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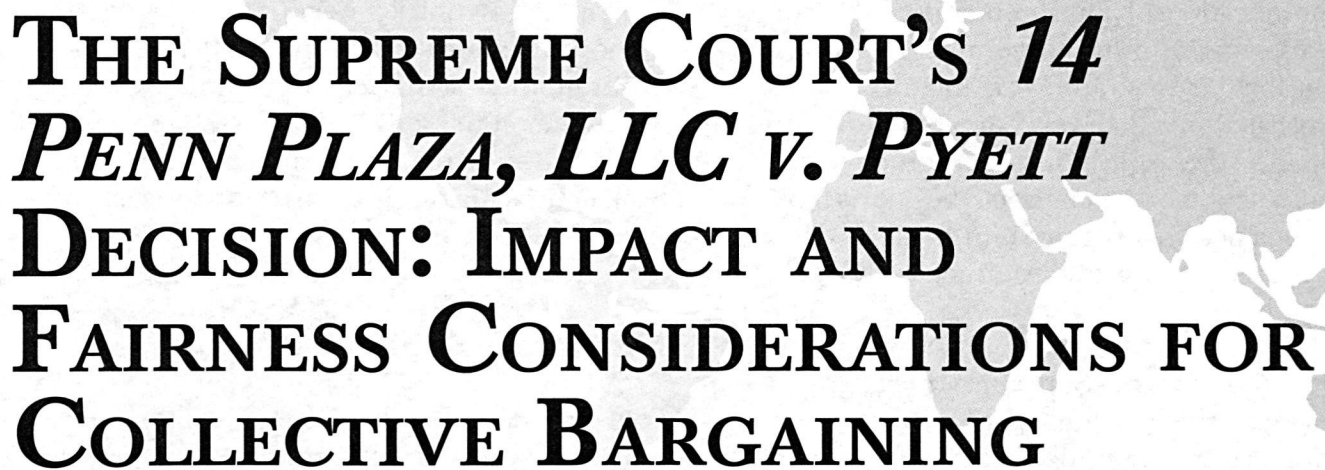
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THE SUPREME COURT'S 14 *PENN PLAZA, LLC v. PYETT* DECISION: IMPACT AND FAIRNESS CONSIDERATIONS FOR COLLECTIVE BARGAINING

By David P. Twomey*

I. Introduction

Labor arbitration is an alternative dispute resolution process created by the parties to a collective bargaining agreement. In the private sector, an arbitration is generally confined to a question of whether or not a particular action was valid under the CBA. And the powers and duties of an arbitrator are as set forth and limited by the terms of the CBA.¹ Some fifty years ago, as part of its *Steelworkers Trilogy*,² the United States Supreme Court announced a strong presumption in favor of arbitrability in the *United Steelworkers v. Warrior & Gulf Navigation Co.*, as follows:

To be consistent with the congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration...[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 to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.³

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In the *United Steelworkers v. Enterprise Wheel & Car Co.* component of the Trilogy, the Supreme Court approved the role of arbitrators as the interpreters of the contract in the following language:

The question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.⁴

Over the years the Supreme Court expanded the use of arbitration in employment disputes beyond arbitration under collective bargaining agreements to approval of the use of arbitration to resolve individual employment agreements to arbitrate statutory rights.⁵ The Supreme Court in *14 Penn Plaza, LLC v. Pyett* recently decided that a provision in a collective bargaining agreement that "clearly and unmistakably" requires union members to arbitrate claims arising under a federal antidiscrimination statute is enforceable and is a waiver of union members' rights to pursue statutory discrimination claims in federal courts.⁶ The decision was a significant departure from existing precedents going back to the Court's 1974 *Alexander v. Gardner-Denver Co.* decision that allowed a union member to pursue a grievance-arbitration remedy under a CBA, and after an adverse arbitration award, to pursue statutory rights in a federal court under the Title VII of the Civil Rights Act of 1964.⁷ Where once labor arbitrators were focused on the four corners of a collective bargaining agreement, interpreting contractual disputes involving wages, hours and working conditions, labor arbitrators will now, in some cases, interpret federal antidiscrimination statutes and case law, and resolve procedural and substantive due process issues inherent in the application of federal statutory law.

This paper presents the developing and sometimes conflicting Supreme Court precedents involving the waiver of employee statutory rights through mandatory arbitration clauses. It then presents the Supreme Court's *Pyett* decision. *Pyett's* impact on the labor arbitration process is considered along with procedural and fairness issues parties may choose to ad-

dress in their contract negotiations on whether or not to require bargaining unit members to arbitrate their statutory discrimination claims. The paper concludes with an assessment of the workability of resolving statutory discrimination claims through arbitration, rather than Article III courts.

II. Pre-Pyett Precedent On Mandatory Arbitration

Four Supreme Court decisions laid the foundation and expressed sufficient conflict to persuade the Supreme Court to grant certiorari in *14 Penn Plaza v. Pyett* to settle issues underlying the distinctions between individual employment agreements to arbitrate and arbitration clauses found in CBA's.

A. *Alexander v. Gardner-Denver*

In the 1974 case of *Alexander v. Gardner-Denver Co.*, the Supreme Court considered the question of whether Harrell Alexander's election to invoke grievance-arbitration machinery that resulted in an adverse arbitration award precluded him from filing a subsequent Title VII claim of racial discrimination.⁸ The Court found that it did not.⁹ The Court held that Title VII was designed by Congress to supplement existing laws and institutions involving employment discrimination.¹⁰ Moreover, the Court determined that the doctrine of election remedies was inapplicable in the present context, which involved statutory rights distinctly separate from the employee's contractual rights, regardless of the fact that violation of both rights may have resulted from the same factual occurrence.¹¹ The unanimous *Gardner-Denver* Court held that "an employee's rights under Title VII are not susceptible of prospective waiver."¹² And, the Court set forth the policy statements regarding the appropriateness of arbitration for the resolution of Title VII rights, in part, as follows:

Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropri-

ate forum for the final resolution of rights created by Title VII. The conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties, rather than the requirements of enacted legislation. Where the collective bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement.... Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.

