 220 F.3d at 75.

³² *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 80 (1998).

being a “clear and unmistakable” waiver of Rogers’ right to bring external litigation. Consequently, even if such a waiver was not barred by *Gardner-Denver*, it failed to meet the “clear and unmistakable” standard set forth in *Wright*.³³

The Second Circuit affirmed the District Court’s holding, maintaining that both lines of reasoning were correct. The Court of Appeals would not enforce a collective bargaining agreement’s mandatory arbitration provision that results in a waiver of an employee’s right to litigate a statutory claim in federal court.³⁴ The Second Circuit explained that while *Wright* questioned *Gardner-Denver*, the latter was not overruled and was still good law.³⁵ The Supreme Court denied New York University’s petition for a writ of certiorari, setting the stage for *Pyett*.³⁶

³³ *Rogers*, 220 F.3d at 75-76.

³⁴ *Id.* at 74-76.

³⁵ *Id.* at 75.

³⁶ *New York University v. Rogers*, 531 U.S. 1036 (2000).

B. Pyett v. Pennsylvania Building Co.

In August, 2007, in *Pyett v. Pennsylvania Building Co.*³⁷, the Second Circuit reaffirmed its holding in *Rogers v. New York University*³⁸ that a collective bargaining agreement's purported mandatory arbitration provision, and corresponding waiver of the worker's right to litigate in federal court statutory causes of action, were inoperative.

In *Pyett*, the plaintiffs, all over age 50, were longtime employees of Temco Services Industries. They were originally employed as night watchmen in a commercial office building. The plaintiffs were also members of Local 32BJ of the Service Employees International Union (SEIU), and subject to a collective bargaining agreement between the Union and the Realty Advisory Board [RAB] of Labor Relations, Inc., the

³⁷ *Pyett v. Pennsylvania Building Co.*, 498 F.3d 88, 90 (2d Cir. 2007). Other federal courts of appeals are in accord with the Second Circuit in refusing to enforce mandatory arbitration of statutory claims. *See*, *Airline Pilots Association International v Northwest Airlines Inc.*, 199 F.3d 477 (D.C. Cir., 1999); *Albertson's, Inc. v. United Food and Commercial Workers Union, AFL-CIO, CLC*, 157 F.3d 758 (9th Cir. 1998); *Bratten v. SSI Services, Inc.*, 185 F.3d 625 (6th Cir.1999); *Harrison v. Potash*, 112 F.3d 1437 10th Cir. 1997); *Pryner v. Tractor Supply Co. Inc.*, 109 F.3d 354 (7th Cir.1997) (Individual worker must agree to waiver of right to litigate statutory claims, and a union cannot waive such rights on the employee's behalf.). But *see, contra*, *Aleman v. Chugach Support Services, Inc.*, 485 F3d 206 (4th Cir 2007) (Effectively ignoring the Supreme Court's decisions, the Fourth Circuit upheld mandatory arbitration, even though many employees did not have English language proficiency); *Brisentine v. Stone & Webster Engineering Corporation*, 117 F.3d 519 (11th Cir.1997); *Martin v. Dana Corp*, 114 F.3d 421 (3rd Cir. 1997) (holding that Gilmer, not Gardner Denver, controls)

³⁸ *Rogers v. New York University*, 220 F.3d 73 (2d Cir. 2000).

bargaining association for the real estate industry in New York City.³⁹ The 2002 “Contractors Agreement,” with a term of January 1, 2002—September 30, 2004, covered the chronology for the events giving rise to this matter.

The Union and the Realty Advisory Board on Labor Relations have had a labor management relationship, reflected in a collective bargaining agreement since the 1930s.⁴⁰ Since 1999, the collective bargaining agreement expressly provided that employment discrimination claims were subject to mandatory arbitration, as set forth in Article XIV, Section 30:⁴¹

“There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union

³⁹ *Pyett*, 498 F.3d at 90.

⁴⁰ *Pyett*, 129 S.Ct. 1456 at 1461

⁴¹ The pertinent section of the collective bargaining agreement reads: “There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, New Jersey Law Against Discrimination, New Jersey Conscientious Employee Protection Act, Connecticut Fair Employer Practices Act, or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI [of the CBA]) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.” *Id.* The amicus brief of the SEIU Local 32BJ on behalf *Pyett*, et. al., sets forth and explains the history of the labor contract and the grievance arbitration mechanism in great detail. The non-discrimination provision “is identical in all material respects to the no-discrimination clauses in the other Local 32BJ/Realty Advisory Board Collective Bargaining Agreements.” Amicus Brief of 32BJ at 9.

membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, New Jersey Law Against Discrimination, New Jersey Conscientious Employee Protection Act, Connecticut Fair Employer Practices Act, or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI [of the CBA]) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.”

Plaintiffs filed a grievance with the Union in August, 2003, protesting their transfer from night watchmen positions to less desirable positions as porters and cleaners. They alleged the unwelcome reassignment was made because they were the only building employees

over the age of fifty.⁴² They also alleged violations of seniority rules and inequitable failure of the employer to rotate and allocate fairly overtime opportunities.⁴³ The plaintiffs alleged that the transfer was in violation of the collective bargaining agreement's provisions prohibiting, inter alia, unlawful age discrimination.

After the first day of the arbitration hearing, the Union declined to pursue the age discrimination claims,⁴⁴ addressing only those elements of the grievance based on denials of overtime and promotions. The formal record is silent as to the reasons why the Union did not pursue the age discrimination claims beyond the first day of the arbitration,⁴⁵

The Union had consented to Spartan Security being brought in by the Penn Plaza management, to provide security previously performed by

⁴² *Id.*

⁴³ *Pyett*, 129 S.Ct. 1456 at 1462.

⁴⁴ The Industry has approximately 700 grievances annually going to arbitration. The parties therefore created their own office of the contract arbitrator, rather than work through an impartial non-profit ADR provider, such as the American Arbitration Association. Oral argument before the Supreme Court, December 1, 2008, at 55.

