# RECENT DEVELOPMENTS

# *14 Penn Plaza LLC v. Pyett*

## I. INTRODUCTION

*14 Penn Plaza LLC v. Pyett* was recently decided by the United States Supreme Court.[1] The fundamental question presented therein was whether a union, through an arbitration provision in a collective bargaining agreement ("CBA"), could waive an individual union member's right to pursue a federal law remedy in court.[2] The issue embedded within the case was whether labor arbitration is an effective or proper forum for resolution of statutory claims, particularly where a union, not the employee, is party to the arbitration.

This recent development delves into what effects a Supreme Court ruling will have on labor law as a whole—in particular, the arbitrability of statutory claims specifically included within a CBA. First, a discussion of the facts, procedural history, and relevant background of the case is necessary. Then the outcome of the case will briefly be discussed.

## II. FACTS AND PROCEDURAL HISTORY

This section reviews the relatively complex facts of the case. It will also review the procedural history of the litigation. After an overview of the facts and procedural posture, the relevant pending issues presented by the case will be analyzed.

### A. *Facts*

Temco Services Industries ("Temco"), a building service and cleaning contractor, employed the plaintiffs as night watchmen in a building owned by 14 Penn Plaza LLC and the Pennsylvania Building Company.[3] The plaintiffs were then transferred and designated as night porters and light duty cleaners

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[1] 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009). This recent development was written while the decision was pending. Therefore, it is written in contemplation of the Court's decision, rather than in response to it. However, an additional section added at the end discusses the Court's opinion.

[2] *See* Pyett v. Pa. Bldg. Co., 498 F.3d 88 (2d Cir. 2007).

[3] *Id.* at 90.

but were assigned to the same office building.[4] The plaintiffs contended that this "transfer" was in fact a demotion based upon their age.

Plaintiffs, as members of Local 32BJ of the Service Employee International Union ("Union"), were covered by a collective bargaining agreement between their Union and the Realty Advisory Board on Labor Relations, Inc. ("RAB").[5] The CBA bargained for between the parties contains a mandatory arbitration clause for discrimination claims, which states in relevant part as follows:

> There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Laws, the New York City Human Rights Code, New Jersey Law Against Discrimination, New Jersey Conscientious Employee Protection Act, Connecticut Fair Employer Practices Act, or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedures (Articles V and VI [of the CBA]) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.[6]

The above provision seems to be a clear and unmistakable waiver of the individual union member's right to bring an age discrimination claim in court, as it details that the arbitration mechanism within the CBA are the "sole and exclusive remedy for violations."[7]

## B. *Procedural History*

The plaintiffs filed grievances with their Union under the CBA, claiming that "as the only building employees over the age of 50, they were wrongfully transferred and denied overtime in violation of various provisions of the CBA, including the provision that prohibited discrimination on the

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[4] *Id.*

[5] *Id.* (clarifying that RAB is a multi-employer bargaining association made up of companies in the real estate industry in New York City).

[6] *Id.* at 90 (noting that since 1999 every CBA between the parties has included a mandatory arbitration clause for discrimination claims).

[7] *Id.*

basis of age."[8] The arbitrator subsequently heard the plaintiffs' claims in eight separate arbitration hearings.[9]

The Union, shortly after the arbitration began, declined to pursue plaintiffs' claims of age discrimination and wrongful transfer.[10] To this day, the arbitrator has yet to hear the age discrimination claims. However, the Union decided to pursue the claims of denial of overtime on behalf of all plaintiffs and wrongful denial of promotion on behalf of Pyett.[11] The plaintiffs then filed an action against the Union, alleging that the Union "had breached its duty of fair representation toward them by withdrawing their age discrimination grievance from arbitration."[12] Subsequently, the arbitrator denied all of the plaintiffs' claims in their entirety.[13]

Subsequently, the plaintiffs filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC"). In each case, the EEOC "notified each plaintiff of his right to sue."[14] Following arbitration, the plaintiffs discontinued their duty of fair representation ("DFR") claim against the Union and their employers,[15] presumably due to the difficultly of proving a DFR claim.[16] However, all of the plaintiffs maintained that their claims for age discrimination remained viable despite the arbitrator's decision.[17]

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[8] *Pa. Bldg. Co.*, 498 F.3d at 90.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 91 (noting that "[a]ccording to plaintiffs, the Union's counsel explained to them that since the Union had consented to Spartan Security being brought into the building, the Union could not contest their replacement as night watchmen by personnel of Spartan Security.").

