

Mandatory Arbitration of Statutory Claims in the Union Workplace After *Wright v.* *Universal Maritime Service Corp.*

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INTRODUCTION

During the last eight years, an increasing number of employees who want to file federal employment discrimination claims against their employers in court have found themselves unable to do so.¹ Ever since the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*² in 1991, more and more employers require their workers to agree to mandatory arbitration clauses, whether contained in job applications or employee handbooks, as a condition of employment.³ These clauses generally compel the employee to submit any dispute arising out of his or her employment to binding arbitration, and courts usually hold that these clauses require arbitration of employees' statutory claims.⁴ Indeed, the result in *Gilmer* sent employers scurrying to sign up their employees to arbitration clauses in hopes of avoiding the high cost of litigating employment discrimination suits.⁵

This recent surge in the use of mandatory arbitration to resolve statutory employment claims, however, has been limited almost exclusively to the non-union workplace. Despite *Gilmer*, and the strong tradition of arbitration's use in the unionized workplace,⁶ most courts currently hold that mandatory arbitration

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¹See Lucille M. Ponte, *In the Shadow of Gilmer: How Post-Gilmer Legal Challenges to Pre-Dispute Arbitration Agreements Point the Way Towards Greater Fairness in Employment Arbitration*, 12 OHIO ST. J. ON DISP. RESOL. 359, 360 (1997).

²500 U.S. 20 (1991).

³See Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining Alexander v. Gardner-Denver in the Wake of Gilmer v. Interstate/Johnson Lane Corp.*, 1997 BYU L. REV. 591, 591-92; Ponte, *supra* note 1, at 360.

⁴The arbitration clause in *Gilmer*, for example, required Mr. Gilmer to arbitrate "[a]ny controversy . . . arising out of the employment or termination of employment." *Gilmer*, 500 U.S. at 23 (quoting App. to Brief for Respondent at 1). This language is consistent with the terms recommended for use in mandatory arbitration clauses found in employment contracts. See Robert K. Sholl & Christian A. Jenkins, *Agreements to Arbitrate Statutory Employment Claims*, WIS. LAW., Apr. 1998, at 15, 17 (suggesting that arbitration agreements require arbitration of "[a]ll disputes arising out of Employee's employment or the termination thereof").

⁵See Cole, *supra* note 3, at 591-92; Ponte, *supra* note 1, at 360.

⁶In 1960, the Supreme Court, in a collection of cases commonly referred to as the *Steelworkers Trilogy*, endorsed the use of labor arbitration. See *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car*

clauses contained in collective bargaining agreements (“CBAs”) do not require unionized employees to arbitrate their statutory claims.⁷ As the basis for this distinction between the union and non-union workplace, courts cite the Supreme Court’s decision in *Alexander v. Gardner-Denver Co.* in 1974.⁸ In *Gardner-Denver*, the Court held that an employee represented by a union who had lost his wrongful discharge claim in arbitration could still bring a Title VII race discrimination suit related to his firing in federal court.⁹ In doing so, the Court reasoned that arbitration was an improper means for resolving statutory claims, and that an employee could never prospectively waive the right to bring a Title VII suit.¹⁰ As a result, during the years following *Gardner-Denver*, it was considered “hornbook labor law”¹¹ that mandatory arbitration clauses, while covering other claims, did not require employees to submit their statutory claims to binding arbitration.¹²

By the time *Gilmer v. Interstate/Johnson Lane Corp.* was decided some seventeen years later, however, the Court had changed its tune on the propriety of arbitration as a means to resolve statutory claims—at least in part.¹³ In *Gilmer*, the Court held that the *non-union* employee in that case *was* required to arbitrate his statutory age discrimination claim because of the mandatory arbitration clause he had signed as a condition of his employment.¹⁴ In reaching this conclusion, the *Gilmer* Court rejected the two major premises underlying the *Gardner-Denver* decision—that arbitration is an improper forum for resolving statutory claims,¹⁵ and that employees can never prospectively waive their right to bring suit under a

Corp., 363 U.S. 593 (1960). Since that time, the use of labor arbitration (i.e., arbitration between unions and management) has become “almost universal.” 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, 1187 (1993). Indeed, arbitration agreements are contained in some 98% of collective bargaining agreements. *See id.* at 1187 n.1. Arbitration as a means of resolving disputes between employers and employees in the non-union setting, however, is a fairly recent phenomenon which has emerged only since the Court’s *Gilmer* decision.

⁷See Robert B. Fitzpatrick, *Is Wright v. Universal Maritime Service Corp. the Death Knell for Alexander v. Gardner-Denver?*, in CURRENT DEVELOPMENTS IN EMPLOYMENT LAW 85, 95-110 (ALI-ABA Course of Study, July 23, 1998).

⁸415 U.S. 36 (1974); Cole, *supra* note 3, at 593.

⁹*Gardner-Denver*, 415 U.S. at 59-60.

¹⁰*See id.* at 51-58.

¹¹Paul Salvatore & John F. Fullerton, III, *Arbitration of Discrimination Claims in the Union Setting: Revisiting the Tension Between Individual Rights and Collective Representation*, 14 LAB. LAW. 129, 130 (1998).

¹²See Robert L. Duston, *Gilmer v. Interstate/Johnson Lane Corp.: A Major Step Forward for Alternative Dispute Resolution, or a Meaningless Decision?*, 7 LAB. LAW. 823, 823 (1991) (explaining that *Gilmer* was a “dramatic departure” from the long-recognized interpretation of *Gardner-Denver*, that “federal civil rights actions are not subject to compulsory arbitration”); *see also* Salvatore & Fullerton, *supra* note 11, at 130.

¹³*See* Cole, *supra* note 3, at 593-94.

¹⁴*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991).

¹⁵*See id.* at 30-34; *see also* Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77, 84 (1996) (concluding that the primary basis for *Gardner-Denver* was the Court’s mistrust of arbitration, and that this view was rejected in *Gilmer*).

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statutory claim.¹⁶ In fact, the Court in *Gilmer* praised the virtues of arbitration, and explained that agreements to arbitrate statutory claims did not undermine any of the substantive rights of the statute; they just required that the claims be resolved in an alternative forum.¹⁷

Gilmer undermined much of *Gardner-Denver's* reasoning. Despite this, however, the *Gilmer* Court declined to expressly overrule *Gardner-Denver*. The Court chose instead to distinguish the two cases, and did so by noting “several important distinctions” between them¹⁸—chief among the distinctions was the fact that the employee in *Gardner-Denver* was represented by a union, while the *Gilmer* employee was not.¹⁹ The *Gilmer* Court explained that representation by a union could subject an employee to the danger of having his or her individual statutory rights undermined in favor of the collective rights of the bargaining unit as a whole.²⁰ While this had been cited in *Gardner-Denver* as a reason for not requiring the employee in that case to arbitrate his statutory claim, it had certainly played a very small role in doing so.²¹ Nevertheless, the general rule that evolved among the lower courts after *Gilmer* was that a non-union employee could be required to arbitrate statutory claims by virtue of a mandatory arbitration clause, while employees represented by a union and working under a CBA could not.²²

Although courts *generally* took this view, they were not, however, unanimous in doing so.²³ While the *Gilmer* opinion kept *Gardner-Denver* alive, the extent to which the latter remained truly viable was seriously called into question, as so much of its reasoning was rejected by *Gilmer*.²⁴ Thus, while most circuit courts held that unionized employees could not be required to arbitrate their statutory claims based on a mandatory arbitration clause in a CBA, the issue of whether such a clause could ever require union employees to do so could only be resolved by a decision from the Supreme Court.

¹⁶See *Gilmer*, 500 U.S. at 26-29.

¹⁷*Id.* at 26.

¹⁸*Id.* at 35.

¹⁹See *infra* Part I.B.

²⁰*Gilmer*, 500 U.S. at 35.

²¹See Malin, *supra* note 15, at 84.

²²Among courts of appeal, the Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have ruled against applying mandatory arbitration agreements found in CBAs to statutory claims, while the Fourth Circuit stands alone in enforcing such an agreement. Compare *Penny v. United Parcel Serv.*, 128 F.3d 408 (6th Cir. 1997), *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997), *Varner v. National Super Mkts., Inc.*, 94 F.3d 1209 (8th Cir. 1996), *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), and *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519 (11th Cir. 1997), with *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996). The Third Circuit initially decided that a mandatory arbitration clause in a CBA could compel arbitration of statutory claims, but the opinion was later vacated. Thus, it is unclear where the Third Circuit stands. See *Martin v. Dana Corp.*, 114 F.3d 421 (3d Cir. 1997), *opinion withdrawn and vacated*, No. 96-1746, 1997 WL 368629 (3d Cir. July 1, 1997). For a nice explanation of where the circuits currently stand on the issue, see Harvey R. Boller & Donald J. Petersen, *Job Discrimination Claims Under Collective Bargaining*, DISP. RESOL. J., Aug. 1998, at 39.

²³See *Austin*, 78 F.3d at 879-86 (applying a mandatory arbitration clause in a CBA to statutory claims).

²⁴See *infra* Part I.C.

Many thought that answer would come when the Court recently granted certiorari to a case out of the Fourth Circuit, *Wright v. Universal Maritime Service Corp.*²⁵ In *Wright*, a union-represented employee's claim under the Americans with Disabilities Act was dismissed from federal district court because he had not yet taken it through the union's arbitration process. The district court found that the CBA's arbitration clause, although general in nature, required the employee to bring his claim before an arbitrator whose decision would be binding. The Fourth Circuit—the only appellate court to date that has held that arbitration clauses in CBAs extend to statutory claims—affirmed the dismissal on appeal.²⁶ When the Supreme Court granted certiorari,²⁷ it set the stage for finally resolving *Gilmer* and *Gardner-Denver*, and ruling on the applicability of a CBA arbitration clause to statutory claims.