⁴⁵ Oral argument at the Supreme Court, December 1, 2008 at 56.

Temco. The Union believed this did not constitute unlawful age discrimination, and, on February 23, 2004, the Union sent a letter to Arbitrator Earl Pfeffer, formally withdrawing the age discrimination claims from arbitration.⁴⁶

Having filed charges with the U.S. Equal Employment Opportunity Commission in May, 2004, in August 2005, the employees also filed a lawsuit in federal district court, alleging that the Union violated the Union's duty of fair representation by its failure to pursue their age discrimination claims to arbitration.⁴⁷

Between August of 2004 and August of 2005, there were several hearing dates in the arbitration of the remaining overtime and promotion

⁴⁶ SEIU 32BJ amicus brief for Pyett, et. al. at 16.

⁴⁷ *Pyett*, 129 S.Ct. 1456 at 1463 (footnote 2).

claims. On August 10, 2005, the arbitrator issued a written decision denying the grievances.⁴⁸

In May 2004, while the arbitration was still ongoing, the plaintiffs also filed charges of age discrimination with the federal Equal Employment Opportunity Commission, which subsequently notified the plaintiffs of their right to sue the employer in federal district court for unlawful age discrimination. In September, 2004, the employees commenced an action in federal district court in the Southern District of New York against Temco and the owners of the building where they were employed, alleging violations of the Age Discrimination in Employment Act, the New York State Administrative Code, and the New York State Human Rights Law.⁴⁹ The defendants moved for dismissal, arguing the plaintiffs failed to state a claim for which relief could be granted, and alternatively, to compel arbitration.

⁴⁸ SEIU 32BJ amicus brief for Pyett at 16-17.

⁴⁹ *Id.*

The District Court denied each motion. The court relied on its decision in *Granados v. Harvard Maintenance*⁵⁰, where it held that a “union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable.”⁵¹ The *Granados* decision relied largely on the Second Circuit’s decisions in *Fayer v. Town of Middlebury*⁵² and *Rogers v. New York University*.

The defendants appealed, claiming that the Supreme Court’s decision regarding arbitration provisions in *Gilmer v. Interstate/Johnson Corp.*⁵³ permitted the enforcement of the mandatory arbitration provision. However, the Second Circuit agreed with the District Court’s reasoning that *Gilmer* dealt with arbitration clauses solely in individual contracts, but was not germane with regard to collective bargaining agreements.⁵⁴ The

⁵⁰ *Granados v. Harvard Maintenance*, No. 05 Civ. 5489(NRB), 2006 WL 435731 (S.D.N.Y. Feb 22, 2006)

⁵¹ *Pyett*, 498 F.3d at 91.

⁵² *Fayer v. Town of Middlebury*, 258 F.3d 117 (2d Cir. 2001).

⁵³ *Gilmer v. Interstate/Johnson Corp.*, 500 U.S. 20 (1991).

⁵⁴ *Pyett*, 498 F.3d at 91, 92.

Second Circuit held that *Gardner-Denver*⁵⁵ controlled.⁵⁶ The Second Circuit held that *Gilmer* did not apply in *Pyett* because the plaintiffs were subject to a collective bargaining agreement, and did not have *Gilmer*-like individual employment contracts.

The Second Circuit also held that *Gilmer* did not trump the holding in *Rogers* for the same reason; *Gilmer* applies to individual contracts, while *Gardner-Denver* applies to collective bargaining agreements.⁵⁷ The Court of Appeals further held that the Supreme Court's decision in *Wright v. Universal Maritime Service Corp.*, which strongly suggested in dicta that in some circumstances a union-negotiated waiver of the right to bring a lawsuit in federal court regarding federal statutory rights could be enforceable, did not overrule *Gardner-Denver*.⁵⁸ The Second Circuit affirmed the District Court's refusal to enforce the labor contract's mandatory arbitration provision, holding that *Rogers* was not overruled by

⁵⁵ *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974).

⁵⁶ *Pyett*, 498 F.3d at 91, FN3.

⁵⁷ *Id.* at 92.

⁵⁸ *Id.*

Gilmer or *Wright* and governs in *Pyett*----a collective bargaining agreement cannot waive a worker's right to litigate statutory claims in federal court.⁵⁹

The Second Circuit reiterated that *Gardner-Denver* “remains good law,” and thus held in *Pyett* “that a collective agreement could not waive covered workers’ rights to a judicial forum for causes of action created by Congress.”⁶⁰ The Second Circuit thus endeavored to meld the principles of *Gardner Denver* and *Gilmer*, reiterating that, while a non-unionized individual could elect arbitration of statutory claims, no labor union could institutionally bind its individual constituent members and fellow employees via such a waiver mechanism in a labor contract.⁶¹ This manifest incongruity, and unresolved issues in the wake of the *Wright*

⁵⁹ *Id.* at 93-95. This is quite analogous to the principle set forth in 1999 by the United States Court of Appeals for the District of Columbia in *Air Line Pilots Association, Intern v. Northwest Airlines, Inc.* 199 F.3d 477 (D.C. Cir., 1999): “Unless the Congress has precluded his doing so, an individual may prospectively waive his own statutory right to a judicial forum, but his union may not prospectively waive that right for him..”

⁶⁰ *Pyett*, 498 F.3d at 91, FN3.