Moreover, the fact-finding process in arbitration usually is not equivalent to judicial fact-finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross examination, and testimony under oath, are often severely limited or unavailable. Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. These same characteristics, however, make arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.¹³

B. *Gilmer v. Interstate/Johnson Lane*

In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court held that stockbroker Robert Gilmer's lawsuit under the Age Discrimination in Employment Act (ADEA) against his former employer could be stayed under the Federal Arbitration Act (FAA), and that he could be compelled to arbitrate his statutory ADEA claim under the FAA rather than pursue his case

in a federal court.¹⁴ Gilmer's registration form with the New York Stock Exchange contained an agreement to arbitrate any controversy arising out of his employment with or termination by a member firm.¹⁵ The Court enforced this broad mandatory arbitration clause even though it deprived Gilmer of his judicial remedy, concluding that Congress did not explicitly preclude arbitration of ADEA claims.¹⁶ The Court distinguished its *Gilmer* decision from *Gardner-Denver* pointing out that *Gardner-Denver* did not involve the issue of the enforceability of an agreement to arbitrate statutory claims; and the arbitration in *Gardner-Denver* occurred in the context of a collective bargaining agreement.¹⁷

C. *Wright v. Universal Maritime Services Corp.*

In *Wright v. Universal Maritime Services Corp.*, the Supreme Court addressed the question of whether a general arbitration clause in a CBA required an employee to use the arbitration procedures set forth in the contract to pursue a remedy for an alleged violation of the Americans with Disabilities Act (ADA).¹⁸ The Fourth Circuit Court of Appeals concluded that the general arbitration provision in the CBA governing Wright's employment was sufficiently broad to encompass a statutory claim under the ADA, and that such a provision was enforceable.¹⁹ Before the Supreme Court, the employer group asserted that this position was supported in part by *Gilmer v. Interstate/Johnson Lane Inc.* and a strong federal policy favoring arbitration.²⁰ The plaintiff, Caesar Wright, contended that the *Alexander v. Gardner-Denver* and *Gilmer* precedents could be reconciled, by maintaining that federal forum rights cannot be waived in union-negotiated CBAs even if they can be waived in individually executed contracts.²¹ The Supreme Court did not take up the daunting task of deciding whether or not *Gilmer* had in fact undermined or overruled *Gardner-Denver*.²² The Court, following its tradition of judicial restraint, resolved the controversy before it on the narrow basis that the arbitration clause in the parties' collective

bargaining agreement did not require the worker to arbitrate his ADA claim.²³ Importantly, the Court provided this clarification:

...whether or not *Gardner-Denver's* seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer*, *Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA. The CBA in this case does not meet that standard.²⁴

Ultimately the Court distinguished the *Wright* case from *Gilmer* reasoning that *Gilmer* involved an individual's waiver of his own rights, in contrast to *Wright's* case in which there was a waiver of the rights of employees covered by the CBA.²⁵

D. Circuit City Stores v. Adams

Following *Gilmer*, many employers required their non-union employees to agree to broad arbitration clauses as a condition of employment, often inserting such clauses in employee handbooks with due notification to affected employees.²⁶ New employees at all salary levels have been commonly required to sign such pre-dispute, broad mandatory arbitration clauses on a take-it-or-leave-it basis. A strong challenge to a so-called *Gilmer* arbitration clause was initiated in the 2001 case of *Circuit City Stores, Inc. v. Adams*²⁷ on the theory that the FAA was intended to compel judicial enforcement of arbitration agreements governing commercial disputes and was not intended to apply to employment contracts.²⁸ The Court of Appeals for the Ninth Circuit had accepted this position in post-*Gilmer* litigation.²⁹ However, in *Circuit City Stores, Inc. v. Adams*, the Supreme Court overturned the Ninth Circuit's interpretation of the FAA, in a 5-4 decision, rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context.³⁰ Relying on its *Gilmer* precedent, the Court made clear that in agreeing to arbitration of a statutory claim,

a party does not forego substantive rights afforded by the statute.³¹

III. The Pyett Decision

The question presented in *14 Penn Plaza, LLC v. Pyett* was whether a provision in a CBA that clearly and unmistakably required union members to arbitrate claims arising under the ADEA was enforceable.³² The Court of Appeals for the Second Circuit held that *Alexander v. Gardner-Denver Co.* forbids enforcement of such a provision.³³

The plaintiffs worked as unionized night lobby watchmen at the 14 Penn Plaza office building in New York City, until the building owner hired a unionized security services contractor to staff the lobby.³⁴ The plaintiffs were then assigned as night porters and light duty cleaners in other locations.³⁵ The Service Employees International Union filed grievances challenging the reassignment, asserting that the owner violated the CBA because of: (1) age discrimination, (2) the seniority provision, and (3) the overtime distribution clause.³⁶ Failing to obtain relief in the grievance procedure, the union initially requested arbitration, believing that it could not legitimately object to the reassignments because it had consented to the contract for the new security personnel.³⁷ The union continued to arbitrate the seniority and overtime claims, which they subsequently lost. While the limited arbitration process continued, the plaintiffs filed complaints with the EEOC alleging the owner violated the ADEA.³⁸ After receiving a right to sue letter from the EEOC, the plaintiffs filed an ADEA lawsuit against the employer in federal district court. The employer responded by filing a motion to compel arbitration under Sections 3 and 4 of the FAA.³⁹ The district court denied the employer's motion and the U.S. Court of Appeals for the Second Circuit affirmed relying on both *Gardner-Denver* and a Second Circuit precedent that a CBA which purports to waive employees' rights to a federal forum with respect to statutory claims, is unenforceable.⁴⁰

A divided Supreme Court reversed.⁴¹ Justice Thomas, writing for the five-justice majority,

stated that the CBA's arbitration clause must be honored unless the ADEA itself removes the particular class of grievances from the National Labor Relations Act's (NLRA's) broad sweep – which was not the case in this instance.⁴² The Court reasoned that the NLRA provided the union and the employer group with statutory authority to bargain over the subject matter of arbitration of workplace discrimination claims, and the ADEA did not terminate that authority.⁴³ Accordingly, the Court found that there was no legal basis to strike down the arbitration clause in the CBA.⁴⁴