But the Supreme Court never reached the issue. It found instead that even if a mandatory arbitration clause in a CBA could bind unionized employees to arbitrate their statutory claims, the clause in *Wright* did not meet the standard for doing so.²⁸ As a result, the case provided only limited guidance on the broader issue, explaining that an arbitration clause in a CBA must be “clear and unmistakable” that it applies to statutory claims in order to be applied to such claims.²⁹ But, of course, this rule would apply only if the Court eventually decides that arbitration clauses in CBAs *can* be extended to reach statutory claims. Therefore, while the case provides perhaps one piece to the puzzle, the broader, more significant issue of whether a unionized employee can in fact be required to arbitrate statutory claims by virtue of an arbitration clause in a CBA remains an open question after *Wright*.³⁰

This Note argues that, so long as the CBA contains “clear and unmistakable” language that the parties intended for statutory claims to be covered by the mandatory arbitration clause, union employees should be required to arbitrate such claims. Although the Court has not overruled *Gardner-Denver* explicitly, the *Gilmer* opinion rejected most of the reasoning upon which *Gardner-Denver* was based. As a result, the only true remaining justification for applying *Gardner-Denver*, and the primary reason cited by courts for continuing to do so, is the difference between union and non-union employees.

But the union status of an employee alone is not a sufficient basis for applying *Gardner-Denver*. In fact, when the two sets of employees are compared, it becomes clear that those represented by a union are capable of providing the same kind of consent to a mandatory arbitration clause as non-union employees. Further, the duty of fair representation which a union owes to those it represents ensures that those employees will have their rights vigorously asserted by the union during the arbitration process. Therefore, so long as the arbitration clause in the CBA

²⁵See, e.g., Salvatore & Fullerton, *supra* note 11, at 141 (noting that *Wright* provided the Court with a “perfect opportunity” to resolve the issue).

²⁶See *Wright v. Universal Maritime Serv. Corp.*, 121 F.3d 702 (4th Cir. 1997), *vacated*, 119 S. Ct. 391 (1998).

²⁷See *Wright v. Universal Maritime Serv. Corp.*, 118 S. Ct. 1162 (1998).

²⁸See *Wright*, 119 S. Ct. at 395.

²⁹*Id.* at 396.

³⁰See Marcia Coyle, *High Court Strikes Down ADR Clause*, NAT'L LAW J., Nov. 30, 1998, at B1 (commenting that *Wright* left this issue “unresolved”).

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meets the “clear and unmistakable” test, courts should enforce the clauses accordingly.

Part I of this Note looks at the *Gardner-Denver* and *Gilmer* decisions. It explains the Court’s reasoning underlying both decisions, identifies what of *Gardner-Denver* is left after *Gilmer*, and explains when and why lower courts continue to apply *Gardner-Denver*.

Parts II and III assess whether the bases for *Gardner-Denver*’s continued application are valid. It concludes that the union status of an employee should not render mandatory arbitration clauses invalid for two reasons: (1) employees represented by a union are capable of providing consent to such arbitration clauses in the same manner in which non-union employees do, and (2) unionized employees are protected by the duty of fair representation from having their individual interests and rights undermined by the union.

Finally, Part IV explains what kind of language a union-negotiated mandatory arbitration clause should contain in order to be applied to statutory claims, with *Wright* and other case law providing guidance.

I. THE REMAINING BASES FOR *GARDNER-DENVER*’S
CONTINUED VIABILITY AFTER *GILMER* AND *WRIGHT*

The first step in examining whether *Gardner-Denver* should still be considered good law is to determine just how much of the decision was left intact after *Gilmer*. The courts that continue to recognize *Gardner-Denver* do so based on the “distinctions” between the two cases. Once the bases for *Gardner-Denver*’s continued recognition are identified, their merit can then be evaluated.

A. *Alexander v. Gardner-Denver Co.*

In *Alexander v. Gardner-Denver Co.*, an African-American employee named Harrell Alexander was fired from his job as a drill operator. Shortly thereafter, Alexander filed a grievance under the CBA in effect between his union and employer, claiming that he had been wrongfully discharged. Although he initially made no mention of racial discrimination, by the time his case finally came before the arbitrator, Alexander argued that his firing was racially motivated. The arbitrator, however, while not specifically addressing the race discrimination claim, ruled that Alexander’s discharge was for good cause, and declined to reinstate him.³¹

While his wrongful discharge claim was making its way through the arbitration process, Alexander had filed a racial discrimination charge with the Colorado Civil Rights Commission, which was later turned over to the Equal Employment Opportunity Commission (“EEOC”).³² The EEOC later informed Alexander that it had failed to find probable cause of a Title VII violation, and that he had the right to sue within thirty days, which Alexander did. The suit, alleging racial discrimination in violation of Title VII, was dismissed by the district court. Because he had taken his claim to arbitration, the court ruled the arbitrator’s

³¹See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 38-42 (1974).

³²See *id.* at 42.

resolution of the matter was binding, and that Alexander was precluded from filing suit. The Tenth Circuit affirmed the dismissal, adopting the district court's reasoning.³³

A unanimous Supreme Court reversed,³⁴ however, and listed a number of reasons for holding that the arbitrator's ruling did not preclude Alexander from filing a Title VII claim. At the outset, the Court noted that claiming an employer had violated terms of a CBA, and charging the employer with running afoul of Title VII were two entirely different things. It explained that an employee who submits a claim to arbitration under a CBA does so in order to "vindicate his *contractual* right," whereas an individual who files a Title VII claim in court "asserts independent *statutory* rights accorded by Congress."³⁵ Simply because both the CBA and Title VII might have been violated by the same, single action, the Court reasoned, does not require that the employee be limited to only one forum for bringing the two distinct claims. Instead, "both rights" should be "enforced in their respectively appropriate forums."³⁶

The Court then proceeded to give a number of reasons why arbitration was most certainly *not* an "appropriate forum" for hearing Title VII claims. First, the Court attacked the qualifications of the arbitrators themselves.³⁷ It explained that arbitrators' competence lay in "the law of the shop, not the law of the land."³⁸ Although an arbitrator might have special knowledge of "industrial relations," the Court reasoned that "resolution of statutory or constitutional issues" was best left to the courts.³⁹

Next, the Court pointed to the procedural deficiencies of arbitration, which it believed resulted in a "factfinding process" inferior to that found in the courts.⁴⁰ It listed several factors in support of its assertion, noting that "the usual rules of evidence do not apply" in arbitration proceedings, and that "rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable."⁴¹ Further, unlike the courts, arbitrators are not required to explain their rulings. In fact, the very informality which generally makes it an attractive alternative forum for dispute resolution⁴² led the Court to conclude that arbitration was an "inappropriate forum for the final resolution of rights created by Title VII."⁴³ The Court feared that either the legal issues might be misinterpreted by incompetent arbitrators, or that important facts might not come to light due to the inadequate procedures of the arbitration process.

³³ See *id.* at 43; *Alexander v. Gardner-Denver Co.*, 466 F.2d 1209 (10th Cir. 1972).

³⁴ See *Gardner-Denver*, 415 U.S. at 43.

³⁵ *Id.* at 49-50 (both emphasis added).

³⁶ *Id.* at 50.

³⁷ See *Duston*, *supra* note 12, at 829.

³⁸ *Gardner-Denver*, 415 U.S. at 57.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 57-58.

⁴² See *id.* at 58.

⁴³ *Id.* at 56.

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In addition to its distrust of arbitration, the *Gardner-Denver* Court also held that “an employee’s rights under Title VII”—in this case, the right to file suit in court—“may not be waived prospectively,” either by the individual or the employee’s union.⁴⁴ That Alexander submitted a wrongful discharge claim to arbitration in no way affected his right to bring a Title VII suit.⁴⁵ Even if an employee or union could waive the right to sue under Title VII, however, the Court explained that the arbitrator in *Gardner-Denver* was not authorized to rule on such a claim. Arbitrators are bound to make their decisions based on the terms of the CBA, and the Court determined that the CBA in *Gardner-Denver* did not call for the arbitral resolution of Title VII claims.⁴⁶ Thus, an arbitrator’s decision on the issue would have been beyond the arbitrator’s authority, and unenforceable.⁴⁷ In short, the Court held that employees cannot waive their right to sue under Title VII prospectively, but that even if they could, the CBA at issue in *Gardner-Denver* did not require arbitration of such claims.

Finally, the Court cited one additional reason for allowing Alexander to bring his claim in court. In a footnote, the Court noted the possibility that a conflict of interest might exist in a unionized workplace between the statutory rights of individual employees under Title VII and the collective interest of the employees represented by a union as a whole. Given the majoritarian nature of collective bargaining, the Court expressed concern that a union might deal away, or undermine, an individual’s right to bring a Title VII suit in exchange for benefits for the bargaining unit as a whole. “In arbitration, as in the collective bargaining process, the interest of the individual employee may be subordinated to the collective interest of all employees in the bargaining unit.”⁴⁸ If enabled, the Court feared that a union might sell out individual employees for the good of the unit, which would undermine the purpose of Title VII. Thus, a union could not be given the opportunity to do so.

Although the Court laid out a number of factors for refusing to enforce the arbitration clause to Alexander’s statutory claim, the main justification for its holding in *Gardner-Denver* was its distrust of the arbitral forum, and its belief that arbitration was simply not an appropriate means to resolve Title VII claims.⁴⁹ Also important was the Court’s holding that Title VII rights, including the right to file suit, could not be waived prospectively by the employee or the employee’s union. Less important seems to be the fact that the CBA did not authorize the arbitrator to resolve statutory claims—even if it had, the arbitrator’s decision would not have precluded the employee from filing suit under Title VII. Finally, given its relegation to a footnote, the “tension” between collective interests and individual rights appears to have played a relatively minor, though not completely insignificant, role in the outcome of *Gardner-Denver*.⁵⁰

⁴⁴*Id.* at 52.

⁴⁵*See id.*

⁴⁶*See* Duston, *supra* note 12, at 829; Salvatore & Fullerton, *supra* note 11, at 132.