⁶¹ *Pyett*, 129 S.Ct. 1456 at 1463.

decision, militated strongly in favor of the grant of certiorari by the Court.⁶²

Unsurprisingly, most of the circuit courts of appeals to have examined whether a union and employer can mandate that the unionized employees bring all of their statutory employment discrimination claims to arbitration, and be thus foreclosed from external litigation of those claims, by the omnibus grievance arbitration language of the labor contract, had consistently maintained that only the Supreme Court could best clarify and prioritize the constellation of pertinent decisions flowing from *Gardner Denver*.⁶³

⁶² *Id.*, and, at footnote 4, the Court pointed to several contrary decisions among the circuits. They include, in addition to *Rogers v. New York University* 220 F.3d 73 (2nd Cir. 2000); *O'Brien v. Agawam*, 350F3d 279 (1st Cir. 2003); *Mitchell v. Chapman*, 343 F.3d 811 (6th Cir. 2003), *Tice v. American Airlines, Inc.*, 288 F.3d 313 (7th Cir, 2002); Cf., *Eastern Associated Coal Corp. v. Massey*, 373F.3d 530 (4thCir. 2004)

⁶³ See, e.g., *Brisentine v. Stone and Webster Engineering Corp.*, 117 F.3d 519, 525 (11th Cir.1997) (“ [I]t may be that the Supreme Court has cut *Gardner-Denver* back so far that it will not survive. Perhaps, but we are not convinced we are authorized to sing the dirge of *Gardner-Denver*. We will leave that to the Supreme Court.”); *Pryner v. Tractor Supply Co. Inc.* 109 F.3d 354, 364 (7th Cir.1997) (The Court of Appeals noted that any lower court’s interpretation of the *Gardner-Denver* and *Gilmer* continuum can be inherently problematic, and that it was up to the Supreme Court to clarify matters.)

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

On April 1, 2009 a sharply divided Supreme Court overturned the Second Circuit's decision in *Pyett v. Pennsylvania Building Co.*, with the Supreme Court holding "a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as matter of federal law."⁶⁴

A. The Majority Opinion

Justice Thomas, writing for the Court, disagreed with the Second Circuit's unduly broad understanding of the Court's 1974 decision in *Alexander v. Gardner-Denver* as somehow forbidding the arbitration of the statutory ADEA claim here. According to the *Pyett* majority, *Gardner-Denver* did not deal with the *Pyett* issue of enforcing an agreement to

⁶⁴ 14 Penn Plaza v. Pyett, 129 S.Ct. 1456, 1474 (2009).

arbitrate statutory claims. Rather, *Gardner* focused on a separate and distinct issue: whether “arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims.”⁶⁵

The Court explained that the Second Circuit faced a dissimilar situation in *Pyett*, where a collective bargaining agreement contained an arbitration provision that included both contractual and statutory discrimination claims; thus, reliance on *Gardner-Denver* was inappropriate.⁶⁶

The Court noted that, from the outset, the labor contract’s very broad arbitration provision was the product of good faith negotiations.⁶⁷ The parties expressly decided that statutory claims “would be resolved in

⁶⁵ *Id.* at 1459.

⁶⁶ *Id.*

⁶⁷ The NLRB has held that the labor contract’s grievance arbitration mechanism is a mandatory subject of bargaining. It cannot be unilaterally imposed by the employer. *Utility Vault Co.*, 345 NLRB No. 4 (2005). If the grievance arbitration mechanism is so broad as to seem to preclude anyone from filing charges with the NLRB, such an over-broad provision would be unlawful. *U Haul Company of California*, 347 NLRB No. 34 (2006).

arbitration.”⁶⁸ The Court summarized: “this freely negotiated term between the Union and the RAB easily qualifies as a ‘condition of employment’ that is subject to mandatory bargaining.”⁶⁹ Justice Thomas concluded: “Examination of the two federal statutes at issue in this case, therefore, yields a straightforward answer to the question presented: the NLRA provided the union and the RAB with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to federal age discrimination claims in the ADEA. Accordingly, there is no legal basis for the Court to strike down an arbitration clause in the CBA, which is freely negotiated by the union and the RAB, which clearly and unmistakably requires respondents to arbitrate the anti-discrimination claims at issue in this appeal. Congress has chosen to allow arbitration of ADEA claims. The judiciary must respect that choice.”⁷⁰ It is the Congress, not the Court, that establishes federal labor policy, and the broad arbitration provision clearly and unmistakably negotiated by the parties is

⁶⁸ *Id.*

⁶⁹ *Id.* at 1464

⁷⁰ *Id.* at 1466.

fully congruent with the Congressional policy choice favoring arbitration rather than litigation as the preferred means of settling labor disputes, now broadened to include mandatory labor arbitration of employment discrimination claims.

The Court acknowledged that *Gardner-Denver* and its progeny contained extensive dicta that criticized arbitration as an inappropriate forum for the resolution of statutory employment discrimination claims, but also opined that this critical, problematic earlier dicta was a result of a negative, parochial, hostile view of arbitration that had “fallen far out of step with our current strong endorsement of the federal statutes favoring this method [labor arbitration] of resolving [employment discrimination] disputes,”⁷¹ an animosity toward arbitration that the current Court has long abandoned.⁷² The “misconceptions [about arbitrators lacking sufficient expertise with Title VII and other statutory rights-based antidiscrimination

⁷¹ *Pyett*, 129 S.Ct. 1456 at 1470.

⁷² *Id.*

law] have been corrected.”⁷³ The Court summarized: “We recognize that ...the *Gardner-Denver* line of cases included broad dicta that was highly critical of the use of arbitration for the vindication of statutory antidiscrimination rights. That skepticism, however, rested on a misconceived view of arbitration that this Court has since abandoned.”⁷⁴ Almost twenty years ago, the Court held in *Gilmer* that the ADEA does not preclude arbitration of age discrimination claims.

The Court explained that it was not overruling *Gardner-Denver*; according to the Court, *Gardner-Denver* was simply inapplicable with respect to *Pyett*. Justice Thomas stated in a footnote that if *Gardner-Denver* had applied, the Court would likely have overruled it due to the Court’s current pro-arbitration jurisprudence.⁷⁵ “*Gardner Denver* and its progeny thus do not control the outcome where, as is the case here, the

⁷³ *Id.* at 1471.

⁷⁴ *Id.* at 1459.

