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PROTECTING UNIONIZED EMPLOYEES AGAINST
DISCRIMINATION: THE FOURTH CIRCUIT'S
MISINTERPRETATION OF SUPREME COURT PRECEDENT

BY
ANN C. HODGES*

The Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corporation*¹ initiated a barrage of employer efforts to dismiss or stay employment discrimination actions in judicial forums based on contractual arbitration agreements. Many of the agreements that formed the basis of employer motions were in the nonunion setting, but despite the Supreme Court's decision in *Alexander v. Gardner-Denver Company*,² employers also have sought dismissal of discrimination claims based on the existence of grievance and arbitration procedures in collective bargaining agreements. The Fourth Circuit is the only circuit thus far to have dismissed employee discrimination claims on the basis of the employee's failure to arbitrate using a collectively bargained arbitration procedure.³ The other circuits that have addressed the issue have refused to find that arbitration provisions in collective bargaining agreements bar judicial

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1. 500 U.S. 20 (1991).

2. 415 U.S. 36 (1974). In *Gardner-Denver*, the Supreme Court held that an employee's claim that his discharge violated Title VII of the Civil Rights Act could proceed in court despite a prior arbitration under the collective bargaining agreement in which the discharge was upheld.

3. See *Wright v. Universal Maritime Serv. Corp.*, 121 F.3d 702, 1997 WL 422869 (4th Cir. July 29, 1997) (unpublished opinion), *cert. granted*, 118 S. Ct. 1162 (1998); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996). The Third Circuit reached a similar result, but subsequently vacated and changed its decision. See *Martin v. Dana Corp.*, 135 F.2d 765, 156 L.R.R.M. 3137 (3d Cir. 1997). The issue is not limited to federal courts and employment discrimination claims. In July 1997, a circuit court in Virginia relied on *Austin* to dismiss an employee's claim that she was terminated in retaliation for filing a workers' compensation claim in violation of state law. See *Graham v. Northern Virginia Electric Cooperative*, No. 41065 (1st Jud. Cir. 1997).

litigation of federal statutory claims.⁴ The Supreme Court has granted certiorari in a Fourth Circuit case to resolve the split in the circuits.⁵

The Fourth Circuit's approach to the issue misinterprets the law as set forth by the Supreme Court and demonstrates a lack of understanding of the operation of the grievance and arbitration procedure in the collective bargaining context. The decisions create great difficulty for unions seeking to protect bargaining unit employees from discriminatory treatment. The Supreme Court should resolve this split in the circuits by reaffirming *Gardner-Denver's* holding that employees covered by a collective bargaining agreement can litigate discrimination claims in federal court, whether or not they choose to avail themselves of the contractual grievance and arbitration procedure.

This article will first review the Supreme Court's arbitration jurisprudence, concentrating on labor and employment law cases. Next, the article will analyze the cases involving arbitration under collective bargaining agreements decided by the courts of appeals subsequent to *Gilmer*. The article will then evaluate the two different approaches of the circuit courts in light of the law relating to collective bargaining and union representation. Finally, the article will review alternative methods of protecting employee rights to determine whether unions can preserve employees' statutory rights under the rule of the Fourth Circuit. The article concludes that the Supreme Court should reverse the Fourth Circuit in order to effectuate the purposes of both national labor policy and antidiscrimination law.

I. THE SUPREME COURT'S ARBITRATION JURISPRUDENCE

Since at least 1960, when it decided the *Steelworkers Trilogy*,⁶

4. See *Harrison v. Eddy Potash*, 112 F.3d 1437 (10th Cir.), petition for cert. filed, 66 U.S.L.W. 3137 (U.S. Aug. 6, 1997) (No. 97-232); *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir.), cert. denied, 118 S. Ct. 295 (1997); *Penny v. United Parcel Service*, 128 F.3d 408 (6th Cir. 1997); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519 (11th Cir. 1997); *Martin v. Dana Corp.*, 156 L.R.R.M. (BNA) 3137 (3d Cir. 1997); *Varner v. National Super Mkts, Inc.*, 94 F.3d 1209 (8th Cir. 1996), cert. denied, 117 S. Ct. 946 (1997); *Bates v. Long Island R.R. Co.*, 997 F.2d 1028 (2d Cir.), cert. denied, 510 U.S. 992 (1993).

5. *Wright v. Universal Maritime Serv. Corp.*, 121 F.3d 702, 1997 WL 422869 (4th Cir. July 29, 1997) (unpublished opinion), cert. granted, 118 S. Ct. 1162 (1998).

6. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

the Supreme Court has been solicitous of the arbitration of disputes arising under collectively bargained agreements. In the *Trilogy*, the Court affirmed the national labor policy favoring arbitration, limiting the court's function to deciding whether the parties had agreed to arbitrate the dispute and admonishing courts that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."⁷ The Court also examined the judicial role in post-arbitration review of awards in the *Trilogy*, ruling that courts should not reevaluate the merits of an arbitrator's decision. The Court in the *Trilogy* recognized that labor arbitration is not a "substitute for litigation," but rather a "substitute for industrial strife."⁸ Arbitration is not solely a method of resolving disputes between employees and the employer, but it is "an extension of the collective bargaining process, the method by which meaning and content are given to the negotiated agreement."⁹ The arbitrator's function is to read the contract, effectively striking a supplemental bargain for the parties to handle matters unanticipated at the time of negotiations.¹⁰

For many years, the Court's deference to labor arbitration was unique. In the 1980s, however, the Supreme Court issued a series of decisions enforcing commercial agreements to arbitrate statutory claims.¹¹ In the commercial context, the Court also concluded that doubts about the scope of an agreement to arbitrate should be resolved in favor of coverage.¹² In 1991, the Court addressed arbitration of a statutory employment discrimination claim in *Gilmer*,

7. *Warrior & Gulf*, 363 U.S. at 582-83. The Court also held that in determining arbitrability of a dispute, the courts should not weigh the merits of the grievance, noting that the processing of even frivolous claims may have therapeutic value. *American Mfg.*, 363 U.S. at 568.

8. *Warrior & Gulf*, 363 U.S. at 578.

9. Ann C. Hodges, *The Steelworkers Trilogy in the Public Sector*, 66 CHI-KENT L. REV. 631, 635 (1990).

10. Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1140 (1977).

11. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (enforcing agreement to arbitrate claims under the Securities Act of 1933); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (enforcing agreement to arbitrate claims under Securities Exchange Act of 1934 and the Racketeer Influence and Corrupt Organizations Act (RICO)); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (enforcing agreement to arbitrate claims based on antitrust law). For a thorough discussion of the Supreme Court's arbitration jurisprudence, see Kenneth R. Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 63-74 (1997).

holding that the employee, who had agreed to arbitrate disputes regarding his employment in his registration application for the New York Stock Exchange, was required to arbitrate his statutory age discrimination claim despite his objections.¹³ Prior to the *Gilmer* decision, however, the Court had addressed the impact of grievance arbitration on a statutory Title VII claim in *Gardner-Denver*.¹⁴

The employee in *Gardner-Denver* filed suit under Title VII alleging that his discharge was because of his race.¹⁵ The employee had previously arbitrated his discharge under the just cause provision of the collective bargaining agreement between his employer and his union and had raised his claim of race discrimination in the arbitration. The arbitrator's decision denied the grievance, finding that the discharge was for just cause, but did not expressly address the issue of race discrimination. The district court and the court of appeals agreed with the employer's argument that the employee was bound by the arbitrator's decision and had no right to sue under Title VII. The Supreme Court upheld the employee's right to sue despite the arbitration decision, rejecting the argument that the employee had waived his cause of action under Title VII. The Court noted that while the union could waive statutory rights related to collective activity, such as the right to strike, the union could not waive the individual's statutory right to be free from discrimination through the collective bargaining process.¹⁶ Nor did the employee's submission of his grievance to the arbitration process waive his statutory right since the process was an independent method of enforcing a contractual, rather than a statutory obligation.¹⁷ The Court emphasized the latter point by noting that the arbitrator's authority related only to contractual matters, not legislation, even if the contractual rights and the statutory rights were identical.¹⁸

Despite the national labor policy favoring arbitration, the Court reasoned that upholding the employee's right of access to a judicial forum would not unduly discourage arbitration.¹⁹ Unlike commercial arbitration, which substitutes for litigation, labor arbitration is a substitute for the strike, providing a strong incentive for employers to

13. *Gilmer*, 500 U.S. at 23.

14. *Gardner-Denver*, 415 U.S. at 38.

15. All facts have been taken from the Court's opinion in *Gardner-Denver*. *Id.* at 38-43.

16. *Id.* at 51-52.

17. *Id.* at 52.

18. *Id.* at 53-54.

19. *Id.* at 54.

agree to arbitrate even if statutory claims can be the subject of later litigation.²⁰ Furthermore, arbitration of the statutory claim might resolve the issue, rendering litigation unnecessary, although permissible.²¹

The employer also urged the Court to rule that courts must defer to an arbitrator's decision in later litigation, if such litigation were permitted.²² In addressing this argument, the Court concluded that arbitration was an inappropriate forum for resolution of Title VII claims.²³ The Court supported this conclusion by pointing out that arbitrators have authority only to enforce collective bargaining agreements, not statutory claims, and that they are chosen because of their expertise in the "law of the shop, not the law of the land."²⁴ The Court went on to note that the informality of the arbitration procedure, including the inapplicability of the rules of evidence and the absence or limited use of discovery, compulsory process, cross examination and testimony under oath, made arbitration a less appropriate forum than the courts for Title VII cases.²⁵ In a footnote, the court also evinced concern for the fact that the union exclusively controlled the collectively-bargained grievance and arbitration procedure.²⁶ The interests of the employee/discriminatee and the union might diverge and the union might subordinate the individual's interest to the collective interests of the bargaining unit employees.²⁷

The Court considered but rejected application of a more demanding deferral standard to resolve its concerns.²⁸ A rule which would require arbitration to contain the safeguards of litigation for deferral purposes would reduce the benefits of arbitral informality, while necessitating more extensive judicial review of the arbitration decision to insure compliance with the standard, thereby limiting the

20. *Id.* at 55.

21. *Id.*

22. *Id.* at 55-56. The proposed deferral rule would have granted summary judgment for the employer on the statutory claim, thereby dismissing the employee's action, if the discrimination claim was before the arbitrator, the collective bargaining agreement prohibited discrimination of the type alleged in the lawsuit, and the arbitrator had the authority to rule on the claim and order a remedy. *Id.* at 56.

23. *Id.*

24. *Id.* at 57.

25. *Id.* at 57-58.

26. *Id.* at 58 n.19.

27. *Id.*

28. *Id.* at 58. The Court cited as an example the standard adopted by the Fifth Circuit in *Rios v. Reynolds Metals Co.*, 467 F.2d 54, 58 (1972). *Id.* at 58 n.20.

efficiency that a deferral rule would be designed to accomplish.²⁹ The Court also reasoned that a deferral rule might discourage utilization of arbitration, generating more, rather than less litigation.³⁰ Accordingly, the Court concluded that "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices could best be accommodated by permitting an employee to fully pursue both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII."³¹

In two subsequent cases, the Court reached the same conclusion with respect to claims under the Fair Labor Standards Act and Section 1983.³² In *Barrentine v. Arkansas-Best Freight Sys.*,³³ the Court relied on *Gardner-Denver* to find that employees were not barred from bringing a claim in federal court based on the Fair Labor Standards Act, despite their prior arbitration of their wage claims under the collective bargaining agreement.³⁴ Like the Court in *Gardner-Denver*, the *Barrentine* Court recognized the risk to statutory rights were they relegated to enforcement through a collectively bargained grievance and arbitration procedure.³⁵ Similarly, the Court noted that an arbitrator expert in the law of the shop might not have the legal expertise or the authority to decide statutory claims.³⁶ Finally, the Court pointed out that the arbitrator could award only the relief available under the contract, which was unlikely to include the liquidated damages, costs and attorney's fees available under the FLSA.³⁷

Again in *McDonald v. City of West Branch*,³⁸ the Court evinced

29. *Id.* at 59.

30. *Id.*

31. *Id.* at 59-60.

32. See *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (Section 1983); *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981) (Fair Labor Standards Act). Section 1983, 42 U.S.C. § 1983 (1994), provides inter alia:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The plaintiff in *McDonald*, a public employee, sued under Section 1983 alleging that his termination violated his first amendment rights.

33. 450 U.S. 728 (1981).

34. *Id.* at 745-46.

35. *Id.* at 744-45.

36. *Id.* at 743. The concern about expertise was particularly acute in *Barrentine* which involved a joint arbitration board composed of union and management representatives. *Id.* at 731.

37. *Id.* at 745.

38. 466 U.S. 284 (1984).

a concern about the union's exclusive control over the grievance procedure, highlighting the possibility that the union "may present the employee's grievance less vigorously, or make different strategic choices than would the employee. Thus, where an arbitration award accorded preclusive effect, an employee's opportunity to be compensated for a constitutional deprivation might be lost merely because it was not in the union's interest to press his claim vigorously."³⁹

These three cases preceded the Supreme Court's decision in *Gilmer*, where the Court distinguished them in ordering Gilmer to arbitrate his age discrimination claim.⁴⁰ Relying on the recent decisions in commercial arbitration cases, the Court found that the Age Discrimination in Employment Act (ADEA) did not bar waiver of the right to a judicial forum, and also rejected the argument that arbitration is not an adequate forum for resolving statutory claims.⁴¹ The Court concluded that the plaintiff's reliance on *Gardner-Denver* and its progeny was misplaced.

First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they 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 their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA, which as discussed above, reflects a "liberal federal policy favoring arbitration agreements."⁴²

Since *Gilmer*, courts have regularly enforced agreements to arbitrate statutory employment discrimination claims in the nonunion context.⁴³ The courts have split, however, on whether the existence

39. *Id.* at 291.

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

41. *Id.* at 29-30.

42. *Id.* at 35.

43. See, e.g., *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991); see also *Metz v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1984) (holding Title VII claims arbitrable but finding that employer waived arbitration in this case); but see *Prudential Corp. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), cert. denied, 516 U.S. 812 (1995) (holding that the employees did not knowingly and voluntarily waive their

of arbitration provisions in collective bargaining agreements bars judicial litigation of statutory claims. A review of those cases demonstrates the opposing views.

II. POST-GILMER LOWER COURT DECISIONS INVOLVING COLLECTIVE BARGAINING AGREEMENTS

In addition to a number of district courts, seven circuits have faced the question of the impact of a collective bargaining agreement's arbitration clause on a statutory discrimination action. The Fourth Circuit stands alone in dismissing discrimination complaints based on arbitration clauses in collective bargaining agreements, while the Second, Third, Seventh, Eighth, Tenth, and Eleventh have rejected employer motions to dismiss or stay judicial claims.

A. The Fourth Circuit

In *Austin v. Owens-Brockway Glass Container, Inc.*,⁴⁴ the Fourth Circuit issued the first and most definitive circuit court of appeals decision dismissing the plaintiff's claim where she failed to invoke the grievance and arbitration procedure of the collective bargaining agreement. The majority in *Austin* began by citing the federal policy favoring arbitration of labor disputes.⁴⁵ It then focused primarily on *Gilmer* and looked to Title VII and the Americans with Disabilities Act to discern whether Congress intended to preclude waiver of judicial remedies.⁴⁶ Since both the ADA and the Civil Rights Act of 1991, amending Title VII, contained language encouraging the use of alternative dispute resolution, the court found no such intent.⁴⁷ While recognizing that the legislative history of both statutes focused on voluntary use of ADR, the court both disregarded the authority of the legislative history and suggested that the case at bar involved voluntary arbitration.⁴⁸ The court dismissed the Supreme Court's

right to a judicial forum for litigation of discrimination claims); *Rosenberg, v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 76 Fair Empl. Prac. Cas. (BNA) 681 (D. Mass. 1998) (Congress did not intend to permit compulsory arbitration of Title VII claims and the arbitral forum at issue was inadequate to resolve the plaintiff's ADEA claim).