⁴⁷*See Gardner-Denver*, 415 U.S. at 53-54.

⁴⁸*Id.* at 58 n.19.

⁴⁹*See* Malin, *supra* note 15, at 84.

⁵⁰Professor David E. Feller refers to the footnote 19 comment as *Gardner-Denver’s* “furthermore.” David E. Feller, *Compulsory Arbitration of Statutory Discrimination Claims*

Although there were many reasons given for *Gardner-Denver*'s result, the case came to stand for one singular proposition—that no employee, neither union nor non-union, could be compelled to arbitrate any of an assortment of statutory claims against an employer by virtue of a mandatory arbitration agreement.⁵¹ This rule, however, was severely undermined when the Court issued its opinion in *Gilmer v. Interstate/Johnson Lane* some seventeen years later.

B. *Gilmer v. Interstate/Johnson Lane Corp.*

In 1981, Robert Gilmer was hired by Interstate/Johnson Lane Corporation as manager of financial services. As a requirement of his employment, Gilmer applied to be registered as a securities representative with a number of stock exchanges. Included in his application was a clause which provided that Gilmer “‘agree[d] to arbitrate any dispute, claim or controversy’ arising between him and Interstate ‘that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which’” he registered.⁵² The New York Stock Exchange had such a rule, mandating that arbitration be used to resolve any claim “‘arising out of the employment or termination of employment’” of registered representatives, such as Gilmer.⁵³

Six years later, in 1987, Gilmer was fired by Interstate. By then sixty-two years old, Gilmer filed suit in federal district court claiming that he had been terminated because of his age in violation of the Age Discrimination in Employment Act of 1967 (“ADEA”). Interstate countered with a motion to compel arbitration based upon the clause in Gilmer’s registration application. While the district court denied the motion, the Fourth Circuit reversed, holding that “‘nothing in the text, legislative history, or underlying purposes of the ADEA indicat[es] a congressional intent to preclude enforcement of arbitration agreements.’”⁵⁴ Gilmer, faced with the prospect of being unable to bring his action in a judicial forum, took his case to the Supreme Court.

As his primary line of attack, Gilmer argued that the Court’s decision in *Gardner-Denver* rendered arbitration agreements, such as the one at issue in his case, unenforceable with respect to statutory claims.⁵⁵ In doing so, he relied on the Court’s “‘mistrust of the arbitral process’” so prevalent throughout the *Gardner-Denver* opinion, citing many of the characteristics of arbitration he felt made it an inappropriate means of resolving his statutory claim.⁵⁶ While these arguments had carried the day in *Gardner-Denver*, however, the *Gilmer* Court now rejected them.

Under a Collective Bargaining Agreement: The Odd Case of Caesar Wright, 16 HOFSTRA LAB. L.J. 53, 58 (1998).

⁵¹See Duston, *supra* note 12, at 830-31.

⁵²*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (quoting App. at 18 (alteration in original)).

⁵³*Id.* (quoting App. to Brief for Respondent at 1).

⁵⁴*Id.* at 23-24 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 197 (4th Cir. 1990) (alteration added)).

⁵⁵See *id.* at 26-33.

⁵⁶*Id.* at 34 n.5 (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 231-232 (1987)); see also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49-58 (1974) (discussing generally the problems it perceived with arbitration of statutory claims).

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In doing so, it abandoned wholesale *Gardner-Denver's* suspicion of arbitration, categorizing those views as outdated, and noting that any mistrust of arbitration expressed in that opinion had “been undermined by our recent arbitration decisions.”⁵⁷ Indeed, in the years leading up to *Gilmer*, the Court had started to change its tune toward arbitration, viewing it in an increasingly favorable light, and even enforcing agreements to arbitrate a number of statutory claims.⁵⁸

The applicability of the Federal Arbitration Act (“FAA”) to *Gilmer's* arbitration agreement also accounted for the Court’s new views on arbitration. It noted that the FAA “reflects a ‘liberal federal policy favoring arbitration agreements.’”⁵⁹ In holding that “[i]t is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA,”⁶⁰ the Court made it clear that *Gilmer's* arguments regarding the possible bias of arbitration panels, inadequacy of procedural tools in arbitration, lack of written opinions by arbitrators, and lack of adequate relief available to employees were rejected.⁶¹ While a specific showing of one or more of these problems in a particular case might possibly result in an arbitration clause going unenforced,⁶² the Court warned that “generalized attacks” on arbitration, such as those made by *Gilmer* (and the *Gardner-Denver* Court) were “‘far out of step with our current strong endorsement of [arbitration as a] method of resolving disputes.’”⁶³

Consistent with this “strong endorsement” of arbitration, the Court was unpersuaded by *Gilmer's* claim that he had been deprived of his rights under the

⁵⁷*Gilmer*, 500 U.S. at 34 n.5. The Court went on to explain that “[w]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.” *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985)).

⁵⁸*See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (enforcing an agreement to arbitrate claims made under the Securities Act of 1933); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (upholding an arbitration agreement concerning claims under the Securities Exchange Act of 1934 and RICO); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (enforcing an agreement to arbitrate claims made under the Sherman Anti-Trust Act). For a brief discussion and summary of these cases, see Amanda G. Dealy, Note, *Compulsory Arbitration in the Unionized Workplace: Reconciling Gilmer, Gardner-Denver and the Americans with Disabilities Act*, 37 B.C. L. REV. 479, 483-88 (1996).

⁵⁹*Gilmer*, 500 U.S. at 35 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985)). The Court stated that the purpose of the Federal Arbitration Act (“FAA”) was “to place arbitration agreements on the same footing as other contracts.” *Id.* at 33. It should be noted, however, that there is substantial debate as to whether or not the FAA applies to “employment contracts.” *See, e.g., id.* at 36-43 (Stevens, J., dissenting). The Court sidestepped the issue, though, by determining that the clause *Gilmer* signed was not a “contract of employment” with Interstate, but an agreement with the securities exchanges instead. *Id.* at 25 n.2. The Court chose to “leave for another day” the applicability of the FAA to employment contracts. *Id.*

⁶⁰*Id.* at 26.

⁶¹*See id.* at 30-33.

⁶²*See id.* at 33 (noting that these claims should be determined on a case-by-case basis).

⁶³*Id.* at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989) (alteration added)).

ADEA by being required to pursue the charges in arbitration.⁶⁴ “[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.”⁶⁵ Therefore, “[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies.”⁶⁶

In taking these views, the *Gilmer* Court abandoned two of the most significant principles upon which *Gardner-Denver* had been based. First, far from an “inappropriate” forum for the resolution of statutory claims, the Court now heartily endorsed the use of arbitration for this purpose.⁶⁷ Second, whereas the Court in *Gardner-Denver* had ruled that an employee could not prospectively waive the right to bring a Title VII suit in court, *Gilmer* held that such a waiver was enforceable.⁶⁸ Yet despite the fact that *Gilmer* wiped out so much of *Gardner-Denver*’s reasoning, the Court declined to overrule *Gardner-Denver* completely.⁶⁹ Instead, it held that Mr. Gilmer’s reliance on *Gardner-Denver* was simply “misplaced” and explained how *Gilmer* differed from its predecessor.⁷⁰ In doing so, the Court enumerated “several important distinctions” between *Gilmer* and *Gardner-Denver*.⁷¹

The first of these distinctions was that the agreement at issue in *Gardner-Denver* did not authorize the arbitrator to resolve statutory claims. Because the employee in *Gardner-Denver* had never agreed to arbitrate his statutory claims, any ruling by the arbitrator on Alexander’s Title VII claim would have been outside the arbitrator’s authority and invalid. In *Gilmer*, however, the Court explained that the clause both authorized arbitral resolution of statutory claims, and had been agreed to by the employee.⁷²

A second distinction cited in *Gilmer* was that in *Gardner-Denver* the arbitration agreement at issue was found within a collective bargaining agreement negotiated by union and management. The *Gilmer* Court recalled that the “tension between collective representation and individual statutory rights” had been cited in *Gardner-Denver* as a basis for not upholding such mandatory arbitration agreements.⁷³ In *Gilmer*, though, the employee was not represented by a union, and had personally signed the application containing the arbitration clause.

⁶⁴*See id.* at 32-33.

⁶⁵*Id.* at 26 (quoting *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (alteration added)).

⁶⁶*Id.* (quoting *Mitsubishi*, 473 U.S. at 628 (alteration in original)).

⁶⁷*Id.* at 26; *see also* *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 880 (4th Cir. 1996) (noting that the “principal concern” in *Gardner-Denver* was that arbitration was “inappropriate” for resolving statutory claims, but that *Gilmer* rejected that rationale) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56 (1974)).

⁶⁸*Gilmer*, 500 U.S. at 26.

⁶⁹*See id.* at 33-35; *see also, e.g.*, *Salvatore & Fullerton*, *supra* note 11, at 132 (explaining that *Gilmer* distinguished itself from *Gardner-Denver* without overruling that case).

⁷⁰*Gilmer*, 500 U.S. at 33.

⁷¹*Id.* at 35.

⁷²*Id.*

⁷³*Id.*

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Therefore, the “tension” that concerned the *Gardner-Denver* Court was “not applicable” in *Gilmer*.⁷⁴

As the final distinction, the Court noted that unlike *Gardner-Denver*, *Gilmer* was decided pursuant to the FAA. Because the FAA expresses a strong federal policy in favor of arbitration agreements, the *Gilmer* Court held that the statute cut in favor of enforcing the *Gilmer* arbitration clause.⁷⁵

Thus, *Gardner-Denver*, perhaps barely, lived on. The extent to which it remained good law after *Gilmer*, however, was unclear.⁷⁶ With these three distinctions as their only guidance, the lower courts were forced to decide for themselves when *Gardner-Denver* should apply, and which cases fell under the new *Gilmer* rule.