[12] Pyett v. Pa. Bldg. Co., 2006 U.S. Dist. LEXIS 35952, at *6 (S.D.N.Y. 2006). This is commonly known as a "DFR" claim.

[13] *Pa. Bldg. Co.*, 498 F.3d at 91.

[14] *Id.* (citations removed).

[15] *Pyett*, 2006 U.S. Dist. LEXIS 35952, at *7.

[16] In order for an individual union member to prove that a union breached its DFR to them, that individual must prove two things: (1) that the employer's action was against the CBA, and (2) that the union acted with discrimination, in an arbitrary fashion, or in bad faith in handling that member's grievance. *See* Vaca v. Sipes, 386 U.S. 171, 190 (1967). This is an extremely high burden for an individual union member to meet, as they not only have to show that the union acted arbitrarily, discriminatorily, or in bad faith, but also that they would have won against the employer in the absence of the union's misconduct.

[17] *Pyett*, 2006 U.S. Dist. LEXIS 35952, at *7.

### C. *Lower Court Rulings and Basis for Appeal*

Pursuant to their right-to-sue notifications from the EEOC, plaintiffs sued Temco, Pennsylvania Building Company, and 14 Penn Plaza LLC, pursuing age discrimination claims.[18] Defendants moved to dismiss for failure to state a claim upon which relief can be granted.[19] Additionally, defendants alternatively moved to compel arbitration under the CBA in an attempt to remove the dispute from federal court and give it back to the arbitrator.[20] However, the district court denied both the motions.[21]

In regards to the motion for dismissal, the district court stated that the plaintiffs had sufficiently pled to satisfy the lenient standards needed to overcome a motion for dismissal, "as they allege that plaintiffs were over the age of 40, that they were reassigned to positions which led to substantial losses in income, and that their replacements were both younger and had less seniority at the building."[22] Basically, the court found that the plaintiffs gave the defendants fair notice of their claims and the grounds upon which their claims rested.[23] The district court also denied the defendants' motion to compel arbitration.[24] The Court concluded that "based largely on binding Second Circuit precedent . . . . even a clear and unmistakable union-negotiated wavier of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable."[25]

## III. SECOND CIRCUIT'S HOLDING AND REASONING

On the defendants' appeal from the district court's decision, the Second Circuit affirmed its earlier decision in *Rogers v. New York University*[26] and

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[18] *Pa. Bldg. Co.*, 498 F.3d at 91 (specifically alleging "that they had been transferred from their positions and replaced by younger security officers in violation" of the ADEA).

[19] FED. R. CIV. P. 12(b)(6).

[20] *Pa. Bldg. Co.*, 498 F.3d at 91.

[21] *Pyett*, 2006 U.S. Dist. LEXIS 35952, at *9–12.

[22] *Id.* at *10–11 (noting that even though "plaintiffs clearly will need evidence supporting these allegations to survive summary judgment, we cannot say that they have failed to meet the notice pleading standard required at this stage.").

[23] *Id.* (citing Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002)).

[24] *Pyett*, 2006 U.S. Dist. LEXIS 35952, at *11.

[25] *Id.* at *11–12 (citations removed).

[26] Rogers v. N.Y. Univ., 220 F.3d 73, 75–77 (2d Cir. 2000) (holding that an arbitration provision in a CBA could not waive an employee's right to assert local, state, and federal statutory employment discrimination claims in federal court).

held "that mandatory arbitration clauses in collective bargaining agreements are unenforceable to the extent they waive the rights of covered workers to a judicial forum for federal statutory causes of action."[27] The Court denied the defendants' assertion that the district court's decision relied on *Alexander v. Gardner-Denver Co.*[28] and *Rogers v. New York University*[29] without taking into account the Supreme Court decision in *Gilmer v. Interstate/Johnson Lane Corp.*[30]

The defendants argued that the Supreme Court overturned *Gardner-Denver* in *Gilmer.*[31] They further argued that while *Gilmer* "dealt only with contracts signed by individuals and not CBAs" and "in *Wright* the Supreme Court made clear its abandonment of *Gardner-Denver*'s rule that a union may only waive certain statutory rights related to collective activity."[32] However, the Second Circuit ultimately disagreed with the defendants' contentions.[33]