⁷⁵ *Id.* at 1469, FN 8. The Court relied on *Patterson v. v. McLean Credit Union*, 491 U.S. 164, 173 (1989) which stated that “it is appropriate to overrule a decision where there ‘has been [an] intervening development of the law’ such that the earlier ‘decision [is] irreconcilable with competing legal doctrines and policies.’”

collective bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimination claims.”⁷⁶

By avoiding a direct confrontation with *Gardner Denver* via summary judicial fiat, the Court also conveniently dodged what the Court in *Wright* identified as the ‘tension’ between the two lines of cases represented by *Gardner Denver* and *Gilmer*. In a preemptive repudiation of Justice Souter’s dissent, the *Pyett* majority accused him of “wrenching...out of context” what he portrayed as “*Wright*’s characterization of *Gardner Denver* as raising a seemingly absolute prohibition of union waiver of employees’ federal forum rights.....[concluding] *Wright* therefore neither endorsed *Gardner Denver*’s broad language nor suggested a particular result in this case.”⁷⁷

⁷⁶ *Pyett*, 129 S.Ct. 1456, at 1469.

⁷⁷ *Id.*

Summarizing *Gardner Denver*, *Barrentine*, and *McDonald*, the Court characterized the underlying facts in those three earlier cases favoring litigation rather than arbitration of statutory claims as “reveal[ing] the narrow scope of the legal rule arising from that trilogy of decisions,” concluding that the *Denver* Trilogy of cases “made clear that the *Gardner Denver* line of cases ‘did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Those decisions instead ‘involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate statutory claims, and the labor arbitrators were not authorized to resolve such claims the arbitration in those cases understandably was held not to preclude subsequent statutory actions.’”⁷⁸

⁷⁸ *Id.* at 1468.

The Court reiterated that “federal antidiscrimination rights may not be prospectively waived,”⁷⁹ finding no such waiver in *Pyett*. “The discussion to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance (citing *Gilmer* at 26). By agreeing to arbitrate a statutory claim a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” (citing *Mitsubishi Motor Corp*, 473 U.S. at 628.) The arbitration decision remains subject to judicial review.”⁸⁰

To read *Gardner-Denver* as somehow prohibiting all waivers of all statutory rights “reveals a distorted understanding of the compromise made when an employee agrees to compulsory arbitration.”⁸¹

⁷⁹ *Id.* at 1469.

⁸⁰ *Id.* at 1471, footnote 10.

⁸¹ *Id.* at 1470.

Ultimately, therefore, the Court concluded that “because today’s decision does not contradict the holding of *Gardner Denver*, we need not resolve the *stare decisis* concerns raised by the dissenting opinions.”⁸²

Nevertheless, in a possible preview of coming attractions, the majority all but sounded the death-knell for the *Gardner Denver* line of cases, concluding “...given the development of this Court’s arbitration jurisprudence in the intervening years...*Gardner Denver* would appear to be a strong candidate for overruling if the dissents’ broad view of its holding were correct.”⁸³

In upholding the enforcement of the arbitration clause, the Court not only dispelled the Second Circuit’s *Gardner-Denver* analysis as inapplicable, but also explained why the very broad arbitration provision in *Pyett* should be enforced. The Court held that the arbitration clause was a

⁸² *Id.* at 1469.

⁸³ *Id.*, footnote 8.

“freely negotiated term between the Union and RAB [that] easily qualifies as a ‘condition of employment’ that is subject to mandatory bargaining” under 29 U.S.C. §159(a).⁸⁴ Accordingly, the clause must be enforced unless the ADEA specifically removed grievances made under it from the authority of the NLRA.”⁸⁵ The Court held in *Gilmer v. Johnson*⁸⁶ that the ADEA does not prohibit arbitrating claims brought under the statute.⁸⁷ Accordingly, in *Pyett*, a clause calling for the arbitration of an ADEA claim brought by a union member bound by the collective bargaining agreement was enforceable.

Pyett and his colleagues also made separate arguments that the arbitration clause was not clear and unmistakable, which could render suspect its validity. However, the Court declined to address this issue as the class of grievants did not raise the argument in the lower courts.⁸⁸

⁸⁴ *Pyett*, 129 S.Ct. 1456, 1464 (2009).

⁸⁵ *Id.*

⁸⁶ *Gilmer v. Interstate / Johnson Lane Corp.*, 500 U. S. 20 (1991).

⁸⁷ *Pyett*, 129 S.Ct. 1456, 1464 (2009).

⁸⁸ *Id.* at 1473.

Additionally, the grievants argued that the arbitration clause functioned as a waiver of their federal right under the ADEA, as it precluded them from a federal judicial forum, and also permitted the Union to block arbitration.⁸⁹ However, the Court explained that since this issue was not fully briefed, and there were existing factual disputes, it would not resolve this issue either.⁹⁰ Finally, whether the labor contract allows the Union to prevent employees from “effectively vindicating their statutory rights in the arbitral forum”⁹¹ is an open question for a future day.

B. The Dissents

Justice Souter’s dissent was joined by Justices Stevens, Breyer, and Ginsburg. They maintained *Gardner-Denver* established a “seemingly absolute prohibition of union waiver of employees’ federal forum rights,” expressly reaffirmed by the Court in *Wright v. Universal Maritime Service*

⁸⁹ *Id.* at 1472. The Court noted, “a substantive waiver of federally protected civil rights will not be upheld.” *Id.*, (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 637 (1985)).

⁹⁰ *Id.*

⁹¹ *Id.* at 1474.