C. Why the Courts Continue to Apply Gardner-Denver

Not surprisingly, when forced to decide whether to apply *Gilmer* or *Gardner-Denver*, most courts have looked to the distinctions noted above, and cited the “precedent” with facts most similar to those it faced.⁷⁷ Although there were three distinguishing factors cited in *Gilmer*, courts most often look to one as being determinative—the union or non-union status of the employee.⁷⁸ If the employee is represented by a union, courts will refuse to interpret the CBA’s arbitration clause as requiring mandatory arbitration of the statutory claim, with the opposite generally true if the employee is non-union.

In supporting this distinction between union and non-union employees, courts usually allude to the “tension” said to exist in a unionized workplace between collective interests and individual rights, which was cited by both the *Gardner-Denver* and *Gilmer* Courts. There are two reasons why courts cite this conflict between the individual and the union as placing statutory claims beyond the reach of arbitration clauses in CBAs.⁷⁹ First, courts believe that an agreement to arbitrate statutory claims is enforceable only if the employee consents to it individually.⁸⁰ While the union can agree to all other “terms and conditions” of the individual’s employment, the union’s agreement that those it represents will submit to mandatory arbitration of statutory claims “does not count.”⁸¹ Second, the courts cite concerns that, because the union has exclusive control⁸² over the arbitration process under a CBA, the union could deny access to individual employees with meritorious statutory claims.⁸³ If so, the employee would be left without a means for vindicating his or her statutory rights. Courts conclude that the union’s control creates too much danger that an individual employee’s rights would be

⁷⁴*Id.*⁷⁵*Id.*⁷⁶*See Pryner v. Tractor Supply Co.*, 109 F.3d 354, 365 (7th Cir. 1997); *Cole*, *supra* note 3, at 594; *Malin*, *supra* note 15, at 81.⁷⁷*See, e.g., Pryner*, 109 F.3d at 364-65 (comparing the facts in that case with those in *Gardner-Denver* and *Gilmer*).⁷⁸*See Feller*, *supra* note 50, at 58, 63.⁷⁹*See Salvatore & Fullerton*, *supra* note 11, at 137.⁸⁰*See id.*⁸¹*Brisentine v. Stone & Webster Eng’g Corp.*, 117 F.3d 519, 526 (11th Cir. 1997).⁸²*See Vaca v. Sipes*, 386 U.S. 171, 174 (1967).⁸³*See Salvatore & Fullerton*, *supra* note 11, at 137.

undermined, perhaps in exchange for benefits to the rest of the bargaining unit as a whole, or for some other illicit purpose.⁸⁴

Relying on these two factors which make up the “tension” in the union workplace, the courts have clearly shown that the primary reason they apply either *Gilmer* or *Gardner-Denver* is whether the employee is represented by a union.⁸⁵ Even if the union or non-union status is the only difference between cases in determining whether *Gilmer* or *Gardner-Denver* should apply, the case law shows that the lower courts believe “the only difference makes all the difference.”⁸⁶

The other two “distinctions” cited in *Gilmer*—the applicability of the FAA, and the fact that the CBA in *Gardner-Denver* did not authorize the arbitrator to hear statutory claims—have also been cited by the courts in their decisions on this issue. These distinctions have played a far less important role, however, in deciding which case to apply. In fact, courts disagree as to whether the FAA applies to CBAs, and the Supreme Court has not yet decided the issue. Even if the FAA does not apply it seems likely that section 301 of the Labor Management Relations Act (“LMRA”) would apply, and the presumption of arbitration under that statute is at least as strong as under the FAA.⁸⁷ In any case, that *Gardner-Denver* and *Gilmer* differed in the applicability of the FAA seems to have played little role in how courts decide which opinion to apply.

The other distinction cited in *Gilmer*—that in *Gardner-Denver* the CBA did not authorize the arbitrator to hear statutory claims—is somewhat more important. In *Wright v. Universal Maritime Service Corp.*, the Supreme Court concluded that the CBA at issue in that case did not authorize, with sufficient clarity, the arbitrator to resolve statutory claims.⁸⁸ Of course, the simple solution to this problem, which would eliminate the distinction between *Gilmer* and *Gardner-Denver*, would be to make it “clear and unmistakable”⁸⁹ in the CBA that the arbitrator is authorized to resolve statutory claims.⁹⁰

⁸⁴See *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 361-62 (7th Cir. 1997).

⁸⁵See Feller, *supra* note 50, at 63.

⁸⁶See *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 886 (4th Cir. 1996) (Hall, J., dissenting). Judge Hall was responding to the majority’s assertion that the “only difference between” the facts of cases in which *Gilmer* applies and the facts in *Austin* was that “this case arises in the context of a collective bargaining agreement.” *Id.* at 885.

⁸⁷See Feller, *supra* note 50, at 60 (concluding that the applicability of the FAA in *Gilmer* was “a distinction . . . without a difference”).

⁸⁸*Wright v. Universal Maritime Serv. Corp.*, 119 S. Ct. 391, 396 (1998).

⁸⁹*Id.*

⁹⁰See Feller, *supra* note 50, at 60.

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II. UNION EMPLOYEES CAN CONSENT TO MANDATORY
ARBITRATION CLAUSES IN THE SAME MANNER IN WHICH
NON-UNION EMPLOYEES AGREE TO THEM

We know that courts generally apply *Gardner-Denver* if the employee at issue is represented by a union. The two reasons for doing so are, first, the belief that only an individual employee can agree to mandatory arbitration of his or her statutory claims, and, second, that the union's unilateral control over access to the arbitral forum could endanger the individual employee's statutory rights. When examined more closely, however, it becomes apparent that these justifications do not warrant a separate rule for union and non-union employees.

*A. Union Employees Can Give the Same Consent to
Arbitration Clauses as Non-Union Workers*

Under the National Labor Relations Act ("NLRA"), once a union has been chosen by employees to represent them, the union becomes the exclusive bargaining agent on all matters concerning terms and conditions of employment.⁹¹ Any effort by the employer to bargain with the represented employees individually on such matters—including which claims should be subject to mandatory arbitration—would constitute a clear unfair labor practice under the NLRA.⁹² Because the union is the sole bargaining agent for employees, courts tend to hold that unionized employees are unable to consent to arbitration clauses "individually"—and because there is no individual consent, a mandatory arbitration agreement will not be applied to an employee's statutory claims.⁹³

⁹¹ See National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1994).

⁹² See, e.g., *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 685 (1944) (holding the employer's "direct negotiation with its employees" who were represented by a union amounted to an unfair labor practice).

⁹³ See *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997).

But if union employees *could* agree “individually” to mandatory arbitration of their statutory claims, that would certainly change things. If individual consent could occur in the unionized workplace, it would specifically undermine one of the main justifications for continuing to recognize *Gardner-Denver*. In fact, when the manner in which non-union employees give “individual” consent is actually examined, it becomes clear that union employees *are* capable of providing the same kind of consent that binds non-union employees to arbitrate their statutory claims.

B. How Non-Union Employees Agree to Arbitration Clauses

In the non-union workplace, employees are not represented by unions, of course, but agree to the terms of their employment on their own. But the notion that these employees sit down at the “bargaining table” with their employers and hammer out the their own, personalized employment contract is an illusion. An overwhelming majority of these workers are never given the opportunity to personalize their employment contracts in any way.⁹⁴ Rather, the non-union, at-will workplace is governed not by individualized employment agreements, but by form contracts, employment manuals, and clauses in job applications, all of which include the terms of employment set forth by the employer. It is within these “agreements” where clauses mandating the arbitration of statutory claims are likely to be found.⁹⁵

When employees are presented with such form agreements, they are not “asked” by their employers to accept, or make a counter-offer. They are instead required to accept, or look for another job.⁹⁶ For mandatory arbitration of statutory claims to be included as just such a term of employment is not unusual.⁹⁷ Yet, despite the fact that these agreements are essentially contracts of adhesion, the employees in these situations are still most often held to their terms.⁹⁸ Thus, although non-union employees have no true opportunity to personally negotiate the terms of the

⁹⁴See Donna Meredith Matthews, Note, *Employment Law After Gilmer: Compulsory Arbitration of Statutory Antidiscrimination Rights*, 18 BERKELEY J. EMP. & LAB. L. 347, 372-73 (1997).

⁹⁵See Ponte, *supra* note 1, at 360 (noting the various kinds of documents which contain arbitration clauses).

⁹⁶See Cole, *supra* note 3, at 610-11.

⁹⁷See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 22 (1991) (showing that the employee was required to sign an arbitration clause before beginning his job); *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465 (D.C. Cir. 1997). The contract at issue in *Cole* contained the following provision which noted that waiver of the right to a trial was a serious matter, and that the employee “MAY WISH TO CONSULT AN ATTORNEY PRIOR TO SIGNING THIS AGREEMENT. . . . HOWEVER, YOU WILL NOT BE OFFERED EMPLOYMENT UNTIL THIS FORM IS SIGNED AND RETURNED BY YOU.” *Id.* at 1469.

⁹⁸See Matthews, *supra* note 94, at 382-84. *But cf.* *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994) (holding that the plaintiffs had not knowingly waived their right to pursue judicial remedies by signing a form contract). The plaintiffs in *Lai*, however, were “recent immigrants to the United States with limited language skills when they applied.” Ponte, *supra* note 1, at 367. Therefore, *Lai* is likely to represent an atypical result.

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employment contract, they are nonetheless found to have consented to an arbitration agreement contained within the contract.

Perhaps the best example of the manner in which non-union employees consent to mandatory arbitration clauses is the seminal case on the issue, *Gilmer v. Interstate/Johnson Lane Corp.*⁹⁹ Recall that in *Gilmer*, the plaintiff was “required by his employment”¹⁰⁰ to submit an application registering him as a securities representative, and it was within the application that the arbitration agreement was contained.¹⁰¹ Mr. Gilmer had no opportunity to bargain with his employer for terms that would have freed him from having to submit the application, nor could he have negotiated a deal with the securities exchange that would have exempted him from being covered by the mandatory arbitration clause. In other words, there was no chance for the plaintiff in *Gilmer* to negotiate any sort of “side deal” that would have allowed him to take the job, but kept him from having to arbitrate his statutory claims—the terms were final, offered on a take it or leave it basis.