The court discussed its ruling in *Rogers* and stated that it "considered two issues: whether a mandatory arbitration clause in a CBA is enforceable generally, and whether the language of the particular clause at issue was a 'clear and unmistakable waiver' under *Wright.*"[34] In *Rogers*, it held that *Gardner-Denver* still governed arbitration provisions in CBA's despite the Supreme Court's ruling in *Gilmer.*[35] Further, "while *Wright* may have called *Gardner-Denver* into question, it did not overrule it."[36]

However, Supreme Court cases, such as *Metropolitan Edison Co. v. N.L.R.B.*[37] and *Circuit City Stores, Inc. v. Adams*,[38] have held that "union officials may be bound by union-negotiated agreements to enforce no-strike

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[27] Pyett v. Pa. Bldg. Co., 498 F.3d 88, 90 (2d Cir. 2007)

[28] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

[29] *Rogers*, 220 F.3d 73.

[30] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[31] *Pa. Bldg. Co.*, 498 F.3d at 92.

[32] *Id.* (citations removed).

[33] *Id.* (stating that "*Rogers* squarely decided that a union-negotiated mandatory arbitration agreement purporting to waive a covered worker's right to a federal forum with respect to statutory rights is unenforceable. We took full account of both *Gilmer* and *Wright* and concluded that the Supreme Court's decision in *Gardner-Denver* remains good law.").

[34] *Id.* (quoting Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 80 (1998)).

[35] *Pa. Bldg. Co.*, 498 F.3d at 92 (holding that *Gilmer* held that an employee could be compelled to arbitrate an age discrimination claim if that individual agreed to waive his individual right to a federal forum).

[36] *Rogers*, 220 F.3d at 75.

[37] Metro. Edison Co. v. N.L.R.B., 460 U.S. 693 (1983).

[38] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

agreements, and thus waive their right (under federal statutes) to be free of anti-union discrimination."[39] The Second Circuit addressed *Metropolitan Edison*, arguing that it supported *Gardner-Denver* in that unions "may waive certain statutory rights *related to collective activity, such as the right to strike*."[40] The Second Circuit also distinguished *Circuit City* from the pending case in that it addressed an individual employment contract, rather than a union-negotiated CBA.[41]

In concluding its affirmation of the district court's decision, the Second Circuit stated that nothing "has changed in the nine years since *Wright* or the seven years since *Rogers* that compels us to reverse our ruling in *Rogers* that arbitration provisions contained in a CBA, which purport to waive employees' rights to a federal forum with respect to statutory claims, are unenforceable."[42] The Second Circuit then went on to note that this dispute displays why the Supreme Court has been reluctant to decide this issue.[43] "If, as plaintiffs allege, the Union refused to submit the wrongful transfer claims to arbitration because the Union had agreed to a new contract, the interests of the Union and the interests of plaintiffs are clearly in conflict."[44]

## IV. THE SUPREME COURT'S CONFLICTING HOLDINGS ON THE ISSUE

As displayed in the Second Circuit's discussion and reasoning, the Supreme Court precedent has been arguably contradictory in the area of waiver in an arbitration provision of a CBA when an individual's right to bring a statutory claim is involved. Although the Court has clearly stated that an individual can waive access to courts in favor of arbitration for statutory claims,[45] the Court has been indecisive in determining whether the union can collectively waive an individual union member's access to the courts for those same statutory claims. However, despite this relative uncertainty, labor and management have collectively determined that these arbitration clauses

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[39] *Pa. Bldg. Co.*, 498 F.3d at 93.

[40] *Id.* at 93 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974)) (emphasis in original).

[41] *Pa. Bldg. Co.*, 498 F.3d at 93 (stating that it "does not address the issue before us now.").

[42] *Id.* at 93–94.

[43] *Id.*

[44] *Id.* at 94 n.5 (stating that "the interests of the individual may be subordinated to the collective interests of all employees in the bargaining unit.").

[45] *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (allowing waiver of state statutory discrimination claims in court in favor of arbitration in an individual employment contract).

are effective at saving costs while at the same time adequately protecting the interests of the union members.[46] These arbitration clauses have rapidly appeared in union contracts in an attempt to control state and federal anti-discrimination disputes.[47] The following sections are a survey of relevant past Supreme Court precedent on the topic of mandatory arbitration of statutory claims in the context of labor and employment law.