Corporation.⁹² As Justice Souter summarized: “In sum, *Gardner Denver* held that an individual's statutory right of freedom from discrimination and access to court for enforcement were beyond the Union's power to waive.”⁹³ This holding has been “repeated over the years and generally understood,” and the majority ignored the principle of *stare decisis* by radically diverging from the rationale of *Gardner-Denver* and enforcing the arbitration clause.⁹⁴ Furthermore, the dissent asserted that if the *Gardner-Denver* holding was actually as narrow as the majority found, then for thirty-five years the Court had been “wreaking havoc on the truth” when it held that there was an absolute prohibition of union waiver of employee’s federal forum rights. “The majority evades the precedent of *Gardner Denver* as long as it can simply by ignoring it.... the issue is settled and the time is too late by 35 years to make a bold assertion that ‘nothing in the law suggests a distinction between the status of arbitration agreements signed by the individual employee and those agreed to by a union representative. In fact, we recently and unanimously said that the

⁹² *Id.* at Dissent, 1478; 525 US 70, 80 (1998).

⁹³ *Pyett*, 129 S.Ct. 1456 at 1478 (2009) (Souter, J. Dissenting).

⁹⁴ *Id.*

principle that ‘federal forum rights cannot be waived in Union-negotiated CBAs even if they can be waived in individually executed contracts... every Court of Appeals save one has read our decisions as holding to this position.’⁹⁵

Interestingly, the dissent also noted that the majority opinion may ultimately be of little consequence, other than being a glaring, infamous incident of dramatic, unwarranted judicial repudiation of the principle of *stare decisis*. The dissent explained that the majority left open a significant question, as it “explicitly reserves the question whether a CBA’s waiver of a judicial forum is enforceable when the union controls access to and presentation of employees’ claims in arbitration.”⁹⁶ The dissent explained that this is often the situation,⁹⁷ and it is likely that this issue, which has been a point of contention for almost four decades, will

⁹⁵ *Id.* at Dissent, 1479.

⁹⁶ *Id.*

⁹⁷ *Id.*

remain a source of controversy unless and until it is definitively resolved by a future Supreme Court decision.

Justice Stevens, who joined Justice Souter's dissent, also wrote a separate dissent to reinforce his profound disagreement with the majority's repudiation of *stare decisis*. Justice Souter's dissent centrally situated *stare decisis*: "Principles of *stare decisis*... demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends.' (citations omitted) Considerations of *stare decisis* have special force' over an issue of statutory interpretation... Once we have construed a statute, stability is the rule, and 'we will not depart from it without some compelling justification.' (citation omitted) There is no argument for abandoning precedent here, and *Gardner Denver* controls."⁹⁸ Justice Stevens summarized: "My concern regarding the Court's subversion of precedent

⁹⁸ *Id.* Souter Dissent at 1478.

to the policy favoring arbitration prompts these additional remarks.”⁹⁹ Justice Stevens forcefully asserted that the majority arrogantly ignored public policy appropriately established by Congress: "The Court's derision of that ‘policy concern’ is particularly disingenuous given its subversion of *Gardner Denver's* holding in the service of an extratextual policy favoring arbitration.”¹⁰⁰ Justice Stevens was deeply disturbed by the raw judicial activism of the Court’s majority. *Gardner-Denver* established quite unequivocally that "Congress did not intend to permit” mandatory arbitration of statutory claims. Justice Stevens concluded: "in the absence of an intervening amendment to the relevant statutory language, we are bound by that decision. It is for Congress, rather than this Court, to reassess the policy arguments favoring arbitration and revise the relevant provisions to reflect its views.”¹⁰¹

⁹⁹ *Id.* at 1474 (Stevens, J. Dissenting).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

V. Analysis and Discussion

A. Jurisprudential Realpolitique, Political Ideology, Stare Decisis, and Justice Souter's Finale

The jurisprudential realpolitique of the *Pyett* decision is dramatically obvious. Stark ideological and political warfare continues between the Court's embattled core conservative majority and the soon-to-be Obama-ascendant liberal minority. This is thoroughly transparent and yields no surprises. The conservatives favor major institutional interests of employers and of unions, at the expense of the workers. Concomitantly, the liberal minority is relatively more solicitous of workers, especially individuals who are sometimes shabbily treated by unions and employers, or, at the very least, are generally more vulnerable have fewer resources.

Justice Souter's opinion for the dissent, is suffused with utter confidence that, sooner-than-later, a new majority, perhaps led by, and

certainly including, his President Obama-appointed successor, will unequivocally repudiate *Pyett* and return to the established law of *Gardner Denver*. In the fitful interim, however, the dissent sees *Pyett* as an aberration, rendered, with perversely appropriate timing on, literally, April Fool's Day. The dissent is especially incensed that such a potential tectonic shift so inimical to workers' interests was the shameless product of blatant activist arrogance by an ideological majority openly contemptuous of stare decisis and thirty five years of the well-established *Gardner-Denver* line of cases. The dissent obviously hopes that the *Gardner-Denver* rationale not only continues to percolate under *Pyett*'s ill-fitting and unstable lid, but that *Gardner-Denver* may, under a new Court liberal majority, soon reemerge and be reestablished as the controlling law, substantially strengthened, paradoxically, by the *Pyett* dissents. With the exceptions of *Gilmer* and *Pyett*, the Supreme Court has eschewed the integrated coherence of arbitration for the dynamic of a labor arbitration followed by external litigation de novo regarding statutory employment discrimination claims.

Nevertheless, to attempt to somehow resuscitate the obsolete *Gardner-Denver* rationale would be a mistake. *Pyett* deserves a fair opportunity to work. While there are a multitude of open questions flowing from the ramifications and consequences, both intended and, especially, unintended, the major elements of justice and fairness to employees, employers, and unions are within *Pyett* probabilities, and they deserve the opportunity to become operational.

B. Why the Court's Right Result Isn't Wrong

The 2009 rationale for continuing fealty to the 1974 rationale for *Gardner-Denver* is, at best, anemic and out of touch with positive developments in labor and employment arbitration in recent years. As Justice Holmes would remind us, it is a poor excuse to have a law just

because it was a law in the time of King Henry.¹⁰² The American Arbitration Association, for example, conducts fastidious scrutiny of, and demands a career-long commitment to state-of-the-art study by, the already highly qualified and accomplished arbitrators it admits to its panels of arbitrators available to prospective parties.¹⁰³ If, assuming *arguendo*, there ever was any legitimate basis for anyone to fear that, somehow, prominent labor arbitrators notoriously lacked sufficient expertise in employment discrimination law, those concerns are simply not well-founded in 2009.