The Court then pointed out that the arbitration provision in *Pyett* is also fully enforceable under the *Gardner-Denver* line of cases, because the arbitration provision in the *Gardner-Denver* CBA did not cover statutory claims,⁴⁵ while in *Pyett*, the CBA's provision expressly covered both statutory and contractual discrimination claims.⁴⁶ Moreover, the Court stated that the union and employer group's decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance.⁴⁷

The Court disavowed *Gardner-Denver's* statement that certain features of arbitration make it “a comparatively inappropriate forum for the final resolution of rights created by Title VII,”⁴⁸ including questioning the competence of arbitrators to decide federal statutory claims.⁴⁹ The Court stated that these misconceptions have been corrected, pointing out, for example, that the Supreme Court has “recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision” and that “there is no reason to assume at the outset that arbitrators will not follow the law.”⁵⁰

The Court disavowed *Gardner-Denver's* statement that certain features of arbitration make it “a comparatively inappropriate forum for the final resolution of rights created by Title VII.”

The Court disposed of the plaintiffs' conflict-of-interest argument, that a union's interest and those of the individual are not always identical or even compatible, by asserting that the principle of majority rule is in fact the central premise of the NLRA.⁵¹ The Court bolstered its rationale by pointing out that the NLRA imposes a “duty of fair representation” on unions; that a union is subject to liability under the ADEA if it discriminates against its members on the basis of age; and age-discrimination claims may be filed with the EEOC and breach of duty of fair representation claims with the NLRB.⁵²

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The majority did not resolve the question whether a collective bargaining agreement's waiver of a judicial forum is enforceable when the union controls access to and presentation of employees' claims in arbitration because it was not fully briefed to the Court and made part of the question presented to the Court.⁵³

Justice Souter's dissent, joined by Justice Stevens, Ginsberg, and Breyer, reprimanded the majority for evading *Gardner-Denver's* rule, a case that it contended was controlling precedent. Justice Souter asserted federal forum rights may not be waived in union-negotiated contracts, stating “one need only read *Gardner-Denver* itself to know that it was not at all so narrowly reasoned....”⁵⁴

IV. Impact And Fairness Issues Under *Pyett*

The *Pyett* decision permits employers and unions to bargain away individual employees' rights to pursue the resolution of statutory discrimination claims in federal court, relegating employees to resolve their claim in arbitration. It is anticipated that unionized employers may seek to take advantage of this important change in the law when bargaining new or renewal contracts. Employers perceive litigation cost

savings⁵⁵ and outcome advantages⁵⁶ in mandatory arbitration by avoiding federal court litigation. Unions will be required to bargain on this mandatory subject of bargaining. Unions will assess the advantages and disadvantages of mandatory arbitration of statutory claims for their members. If unions agree to the concept, they will demand to have input into the content of any arbitration clause and will expect enhanced economic benefits for its members as *quid pro quo* for acceptance of the arbitration agreement provision, as well as an economic adjustment for the additional costs to be borne by the union for additional representation costs. Impact and fairness issues include the unresolved issue, in *Pyett*, of a union's failure to progress an individual's discrimination claim to arbitration, "clear and unmistakable" waivers in light of post-*Pyett* trial court decisions, and "fairness" issues including: an overview comparison of arbitration and litigation, arbitrator competence, grievant representation, rules of evidence, discovery, conflicting time limits and limited court review.

A. Failure of a Union to Progress Discrimination Claims to Arbitration

In processing a grievance of a bargaining unit member, the union progresses the matter through the contractual grievance-arbitration steps set forth in a CBA, and the union has the discretion to make decisions "in good faith" and "in a non arbitrary manner" as to the merits of any particular grievance.⁵⁷ In the absence of any bad faith, a union cannot be found to have breached its duty of fair representation to a union member when it decides not to arbitrate a grievance as non-meritorious.⁵⁸ The *Pyett* court did not resolve the question whether a CBA's waiver of a judicial forum is enforceable against a union member when the union declines to progress the grievance involving a federal statutory discrimination claim to arbitration.⁵⁹ In *Kravar v. Triangle Services, Inc.*, involving an arbitration clause identical in all respects to *Pyett*, the union refused to take Ms. Kravar's disability discrimination claims to arbitration.⁶⁰ In adjudicating

the case brought by the employer to compel arbitration under Sections 3 and 4 of the FAA, the U.S. District for the Southern District of New York relied on the *Pyett* principle that "the decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination: it waives only the right to seek relief from a court in the first instance."⁶¹ The *Kravar* court held that the CBA operated to preclude Ms. Kravar from raising her disability claim in *any* forum. As such, the CBA arbitration provision operated as a waiver of Ms. Kravar's substantive rights and may not be enforced.⁶²

B. Negotiating "Clear and Unmistakable" Waivers

After *Pyett*, a first wave of cases raised a range of *Pyett*-related enforceability issues. In *Mathews v. Denver Newspaper Agency, LLP*, the U.S. District Court for the District of Colorado found that the CBA's arbitration agreement covered the plaintiff's statutory discrimination claim, and the court concluded that the plaintiff waived his right to seek a judicial remedy.⁶³ However, in *St. Aubin v. Unilever*, the U.S. District Court for the Northern District of Illinois found that the "clear and unmistakable" requirement to arbitrate the statutory discrimination claim was not met where the arbitration clause and the anti-discrimination clause were distinct, and the anti-discrimination clause did not refer to arbitration.⁶⁴ In *Markell v. Kaiser Foundation Health Plan*, the U.S. District Court for the District of Oregon determined that where a CBA did not clearly provide for arbitration of statutory claims, the statutory claim should be given *de novo* consideration in federal court.⁶⁵ In *Shipkevich v. Staten Island University Hospital*, the U.S. District Court for the Eastern District of New York determined that the CBA did not "clearly and unmistakably require" arbitration of statutory antidiscrimination claims.⁶⁶ Finally, in *Mendez v. Starwood Hotels*, the Court of Appeals for the Second Circuit upheld the lower court's denial of a motion to compel arbitration based on a letter agreement signed by Starwood

and Mendez because the subject matter of the agreement to arbitrate employment related discrimination claims was subject to mandatory bargaining under the NLRA, and the employer had no right to go outside the collective bargaining context to obtain this letter.⁶⁷ To avoid the time and expense of litigation about “clear and unmistakable” waivers, the arbitration clause in *Pyett* may be used by employers and unions in contract negotiations as a Court approved model of arbitration clause language that clearly and unmistakably requires union members to arbitrate statutory discrimination claims. The clause states:

§30 NO DISCRIMINATION. There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, ... or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedures (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.⁶⁸

As discussed in the previous segment of this paper, the *Pyett* Court did not resolve the question whether a CBA’s waiver of a judicial forum is enforceable against a union member when the union declines to progress the grievance involving a statutory claim to arbitration. The *Kravar* decision indicates that the employer would not be able to compel arbitration against the union member in that case. In their contract negotiations the parties may choose to address this matter to attempt close this exclusion.⁶⁹ And, in order to obtain union approval of the model waiver clause contained in the *Pyett* decision,

the parties may address other procedural and remedial issues unique to their history of collective bargaining and current circumstances.

C. Selected Fairness Considerations Regarding the Arbitration of Statutory Discrimination Claims; With Certain Litigation Comparisons

The *Pyett* majority noted that “arbitration procedures are more streamlined than federal litigation” as an advantage not an inadequacy, pointing out that the relative informality of arbitration is one of the chief reasons that parties select arbitration.⁷⁰ The Court noted that the parties to a CBA “trade the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”⁷¹ In this bargained-for exchange of forums, a number of procedural and fairness issues arise which parties in upcoming negotiations of their CBAs may choose to address in deciding whether or not to agree to a contractual provision requiring union members to arbitrate statutory discrimination claims, and if so, what procedural adjustments, if any, are necessary based on the individualized history and circumstances of the parties themselves.

I. Arbitration and Litigation

Parties to CBAs agree to resolve the complaints of employees who believe they have been wronged through the steps of a contractual grievance-arbitration procedure.⁷² The process takes form with the filing of a grievance with a first-line supervisor, whereby the grievant, with the assistance of a union shop steward, states the basis of the complaint in writing on a grievance form, identifies the section of the CBA believed to have been violated, and states the remedy sought. Through a series of procedural steps with specified time limits, the matter is progressed up to the highest designated manager for resolving grievances and a high ranking union officer, such as an international vice president who will meet to attempt to resolve the grievance.⁷³ If the parties are unable to resolve the grievance, it may be progressed to arbitration.⁷⁴

At the arbitration stage, both parties participate in the selection of the arbitrator.⁷⁵ The arbitrator's authority emanates from the contract itself and the parties' "statement of the issue." The issue and the contract define the jurisdiction of the arbitrator.⁷⁶

As compared to the grievance handling and the initiation of the arbitration process outlined above, in litigation, technical pretrial pleadings are complied with and discovery is pursued, consisting of interrogatories between the parties, taking depositions from principal witnesses involved in the controversy and requiring the production of relevant company documents and records.⁷⁷ Once all of the pretrial motions have been resolved, the judge presides over the selection of the jury and the trial begins.⁷⁸

2. Arbitrator Competence

Arbitrators are usually selected by mutual agreement of the parties,⁷⁹ or through the process of elimination by striking names from a panel of names of arbitrators with corresponding information about the arbitrators' backgrounds, experience, and fees.⁸⁰ The American Arbitration Association (AAA) and the Federal Mediation and Conciliation Service provide panels of arbitrators who are prescreened for their neutrality and experience.⁸¹ Upon selection, an arbitrator is duty bound to disclose any conflict of interest.⁸²

Federal judges are highly qualified to preside over statutory discrimination cases and to make rulings on all legal issues. They are assigned to cases, as opposed to selection by the parties. And, in federal courts, juries make determinations on facts and damages determinations, including compensatory and punitive damages. Employer uncertainty and concern over the potential for large damages awarded by juries and the cost of litigation itself, even when successful, has led employers to be the moving party seeking to mandate arbitration of statutory claims. Indeed, in *Pyett* the employer's brief before the Supreme Court stated that the union accepted the arbitration clause in question in exchange for unit-wide economic improvements.⁸³

As asserted by the *Pyett* majority, there is little doubt that the parties will in fact be able to retain "competent, conscientious and impartial arbitrators" to make findings of fact, and interpret the contract and statutory law, and assess appropriate damages in full compliance with statutory law.

3. Conflicting Time Limits

Grievance arbitration provisions in CBAs may require grievances to be filed within short periods of time up to thirty days after the grievant knew or should have known of the occurrence giving rise to the grievance.⁸⁴ Untimely grievances often are refused a hearing unless it is a "continuing violation" of the contract.⁸⁵ Antidiscrimination statutes provide much longer periods of time to initiate claims under each statute.⁸⁶ In union settings with access to immediate advice from shop stewards, union members should be readily able to file their grievances within a contractual time period of up to thirty days. The early filing of a grievance allows the employer and union to investigate matters in a timely fashion while memories are fresh and to obtain other evidence that may exist, in the interest of early and accurate resolution of claims.

As the parties negotiate contractual language for the arbitration of statutory discrimination claims, they may decide to provide a modified time limit shortening the statutory period for filing such claims to provide for the early resolution of claims, writing into the CBA a "clear and unmistakable" waiver of each applicable federal statute's time limits. A reasonable shortened time limit for discrimination cases may range from ninety days to six months. However, with the promise promulgated by *Gilmer*,⁸⁷ *Circuit City*,⁸⁸ and *Pyett*⁸⁹ that parties agreeing to resolve statutory claims through arbitration do not forego substantive rights afforded by the statute, shortened statutory time limits will be subject to scrutiny for reasonableness by reviewing courts.