### A. *Early Fear of the Arbitration Forum*

The Supreme Court, in *Gardner-Denver Co.*, held that unions cannot prospectively waive an individual employee's Title VII statutory rights to bring suit in federal court in a CBA.[48] In *Gardner-Denver Co.*, an employee filed a grievance with his union under the CBA, arguing that he had been improperly dismissed on the basis of his race.[49] The Union submitted the employee's claim to arbitration but the arbitrator found against him.[50] The employee then filed suit in a federal district court under Title VII of the Civil Rights Act.[51] The employer countered by moving to dismiss based on the fact that the arbitrator had already decided the merits of the case.[52]

The Court held that an individual employee does not waive a private cause of action even though that employee first pursued the claim to a final arbitration decision as required under a CBA.[53] The Court contended that choosing to submit the dispute to arbitration only bound the employee's contractual rights, not his or her statutory rights.[54] The Court also expressed its concern that arbitrators are not qualified to decide statutory matters due to the respective statutes' relative complexities and distance from the law of the workplace.[55] However, since 1974, the Supreme Court has taken a much different route in terms of its approval of arbitration as a valid substitute for litigation.

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[46] *See* Loren K. Allison & Eric H. J. Stahlhut, *Arbitration and the ADA: Do the Two Make Strange Bedfellows?*, 37 RES GESTAE 168, 171–72 (1993).

[47] *Id.* at 168.

[48] *See generally* Alexander v. Gardner-Denver Co., 415 U.S. 36, 46–60 (1974).

[49] *Id.* at 39.

[50] *Id.* at 42.

[51] *Id.* at 43.

[52] *Id.* at 55.

[53] *Id.* at 49–51.

[54] *Gardner-Denver*, 415 U.S. at 52.

[55] *Id.* at 57 (stating their "mistrust" of arbitration as an adequate forum for statutory claims due to the lack of experience of arbitrators, their limited ability to conduct fact finding procedures, and the relative informality of the process).

### B. *Subsequent Supreme Court Favor of Arbitration as an Effective Forum for Dispute Resolution*

More recently, the Supreme Court has been much more favorable towards arbitration as a valid procedure for resolving legal disputes.[56] Congress' enactment of the Federal Arbitration Act (FAA) provided the Court with a vehicle to legitimize arbitration as a valid and adequate substitute for traditional litigation.[57] Even though the FAA deals squarely (and exclusively) with individual contracts (such as contracts between an employer and an individual employee with no union involvement), the Supreme Court has used the same language in supporting FAA individual arbitration as it has used to support union arbitration.[58] Some scholars have even advocated the unification of FAA commercial arbitration law and labor arbitration law,[59] which the Supreme Court has been reluctant to do up to this point.

Since the Court's ruling in *Gardner-Denver*, where the Court called into question the validity of arbitration and arbitrators, the Court has started to retract its initial fear of the supposed inadequacies of arbitration and has since deemed arbitration an adequate substitute to litigation.[60] The following is a survey of the specific cases from the Supreme Court that are supportive of the use of arbitration in labor and employment law.

In *Metropolitan Edison Co. v. N.L.R.B.*, the Supreme Court held that unions may waive a member's statutorily protected rights, including the right to strike during the contract term and the right to refuse to cross a lawful picket line.[61] The conflict arose when union officials were terminated for violating a union negotiated no-strike agreement by striking and refusing to

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[56] *See* Rodriguez de Quijas v. Sherason/American Express, Inc., 490 U.S. 477, 483 (1989) (enforcing an agreement to arbitrate claims under the Securities Act); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985) (enforcing an agreement to arbitrate antitrust claims).

[57] 9 U.S.C. § 2 (2008) (authorizing federal courts to enforce arbitration agreements).

[58] *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83–86 (2002) (citing various labor law arbitrability cases in deciding the arbitrability of an individual employment contract under the FAA).

[59] *See, e.g.*, Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 BAYLOR L. REV. 781 (2000) (advocating unification of the law or labor arbitration and the law of commercial arbitration developed under the FAA).

[60] *See Mitsubishi Motors Corp.*, 473 U.S. at 628 (stating that "[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.").

[61] *See* Metro. Edison Co. v. N.L.R.B., 460 U.S. 693, 705–06 (1983).

cross a picket line.[62] The union officials filed suit claiming that they were unlawfully discriminated against on the basis of union membership.[63]

The Court held that union officials may be bound by union-negotiated no-strike agreements.[64] Therefore, the union can collectively waive an individual union official's right under a federal statute to be free from anti-union discrimination.[65] Such waivers are valid because they rest on the premise of fair representation and presuppose that the selection of a bargaining representative remains free.[66] Simply put, if the union members do not like union leadership, they can vote out them out pursuant to guidelines of the NLRA.[67] However, *Metropolitan Edison* may be cabined by the fact that it dealt with a collective federal statutory right of union members, as opposed to an individual's federal statutory right.[68]

Later, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court held that an individual employee's arbitration agreement making age discrimination claims subject to arbitration was enforceable.[69] The Court relied on the FAA to hold that an age discrimination claim under a federal statute can be subjected to compulsory arbitration.[70] The Court was not

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[62] *Id.* at 696–97.