Thus, when presented with the application, Gilmer had two choices. He could either go ahead and submit the application, accept all of its terms, and have the job; or he could reject the terms offered, including the mandatory arbitration provision, by declining to take the job at all¹⁰²—in other words, he could take it or leave it. Re-negotiation of the particular terms was, of course, never an option. Eventually, Gilmer decided that he should agree to the terms offered, and took the job. This, at least according to the Supreme Court, provided the consent necessary to bind him to arbitrate, despite the fact that he never could have negotiated for a different contract.

Another example in which an employee was faced with similar, but actually more difficult choices, was *Lang v. Burlington Northern Railroad Co.*¹⁰³ In that case, the employee had worked for Burlington Northern for over twenty-five years when the company adopted a new policy “calling for non-judicial resolution of claims arising out of an employee’s termination” by placing an arbitration clause in the employee handbook.¹⁰⁴ Though he continued to work for the company over the next year, the employee was eventually fired in 1992. He later filed suit against the employer in federal district court for wrongful discharge.¹⁰⁵

However, the district court dismissed his complaint, and required that he seek relief in arbitration instead. The court found that the employee was bound to arbitrate his claim by virtue of the new clause in the employee handbook.¹⁰⁶ Although he had worked for the company for such a long period of time, and the change in the terms of employment had been unilaterally imposed by the employer, the court found that the employee had provided adequate consent to the new provision. “When, as here, a change in the employment relationship is proposed to an employee, ‘the employee’s retention of employment constitutes

⁹⁹500 U.S. 20 (1991).

¹⁰⁰*Id.* at 23.

¹⁰¹*See id.*

¹⁰²*See Cole, supra* note 3, at 610-11.

¹⁰³835 F. Supp. 1104 (D. Minn. 1993).

¹⁰⁴*Id.* at 1105.

¹⁰⁵*See id.*

¹⁰⁶*See id.* at 1106.

acceptance of the offer”¹⁰⁷ In other words, the employee had accepted the provision because he ““continu[ed] to stay on the job, although free to leave.””¹⁰⁸ Therefore, despite the fact that he had been on the job for more than a quarter of a century, and was afforded no opportunity to renegotiate terms unilaterally imposed on him by the employer, the employee was still bound by the arbitration agreement because he continued to work for the employer.

Just as in *Gilmer*, the employee in *Lang* was also given two choices when confronted with the arbitration clause—either accept it and keep his job, or reject it and quit. By staying on the job, the court found that he had agreed to arbitrate his disputes. Both of these cases show that consent to an arbitration agreement is valid, even where there is no possibility of negotiation, and the only alternative is losing, or never getting, a job.¹⁰⁹ By staying on the job, or taking it in the first place, the employee gives the required consent.

C. Union Employees

Again, in order to justify taking arbitration agreements out of the unionized workplace, one of the most often-cited reasons is that union employees cannot give the same kind of individual consent to arbitration agreements that their counterparts in the non-union workplace can provide. This, however, is simply not true.¹¹⁰ When compared to the individual “consent” to arbitration agreements courts found to have occurred in the cases mentioned above, the manner in which union employees give their consent to terms of employment is remarkably similar.

When an individual seeks a position in a unionized workplace, for example, he or she is faced with the same decisions as was the applicant in *Gilmer*. Specifically, the terms and conditions of employment in a unionized setting will already have been determined, through bargaining between the union and management, before the applicant has any chance to negotiate a separate deal. The chance for individual negotiation is virtually eliminated by the exclusivity of the union’s representation. Therefore, if the union and employer have agreed on a clause requiring arbitration of statutory claims, the applicant must make a decision. Either accept the job and be bound by the arbitration agreement, or reject the job altogether. Whichever option is chosen, the alternatives presented are identical to

¹⁰⁷*Id.* (quoting *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 627 (Minn. 1983) (omission in original)).

¹⁰⁸*Id.* (quoting *Mettelle*, 333 N.W.2d at 627 (alteration added)).

¹⁰⁹See *Cole*, *supra* note 3, at 610-11 (explaining the choices which *Gilmer* had when presented with the agreement); Gregory N. Freerkeen, *The Changing Character of Labor Arbitration: Labor Perspective*, in *ARBITRATION 1992: IMPROVING ARBITRAL AND ADVOCACY SKILLS, PROCEEDINGS OF THE FORTY-FIFTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 92, 99 (Gladys W. Gruenberg ed., 1992) (noting that *Gilmer* had no opportunity to renegotiate his contract).

¹¹⁰Freerkeen notes that *Gilmer* and *Gardner-Denver* cannot be distinguished on the basis that the employee in *Gilmer* had an opportunity to personally negotiate the terms of his contract. See Freerkeen, *supra* note 109, at 99.

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those in the non-union workplace. If the job is accepted, the employee will have provided exactly the same consent as that which was given in *Gilmer*.¹¹¹

In the situation involving an employee already at work in a union workplace, the employee is given the same opportunity as the *Lang* employee to accept or reject a mandatory arbitration clause. If an employee has been on the job for a few years, for example, and the union and employer agree that statutory claims will be subject to mandatory arbitration, the union employee has at least the same two options as the employee in *Lang*—continue working at the job, thereby accepting the new terms of employment, or reject the terms and quit.¹¹² If the employee continues to work, he or she will have given consent in the exact same manner in which the employee in *Lang* did so, regardless of the union's representation. Giving consent in this manner does not, of course, violate any provision of the NLRA. Yet, it is "individual" in the same way that the employees in *Gilmer* and *Lang* "individually" agreed to the arbitration clauses in those cases.

Yet, some argue that there is one important distinction that justifies treating the two differently. As noted above, under the NLRA individual unionized employees are precluded from striking individual agreements with the employer, and must adhere to the contract negotiated by the union and management. The situation in the non-union workplace is virtually identical, with employees forced to adhere to the terms presented with no opportunity to negotiate a different agreement. Professor Martin Malin, for example, contends that although non-union employees have no real chance to negotiate an agreement that does not include mandatory arbitration of statutory claims, they "at least" have a "theoretical possibility of negotiating a separate deal with their employers which did not require arbitration."¹¹³ Union employees, on the other hand, have "no such choice."¹¹⁴ Thus, Malin says, the consent provided by the non-union employee is somehow superior to that given by the worker represented by a union.

This view is, to say the least, troublesome. When non-union employees are faced with a mandatory arbitration clause in an employment contract, they do in fact have a "theoretical" chance of bargaining for an agreement that does not contain the arbitration clause. However, they have *only* a theoretical possibility of negotiating for a different deal. The reality is that non-union, at-will workers simply have no realistic chance to strike any agreement different to the one offered by the employer. Indeed, if Malin's view were adopted, it would create a situation where "a union and an employer could not agree to a result that an employer could impose *unilaterally* in the absence of a union."¹¹⁵ Malin's distinction—nothing

¹¹¹ See Cole, *supra* note 3, at 610-11. Essentially, Cole argues that union and non-union employees are presented with the same choices in these situations. Therefore, she believes that there should be no recognition of any difference between *Gilmer* and *Gardner-Denver*. It is noteworthy that the employer's counsel in *Wright* made a similar contention before the Supreme Court during oral argument. See Transcript of Oral Argument, *Wright v. Universal Maritime Serv. Corp.*, 118 S. Ct. 1162 (1998) (No. 97-889), available in 1998 WL 721090, at *46 (Oct. 7, 1998).

¹¹² See *id.*

¹¹³ Malin, *supra* note 15, at 87 (emphasis added).

¹¹⁴ *Id.*

¹¹⁵ Feller, *supra* note 50, at 81 (emphasis added). Who, I would ask, is more likely to better represent the employees' interests—the union, or the employer? I do not suggest that the

more than “empty formalism”—should be rejected.¹¹⁶ Because union employees can consent to mandatory arbitration clauses in the same manner that non-union employees agree to them, the argument that those represented by a union cannot provide the requisite “individual” consent should not be used as a basis for applying *Gardner-Denver*.

III. CONCERN OVER THE UNION’S CONTROL OF ACCESS TO ARBITRATION

In placing the arbitration of statutory claims outside of the union workplace, courts have expressed another concern caused by the “tension” between collective interests and individual statutory rights that supposedly exists in the union workplace.¹¹⁷ Under most CBAs, the union, and not the individual employee, decides whether to pursue the employee’s claim in arbitration.¹¹⁸ Various factors might play a role in the union’s decision whether to arbitrate, such as the likelihood of success, the merits of the case, and the seriousness of the discipline incurred by the employee.¹¹⁹ What concerns the courts is that the union might use other reasons in deciding whether to arbitrate claims—such as trading off one claim for another, or other more illicit purposes.¹²⁰ Thus, courts worry that if statutory claims were covered under a mandatory arbitration clause, the union might use these improper considerations in denying an employee access to arbitration, and the aggrieved worker would have no means by which to vindicate his or her statutory rights.¹²¹

union should or must agree to mandatory arbitration of statutory claims. Rather, I argue only that if management and the union do, in fact, agree to such a clause, the agreement should be enforced. This is, I think, a rather modest proposal.

¹¹⁶ Cole, *supra* note 3, at 611.

¹¹⁷ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991); *Alexander v. Gardner-Denver*, 415 U.S. 36, 58 n.19 (1974); see also, e.g., *Brisentine v. Stone & Webster Eng’g Corp.*, 117 F.3d 519, 524-25 (11th Cir. 1997) (citing tension between collective interests and individual rights where employees are represented by unions).

¹¹⁸ See *Vaca v. Sipes*, 386 U.S. 171, 185, 191 (1967).

¹¹⁹ See Stanley J. Schwartz, *Different Views of the Duty of Fair Representation*, 34 LAB. L.J. 415, 420-26 (1983).