4. Grievant Representation

The parties to a collective bargaining agreement are the employer and the union, and

they are “the parties” as well at an arbitration under their CBA. The parties apportion the administrative fees charged by the arbitration services agency, and the arbitrator’s fees and expenses. Other than periodic union dues, there is no cost to the grievant. The union also pays the fees of the attorney retained by the union to represent the grievant at an arbitration.⁹⁰ What if the grievant desires to have his own attorney represent his individual interests at the arbitration? Should the parties negotiate a contractual right for a grievant asserting a violation of an antidiscrimination statute to retain counsel of his or her choice to present the case at the arbitration since the arbitration decision will result in a final and binding resolution of the grievant’s statutory rights? Such is a matter to be resolved by the union and the grievant. It is the union’s right to put on its case for the grievant as it sees fit, so long as the union’s conduct towards the grievant is not arbitrary, discriminatory or in bad faith.⁹¹ However, when requested in statutory discrimination cases, it would make sense for the union to step aside, and allow the grievant’s retained attorney to present the union’s case for the grievant, with the union’s full cooperation.

5. Pre-hearing Procedures

CBA’s rarely set forth the rules and procedures for conducting an arbitration. Rather the procedures for conducting arbitrations have evolved over time through the combined influences of arbitrators themselves and the practice of publication of their awards, the procedures of the War Labor Board, the rules and publications of the AAA, the activities and proceedings of the National Academy of Arbitrators and the conduct of lawyers.⁹² The procedural practices of labor arbitration are widely accepted as fair by workers, unions, employers, and courts.⁹³ Some further development of arbitration procedures may evolve regarding the pre-hearing role of arbitrators in handling pre-hearing discovery requests in arbitrations involving statutory discrimination claims.

Section 1.10 of The Second Edition of The Common Law of the Workplace, summarizes

some of the leading arbitral principles developed over six decades of labor arbitration. It states:

Unless mutually agreed to, prehearing discovery tools as found in civil litigation—such as prehearing depositions, written interrogatories, and requests for admissions—are generally not allowed in labor arbitration. Depositions may be allowed, however, to preserve testimony that would otherwise be unavailable at the hearing.⁹⁴

In footnote 10, the *Pyett* majority recognized that the FAA applies to labor arbitration procedures.⁹⁵ Section 7 of the FAA authorizes the arbitrator to “summon in writing any person to attend...as a witness and in a proper case to bring with him...any book, document, or paper, which may be deemed material as evidence in the case.”⁹⁶ It also grants a party permission to take the deposition of a witness who cannot be subpoenaed or is unable to attend the hearing.⁹⁷ Section 10 of the FAA also allows for a vacatur of an award for an arbitrator’s refusal to hear evidence pertinent and material to the controversy.⁹⁸ Future litigation may develop guidance as to the extent of additional discovery rights of grievants in statutory discrimination cases.

The parties themselves, in negotiating contractual language mandating the arbitration of statutory discrimination claims may consider providing for limited discovery rights in balance with the goal of an efficient and effective dispute resolution process, which coupled with the information developed during the steps of the grievance procedure, may very well lead to an early resolution of the matter.

6. Rules of Evidence

In an arbitration, the arbitrator may not strictly adhere to the application of the rules of evidence as applied in the federal courts.⁹⁹ For example, arbitrators may choose to hear a grievant’s testimony that would have been ruled inadmissible hearsay in a federal court, for the therapeutic value to the grievant, allowing the grievant to tell his or her story “for whatever weight it deserves.”¹⁰⁰ However, testimony

of little probative value, like uncorroborated hearsay, is addressed by the arbitrator from the bench or disposed of in the arbitrator's award.¹⁰¹ In some continuing relationships the parties themselves, in the manner in which they present their cases and assert objections have led to a gradual increase in the strictness of the rules of evidence and a resulting increase in legalism in labor arbitration.¹⁰² As expert tribunals, neutral and competent, it is highly unlikely that an arbitration case will turn on the basis of incompetent evidence.

7. Judicial Review of Arbitration Awards

Arbitration awards are "final and binding" on the parties as required by specific language set forth in each collective bargaining agreement. As compared to litigation, it is this expeditious, efficient, and final resolution of controversies that provide the major advantage for arbitration over litigation. To maintain this advantage, arbitrators' decisions are afforded an extraordinary level of deference by courts.¹⁰³ Arbitration decisions are subject to limited court review under the FAA.¹⁰⁴ The FAA applies to all employees, with the exclusion of transportation workers engaged in foreign or interstate commerce.¹⁰⁵ And, as set forth in *Pyett*, the FAA applies to arbitration agreements involving statutory discrimination claims of unionized employees.¹⁰⁶

The FAA provides streamlined treatment for vacating or modifying or correcting an arbitration award. Section 10 lists grounds for vacating an award, including (1) corruption, fraud, or undue means, (2) evident partiality or corruption by the arbitrators, (3) misconduct of the arbitrators, or (4) the arbitrators exceeding their power.¹⁰⁷ The grounds for modifying or correcting an award under Section 11 of the FAA include (1) evident material miscalculation, (2) evident material mistake, and (3) imperfections on a matter of form not affecting the merits.¹⁰⁸ The Supreme Court held that Sections 10 and 11 are the exclusive grounds for expedited vacatur and modification of awards with these provisions substantiating a national policy favoring arbitration with just the limited review needed to

maintain arbitrations essential virtue of resolving disputes straightaway.¹⁰⁹

Resolution of federal statutory discrimination claims through the procedures of the EEOC and then the federal trial and appeals courts are the primary dispute resolution process designed by Congress. However, this process is technical, prolonged, and expensive. The expense alone may make it impossible for a unionized worker to pursue statutory rights in the federal courts. Appellate review of federal trial court decisions, however, provides a much broader review of the legal determinations of a trial court than is made of the legal determinations of arbitrators under the FAA. Appellate court review allows for errors of law to be corrected.¹¹⁰ Moreover, the published decisions of the appeals courts provide precedents for the resolution of similar issues in the future.¹¹¹

As the Court majority expressed in *Pyett*, "[p]arties trad[e] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."¹¹² Arbitration of statutory discrimination claims is a bargained for, agreed to process, with mutually beneficial features and drawbacks for the parties. It is reserved to the parties themselves to choose whether or not to include a mandatory arbitration of statutory discrimination claims provision in their collective bargaining agreement.