On the eve of a half-century of Supreme Court enthusiasm for labor arbitration, manifested particularly in the landmark *Steelworkers Trilogy* in 1960¹⁰⁴, the *Pyett* decision reached the correct result, via admittedly somewhat problematic, truncated reasoning that could potentially cause a degree of jurisprudential and practical instability in labor arbitration and in the courts. We urge, however, that the *Pyett* decision, having achieved the

¹⁰² Oliver Wendell Holmes, Jr., THE COMMON LAW (1880)

¹⁰³ Professor Gregory, the lead author of this article, is a member of the National Academy of Arbitrators, and he serves on, inter alia, the labor and the employment arbitrator panels of the American Arbitration Association and United States Federal Mediation and Conciliation Service.

¹⁰⁴ See *supra* note 5.

correct result, deserves the opportunity to work in the real world, and that parties with such omnibus arbitration provisions in their collective bargaining agreements have the benefit of their one bite at the integrated, globalized apple.

The phenomenon of the Court reaching the correct result, albeit through fractured and spasmodic reasoning, while not the norm, certainly occurs with some frequency. As a pragmatic and positive matter, a sound functional result from a problematic and jagged opinion is infinitely superior to decision replete with elegant theory but yielding only a reflexive reiteration of a long-obsolete result.

The great practical utility and insight of these quintessentially Lincolnian principles are especially true in labor and employment law. *Pyett* is certainly not the first, and will not be the last, decision of the Court that, while not elegantly grounded in sophisticated jurisprudential

metaphysics, may nevertheless work well and yield just and fair results for employees, employers, and unions.

Whether *Gardner Denver* or *Pyett* controls, the stakes are significant for everyone. Unions will have continuing concerns about exposure to liability from law suits alleging breach of the union duty of fair representation under either model.¹⁰⁵

The employer presciently warned during oral argument before the Supreme Court that “forbidding unions from bargaining about the procedural right to bring all grievance claims, including those involving statutory rights, such as employment discrimination claims, into one integrated arbitration would be very dangerous. To repudiate *Pyett* would vitiate the role of the Union as the exclusive bargaining agent, and would

¹⁰⁵ Perhaps union concerns about Union DFR litigation are overwrought, according to Mitchell Rubinstein, *Duty of Fair Representation Jurisprudential Reform: The Need To Adjudicate Disputes In Internal Union Review Tribunals and the Forgotten Remedy of Re-Arbitration*, 42 U. MICH. J.L.REF. (2009) But, that does not translate necessarily into any reduction in the volume of Union DFR litigation that is filed.

encourage employees to deal directly with employers, in derogation of Congress's central role in setting national labor policy.”¹⁰⁶

To effectuate *Pyett*, however, also poses many challenges and raises a host of implicit unanswered procedural and substantive questions.

Perhaps the most thoughtful and realistic template as to whether, and under what circumstances, employees represented by labor unions and subject to the protections of anti-discrimination provisions in collective bargaining agreements may be bound to arbitrate, rather than litigate, statutory claims, was most cogently set forth by the Eleventh Circuit in *Brisentine v. Stone & Webster Engineering Corp.* in 1997.¹⁰⁷ In *Brisentine*, an employee brought an action against the employer in federal District Court, alleging violations of the Americans with Disabilities Act.¹⁰⁸ The defendant employer moved for summary judgment,

¹⁰⁶ December 1, 2008 oral argument transcript at 3-4.

¹⁰⁷ 117 F.3d 519 (11th Cir., 1997).

¹⁰⁸ *Id.* at 521.

contending that the plaintiff's claims were subject to a mandatory arbitration clause in the collective bargaining agreement. The employee appealed the District Court's summary judgment for the employer.

On appeal, the Eleventh Circuit reversed, holding that the mandatory arbitration provision of the labor contract was unenforceable.¹⁰⁹ In reaching this conclusion, the Eleventh Circuit formulated a three-part analytical framework derived from *Gardner-Denver* and *Gilmer*.¹¹⁰ The appellate court made several principal distinctions between *Gardner-Denver* and *Gilmer*, and ultimately decided that it would not enforce the union-negotiated waiver of a judicial forum for statutory claims.

First, it is necessary that the employee expressly individually agreed to the waiver of the right to bring statutory claims in court. Second, the parties must have expressly authorized the arbitrator to resolve statutory

¹⁰⁹ *Id.* at 526.

¹¹⁰ *Id.*

claims. Third, and perhaps most dramatically, the individual employee has the right to take statutory claims to arbitration,¹¹¹ which, more than coincidentally, Penn Plaza emphasized during oral argument before the Supreme Court. Pointing to the black letter language of the collective bargaining agreement, the employer argued that “all claims” regarding statutory rights are required to be arbitrated. Therefore, if the union, for whatever reasons, does not pursue statutory claims of grievants to arbitration, “the individuals then have [the right] to go to arbitration with their private counsel... and have their claims heard in the arbitral forum.”¹¹²

As the employer expressly stated at oral argument in *Pyett*: “As this Court has approved in *Gilmer*, what we are talking about is moving the forum from the judicial one to the arbitral one.”¹¹³ Justice Scalia framed the essence of the matter astutely at oral argument: “...if the union chooses

¹¹¹ 117 F.3d 519,-521 526 (11 Cir. 1997)

¹¹² *Id.* at 5.