44. 78 F.3d 875 (4th Cir.), cert. denied, 117 S. Ct. 432 (1996).

45. *Id.* at 879.

46. *Id.* at 880-82.

47. *Id.* at 881. But see *Rosenberg*, 76 Fair Empl. Prac. Cas. (BNA) at 690-94 (concluding that Congress did not intend to permit mandatory predispute agreements to arbitrate Title VII claims).

48. 78 F.3d at 885-86.

concern in *Gilmer* about tension between individual and collective rights, finding that the plaintiff was a party to the collective bargaining agreement through which she voluntarily agreed to arbitrate.⁴⁹ To the court, it made no difference whether the agreement to arbitrate was contained in an employment contract, a securities registration application, or a collective bargaining agreement.⁵⁰

To further support its decision, the *Austin* court cited the ability of a union to waive employee rights protected by the National Labor Relations Act.⁵¹ The court found no distinction between such a waiver and bargaining for arbitration which waived the individual's right to a judicial forum.⁵² Finally, the court also relied on judicial decisions under Section 301 of the Labor Management Relations Act requiring employees to exhaust the grievance and arbitration procedure prior to filing suit against the employer.⁵³ Judge Hall dissented, relying on the continued vitality of *Gardner-Denver*, which according to Judge Hall governs arbitration of statutory claims in the context of collective bargaining agreements.⁵⁴

Since *Austin*, the Fourth Circuit has twice addressed the issue. First, in *Wright v. Universal Maritime Service Corporation*, the court relied on *Austin* to dismiss an employee's Americans with Disabilities Act claim against a group of employers who were members of an employer association.⁵⁵ Although there was a grievance and arbitration procedure in the collective bargaining agreement, Wright did not file a grievance.⁵⁶ In an unpublished opinion, the court upheld the district court's dismissal of the claim based on the broad language of the grievance and arbitration agreement.⁵⁷ Since the contract stated that "this agreement is intended to cover all matters affecting wages, hours, and other terms and conditions of employment," the court concluded that the absence of any language referring to the ADA or statutory disability discrimination claims did not preclude dismissal based on failure to arbitrate.⁵⁸ "An employer

49. *Id.* at 885.

50. *Id.*

51. *Id.*, citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705 (1983).

52. *Id.* at 885.

53. *Id.*, citing *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965). The case cited involved suits for breach of the collective bargaining agreement.

54. *Id.* at 886-87 (Hall, J. dissenting).

55. 121 F.3d 702 (table), 1997 WL 422869 (4th Cir. July 29, 1997) (unpublished opinion), cert. granted, 118 S. Ct. 1162 (1998).

56. *Id.* at *1.

57. *Id.* at *2.

58. *Id.*

need not provide a laundry list of potential disputes in order for them to be covered by an arbitration clause. . . . A narrower interpretation of the agreement would fly directly in the face of both the ADA's statutory preference for arbitration, and the strong federal policy favoring alternative dispute resolution (citations omitted)."⁵⁹

Several months later, the court again addressed the issue in a case arising under the Railway Labor Act.⁶⁰ The Fourth Circuit reversed the district court's dismissal of the plaintiff's Title VII and the Family and Medical Leave Act claims based on *Austin*.⁶¹ The court distinguished the case from *Austin*, holding that the collective bargaining agreement's arbitration provision did not cover statutory disputes; instead it was limited to contractual disputes.⁶² The contractual prohibition of conduct similar to that prohibited by Title VII and the FMLA was insufficient to create an obligation to arbitrate statutory claims, according to the court.⁶³ In accordance with the earlier decision in *Wright*, however, the court stated that the parties could agree to arbitrate disputes based on statutory and common law claims and "would not need to mention in their agreement that a statute was the source of a dispute committed to arbitration as long as it were made clear that their agreement is sufficiently broad to include the arbitration of such disputes."⁶⁴

Accordingly, in the Fourth Circuit, either contractual reference to statutory rights or broad language indicating that the contract covers more than just contractual rights will bind employees to arbitrate statutory claims. In contrast to the Fourth Circuit, each of the other circuits has relied on the continuing viability of *Gardner-Denver* to reject employer efforts to compel arbitration of statutory claims under collective bargaining agreements.

B. The Second Circuit

The Second Circuit Court of Appeals refused to dismiss a claim of disability discrimination under the Rehabilitation Act of 1973 based on the Railway Labor Act's requirement that minor disputes

59. *Id.*

60. *Brown v. Trans World Airlines*, 127 F.3d 337 (4th Cir. 1997).

61. *Id.* at 338. The court, however, found that *Brown* failed to rebut facts showing that she had no claim under the FMLA and upheld summary judgment on that cause of action on the merits. *Id.* at 342.

62. *Id.* at 341.

63. *Id.*

64. *Id.* at 341-42.

be arbitrated.⁶⁵ Although the court recognized that the claims implicated the collective bargaining agreement, it relied on *Gardner-Denver*, *Barrentine* and *McDonald* to find that the employees were entitled to proceed in court.⁶⁶ *Gilmer* did not apply, according to the court, because the Federal Arbitration Act excludes contracts of railroad employees, and, in addition, *Gilmer* did not involve a collective bargaining agreement.⁶⁷ The court's decision, however, seemed to rely in part on the inadequacy of the arbitration forum for the resolution of statutory claims, a rationale rejected in *Gilmer*.⁶⁸

Two years later, the Second Circuit again addressed the arbitration of statutory claims in *Tran v. Tran*.⁶⁹ In that case, the court relied on *Barrentine* to reverse the district court's determination that the employee was required to "exhaust his arbitral remedy prior to filing" suit under the Fair Labor Standards Act.⁷⁰ The court concluded that *Barrentine* not only survived *Gilmer*, but indeed had renewed vitality based on the *Gilmer* Court's distinction of the cases involving arbitration under a collective bargaining agreement.⁷¹

C. The Eighth Circuit

In *Varner v. National Super Markets, Inc.*,⁷² the Eighth Circuit upheld the district court's denial of the employer's motion for judgment as a matter of law based on the plaintiff's failure to exhaust the

65. *Bates v. Long Island R.R. Co.*, 997 F.2d 1028 (2d Cir. 1997), cert. denied, 510 U.S. 992 (1993). The Railway Labor Act provides that minor disputes, disputes about the interpretation of collective bargaining agreements, must be resolved exclusively by the statutory arbitration procedure. *Id.* at 1034.

66. *Id.*

67. *Id.*

68. See *id.* at 1030-32. In a subsequent case, the District Court of Connecticut concluded that the plaintiff must arbitrate his claims of race discrimination under § 1981 because the collective bargaining agreement prohibited "discrimination as defined by federal law and provide[d] for arbitration of any violation." *Almonte v. Coca-Cola Bottling Co.*, 959 F. Supp. 569, 573-74 (D. Conn. 1997). The court relied on its prior decision in *Claps v. Moliterno Stone Sales, Inc.*, 819 F. Supp. 141 (D. Conn. 1993), in which it established a rebuttable presumption that statutory claims were excluded from the collective bargaining process, but found the presumption rebutted in *Almonte*. 959 F. Supp. at 574. The *Almonte* court neither discussed *Bates* nor distinguished *Almonte* from *Bates*.

69. 54 F.3d 115 (2d Cir. 1995), cert. denied, 517 U.S. 1134 (1996).

70. *Id.* at 118, quoting *Tran v. Tran*, 847 F. Supp. at 309. The Ninth Circuit reached a similar conclusion in a Fair Labor Standards Act (FLSA) case, which suggests that it would reach the same conclusion with respect to discrimination claims. See *Local 246, Utility Workers v. Southern Cal. Edison Co.*, 83 F.3d 292 (9th Cir. 1996). On the other hand, discrimination claims may be distinguished from FLSA claims based on the absence of statutory language in the FLSA encouraging alternative dispute resolution. See *supra* note 47 and accompanying text.

71. 54 F.3d at 117.

72. 94 F.3d 1209, 1213 (8th Cir. 1996), cert. denied, 117 S. Ct. 946 (1997).

collective bargaining agreement's grievance and arbitration procedure before filing a Title VII sexual harassment case. The court, with little discussion, relied on *Gardner-Denver* to hold that exhaustion was not required. Later, in *Patterson v. Tenet Healthcare*, the court reiterated, in dicta, that "arbitration agreements contained within a CBA do not bar civil claims under Title VII."⁷³

D. The Seventh Circuit

While the Second and Eighth Circuits followed the *Gardner-Denver* line of cases with limited analysis, the Seventh Circuit engaged in a far more extensive analytical review before concluding that the availability of arbitration under a collective bargaining agreement did not require the court to stay judicial litigation of statutory claims.⁷⁴ The consolidated case involved two plaintiffs, one alleging race discrimination under Title VII and Section 1981 and disability discrimination under the ADA and the second alleging age and disability discrimination under the ADEA and ADA respectively. Each was covered by a collective bargaining agreement which prohibited discrimination, required just cause for termination, and contained a grievance and arbitration procedure for disputes involving interpretation and application of the agreement.⁷⁵ One plaintiff's union had demanded arbitration of his grievance, while the other's union had dropped the grievance.⁷⁶ First, the court addressed the question of whether the Federal Arbitration Act encompasses collective bargaining agreements, noting that the question was critical in determining the court's jurisdiction.⁷⁷ The court decided that the contract was not excluded from the FAA, since the statutory exclusion applied only to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."⁷⁸ On this issue, which has split the courts, the Seventh Circuit agreed with those courts who read the exclusion narrowly to encompass only employment contracts in the transportation

73. 113 F.3d 832 (1997).

74. *Pryner v. Tractor Supply Company*, 109 F.3d 354 (7th Cir.), cert. denied, 118 S. Ct. 294 (1997).

75. One contractual antidiscrimination clause referred to state and federal law while the other did not. *Id.* at 356.

76. There was some dispute as to whether the grievance was dropped as a result of the employee's actions or the union's. *Id.*

77. *Id.* at 356-60.

78. *Id.*

industry.⁷⁹ The court then reached the second issue of whether a collective bargaining agreement can compel arbitration of a federal statutory discrimination claim.

Noting that resolution of the issue involved balancing "the interest in allowing unions and employers to establish a comprehensive regime for the adjustment of employment disputes"⁸⁰ and the "interest in the effective enforcement of rights designed for the protection of workers"⁸¹ in vulnerable groups, the court concluded that the appropriate balance was to allow judicial litigation despite the collective bargaining agreement's arbitration provision. Therefore, the court denied the requested stay. Despite the employers' attempts to convince the court that a stay pending arbitration would benefit both the employers and the employees, the court found that the employees might well lose statutory rights were they required to submit their claims to arbitration, even if later judicial litigation were permitted.⁸²

The court offered three reasons supporting the balance it struck. First, because the employees' rights under the collective bargaining agreements were more limited than their statutory rights, they might be required to litigate twice in order to obtain complete relief.⁸³ Second, by arbitrating their claims, the employees would lose the right to trial by jury.⁸⁴ Finally, as the Supreme Court recognized in both *Gilmer* and *Gardner-Denver*, the union controls the grievance and arbitration procedure.⁸⁵ While the duty of fair representation requires the union to represent the employee nondiscriminatorily and in good faith, the union has broad discretion in determining whether to arbitrate a grievance.⁸⁶ Even if the duty is breached, the employee must then file another lawsuit to vindicate his or her statutory rights.⁸⁷ Accordingly, it is inconsistent with the policy underlying the employment discrimination statutes to allow the statutory rights of the minority to be controlled by the majority.⁸⁸ Forcing arbitration

79. *Id.* at 357-58.

80. *Id.* at 360.

81. *Id.*

82. *Id.* at 361.

83. *Id.* at 362.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*; see *Vaca v. Sipes*, 386 U.S. 171, 186 (1967). Charges of breach of the duty of fair representation can also be filed with the National Labor Relations Board in lieu of judicial litigation. *Id.*

88. *Pryner*, 109 F.3d at 363.

under the collective bargaining agreement allows the union (representing the majority) to waive the employees' individual rights to a judicial forum to vindicate their statutory rights.⁸⁹

E. The Tenth Circuit

Less than two months after *Pryner*, the Tenth Circuit decided that judicial litigation of a Title VII sexual harassment claim was not barred by the plaintiff's failure to file a grievance under the collective bargaining agreement.⁹⁰ The court concluded that *Gilmer* distinguished arbitration under a collective bargaining agreement from individual arbitration agreements because of the concern about conflicts between group goals and individual rights.⁹¹ Labor arbitrators interpret the agreement (private law), while employment arbitrators deciding statutory claims determine public law rights.⁹² In addition, the court suggested that *Gilmer* did not apply outside the context of the FAA, which the Tenth Circuit had held does not cover labor arbitration because of the Section 1 exclusion.⁹³ Accordingly, *Gardner-Denver* was the appropriate authority rather than *Gilmer*, requiring rejection of the Defendant's argument.⁹⁴

F. The Third Circuit

The Third Circuit, addressing the issue just over a month after the Tenth Circuit, dismissing the plaintiff's race discrimination claim brought under Title VII and Section 1981 because he failed to utilize the collective bargaining agreement's arbitration procedure.⁹⁵ Upon

89. *Id.* at 362-63.

90. *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir.), petition for cert. filed, 66 U.S.L.W. 3137 (U.S. Aug. 6, 1997) (No. 97-232).

91. *Id.* at 1453-54.

92. *Id.* at 1454, citing Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77, 87-88 (1996). The court noted that it did not have evidence regarding the scope of the arbitration clause, but that no argument had been put forth that the agreement covered statutory claims. 112 F.3d at 1454 n.2. This caveat may suggest that the court would reach a different conclusion if the contract specifically incorporated statutory claims under the arbitration provision. Cf. *Martin v. Dana Corp.*, 135 F.3d 765, 156 L.R.R.M. (BNA) 3137 (3d Cir. 1997).

93. 112 F.3d at 1454.

94. *Id.*

95. *Martin v. Dana Corp.*, 114 F.3d 421 (1997), vacated, 114 F.3d 428 (3d Cir. 1997). On July 1, 1997, the court voted to rehear the case *en banc*. 114 F.3d 428. On September 12, however, the court vacated that order and referred the case back to the panel for rehearing. 124 F.3d 590. In its initial opinion, the Third Circuit concluded that the facts of the *Martin* case differed from cases previously addressed by the courts in the labor arbitration context because the employee individually could compel arbitration. Accordingly, the concern about conflicting individ-

rehearing, the same panel, in an unpublished opinion, concluded without dissent that because the union maintained exclusive control over the grievance procedure, *Alexander v. Gardner-Denver* required reversal of the district court's order dismissing the complaint for failure to arbitrate.⁹⁶

G. The Eleventh Circuit

In *Brisentine v. Stone & Weber Engineering Corp.*,⁹⁷ the Eleventh Circuit followed the majority view and reversed the district court's grant of summary judgment in favor of the employer. The employee had filed an ADA claim challenging his termination with the EEOC and subsequently in court, eschewing the contractual grievance procedure on the advice of the union.⁹⁸ The district court dismissed Brisentine's ADA claim because of his failure to file a grievance under the collectively bargained procedure.⁹⁹ On review, the Eleventh Circuit, like the Tenth Circuit, concluded that *Gardner-Denver* was still good law and looked to the *Gilmer* Court's distinction between the two cases to determine whether the case at bar more closely resembled *Gilmer* or *Gardner-Denver*.¹⁰⁰

The court tested the facts of *Brisentine* against the three distinctions the Supreme Court drew between *Gilmer* and *Gardner-Denver*. First, as in *Gardner-Denver*, the collective bargaining agreement in *Brisentine* authorized the arbitrator to interpret only the contract, not statutory claims.¹⁰¹ Second, in both cases there was a potential

ual and group interests was not present and the court determined that *Gilmer*, rather than *Gardner-Denver* controlled. The court supported its decision by noting another "determinative factor"—the language of the collective bargaining agreement explicitly provided for arbitration of statutory discrimination claims. *Id.* at *21. The agreement stated:

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 provision of this Agreement.