V. Conclusion

The dissent in *Pyett* correctly complained that the majority misread *Gardner-Denver* when it claimed the decision in that case turned solely on the narrow ground that the CBA did not cover statutory claims.¹¹³ And, it is true that under the *Pyett* decision, unions can, in effect, waive an employee's right to a jury trial for the employee's statutory discrimination claim(s). However, the *Pyett* Court majority decision is now the law. The matter is finally settled. Unions and employers may negotiate a rule in their CBAs requiring the arbitration of statutory discrimination claims as the sole and exclusive remedy for both the violations of the CBA and the antidiscrimination statutes.¹¹⁴

Under the *Gilmer* and *Circuit City* precedents, pre-dispute, broad, mandatory arbitration clauses in employment contracts, imposed on new or continuing non-union employees by employers on a take-it-or-leave-it basis may be enforceable under the Federal Arbitration Act.¹¹⁵ A narrow exclusion exists for transportation workers.¹¹⁶ These unilaterally drafted and imposed arbitration provisions are often unbalanced and unfair to the employees involved.¹¹⁷ Contrary to these so called "employment arbitration" category of cases is the "labor arbitration" category of cases, as dealt with in *Pyett* where the arbitration clauses are co-authored by unions and employers. If a

union believes it is unfair or unjust to agree to a clause requiring the mandatory arbitration of statutory discrimination claims for all of its members it can refuse to agree to such a provision. Or, if a union is offered "sizeable wage and benefit enhancements" as asserted by the employer in *Pyett*,¹¹⁸ union and employer negotiators can modify the *Pyett* arbitration clause model, balancing and adjusting with agreement language for the fairness and procedural issues raised previously in this article, while retaining for the employees and the employers the full scope of remedies and defenses available in the antidiscrimination statutes. ■

ENDNOTES

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¹ See David P. Twomey, *LABOR & EMPLOYMENT LAW*, 266 (2010).

² *United Steelworkers v. American Mfg. Co.*, 363 U.S. 561 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

³ 363 U.S. 574, 582 (1960).

⁴ 365 U.S. 593, 599 (1960).

⁵ *Gilmer v. Interstate/Johnson Lane Corp.* 500 U.S. 20 (1991); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

⁶ 129 S. Ct. 1456 (2009).

⁷ 415 U.S. 36 (1974).

⁸ *Id.* at 38.

⁹ *Id.* at 60.

¹⁰ *Id.* at 48-49.

¹¹ *Id.* at 49-50.

¹² *Id.* at 51.

¹³ *Id.* at 56-58.

¹⁴ 500 U.S. 20 (1991).

¹⁵ *Id.* at 23.

¹⁶ *Id.* at 29.

¹⁷ *Id.* at 35.

¹⁸ 525 U.S. 70, 72 (1998).

¹⁹ *Id.* at 75.

²⁰ See *Id.* at 77.

²¹ *Id.*

²² See *Id.* at 77 and 80.

²³ The Court handled the Fourth Circuit's erroneous interpretation of the arbitration clause with judicial tact by simply refusing to apply a presumption of arbitrability to the case before it. *Id.* at 79. The arbitration clause in question stated: "Union agrees that this Agreement is intended to cover all matters affecting wages, hours and other terms and conditions of employment...." *Id.* at 73. The plain language of this clause does not purport to vest an arbitrator with authority to decide whether or not the employer violated

the Americans with Disabilities Act or discrimination laws in general.

²⁴ *Id.* at 80.

²⁵ *Id.* at 80-81.

²⁶ See David Lewin, *Workplace ADR: What's New and What Matters?* 2007 N.A.A. Proc. 26-27.

²⁷ 532 U.S. 105 (2001).

²⁸ See *Circuit City*, 532 U.S. at 110-111.

²⁹ *Id.* at 124-128 (Stevens, J. dissenting). Proponents of the position rely on the language of Section 2 of the FAA which makes enforceable written agreements to arbitrate "in any maritime transaction or contract involving commerce." 9 U.S.C. §2 (2006). Advocates believe that the legislative history of the Act shows that it was intended to apply only to commercial and maritime contracts. While there is no legislative history of intent to extend arbitration to employment disputes, proponents point out that the Secretary of Commerce, Herbert Hoover, proposed the language, "but nothing herein shall apply to seamen or any class of workers in the interstate and foreign commerce" to allay the fears of a maritime union. Joint Hearing on S. 1005 and H.R. 646, 68th Cong. 1st Sess. 14 (1924).

³⁰ *Circuit City*, 532 U.S. at 118, 119.

³¹ *Id.* at 123.

³² 14 Penn Plaza, LLC v. *Pyett*, 129 S. Ct. 1456, 1461 (2009).

³³ *Pyett v. Pennsylvania Building Co.*, 498 F.3d 88 (2d Cir. 2007).

³⁴ 14 Penn Plaza, 129 S. Ct. at 1461.

³⁵ *Id.* at 1462.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* Federal Arbitration Act, 9 U.S.C. §§ 3, 4 (2006).

⁴⁰ *Pyett*, 498 F.3d at 93-94.

⁴¹ 14 Penn Plaza, at 129 S. Ct. at 1461.

⁴² *Id.* at 1465.

⁴³ *Id.* at 1466.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1467.

⁴⁶ *Id.* at 1469.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1471.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1471, citing *Shearson/American Express*,

Inc. v. McMahon, 482 U.S. 220, 231-232 (1987). 14 Penn Plaza, 129 S. Ct. at 1472.

⁵¹ *Id.* at 1473.

⁵² *Id.* at 1474.

⁵³ *Id.* at 1479.