¹²⁰ See *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 362-63 (7th Cir. 1997).

¹²¹ See *id.* at 362; see also *Brisentine*, 117 F.3d at 525.

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What courts fail to recognize, however, is that unions already have incentive to take meritorious claims of employment discrimination to arbitration because of the duty of fair representation (“DFR”). Although limited, the DFR has been broadened enough over the years to allow disgruntled employees to recover from their unions for harm suffered as a result of a union’s wrongful conduct—or at least for the employee to file suit for breach of the DFR, forcing the union to incur substantial legal costs. Thus, while it is difficult for a represented employee to win a DFR suit, unions fear such actions so much that their handling of grievances has changed to the point that essentially any meritorious claim is taken to arbitration. There is no reason to believe that the same would not hold true if statutory claims were placed within the realm of arbitration clauses in CBAs.

A. Duty of Fair Representation

All unions owe a duty of fair representation to the employees in the bargaining unit. First recognized in *Steele v. Louisville & Nashville Railroad Co.*,¹²² the duty was, at its inception, extremely limited.¹²³ In *Steele*, African-American union members filed suit claiming their union had unfairly discriminated against them in contract negotiations by making agreements adverse to their interests because of their race. The Court held that in representing their members, unions had to act “without hostile discrimination, fairly, impartially, and in good faith.”¹²⁴ Initially, *Steele* was seen as requiring only that the union act in “good faith” in order to satisfy its duty of fair representation, a view that prevailed for the next twenty years.¹²⁵

Then, in 1967, the Supreme Court decided *Vaca v. Sipes*.¹²⁶ *Vaca* involved an employee who filed a grievance with his union after being fired due to health problems. Although the union initially pursued the claim through several steps of the grievance process, it eventually decided to drop the employee’s complaint short of submitting it to arbitration, concluding that there was insufficient evidence to make a successful case.¹²⁷ The employee, however, insisted that the dispute go before the arbitrator. After the union refused, the employee filed suit, arguing that the union’s failure to submit his claim to arbitration breached the duty of fair representation.¹²⁸

When the case finally reached the Supreme Court, the employee’s claim was rejected. The Court held that employees have no right to insist that a union arbitrate a claim, and that unions enjoy broad discretion in deciding whether to

¹²²323 U.S. 192 (1944).

¹²³See Harry T. Edwards, *The Duty of Fair Representation: A View From the Bench*, in *THE CHANGING LAW OF FAIR REPRESENTATION* 93, 96-97 (Jean T. McKelvey ed., 1985) [hereinafter *THE CHANGING LAW*].

¹²⁴*Steele*, 323 U.S. at 204.

¹²⁵See Ross E. Cheit, *Competing Models of Fair Representation: The Perfunctory Processing Cases*, 24 B.C. L. REV. 1, 5-8 (1982).

¹²⁶386 U.S. 171 (1967).

¹²⁷The union had sent the employee to an outside physician to evaluate his claim that he was medically fit to return to work. When the doctor concluded that he was not, the union decided that it could not win at arbitration. *See id.* at 175.

¹²⁸*See id.* at 174-76.

take an employee's disputes to arbitration.¹²⁹ However, the Court did note that a union's discretion is limited by the duty of fair representation, warning that a union may not "arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion."¹³⁰

Vaca has generally been interpreted as requiring the employee prove two things in order to recover damages—(1) that the underlying grievance was meritorious in the first place, and (2) that the union acted in "bad faith," processed the grievance in a "perfunctory fashion," or "arbitrarily" failed to pursue it at all.¹³¹ But these criteria provided by the *Vaca* Court are rather vague, and there is no true consensus on exactly what level of care *Vaca* requires of a union in order to fulfill its duty.¹³² Where the union handles an employee's grievance, there is no set standard as to what constitutes an "arbitrary"¹³³ refusal to take a claim to arbitration, or when the union's performance in the arbitration process should be considered "perfunctory."¹³⁴ This lack of clarity has led unions, fearful that their actions might constitute a breach of the DFR, to arbitrate more claims. Thus, while *Vaca* "should have strengthened unions' independent evaluation of grievances," it actually "did the opposite."¹³⁵

Indeed, while lower courts interpreted *Vaca* as still requiring employees to meet a "very heavy burden of proof"¹³⁶ in order to win a DFR suit, some courts did

¹²⁹*See id.* at 191.

¹³⁰*Id.*; see also Clyde W. Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251, 259-61 (1977). Summers explained that while an "individual employee has no 'absolute right to have his grievance taken to arbitration,'" *id.* at 260 (quoting *Vaca*, 386 U.S. at 191), the Court in *Vaca* had "emphasized that the union's exclusive control over grievance procedures did not carry with it 'unlimited discretion to deprive injured employees of all remedies for breach of contract,'" *id.* at 260-61 (quoting *Vaca*, 386 U.S. at 186).

The *Vaca* Court also noted that even if an employee could eventually show that the grievance was valid, recovery against the union for failing to pursue it would certainly not be automatic. *Vaca*, 386 U.S. at 192-93.

¹³¹Cheit, *supra* note 125, at 10.

¹³²The uncertainty surrounding what the case requires prompted Professor Summers to observe that *Vaca* "is like a giant squid. It has a number of procedural tentacles, any one of which may be more than we can master, but with all of which we must ultimately contend." Summers, *supra* note 130, at 251.

¹³³In *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65 (1991), the Supreme Court reasoned that an arbitrary decision would be one in which the union acted "irrationally," and outside of the "wide range of reasonableness" unions are given in their decisionmaking. *Id.* at 79 (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). Exactly how much guidance this provides as to the meaning of "arbitrary" is questionable.

¹³⁴The "most detailed explanation" of the term is that a union has processed a grievance in a "perfunctory" fashion where "'the union acted without concern or solicitude, or gave a claim only cursory attention.'" *Webb v. ABF Freight Sys., Inc.*, 155 F.3d 1230, 1240 (10th Cir. 1998) (quoting *Beavers v. United Paperworkers Int'l Union, Local 1741*, 72 F.3d 97, 100 (8th Cir. 1995)). Of course, this raises the question as to what constitutes "cursory" attention, and so on.

¹³⁵GLADYS W. GRUENBERG ET AL., NATIONAL ACADEMY OF ARBITRATORS, FIFTY YEARS IN THE WORLD OF WORK 69 (1998).

¹³⁶Edwards, *supra* note 123, at 93.

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begin to hold unions liable for unintentional acts that harmed employees.¹³⁷ Although none of these decisions imposed liability on a union due to simple negligence, and it seems clear that the failure to exercise ordinary care does not alone breach the DFR,¹³⁸ what is also apparent is that some courts have required a higher level of care by unions to satisfy their DFR.¹³⁹

Given these changes, it is safe to say that the law of the DFR has changed since the *Gardner-Denver* Court noted that “a breach of the union’s duty of fair representation may prove difficult to establish.”¹⁴⁰ While the employee still has a relatively high burden of proof to show breach of duty, a union is now more likely to be found liable than when *Gardner-Denver* was decided.¹⁴¹

In addition, and perhaps more important, while courts began to show more of a willingness to find unions liable for breaching the DFR, the behavior of union members started to change as well. Specifically, during the 1970s, union members began to file DFR suits against their unions in much greater numbers.¹⁴² While in the past, members were more likely to try to resolve conflicts with the union within the organization itself, members started to “go to attorneys . . . almost without provocation.”¹⁴³ Attributed to both a greater awareness of rights, as well as an increased “aggressiveness” in enforcing them,¹⁴⁴ disenchanted employees teamed up with attorneys, and the number of claims filed for breach of duty skyrocketed.¹⁴⁵

The unions, all too aware of their members’ increasingly litigious behavior, were forced to change the manner in which they performed their duties in order to avoid DFR suits.¹⁴⁶ They knew that if they were eventually found to have failed to provide fair representation, they could be liable to the employee for damages resulting from the breach, including emotional distress,¹⁴⁷ attorneys fees,¹⁴⁸ and

¹³⁷See *id.* at 97-101. Judge Edwards’s view is that since *Vaca* was decided, lower courts “have produced increasing, albeit inconsistent, judicial intervention in matters of . . . grievance processing, and arbitration.” *Id.* at 97. This has included an “expansion of the duty of fair representation to include inadvertent conduct, *i.e.*, conduct that is merely negligent rather than deliberate or in bad faith.” *Id.* at 100; see also Paul H. Tobias, *The Plaintiff’s Perception of Litigation*, in *THE CHANGING LAW*, *supra* note 123, at 128, 138 (noting that “the majority of the circuit courts now hold that it is not necessary to prove bad faith to show unfair representation”).

¹³⁸See Edwards, *supra* note 123, at 100; see also *United Steelworkers v. Rawson*, 495 U.S. 362, 372-73 (1990) (endorsing the view that mere negligence on part of the union is not sufficient to support a claim of unfair representation).

¹³⁹See *supra* note 137.

¹⁴⁰*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974).

¹⁴¹See Edwards, *supra* note 123, at 96.

¹⁴²See Schwartz, *supra* note 119, at 419.

¹⁴³*Id.*

¹⁴⁴*Id.* at 419-20.

¹⁴⁵See Edwards, *supra* note 123, at 93-94 (labeling the rate of increase in fair representation cases “quite extraordinary”).

¹⁴⁶See Schwartz, *supra* note 119, at 420 (noting that members’ behavior has had an important impact on how unions operate).

¹⁴⁷See *Cantrell v. International Bhd. of Elec. Workers, Local 2021*, 32 F.3d 465 (10th Cir. 1994).

backpay awards.¹⁴⁹ With the courts chipping away at their discretion and DFR suits on the rise, union officials had to take more and more caution in deciding which claims to pursue.