¹¹³ Oral Argument at 16, December 1, 2008.

not to arbitrate it [the grievance regarding statutory claims] the individual must have the right to arbitrate it on his own,”¹¹⁴ a framing of the issue that the employer “wholeheartedly endorse[d].”¹¹⁵

This has stunning possibilities, and could utterly transmogrify labor arbitration in ways deeply problematic. Grievance negotiations are usually designed and intended by the employer, union, and employees/grievants to fairly and justly resolve grievance disputes well prior to arbitration. Both institutional employer and union interests are especially implicated, as are the interests of most grievants in obtaining fair resolution of grievances through good faith negotiations at the lower, quicker, and more immediate steps of the labor contract’s grievance procedure. What are the challenges and opportunities posed by *Pyett* to the conventional grievance and arbitration procedure dynamic?

¹¹⁴ *Id.* at 17.

¹¹⁵ *Id.* at 17.

Among the open questions raised by *Pyett*: If the Union does not pursue the statutory employment discrimination claims to arbitration, would the Union likely have greater exposure to suits alleging breach of the Union Duty of Fair Representation? Is *Pyett* thus a full employment bill for attorneys seeking to work within, or be retained by, labor unions? How many, if any, unions currently have sufficient internal expertise to evaluate correctly and work within a *Pyett* grievance presentation and negotiation dynamic to, and including, arbitration? Would the presence of a statutory claim pressed by grievant's personal attorney debilitate the Union's prerogatives as the NLRA Section 9 exclusive bargaining representative? What are most unions' prospects if they refuse outright, or grudgingly admit, and resent, interactions with private attorneys? What are the ethical responsibilities of any attorney in such a dynamic, but, especially, what is the role and duty of the private attorney? Who pays the attorney's fees for private counsel successfully representing a grievant at the arbitration, with the Union absent and not in the picture for any numbers of reasons?

Pyett may have the unintended, ominous consequence of having ushered everyone into a limbo-like no-man's land. Many of the open questions in this post-*Pyett* litany are implicitly premised upon the assumption that if the institutional Union decides not to pursue a grievant's statutory claim to arbitration, the Union nevertheless will necessarily allow the grievant to hire private counsel to represent the grievant at a Union-less arbitration with the employer, with the legal fees of private counsel absorbed by the Union. Obviously, this is a large leap, and may not be the case.¹¹⁶ In *Pyett*, the employees were informed that they could individually present their statutory claims before the arbitrator, and that they could be represented by their own private counsel, but that their attorney's fees and the arbitration fees would be the responsibility of the individual worker, and not of the Union.¹¹⁷ For all practical purposes, that could well be the end of the matter, since few grievants have the

¹¹⁶ My faculty colleague Mitchell H. Rubinstein brought these points to my attention. See, Mitchell H. Rubinstein, *Assignment of Labor Arbitration*, 81 St. John's L. Rev/ 41 (2008).

¹¹⁷ SEIU Local 32BJ amicus brief for *Pyett* at 17. Barry Winograd, *A New Day Dawning or Dark Clouds on the Horizon? The Potential Impact of the Pyett Case*, Labor Law Journal 227, 228 (2008-09).

financial means to hire private counsel and absorb a share of the arbitrator's fee.

Certainly not least is the central practical question---who pays? Who really pays?¹¹⁸ What if the statutory claim grievant does not have funds sufficient to hire private counsel to take those statutory claims to arbitration? If the Union institutionally is responsible for the cost of the grievant's attorney, it would probably be more cost efficient for the Union itself to take every statutory claim to arbitration. If, however, every statutory claim can come to arbitration, what incentive is there for the Employer and the Union to bargain for resolution of the grievance in the lower steps of the labor contract's grievance procedure?

Discovery could proliferate dramatically, with corresponding motion practice becoming virtually ubiquitous. These dimensions, imported from

¹¹⁸ See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997). See also, Harry T. Edwards, *Where Are We Heading With Mandatory Arbitration of Statutory Claims in Employment?* 16 GA. ST. U. L. REV. 293 (2000); Kenneth May, *Labor Lawyers at ABA Session Debate Role of American Arbitration Association*, DAILY LAB. REP., Feb. 15, 1996, at A-12.

employment discrimination law, could flood and freeze the collective bargaining agreement's grievance arbitration system with meritless grievances that are nevertheless obdurately headed for arbitration, to the detriment of meritorious grievances now inexorably subjected to interminable delays in an increasingly clogged and dysfunctional arbitration system.

Would the arbitrator have the authority to award the full range of remedies typically available in employment discrimination, including compensatory and punitive damages and attorney's fees of the prevailing party to be paid by----whom, exactly? . If so, where would such arbitral authority be grounded---implicitly, flowing from the *Pyett* decision, or would the labor contract have to be formally amended to allow the full range of damages and remedies available in federal court?

Once compensatory and punitive damages and attorney's fees considerations enter the *Pyett* equation, the conventional labor arbitration

of the pre-*Pyett* era will inevitably be significantly transformed and unrecognizable.

If the *Pyett* process becomes very expensive for the institutional parties, they remain always the masters of their conduct---no one is compelled to violate statutory employment discrimination law, for example. If the *Pyett* process becomes too burdensome and loses many of the distinct advantages that labor arbitration generally offers, including, especially, significantly less time and less expense to present the case in arbitration, and instead becomes the functional equivalent of an endless federal court case extracting the last dime from the parties, the parties are also the masters, presumably, of their collective bargaining agreement. They are certainly free to negotiate dramatically down the omnibus inclusory plethora of matters subject to the grievance arbitration process of the labor contract.

For example, assume *Pyett* operationally proves counterproductive. The parties could negotiate new labor contract language that, while pledging all parties to the spirit and letter of all applicable federal, state, and local statutory law, including, but not limited to all those prohibiting unlawful employment discrimination, bars bringing most, if not all, anti-discrimination matters into the grievance arbitration mechanisms of the labor contract. While, of course, this may not make for the best public relations or enlightened human resources, making the union and the employer appear as regressive and reactionary endorsers of unlawful employment discrimination, but, with the *Pyett* Court majority readily stating that *Gardner Denver* is not overruled, or even reached, by *Pyett*, *Gardner-Denver* remains the fully lawful default position in the event that *Pyett* is not workable.