⁵⁴ See Theodore St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 786 (2008) (citing litigation costs as follows: fees and expenses for a successful defense of a discharge case before a jury could range from \$100,000 in the Midwest to \$200,000 on the coast according to a Dean St. Antoine's informal survey in 1992).

⁵⁵ Employers may perceive an outcome advantage by avoiding the broad discovery rights available in the federal courts, and have more confidence in the fact finding of an arbitrator selected by the parties as compared to that of a jury. Without regard for whether a workplace is unionized or not, employers fear exposure to what they perceive as possible runaway jury awards in employment discrimination law suits. For example, in a highly publicized case, a jury awarded Anucha Browne Sanders, a former marketing vice president of the New York Knicks basketball team, \$11.6 million in punitive damages for sexual harassment and retaliation against the team's corporate owner, its chairman, and its president and head coach; and even though the defendants "vehemently disagreed with the jury's decision" they settled the case under pressure from the NBA Commissioner. See *Post-Verdict Settlement Reached in Former Knicks Executive's Case*, DLR NO. 238, A-12 (Dec. 12, 2007). The median award to plaintiffs who won employment discrimination lawsuits between the mid-1990s and the mid-2000s was \$250,000, and one in nine cases resulted in plaintiffs receiving \$1 million or more each. See Lewin, *supra* note 26 at 26. See also David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 Notre Dame L. Rev. 1247 (2009) where Professor Schwartz challenges the fairness of mandatory arbitration of employment disputes involving individual employment agreements to arbitrate forced on employees by their employers, in contrast to arbitration under collective bargaining agreements.

⁵⁷ *Vaca v. Sipes*, 386 U.S. 171, 191 (1967).

⁵⁸ See *Id.* at 190-191.