Yet, despite the increased number of suits, and the fact that courts have expanded the scope of what might constitute a breach of the DFR, many who oppose mandatory arbitration of statutory claims in the union workplace argue that the DFR is an inadequate protection against union misconduct, because the union is still so likely to prevail in any DFR suit.¹⁵⁰ The odds do indeed remain strongly in favor of the union ultimately winning such cases.¹⁵¹ However, even though the likelihood of ultimately losing has not increased that greatly, the chances of being dragged into court as a defendant have undeniably risen in much greater proportion. It is not, in fact, the prospect of losing these cases that keeps unions in check. Rather, it is simply the fear of finding themselves faced with lawsuits that has had the greatest impact on the manner in which unions handle arbitration.¹⁵² Because the cost of defending just one fair representation suit is so much greater than arbitrating multiple claims, unions have started taking more precautions in exercising their discretion.¹⁵³ The mere specter of DFR litigation has had a significant impact on the manner in which unions now handle claims in the grievance process.¹⁵⁴

¹⁴⁸See, e.g., *Cruz v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 34 F.3d 1148 (2d Cir. 1994).

¹⁴⁹See *Bowen v. United States Postal Serv.*, 459 U.S. 212 (1983). *Bowen* dramatically increased the potential liability of unions when found to have represented an employee unfairly. In the past, unions were normally responsible only for damages such as attorneys fees incurred by the employee in pursuing the breach claim. It was usually the employer who was liable for back wages, as it was the employer's wrongful discharge of the employee in the first place which was viewed as the cause for lost pay. However, in *Bowen*, the Court assumed that the employee would have been reinstated at arbitration, and that a proportion of lost wages incurred after the point at which the employee would have gone back to work could be collected from the union. See Tobias, *supra* note 137, at 137 (observing that "[t]he *Bowen* case, with its added financial exposure for unions, will undoubtedly accelerate the trend toward more arbitrations").

¹⁵⁰See *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 362 (7th Cir. 1997); Malin, *supra* note 15, at 87.

¹⁵¹See Tobias, *supra* note 137, at 130-37 (exploring the "frustration" of employee-plaintiffs in duty of fair representation cases).

¹⁵²See Schwartz, *supra* note 119, at 420.

¹⁵³See *id.* at 425-26; GRUENBERG ET AL., *supra* note 135, at 69. When it comes to processing grievances, and deciding whether to take them to arbitration, the "big fear for many unions" after *Vaca* was the cost of having to litigate a DFR suit. *Id.* "Even if they were sure of winning at the end of the process, they would still have to pay for the victory. Often it was cheaper to arbitrate a dubious grievance than to risk a lawsuit for not doing so." *Id.*

¹⁵⁴It should probably be noted that unions are also vulnerable to suits under many of the same discrimination statutes at issue in the statutory arbitration cases, such as Title VII. However, while unions could be sued under these statutes, just as they can for breach of duty, a violation of Title VII, for example, would constitute a breach of duty so blatant as to even meet the *Steele* standard. Therefore, unions would appear to be just as adverse to committing such an act as any other action exposing them to a breach of duty violation. See Cole, *supra* note 3, at 607-10.

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The most obvious consequence is that most unions will now take even the most borderline cases all the way to arbitration.¹⁵⁵ This is especially true with claims that involve more serious charges, such as the discharge of an employee.¹⁵⁶ If an employee expresses a strong desire to go to arbitration, the union is even more likely to defer to the employee's wishes "regardless of merit."¹⁵⁷ Rather than run the risk of incurring a costly lawsuit, unions would rather play it safe and take the case to arbitration. Therefore, despite the significant costs involved in arbitrating a claim, unions would prefer the added expense of doing so in order to avoid an even more costly DFR suit.

In sum, although breach of the DFR was terribly difficult to prove in the past, the new standards of what constitutes fair representation have resulted in a greater likelihood of employee success. Because unions are most likely aware that engaging in the "subordination" of individual statutory rights might breach their duty, or at least subject them to a DFR suit, they are now far less likely to commit such an act. The increased chances that a court will uphold a finding of breach, greater potential damage awards, and especially the increased odds of being sued in the first place, have created a powerful incentive for unions to take many more claims to arbitration, and provide fair representation while doing so. Even though employees cannot always "insist" on taking their statutory claims to arbitration, the DFR provides enough incentive for unions to take even claims of questionable merit through the process.

B. If Arbitration Clauses in CBAs Are Applied to Statutory Claims, Must the Employee Be Allowed to Insist on Taking the Claim to Arbitration?

Some courts have hinted that if an employee *were* able to insist on taking a statutory claim to arbitration, that would at least be a factor in favor of applying an arbitration clause in a CBA to statutory claims.¹⁵⁸ It seems, though, that such a requirement would do more harm than good. If *all* statutory claims were required to go to arbitration simply upon an employee's insistence, a likely consequence would be that only the weakest of claims would be affected. That is, because most claims with even questionable merit already go to arbitration now because of the fear of DFR suits, the only cases not currently arbitrated are, presumably, those not even within the "borderline" category. Therefore, the only advantage an employee would gain by such a rule would be the right to take a frivolous claim all the way to arbitration.

¹⁵⁵ See Schwartz, *supra* note 119, at 424; Tobias, *supra* note 137, at 138 (noting that "fear of lawsuits has caused a marked increase in the number of arbitrations"). Another effect which benefits employees is that, because unions fear breach suits so much, they take significantly more care in how they handle claims. The result has been "that grievants are receiving better representation." *Id.*

¹⁵⁶ See Schwartz, *supra* note 119, at 421-22.

¹⁵⁷ *Id.* at 421.

¹⁵⁸ See *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 527 (11th Cir. 1997) (requiring, as the third prong of a three-part test to determine whether a mandatory arbitration clause would cover statutory claims, that the employee have "the right to insist on arbitration if the federal statutory claim is not resolved to his satisfaction in any

Also, if employees were allowed by law to insist on going to arbitration with their statutory claims, they could do so with impunity. The union and company—not the employee—bear the expense of arbitration.¹⁵⁹ Therefore, there is absolutely no incentive for an employee who has been discharged or disciplined not to bring a statutory employment discrimination claim—even if it is frivolous—if he or she can *insist* on arbitrating.¹⁶⁰

In *Vaca*, the Supreme Court actually warned against allowing employees to insist on arbitrating their claims, recognizing the harm that might result if such a rule were adopted:

If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully. It can well be doubted whether the parties to collective bargaining agreements would long continue to provide for detailed grievance and arbitration procedures . . . if their power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievant unilaterally to invoke arbitration.¹⁶¹

The admonition of the *Vaca* Court is even more compelling today. Given the already increased number of claims being taken to arbitration as a result of unions' fear of lawsuits, adding frivolous complaints to the already crowded arbitration mechanism would create a real danger of harm to the process, and to those who need it to settle their legitimate claims.¹⁶² To allow unions to agree to mandatory arbitration of statutory claims *only* where the employee has the right to insist on arbitration of such claims would be both harmful and unnecessary.¹⁶³

In sum, although the DFR is still limited enough that a union is likely to win a DFR suit filed against it, the fear of such suits has caused unions to start taking

grievance process"); see also *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 362 (7th Cir. 1997) (noting that the "[m]ost important" factor in holding the plaintiff was not required to arbitrate the statutory claim in that case was that "the grievance and arbitration procedure can be invoked only by the union").

¹⁵⁹See, e.g., *Freerkeen*, *supra* note 109, at 108 (discussing the costs unions and employers can expect to pay for arbitrators' services).

¹⁶⁰At least one commentator has suggested that, as an alternative, employees could be allowed to insist on arbitrating statutory claims if they did so at their own expense. See Ann C. Hodges, *Protecting Unionized Employees Against Discrimination: The Fourth Circuit's Misinterpretation of Supreme Court Precedent*, 2 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 123, 163 (1998). However, by Professor Hodges' own admission, such a requirement presents problems for all parties involved. See *id.* at 164-66.

¹⁶¹*Vaca v. Sipes*, 386 U.S. 171, 191-92 (1967) (footnote omitted) (citation omitted).

¹⁶²Judge Edwards noted that the increase in claims in arbitration attributable to litigation aversion has already endangered the process. Edwards, *supra* note 123, at 94-96. Therefore, it would be reasonable to assume that even more claims would exacerbate the already existing problem.

¹⁶³Although some of the reasons why unions now take more claims to arbitration were explained above, *why* they go to arbitration is not the issue. Rather, the most important consideration is that they *do* go to arbitration. Therefore, the concern over subordinating rights does not seem to be viewed as a real problem any longer.

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even the most borderline cases to arbitration. There is simply no reason to believe that the same would not hold true with regard to arbitrating statutory claims. The DFR provides employees with protection against having their statutory rights undermined by a union unwilling to take their meritorious claim to arbitration. If the claim truly has merit—even if it is borderline—the union will likely take it to arbitration. Therefore, the “tension” that courts cite between unions and individual employees is truly “an unfounded specter,”¹⁶⁴ and should not be used as a basis for refusing to apply mandatory arbitration agreements in CBAs to statutory claims.

IV. *WRIGHT’S CONTRIBUTION TO THE ISSUE—THE “CLEAR
AND UNMISTAKABLE” REQUIREMENT*

In *Wright v. Universal Maritime Service Corp.*,¹⁶⁵ the Supreme Court passed on the opportunity to decide whether statutory claims can ever be subject to mandatory arbitration by virtue of an arbitration clause in a CBA. It chose instead to hold that arbitration could not be compelled in that particular case, finding that the CBA at issue was not sufficiently clear that it required arbitration of statutory claims.¹⁶⁶ In most cases, where such ambiguity exists as to whether a particular claim is subject to arbitration, there is an initial presumption that the claim is arbitrable. In *Wright*, however, the Court held that statutory claims are never *presumed* to be arbitrable under a CBA.

Instead, the Court explained, in order for such a clause to be enforceable, the “CBA requirement to arbitrate [statutory claims] must be particularly clear.”¹⁶⁷ In other words, the clause must be “clear and unmistakable” that it covers statutory claims.¹⁶⁸ Although the *Wright* Court recognized that much of *Gardner-Denver* was undermined by *Gilmer*, it explained that “*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.”¹⁶⁹

¹⁶⁴Salvatore & Fullerton, *supra* note 11, at 140.