Labor arbitration has many virtues, ranging from time and cost efficiency, due to minimal discovery and no pre-hearing motion practice, to no compensatory or punitive damages or attorney's fees shifted to the

loser. Institutional employers and unions, over time, develop mature and productive relationships, making labor grievance arbitration an important part, but only a part, of the parties' larger labor management dynamic. Under the *Pyett* regime, however, there is at least the plausible potential that some of these salient positive attributes of labor arbitration could be quickly debilitated. If the *Pyett*-era arbitration system becomes flooded with statutory rights claimants, accompanied by their personal attorneys, and suing the Union and the Employer for hybrid Section 301/breach of the Union DFR, all resolutely headed for the labor arbitration of their statutory claim as a matter of right, the institutional parties will amend their labor contracts to much more carefully contour *Pyett* issues.

In the latter instance, employers pleased with the unitary, integrated result achieved in *Pyett* may come to rue the day that they no longer had to worry about *Gardner-Denver* external litigation of statutory claims subsequent to the labor arbitration. In the *Pyett* era, as employers may face arbitration of statutory claims as a matter of right, a flooded grievance

arbitration system overloaded with individual grievants, and represented by private attorneys, resolved to arbitrate is not an attractive picture. Rather, it appears to be the labor and employment arbitration equivalent of Dickens' spectral, shrouded, wordless Ghost of Christmas future, inexorably promising bankruptcy and death on the present course, if left unamended. And, as employers yearn mightily for a return to the pre-*Pyett* days of *Gardner-Denver*, they, of course, under this parade of horrors, could be deemed to be entirely responsible for the fees of both the grievant's private, personal attorney and for the fees of the arbitrator in those statutory rights cases that the Union declines to take to arbitration.

Nevertheless, despite the many formidable challenges, the undeniable advantages of a unitary, single labor arbitration of all claims are very significant, with probable time, cost, and efficiency economies. In short order, meritless claims at labor arbitration are going to lose, with the corresponding word quickly spreading among the workers. Concomitantly, statutory claims of merit will be addressed, either in arbitration or in court.

Those employers and unions refusing to adopt *Pyett* language in their labor contract are not going to thereby be exempt from litigation externally in court for statutory claims that may be brought. Rather, on the contrary, by eschewing *Pyett*, external litigation is guaranteed in the absence of an omnibus *Pyett*- like grievance arbitration definition in the labor contract.

VI. Conclusion

On the eve of the half-century anniversary of the landmark *Steelworkers Trilogy*, the most classic of the many Supreme Court¹¹⁹ enthusiastic endorsements of labor arbitration, rather than external litigation, as the preferred means of dispute resolution in the unionized labor management relationship, much remains to be said for the reinvigoration and unequivocal restoration of *Gardner-Denver* precedent.

¹¹⁹ See *supra* note 5.

But, much can also be said for judicial deference to the successful bargain made by the parties endeavoring to utilize the unitary, single labor arbitration as the integrated setting for the resolution of all contractual and statutory claims.

Pyett is one significant, but not radical, exception to the *Gardner-Denver* genre of dispute resolution modalities. For all practical purposes, unless the union and the employer expressly negotiate a *Pyett* provision mandating omnibus inclusion of statutory claims in the grievance arbitration procedure, *Gardner Denver* remains the default position---if not *Pyett*, then *Gardner Denver* controls with the potential for statutory claims being subsequently litigated in court de novo after the conclusion of the labor arbitration that lacks any res judicata or collateral estoppel force.

Meanwhile, unfortunately, due to the transparent bitterness among some of the ideologically riven Justices, especially in Justice Souter's final

weeks of service on the Court, and the equally raw activism marginalizing and subordinating *Gardner-Denver*, yet purportedly without overruling *Gardner-Denver*, *Pyett* will be one of the more contentious labor and employment decisions in the past several Terms of the Court.

A plethora of legislative initiatives,¹²⁰ such as the Arbitration Fairness Act of 2009, may be catalyzed and revitalized from their recent languishing dormancy by the more controversial implications of *Pyett*. Much of the reform legislation is, despite benign titles, in fact, overtly hostile to labor and employment arbitration. *Pyett* may add fuel in the short term to those pernicious populist legislative fires. The Arbitration Fairness Act, for example, would render unenforceable any and all agreements to arbitrate entered into before a dispute arose, a gross overreaction to the proven efficacy and fairness of labor and employment arbitration. In addition, the proposed Act would amend Chapter 1 of Title 9 of the United States Code, the Federal Arbitration Act, to invalidate all mandatory

¹²⁰ For synthesis of the pending legislation, see ADR, National Law Journal In Focus Section 13-17, November 24, 2008.

predispute agreements to arbitrate all employment, consumer, franchise, and civil rights disputes. The Act further provides that the determination of the validity and enforceability of an agreement to arbitrate shall be determined by courts looking to federal law, and not by arbitrators.

Pyett's seeming initial attractiveness to some employer and union institutional interests is presumably genuine. A single labor arbitration resolving all labor contract and statutory claims, with subsequent litigation of the statutory claims foreclosed, presents the great advantage of the unitary omnibus process,

Pyett offers unions and employers the alternative of one, rather than at least two serial, bite(s) at the proverbial apple.

Pyett is a significant alternative to *Gardner Denver*, but it is *Pyett* that is the innovative, intriguing exception, while *Gardner Denver* remains the default, the norm, and, quite likely, the prevailing dynamic for the

foreseeable future. Meanwhile, it is not a zero-sum war between *Gardner-Denver* and *Pyett*. The latter is an interesting alternative that merits the careful consideration of employers, employees, and unions, especially by those dissatisfied with the serial proceedings and seemingly never-ending litigation virtually guaranteed by *Gardner-Denver*.

On H as: PYETT Article 2009