- ⁵⁹ 14 Penn Plaza, 129 S. Ct. at 1474.
- ⁶⁰ No. 1: 06-CV-07858, 2009 U.S. Dist. LEXIS 26459, at *8 (S.D.N.Y., Mar. 27, 2009).
- ⁶¹ *Id.* at *6 (quoting 14 Penn Plaza, 129 S. Ct. at 1469).
- ⁶² No. 1: 06-CV-07858, 2009 U.S. Dist. LEXIS 26459, at *9 (S.D.N.Y., Mar. 27, 2009).
- ⁶³ No. 07-CV-02097, 2009 U.S. Dist. LEXIS 37697, at *12-13 (D. Colo. May 4, 2009). The anti-discrimination clause in the CBA stated: "The Employer and the Union acknowledge continuation of their policies of no discrimination against employees and applicants on the basis of age, sex, race, religious beliefs, color, national origin or disability in accordance with and as required by applicable state and federal law."
- ⁶⁴ No. 09 C 1874, 2009 U.S. Dist. LEXIS 55626, at *9-10 (N.D. Ill. June 26, 2009). See also, *Dunigan v. City of Peoria*, No. 09-CV-1064, 2009 U.S. Dist. LEXIS 71797, at *5-7 (C.D. Ill. July 25, 2009).
- ⁶⁵ No. CV 08-752, 2009 U.S. Dist. LEXIS 95891 at *19-20 (D. Or. Sept. 14, 2009). The CBA provided that the parties are "free to arbitrate" disputes regarding "problems arising in connection with the application or interpretation of" the CBA itself; that is, arbitration is clearly authorized in connection with contract-based claims only. CBA, Art 9., §§ B(8), A(3).
- ⁶⁶ No. 08-CV-1008, 2009 U.S. Dist. LEXIS 51011, at *19-20 (E.D.N.Y. June 15, 2009). The CBA that governed the parties in this case stated: "Neither the Employer nor the Union shall discriminate against or in favor of any Employee on account of race, color, creed, national origin, political belief, sex, sexual orientation, citizenship status, marital status, disability or age." Arbitration is contemplated if the CBA's grievance procedure does not resolve the dispute: "A grievance...which has not been resolved [under the grievance procedure] may, within thirty (30) working days after completion of...the grievance procedure, be referred for arbitration by the Employer or the Union..."
- ⁶⁷ No. 08-4264-CV, 2009 U.S. App. LEXIS 17113, at *4 (2d Cir. 2009).
- ⁶⁸ 14 Penn Plaza, 129 S. Ct. at 1461.
- ⁶⁹ It is unusual indeed for a union not to progress a case of a terminated employee to arbitration. It is an unwritten rule in most unions that every terminated union worker is entitled to his or her "day in court" -- meaning a right to go before an arbitrator to challenge the termination. Statutory discrimination claims are often raised in such arbitration proceedings. Moreover, in this day and age unions' interests are very supportive of broad civil rights and it would be unusual for a union to fail to progress a statutory antidiscrimination claim to arbitration. It may well be best for the parties to simply allow this "union declination exception" to exist. Justice Souter's dissent in *Pyett* states in closing that "[o]n one level, the majority opinion may have little effect" because of the union declination exception. 14 Penn Plaza, 129 S. Ct. at 1481. However, I believe that the applicability of this exception will be quite unusual.
- ⁷⁰ 14 Penn Plaza, 129 S. Ct. at 1471.
- ⁷¹ *Id.*
- ⁷² See generally Frank Elkouri & Edna Asper Elkouri, *HOW ARBITRATION WORKS*, 198-278 (Alan Miles Ruben Ed. 6th ed. 2003).
- ⁷³ See *id.* at 213-214.
- ⁷⁴ See *id.* at 268.
- ⁷⁵ See *id.* at 42-43. (The Federal Mediation and Conciliation Service and the American Arbitration Association provide panels of arbitrators experienced in dealing with labor matters.)
- ⁷⁶ See, *THE COMMON LAW OF THE WORK-PLACE*, 15-16 (Theodore J. St. Antoine ed. 2005).
- ⁷⁷ See David P. Twomey & Marianne M. Jennings, *BUSINESS LAW*, 22 (2nd ed. 2008).
- ⁷⁸ See *id.* at 23.
- ⁷⁹ Elkouri & Elkouri, *supra* note 72, at 171.
- ⁸⁰ *Id.* at 173.
- ⁸¹ See *id.* at 173-175.
- ⁸² St. Antoine, *supra* note 76, at 9. The *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes* (2003) has been adopted by the National Academy of Arbitrators, the American Arbitration Association, and the Federal Mediation and Conciliation Service. Section 2.B.1 of the code mandates that an arbitrator "disclose directly... any current or past managerial, representational, or consultative relationship with any company or union" involved, and must disclose "any pertinent pecuniary interest."
- ⁸³ See Brief of Petitioners, 14 Penn Plaza LLC v. Pyett, No.07-581, at 6, available at www.supremecourtpreview.org, (asserting that "the Union gained sizable wage and benefit enhancements, as well as other favorable provisions, in exchange for its agreement to arbitrate its members' statutory employment claims").
- ⁸⁴ Elkouri & Elkouri, *supra* note 72, at 213-217.
- ⁸⁵ *Id.* at 217-219. See the Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C. §2000-a note (2009), (providing that every paycheck resulting from an earlier discriminatory pay decision would constitute a continuing violation of the Civil Rights Act provided the employee filed charges within 180 day of the discriminatory paycheck).
- ⁸⁶ See the 180-day and 300-day initial filing periods of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-5(e)(1) (2000).
- ⁸⁷ *Gilmer*, 500 U.S. at 26.
- ⁸⁸ *Circuit City*, 532 U.S. at 123.
- ⁸⁹ 14 Penn Plaza, 129 S. Ct. at 1469.
- ⁹⁰ A union ordinarily does not breach its duty of fair representation merely because it uses a union representative rather than an attorney to present the union's case at the arbitration hearing. See Elkouri & Elkouri, *supra* note 72, at 303. However, having bargained for the right to arbitrate bargaining unit employees' statutory employment discrimination claims, to provide representation with a person without legal training and experience may well be on its face a violation of the union's duty of fair representation.
- ⁹¹ *Vaca v. Sipes* 386 U.S. 171, 190 (1967).
- ⁹² See Laura J. Cooper, *The Process of Process: The Historical Development of Procedures in Labor Arbitration*, 2005 N.A.A. Proc. 19-20.
- ⁹³ *Id.* at 20.
- ⁹⁴ St. Antoine, *supra* note 76 at 12.
- ⁹⁵ 14 Penn Plaza, 129 S. Ct. at 1471.
- ⁹⁶ 9 U.S.C. § 7 (1994).
- ⁹⁷ *Id.*
- ⁹⁸ 9 U.S.C. § 10 (1994).
- ⁹⁹ Elkouri & Elkouri, *supra* note 72, at 341.
- ¹⁰⁰ St. Antoine, *supra* note 76, at 32.
- ¹⁰¹ See Elkouri & Elkouri, *supra* note 72, 2008 Supp. 159.
- ¹⁰² See W. Daniel Boone, *How to Have an Arbitration Hearing In One Day or Less*, 2007 N.A.A. Proc. 91-95.
- ¹⁰³ See *Crawford Group, Inc. v. Holekamp*, 543 F.3d 971, 976 (8th Cir. 2008).
- ¹⁰⁴ 9 U.S.C. §§ 1-16 (2006).
- ¹⁰⁵ *Circuit City Stores v. Adams*, 532 U.S. 105 (2001).
- ¹⁰⁶ 14 Penn Plaza, 129 S. Ct. at 1471 n.10.
- ¹⁰⁷ 9 U.S.C. § 10 (2006).
- ¹⁰⁸ 9 U.S.C. § 11 (2006).
- ¹⁰⁹ In *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008), the Supreme Court rejected enforcing additional grounds agreed to by the parties for setting aside an award under the FAA, including the ground that "the arbitrator's conclusions of law were erroneous." *Id.* at 579. The Court stated any other reading opens the door to the full-bore legal and evidentiary appeals that can "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process." *Id.* at 588.
- ¹¹⁰ FED. R. CIV. P. 52(a).
- ¹¹¹ Selected arbitration decisions are published by numerous publishing houses serving as guidance for parties in resolving grievances prior to arbitration and as persuasive reasoning supportive of a party's position in arbitration.
- ¹¹² 14 Penn Plaza, 129 S. Ct. at 1471 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).
- ¹¹³ 14 Penn Plaza, 129 S. Ct. at 1479.
- ¹¹⁴ Under an arbitration clause modeled on the *Pyett* clause, an employee asserting that he or she has been discharged without just cause and who is also claiming that the discharge was the result of age discrimination, the arbitrator will consider the facts and circumstances that encompass both claims, and make a determination on the contractual just cause claim and the contractual/statutory discrimination claim of age discrimination. The employee will no longer be able to bring a statutory claim in a federal forum under *Gardner-Denver* after an adverse arbitration decision on a contractual claim. The matter is resolved in an expeditious, timely and just manner, before an expert on labor and employment law, with lower overall costs for all. Should the employee be successful, the employer can take expeditious corrective action, and provide full statutory remedies covering a much shorter time period and thus lower damages. Moreover, the process is a private one, and not a source of adverse publicity in the case of an adverse decision. Should the employee be unsuccessful, the controversy is resolved in a shorter period of time, with a decision explaining why the claim lacked merit, and the individual can move forward with his or her life, short of the years that are sometimes consumed in prolonged litigation.
- ¹¹⁵ See the discussion of the *Gilmer* precedent in part II.B. of the text and the discussion of the *Circuit City* precedent in part II.D. of the text.
- ¹¹⁶ *Circuit City*, 532 U.S. at 119.
- ¹¹⁷ A resolution of the unfairness issues is proposed in the Arbitration Fairness Act of 2009, now pending before Congress, S. 931, H.R. 1020, 11th Cong. (2009). The bill would prohibit pre-dispute arbitration agreements and would promulgate due process standards to apply to "employment arbitration" cases. The bill excludes coverage of arbitration provisions in collective bargaining agreements. See Section 401.
- ¹¹⁸ See Brief of Petitioners, *supra* note 83.