Id. A strong dissent by Judge Scirica argued that the union could not waive the employee's statutory rights, particularly where the waiver precluded a jury trial. *Id.* at *25-26.

96. 135 F.3d 765, 156 L.R.R.M. (BNA) 3137, 3139 (3d Cir. 1997).

97. 117 F.3d 519 (11th Cir. 1997).

98. *Id.* at 521. The union representative told Brisentine that because his dispute "centered around his disability, he would be better off filing a complaint with the Equal Employment Opportunity Commission ("EEOC") instead of pursuing his claim through the grievance procedure." *Id.*

99. *Id.*

100. *Id.* at 522-26.

101. *Id.* at 524. The court found the agreements "materially identical" since both confined the arbitrator's jurisdiction to determining the interpretation of the agreement and both specified that the arbitrator had no authority to alter the contractual provisions. *Id.*

for differing interests between the union and the employee with respect to the arbitration of statutory claims.¹⁰² Third, in *Brisentine* like *Gardner-Denver*, the claim did not arise under the Federal Arbitration Act.¹⁰³

Having concluded that the case closely resembled *Gardner-Denver*, the court stated "[u]nless and until the Supreme Court overrules [*Gardner-Denver*], we are bound to apply that decision to a case like this one that involves an exclusive remedy arbitration clause in a collective bargaining agreement under which the arbitrator is limited to resolving contractual claims, and the employee-claimant is not empowered to insist that his claim be arbitrated."¹⁰⁴ The court noted its disagreement with the contrary conclusion of the Fourth Circuit majority in *Austin*, stating that the reasoning of the dissent was more persuasive.¹⁰⁵ Finally, the court set forth a three factor test for determining whether an arbitration clause bars litigation of a statutory claim:

[A] mandatory arbitration clause does not bar litigation of a federal statutory claim, unless three requirements are met. First, the employee must have agreed individually to the contract containing the arbitration clause—the union having agreed for the employee during collective bargaining does not count. Second, the agreement must authorize the arbitrator to resolve federal statutory claims—it is not enough that the arbitrator can resolve contract claims, even if factual issues arising from those claims overlap with the statutory claim issues. Third, the agreement must give the employee the right to insist on arbitration if the federal statutory claim is not resolved to his satisfaction in any grievance process.¹⁰⁶

H. The Sixth Circuit

The Sixth Circuit is the most recent circuit to weigh in on the debate over arbitration of statutory claims under the collective bar-

102. In support of this conclusion, the court noted the union's advice to *Brisentine* to file an EEOC charge rather than a grievance, suggesting that such advice might reflect a lack of enthusiasm for litigating his statutory claim in the grievance procedure. *Id.* at 525. The court noted that not only could *Brisentine* not force arbitration of his claim, but also his union did not control that decision. *Id.* Rather a council of unions made the determination and the cost of arbitration, borne by the union, might provide an incentive to decline to arbitrate. *Id.*

103. *Id.*

104. *Id.* at 526.

105. *Id.* See discussion of *Austin supra* notes 44-54 and accompanying text. The court also noted that the case was factually distinguishable from *Martin*. See discussion of *Martin, supra* notes 95-96 and accompanying text.

106. *Brisentine*, 117 F.3d at 526-27.

gaining agreement.¹⁰⁷ After considering the analysis of the other circuits that have dealt with the question, the Sixth Circuit concluded that "an employee whose only obligation to arbitrate is contained in a collective bargaining agreement retains the right to obtain a judicial determination of his rights under a statute such as the ADA."¹⁰⁸ The court concluded that *Gilmer* did not affect the holding of the Court in *Gardner-Denver* that the union could not waive an individual's statutory right to litigate in a judicial forum.¹⁰⁹

I. District Courts

In those circuits which have not addressed the issue, district courts have reached differing results, some following the *Austin* rationale and others rejecting it. In the First Circuit, the Massachusetts District Court expressly declined to follow *Austin* in *Lachance v. Northeast Publishing, Inc.*,¹¹⁰ noting "[l]astly, and most importantly, I think the Fourth Circuit erred in failing to address the Supreme Court's recognition of the continuing viability of *Gardner-Denver*."¹¹¹

Texas courts addressing the issue have reached differing results. In *Dickerson v. United Parcel Service*, the court ordered plaintiff's claimed stayed pending arbitration of his ADA claims under the collective bargaining agreement, which referenced the statute.¹¹² In *Hill v. American National Can Co.*,¹¹³ the court adopted the magistrate judge's recommendation to deny the employer's motion to dismiss plaintiff's ADA claim based on failure to exhaust the collectively-bargained grievance procedure, although the agreement

107. *Penny v. United Parcel Serv.*, 128 F.3d 408 (6th Cir. 1997).

108. *Id.* at 413.

109. *Id.* at 414. The Sixth Circuit expressly rejected the analysis of the Fourth Circuit in *Austin*. *Id.*

110. 965 F. Supp. 177 (D. Mass. 1997).

111. *Id.* at 189. Subsequently, the same court concluded in a case involving a New York Stock Exchange (NYSE) arbitration agreement that Congress intended to preclude enforcement of mandatory, pre-dispute arbitration agreements in Title VII cases. *Rosenberg v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 76 Fair Empl. Prac. Cas. (BNA) 681 (D. Mass. 1998). The court further determined that "the employer's structural dominance of the NYSE arbitration makes it an inadequate forum for the vindication of civil rights claims. . . ." *Id.* at 699. In one case, the First Circuit addressed the question of whether claims under the ADA and state anti-discrimination law were preempted by the collective bargaining agreement which provided a grievance and arbitration procedure. *Ralph v. Lucent Technologies, Inc.*, 135 F.3d 166 (1st Cir. 1998). The court rejected the employer's preemption argument, noting that statutory rights exist independently of the collective bargaining agreement. *Id.* at 171.

112. 154 L.R.R.M. (BNA) 2471 (N.D. Tex. 1996).

113. 952 F. Supp. 398 (N.D. Tex. 1996).

specified that it would be administered in accordance with the ADA. The magistrate's opinion relied on the vitality of *Gardner-Denver*, concluding that the individual's statutory rights were not waived by the collective bargaining agreement.¹¹⁴ A third Texas district court agreed with the magistrate in *Hill*, declining to follow the *Austin* rationale.¹¹⁵

In the Ninth Circuit, a California district court rejected *Austin*, concluding that it incorrectly interpreted the Supreme Court's jurisprudence and ignored the important distinction between individual arbitration agreements and collective bargaining agreements.¹¹⁶ The Idaho District Court concluded that a union was not required to arbitrate FLSA claims before bringing suit, relying on *Barrentine* and distinguishing *Austin*.¹¹⁷ Notably, however, the Ninth Circuit had previously determined that employees need not arbitrate FLSA claims under a collective bargaining agreement because the statutory provisions "are guarantees to individual workers that may not be waived through collective bargaining."¹¹⁸ This decision may presage the Ninth Circuit's position on the arbitration of discrimination claims.

Having reviewed the divergent approaches of the courts to arbitration of statutory claims under collective bargaining agreements, the next step is the analysis of these approaches under the existing law of collective bargaining and nondiscrimination.

III. GARDNER-DENVER SURVIVES GILMER

As most of the courts of appeals have recognized, *Gilmer* expressly distinguished *Gardner-Denver* rather than overruling it, ei-

114. *Id.* at 402-08.

115. *Bush v. Carrier Air Conditioning*, 940 F. Supp. 1040, 1045-46 (E.D. Tex. 1996). The United States District Court for the Western District of Louisiana distinguished *Austin* in refusing to dismiss a Title VII claim. *Bynes v. Ahrenkiel Ship Management, Inc.*, 944 F. Supp. 485 (W.D. La. 1996). The court decided that since the plaintiffs could not compel arbitration and the union had dropped their grievance, they had exhausted any arbitration opportunity and could proceed in court. *Id.* at 487.

116. *Buckley v. Gallo Sales Co.*, 949 F. Supp. 737, 743 (N.D. Cal. 1996).

117. *Albertson's, Inc. v. United Food & Commercial Workers*, 1997 U.S. Dist. LEXIS 4554 (D. Idaho March 10, 1997).

118. *Local 246 Utility Workers Union v. Southern Cal. Edison Co.*, 83 F.3d 292, 297 (9th Cir. 1996). Subsequent to the completion of this article, the Ninth Circuit ruled in *Duffield v. Robertson Stephens & Co.*, 76 Fair Empl. Prac. Cas. (BNA) 1450 (9th Circuit 1998) that Congress intended to prohibit compulsory arbitration of Title VII claims. While *Duffield* did not involve a collectively-bargained arbitration agreement, it would appear to apply in that context, particularly because the court criticized the Fourth Circuit's analysis in *Austin*.

ther implicitly or explicitly.¹¹⁹ At most, the *Gilmer* Court rejected *Gardner-Denver's* mistrust of arbitration as a vehicle for resolving statutory claims.¹²⁰ The remaining rationale of *Gardner-Denver*, as explicated in *Gilmer*, provides a persuasive argument for reversing the Fourth Circuit's decision in *Wright*.¹²¹

The *Gardner-Denver* Court recognized that labor arbitration under a collective bargaining agreement differs from arbitration of individual contractual or statutory claims. Because labor arbitration substitutes for the strike, not for litigation, it is an extension of the collective bargaining process. As a result, it is controlled by the union and great deference is given to the union's decisions regarding whether and how to arbitrate,¹²² and to the arbitrator's decision.¹²³ This deference furthers the federal labor policy of encouraging collective bargaining and peaceful resolution of labor disputes, but it is not designed to vindicate employees' statutory rights.

Because of these differences between labor arbitration and individual arbitration of statutory claims, construing arbitration clauses in collective bargaining agreements to waive individual statutory

119. See *Gilmer*, 500 U.S. at 33-5.

120. *Id.* at 34 n.5.

121. While this article focuses on the continuing viability of *Gardner-Denver* and the distinction between individual agreements to arbitrate and collective bargaining agreements, there are other bases on which the Supreme Court might rule. There is a strong argument that the Federal Arbitration Act does not cover arbitration provisions in collective bargaining agreements. The courts of appeals have disagreed on this issue. Cf. *Pryner*, 109 F.3d at 377 (FAA excludes from coverage only employment contracts in the transportation industry); *Harrison*, 112 F.3d at 1454 (FAA does not cover collective bargaining agreements.) The Fourth Circuit in *Austin* noted prior circuit precedent holding that the FAA does not apply to collective bargaining agreements, but relied on the federal policy favoring arbitration of labor disputes as expressed in the *Steelworkers Trilogy* to support its decision. 78 F.3d at 879-81. *Wright* relied on *Austin*. Thus, it is not clear that the Supreme Court will resolve the issue of the scope of the FAA in *Wright*. Professor Stone argues that the Fourth Circuit could only be relying on the FAA since Section 301 preemption is only available to require arbitration of state law claims. See Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1035 (1996). For a thorough discussion of the FAA's Section 1 exclusion, 9 U.S.C. § 1 (1994), see Matthew W. Finkin, *Workers' Contracts Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282 (1996); see also Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. REV. 687, 731-42 (1997); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1, 15-28 (1996).

The Court might also conclude that the ADA evidences an intent to preclude waiver of the judicial forum. There is substantial support in the legislative history for such a conclusion. See Grodin, *supra* at 30-32; Ann C. Hodges, *The Americans with Disabilities Act in the Unionized Workplace*, 48 U. MIAMI L. REV. 567, 621-25 (1994). Given the Court's contrary ruling in *Gilmer* with respect to the ADEA, however, such a result seems unlikely.

122. See *Vaca v. Sipes*, 386 U.S. 171 (1967).

123. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

rights is inconsistent with both the goals of national labor policy and the goals of antidiscrimination statutes.¹²⁴

A. *Finding Union Waivers of Employee Statutory Rights is Inconsistent with National Labor Policy and Statutory Nondiscrimination Rights*

A key distinction between the Fourth Circuit's decisions barring litigation based on the collective bargaining agreement's arbitration clause and the contrary decisions of the other circuits is the courts' conclusion regarding the union's authority to waive employee statutory rights. The Fourth Circuit determined that because a union can waive employee rights provided in the National Labor Relations Act, such as the right to strike,¹²⁵ the union can also waive the right to a judicial forum, including the right to a jury trial under Title VII and other discrimination laws. *Gardner-Denver* suggests otherwise.

It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. . . . These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as the collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on a plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.¹²⁶

124. This article takes no position on whether arbitration of statutory claims is appropriate or effective in nonunion settings. For further discussion of the arguments favoring and opposing such arbitration, see the authorities cited *supra* note 121 and *infra* notes 126, 166, 198, 201. See also Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 383-84 (1996); Walter J. Gershenfeld, *Pre-employment Dispute Arbitration Agreements: Yes, No and Maybe*, 14 HOFSTRA LAB. L.J. 245 (1996).

125. 29 U.S.C. § 163 (1994).

126. *Gardner-Denver*, 415 U.S. at 51-52 (citations omitted). Although this language might be read as precluding an individual waiver as well as a waiver by the union, the subsequent decision in *Gilmer* makes clear that an individual can agree prospectively to arbitrate statutory discrimination claims. Professor Samuel Estreicher argued persuasively in *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 781 (1990), written before *Gilmer* was decided, that "the *Gardner-Denver* line of authority is best understood in terms of the collective bargaining agent's lack of authority to compromise individual employee entitlements flowing from extra-contractual sources."

The *Gilmer* Court determined that the employee could knowingly and voluntarily waive the right to a judicial forum for litigation of statutory claims, but it did not reject the *Gardner-Denver* Court's analysis regarding union waiver. Indeed, while the *Gilmer* Court did not expressly discuss union waiver, the concern expressed in *Gardner-Denver* underlay the *Gilmer* Court's distinction of that case, which focused on the potential conflicts between collective rights and individual rights.¹²⁷ A thorough analysis of the relevant labor law and antidiscrimination cases will demonstrate why finding a union waiver of employee statutory rights is inconsistent with both.

1. Unions Cannot Waive Individual Statutory Rights Because of Potential Conflicts of Interest

As noted by the *Gardner-Denver* Court, the Supreme Court has recognized that unions can waive employees' statutory rights under the NLRA so long as the waiver is clear and unmistakable.¹²⁸ Such waivers are permissible because the union was freely selected to represent the employees and is governed by the doctrine of fair representation.¹²⁹ The Supreme Court has drawn a distinction between economic rights and rights that relate to the choice of bargaining representative.¹³⁰ The former can be waived while the latter cannot because, in the latter situation, the union has a self interest which might lead to a waiver that is not in the interest of the employees.¹³¹ This point was emphasized by Justice Stewart concurring in part and dissenting in part, in *Magnavox*.¹³² "Although the union is deemed to represent all employees in the bargaining unit, both pro-union and anti-union, and may waive important Section 7 rights in the course of collective bargaining, presumably in return for management concessions on other fronts, this authority cannot extend to rights with respect to which the union and the individual employees have essentially conflicting interests."¹³³

While the focus of the Court in these decisions was on rights under the National Labor Relations Act, the conflict analysis is

127. *Id.* at 35.

128. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). A waiver of a statutory right will not be lightly implied. See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 283-89 (1955).

129. 460 U.S. at 705, quoting *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974).

130. *Id.* at 705-06.

131. *Id.* at 706; *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974).

132. 416 U.S. at 327 (Stewart, J., concurring in part, dissenting in part).