[63] *Id.* at 697. It is an unfair labor practice under the National Labor Relations Act to discriminate on the basis of union membership. 29 U.S.C. § 158(a)(3) (2008) (stating that it "shall be an unfair labor practice for an employer to . . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.").

[64] *Metro. Edison*, 460 U.S. at 705–06.

[65] *Id.* (explaining that "a union may bargain away its members' economic rights, but it may not surrender rights that impair the employees' choice of their bargaining representative.").

[66] *Id.* at 706 (noting that "[s]uch a waiver imposes no constraints on the employees' ability to choose which union will represent them . . . . It merely requires union officials to take steps that are ancillary to the union's promise not to strike and provides the employer with an additional means of enforcing this promise.").

[67] *Id.*

[68] For an explanation of this concept, see Janet McEneaney, *Arbitration of Statutory Claims in a Union Setting: History, Controversy and a Simpler Solution*, 15 HOFSTRA LAB. & EMP. L.J. 137, 140 (1997) (stating that collective rights are conferred to employees "to foster the processes of bargaining and properly may be exercised or relinquished by the union . . . . to obtain economic benefits for union members. Title VII . . . . concerns not majoritarian processes, but an individual's right to equal employment opportunities.").

[69] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33–35 (1991).

[70] *Id.* at 35 (noting that there is nothing in the Age Discrimination Enforcement Act or its legislative history that precluded arbitration).

swayed by the notion that there is often a discrepancy between the bargaining power of an individual employee and an employer.[71]

The Court confronted and discussed the two major differences between the *Gilmer* and *Gardner-Denver* lines of cases and their applications.[72] First, the Court distinguished its earlier decision in *Gardner-Denver* by clarifying that it did not involve the enforceability of an agreement to arbitrate statutory claims; rather, it decided "whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims."[73] Second, the Court noted the differences between union CBA's, which are governed by the Labor Management Relations Act, and individual employment contracts which are governed by the FAA.[74]

### C. *An Ambiguous Recent Supreme Court Decision*

In the Supreme Court's most recent decision on the issue directly at hand, the Court had an opportunity to clarify the confusion between *Gilmer* and *Gardner-Denver*.[75] In *Wright v. Universal Marine Services Corp.*, a CBA between a union and employer had a mandatory arbitration clause which stated that it was "intended to cover all matters affecting wages, hours, and other terms and conditions of employment."[76] An individual employee covered under the CBA filed discrimination charges against his employer under the American with Disabilities Act (ADA), alleging that he had been discriminated against on the basis of his disability.[77]

The Court noted that under its past precedent, in order for a CBA to effectively waive an individual union member's statutory right, the waiver must be "clear and unmistakable."[78] The Court found that the specific arbitration provision in the CBA at issue was not a clear and unmistakable

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[71] *Id.* at 33 (stating that "[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context" because "the FAA's purpose was to place arbitration agreements on the same footing as other contracts.").

[72] *Id.* at 35.

[73] *Id.* (stating additionally that "[s]ince 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.").

[74] *Id.* (noting that in cases decided under the FAA there is a "liberal federal policy favoring arbitration agreements.").

[75] *See generally* Wright v. Universal Mar. Serv. Corp., 525 U.S. 70 (1998).

[76] *Id.* at 73.

[77] *Id.* at 75.