¹⁶⁵119 S. Ct. 391 (1998).

¹⁶⁶*See id.* at 397.

¹⁶⁷*Id.* at 396.

¹⁶⁸*Id.* (quoting *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)).

¹⁶⁹*Id.*

Assuming the Court eventually decides that statutory claims can be covered by a mandatory arbitration clause in a CBA, the question still to be decided is what constitutes the kind of “clear and unmistakable” language sufficient to satisfy *Wright*. Unfortunately, while the Court announced this standard in *Wright*, it did little to expand on exactly what “clear and unmistakable” means. A closer look at *Wright*, as well as some cases from the lower courts applying the decision, should help in understanding exactly what language is clear and unmistakable enough to fulfill the *Wright* requirement.

A. “General” Arbitration Clauses Will Not Suffice

In *Wright*, the CBA at issue contained a “very general” clause that required arbitration of all “[m]atters under dispute.”¹⁷⁰ The employer argued that this broad clause covered the employee’s ADA claim, and that he should have been required to submit the “matter” to binding arbitration.¹⁷¹ This contention had, in fact, been successful at the court of appeals, where “the Fourth Circuit relied upon the fact that the equivalently broad arbitration clause in *Gilmer*—applying to ‘any dispute, claim or controversy’—was held to embrace federal statutory claims.”¹⁷² Therefore, because the broad arbitration agreement in *Gilmer* was enforced, the employer argued claimed that the clause at issue in *Wright* should be enforced as well.

The Supreme Court rejected this argument. While accepting the fact that the arbitration clauses in *Wright* and *Gilmer* were similar in construction, the Court explained that the two agreements were subject to different standards. “*Gilmer* involved an individual’s waiver of his own rights, rather than a union’s waiver of the rights of represented employees—and hence the ‘clear and unmistakable’ standard was not applicable.”¹⁷³ The Court went on to find that, when the clear and unmistakable standard was applied to the clause in *Wright*, the agreement was not sufficiently clear to compel arbitration.¹⁷⁴

After *Wright*, it is clear that a broad, general arbitration clause—a *Gilmer*-like clause—in a CBA will not meet the clear and unmistakable standard. While these general arbitration agreements continue to be applied in cases involving non-union employees, even after *Wright*,¹⁷⁵ the same clauses will be ineffective in the union workplace.¹⁷⁶

¹⁷⁰*Id.* (quoting App. 43a (alteration in original)).

¹⁷¹*See id.*

¹⁷²*Id.* at 397.

¹⁷³*Id.*

¹⁷⁴*See id.*

¹⁷⁵*See, e.g., Stanton v. Prudential Ins. Co.*, No. 98-4989, 1999 WL 236603, at *4 (E.D. Pa. Apr. 20, 1999). *Stanton* involved a non-union employee, and the same Form U-4 that was at issue in *Gilmer*. The court in *Stanton* dismissed the employee’s reliance on the recent *Wright* decision, explaining that the “validity of the arbitration provision in this action is governed by *Gilmer* rather than *Wright*.” *Id.*

¹⁷⁶*See Carson v. Giant Food, Inc.*, No. 97-2240, 1999 WL 254438 (4th Cir. Apr. 29, 1999); *Prince v. Coca-Cola Bottling Co.*, 37 F. Supp.2d 289 (S.D.N.Y. 1999).

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*MANDATORY ARBITRATION**B. “Incorporating” Federal Laws into the CBA.*

The CBA in *Wright* also stated that ““this Agreement is intended to cover all matters affecting wages, hours, and other terms and conditions of employment”” and, further, ““that no provision or part of this Agreement shall be violative of any Federal or State Law.””¹⁷⁷ The employer claimed that these clauses ““incorporated”” the ADA into the CBA. As a result, the employer argued, the arbitrator was required to apply ““legal definitions derived from the ADA’ in determining whether Wright is ‘qualified’ for employment within the meaning of the CBA,”” and compliance with the ADA had become a term of the CBA, subject to mandatory arbitration.¹⁷⁸

The Court was not persuaded by these arguments. Although the CBA purported to cover “all matters” concerning terms and conditions of employment, the Court called it “doubtful” that such a general clause could “be considered a clear and unmistakable incorporation of employment discrimination laws.”¹⁷⁹ Indeed, even if it could be considered such “in isolation,” the Court explained that the effect of the clause was undone by a subsequent provision in the CBA noting that ““[a]nything not contained in this Agreement shall not be construed as being part of this Agreement.””¹⁸⁰

Further, the language in the CBA explaining that the agreement was intended to comply with all state and federal laws was also found insufficient to constitute an “incorporation” of the ADA. Specifically, the Court noted that despite this general provision, compliance with another federal law—OSHA—was *specifically* required by the CBA. If the general provision was intended to incorporate all federal laws, the Court reasoned, then under the employer’s “interpretation” of the agreement, the “OSHA provision would be superfluous.”¹⁸¹

¹⁷⁷ *Wright*, 119 S. Ct. at 397 (quoting App. 45a-46a, 47a).

¹⁷⁸ *Id.* (quoting Brief for Respondents at 39).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (quoting App. 46a (alteration in original)).

¹⁸¹ *Id.*

In the end, it seems plain that neither a general provision in a CBA purporting to cover “all matters” concerning “terms and conditions of employment,” nor a clause showing the parties’ intent that the CBA comply with all federal laws, constitutes a clear and unmistakable incorporation of federal law into the CBA.

C. What Does Meet the Clear and Unmistakable Standard?

What should be clear by now is that broad arbitration clauses purporting to cover “all claims” are not clear and unmistakable. Nor will general statements in a CBA that the parties mean for the agreement to be consistent with state and federal laws be considered a valid incorporation. Both will fail the clear and unmistakable test because they lack the specificity that is key in showing the parties’ intent¹⁸² for statutory claims to be covered by the mandatory arbitration clause. Because there is no presumption that the parties intend for statutory claims to be arbitrable, the intent should be evident on the face of the CBA through “ordinary textual analysis.”¹⁸³

As the Fourth Circuit recently explained, the “most straightforward” approach to making the parties’ intent clear “simply involves drafting an explicit arbitration clause.”¹⁸⁴ The CBA should specifically state that employees are required to “submit to arbitration all federal causes of action arising out of their employment.”¹⁸⁵ In addition to mentioning “federal claims” generally, the CBA should also list the individual federal statutes covered under the arbitration clause.¹⁸⁶ In doing so, any confusion as to what claims the parties intended to make subject to arbitration would be alleviated, and the clear and unmistakable standard would surely be met.

A second, and perhaps less “clear” approach, is to use a general arbitration clause coupled with the specific incorporation of particular statutes into the CBA.¹⁸⁷ In *Wright*, the Court indicated that such incorporation could make compliance with these laws “a contractual commitment that would be subject to the arbitration clause.”¹⁸⁸ The key here, again, is specificity. The clear and unmistakable test requires that, for incorporation to be effective, the CBA must expressly cite the statutes to be integrated as part of the CBA. This involves listing

¹⁸²In *Carson*, for example, the court noted that “the determination of what disputes are arbitrable is focused on the intent of the parties.” *Carson v. Giant Food, Inc.*, No. 97-2240, 1999 WL 254438, at *2 (4th Cir. Apr. 29, 1999) (citing *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-49 (1986)).

¹⁸³*Wright*, 119 S. Ct. at 396.

¹⁸⁴*Carson*, 1999 WL 254438, at *6.

¹⁸⁵*Id.*

¹⁸⁶See *Prince v. Coca-Cola Bottling Co.*, 37 F. Supp.2d 289, 293 (S.D.N.Y. 1999) (finding the clause at issue deficient, in part, because it failed “to identify the statutes by name or citation”). In *Carson*, the Fourth Circuit indicated that it would require only that the CBA state that all federal claims generally are subject to arbitration. See *Carson*, 1999 WL 254438, at *6. It seems to me that the better rule is to require that all statutes covered by the CBA be listed in order for the agreement to be enforced. This would ensure that the parties’ intent is made absolutely clear. At the very least, even if courts eventually do side with the Fourth Circuit’s view, drafting a CBA that included a specific enumeration of the laws subject to mandatory arbitration would seem to be a good way to avoid litigation on the issue of the scope of the arbitration clause.

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“by name or citation”¹⁸⁹ every statute meant to be incorporated into the CBA. Failure to do so will constitute a “less-than-explicit”¹⁹⁰ incorporation, and the clear and unmistakable test will not be satisfied. While perhaps a less certain approach than the “explicit arbitration clause” option, express incorporation of federal statutes into the CBA, coupled with a general arbitration clause, should satisfy the clear and unmistakable test.

CONCLUSION

After *Gilmer* undermined so much of *Gardner-Denver’s* reasoning, the only remaining basis for refusing to enforce mandatory arbitration clauses in CBAs when the dispute involves statutory claims is the union or non-union status of the employee. But unionized employees can consent to mandatory arbitration clauses contained in CBAs in the exact same manner as employees do in the non-union workplace. Further, the union’s duty of fair representation, and fear of having to defend a suit for an alleged breach, provides adequate incentive for unions to take even the most borderline claims to arbitration. The same would hold true if statutory employment discrimination claims fell under a mandatory arbitration clause in a CBA. Therefore, so long as it is “clear and unmistakable,” as required by *Wright*, that the union and employer intended for statutory claims to be covered by the mandatory arbitration clause in the CBA, union employees should be required to submit their claims to arbitration.

¹⁸⁷ See *Carson*, 1999 WL 254438, at *6.

¹⁸⁸ *Wright*, 119 S. Ct. at 397; see also *Carson*, 1999 WL 254438, at *6.

¹⁸⁹ *Prince*, 37 F. Supp.2d at 293.

¹⁹⁰ *Wright*, 119 S. Ct. at 396.