133. *Id.*

equally applicable to other statutory rights. Not only is there an inherent tension between collective and individual interests,¹³⁴ but also, given the history of discrimination on the part of some unions,¹³⁵ it would be anomalous indeed to conclude that those unions could waive the rights of union-represented employees to a judicial forum, including a jury trial, for litigation of discrimination claims. While many unions actively support civil rights, the rule would apply equally to those few that not only do not support employees in their discrimination cases against employers, but discriminate themselves. It is no answer to say that employees can sue unions that discriminate, because negotiating contractual protection against discrimination will certainly not be found to be discriminatory, and the duty of fair representation limits the union's liability for failing to pursue discrimination grievances.¹³⁶

Furthermore, some discrimination cases involve conflicts between union-represented employees, such as sexual harassment allegations by one employee against a co-employee.¹³⁷ Such cases inherently contain the potential for a conflict of interest between the harassed employee and the union. This is not to suggest that a union cannot effectively represent an employee in an arbitration involving co-employee harassment, but only that the employee should have the right, where the potential for conflicting interests exists, to choose litigation to vindicate statutory rights.¹³⁸ Thus, as the Seventh Circuit

134. See *Gilmer*, 500 U.S. at 35.

135. See, e.g., *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 477 (1986).

136. See *infra* notes 140-65 and accompanying text.

137. The employer is liable for sexual harassment by co-employees if it knew or should have known about the harassment and failed to take appropriate remedial action. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 881-83 (9th Cir. 1991). For cases where unions have arbitrated claims involving sexual harassment, see *Western Lake Superior Sanitary Dist. and Minnesota Arrowhead Dist. Local 96, AFSCME*, 94 Lab. Arb. (BNA) 289 (1990) (Boyer, Arb.) (employer justified in suspending two male employees based on sexual harassment of female employee); *McDonnell Douglas Corp. and UAW Local 1093*, 94 Lab. Arb. (BNA) 585 (1989) (Woolf, Arb.) (just cause existed to discharge employee who violated management order designed to stop sexual harassment of female employee); *EZ Communications, Inc.*, and *AFTRA*, 91 Lab. Arb. (BNA) 1097 (1998) (Talarico, Arb.) (female employee was justified in walking off the job based on sexual harassment). Notably, however, unions are frequently in the position of challenging the employer's discipline of harassers. See *Western Lake, supra*; *McDonnell Douglas, supra*. For a discussion of some of the concerns relating to arbitration of sexual harassment cases, see Tim Bornstein, *Arbitration of Sexual Harassment*, in *ARBITRATION 1991: THE CHANGING FACE OF ARBITRATION IN THEORY AND PRACTICE*, PROCEEDINGS OF THE FORTY-FOURTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 109-20 (Gladys W. Gruenberg, ed. 1992); Helen R. Neuborne, *Comment, in id.* at 120-32.

138. In addition to sexual harassment cases, employee rights may conflict in other cases as well, such as affirmative action issues involving conflicts between the rights of minority workers and more senior majority workers and Americans with Disabilities Act cases where the employee is seeking reasonable accommodation which conflicts with the rights of other employees

concluded in *Pryner*, the union, representing the majority, should not be permitted to waive an employee's right to a judicial forum, particularly where the employee is a member of a minority group that has been historically oppressed.¹³⁹

2. The Duty of Fair Representation Does Not Adequately Protect Employee Statutory Rights

While the union is governed by the duty of fair representation, which provides the employee some protection from discriminatory treatment by the union,¹⁴⁰ compliance with the duty of fair representation does not insure full vindication of the employee's statutory rights. The doctrine of fair representation does not require the union to arbitrate every case.¹⁴¹ The union is vested with the authority to determine which cases to pursue so long as the authority is exercised without hostility, discrimination or arbitrariness.¹⁴² Thus, the union can determine not to arbitrate a discrimination claim because, in good faith, it doubts the merits of the claim,¹⁴³ although the union officers making that decision may have no expertise in statutory discrimination law. The union can use a lay representative, rather than an attorney to represent a grievant in arbitration, although the representative may have little or no expertise in statutory discrimination issues. The duty of fair representation does not require the union to provide the employee with an attorney for the arbitration, even in complex cases,¹⁴⁴ nor does it prevent the union from excluding the

under the collective bargaining agreement. See *Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (1984) (Supreme Court overturned district court order to modify seniority system to protect from layoff minority workers hired as a result of affirmative action provisions in a consent decree settling a Title VII claim); *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996) (ADA does not require accommodation that violates the seniority system at the expense of other employees).

139. 109 F.3d at 362-63.

140. See *Vaca v. Sipes*, 386 U.S. 171, 177 (1967) ("the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct"); *Airline Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991) (reiterating the *Vaca* standard and holding that it applies to contract negotiation as well as administration). Perhaps ironically, the duty of fair representation was judicially developed to remedy racial discrimination on the part of unions in representing employees. See *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944).

141. *Vaca*, 386 U.S. at 191.

142. *Id.*

143. *Id.*

144. See *Patterson v. International Bhd. of Teamsters Local 959*, 121 F.3d 1345, 1350 (9th Cir. 1997); *Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480, 1483 (9th Cir. 1985); *Del Casal v.*

employee's private attorney from the arbitration.¹⁴⁵ Furthermore, the union's lay representatives will not be held to the same professional standards as an attorney.¹⁴⁶

The arbitration need not be equivalent to a judicial proceeding to meet the union's duty of fair representation. For example, in *Walden v. Local 71, International Brotherhood of Teamsters*, the plaintiff employee alleged that the union breached its duty of fair representation by failing to consult a lawyer in preparation for the hearing, by failing to object to hearsay evidence introduced at the hearing, and by failing to raise a due process argument in support of the claim that he was discharged in violation of the collective bargaining agreement.¹⁴⁷ The Fourth Circuit, the same court that relegated Austin to the grievance procedure for her Title VII and ADA claims, found no breach of the duty of fair representation, stating "[a]n arbitration is not a court of law and need not be conducted like one. Neither lawyers nor strict adherence to judicial rules of evidence are necessary complements of industrial peace and stability—the ultimate goals of arbitration."¹⁴⁸

Similarly, in *Castelli v. Douglas Aircraft Co.*, the plaintiff alleged that the union breached its duty of fair representation by using a union representative who spent only one and a half hours preparing for the arbitration, did not call key witnesses, failed to introduce

Eastern Airlines, Inc., 634 F.2d 295, 301 (5th Cir.), cert. denied, 454 U.S. 892 (1981) (the union may decide under what conditions it will provide counsel, but may not base such a determination on the employee's lack of union membership); *Walden v. Local 71, Int'l Bhd of Teamsters*, 468 F.2d 196 (4th Cir. 1972) (union did not breach its duty by failing to consult an attorney and using instead a lay union representative to arbitrate the claim); Malin, *supra* note 92, at 87.

145. See *Garcia v. Zenith Elecs. Corp.*, 58 F.3d 1171, 1179-80 (7th Cir. 1995) (unions have the right to limit the role of outside attorneys in the grievance and arbitration procedure); *Castelli*, 752 F.2d at 1483 (union not required to permit employee's attorney in arbitration so long as exclusion not discriminatory); Malin, *supra* note 92, at 87 n.45. Indeed the employer is not required to meet with the employee's counsel or arbitrate with the employee's counsel where the union has exclusive representation rights, even where the union authorized such arbitration. See *General Drivers Local 984 v. Malone & Hyde, Inc.*, 23 F.3d 1039, 1043 (6th Cir. 1994); *Malone v. United States Postal Serv.*, 526 F.2d 1099, 1106 (6th Cir. 1975).

146. See, e.g., *Thomas v. United Parcel Serv., Inc.*, 890 F.2d 909, 920 (7th Cir. 1989) (where the court, noting it was unreasonable to expect a union in arbitration to meet the same standards as an attorney in a court of law, stated "[w]e have no doubt that certain acts or omissions by a union official representing a grievant, while actionable if done by an attorney, would not constitute a breach of the union duty of fair representation"); *Curtis v. United Transp. Union*, 700 F.2d 457, 458 (8th Cir. 1983) (finding it would defeat the arbitral goals of informality and speedy resolution to hold a union to the standard of a reasonable attorney in a duty of fair representation case).

147. 468 F.2d at 197.

148. *Id.* By 1996, in *Austin*, the Fourth Circuit apparently lost this recognition of the goals of labor arbitration.

relevant evidence, and failed to cross examine the employer's witnesses effectively.¹⁴⁹ Like the Fourth Circuit, the Ninth Circuit found no breach of the duty of fair representation, noting that the conduct was at most negligence, or tactical mistakes which did not breach the duty of fair representation.¹⁵⁰

Even where the union employs an attorney for the grievance proceeding, the fair representation standard may be applied.¹⁵¹ In *Garcia*, the plaintiff based his claim of breach of the duty of fair representation on the attorney's conduct; specifically, failure to interview or present testimony of a particular witness, failure to call the grievant as a witness, failure to review a videotape of evidence, and failure to call any witnesses or to present grievant's side of the story.¹⁵² Applying the wide range of reasonableness standard, the court concluded that the lawyer's actions were strategy decisions which were not so irrational as to breach the duty of fair representation.¹⁵³ The court stated:

Stanton's strategy and presentation may not have been Garcia's preferred approach, and Stanton may not have been as thorough as he might have been. However, Garcia does not prove a disregard for his case sufficient to meet the standard imposed on the Union. Stanton pursued a rational strategy with sufficient competence and vigor to meet the burden of "some minimal investigation of employee grievances," and showed no "egregious disregard for union members' rights constituting a breach of the union's duty."¹⁵⁴

The *Garcia* court, in holding that the plaintiff established no injury from any misrepresentation by the union regarding his right to consult an attorney, went on to state that the union's attorney was not required to follow any advice from plaintiff's counsel.¹⁵⁵ The court recognized that the union lawyer may have chosen his strategy out of a concern that an alternative strategy would damage the union's credibility and indicated that the plaintiff could not have com-

149. 752 F.2d at 1482.

150. *Id.* at 1483.

151. See *Garcia*, 58 F.3d at 1178 (noting that a duty of fair representation case is quite different from a malpractice action and the lawyer need only act within a wide range of reasonableness). See also *Peterson v. Kennedy*, 771 F.2d 1244, 1256 (9th Cir. 1985) (union attorney has no liability to individual grievants for malpractice independent of the duty of fair representation).

152. *Garcia*, 58 F.3d at 1178. *Garcia* also claimed that the union prevented *Garcia* from hiring his own attorney. *Id.*

153. *Id.* at 1177-79. In *Patterson*, the court similarly refused to question a union's strategy decision in arbitration so long as it was supported by a reasoned explanation. 121 F.3d at 1349-50.

154. *Garcia*, 58 F.3d at 1179 (citations omitted).

155. *Id.* at 1180.

pelled a different choice.¹⁵⁶

Moore v. Duke Power Co.,¹⁵⁷ a recent North Carolina case, demonstrates the limits of the duty of fair representation in insuring that employees' statutory nondiscrimination rights are protected under the *Austin* rule. The plaintiff, Moore, was terminated by the employer, allegedly because of his disability.¹⁵⁸ He filed a grievance under the collective bargaining agreement and a complaint of disability discrimination with the Office of Contract Federal Compliance Programs. His lawsuit alleging violations of the ADA and state law was stayed pending arbitration. The union arbitrated his termination grievance but refused to raise the disability discrimination claims in the arbitration, although it had allegedly promised to do so. The union also prevented the plaintiff's attorney from participating in the arbitration. The arbitrator found the plaintiff had been discharged for just cause.

Based on *Austin*, the court granted summary judgment for the employer, concluding that the plaintiff arbitrated his claim and lost and that the union's failure to raise the disability discrimination argument did not violate the duty of fair representation. The court determined that a reference in the preamble of the collective bargaining agreement to discrimination on the basis of handicap indicated that the agreement was intended to cover such claims. Thus Moore was bound to arbitrate. He lost and was bound by the result, absent evidence that the union's conduct was "'grossly deficient' or in reckless disregard of the member's rights."¹⁵⁹ The court concluded: "Taken in the light most favorable to the plaintiff, the evidence establishes that the Union, at arbitration, either forgot to raise plaintiff's concerns about disability discrimination or instead made a strategic decision not to pursue that aspect of plaintiff's grievance regarding his termination. At best, such evidence establishes that the Union was negligent in its representation of plaintiff or merely made a strategic error."¹⁶⁰ Accordingly, the *Austin* rule precluded Moore's

156. *Id.* at 1180-81. "A private attorney would have had no power to force Stanton to follow a strategy that Stanton found detrimental to the union." *Id.* at 1181.

157. 971 F. Supp. 978 (W.D.N.C. 1997).

158. *Id.* at 979. All facts are taken from the court's opinion. The plaintiff also complained of discrimination in various acts which preceded his termination, including a demotion, several transfer denials, and a suspension. *Id.* at 980.

159. *Id.* at 982, citing *Ash v. United Parcel Serv.*, 800 F.2d 409, 411 (4th Cir. 1986).

160. *Id.* at 985. Plaintiff's claim relating to his suspension was dismissed because the union accepted the employer's contention, which "may have been wrong," that the grievance was untimely. *Id.* at 983. The court determined that the union's failure to investigate the employer's claim was not grossly deficient conduct. *Id.*

disability discrimination claim from hearing in any forum because of his inability to meet the demanding standard required to prove that the union breached its duty of fair representation.

These cases demonstrate that the duty of fair representation does not adequately protect the employees' rights under the discrimination statutes. The employee does not have the right to legal representation, has no control over strategy decisions in arbitration, may be represented by an individual with little or no knowledge of statutory discrimination law, may have an arbitrator (selected by the union and the company without her input) with little or no knowledge of discrimination law,¹⁶¹ and may have no right to any discovery.¹⁶² Indeed, the employee's claim may never be heard in any forum if the union decides not to arbitrate or arbitrates but does not raise the discrimination claim. Furthermore, the typical local union

161. The problem of arbitral familiarity with discrimination law may apply equally to individual arbitration, but at least in that forum, the individual participates in selecting the arbitrator and has the opportunity to select a knowledgeable arbitrator, although she may lack the information necessary to make such participation effective. See *infra* note 243. A 1975 survey of arbitrators indicated that only half kept current on Title VII issues and only 14% believed that they could define accurately basic employment discrimination concepts. Harry Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in PROCEEDINGS OF THE TWENTY-EIGHTH NATIONAL ACADEMY OF ARBITRATORS 59 (1976). Nevertheless, 72% concluded that they were competent to decide legal issues in employment discrimination cases. *Id.* The Due Process Protocol for Mediation and Arbitration of Statutory Disputes arising out of the Employment Relationship recognized that "the existing cadre of labor and employment mediators and arbitrators, some lawyers, some not, although skilled in conducting hearings and familiar with the employment milieu is unlikely, without special training, to consistently possess knowledge of the statutory environment in which these disputes arise . . ." See *Prototype Agreement on Job Bias Dispute Resolution*, Daily Lab. Rep. (BNA) No. 91 at E-11 (May 11, 1995) [hereinafter *Prototype Agreement*]. The Due Process Protocol has been endorsed by the National Academy of Arbitrators Board of Governors and by union and management representatives of the Employment and Labor Law Section of the American Bar Association. *Academy Board Endorses ADR Task Force Protocol*, 149 Lab. Rel. Rep. (BNA) at 161 (June 5, 1995). In recommending more extensive use of voluntary arbitration to resolve employment disputes, the Dunlop Commission encouraged the Equal Employment Opportunity Commission to establish a training program on discrimination law for arbitrators and to adopt standard training requirements for arbitrators marketing their services for resolving discrimination disputes. See REPORT AND RECOMMENDATIONS OF THE COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, reprinted in Daily Lab. Rep. (BNA) No. 6 at d55 (January 10, 1995).

162. FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 304-310 (4th ed. 1985). The absence of discovery is not unique to collectively bargained arbitration procedures. The *Gilmer* Court rejected the plaintiff's argument that limited discovery rendered arbitration of statutory claims inappropriate, noting that by agreeing to arbitrate, the plaintiff traded the more extensive judicial procedures for a simpler, more expeditious proceeding. 500 U.S. at 31. The Court left open the possibility, however, that discovery might be so limited as to deny a plaintiff a fair opportunity to present her claims. *Id.* Some "discovery" is available in the grievance procedure using the NLRA right to request and receive information relevant to contract administration. See *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967). The right belongs to the union rather than the employee, however, and the union is accountable to the employee only through the duty of fair representation. See Malin, *supra* note 92, at 87.

has limited financial resources for pursuing complex discrimination cases which may require extensive research in order to gather evidence of discrimination.

The limitations on the union's accountability to employees in handling grievances are appropriate where the contractual grievance procedure serves the purpose of developing private law governing the workplace.¹⁶³ As the Supreme Court has repeatedly recognized, grievance arbitration is a part of the collective bargaining process, not a substitute for litigation.¹⁶⁴ Using arbitration, the parties refine and flesh out their agreement resolving issues left open by the general language of the agreement.¹⁶⁵ Thus, union control over the procedure, with limited recourse by the employees, insures that the system of collective bargaining can operate as Congress intended, leading to industrial peace rather than warfare. A determination that the union's agreement to the arbitration procedure not only waives the right to strike and provides a method for peacefully determining private law, but also waives the employees' statutory right to litigate and establishes a forum for determining public law, does not further the goal of industrial peace. In addition, it is inconsistent with the purposes underlying the discrimination statutes.

3. Finding A Waiver Based on A Collective Bargaining Agreement Penalizes Employees for Exercising Their Statutory Right to Bargain Collectively and Does Not Meet the Stringent Standard Required for Such a Waiver

An employee who chooses a collective bargaining representative is on notice that the representative will bargain for the employee's terms and conditions of employment. Similarly, an employee who signs an individual agreement with his employer to arbitrate statu-

163. Malin, *supra* note 92, at 87.

164. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Indeed, the grievance and arbitration procedure is the quid pro quo for the agreement not to strike. The strength of this rationale is demonstrated by the Court's decision in *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 105-06 (1962), where the Court held that the very existence of a grievance and arbitration procedure in an agreement implied a promise by the union not to strike during the term of the contract. For additional discussion of differences between labor arbitration and arbitration of statutory disputes, see Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635; G. Richard Shell, *ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 511-15 (1990).

165. *St. Antoine*, *supra* note 10, at 1140, 1161.

tory claims is on notice that arbitration will be the forum for resolution of employment-related statutory disputes.¹⁶⁶ In contrast, the employee whose union negotiates a collective bargaining agreement containing a prohibition on discrimination and a standard grievance and arbitration provision is extremely unlikely to be aware, much less agree, that the union has negotiated away his right to litigate a statutory discrimination claim. Indeed, the union may be unaware that it is doing so.¹⁶⁷

The impact of the determination of waiver is analogous to the impact of the state law provisions found preempted by the Supreme Court in *Livadas v. Bradshaw*.¹⁶⁸ In *Livadas*, the Court held that the NLRA preempted the California statutory provision which denied enforcement of state wage claims filed by employees covered by collective bargaining agreements with arbitration provisions.¹⁶⁹ According to the Court, the state law impermissibly burdened employees who chose to exercise their federal right to bargain collectively

166. *Gilmer*, 500 U.S. at 32-3. Furthermore, the employee retains the right to prove that the waiver of a judicial forum was not knowing. See *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1304-05 (9th Cir. 1994), cert. denied, 516 U.S. 812 (1995). For criticism of mandatory arbitration of statutory claims in the nonunion context, see *NERP's Position on Mandatory Arbitration of Employment Disputes*, 1 EMPLOYEE RTS & EMPLOYMENT POLICY J. 263 (1997); *EEOC Policy Statement on Mandatory Arbitration*, 1997 Daily Lab. Rep. (BNA) No. 133 at d30 (July 11, 1997); Michele L. Giovagnoli, *To Be or Not to Be? Recent Resistance to Mandatory Arbitration Agreements in the Employment Arena*, 64 UMKC L. REV. 547 (1996); Grodin, *supra* note 121; David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in An Age of Compelled Arbitration*, 1997 WISC. L. REV. 33; Stone, *supra* note 121; Brian K. Van Engen, *Post-Gilmer Developments in Mandatory Arbitration: The Expansion of Mandatory Arbitration for Statutory Claims and the Congressional Effort to Reverse the Trend*, 21 J. CORP. L. 391 (1996); John L. Zalusky, *A Union View of Nonrepresented Employees' Grievance Systems*, in LABOR ARBITRATION UNDER FIRE 182 (James L. Stern & Joyce M. Najita, eds. 1997).

167. Certainly it is unlikely that the union consciously intended to bargain for such a waiver for the union has no reason to seek such a waiver and many reasons not to do so, not the least of which is subjecting itself to additional fair representation claims. See *infra* notes 191-211 and accompanying text.

168. 512 U.S. 107 (1994).

169. *Id.* at 109. Notably, the court in *Livadas*, reaffirmed the distinction between *Gilmer* and *Gardner-Denver* while emphasizing their "basic consistency":

In holding that an agreement to arbitrate an Age Discrimination in Employment Act claim is enforceable under the Federal Arbitration Act, *Gilmer* emphasized its basic consistency with our unanimous decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. (1974), permitting a discharged employee to bring a Title VII claim, notwithstanding his having already grieved the dismissal under a collective-bargaining agreement. *Gilmer* distinguished *Gardner-Denver* as relying, *inter alia*, on: the "distinctly separate nature of . . . contractual and statutory rights" (even when both were "violated as a result of the same factual occurrence"), 415 U.S. at 50; the fact that a labor "arbitrator has authority to resolve only questions of contractual rights." *Id.*, at 53-54; and the concern that in collective-bargaining arbitration, "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Id.* at 58 n.19.

Id. at 127 n.21.

and to negotiate an arbitration provision by denying them the protection of a state statute.¹⁷⁰ The Court not only concluded that the state law was preempted, but found that Livadas was entitled to pursue redress under Section 1983 because of the state statute's interference with her statutory rights to bargain collectively and to agree to an arbitration clause.¹⁷¹ Similarly, under the rule of the *Austin* Court, the employee is penalized by losing her judicial forum because she is represented by a union which has negotiated an arbitration provision. Unlike *Austin*, however, in *Livadas* there was no claim that the union waived the employee's statutory right nor was there an indication that the parties considered the statutory claim to be covered by the arbitration provision, so the Court did not have to consider whether such a waiver would be effective.¹⁷² Nevertheless, the Court stated that such a waiver would have to "be clear and unmistakable for a court even to consider whether it could be given effect."¹⁷³

The National Labor Relations Board, with approval of the Supreme Court, has applied this stringent standard for waiver of National Labor Relations Act rights.¹⁷⁴ And as the *Livadas* Court noted, the standard is appropriate for union waivers of other statutory rights as well.¹⁷⁵ Negotiation of a contractual antidiscrimination provision, even one which incorporates discrimination statutes, and an arbitration procedure for contract enforcement cannot meet this stringent waiver standard. Therefore, even if a union waiver of statutory rights is permissible, none should be found based solely on the negotiation of contractual protection of statutory rights.

Under NLRA precedent, neither general contractual provisions nor bargaining history that does not evidence a full discussion, conscious exploration and conscious yielding of position can waive a statutory right.¹⁷⁶ Several examples illustrate the Supreme Court's

170. *Id.* at 123. The state attempted to justify its statutory inaction on the theory that Section 301 preempts state law claims which depend on interpretation of the collective bargaining agreement. See *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988). As the Supreme Court noted, however, the state's position was not limited to such circumstances and, indeed, Livadas' claim did not depend on interpretation of the agreement. 512 U.S. at 124.

171. *Id.* at 132.

172. *Id.* at 125.

173. *Id.* (citation omitted).

174. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Johnson-Bateman Co.*, 295 N.L.R.B. 180 (1989). See *infra* notes 176-79 and accompanying text.

175. *Livadas*, 512 U.S. at 125. In addition to *Metropolitan Edison*, the Court cited its earlier decision in *Lingle*, 486 U.S. at 410 n.9, where it stated that union waiver of an employee's state statutory right would have to be clear and unmistakable before the Court would conclude that such a waiver was intended.

176. *Johnson-Bateman Co.*, 295 N.L.R.B. at 184-85.

reluctance to infer a waiver. In *Metropolitan Edison*, two arbitrators had interpreted the contractual no strike clause to permit disparately severe punishment of union officials for their participation in unlawful strikes because of their duty to uphold the contract.¹⁷⁷ Despite the two decisions, the union failed to seek modification of the contractual no strike clause. When the employer subsequently disciplined union officials more harshly for violating the no strike clause, the union then filed unfair labor practice charges alleging that the employer's action constituted unlawful discrimination under the NLRA. The employer argued that the union had waived the officials' statutory right by acquiescing in the prior arbitrators' interpretations of the no strike clause. The Court disagreed, looking for much more to find a waiver—either an arbitration decision stating that the contract clearly and unmistakably imposed an express duty on union officials to end unlawful strikes or a clear and consistent pattern of arbitration decisions and circumstances under which it could be said that the parties incorporated those decisions into the collective bargaining agreement.¹⁷⁸ Similarly, in *Mastro Plastics*, the Court concluded that contract language agreeing to refrain from any strike or work stoppage during the term of the agreement did not waive the right to strike over unfair labor practices during the term of the agreement.¹⁷⁹

This stringent standard for waivers insures that employee rights are not waived without express intent to do so. Like the duty of fair representation, this standard protects employees. No such stringent standard was applied by the courts finding waivers of the right to litigate a statutory discrimination claim before a jury. Even the clear intent to incorporate such statutory claims in the contract does not establish an intent to waive litigation of them, particularly in light of the existing precedent of *Gardner-Denver*. And certainly the union's negotiation of a broad arbitration provision without inclusion of contractual language regarding statutory discrimination law cannot establish an intent to waive litigation of statutory claims.

The Supreme Court has required that waiver of statutory rights by individuals be knowing and voluntary.¹⁸⁰ The *Austin* Court apparently concluded that such a waiver existed because the agreement was voluntary, finding her to be a party to the agreement solely by

177. 460 U.S. at 709. All facts are taken from the Court's decision.

178. *Id.*

179. 350 U.S. at 281.

180. *Gardner-Denver*, 415 U.S. at 52 n.15.

virtue of her membership in the bargaining unit.¹⁸¹ The Court offered no support for this conclusion and it is contrary to the principles of labor and employment law.¹⁸² The employee's rights under the agreement can be contractually limited, particularly the right to arbitrate grievances. For example, where the individual employee does not have a contractual right to invoke arbitration, the employee may not compel arbitration.¹⁸³ The same is true where the court concludes that the employee is attempting to arbitrate a broad policy issue that directly concerns only the union.¹⁸⁴ Furthermore, the agreement is negotiated by the union, and may or may not be ratified by the employees.¹⁸⁵ Even where ratification is required, it occurs by majority vote. An individual employee opposed to a particular provision is bound by it if the contract is ratified despite her opposition. Accordingly, even if the employee's waiver of a judicial forum was knowing, it cannot be voluntary since a contract waiving such rights can be negotiated and approved despite her opposition. Where collective rights are involved, this scheme furthers the statutory goals of collective bargaining and labor peace, but it may frustrate the goal of protecting employees from discrimination.

4. Compelling Arbitration of Statutory Claims Under a Collective Bargaining Agreement Does Not Merely Substitute A Different Forum for Hearing the Discrimination Claim

In holding that Gilmer was required to arbitrate his statutory ADEA claim, the Supreme Court, quoting *Mitsubishi*, stated "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."¹⁸⁶ Given the differences between labor arbitration and commercial arbitration, however, this representation simply does not hold true in labor arbi-

181. *Austin*, 78 F.3d at 885-86.

182. See H. David Kelly, Jr., *An Argument for Retaining the Well Established Distinction Between Contractual and Statutory Claims in Labor Arbitration*, 75 U. DET. MERCY L. REV. 1, 65 (1997).

183. See *Black-Clawson Co. v. International Ass'n of Machinists Lodge 355*, 313 F.2d 179 (2d Cir. 1962).

184. See *Brown v. Sterling Aluminum Products Corp.*, 365 F.2d 651 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967) (employer relocation is a broad policy issue and the employee cannot compel arbitration absent the union).

185. Ratification is not required by law. See MARTIN H. MALIN, *INDIVIDUAL RIGHTS WITHIN THE UNION* 60, 378 (1988).

186. *Gilmer*, 500 U.S. at 26, quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

tration. As noted, labor arbitration is not a substitute for litigation. Instead, it is a substitute for the strike. It is designed to be a continuation of the collective bargaining process, not to litigate individual statutory claims. Accordingly, it has characteristics that render it inappropriate for that purpose.

Unlike the arbitration agreement in *Gilmer*, the individual covered by a collectively bargained arbitration provision is relegated to a forum in which she does not control her claim. She cannot decide whether or not to arbitrate and may be lawfully precluded from arbitrating her claim. She cannot participate in choosing the arbitrator.¹⁸⁷ If the claim is arbitrated, she cannot choose her own representative and the union-designated representative may have no expertise in statutory claims. She cannot make strategy decisions or determine which arguments to raise or which witnesses to call in support of her claim. While such limitations are appropriate to effectuate the national labor policy of collective representation, they render labor arbitration an ineffective substitute for litigation of individual claims. These differences are not the challenges to the adequacy of arbitration generally rejected by the *Gilmer* court,¹⁸⁸ but differences relevant to labor arbitration in particular. Moreover, they are differences which may adversely affect the employee's statutory right to be free from discrimination. Indeed, they may prevent the employee's discrimination claim from receiving any hearing, thus insuring that she will receive no remedy for any discrimination.¹⁸⁹

B. *The Fourth Circuit's Decision Imposes a Duty of Fair Representation on the Union for Statutory Claims*

The Fourth Circuit's decisions in *Austin* and *Wright* expand the duty of fair representation beyond its intended application. Unions

187. Of course, the union could involve the employee in decision-making but it is not required to do so and may be concerned about setting such a precedent as employees with non-statutory claims may then demand more extensive involvement in the process.

188. 500 U.S. at 30-33.

189. See, e.g., *Moore v. Duke Power Co.*, 971 F. Supp. 978 (W.D.N.C. 1997). Section 301 preemption also deprives unionized employees of certain causes of action under state law and has been criticized for that reason. See Bales, *supra* note 121, at 718; Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 605-20 (1992). Despite criticism of the preemption doctrine, it at least serves the purpose of insuring uniform interpretation of collective bargaining agreements, long held to be an important goal of national labor policy. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962). The *Austin* rule furthers no such goal.

chosen by a majority of employees under the NLRA procedures,¹⁹⁰ have both the right to exclusive representation and the corresponding duty of fair representation.¹⁹¹ Unions have years of experience in negotiating collective bargaining agreements, administering contracts, including arbitration of contractual claims, and complying with the duty of fair representation. Relegation of statutory claims to the contractual arbitration procedure arguably expands the right of exclusive representation and almost certainly expands the duty of fair representation to include statutory claims.

Because the duty of fair representation arises out of the right of exclusive representation,¹⁹² it has been confined to matters on which the union exclusively represents the employee.¹⁹³ Although unions have often negotiated contractual provisions prohibiting discrimination,¹⁹⁴ the union does not exclusively represent the employee with respect to statutory employment discrimination claims. The employee can file and pursue such a claim even if the union opposes the filing. The employee can settle the claim with the employer without union input or approval.¹⁹⁵ By way of contrast, a union-represented employee cannot negotiate his or her own wage provisions or contractual grievance procedure.¹⁹⁶ Since statutory employment discrimination claims are not within the zone of exclusive representation, the union has no duty to file such a claim on behalf of the employee or to represent the employee making such a claim.¹⁹⁷ The union does have a duty to represent the employee with respect to wages and to negotiate wage provisions without discrimination or bad faith, however.