[78] *Id.* at 79–80.

waiver of a statutory right.[79] Therefore, the Court stated that it would "not reach the question whether such a [clear and unmistakable] wavier would be enforceable."[80] However, the Court did acknowledge the conflict between *Gilmer* and *Gardner-Denver* but gave little, if any, guidance for litigants going forward. The Court hinted that there was doubt as to whether "*Gardner-Denver*'s seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer*."[81] However, the Court's reasoning supremely relied on *Metropolitan Edison*, a decision that allowed the prospective waiver of federal statutory rights in a CBA in favor of arbitration.[82]

## IV. THE SUPREME COURT'S DECISION IN *PYETT*[83]

In *Pyett,* the Supreme Court chose to finally face the issue that it determined was not yet ripe for adjudication in *Wright.* Justice Thomas, writing for the majority of the Court, joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito, stated the question presented succinctly as "whether a provision in a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate claims arising under the [ADEA] is enforceable."[84] The Court granted certiorari "to address the issue left unresolved in *Wright*" and ultimately reversed the holding of the Second Circuit.[85] The Court held that a CBA "that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law."[86]

The Court stated that the parties' decision to create an arbitration system to decide statutory employment discrimination claims "is no different from the many other decisions made in designing grievance machinery."[87]

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[79] *Id.* at 80.

[80] *Id.* at 82.

[81] *Wright*, 525 U.S. at 80.

[82] *Id.* at 79–80.

[83] As stated in the Introduction, this recent development was written while the case was still pending before the Supreme Court. Therefore, this section is meant to briefly summarize the Court's decision and reasoning, but not meant as a full analysis of the case.

[84] 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1461 (2009). Two dissenting opinions were filed, one by Justice Stevens and one by Justice Souter, in which Justices Stevens, Ginsburg, and Breyer joined.

[85] *Id.* at 1463.

[86] *Id.* at 1474.

[87] *Id.* at 1464.

Therefore, since the judiciary "may not interfere in this bargained-for exchange," the CBA's "provision must be honored unless the ADEA itself removes this particular class of grievances from the NLRA's broad sweep."[88] The Court primarily relied on the fact that there is no evidence that Congress, in enacting the ADEA, meant to preclude arbitration of claims under the Act.[89]

Thomas provided a clear, sweeping, and rather judicially-conservative answer to the question presented by stating simply that:

> The NLRA provided the Union and the RAB with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to federal age-discrimination claims in the ADEA. Accordingly, there is no legal basis for the Court to strike down the arbitration clause in this CBA, which is freely negotiated by the Union and the RAB, and which clearly and unmistakably requires respondents to arbitrate the age-discrimination claims at issue in this appeal. Congress has chosen to allow arbitration of ADEA claims. The Judiciary must respect that choice.[90]

In essence, the majority explicitly limited the holding in *Gardner-Denver* by stating that it "is not as broad as respondents suggest."[91] The majority clarified by asserting that although federal anti-discrimination rights may not be prospectively waived, an agreement to arbitrate them is not a prospective waiver.[92] Further, the Court, showing its favor for arbitration, noted that an "arbitrator's capacity to resolve complex questions of fact and law extends with equal force to discrimination claims brought under the ADEA."[93]

## VII. CONCLUSION

This case was one of the more controversial cases the Court decided this term. The ruling will affect the landscape of labor and employment law going forward into this new century. Most employers and unions argued that if the

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[88] *Id.* at 1464–65.

[89] *Id.* at 1465.

[90] *Pyett*, 129 S. Ct. at 1466. However, the Court did acknowledge that "the *Gardner-Denver* line of cases included broad dicta that was highly critical of the use of arbitration for the vindication of statutory anti-discrimination rights." *Id.* at 1469.

[91] *Id.* at 1466. The Court later stated that "*Gardner-Denver* and its progeny thus do not control the outcome where, as is the case here, the collective-bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimination claims." *Id.* at 1468–69.

[92] *Id.* at 1469.

[93] *Id.* at 1471.

judiciary does not enforce arbitration agreements in CBA's, all employees will have a "second bite" at their statutory claims.[94] Such a hypothetical seems inequitable in labor law which, by legislative design, champions collective employee rights over individual employee rights. The arbitration provisions were likely subject to intense collective bargaining and represent a compromise between the employer and the employees as a group, represented by a union. The Supreme Court resolved this dispute quite clearly by holding that a union can waive an individual union member's statutory right as long as there is an arbitration procedure involved. If nothing else, the Court has provided certainty going forward for unions, employers, union employees, and non-union employees considering unionizing.

*Kyle G. Baker*

[94] For a thorough analysis of this issue, see Daniel B. Moar, *Arbitrating Hate: Why Binding Arbitration of Discrimination Claims is Appropriate for Union Members*, 10 DUQ. BUS. L.J. 47, 72 (2008) (stating that "[t]he reasoning in *Gardner-Denver* failed to recognize that employers have no incentive to agree to the 'second apple' of arbitration if employees are already guaranteed an 'apple' though the federal courts.").