190. See 29 U.S.C. § 159 (1994).

191. *Steele*, 323 U.S. at 204.

192. *Id.*; see also *Vaca v. Sipes*, 386 U.S. 171 (1967).

193. See *infra* note 217 and accompanying text.

194. Under the NLRA, prohibitions on employment discrimination are conditions of employment and therefore mandatory subjects of bargaining. THE DEVELOPING LABOR LAW 901 (Patrick Hardin, ed., 3d ed. 1992). When a subject is mandatory, neither party may refuse to bargain about the subject and either party may insist to impasse on inclusion of a provision relating to the subject in the collective bargaining agreement and take economic action to compel such inclusion. See *NLRB v. Wooster Div., Borg-Warner Corp.*, 356 U.S. 342 (1958).

195. An arbitration award which conflicts with a settlement of a discrimination claim may be enforced against the employer, however, where the union was not involved in the settlement. See *W.R. Grace & Co. v. Local 759, Rubber Workers*, 461 U.S. 757 (1983).

196. Indeed the employer who negotiates individually with an employee represented by a union violates Section 8(a)(5) of the National Labor Relations Act. See *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *Allied-Signal, Inc.*, 307 N.L.R.B. 752 (1992).

197. MALIN, *supra* note 185, at 414 ("No court has suggested that a union has an affirmative duty to litigate on behalf of the employees it represents to redress discrimination.").

In holding that statutory claims must be arbitrated, courts are requiring the union to represent the employee with respect to the statutory claim. Employees who want to litigate apparently are relegated to suing the union for breach of the duty of fair representation. Yet as demonstrated above, the requirements of the duty do not hold the union to the standard of an attorney handling a statutory claim for an individual in any forum. If this is unsatisfactory from the point of view of the employee, it also creates significant difficulties for the union.

While the courts have been deferential to union decisions in arbitration of contractual claims because of the union's representation of collective interests, it is not clear that the same deference will be applied when the claim is statutory.¹⁹⁸ Must the union train its representatives in employment discrimination law? Must it use lawyers in discrimination cases? Must the union educate its representatives about arbitrator selection for statutory cases?¹⁹⁹ Does the union's decision not to arbitrate bind the employee? If the arbitrator rules against the union, finding no discrimination, must the union request review of the decision in court? Alternatively, if the arbitrator rules for the union and the employer does not comply with the decision, does the duty of fair representation require the union to seek enforcement, regardless of its financial resources?

Unions must allocate scarce resources, determining which claims to arbitrate not only on the basis of merit, but taking into account the limited resources of the union.²⁰⁰ Litigation of a statutory discrimination claim can be extremely expensive even if that litigation

198. Some commentators have argued for more extensive judicial review of arbitral decisions on statutory issues. See, e.g., Estreicher, *supra* note 126, at 796; Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187 (1993); Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims with Special Reference to the Three A's—Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231, 293 (1996).

199. See Stephen L. Hayford, *The Coming Third Era of Labor Arbitration*, 48 ARB. J. 8 (1993) (Advocates in arbitration cases involving statutory issues must select arbitrators with the necessary expertise in the substantive law).

200. An arbitrator's charge for a single arbitration is, on average, \$2222.38. LAURA J. COOPER & DENNIS R. NOLAN, *LABOR ARBITRATION: A COURSEBOOK* 463 (1996) (1992 statistics from the Federal Mediation and Conciliation Service). If a lawyer is used, costs increase substantially. *Id.* at 464. Not only must the union pay the attorney's fees, but briefs and transcripts are used more frequently when lawyers are involved in the arbitration, adding to the cost. *Id.* Furthermore arbitrating a statutory claim could be even more expensive. See *infra* notes 206-07 and accompanying text. For further information about arbitrator fees in statutory disputes, see *Cole v. Burns Int'l Security Serv.*, 105 F.3d 1465, 1480-81 and n.8 (\$700 per day is average arbitrator's fee according to the American Arbitration Association, but some arbitrators charge \$400-\$600 per hour and the typical employment case requires 15-40 hours of arbitrator time).

takes place in the arbitral forum.²⁰¹ For example, to litigate a discrimination case effectively, expert witnesses may be required.²⁰² Sophisticated statistical analysis may be necessary as well.²⁰³ Statisticians and other expert witnesses can add significant expense to arbitration.²⁰⁴ Additionally, discrimination claims often involve sophisticated inquiries into employer motive.²⁰⁵ Absent specialized training, the traditional labor arbitrator may lack the expertise necessary to deal with such issues.²⁰⁶ The same skepticism applies to the union officials who must make determinations regarding the merits of discrimination claims in deciding whether to arbitrate them, and then arbitrate those with merit. Obtaining the necessary expertise would impose a cost beyond the resources of most unions,²⁰⁷ yet the alternative under the Fourth Circuit's rule is either ineffective litigation or no litigation of most statutory claims.

If an employee's only chance to litigate a discrimination claim is through a duty of fair representation suit, such suits are likely to increase, particularly if unions decline to arbitrate.²⁰⁸ If arbitration is

201. See Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F.L. REV. 169, 203 (1991) (noting that unions do not become actively involved in protecting public rights outside of collective bargaining because they lack the resources, particularly when legal representation is involved.)

202. See *Price, Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988).

203. See, e.g., *Bazemore v. Friday*, 478 U.S. 385 (1986); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977). For discussion of the use of statistical evidence in employment discrimination cases, see 2 BARBARA LENDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1687-1737 (3d ed. 1996); MICHAEL J. ZIMMER, ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 278-98, 477-87 (4th ed. 1997).

204. See, e.g., *Gray v. Phillips Petroleum Co.*, 758 F. Supp. 673, 674 (D. Kan. 1991), *rev'd*, 971 F.2d 591 (10th Cir. 1992) (Plaintiff in ADEA case sought \$68,009.25 in expert witness fees).

205. See Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 563, 564 (1996) (noting both that "the essence of most cases . . . turns on the issue of whether the employer acted with an intent to discriminate" and that "the concept of individual disparate treatment discrimination . . . is difficult and complicated.") Zimmer's article demonstrates the complexity of the proof schemes under disparate treatment discrimination law.

206. See *supra* note 161.

207. See *infra* notes 233-35 and accompanying text regarding the cost of legal representation and *supra* note 204 regarding the cost of experts. The average labor arbitrator's charge is \$2222.38, see note 200 *supra*. Most local unions, whose only income is from employee dues, can afford to arbitrate only a few cases per year and many do not use attorneys because of the cost of legal representation. In right to work states, where employees are not required to pay the cost of representation, union resources are even more limited. Notably, three of the five states in the Fourth Circuit are right to work states. See ARCHIBALD COX, ET AL., *CASES ON LABOR LAW* 1090 (12th ed. 1996) (North Carolina, South Carolina and Virginia).

208. If the employee files an unfair labor practice charge with the National Labor Relations Board alleging breach of the duty of fair representation based on a union's refusal to arbitrate a statutory claim, the N.L.R.B., in determining whether the duty was breached, would have to de-

costly, a duty of fair representation case is more so.²⁰⁹ Moreover, litigation of statutory claims in grievance arbitration may further formalize arbitration, a concern that has already surfaced due to the increasing use of lawyers.²¹⁰ Ironically, a decision supporting and encouraging arbitration may lead to elimination of some of the advantages of arbitration, such as speed and informality. Given the difficulties created for unions and employees by the Fourth Circuit rule, the question arises whether there exist alternatives for unions desiring to protect the statutory rights of employees. The next section considers such alternatives.

IV. UNION PROTECTION OF EMPLOYEE RIGHTS

Thus far this article has argued that arbitration under collective bargaining agreements differs substantially from arbitration under individual agreements and that the Supreme Court should reaffirm that distinction, which it recognized in earlier cases. It might be argued, however, that despite the rule of the Fourth Circuit, unions can protect employee statutory rights. A review of the alternatives available to unions seeking to preserve the statutory rights of employees to be free from discrimination,²¹¹ however, demonstrates that none satisfactorily protects employee rights without sacrificing important collective goals or risking duty of fair representation claims. Because duty of fair representation claims are costly to the union, they ultimately injure employees by limiting the union's effectiveness in representing the employees in the bargaining unit.

side whether the employee's claim was meritorious. See, e.g., *Teamsters Local 337*, 307 N.L.R.B. 437 (1992) (union lawfully refused to arbitrate employee's grievance where merits of grievance were, at most, debatable). Thus, as part of the resolution of the unfair labor practice charge, an inexperienced and unauthorized agency would become enmeshed in deciding whether discrimination statutes other than the National Labor Relations Act have arguably been violated.

209. A duty of fair representation case will certainly require attorneys' fees and unless the case is quickly dismissed, discovery costs as well. COOPER & NOLAN, *supra* note 200, at 464 (arbitration is cheaper than litigation).

210. See, e.g., Reginald Alleyne, *Delayerizing Labor Arbitration*, 50 OHIO ST. L.J. 93, 95, 107 (1989); *Creeping Legalism in Labor Arbitration: An Editorial*, 13 ARB. J. 129 (1958).

211. This is a matter of concern to unions in the Fourth Circuit presently and in the First, Fifth, Ninth, and District of Columbia Circuits where no definitive ruling has been issued by the Court of Appeals. Based on *Austin*, district courts in the Fourth Circuit continue to dismiss claims based on collectively-bargained arbitration provisions. See, e.g., *Brown v. ABF Freight System, Inc.*, 1998 WL 105641 (E.D. Va. Feb. 17, 1998) (where contract refers to discriminatory acts prohibited by law, plaintiff's ADA claim is dismissed for failure to arbitrate).

A. Preserving Litigation Rights Using Contractual Language

Unions might protect employee litigation rights by eliminating contractual nondiscrimination provisions and expressly limiting the grievance procedure to contractual disputes. With such contractual provisions, there would be no arbitrable grievance and the employee would be relegated to judicial action.²¹² There are several problems with this approach, however. First, while many grievance and arbitration provisions are limited to contractual disputes, others are broader.²¹³ Narrowing the grievance and arbitration procedure in those contracts would prevent the union from both grieving and arbitrating many disputes other than statutory claims. Accordingly, employees would lose substantial rights unrelated to statutory discrimination.

To eliminate this problem, the union could seek to exclude statutory claims from arbitration expressly, while retaining the broad arbitration language for other noncontractual issues. There is little incentive for an employer to agree to such a proposal, however. Arbitration of statutory claims is an alternative to litigation, one which may well benefit the employer as evidenced by the increasing use of arbitration agreements in the nonunion sector.²¹⁴ An employer is unlikely to give up the protection of an agreement to arbitrate statutory claims while allowing the union to retain the right to arbitrate other noncontractual claims. To obtain such a contractual change the employer might insist that the union make economic concessions, thereby causing the employees to sacrifice other benefits.²¹⁵

212. Of course, the employee would first have to exhaust administrative remedies. See 29 U.S.C. § 626(d) (1994) (charge must be filed with EEOC before filing judicial action under ADEA); 42 U.S.C. § 2000e-5(e)(1), (f)(1) (1994) (under Title VII charge must be filed with the EEOC, which will issue notice of right to sue, and the individual must file suit within 90 days of receipt of such notice); 42 U.S.C. § 12117 (1994) (adopting Title VII procedures for enforcement of ADA).

213. See, e.g., *Wright*, 1997 WL 422869 at *2.

214. A survey by the General Accounting Office indicated that 19% of the private employers responding used arbitration to resolve workplace disputes. U.S. GEN. ACCT. OFF., *ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS' EXPERIENCES WITH ADR IN THE WORKPLACE*, GAO/GGD-97-157 (1997). Private employers adopted alternative dispute resolution to reduce the costs—in time, money and good employment relationships—associated with “employment-related lawsuits and discrimination complaints.” *Id.* at 8. The number of cases in which employers have sought dismissal of statutory discrimination claims based on collectively bargained grievance and arbitration procedures also indicates the importance of such provisions to employers. For further discussion of the reasons employers may prefer arbitration of discrimination claims, see R. Theodore Clark, Jr., *A Management View of Nonunion Employee Arbitration Procedures*, in *LABOR ARBITRATION UNDER FIRE*, *supra* note 166, at 162.

215. Of course, collective bargaining is about exchanging benefits and requires tradeoffs by both parties, but in this case the employees are giving up economic benefits to preserve rights

Removal of contractual nondiscrimination provisions, necessary to insure retention of the litigation alternative, takes away an option for the union and the employees.²¹⁶ The union would be unable to grieve and arbitrate discrimination claims against the employer.²¹⁷ Some employees may prefer to arbitrate discrimination claims, an option that would be lost by eliminating language requiring or permitting arbitration of statutory claims.²¹⁸ Accordingly, the union may

which Congress gave them by statute.

216. Arbitration is a matter of agreement. If there is no agreement to arbitrate a particular claim, arbitration cannot be compelled. *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 648-49 (1986). If arbitration of contractual discrimination claims remains an option, the inability to arbitrate a statutory claim may be irrelevant, however. The employee could arbitrate the contractual claim (assuming the union decided to arbitrate) and if the employee lost, litigate the statutory claim based on common facts. See *Gardner-Denver*, 415 U.S. at 53-54 (arbitrator has authority to resolve only questions of contractual rights even where the contractual rights are similar to statutory nondiscrimination rights). Elimination of language referring to the statute might limit the union's ability to argue that statutory standards should be applied in arbitration of contractual discrimination issues also. There is substantial debate in the arbitral community about the use of external law in arbitration and an argument could be made that a contractual change eliminating statutory language evidenced an intent to limit the use of statutory standards by the arbitrator. See COOPER & NOLAN, *supra* note 200, at 61-76 and authorities cited therein.

217. It is not at all uncommon for unions to arbitrate discrimination claims. See, e.g., *Chicago Transit Auth. and Amalgamated Transit Union Local 305*, 95 Lab. Arb. (BNA) 753 (1990) (Goldstein, Arb.); *P.D.I. Inc. and International Ass'n of Machinists Lodge 276*, 91 Lab. Arb. (BNA) 21 (1988) (Dworkin, Arb.). Nor is it unusual for the union to grieve employer action on several bases, one of which is discrimination. See, e.g., *ITT Federal Servs. Corp. and International Bhd. of Teamsters, Local 959*, 105 Lab. Arb. (BNA) 289 (1995) (Landau, Arb.) (union challenged grievant's layoff as violative of the agreement's nondiscrimination clause and the seniority clause). Even in the absence of a contractual prohibition on discrimination, a union could still challenge terminations or other discipline as discriminatory based on a contractual requirement of just cause for discipline or discharge. See, e.g., *Thrifty Cos. and United Food & Commercial Workers Union, Local 839*, 103 Lab. Arb. (BNA) 317 (1994) (Staudohar, Arb.) (union challenged discharge of diabetic employee as without just cause based on the lack of an absenteeism policy and inconsistent treatment of illness-related absences, although arbitrator relied on ADA to support his decision); *Jefferson-Smurfit Corp. and Graphic Communications Int'l Local 16-C*, 103 Lab. Arb. (BNA) 1041 (1994) (Canestraight, Arb.) (although there was no accommodation requirement in the collective bargaining agreement, union challenged termination of employee with wrist injury as without just cause because the employer did not accommodate her as required by the ADA). If the parties eliminated a nondiscrimination clause in negotiations, however, the employer might argue that the parties intended to remove discrimination cases from contractual challenge under the just cause provision of the contract. See *City of Flint and Lieutenants & Captains Ass'n*, 97 Lab. Arb. (BNA) (1991) 1 (McDonald, Arb.) (use of bargaining history to establish intent of the parties). For a thorough discussion of recent arbitration awards involving disability issues, see Thomas E. Terrill, *The Americans with Disabilities Act and Labor Arbitration: Recent Awards*, 48 LAB. L.J. 3 (1997).

218. Arbitration may provide a quicker, cheaper forum for hearing discrimination claims, some of which would not otherwise be litigated because of the time or cost. See Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS & EMPLOYMENT POL. J. 189, 189-90 (1997). For further discussion of the advantages of the arbitral forum, see Grodin, *supra* note 121, at 50-51; Turner, *supra* note 198, at 289-84. Choosing arbitration over litigation may have significant disadvantages, however. In addition to the absence of discovery, which may affect the employee's ability to prove the claim, evidence suggests that monetary recovery is lower in arbitration than litigation. Bingham, *supra*, at 243.

be faced with conflicting employee desires with respect to the non-discrimination provisions, creating potential division within the bargaining unit. And bargaining unit divisions, of course, weaken the union's negotiating power. Moreover, even if all employees desired removal of contractual nondiscrimination provisions or opposed inclusion of them, it is highly unlikely that the issue would be a strike issue for a sufficient number of employees for the union to achieve its objective over employer opposition.

Furthermore, in some cases arbitration might be the most appropriate forum for finding an effective solution in a discrimination case. For example, in a dispute about reasonable accommodation under the ADA where the accommodation might conflict with the collective bargaining agreement, arbitration provides a forum where the contractual and statutory issues can be treated together.²¹⁹ Accordingly, while the absence of contractual agreement to arbitrate statutory rights may enable employees to litigate statutory claims, it may eliminate the right to arbitrate such claims in situations where arbitration would provide an adequate remedy.

Another problem with this approach is the existence of case law finding failure to negotiate a nondiscrimination clause to be evidence of unlawful discrimination on the part of the union. In *Macklin v. Spector Freight Systems, Inc.*,²²⁰ for example, the court stated, albeit in dicta, that where the union has not negotiated protection from discrimination for the employees and "there is such solid evidence of employer discrimination . . . it would undermine Title VII's attempt to impose responsibility on both unions and employers to hold that union passivity at the negotiating table in such circumstances cannot constitute a violation of the Act."²²¹ Other courts have used an efforts test in determining whether a union is liable under Title VII for discriminatory contract provisions, absolving the union only where it makes all reasonable efforts to eliminate discrimination.²²² Under this test, failure to negotiate a nondiscrimination provision might in-

219. Rabin, *supra* note 201, at 248-49. For a discussion of the potential for conflict between accommodations under the ADA and the collective bargaining agreement, see Hodges, *supra* note 121, at 614-25.

220. 478 F.2d 979 (D.C. Cir. 1973).

221. *Id.* at 989.

222. See, e.g., *Howard v. International Molders & Allied Workers, Local 100*, 779 F.2d 1546, 1548 (11th Cir. 1986); *Waker v. Republic Steel Corp.*, 675 F.2d 91, 93 (5th Cir. 1982); *Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112, 1120-21 (5th Cir. 1981), *cert. granted and judgment vacated on other grounds sub nom. International Molders & Allied Workers Union Local 342 v. Terrell*, 456 U.S. 968 (1982); *Martinez v. Oakland Scavenger Co.*, 680 F. Supp. 1377, 1397-98 (N.D. Cal. 1987).

crease the probability that the union will be held liable for unlawful discrimination. Accordingly, the union runs a risk when it fails to negotiate a nondiscrimination provision. If it seeks to eliminate an existing nondiscrimination provision, the risk might be even greater unless the court considering a discrimination claim was willing to recognize that the purpose of the union's action was to free employees to seek judicial resolution of discrimination cases.²²³

B. Permitting Employees to Arbitrate Discrimination Claims

A second alternative for dealing with this problem is to allow employees to arbitrate all discrimination claims at their own expense. As reflected in the cases discussed above, the employee has no right to insist on arbitration and no right to control arbitration, including no right to his or her own legal representative.²²⁴ A union could agree to allow an employee to arbitrate his or her own case, however. Of course, this does not provide the employee with the rights available in litigation, such as a jury trial and extensive discovery, but it does insure that the employee has a forum to hear the discrimination claim. Since unions cannot arbitrate every case, a union could decline to arbitrate a discrimination claim without breaching the duty of fair representation. When that decision deprives the employee of any opportunity for a hearing on a statutory claim, however, it complicates the already difficult decision about which of the many grievances filed to arbitrate.

A decision not to arbitrate a discrimination claim has political implications for the union officers, who may be accused by the members of discrimination. Member dissatisfaction may lead to political defeat of the officers or even decertification of the union.²²⁵ Fur-

223. Elimination of the nondiscrimination provision might equally be viewed as evidence that the union wanted to escape the responsibility of representing employees in the grievance procedure on nondiscrimination claims. A union taking this approach should clearly state the reason for its position in the contract negotiations and keep careful records of the negotiations so that it can prove, if challenged, that its intent was to protect the employees' right to sue for statutory violations.

224. See *supra* notes 143-60 and accompanying text.

225. The Labor-Management Reporting and Disclosure Act requires local unions to hold elections of officers at least every three years. 29 U.S.C. § 481(b) (1994). Decertification petitions, which must be supported by at least thirty percent of the employees in the bargaining unit, may be filed when no collective bargaining agreement is in effect or between 90 and 60 days before expiration of the collective bargaining agreement. See, e.g., *Leonard Wholesale Meats, Inc.*, 136 N.L.R.B. 1000 (1962); *De Luxe Metal Furniture Co.*, 121 N.L.R.B. 995 (1958). No decertification petition may be filed in the first year after certification of the union, however. *Brooks v. NLRB*, 348 U.S. 96 (1954).

thermore, the union may be sued for breach of the duty of fair representation or charged with violating discrimination laws for failing to arbitrate a discrimination grievance.²²⁶ While all of these risks exist for unions even in the absence of decisions binding employees to the union's grievance procedure for discrimination claims, the risk is exacerbated when the union's decision deprives the employee of a hearing on his or her discrimination claim.

Allowing the employee to arbitrate the grievance minimizes these risks, but does not eliminate them, and poses other difficulties for the union. The union maintains control over the grievance procedure for several reasons.²²⁷ First, an incentive for employers to agree to grievance and arbitration procedures is the screening function performed by the union.²²⁸ The employer is freed from having to deal with many employee complaints because the union determines that they do not rise to the level of contract violations or that its resources are better spent on more significant issues. Abandonment of the screening function may discourage arbitration agreements.

Second, the arbitrator serves as contract reader for the parties²²⁹ determining what the contract means. Submission of a grievance to arbitration gives the arbitrator control over contract terms. Where the risk of an adverse determination is significant,²³⁰ the union can decline to arbitrate, preserving the right to assert its interpretation of the provision and to negotiate a satisfactory solution. Accordingly, giving up the right to decide which grievances to arbitrate creates significant problems for the union. Allowing an employee to arbitrate with her own representative and make strategy decisions poses

226. See *Vaca*, 386 U.S. at 186 (courts have jurisdiction of duty of fair representation claims); *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enft denied*, 326 F.2d 172 (2d Cir. 1963) (breach of the duty of fair representation is an unfair labor practice); 42 U.S.C. § 2000e-2(c) (1994) (prohibiting discrimination by unions on the basis of race, gender, national origin and religion); 42 U.S.C. § 12111(2) (1994) (union is covered entity barred from discriminating under the Americans with Disabilities Act); 29 U.S.C. § 623(c) (1994) (prohibiting age discrimination by unions).

227. Of course there is a financial reason for the union to retain control over decisions to arbitrate because the union can afford to arbitrate only a limited number of cases.

228. *Vaca*, 386 U.S. at 191-92.

229. *St. Antoine*, *supra* note 10, at 1138-40.

230. The risk may be great because of the facts underlying the grievance or because the contractual interpretation argument of the union is weak. Alternatively, the risk may be great because an adverse decision would affect a large number of bargaining unit members. In the latter case, even if the chances of winning are more than even, the union may not want to risk an adverse decision. In the former case, the union might prefer to wait for a case with better facts to challenge the company's interpretation of the contract. The axiom "hard cases make bad law" applies equally in grievance arbitration.

the same risks of adverse determination. The employee's attorney might choose to make arguments that undermine the union's position in other cases. While these risks may not be as great for arbitration cases involving statutory discrimination claims, allowing employees to arbitrate discrimination cases but not other cases may make the union more vulnerable to duty of fair representation claims. At a minimum, the union would have to justify the differential treatment, which could be attacked as arbitrary or discriminatory or both.²³¹ Additionally, there may be substantial overlap between contractual and statutory claims, making it impossible for the union to permit individual arbitration of statutory claims only.²³²

Finally, allowing the employee to arbitrate may not accomplish the desired result because the expense may be prohibitive. Given the lack of discovery and the absence of a jury in arbitration,²³³ the employee may be unable to find an attorney to represent her on a

231. See *Vaca*, 386 U.S. at 190. This differential treatment might also be challenged as violative of antidiscrimination laws. For example, an African-American female employee terminated for absenteeism who challenged the termination as discriminatory would be able to arbitrate her claim even if the union determined not to arbitrate. A white male employee terminated for absenteeism who challenged his termination as without just cause, but made no statutory discrimination claim, would be bound by the union's decision not to arbitrate. The potential for discrimination claims against the union is obvious, not to mention the potential for political backlash against the union and racial and gender division within the union's membership. While such division may, at first blush, appear to be beneficial to the employer—united we stand, divided we fall—the resulting disruption may affect productivity as well as make it difficult for the union to negotiate a satisfactory collective bargaining agreement, leading to unnecessary labor strife.

232. For example, a termination could be challenged as without just cause under the collective bargaining agreement and also discriminatory in violation of one of the discrimination statutes. The challenge to just cause might be based not only on discrimination, but on other factors such as lack of due process or lack of notice that conduct the employee engaged in was prohibited.

233. Furthermore, it is not clear that an arbitrator under a collective bargaining agreement, even one that incorporated statutory claims, would feel free to award compensatory or punitive damages absent express authorization from the parties, since such damages are not generally awarded in labor arbitration. See ELKOURI & ELKOURI, *supra* note 162, at 589-92 (noting that punitive damages are generally not awarded unless clearly justified and compensatory damages are usually make whole awards such as back pay). Even where such damages are clearly authorized, monetary awards are generally lower in arbitration than jury awards in discrimination cases, further reducing the likelihood that the attorney would take the case on a contingency basis. See William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, DISP. RESOL. J., Oct.-Dec. 1995 at 40, 45 (citing study which found that mean and median jury verdicts in litigated employment discrimination cases were three times higher than awards in arbitrated discrimination cases). In cases where no back pay is involved, such as harassment, the problem would be even more acute. See Bales, *supra* note 121, at 740. The same is true for awarding attorneys' fees to successful plaintiffs. See ELKOURI & ELKOURI, *supra* note 162, at 592 ("it is not customary practice to award attorney fees against the offending party in arbitration."); 2 LINDEMANN & GROSSMAN, *supra* note 203, at 1859-61 (citing statutory authority for awarding attorneys fees to prevailing plaintiffs). Inability to collect attorneys' fees from the employer is likely to discourage many attorneys from representing plaintiffs in discrimination cases.

contingency basis. And it is unlikely that an employee covered by a collective bargaining agreement would have sufficient income or assets to hire an experienced attorney on an hourly basis.²³⁴ Thus, this option, even if chosen by the union, which is unlikely, would, in all probability, not effectuate the purposes of the laws prohibiting discrimination.

C. Union Assistance with Litigation or Voluntary Arbitration

The rapid growth of statutory rights in the workplace has led to suggestions that unions can assist employees in the enforcement of these statutory rights.²³⁵ The Fourth Circuit's decisions force this role on the union to the detriment of both employees and unions. Unions can support employees in either litigation or voluntary arbitration of statutory claims, however. Unions have access to information with respect to employer policies and practices and treatment of similarly situated employees, which may assist employees challenging discriminatory treatment.²³⁶ Unions also can identify potential witnesses that may support an employee's claim and encourage them to testify. In addition, the presence of a union-negotiated just cause provision for termination or discipline provides protection to employees against retaliation for their testimony. Unions can provide this assistance whether the employee chooses to litigate or arbitrate.

While there has been substantial criticism of mandatory arbitration of statutory claims, particularly where employees are required to agree to arbitration as a condition of employment, truly voluntary arbitration has met with less criticism.²³⁷ A procedure that provides employees with the option of arbitration and allows the choice to be made at the time the dispute arises does not involve the coercion that

234. William M. Howard, *Arbitrating Employment Discrimination Claims: Do You Really Have To? Do You Really Want To?*, 43 DRAKE L. REV. 256, 289 (1994) (indicating that even a retainer of \$2500—\$5000 is a bar to obtaining representation). On the other hand, it has been suggested that legal representation in arbitration might be more affordable because the time expenditure would be limited. *Id.*

235. Rabin, *supra* note 201, at 171-72. Professor Clyde Summers has suggested that statutory remedies may be ineffective where employees have no union representation because the employer has "dominant authority in the workplace, greater knowledge, larger resources," and is a repeat player in the enforcement process. Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 543-44 (1992).

236. Where similarly situated employees of a different race or gender are treated differently, an employee would have a claim of disparate treatment in violation of Title VII. See 1 LINDEMANN & GROSSMAN, *supra* note 203, at 10 (citing *McAlester v. United Air Lines, Inc.* 851 F.2d 1249, 1261 (10th Cir. 1988) (where nonwhite employees were disciplined more harshly than white employees.)).

237. See authorities cited *supra* note 166.

is present, if implicit, where the employee is asked (or certainly required) to agree to arbitration upon hiring or even while employed, but before any dispute arises.²³⁸ In the collective bargaining setting, the problem is not individual coercion, but the lack of individual choice. Since the union is the employee's collective bargaining representative, she cannot negotiate a separate agreement with the employer; she is bound by the union's contract.²³⁹ If the union's negotiation of a prohibition on discrimination which is subject to the grievance and arbitration procedure bars litigation, the employee's rights have been waived solely by virtue of her representation by a union. This is true regardless of whether she is a union member, regardless of whether she supported the contract, regardless of whether the union had any knowledge that it was waiving individual employee rights by negotiating protection against discrimination, and regardless of whether the protection negotiated by the union is adequate.²⁴⁰

Even if the employee cannot be forced to arbitrate under the collective bargaining agreement, she may choose voluntarily to arbitrate her discrimination claim after it arises.²⁴¹ If she does so, the union can support litigation of the claim in the arbitral forum by providing information to the employee that would support her claim. Moreover, the presence of union representation may help alleviate the concerns raised by the fact that the employer will be a repeat player in arbitration while the employee will not.²⁴² The employee

238. See Grodin, *supra* note 121, at 38.

239. See Malin, *supra* note 92, at 87.

240. See *supra* notes 167, 183-85 and accompanying text.

241. If the employer has a procedure for arbitration of statutory claims for nonunion employees, it could be made available on an optional basis to union employees. For the union to recommend the procedure to bargaining unit members, however, it would have to be convinced that the procedure provided a fair and effective forum for statutory claims. Several groups have attempted to set forth guidelines for fair and effective arbitration of statutory disputes. See, e.g., *Prototype Agreement*, *supra* note 161, at E-11 (setting forth the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship prepared by the Task Force on Alternative Dispute Resolution in Employment); The Committee on Labor and Employment Law, *Final Report on Model Rules for the Arbitration of Employment Disputes*, 50 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 629 (1995) (setting forth Model Procedures for the Resolution of Employment Disputes prepared by the Committee on Labor and Employment Law of the New York bar). The Due Process Protocol has been endorsed by the Board of Governors of the National Academy of Arbitrators and by union and management representatives of the Employment and Labor Law Section of the American Bar Association. *Academy Board Endorses ADR Task Force Protocol*, 149 Lab. Rel. Rep. (BNA) No. 6 at 176 (June 5, 1995); *ABA Approves ADR Process Protocol*, 154 Lab. Rel. Rep. (BNA) 209 (February 24, 1997).

242. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1475-76 (D.C. Cir. 1997); Bingham, *supra* note 218, at 192-93. Bingham's study demonstrated statistically significant reductions in

may be disadvantaged by a lack of familiarity with the arbitration procedure and lack of information about arbitrators, so that a role in selecting the arbitrator may be relatively useless.²⁴³ In addition, the arbitrator may have an economic incentive, conscious or unconscious, to satisfy the employer because the employer is a source of future business for the arbitrator.²⁴⁴

The union can help reduce these disadvantages.²⁴⁵ The union could collect information about arbitrators and make it available to employees. The potential for repeated use by unionized employees, with the union available as a vehicle for sharing information about arbitrators, should help counteract any repeat customer bias favoring the employer.²⁴⁶ The union could maintain a data bank of arbitration decisions, information about arbitrators, and perhaps even a list of attorneys in the area that represent employees in discrimination cases. Moreover, the presence of the union in the workplace and the collective bargaining agreement limiting termination provides protection for employees who might be subject to retaliation.²⁴⁷

employee success in nonunion arbitration where the employer was a repeat player. *See id.* at 213. Bingham notes that the study does not establish a cause of the repeat player phenomenon. *Id.* at 214.

243. *See* Lisa R. Bingham, *Employment Arbitration: Differences between Repeat Player and Nonrepeat Player Outcomes*, PROCEEDINGS OF THE FORTY-NINTH ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 201, 202, 207 (1997) (noting that repeat player employers have the advantage of institutional memory which leads to informed arbitrator selection)

244. *See* Estreicher, *supra* note 126, at 764; Peter M. Panken, *et al.*, *Avoiding Employment Litigation: Alternative Dispute Resolution of Employment Disputes in the 90's*, 53 ALI-ABA (LEXIS, CLE Library, ALI-ABA file) (1996) (noting that an arbitrator must be fair to major clients which are employers in the nonunion context); AAA *President Predicts Upswing in Use of ADR*, *Individual Employment Rights* (BNA) 3 (July 20, 1993) (noting concern for repeat customer bias); Bingham, *supra* note 243, at 207-08 (empirical study in which only two employers who used the same arbitrator in multiple cases won all of their cases, a "troublesome trend... which bears watching.").

245. *See* *Cole*, 105 F.3d at 1475-76.

246. Bingham, *supra* note 243, at 196-97, 219. Bingham suggests that unions could provide limited membership to employees at unrepresented workplaces and offer representation in employment arbitration as a benefit. *Id.* at 219.

247. Although retaliation is unlawful under Title VII, the ADA, and the ADEA, lengthy procedures and the difficulty of proof may make arbitration under a just cause provision a more valuable remedy. *See* 42 U.S.C. § 2000e-3 (1994); 29 U.S.C. § 12203 (1994); 29 U.S.C. § 623(d) (1994). Ninety-seven percent of collective bargaining agreements require cause or just cause for discipline and discharge. *See* COOPER & NOLAN, *supra* note 200, at 87, *citing* BASIC PATTERNS IN UNION CONTRACTS (13th ed. 1992). Furthermore, the union may protect against more subtle forms of retaliation. *See* Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 923, 934-36 (1979); Martha West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1, 39-40 (reinstatement has been most successful as a remedy in labor arbitration because the presence of the union and the grievance and arbitration process dissipates the fear of employer retaliation).

If, as is likely without a formal procedure, few employees choose to arbitrate, the union's ability and incentive to collect information about arbitration will be limited. Employees with statutory claims might be more likely to choose to arbitrate claims if the union were more extensively involved in the arbitration procedure. The union could play a greater role by negotiating a procedure for knowing and voluntary post-claim arbitration of statutory claims if it determined that it would benefit the employees.²⁴⁸ The employer would have an incentive to agree to such a procedure as it might encourage employees to arbitrate rather than litigate, an option clearly preferable to at least some employers given the proliferation of arbitration provisions in the nonunion setting.²⁴⁹

Because of the risk of duty of fair representation claims, however, this option may have little appeal for unions. Even the limited role of collecting and disseminating to all employees information about arbitrators and the arbitral process may expose the union to allegations that it has not fairly provided assistance to a particular individual. Going beyond this role by recommending arbitrators or providing information about particular employer practices or possible witnesses increases the risk that the union may be perceived to be providing more assistance to certain employees or recommending inferior arbitrators. Involvement in the negotiation of the procedure increases the likelihood that the duty of fair representation would be applied to the union's role.²⁵⁰

It can be argued that if the union negotiates an arbitration procedure and it is available to employees to use at their option, then it should be covered by the duty of fair representation. Statutory dis-

248. Further consideration of several issues would be necessary were such a procedure to be negotiated. For example, where contractual and statutory issues overlap, which procedure would be used? One possibility would be to require the employee to choose. Because of the disincentive of the duty of fair representation, however, negotiation of such a procedure is unlikely. See *infra* notes 250-57 and accompanying text.

249. See *supra* note 214 and accompanying text.

250. Negotiation of a separate arbitration procedure might have another downside. If discrimination claims are litigated under the contractual grievance procedure, the union is entitled to information that is relevant and necessary to process the grievances. See *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967). Thus the union could aid the employee in obtaining some discovery relevant to the discrimination claim by requesting information. The employer might argue that the union was not entitled to the information for use in a noncontractual grievance procedure. The NLRB has held, however, that the union is entitled to data relating to the demographic makeup of the employer's workforce, EEOC charges against the employer, and affirmative action plans, where the union sought the information for the express purpose of bringing a discrimination suit against the employer. See *Westinghouse Elec. Corp.*, 239 N.L.R.B. 106 (1978), *enfd in part*, 648 F.2d 18 (D.C. Cir. 1980). Accordingly, data should be equally available for use in an arbitration procedure limited to statutory claims.

crimination claims relate to employment and the union should represent all employees fairly even when it comes to statutory claims.

The better argument, however, is that a voluntary arbitration procedure for statutory claims is an alternative to litigation which does not implicate the duty of fair representation. Courts have not found a union duty to litigate on behalf of employees to remedy discrimination.²⁵¹ A procedure available only for statutory claims would be analogous to litigation. The duty of fair representation arises out of the right of exclusive representation.²⁵² Since the employee's statutory rights are independent of the union, the union is not the employee's exclusive representative for statutory claims. In a similar context, the Seventh Circuit Court of Appeals concluded that the union did not have a duty with respect to its decision about whether to ask a court to vacate an arbitration award.²⁵³ The court found that since the right to ask a court to vacate an arbitration award was not exclusive to the union, the union had no duty to the employees with respect to that decision.²⁵⁴ The employee himself was free to ask the court to vacate the award. Unfortunately, not all courts have agreed with the Seventh Circuit and there is no certainty that the duty would not be applied in the context of voluntary arbitration of statutory claims.²⁵⁵

If the duty of fair representation does not apply, unions could be far more active in assisting employees in arbitration without fear of liability. Refusal to apply the duty of fair representation would not leave employees wholly without a remedy for union misconduct, however. If the union actively discriminated against employees, an action could be brought against the union under the appropriate discrimination statute.²⁵⁶ In the absence of a fair representation duty, however, the union could offer a service to its members by providing legal counsel in discrimination cases.²⁵⁷ This additional benefit of

251. See MALIN, *supra* note 185, at 414.

252. See *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

253. *Freeman v. Local Union 135, Teamsters*, 746 F.2d 1316, 1320 (7th Cir. 1984).

254. *Id.* at 1321.

255. See *Sear v. Cadillac Automobile Co.*, 654 F.2d 4 (1st Cir. 1981) (declining to hold that failure to seek vacation of an arbitration award could never breach the duty of fair representation, but stating that an action should lie, if at all, only when there was blatant unfairness on the part of the union).

256. See 42 U.S.C. § 2000e-2(c) (1994) (prohibiting discrimination by unions on the basis of race, gender, national origin and religion); 42 U.S.C. § 12111(2) (1994) (union is covered entity prohibited from discrimination under the Americans with Disabilities Act); 29 U.S.C. § 623(c) (1994) (prohibiting age discrimination by unions).

257. As noted previously, however, if the union discriminated in providing attorneys on the

union membership could encourage employees in right to work states to join the union. The union would benefit through additional members and the employees would benefit through more effective enforcement of discrimination statutes. The union could also provide more active assistance to employees in arbitration, such as guidance in arbitration techniques and strategy based on union experience, without fear of liability.

Because of uncertainty about the application of the duty of fair representation, however, voluntary arbitration does not provide an effective alternative for enforcement of statutory rights for the unionized employee or the union. The union cannot provide effective assistance or participate in creating a procedure without risking a breach of the duty of fair representation. At most, the union could collect and provide information, available to all employees, should employees voluntarily choose to arbitrate their claims after a dispute has arisen.

V. THE ROLE OF UNIONS IN STATUTORY DISCRIMINATION CLAIMS

Involvement of unions in statutory discrimination claims may further the objectives of discrimination statutes by providing individual employees with litigation (or arbitration) assistance, improving the ability of discriminatees to find lawyers to handle their claims,²⁵⁸ and providing a screening function to discourage nonmeritorious claims.²⁵⁹ Such involvement should not be coerced through forcing such claims into the contractual grievance procedure, however. Such an approach works to the detriment of the statutory objectives of both the NLRA and the discrimination statutes. The union is encouraged either to deprive employees of the statutory litigation forum or to eliminate any contractual protection against discrimination, removing the union from any role other than litigating itself or assisting employees with litigation. If, in fact, arbitration is a viable alternative for discrimination claims, it should be encouraged as an

basis of union membership where the duty of fair representation applied, it would most likely be found to have violated that duty. See *supra* note 144 and accompanying text. Because of the cost of attorney representation, this would be a substantial benefit, but one which the union could not afford to provide to all employees. See Rabin, *supra* note 201, at 203.

258. See Howard, *supra* note 234, at 288 (obtaining counsel is difficult for many employment discrimination plaintiffs).

259. Unions provide such a screening function for contractual claims under the grievance and arbitration procedure, a fact which has encouraged the negotiation and use of such procedures. See *Vaca*, 386 U.S. at 191-92.

option, with the availability of union support.²⁶⁰ Application of the duty of fair representation to such a procedure would discourage unions from negotiating or participating in a voluntary arbitration procedure. While there is a persuasive argument that the duty should not apply, the uncertainty of its application will have a discouraging effect on unions, limiting their involvement. Accordingly, a legislative declaration that the union's duty of fair representation does not apply to statutory claims might be necessary to encourage voluntary arbitration by unionized employees. At present, voluntary arbitration is not a viable alternative unless individually chosen by an employee represented by counsel to resolve a discrimination claim after it has arisen.

VI. THE SUPREME COURT SHOULD REVERSE *WRIGHT*

For all of the reasons set forth above, the Supreme Court should reverse the Fourth Circuit's decision in *Wright* and hold that unions cannot prospectively waive employee rights under the discrimination statutes by negotiating nondiscrimination provisions in a collective bargaining agreement or a broad grievance and arbitration provision. While it might be argued that employees should be required to arbitrate under the collective bargaining agreement prior to filing suit,²⁶¹ the requirement that employees exhaust the grievance and arbitration procedure before filing a suit for breach of the collective bargaining agreement is inapposite here. The requirement serves the salutary purpose of encouraging arbitration of labor disputes and limiting judicial involvement in contract interpretation.²⁶² Thus it furthers the NLRA's goal of encouraging collective bargaining.²⁶³ Requiring exhaustion of statutory claims does not further that purpose. Instead, it serves as a trap for the unwary employee who unknowingly fails to file a grievance. In addition, the employee who files a grievance may neglect to file a timely EEOC charge while waiting for resolution through the grievance procedure, thereby losing her

260. Several commentators have suggested some form of legislated system for arbitration of some or all employment discrimination claims. While consideration of the merits of such a system is beyond the scope of this article, were such a system to be implemented, unions could play an important role in supporting employees if their support were not circumscribed by the duty of fair representation. For such proposals, see Grodin, *supra* note 121, at 55; Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent Discharge Policy*, 57 OHIO ST. L.J. 1443, 1515 (1996).

261. *Austin*, 78 F.3d at 885.

262. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653, 656 (1965).

263. *Id.* at 653.

claim.²⁶⁴ The purposes of the nondiscrimination statutes are not served by procedures and traps that make it more difficult for employees, who are often unsophisticated, to enforce their rights.

Exhaustion requires the employee to use what may prove to be an ineffective forum for statutory claims because of the employee's lack of control over the procedure, which merely adds to the employee's burden in attempting to remedy discriminatory treatment.²⁶⁵ While the employee may vindicate her rights in arbitration, given the limitations on union resources, it is more likely that the exhaustion requirement will merely delay resolution of the dispute.

If the union does not arbitrate, the courts will have to determine whether to hear the claim *de novo* or, as in the case of contractual claims, reach the merits only if the employee can prove that the union breached its duty of fair representation, thereby excusing the failure to exhaust.²⁶⁶ If the latter rule applies, then the employee's claim will, in all likelihood, never be heard.²⁶⁷ If the union arbitrates and loses or wins less than the full remedy that would be available under the statute, a judicial action may still be filed. The Supreme Court in *Gardner-Denver* declined to defer to the arbitrator's decision in the litigation of the statutory claim.²⁶⁸ If that view prevails and it should for reasons set forth in the opinion and this article, the arbitration has merely postponed resolution of the dispute.²⁶⁹ If not, courts will have to determine the appropriate level of deference to the arbitrator's decision.²⁷⁰ Thus, the exhaustion requirement has little to recommend it as it creates many of the same problems as a

264. See *International Union Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976) (filing of grievance under collective bargaining agreement does not toll statute of limitations).

265. See *supra* notes 141-65 and accompanying text for a discussion of the concerns about the effectiveness of the forum.

266. See *Vaca*, 386 U.S. at 186; *Moore v. Duke Power*, 971 F. Supp. at 982.

267. See *supra* notes 157-61 and accompanying text.

268. *Gardner-Denver*, 415 U.S. at 57-58.

269. It is possible that this approach will give an employee "two bites at the apple," to the detriment of the employer, and perhaps the judicial system, because of the expenditure of resources on dual litigation of claims. It is likely, however, that few employees will actually be able to both arbitrate their claim under the collective bargaining agreement and litigate the claim in court. First, the union will not arbitrate most cases and second, many employees will not actually litigate either because of lack of resources, inability to find an attorney, or other reasons. At most, employees may file a charge with the EEOC, which requires an employer response but is far less costly than litigation. And even under *Gilmer*, an enforceable arbitration agreement does not preclude an EEOC charge. 500 U.S. at 28.

270. If, as has been suggested, see *supra* note 196 and accompanying text, judicial review of arbitral decisions on statutory claims is less deferential, the efficiency gains from exhaustion may be limited. See also *Gardner-Denver*, 415 U.S. at 59 (suggesting *de novo* review); *Rios v. Reynolds Metals Co.*, 467 F.2d 54, 58 (5th Cir. 1972) (setting deferral standard).

complete bar to litigation. Accordingly, the Court should conclude that collectively-bargained arbitration provisions have no impact on statutory discrimination rights.

VII. CONCLUSION

While unions can play an effective role in eliminating discrimination from the workplace, employees should not be deprived of a judicial forum for discrimination claims by virtue of their coverage by a collective bargaining agreement. Labor arbitration has served as an important element of national labor policy, furthering peaceful settlement of disputes between employers and unions. Labor arbitration was not designed to achieve the goals of antidiscrimination legislation, however, and imposing that burden will interfere with the goals of both labor policy and antidiscrimination statutes. The Supreme Court should reverse the Fourth Circuit's *Wright* decision, holding that individual statutory nondiscrimination rights cannot be waived by the provisions of a collective bargaining agreement. If arbitration is truly a viable option for statutory claims, Congress should consider a legislative approach, including a provision barring the application of the duty of fair representation to arbitration of statutory claims.